Annual Report 2015

Citizenship and Immigration Services

Ombudsman

June 29, 2015

Homeland Security

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Office of the Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security
Mail Stop 0180
Washington, DC 20528-0180

Homeland Security

June 29, 2015

The Honorable Charles Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairmen and Ranking Members:

The Office of the Citizenship and Immigration Services Ombudsman is pleased to submit, pursuant to section 452(c) of the Homeland Security Act of 2002, its 2015 Annual Report.

I am available to provide additional information upon request.

Sincerely,

Maria M. Odom
Citizenship and Immigration Services Ombudsman

Message from the Ombudsman

The 2015 reporting period was a momentous one for immigration. On November 20, 2014, President Obama announced significant new executive actions to help fix our broken immigration system. Among the initiatives are new enforcement priorities and an expansion of programs vital to family unity. While the executive actions are no replacement for the legislative reform our immigration system desperately needs, they will help ameliorate barriers faced by individuals and employers seeking immigration benefits and services. I am honored to serve in the Department of Homeland Security under Secretary Jeh Johnson's leadership, and I am proud of the many dedicated public servants who work tirelessly to improve our nation's immigration programs.

Although the new initiatives, known as expanded DACA and DAPA, were halted due to court orders,[1] USCIS published policy guidance and regulations to improve existing programs, including the much anticipated L-1B Specialized Knowledge draft guidance and final regulations extending work authorization to certain spouses of H-1B visa holders. The agency launched two new humanitarian programs to support family unity and help prevent travel by unaccompanied children from Central America: the Haitian Family Reunification Parole Program and the In-Country Refugee/Parole Program for Central American Minors. In response to the high number of children arriving at the Southwest border last summer, USCIS asylum officers have acted diligently to process their cases and to ensure that women and children in detention are afforded the opportunity to express a fear of returning to their home countries and seek asylum in the United States. The agency's efforts to serve vulnerable populations and protect the integrity of our asylum system should be commended and supported.

An ambitious undertaking, the executive actions demanded the attention of USCIS Director León Rodriguez and many key leaders in the immigration service. At the same time, longstanding challenges in existing immigration programs likewise require agency attention and action. In last year's Annual Report, we discussed in detail Requests for Evidence (RFEs) that are too often vague, unduly burdensome, or unnecessary. Such RFEs continue to delay adjudications and burden applicants and petitioners, particularly in the provisional waiver program and key employment-based categories. Providing adequate notice regarding filing deficiencies is essential to the effectiveness of RFEs, but they are often general and fail to address evidence already in the record. This is especially important in cases in which customers are not afforded the option of an appeal or a motion to reopen or reconsider.

During this reporting year, my office received numerous examples of Special Immigrant Juvenile petitions in which USCIS requested a wide range of records pertaining to the underlying state court dependency order, essentially second-guessing the state court action. We believe these RFEs are inconsistent with USCIS' limited statutory "consent authority," and the agency's own training materials. I strongly encourage USCIS to engage with stakeholders serving unaccompanied children to better understand the impact of its current adjudicatory practices. In the coming weeks, we will publish formal recommendations to improve processing of petitions for Special Immigrant Juveniles.

Since December 2014, the Ombudsman's Office has worked to resolve nearly 1,500 requests for case assistance from DACA renewal applicants facing expiration of their deferred action and accompanying work authorization due to processing delays. Requests for assistance came from a young man supporting a disabled parent, a new public school teacher in the Midwest, a low-income applicant facing eviction from his apartment, and an

[1] As of the date of publication of this Report, implementation of expanded Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) has been halted following a preliminary injunction. *Texas v. USA,* 15-40238 (5th Cir. May 26, 2015)(order denying stay of preliminary injunction).

expectant mother about to lose her health benefits due to the imminent loss of employment caused by delays in her DACA renewal. As is the case for many applicants facing a lapse in work authorization, processing delays threaten people's livelihoods and can disrupt their education, healthcare benefits, driving privileges, and even housing and food stability. Administrative processing delays must not undermine a program that has enabled young people—Americans in every way but on paper—to realize their full potential in our workforce and our communities.

In addition to DACA renewal delays, our office continued to receive requests for assistance from other applicants seeking to renew employment authorization. Though a small percentage of the total number processed each year, thousands of applications for employment authorization remained pending past the 90-day regulatory processing time. I urge USCIS to adopt measures that facilitate a more orderly and predictable renewal process for DACA and other employment authorization applicants. We will continue to present recommendations to help achieve these goals.

In this year's Report, we discuss again backlogs in the asylum program, the strains these place on applicants and their families, and the current efforts to address them. This Report also addresses adjudications issues in other programs for vulnerable populations, including victims of violence, and the need for a parole program for conditional U visa grantees who are often in danger in their home countries while awaiting visa availability.

In the EB-5 immigrant investor program, backlogs grew and many cases remained pending long past the 11 to 14-month processing time goals. Projects languished and job creation was stalled because of these delays.

Last year, our Annual Report highlighted the agency's accomplishments in the area of stakeholder outreach. Public engagement should remain fundamental to developing new policy and initiatives. It is my hope that this area in which the agency has made great strides in the past will continue to be prioritized as a core function of USCIS.

At this inflection point in the history of our nation's immigration policy, I believe more than ever in the Ombudsman's statutory charge of assisting individuals and employers with problems with USCIS both through case assistance and policy recommendations. But we cannot achieve this mandate alone. Every day the Ombudsman staff works with dedicated USCIS officers from around the country to provide high-quality services for customers who may not have experienced USCIS at its best. I very much appreciate our USCIS colleagues for their collaboration in this important work.

I want to thank Secretary Johnson and Deputy Secretary Alejandro Mayorkas for their unflinching support of the Ombudsman's mission, and Director Rodriguez for his partnership in pursuing our shared goal of an immigration service built on fairness and integrity. I am also grateful for the entire team in the Ombudsman's office who honor our mission by helping individuals and employers navigate our immigration system and without whom publication of this in-depth report would not be possible.

Sincerely,

Maria M. Odom
Citizenship and Immigration Services Ombudsman

I. Legislative Requirement

Section 452 of the Homeland Security Act of 2002, 6 U.S.C. § 272, provides in relevant part:

(c) ANNUAL REPORTS—

1) OBJECTIVES—Not later than June 30 of each calendar year, the Ombudsman shall report to the Committee on the Judiciary of the House of Representatives and the Senate on the objectives of the Office of the Ombudsman for the fiscal year beginning in such calendar year. Any such report shall contain full and substantive analysis, in addition to statistical information, and—

(A) Shall identify the recommendation the Office of the Ombudsman has made on improving services and responsiveness of the Bureau of Citizenship and Immigration Services;

(B) Shall contain a summary of the most pervasive and serious problems encountered by individuals and employers, including a description of the nature of such problems;

(C) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which action has been taken and the result of such action;

(D) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which action remains to be completed and the period during which each item has remained on such inventory;

(E) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which no action has been taken, the period during which each item has remained on such inventory, the reasons for the inaction, and shall identify any official of the Bureau of Citizenship and Immigration Services who is responsible for such inaction;

(F) Shall contain recommendations for such administrative action as may be appropriate to resolve problems encountered by individuals and employers, including problems created by excessive backlogs in the adjudication and processing of immigration benefit petitions and applications; and

(G) Shall include such other information as the Ombudsman may deem advisable.

2) REPORT TO BE SUBMITTED DIRECTLY—Each report required under this subsection shall be provided directly to the committees described in paragraph (1) without any prior comment or amendment from the Secretary, Deputy Secretary, Director of the Bureau of Citizenship and Immigration Services, or any other officer or employee of the Department or the Office of Management and Budget.

Executive Summary

The Office of the Citizenship and Immigration Services Ombudsman's (Ombudsman) 2015 Annual Report contains:

- An overview of the Ombudsman's mission and services;
- A review of U.S. Citizenship and Immigration Services (USCIS) programmatic and policy achievements during this reporting period; and
- A detailed discussion of pervasive and serious problems, recommendations, and best practices in the family, employment and humanitarian areas, as well as in customer service.

Ombudsman's Office Overview

In the 2015 reporting period, April 1, 2014 to March 31, 2015, the Ombudsman received 7,555 requests for assistance, an increase of over 23 percent from the 2014 reporting period. Approximately 96 percent of case assistance requests during the reporting period were received through the Ombudsman's Online Case Assistance system. Overall, 38 percent of the requests were for humanitarian-based matters; 23 percent for family-based matters; 24 percent for employment-based matters; and 15 percent for general immigration matters, such as applications for naturalization. The Ombudsman seeks to review all incoming case assistance requests within 30 days and take action to resolve 90 percent of inquiries within 90 days of receipt. Notably, the Ombudsman received 1,151 requests for case assistance involving processing times for Deferred Action for Childhood Arrivals (DACA) renewal adjudications—approximately 15 percent of all case assistance requests handled by the Ombudsman for the reporting period. Employment authorization inquiries (not related to DACA) were the next largest source of requests for case assistance, comprising 12 percent of the Ombudsman's casework.

The Year in Outreach

From April 2014 to March 2015, the Ombudsman conducted 84 stakeholder engagements in regions across the United States, reaching thousands of stakeholders.

To inform stakeholders of new initiatives and receive feedback on a variety of topics, the Ombudsman hosted six public teleconferences in the 2015 reporting period. On November 6, 2014, the Ombudsman held its fourth Annual Conference, featuring Secretary of Homeland Security Jeh Johnson as keynote speaker as well as an "armchair" discussion with USCIS Director León Rodriguez. The Ombudsman continued to promote interagency liaison through monthly meetings with the Department of State (DOS) and USCIS on the management of the visa queues; quarterly data quality working group meetings with USCIS, U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and the DHS Office of the Chief Information Officer to facilitate problem-solving related to the Systematic Alien Verification for Entitlements (SAVE) program; and a working group with the Department of Labor (DOL), DOS, and USCIS representatives on H-2 Temporary Worker processing issues, among other interagency meetings.

DHS Blue Campaign

Ombudsman Odom serves as Chair of the Blue Campaign Steering Committee (Blue Campaign), the Department's unified effort to combat human trafficking. The Blue Campaign brings together resources and expertise from across DHS components, while harnessing partnerships with a network of other governmental and non-governmental organizations. The Ombudsman's Office provides subject matter expertise to the Blue Campaign and helps organize stakeholder events that address pressing trafficking and immigration issues. The Ombudsman also provides case assistance to individuals seeking to resolve problems with applications and petitions for humanitarian immigration relief, including immigrant victims of trafficking. In addition, the Ombudsman conducts regular stakeholder engagements with service providers to understand and address systemic concerns with the immigration benefits process for victims of trafficking and other crimes.

Key Developments and Areas of Focus

Executive Immigration Reform

On November 20, 2014, President Obama announced a series of executive actions to "fix our nation's broken immigration system." Secretary Johnson published at that same time multiple policy memoranda to implement the announced executive immigration reforms. USCIS, along with CBP and ICE, is responsible for carrying out these actions. These include new USCIS initiatives as well as new regulations and policies for enforcement, families, and businesses hiring foreign workers. Planning and implementation of these initiatives, as well as ensuing litigation, have dominated USCIS' attention for much of the reporting period.

Families and Children

Deferred Action for Childhood Arrivals

This reporting period marks the third year of the DACA program. DACA has allowed more than 664,300 young people who were brought to the United States as children to live, study, and work legally in this country. During the reporting period, the Ombudsman received 1,151 requests for case assistance from DACA renewal applicants who temporarily lost or were on the verge of losing employment authorization. A sample of requests for assistance submitted to the Ombudsman showed the following:

- 77 percent involved the expiration of the deferred action period and employment authorization before a decision was issued; and
- Of the requests with a lapse, over 30 percent were filed timely—at least 120 days before the expiration of the initial DACA period. Another 42 percent of these requests were not timely filed, but the applications remained pending past the processing time goal of 120 days or more before a decision was issued.

The Ombudsman urges USCIS to provide for automatic temporary extension of employment authorization upon timely receipt of the DACA renewal application, or take other measures to ensure that individuals previously granted DACA do not suffer the impact of a lapse in employment authorization or accrue unlawful presence, both of which carry significant adverse consequences.

Provisional and Other Immigrant Waivers

The Provisional Waiver program helps alleviate problems of family separation and unpredictable processing times that were endemic to the prior system of overseas filing of waivers for immigrant visa applicants. In 2012 and 2013, USCIS consolidated Form I-601, *Application for Waiver of Grounds of Inadmissibility* processing in one USCIS service center and implemented a stateside provisional waiver for immediate relatives of U.S. citizens who must consular process abroad. On November 20, 2014, Secretary Johnson published a memorandum titled *Expansion of the Provisional Waiver Program*, instructing USCIS to amend its 2013 regulation to expand the Provisional Waiver program to all statutorily eligible applicants. Requests for case assistance submitted to the Ombudsman, as well as information provided by stakeholders and USCIS during this reporting period, continue to demonstrate concerns with: summary denials in "reason to believe" cases, either on criminal, fraud, smuggling, or prior unlawful presence and reentry grounds; Requests for Evidence (RFEs) that do not assess particular evidence previously provided by the applicant; inconsistent application of the "extreme hardship" standard; and the lack of any administrative appeal or other mechanism to correct administrative error. When the regulations are revised to expand the Provisional Waiver program, pursuant to Secretary Johnson's recent memorandum, the Ombudsman urges USCIS to afford applicants the option to file Motions to Reopen/Reconsider or an appeal.

Extreme Hardship

Secretary Johnson's Memorandum on November 20, 2014, also directed USCIS to clarify the factors contemplated in determining whether the "extreme hardship" standard has been met, and to consider criteria by which a presumption of extreme hardship may be determined to exist such that it would provide for broader use of the waiver. These changes will improve the program and assist numerous families who would have otherwise faced long periods of separation as they waited for processing of their waivers from overseas.

Military Immigration Issues

Members of Congress and U.S. military leaders have consistently emphasized to DHS that military immigration issues, including military naturalization, regularization of military dependent immigration status, and preserving military family unity are critical aspects of military readiness. The Ombudsman strongly supports USCIS efforts to assist the Armed Forces of the United States and their immigrant family members.

The Haitian Family Reunification Parole Program

On December 18, 2014, USCIS implemented the Haitian Family Reunification Parole program to expedite family reunification for certain Haitian family members of U.S. citizens and Lawful Permanent Residents and to promote a safe, legal, and orderly migration from Haiti to the United States. The program will allow eligible Haitians who are beneficiaries of an approved Form I-130, *Petition for Alien Relative* to join family members in the United States up to 2 years before their immigrant visas become available. Through this program, DHS anticipates paroling 5,000 Haitians into the United States by 2016.

Employment

The H-2 Temporary Worker Programs

While USCIS approved over 20,000 employer petitions for H-2 workers in FY 2014, the Ombudsman continued to receive reports of processing delays in both the H-2A agricultural temporary worker and H-2B nonagricultural temporary worker programs. Such delays can have severe economic consequences for petitioning U.S. employers. From the employer's perspective, the fact that three separate agencies govern the H-2 processes can be perplexing. These agencies—DOL, DOS, and USCIS—generally perform their individual program steps autonomously. To explore areas of collaboration in the H-2 programs, the Ombudsman convened an interagency working group, and continues to encourage coordination and more efficient practices, especially in USCIS processing.

High-Skilled Adjudication Issues

As discussed in Annual Reports since 2008, stakeholders continue to raise concerns with USCIS adjudication of nonimmigrant petitions for high-skilled beneficiaries, including H-1B (Specialty Occupations), L-1A (Intracompany Transferee Managers or Executives), L-1B (Specialized Knowledge Worker), and O-1 (Individuals with Extraordinary Ability or Achievement). Specifically, employers and their representatives provide examples to the Ombudsman of RFEs that appear to be redundant, seeking documentation that was previously provided; unnecessary, requesting information that is irrelevant or exceeds what is needed to complete the adjudication; and unduly burdensome in scope or intrusiveness. Notably, on March 23, 2015, USCIS issued the long awaited L-1B Policy Guidance Memorandum in draft form with a scheduled implementation date of August 31, 2015.

The EB-5 Immigrant Investor Program

The EB-5 Immigrant Investor Program has surged in popularity in recent years as an effective way to attract foreign investment, to provide financing to large private and public projects, and for foreign nationals to obtain lawful permanent residency in the United States. While USCIS has hired new adjudicators and economists, it had 12,749 investor petitions (Form I-526, *Immigrant Petition by Alien Entrepreneur)* in its pending inventory as of March 31, 2015, with nearly 20 percent pending adjudication for more than a year; EB-5 processing times have been getting longer. USCIS has provided technical assistance to Congress and is actively working with other DHS and government agencies to put safeguards in place to ensure program integrity.

Seasonal Delays in Employment Authorization Processing

Eligible individuals in the United States may apply for employment authorization by filing Form I-765, *Application for Employment Authorization* with USCIS. Applicants who receive Employment Authorization Documents (EAD) are then able to commence (or resume) employment, as well as apply for Social Security Numbers and driver's licenses. USCIS received 1,477,898 Forms I-765 in the reporting period. While the agency adjudicates the vast majority of applications for EADs within the 90-day regulatory processing timeframe, every year

thousands of eligible individuals encounter processing delays. When processing of employment authorization applications is delayed, both individuals and their current or would-be employers suffer adverse consequences. Ombudsman data reveal a seasonal pattern with an increase in requests for case assistance in the summer months due to adjudications that exceed the agency's 90-day processing requirement. This section provides suggested steps USCIS could take to address these seasonal employment authorization processing delays.

Employment-Based Immigrant Petition (Form I-140) Processing

Stakeholders continue to report concerns pertaining to USCIS' handling of employment-based immigrant petitions. With extensive backlogs in certain employment-based preference categories due to statutory visa caps and potential changes to USCIS policies on petitioner-beneficiary rights, it is imperative that USCIS maintain clear and consistent communication with its stakeholders. In recent months, USCIS has taken steps to review its longstanding policy on who is an "affected party" when it comes to appealing a decision of a Form I-140, *Immigrant Petition for Alien Worker*. The Ombudsman encourages USCIS to consider the significant case law and recognize legal standing for certain beneficiaries of a Form I-140 petition.

Humanitarian

Special Immigrant Juveniles

The Special Immigrant Juvenile (SIJ) program is designed to help children in the United States who have been abused, abandoned, or neglected to obtain lawful permanent residency status. The program has seen significant policy and legislative changes over the years. Stakeholders report and the Ombudsman has observed adjudication inconsistencies regarding consent requirements, age-inappropriate interviewing techniques, and delayed processing times for SIJ adjudications. USCIS continues to seek evidence underlying state court dependency orders. The Ombudsman continues to receive reports from stakeholders experiencing difficulties with pending or recently adjudicated petitions. In the coming weeks, the Ombudsman intends to issue formal recommendations that USCIS: (1) centralize SIJ adjudication to improve the quality and consistency of decisions; and (2) issue updated regulations to clarify policy guidance and the limitations of USCIS's consent authority. These steps would substantially improve adjudications and end the agency's current practices of seeking evidence underlying state court dependency orders.

The Affirmative Asylum Backlog

A substantial backlog of affirmative asylum applications pending before USCIS has led to lengthy case processing times for tens of thousands of asylum seekers. Spikes in requests for reasonable and credible fear determinations, which have required the agency to redirect resources away from affirmative asylum adjudications, along with an uptick in new affirmative asylum filings, are largely responsible for the backlog and processing delays. Although USCIS has taken various measures to address these pending asylum cases, such as hiring additional staff, modifying scheduling priorities, and introducing new efficiencies into credible and reasonable fear adjudications, the backlog continues to mount.

Immigration Benefits for Victims of Domestic Violence, Trafficking, and Other Violent Crimes

Victims of domestic violence, human trafficking, and other specified crimes may seek humanitarian immigration relief. Specifically, these programs include U nonimmigrant status, T nonimmigrant status, and self-petitioning for adjustment of status under the Violence Against Women Act (VAWA). The Ombudsman continues to monitor processing times, quality of RFEs and adjudications, and outreach to this vulnerable population.

Fee Waiver Processing Issues

USCIS' Office of Intake and Document Production, which supports both the Field Operations and Service Center Operations Directorates, administers the system of fee waivers for immigration applications. Fee waivers are critical to populations who cannot access immigration benefits because of their inability to afford the required fees, including elderly, indigent, or disabled applicants. This year's Report summarizes ongoing problems experienced by individuals requesting fee waivers.

Humanitarian Reinstatement for Surviving Relatives Under Immigration and Nationality Act Section 204(l) and the Regulations

For immigrant families, the death of a family member often triggers an inability of surviving family members to seek immigration status because USCIS revokes approved family-based petitions automatically upon the death of the sponsoring petitioner. Besides the avenue of relief open

to widow/widowers of U.S. citizens, there are two types of remedies that may preserve the surviving relative's ability to immigrate: statutory reinstatement under the Immigration and Nationality Act (INA) section 204(l), and humanitarian reinstatement under the regulations. Stakeholders have reported to the Ombudsman, among other issues, the following: variances and long delays in the handling of INA section 204(l) and humanitarian reinstatement requests; inability to ascertain which office will take jurisdiction over such requests; difficulty determining receipt of requests by USCIS; rejection of requests by service center mailrooms; template denials; confusion between humanitarian reinstatement and INA section 204(l) requirements; and the inability of *pro se* applicants to overcome these challenges to seeking relief. These and other concerns continue in this reporting period.

In-Country Refugee/Parole Program for Central American Minors

In recent years, unprecedented numbers of unaccompanied minors from Central America have been apprehended crossing the U.S. southern border. Many of these children suffer violence and exploitation during their cross-country passage. Through the newly-established Refugee/Parole Program for Central American Minors (CAM), qualifying parents who reside in the United States and have children in Central America can petition for those children to join them stateside as refugees or parolees. This program offers vulnerable youth in this region the prospect of protection in the United States without a dangerous trek to the U.S. border.

Interagency, Process Integrity and Customer Service

Customer Service: Ensuring Proper Delivery of Notices and Documents

Every year, USCIS sends millions of notices, decisions, and documents to applicants and petitioners and their attorneys through the U.S. Postal Service (USPS). Some of these mailings inform individuals of a required next step in the application process for an immigration benefit, such as fingerprinting, an interview, or an RFE. When time sensitive notices are not received, individuals often do not

take the required action, and the application or petition may be denied for abandonment. USCIS also mails decision notices and immigration documents, including EADs, Travel Documents, and Permanent Resident Cards, which when not properly delivered can leave individuals without the ability to obtain or renew their driver's licenses, apply for Social Security Numbers, start or continue employment without interruption, or travel outside of the United States. The proper delivery of documents and effectiveness of USCIS' change of address systems are thus critical.

Issues with USCIS Intake of Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*

The Ombudsman frequently hears concerns from attorneys that Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative* is not properly recorded when submitted after an application or petition has been filed with USCIS. Similarly, stakeholders bring cases to the Ombudsman's attention where notices of withdrawal of representation are not captured in USCIS systems, and attorneys continue to receive notices as the attorney of record. The Ombudsman discussed issues with rejections of Forms G-28 in the 2014 Annual Report; USCIS has yet to implement procedures to provide notice to an applicant/petitioner or to the attorney or accredited representative upon rejection of a Form G-28. Failure to properly record the legal representative may prevent individuals and employers from receiving notice of USCIS actions or the delivery of secure documents. It raises concerns pertaining to an individual's right to counsel.

Calculating Processing Times

Both USCIS and the Ombudsman use the processing times posted on USCIS' website to manage customer inquiries and make decisions that impact customer service. When posted processing times do not accurately reflect actual processing times, those seeking immigration benefits naturally become frustrated, are unable to make personal or professional plans, and make inquiries to USCIS through the National Customer Service Center (NCSC) and at InfoPass appointments, as well as submit requests for case assistance from the Ombudsman and Congressional offices. The Ombudsman has brought these concerns to USCIS, and urges the agency to consider new approaches to calculating case processing times that more accurately convey to individuals and employers how long a case will take to be adjudicated and where the case is within the processing queue.

Transformation: Modernizing USCIS Systems, Case Processing, and Customer Service

USCIS' effort to reengineer business processes from paper-based adjudications to an electronic environment is known as "Transformation." By March 2015, 1.1 million customers had used available Transformation processes, such as setting up user accounts, paying the immigrant visa fee, filing for immigration benefits, or tracking applications and petitions through the USCIS Electronic Immigration System (ELIS). Long before the majority of form types are scheduled to be available through Transformation, however, the agency is significantly re-designing its new system's architecture, and has just discontinued temporarily the electronic filing in USCIS ELIS of Form I-539, *Application to Extend/Change Nonimmigrant Status*, and Form I-526.

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Ombudsman's Office: The Year In Review

Ombudsman's Office Overview

The mission of the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman)[1] is to:

- Assist individuals and employers in resolving problems with U.S. Citizenship and Immigration Services (USCIS);
- Review USCIS policies and procedures to identify areas in which individuals and employers have problems in dealing with USCIS; and
- Propose changes in the administrative practices of USCIS to mitigate identified problems.[2]

Critical to achieving this mandate is the Ombudsman's role as an independent, impartial and confidential resource within the Department of Homeland Security (DHS).

- ***Independent.*** The Ombudsman is an independent DHS office, reporting directly to the DHS Deputy Secretary; the Ombudsman is not a part of USCIS.
- ***Impartial.*** The Ombudsman works in a neutral, impartial manner to improve the delivery of immigration benefits and services.
- ***Confidential.*** Individuals and employers seeking assistance from the Ombudsman may do so in confidence. Any release of confidential information is based on prior consent, unless otherwise required by law or regulation.

The Ombudsman performs its mission by:

- Evaluating individual requests for case assistance and recommending that USCIS engage in corrective actions, where appropriate;
- Identifying trends in requests for case assistance, reviewing USCIS operations, researching applicable legal authorities, and writing formal recommendations or informally bringing systemic issues to USCIS' attention for resolution; and
- Facilitating interagency collaboration, and conducting outreach to a wide range of public and private stakeholders.

For Fiscal Year (FY) 2015, Congress approved and the President signed into law a program increase for the Ombudsman for five new positions and a team dedicated to employment case resolution.[3] This funding partially restored prior budget reductions, and as described in detail below, follows significant increases in requests for case assistance. The Ombudsman is pleased that the enacted FY 2015 budget level reaffirms its mission and work, and provides resources needed to provide timely, effective case resolution services.

Pursuant to its statutory mandate, the Ombudsman identifies areas in which individuals and employers have problems in dealing with USCIS and, to the extent possible, proposes changes in administrative practices to mitigate these problems. Recommendations are developed based on:

- Trends in requests for case assistance;
- Feedback from individuals, employers, community-based organizations, trade and industry associations, faith communities and immigration professionals from across the country; and
- Information and data gathered from USCIS and other agencies.

Requests for Case Assistance

Pursuant to its statutory mission, the Ombudsman assists individuals and employers in resolving problems with USCIS,[4] which administers an immigration benefits system with millions of applications and petitions annually. Individuals and employers rely on USCIS

[1] In this Report, the term "Ombudsman" refers interchangeably to the Ombudsman's staff and the office.

[2] Homeland Security Act of 2002 (HSA) § 452, Pub. L. No. 107-296.

[3] Department of Homeland Security Appropriations Act of 2015, Pub. L. No. 114-4 (2015).

[4] HSA § 452(b)(1).

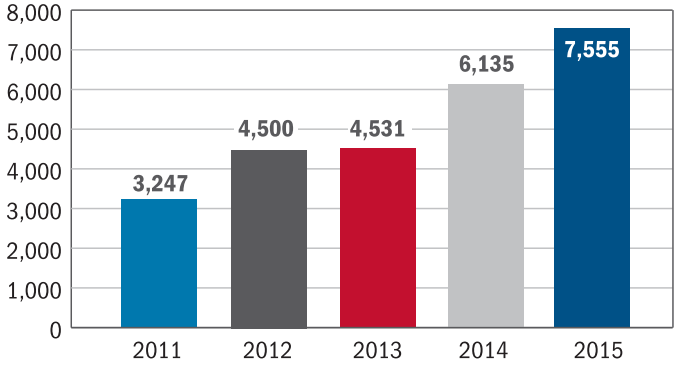
adjudications to reunite with family members; begin or continue employment; receive humanitarian protection; apply for driver's licenses, Social Security Numbers, health insurance, bank accounts, and mortgages; transfer key employees; enroll in school; and travel outside of the United States, to name but a few essential activities. In short, applicants' lives are often on hold while waiting for the benefits from USCIS for which they may qualify.

USCIS adjudicates the majority of filings timely and in accordance with applicable statutes, regulations, and policy. However, when cases are delayed past posted processing times or there are administrative or adjudication errors, individuals and employers may contact the Ombudsman for case assistance after first attempting to resolve the issue with USCIS.

During the 2015 reporting period, the Ombudsman was staffed with approximately 25 full-time employees with diverse backgrounds and areas of subject matter expertise in immigration law and policy, most of whom work on this vital function. These individuals include former employees from USCIS, DOS, and DOL; attorneys who previously worked for non-profit organizations; and private sector business and family immigration experts. The Ombudsman team provides case assistance daily to the thousands of people who seek assistance.

1.1 Requests for Case Assistance Received by Reporting Period

(2011 to 2015)



In the 2015 reporting period (April 1, 2014 to March 31, 2015), the Ombudsman received 7,555 case assistance requests, an increase of over 23 percent from the 2014 reporting period's total. ***See Figure 1.1,*** *Requests for Case Assistance Received by Reporting Period (2011 to 2015).* The Ombudsman seeks to review all incoming requests for case assistance within 30 days and to take action to resolve 90 percent within 90 days of receipt.[5]

The 2015 increase in requests for case assistance is due in large part to individuals who are experiencing difficulties with DACA renewal applications. A detailed review of DACA issues can be found in the section titled *Renewals for Deferred Action for Childhood Arrivals* of this Annual Report. ***See Figure 1.2,*** *Top Five Primary Form Types Associated with Requests for Case Assistance.*

The Ombudsman's Jurisdiction. The Ombudsman's jurisdiction is limited by statute to matters involving USCIS.[6] Individuals, employers, and their legal representatives may contact the Ombudsman after encountering problems with USCIS. When a request for case assistance falls outside of the Ombudsman's jurisdiction, the individual or employer is referred to the pertinent government agency.

Request for Case Assistance. The Ombudsman encourages individuals and employers to submit requests for case assistance through the Ombudsman's Online Case Assistance, but they can also file via mail, email and facsimile. Approximately 96 percent of case assistance requests during the reporting period were received by the Ombudsman through the online system. ***See Figure 1.3,*** *Top 10 Customers' States for Case Assistance Received this Reporting Period.*

[5] Ombudsman's Webpage, "Submitting a Request for Case Assistance" (Mar. 25, 2014); http://www.dhs.gov/case-assistance (accessed May 7, 2015); *see* DHS Quarterly Performance Report: Management Measures, FY 2014 End of Year (Dec. 5, 2014).

[6] HSA § 452(b)(1). Jurisdiction may extend to issues involving both USCIS and another government entity. The Ombudsman does not provide legal advice.

1.2 Top Five Primary Form Types Associated with Requests for Case Assistance

FORM NAME	NUMBER	PERCENTAGE OF TOTAL RECEIPTS
I-821D, *Consideration of Deferred Action for Childhood Arrivals*	1,556	20.6%
I-765, *Application for Employment Authorization*	878	11.6%
I-130, *Petition for Alien Relative*	656	8.7%
I-485, *Application to Register Permanent Residence or Adjust Status* (Based on an underlying humanitarian application/petition)*	641	8.5%
I-485, *Application to Register Permanent Residence or Adjust Status* (Based on an underlying employment-based immigrant petition)	446	5.9%

*Underlying humanitarian petitions or applications include those for Special Immigrant Juveniles, refugees, and asylees.

An Office of Last Resort. Absent an urgent matter, the Ombudsman requires that individuals and employers first avail themselves of the USCIS customer service options and wait 60 days past USCIS posted processing times before contacting the Ombudsman for assistance.[7] USCIS customer service options include: My Case Status,[8] NCSC,[9] InfoPass,[10] and the e-Service Request tool.[11] Individuals and employers are asked to indicate prior attempted remedial actions when submitting case assistance requests to the Ombudsman. In 69 percent of requests for case assistance submitted to the Ombudsman during the reporting period, individuals and employers first contacted the NCSC, while 27 percent appeared at InfoPass appointments at a USCIS local field office.

1.3 Top 10 Customers' States for Case Assistance Received this Reporting Period

CUSTOMERS' STATES	NUMBER	PERCENTAGE OF TOTAL RECEIPTS
California	1,084	14.4%
Texas	951	12.6%
New York	832	11.0%
Illinois	755	10.0%
Florida	464	6.1%
Virginia	318	4.2%
New Jersey	289	3.8%
Maryland	225	3.0%
Georgia	224	3.0%
Washington	194	2.6%

Expediting Inquiries to USCIS. The Ombudsman will expedite a request based on an emergency or hardship.[12] In deciding whether to expedite, the Ombudsman adheres to criteria used by USCIS.[13]

Ombudsman Inquiries Resolved Though Direct Contact with USCIS Offices. To effectively and efficiently carry out its mission, the Ombudsman works directly with USCIS field offices, service centers, and other offices where adjudications are performed to resolve case issues. Collaboration and open dialogue are key tools in resolving problems with pending applications or petitions that have been brought to the Ombudsman's attention. When the Ombudsman is not able to resolve a request for case assistance, the request is escalated to the office director at first, and, if necessary, to USCIS Headquarters. The Ombudsman evaluates each request for case assistance by examining facts, reviewing relevant USCIS systems, and analyzing applicable laws, regulations, policies and procedures. After assessing each request for case assistance, the Ombudsman may contact USCIS service

7 There are two exceptions to the Ombudsman's requirement that applicants wait 60 days past USCIS processing times: requests for case assistance related to applications for employment authorization, which are to be adjudicated in 90 days pursuant to the regulations, may be submitted at day 75; and DACA renewal applications, for which the posted processing time is currently 120 days, may be submitted at day 105.

8 *See* USCIS Webpage, "myUSCIS—Case Status;" https://egov.uscis.gov/casestatus/landing.do (accessed May 7, 2015).

9 The NCSC can be reached at 1-800-375-5283.

10 InfoPass is a free service that allows individuals to schedule an in-person appointment with a USCIS Immigration Officer through the USCIS Webpage at http://infopass.uscis.gov/ (accessed May 7, 2015).

11 USCIS e-Request, https://egov.uscis.gov/e-Request/Intro.do (accessed May 7, 2015).

12 Individuals or employers requesting expedited handling are instructed to clearly state so in Section 10 ("Description") of Form DHS-7001, briefly describe the nature of the emergency or other basis for the expedite request, and provide relevant documentation to support the expedite request. All expedite requests are reviewed on a case-by-case basis.

13 U.S. Department of Justice Memorandum, "Service Center Guidance for Expedite Requests on Petitions and Applications" (Nov. 30, 2001). The criteria are: Severe financial loss to company or individual; extreme emergent situation; humanitarian situation; nonprofit status of requesting organization in furtherance of the cultural and social interests of the United States; Department of Defense or National Interest Situation; USCIS error; and compelling interest of USCIS. *See also* USCIS Webpage, "Expedite Criteria" (Jun. 7, 2011); http://www.uscis.gov/forms/expedite-criteria (accessed May 7, 2015).

centers, field offices, or other facilities to request they engage in remedial actions.[14] ***See Figure 1.4,*** *Top 10 USCIS Offices Contacted in 2015 Reporting Period.*

USCIS Responses. Pursuant to a Memorandum of Understanding (MOU) between USCIS and the Ombudsman, USCIS has 30 business days to respond to the Ombudsman's case inquiries regarding the action taken on a specific application or petition, and 7 business days to respond to expedited inquiries.[15] ***See Figure 1.5,*** *Average Number of Days for a USCIS Response.*[16]

Ombudsman case assistance, of course, does not always result in a case approval. Based on the Ombudsman's intervention, USCIS sometimes takes action on a long pending case and issues a Request for Evidence, a Notice of Intent to Deny, or a denial. Often cases that have fallen outside of normal processing times have done so for reasons beyond the control of USCIS, such as a pending background check being conducted by another agency. Some adjudication issues are a matter of discretion, and the USCIS decision is not changed after an Ombudsman inquiry. It is important to note that the Ombudsman's case assistance is never a substitute for legal recourse; for many immigration benefits, individuals and employers must file a Motion to Reopen/Reconsider and/or appeal to preserve their rights.[17]

In cases taken on by the Ombudsman that are delayed 6 months past USCIS posted processing times with no action by the agency, the Ombudsman places the application or petition in a long pending case queue. The Ombudsman regularly follows up with USCIS on these cases. These requests for case assistance are closed when USCIS takes action on the application or petition.

The Ombudsman's Case Assistance

The Ombudsman works to resolve a wide range of requests for assistance across employment, family, and humanitarian

1.4 Top 10 USCIS Offices Contacted in 2015 Reporting Period

USCIS OFFICE	NUMBER OF INQUIRIES
Nebraska Service Center (NSC)	1,759
Texas Service Center (SSC)	1,474
Vermont Service Center (ESC)	886
National Benefits Center (NBC)	509
California Service Center (WSC)	341
Investor Program Office (IPO)	174
Chicago Field Office (CHI)	156
New York City Field Office (NYC)	102
Atlanta Field Office (ATL)	71
Washington Field Office (WAS)	63

1.5 Average Number of Days for a USCIS Response

USCIS OFFICE	AVERAGE NUMBER OF DAYS FOR A USCIS RESPONSE
USCIS Offices with the Shortest Response Time	
San Fernando Valley Field Office (SFV)	1
Newark Field Office (NEW)	5
Denver Field Office (DEN)	6
Memphis Field Office (MEM)	8
Queens Field Office (QNS)	9
USCIS Offices with the Longest Response Time	
Refugee Affairs Division (RAD)	246
Miami Field Office (MIA)	178
Los Angeles Asylum Office (ZLA)	158
Arlington Asylum Office (ZAR)	143
Newark Asylum Office (ZNK)	143
Average Number of Days Awaiting USCIS Response by Service Center	
California Service Center (WSC)	74
Nebraska Service Center (NSC)	57
Texas Service Center (SSC)	46
National Benefits Center (NBC)	42
Vermont Service Center (ESC)	30

[14] If a request for case assistance has been determined to be within USCIS posted processing time or USCIS has recently taken action on the application or petition, the Ombudsman will note that "no difficulty has been found" and will close the matter without contacting USCIS. *See* Ombudsman Webpage, "Submitting a Request for Case Assistance" (Mar. 25, 2014); http://www.dhs.gov/case-assistance (accessed May 7, 2015).

[15] USCIS Webpage, "Memorandum of Understanding Between U.S. Citizenship and Immigration Services and the Citizenship and Immigration Services Ombudsman" (Feb. 23, 2012); http://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/signedmou2-23-12.pdf (accessed May 7, 2015).

[16] This data reflects the average number of days awaiting USCIS response, and data does not include case assistance requests that have been placed under extended review queue or have been resolved.

[17] *See generally* 8 C.F.R. §§ 103.3(a) (appeals), 103.5 (Motions to Reopen/Reconsider).

categories, and ranging from cases that are outside posted processing times to more complex issues involving administrative, adjudicative, or multi-agency issues. The following cases are illustrative of assistance provided by the Ombudsman in the 2015 reporting period.

Expediting Cases

- **Preventing Children from "Aging Out" of Eligibility**. USCIS approved Form I-130, *Immigrant Petition for Alien Relative,* but the petitioner did not receive the approval notice and was concerned that his child, the beneficiary, would age out—no longer be eligible to immigrate as a child—by turning 21-years old the following day. The Ombudsman contacted USCIS, and the agency forwarded an electronic copy of the approval notice to the Ombudsman and mailed the hard copy notice to the petitioner the same day, and the child could immediately file his Form I-485, *Application to Register Permanent Residence or Adjust Status.*

Reopening Improper Denials

- **Provisional Waivers**. A provisional waiver applicant who was denied for lack of extreme hardship sought assistance from the Ombudsman. The Ombudsman contacted USCIS because the Request for Evidence was vague and did not provide the applicant with the opportunity to address concerns identified by USCIS during the initial review of the waiver application. The Ombudsman also noted that it appeared USCIS did not consider substantial evidence of financial hardship and made errors in factual summaries. In response to the Ombudsman's inquiry, USCIS reopened and approved the waiver.

- **Legal Interpretations**. Stakeholders brought to the Ombudsman's attention cases in which Lawful Permanent Residents were denied naturalization on the basis that an Immigration Judge's orders of adjustment to permanent residence were erroneous. The applicants with the assistance of a community-based organization had made repeated efforts to explain and correct USCIS' interpretation regarding the judge's order. The Ombudsman contacted USCIS field office leaders, who stated that they were bound by the decision of local counsel that compelled them to deny these cases. The Ombudsman contacted USCIS Region and Headquarters leaders to seek further review of the interpretation. USCIS later informed the Ombudsman that the denials were issued in error, and the naturalization applications for these individuals were reopened.

Administrative and Procedural Issues

- **Mailing Issues**. An applicant with an approved Form N-565, *Application for Replacement Naturalization/ Citizenship Document* contacted the NCSC because the applicant never received the naturalization certificate. In response to the call, the applicant received two letters from USCIS that were issued on the same day; but the letters contradicted each other. One letter stated a certificate was never produced and mailed, while the other letter stated that a certificate was mailed. The applicant called the NCSC for clarification and was told to wait 30 days to receive the certificate. After 30 days, the applicant once again called the NCSC and was informed that the only solution was to file a second N-565 application with filing fee. The applicant followed the NCSC's instruction and filed a second application. When the second application was pending outside the posted processing times, the applicant contacted the Ombudsman for assistance. Following receipt of the Ombudsman's inquiry, USCIS found that there was an error in issuing the certificate for the first application. USCIS immediately resolved the issue and mailed the certificate to the applicant; however, USPS returned the certificate to USCIS as undeliverable. The Ombudsman confirmed the mailing address with USCIS and requested the certificate be re-mailed. Since the second application should not have been required, the Ombudsman also requested a fee refund. At the time of finalizing this Report, the fee refund request remained pending.

- **Change of Address.** The Ombudsman contacted USCIS regarding non-delivery of an EAD. USPS returned the EAD, and USCIS did not appear to follow its standard operating procedure to search for an updated address. The Ombudsman contacted USCIS and was informed the following day that the EAD would be mailed to the new address, and USCIS also provided the applicant the parcel tracking number.

- **Timely Receipt of Appeals.** USCIS denied a Form I-290B, *Notice of Appeal or Motion* on the ground that it was not timely filed. The petitioner sought assistance from the Ombudsman, stating that the Form I-290B was timely filed within 33 days of the denial notice. Since the 33rd day fell on a weekend, the filing should have been considered as timely received the next business

day, in accordance with the regulations.[18] Following receipt of the Ombudsman's inquiry, USCIS reviewed the documentation, accepted the motion, and reopened the case.

USCIS' Role in Resolving Cases

USCIS' cooperation is critical to the Ombudsman's mission to resolve problems that individuals and employers experience when seeking immigration benefits. USCIS field offices, service centers, asylum offices, lockbox receipting facilities, and other offices work directly with the Ombudsman to address individual cases. To do so, USCIS officers must locate and retrieve files, re-examine supporting documentation, and sometimes consult with agency counsel to determine if a case was properly decided. Often cases present complex procedural issues that necessitate in-depth analysis or novel questions of law and policy that require USCIS Headquarters review. On behalf of all the immigrants served, the Ombudsman thanks the dedicated USCIS officers who assist in resolving case problems every day.

The Year in Outreach

The Ombudsman meets frequently with a wide range of stakeholders across the United States, including state and local officials, Congressional offices, national and community-based organizations, and employer associations.[19] Public engagement provides the Ombudsman the opportunity to learn about various immigration issues in different regions of the country. Outreach is essential to the Ombudsman's mission and critical to fostering accountability and transparency in the delivery of immigration services. In this reporting period, the Ombudsman conducted over 84 stakeholder engagements, reaching thousands of stakeholders.[20]

Teleconferences

To inform stakeholders of new initiatives and receive feedback on a variety of topics, the Ombudsman hosted the following teleconferences in the 2015 reporting period:

- Provisional Waivers (March 31, 2015)
- Employment-Based Programs (February 19, 2015)
- Deferred Action for Childhood Arrivals (DACA) Renewals (January 27, 2015)
- Fourth Annual Conference Recap (December 3, 2014)
- USCIS and Student Visa Issues (September 25, 2014)
- Annual Report to Congress (July 30, 2014)

The Ombudsman's Annual Conference

On November 6, 2014, the Ombudsman held its Fourth Annual Conference: *Government and Stakeholders Working Together to Improve Immigration Services.*[21] Conference participants included individuals from non-governmental organizations, the private sector, and federal and state agencies. The Ombudsman was honored to have Secretary of Homeland Security Jeh Johnson as the keynote speaker. The morning session also featured an "armchair discussion" with USCIS Director León Rodriguez and remarks from Internal Revenue Service Taxpayer Advocate Nina Olsen. The afternoon panels focused on a variety of immigration issues:

- Interagency Management of the Visa Queues: The Visa Bulletin, Cut-Off Dates, and Employment and Family-Based Strategies
- Employment Hot Topics (H-2 Adjudications)
- Advanced Topics in U Visa and U Adjustment
- Immigration Benefits Programs for Children: Special Immigrant Juveniles (SIJ) and Unaccompanied Alien Children (UAC) Asylum

[18] 8 C.F.R. §§ 103.5, 103.8. Additionally, in accordance with 8 C.F.R. § 1.1(h), the term "day" when computing the period of time for taking any action provided in this chapter including the taking of an appeal, shall include Saturdays, Sundays, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, nor a legal holiday.

[19] The Ombudsman led or participated in stakeholder engagements in the following locations: Northeast: Newtown and Philadelphia, PA; New York, NY; and Boston, MA. Midwest: Indianapolis, IN; and Chicago, IL. Mid-Atlantic: Alexandria, Arlington, Roanoke, and Herndon, VA; Baltimore, MD; Washington, DC; and Charles Town, WV. Southeast: Charleston and Greenville, SC; Atlanta, GA; Memphis, TN; Greensboro, Raleigh, and Charlotte, NC; New Orleans, LA; and Orlando, FL. Southwest: El Paso, TX; Artesia, NM; and Phoenix, AZ. West: Las Vegas, NV; San Diego and Newport Beach, CA; Seattle, WA; and Portland, OR. Central America: Mexico City, Mexico.

[20] The Ombudsman has established a performance measure to conduct 100 outreach activities each fiscal year. *See* DHS Quarterly Performance Report page 48: Management Measures, FY 2014 End of Year (Dec. 5, 2014).

[21] *See* DHS Blog, http://www.dhs.gov/blog/2014/11/10/ombudsmans-fourth-annual-conference-government-and-stakeholders-working-together (Nov. 10, 2014).

- Change of Address and Mailing Issues: Delivery of USCIS Correspondence and Documents
- A Close Look at I-140 Adjudications

Ombudsman Local Representatives

Section 452(g) of the Homeland Security Act contemplates "local ombudsmen" to represent the office at the state and local level. In addition to an office in Washington, DC, the Ombudsman now currently has remote employees in North Carolina and Indiana who conduct regional outreach in the Southeast and Midwest to identify and resolve problems with local USCIS offices. The Ombudsman is evaluating the impacts and benefits of local engagement.

During this reporting period, remote employees visited eight USCIS offices in the Southeast and Midwest, attended 12 in-person engagements, and conducted in-person trainings for USCIS officials in the Charlotte and Raleigh USCIS Field Offices.

Interagency Engagement

The Ombudsman continues to promote interagency liaison through:

- Monthly meetings with DOS and USCIS on the management of the visa queues aimed at ensuring visas for which there is demand are fully allocated, and the transparent, orderly, and predictable movement of Visa Bulletin cut-off dates;
- Quarterly data quality working group meetings with USCIS, CBP, ICE, and the DHS Office of the Chief Information Officer to facilitate problem-solving related to the SAVE program, which utilizes DHS systems used to verify immigration status and benefits eligibility;
- A working group with the DOL, DOS, and USCIS representatives focused on H-2 Temporary Worker processing issues;
- Participation in the Department's assessment group tasked with the annual DHS Strategic Review of Goal 3.1: *Strengthen and Effectively Administer the Immigration System;*[22]
- Participation in the Interagency Working Group on Separated and Unaccompanied Children with other DHS components, Department of Justice (DOJ), DOS, the Department of Health and Human Services, the White House, representatives of foreign governments, and other non-governmental and quasi-governmental representatives such as Office of the United Nations High Commissioner for Refugees. The working group discusses topics relating to unaccompanied and separated alien children, including trends within this population, care and custody issues, and family reunification; and
- Participation in the DHS Language Access Working Group to address the language needs of persons with limited English proficiency and improve language services for diverse communities across the country, demonstrating the Ombudsman's commitment to providing meaningful access to DHS programs and activities.

The Ombudsman's Language Access Plan

Over the past year, the Ombudsman has been developing a Language Access Plan to provide greater access for individuals with limited English proficiency to Ombudsman services. The Ombudsman translates key materials into the most frequently encountered languages, and is reviewing the best methods to provide interpretive services.[23]

The Ombudsman's Annual Report

The Ombudsman submits an Annual Report to Congress by June 30 of each calendar year in accordance with section 452(c) of the Homeland Security Act. The Ombudsman received USCIS' response to the 2014 Annual Report on June 9, 2015. The Ombudsman is currently evaluating USCIS' response, which was delivered as this Report was going to press.

DHS Blue Campaign

DHS combats human trafficking, and humanitarian immigration programs provide relief for foreign national victims. As Chair of the Blue Campaign, the Department-wide effort dedicated to fighting human trafficking, and Acting Co-Chair of the DHS Council on Combating Violence Against Women, Ombudsman Odom is at the forefront of these efforts. These two initiatives, in tandem with USCIS and a host of other Federal, state, and local

[22] Effective FY 2014, every executive agency must conduct an annual Strategic Review on the agency's progress in achieving its strategic goals. OMB Circular A-11, Part 6; http://www.performance.gov/content/goal-31-strengthen-and-effectively-administer-immigration-system#overview (accessed Apr. 20, 2015).

[23] DHS Language Access Plan (Feb. 28, 2012); http://www.dhs.gov/xlibrary/assets/crcl/crcl-dhs-language-access-plan.pdf (accessed Apr. 3, 2015).

entities, have elevated awareness of successful anti-trafficking strategies while enhancing humanitarian relief programs for thousands of trafficking and abuse victims each year.[24]

Background

Under U.S. law, human trafficking consists of the recruitment, harboring, and/or transportation of a person or persons, through the use of force, fraud or coercion, for labor or services, such as involuntary servitude, peonage, debt bondage, or slavery.[25] Sex trafficking—a form of human trafficking—is a commercial sex act induced by force, fraud, or coercion, or in which the person performing a commercial sex act has not attained 18 years of age.[26]

DHS helps prevent trafficking through public outreach and education; protects trafficking victims through a coordinated, victim-centered approach; and aids the prosecution of traffickers through law enforcement investigations. Central to DHS's protection of trafficking and abuse victims is the Department's continued implementation of VAWA.[27] Under VAWA, DHS extends three key forms of relief to these victims: (1) a process through which domestic violence sufferers can obtain independence from abusive partners by self-petitioning for lawful permanent residence; (2) T visas for human trafficking victims; and (3) U visas granted to victims of certain crimes who aid law enforcement officials in the investigation and/or prosecution of those crimes.[28] Through these three programs, DHS and USCIS bring relief to more than 10,000 trafficking and abuse victims annually.[29]

DHS Blue Campaign Engagements. Since its formal charter in 2013, the Blue Campaign has served as the Department's unified effort to combat human trafficking.

DHS's specific activities include:

- *Prevention:* DHS aims to prevent human trafficking before it happens by educating the public to recognize and report suspected human trafficking to law enforcement. The Blue Campaign's national public awareness campaign includes broad dissemination of print materials and public service announcements (PSAs) to bring visibility to a crime that is often hidden from view. The "Out of the Shadows" television PSA has aired more than 32,000 times in 40 states, with total donated airtime value of over $7.7 million.[30] DHS also takes its message of awareness and prevention abroad, partnering with the DOS to train U.S. Embassy staff, consular officers, and employees in recognizing and reporting suspected human trafficking.
- *Protection:* DHS provides immigration relief to foreign victims of human trafficking in the form of Continued Presence, a temporary immigration status, T visas, and U visas. Through ICE Homeland Security Investigations (HSI), the Department employs victim assistance specialists who work with law enforcement and non-governmental service providers to inform potential victims of their rights and how to receive help.
- *Prosecution:* DHS trains Federal, state, tribal, and local law enforcement officials to recognize indicators of human trafficking and to conduct successful human trafficking investigations. In FY 2014, DHS, through ICE HSI, opened more than 987 cases—many with help from tips from the public—that resulted in 828 convictions in Federal cases with a nexus to trafficking

[24] *See infra* section "Processing of Benefits for Victims of Domestic Violence, Trafficking, and Other Violent Crimes" of this Report.

[25] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4; *see also* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162 (2006); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386; Violence Against Women Act of 2000, Pub. L. No. 106-386; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322.

[26] *Id.*

[27] *Id.*

[28] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322; Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193.

[29] *See, e.g.,* USCIS Webpage, "USCIS Approves 10,000 U Visas for 6th Straight Fiscal Year" (Dec. 11, 2014); http://www.uscis.gov/news/uscis-approves-10000-u-visas-6th-straight-fiscal-year (accessed Mar. 18, 2015).

[30] DHS Webpage, "Out of the Shadows PSA" (Jan. 12, 2015); www.dhs.gov/video/out-shadows-psa (accessed Apr. 21, 2015).

and the identification of more than 446 trafficking victims. DHS also coordinates and conducts human trafficking instruction overseas to deliver training at the DOS-International Law Enforcement Academies.

- *Training*: DHS, with support from its Federal Law Enforcement Training Center (FLETC), is a national leader in human trafficking training development and delivery, providing instruction to law enforcement, first responders, prosecutors, government, and faith-based and private organizations. Since 2010, DHS Components and the Blue Campaign have trained well over 150,000 individuals on indicators of human trafficking through a combination of live and web-based trainings. This year, the Blue Campaign developed nine training videos, addressing sex trafficking in high schools, domestic servitude, and labor trafficking in a variety of locales. Many of these training videos have already been presented to live audiences, and all non-law enforcement sensitive videos will be posted online in this fiscal year. In conjunction with FLETC, the Blue Campaign has also released a web-based course for law enforcement focused on labor trafficking and commercial sex trafficking. A companion web-based course for general audiences is in development and is scheduled for dissemination in the coming fiscal year.

The Blue Campaign offers a variety of free, public resources through its website, www.dhs.gov/bluecampaign, that help raise awareness about combating human trafficking. Blue Campaign posters showcase examples of the three forms of human trafficking: forced labor, domestic servitude, and commercial sex trafficking. These posters have been displayed at truck stops and major airports across the country. Additional resources include indicator cards for law enforcement, first responders, or others likely to encounter victims; pamphlets on human trafficking, DHS services, and DHS programs; and cards listing contact information for the National Human Trafficking Resource Center for distribution to potential victims and vulnerable populations.

One of the key successes of the Blue Campaign has been the ability to create a vast network of partner organizations to join in DHS's efforts to combat human trafficking. Within the past year, the Blue Campaign has entered into formal partnerships with the City of Phoenix, the State of Arizona, the State of Mississippi, the National League of Cities, and TravelCenters of America, a company that operates highway gas stations, quick-service restaurants, and convenience stores in 43 states. Through these partnerships, DHS provides web-based training resources to personnel and co-branded public awareness materials to educate the public on recognizing and reporting suspected human trafficking activity.

The Ombudsman also provides case assistance to individuals seeking to resolve problems with applications and petitions for immigration relief, including immigrant victims of trafficking. In addition, the Ombudsman conducts regular stakeholder engagements with service providers to understand and address systemic concerns with the immigration benefits process for victims of trafficking and other crimes.

In the coming months, the Blue Campaign will enhance its national awareness campaign by focusing on industries where trafficking is especially prevalent. The Blue Campaign will increase external engagement through stakeholder events, formalized partnerships, and targeted outreach to sectors uniquely positioned to recognize suspected human trafficking and do something about it. In support of this approach, training objectives for the 2015 fiscal year include development of additional human trafficking indicator videos, development of a train-the-trainer course for law enforcement to exponentially increase the pool of qualified human trafficking instructors nationwide, and leveraging formal and informal partnerships to broadly disseminate Blue Campaign training tools.

DHS Council on Combating Violence Against Women. The Council on Combating Violence Against Women arose out of DHS's ongoing commitment to prevent and address gender-based violence. In 2010, the Department established a working group dedicated to championing the mission of the White House Council on Women and Girls.[31] In March 2013, DHS formally launched the Council on Combating Violence Against Women and named Ombudsman Odom as the Council's Acting Co-Chair in September of that year.[32]

Ombudsman Odom and Council Co-Chair, Assistant Secretary for Legislative Affairs Brian de Vallance, have facilitated key stakeholder engagements, including public webinars offered each quarter that bring together law enforcement personnel, healthcare providers, and victim advocates. These webinars highlight measures that DHS can undertake to better serve and protect victims

[31] *See* White House Council on Women and Girls Webpage, "Council on Women and Girls;" https://www.whitehouse.gov/administration/eop/cwg (accessed May 19, 2015).

[32] *See* Ombudsman's Annual Report 2014, p. 34.

of violence. In summer 2014, the Council co-hosted a teleconference with USCIS for domestic violence service providers focused on U and T visas. In January 2015, the Council co-hosted a Human Trafficking 101 teleconference with the Blue Campaign in recognition of Human Trafficking Awareness month. During this teleconference, representatives from the Ombudsman's Office, USCIS, FLETC, and ICE HSI shared information about the indicators of human trafficking, the investigation and prosecution of trafficking crimes, protections for immigrant victims including the U and T visas, and support services for trafficking victims. In April 2015, the Council hosted a teleconference on DHS implementation of the Prison Rape Elimination Act (PREA) in recognition of National Sexual Assault Awareness and Prevention Month.[33] DHS issued final regulations related to PREA in 2014 to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities.[34]

The Council has also supported the DHS Office for Civil Rights and Civil Liberties' efforts to coordinate consistent VAWA confidentiality policies for the Department. In November 2013, DHS issued two directives (DHS Directive Number 002-02, *Implementation of Section 1367 Information Provisions* and DHS Directive Number 215-01, *Disclosure of Section 1367 Information to National Security Officials for National Security Purposes*) establishing a single DHS policy regarding the implementation of the VAWA confidentiality provisions.[35] The two directives are complementary—DHS Directive Number 002-02 governs general policy for sharing information and DHS Directive Number 215-01 pertains to sharing for national security purposes. The directives apply throughout DHS, particularly to those employees who work with applicants for victim-based immigration relief or who have access to protected information, such as USCIS, ICE, the Office of Operations Coordination and Planning, the Office of Intelligence and Analysis, and CBP. The directives also serve as the principal reference for disclosing any information related to individuals seeking T visas, U visas, or VAWA protections for counterterrorism purposes to elements of the intelligence community, other Federal departments and agencies, and foreign government entities.

Components with access to section 1367 information must create ways to identify protected individuals, develop safeguards to protect this information, and require all employees, who through the course of their work could come into contact with victim applicants or have access to information covered by section 1367, to complete *VAWA: Confidentiality and Immigration Relief* training.

[33] *See* Proclamation No. 9249, 80 Fed. Reg. 18513 (Apr. 1, 2015).

[34] DHS Press Release, "DHS Announces Finalization of PREA Regulations" (Feb. 28, 2014); http://www.dhs.gov/news/2014/02/28/dhs-announces-finalization-prison-rape-elimination-act-standards (accessed Apr. 28, 2015).

[35] 8 U.S.C. § 1367. Directing guidance as instructed by 8 U.S.C. § 1367(d), as amended by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, section 810.

Key Developments and Areas of Focus

Under Section 452(c)(1)(B) of the Homeland Security Act of 2002, the Ombudsman's Annual Report must include a "summary of the most pervasive and serious problems encountered by individuals and employers" seeking benefits from USCIS and other information as the Ombudsman may deem advisable. This year's Annual Report covers issues and developments in the following areas:

- Families and Children
- Employment
- Humanitarian
- Interagency, Customer Service, and Process Integrity

Executive Immigration Reform

On November 20, 2014, President Obama announced a series of executive actions to "fix our nation's broken immigration system."[36] Secretary of Homeland Security Jeh Johnson published at that same time multiple policy memoranda to implement the announced executive immigration reforms.[37] USCIS, along with CBP and ICE, is responsible for carrying out most of these actions. As described in greater detail below, these include new USCIS initiatives, as well as new regulations and policies for enforcement families, and businesses hiring foreign workers. Planning and implementation of these initiatives, as well as ensuing litigation, dominated USCIS' attention for much of the reporting period.

Background

New Enforcement Priorities and the Priority Enforcement Program. On January 5, 2015, DHS implemented a new department-wide enforcement and removal policy.[38] The new policy places top priority on national security threats, convicted felons, gang members, and illegal entrants apprehended at the border; second priority on those convicted of significant or multiple misdemeanors and those who are not apprehended at the border, but who entered or reentered this country unlawfully after January 1, 2014; and third priority on those who are non-criminals but who have failed to abide by a final order of removal issued on or after January 1, 2014. Under this revised policy, those who entered without inspection prior to January 1, 2014, who never disobeyed a prior order of removal, and were never convicted of a serious offense, will not be priorities for removal.

[36] *See* White House Webpage, "Fixing the System: President Obama is Taking Action on Immigration;" http://www.whitehouse.gov/issues/immigration/immigration-action (accessed Apr. 23, 2015).

[37] *See* DHS Webpage, "Fixing Our Broken Immigration System Through Executive Action—Key Facts" (Jan. 5, 2015); http://www.dhs.gov/immigration-action (accessed Apr. 23, 2015).

[38] *See* DHS Policy Memorandum, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (accessed Feb. 23, 2015).

In June 2015, DHS is ending the Secure Communities program and is replacing it with the Priority Enforcement Program (PEP) that will reflect DHS's new enforcement priorities.[39] DHS also implemented a new Southern Border and Approaches Campaign Strategy to fundamentally alter the way resources are brought to bear at the border.[40] The new strategy focuses on three areas to coordinate more effectively interdiction resources: the southern maritime border; the southern land border (including the West Coast); and the crossing of unaccompanied children.[41]

New USCIS Programs, Policies, and Regulations. In February 2015, USCIS was to begin accepting applications for an expanded DACA program. In May 2015, the agency was scheduled to extend deferred action eligibility to certain individuals, on a case-by-case basis, who have children who are U.S. citizens or Lawful Permanent Residents through the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. On February 16, 2015, the U.S. District Court for the Southern District of Texas temporarily enjoined implementation of expanded DACA and DAPA.[42] The DOJ appealed the temporary injunction; the Department and USCIS have ceased all activities related to expanded DACA and DAPA, and on May 26, 2015, the Fifth Circuit denied the emergency stay of the preliminary injunction.[43]

The Court's order does not affect the existing DACA program. At the time of this Report, individuals may continue to come forward and request an initial grant or renewal of DACA pursuant to the guidelines established in 2012. The Court's order does not affect the Department's ability to set and implement enforcement priorities, as discussed above.

Similarly, other executive actions that USCIS is responsible for carrying out are unaffected by the District court's injunction and will move forward. These initiatives include:

- **Expansion of the Provisional Waiver Program.** The Provisional Waiver program for undocumented spouses and children of U.S. citizens will be expanded to include the spouses and children of Lawful Permanent Residents, as well as the adult children of U.S. citizens and Lawful Permanent Residents. USCIS also will further clarify the "extreme hardship" standard that must be met to obtain the waiver.[44]

- **Revised Parole Rules.** DHS will begin rulemaking to identify the conditions under which entrepreneurs should be paroled into the United States, on the ground that their entry would yield a significant public economic benefit.[45] DHS will support the military and its recruitment efforts by working with the Department of Defense to address the availability of parole in place and deferred action to spouses, parents, and children of U.S. citizens or Lawful Permanent Residents who seek to enlist in the U.S. Armed Forces.[46] DHS will also issue guidance to clarify that, in all cases when an individual physically leaves the United States pursuant to a grant of advance parole, that individual shall not have made a "departure" within the meaning of INA section 212(a)(9)(B)(i).[47]

- **Support High-Skilled Business and Workers.** DHS will take a number of administrative actions to better enable U.S. businesses to hire and retain highly skilled foreign-born workers and strengthen and expand opportunities for students to gain on-the-job training.[48] On February 25, 2015, USCIS published a final rule extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants seeking employment-based Lawful Permanent Residence.[49] The rule became effective on May 26, 2015. Eligible individuals include certain H-4 dependent spouses of H-1B nonimmigrants who: (1) are the principal beneficiaries of an approved Form

[39] *See* DHS Policy Memorandum, "Secure Communities" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (accessed Feb. 23, 2015).

[40] *See* DHS Policy Memorandum, "Southern Border and Approaches Campaign" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_southern_border_campaign_plan.pdf (accessed Feb. 23, 2015).

[41] *See* DHS Webpage, Fixing Our Broken Immigration System Through Executive Action - Key Facts" (Jan. 5, 2015); http://www.dhs.gov/immigration-action (accessed Apr. 23, 2015).

[42] *Texas v. United States*, No. B-14-254 (S.D. Tex. Feb. 16, 2015).

[43] *Texas v. United States,* No. 15-40238 (5th Cir. May 26, 2015).

[44] *See* DHS Policy Memorandum, "Expansion of the Provisional Waiver Program" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf (accessed Feb. 23, 2015). *See infra* section "Provisional and Other Immigrant Waivers" of this Report.

[45] *See* DHS Policy Memorandum, "Policies Supporting U.S. High-Skilled Businesses and Workers" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf (accessed Feb. 23, 2015).

[46] *See* DHS Policy Memorandum, "Families of U.S. Armed Forces Members and Enlistees" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf (accessed Feb. 23, 2015).

[47] *See* DHS Policy Memorandum, "Directive to Provide Consistency Regarding Advance Parole" (Nov. 20, 2015); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_arrabally.pdf (accessed Feb. 23, 2015). Undocumented individuals may trigger a 3-year or 10-year bar to returning to the United States when they depart. INA § 212(a)(9)(B)(i)(I-II). *See infra* section "Military Immigration Issues" of this Report.

[48] *See* DHS Policy Memorandum, "Policies Supporting U.S. High-Skilled Business and Workers" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf (accessed Feb. 23, 2015).

[49] "Employment Authorization for Certain H-4 Dependent Spouses; Final Rule," 80 Fed. Reg. 10283 (Feb. 25, 2015).

I-140, *Immigrant Petition for Alien Worker*; or (2) have been granted H-1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), as amended by the 21st Century Department of Justice Appropriations Authorization Act.[50] Additionally, on March 24, 2015, USCIS published for public comment draft guidance on L-1B Specialized Knowledge, with a target effective date of August 31, 2015.[51] Other initiatives related to employment-based programs, including guidance for foreign workers waiting in the visa queues seeking to take advantage of portability under AC21 were still in development at the time this Report was finalized.[52]

- **Promote the Naturalization Process.** To promote access to U.S. citizenship, USCIS will permit the use of credit cards as a payment option for the naturalization fee, and "expand citizenship public awareness."[53] Currently, the naturalization fee of $680 is payable only by cash, check, or money order. DHS will also explore the feasibility of expanding fee waiver options. On April 14, 2015, Cecilia Muñoz, Assistant to the President and Director of the White House Domestic Policy Council, and USCIS Director León Rodriguez published The White House Task Force on New Americans' strategic action plan.[54] The plan outlines the Task Force's immigrant integration strategy for the federal government, including goals and recommended actions to build welcoming communities; strengthen existing pathways to naturalization and promote civic engagement; support the skill development, entrepreneurship, and protect new American workers; expand opportunities for linguistic integration and education; and strengthen federal immigrant and refugee integration infrastructure.

50 American Competitiveness in the Twenty-first Century Act of 2000 (AC21) § 106(c)(1), Pub. L. No. 106-313. The Act permits H-1B nonimmigrants seeking Lawful Permanent Residence to work and remain in the United States beyond the 6-year limit on their H-1B status.

51 USCIS Policy Memorandum, "L-1B Adjudications Policy" (Mar. 24, 2015); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/2015-0324-Draft-L-1B-Memo.pdf (accessed Apr. 14, 2015). *See infra* section "Nonimmigrant Business Petitions Review" of this Report.

52 *See* AC21 § 106(c)(1), Pub. L. No. 106-313; INA § 204(j).

53 *See* DHS Policy Memorandum, "Policies to Promote and Increase Access to U.S. Citizenship" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_naturalization.pdf (accessed Apr. 20, 2015).

54 The White House Task Force on New Americans, "Strengthening Communities by Welcoming All Residents: A Federal Strategic Action Plan on Immigrant & Refugee Integration" (Apr. 2015); https://www.whitehouse.gov/sites/default/files/docs/final_tf_newamericans_report_4-14-15_clean.pdf (accessed Apr. 20, 2015).

Families and Children

Family re-unification is a foundation of U.S. immigration, and the Ombudsman reviews key family-based programs in this section. USCIS began accepting renewal applications under the DACA program in June 2014, continuing to provide discretionary relief to hundreds of thousands of young people. Approximately 15 percent of requests for case assistance submitted to the Ombudsman involve DACA renewal processing delays. Secretary of Homeland Security Jeh Johnson directed USCIS to expand the Provisional Waiver program and to clarify the "extreme hardship" factors. In December 2014, USCIS implemented the Haitian Family Reunification Parole Program. USCIS sub-offices at military installations continued to help military personnel through the naturalization application process while they simultaneously complete basic training.

Renewals of Deferred Action for Childhood Arrivals

Responsible USCIS Office: Service Center Operations Directorate

This reporting period marks the third year of the DACA program.[55] DACA has allowed more than 664,300 young people who were brought to the United States as children to live, study, and work lawfully in this country.[56] USCIS began accepting DACA renewal applications in June 2014,[57] and had received 374,311 applications as of March 31, 2015.[58] During the reporting period, the Ombudsman received 1,151 requests for case assistance from DACA renewal applicants who had lost or were on the verge of losing employment authorization. A sample of requests for case assistance submitted to the Ombudsman reflected that 42 percent of those applicants filed for renewal within the 150 to 120 day window before expiration, as recommended by USCIS, were not subject to RFEs, and still experienced processing delays. The Ombudsman urges USCIS to provide for automatic temporary extension of employment authorization upon timely receipt of the DACA renewal application, or take other measures to ensure that individuals previously granted DACA do not suffer the impact of a lapse in employment authorization or accrue unlawful presence.[59]

55 *See* Ombudsman's Annual Report 2014, pp. 15-18.

56 Information provided by USCIS (Apr. 30, 2015). USCIS approved 664,373 initial DACA applications between August 15, 2012 and March 31, 2015.

57 USCIS Webpage, "Frequently Asked Questions" (Mar. 10, 2015); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (accessed Apr. 29, 2015). The Frequently Asked Questions were last updated on June 15, 2015.

58 Information provided by USCIS (Apr. 30, 2015).

59 USCIS Webpage, "Frequently Asked Questions" (Mar. 10, 2015); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (accessed Apr. 29, 2015). (Question 52: "[I]f your previous period of DACA expires before you receive a renewal of deferred action under DACA, you will accrue unlawful presence for any time between the periods of deferred action unless you are under 18 years of age at the time you submit your renewal request.") This FAQ was deleted as of June 16, 2015.

Background

Announced in June 2012 and implemented in August of that year, the DACA program provides relief from deportation and employment authorization for a period of 2 years to individuals who entered the United States before reaching the age of 16 and who meet several additional requirements.[60] As of March 31, 2015, USCIS received 793,237 and approved 664,373 initial DACA applications.[61] Individuals who were granted DACA at the inception of the program became eligible to file for renewal of the deferred action period in June 2014.[62]

USCIS currently advises renewal applicants to file between 150 to 120 days prior to the expiration of their employment authorization.[63] Upon releasing the revised Form I-821D, *Consideration of Deferred Action for Childhood Arrivals* on June 4, 2015, USCIS did not distinguish between initial and renewal applications in its suggested processing timeframes.[64] USCIS subsequently reduced the published processing time for DACA renewals and began accepting case inquiries for applications pending 105 days or more.[65] Recent posted processing times for the Nebraska Service Center (NSC) and Texas Service Center (TSC)—the service centers that have been adjudicating DACA applications—reflect processing times of 3.5 months for renewal applications.[66]

To encourage timely filings and prevent lapses, on March 27, 2015, USCIS began mailing renewal reminder notices to DACA recipients 180 days prior to the expiration date of their current period of DACA.[67] Previously, USCIS mailed these reminder notices 100 days before the expiration date. Data provided by USCIS indicate that 81 percent of renewal filings are not being submitted timely. Stakeholders have expressed to the Ombudsman that renewal applicants miss the suggested filing window because of difficulties affording the $465 filing fee, among other factors.

Request for case assistance from a DACA renewal applicant who ultimately was approved 133 days after her application was received:

"I applied for my DACA renewal November 3, 2014 (120 days before my permit expires) and I have not received anything informing me about what is going on. The last form I received from USCIS was the form giving my appointment date for my biometrics, which I completed on November 24, 2014. I'm 5 months pregnant, about to lose my job and health benefits, and I need something to show to my employer (temporary extension) so I don't lose my job."

Ongoing Concerns

Requests for Case Assistance. USCIS has stated that it is timely adjudicating DACA renewal applications and issuing EADs in the vast majority of cases.[68] USCIS data provided to the Ombudsman indicate that 92 percent of completed DACA renewals were adjudicated within the processing time goal.[69]

Processing times published by USCIS, however, are not always reflective of processing times experienced by applicants. The Ombudsman received 1,151 requests for case assistance this reporting period involving processing times for DACA renewal adjudications—approximately 15 percent of all case assistance requests handled by the Ombudsman for the reporting period. Requests for case assistance increased steadily through the reporting period, and 385 requests were received in March 2015 alone. An in-depth review of case assistance requests submitted to the Ombudsman between December 1, 2014 and January 31, 2015, two of the heaviest months for such requests, showed the following:

60 *See* DHS Press Release, "Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities" (Jun. 15, 2012); https://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low (accessed Apr. 30, 2015).

61 Information provided by USCIS (Apr. 30, 2015).

62 *See* DHS Press Release, "Secretary Johnson Announces Process for DACA Renewal" (Jun. 4, 2014); http://www.uscis.gov/news/secretary-johnson-announces-process-daca-renewal (accessed May 20, 2015).

63 USCIS Webpage, "Frequently Asked Questions" (Mar. 10, 2015); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (accessed Apr. 29, 2015).

64 DHS Press Release, "Secretary Johnson Announces Process for DACA Renewal" (Jun. 4, 2014); http://www.uscis.gov/news/secretary-johnson-announces-process-daca-renewal (accessed May 20, 2015).

65 USCIS Webpage, "Frequently Asked Questions" (Mar. 10, 2015); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (accessed Apr. 29, 2015).

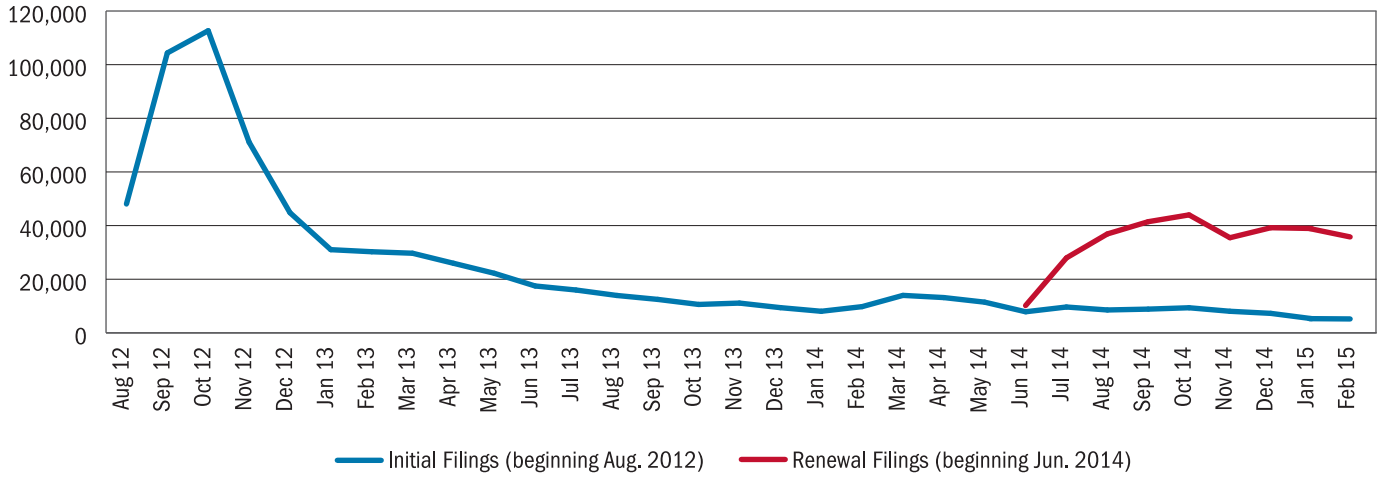
66 USCIS Webpage, "USCIS Processing Time Information for the Texas Service Center" (Apr. 13, 2015); https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed Apr. 29, 2015); USCIS Webpage, "USCIS Processing Time Information for the Nebraska Service Center" (Apr. 13, 2015); https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed Apr. 29, 2015).

67 USCIS email to stakeholders, "USCIS Message: Deferred Action for Childhood Arrivals (DACA) Renewals" (Apr. 7, 2015).

68 Information provided by USCIS (Apr. 30, 2015).

69 *Id.*

2.1 DACA Initial vs. Renewal Filing Receipts at USCIS



Source: Information provided by USCIS (Mar. 14, 2015).

- Of 215 requests, 77 percent (166 requests) involved the expiration of the deferred action period and employment authorization before a decision was issued.
- Of the 166 requests with a lapse, over 30 percent were filed timely—at least 120 days before the expiration of the initial DACA period. Another 42 percent of these requests were not timely filed but the applications remained pending past the processing time goal of 120 days before a decision was issued.

Requests received by the Ombudsman in December 2014 and January 2015 therefore reflected a high percentage of adjudications taking longer than 120 days, USCIS' stated processing time goal; 72 percent of the requests for case assistance with a lapse involved adjudication periods exceeding 120 days, regardless of when they were filed. Further, an additional 20 percent of the cases without a lapse were adjudicated within 2 days of the expiration of the EAD, leading to card production after the expiration of employment authorization and a *de facto* lapse of employment authorization.[70]

Such lapses carry severe consequences. Applicants whose DACA eligibility lapses accrue unlawful presence,[71] are unable to renew their driver's licenses, may lose eligibility for in-state tuition, and lose employment and related employer-provided health benefits. The Ombudsman has handled requests for case assistance made by individuals who have been terminated by their employers due to a lapse of work authorization and are therefore unable to support themselves and their families. Delays through no fault of the applicant, resulting in expiration of DACA, contradict the spirit and purpose of the DACA program.

Individuals requesting case assistance have explained challenging personal circumstances:

"[It] is over 120 days and application still in initial review, my DACA/EAD expired already causing the termination from my job. I have 60 days to [recover] my job and not lose my health insurance and possible [sic] my house for being unable to pay the mortgage."

In another request for case assistance, an applicant filed the DACA renewal application 142 days before the initial DACA expiration date, within USCIS' filing window of 150 to 120 days. Despite timely filing for renewal, USCIS neither adjudicated the case nor granted the applicant an interim extension. The applicant was unable to work upon the expiration of her employment authorization, which in turn impacted her ability to pay her college tuition as well as medical bills for chronic asthma. USCIS issued its decision 70 days past the applicant's expiration date—212 days after the filing date.

[70] EADs are required for those approved for deferred action. 8 C.F.R. §§ 274a.12(c)(14), 274a.13(a)(1).

[71] USCIS Webpage, "Frequently Asked Questions" (Mar. 10, 2015); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (accessed Apr. 29, 2015).

"I am writing this E-mail [sic] today to ask for assistance in regards to my Deferred Action for Childhood Arrivals renewal process.

I am 25 years old and I have been employed ... for 2 years. Today I am requesting assistance due to the fact that my work authorization (EAD) expired on [November 26, 2014] and I have not been unable [sic] to return to work because of this. I have been on unpaid administrative leave and I am going through an extremely difficult time with financial hardship and need to return to work to support my family as I have no income at this time and my fiancé will be expecting soon .... Please help me in expediting my case and request to have my case adjudicated, I just want to have my life back and continue to contribute to American society." This applicant lost his job and was also evicted from his home while he waited for a USCIS decision on his DACA renewal; the renewal was pending for 199 days.

Temporary DACA Approvals. In addressing the possibility of a lapse in DACA benefits, USCIS guidance indicates that short-term DACA and employment authorization may be provided by the agency for applicants who filed for renewal at least 120 days before the expiration of the initial DACA period and the adjudication is delayed through no fault of the applicant.[72] However, stakeholders have reported to the Ombudsman that USCIS has not issued short-term approvals for delayed adjudications involving timely filed cases, and USCIS has confirmed that it has not issued any temporary approvals.[73] This guidance created much confusion in the stakeholder community. The following description of one applicant's experience in requesting issuance of short-term approval illustrates this problem:

> Called USCIS … 4 times between October 20, 2014 and December 23, 2014. First time [USCIS] told me that they will put in an online application for interim employment authorization and that they will issue the document within 2 weeks. When called second time, officer said interim card takes 4 weeks to process. Third time when I called on November 19, 2014, a Tier II said there was no way to expedite the process and that application is still undergoing normal processing. A Tier II officer told me that they no longer issue interim EAD. Fourth time I called on December 2, 2014. [USCIS] said the normal processing time is 3 months, they are experiencing a backlog of applications. Suggested I go to field office.[74]

In addition to highlighting the need for timely adjudications, the requests for case assistance also illustrate the need for an expedite process that takes humanitarian factors into account to prioritize certain cases. Unlike other types of applications, current USCIS policy does not allow expedited processing for DACA applications.[75]

In January 2015, the Ombudsman brought these issues to USCIS' attention and informally recommended that USCIS provide automatic, temporary extension of DACA eligibility and employment authorization upon timely receipt[76] of a DACA renewal application. An automatic extension lasting until the adjudication of the EAD and the issuance of a new card would afford the agency sufficient time to undertake the case-by-case review of each application and contend with the issues raised in cases requiring additional scrutiny. Alternatively, the agency can set a time-limited period, such as the 240 days granted for certain employment-based renewal applications.[77]

An automatic temporary extension could be limited in scope, covering only those who timely file applications for renewal and only until the adjudication of the renewal application is complete. An extension of deferred action and employment authorization presumes continuing eligibility, but could be abrogated at any time upon a determination that the applicant has lost eligibility.

Conclusion

DACA has helped hundreds of thousands of young people who were brought to the United States as children emerge from the shadows to study and work lawfully in the United States. The Ombudsman is considering issuing a formal recommendation to ensure that DACA renewal applicants who file timely do not suffer not suffer the impact of a lapse in employment authorization.

[72] USCIS Webpage, "Frequently Asked Questions" (Mar. 10, 2015); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (accessed Apr. 29, 2015). (Question 49: "[I]f you have filed your renewal request at least 120 days before your deferred action expires and USCIS is delayed in processing your renewal request, USCIS may provide you with DACA and employment authorization for up to an additional 120 days"). This FAQ was deleted as of June 16, 2015.

[73] Information provided by USCIS (Nov. 17, 2014 and Apr. 30, 2015).

[74] Information received through requests for case assistance.

[75] USCIS Webpage, "Frequently Asked Questions" (Mar. 10, 2015); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (Apr. 29, 2015).

[76] USCIS defines timely receipt as filings received within the 150 and 120 day window before expiration. USCIS Webpage, "Frequently Asked Questions" (Mar. 10, 2015); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (accessed Apr. 29, 2015).

[77] *See generally* 8 C.F.R. § 274a.12(b)(20).

Provisional and Other Immigrant Waivers

Responsible USCIS Offices: Field Operations and Service Center Operations Directorates

The Provisional Waiver program helps alleviate problems of family separation and unpredictable processing times that were endemic to the prior system of overseas filing of waivers for immigrant visa applicants.[78] In 2012 and 2013, USCIS consolidated the processing of Form I-601, *Application for Waiver of Grounds of Inadmissibility* at one USCIS service center[79] and implemented a stateside provisional waiver for immediate relatives of U.S. citizens who must consular process abroad.[80] In January 2014, USCIS issued new guidance to adjudicators clarifying how evidence was to be assessed in certain provisional waiver cases.[81] On November 20, 2014, Secretary Johnson published a memorandum titled *Expansion of the Provisional Waiver Program*, instructing USCIS to amend its 2013 regulation to expand the Provisional Waiver program to all statutorily eligible applicants.[82] The Secretary noted the waiver program had been underutilized and directed USCIS to issue new regulations and policies expanding access to certain eligible applicants beyond immediate relatives. The Secretary also directed USCIS to clarify factors considered in assessing "extreme hardship" and criteria by which a presumption of extreme hardship may be determined to exist.[83]

Background

As described in the Ombudsman's 2013 and 2014 Annual Reports, individuals who are seeking Lawful Permanent Resident status may apply for a waiver of the 3-year and

10-year bars for unlawful presence.[84] Applicants must demonstrate refusal of admission would result in "extreme hardship" to a qualifying relative.[85]

Traditional Waivers (Form I-601). Currently, intending immigrants who have departed the United States and been found to be inadmissible following a consular interview overseas may file the I-601 waiver by mail to a USCIS processing center in the United States. The NSC adjudicates Forms I-601.[86] Between October 2009 and March 2015, USCIS approved 51,628 Form I-601 waiver

78 *See* Ombudsman Recommendation 45, "Processing of Waivers of Inadmissibility" (Jun. 10, 2010); http://www.dhs.gov/ombudsman-recommendation-processing-waivers-inadmissibility (accessed Apr. 22, 2015).

79 USCIS Webpage, "USCIS to Centralize Filing and Adjudication for Certain Waivers of Inadmissibility in the United States" (May 23, 2012); http://www.uscis.gov/forms/centralized-filing-and-adjudication-form-i-601-application-waiver-grounds-inadmissibility (accessed Apr. 22, 2015).

80 "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule," 78 Fed. Reg. 535 (Jan. 3, 2013).

81 USCIS Webpage, "Guidance Pertaining to Applicants for Provisional Unlawful Presence Waivers" (Jan. 24, 2014); http://www.uscis.gov/sites/default/files/files/nativedocuments/2014-0124_Reason_To_Believe_Field_Guidance_Pertaining_to_Applicants_for_Provisional_Unlawful_Presence_Waivers-final.pdf (accessed May 7, 2015).

82 DHS Policy Memorandum, "Expansion of the Provisional Waiver Program" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf (accessed Mar. 7, 2015).

83 *Id.*

84 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208. INA § 212 (a)(9)(B)(i)(I) is known commonly as the 3-year bar, referring to the time an individual is barred from returning to the United States. It is triggered by 180 days or more of unlawful presence and a departure from the United States, followed by seeking readmission. INA § 212(a)(9)(B)(i)(II) is commonly known as the 10-year bar, which is triggered by 1 year or more of unlawful presence and a departure from the United States, followed by seeking readmission.

85 INA § 212(a)(9)(B)(v). A qualifying relative is a U.S. citizen or a Legal Permanent Resident spouse or parent of the immigrant seeking a waiver of unlawful presence inadmissibility. *See infra* section "Extreme Hardship" of this Report.

86 USCIS Webpage, "USCIS to Centralize Filing and Adjudication for Certain Waivers of Inadmissibility in the United States" (May 23, 2012); http://www.uscis.gov/forms/centralized-filing-and-adjudication-form-i-601-application-waiver-grounds-inadmissibility (accessed Apr. 22, 2015); Information provided to the Ombudsman (Apr. 9, 2014).

applications and denied 13,198. ***See Figure 2.2**, Approvals and Denials of I-601 Waivers FY 2010 to FY 2015, as of March 2015.*[87]

Provisional Waivers (Form I-601A). Currently, certain immediate relatives of U.S. citizens who apply for an immigrant visa and who require a waiver of inadmissibility for unlawful presence are eligible to file Form I-601A, *Applications for Provisional Unlawful Presence Waiver* for adjudication with USCIS' National Benefits Center (NBC) prior to departing the United States for the immigrant visa interview at a U.S. embassy or consulate abroad.[88] Under the regulations, provisional waivers are unavailable to applicants who USCIS has "reason to believe" may be subject to a ground of inadmissibility other than unlawful presence.[89]

USCIS processing times for provisional waivers have varied from 5.9 months in 2014, to 2.5 months in the second quarter of FY 2015.[90] Between March 3, 2013 and January 31, 2015, USCIS approved 44,237 Forms I-601A and denied 17,782. ***See Figure 2.3,** NBC I-601A Report,* for a breakdown of NBC's receipt and adjudication data for provisional waivers since the program began in March 2013.

Expansion of the Provisional Waiver Program. The Secretary's November 20, 2014 memorandum, *Expansion of the Provisional Waiver Program*, directs DHS to amend its regulations to expand access to the Provisional Waiver program to all statutorily eligible classes of relatives for whom an immigrant visa is immediately available. The Secretary describes the current program as underutilized, in part because the program was not initially extended to the relatives of Lawful Permanent Residents, only to those with U.S. citizen spouses or parents.[91] Significantly, the Secretary's memorandum also directs USCIS to provide additional guidance on the definition of "extreme hardship," to clarify the factors required, and to consider criteria for a presumption of extreme hardship.[92]

2.2 Approvals and Denials of I-601 Waivers

(FY 2010 to FY 2015, as of Mar. 2015)*

FY	I-601 WAIVERS	
	APPROVAL	DENIAL
2010	5,571	1,196
2011	4,537	1,814
2012	6,990	2,024
2013	12,100	2,586
2014	18,340	4,177
2015*	4,090	1,401
Total	**51,628**	**13,198**

Source: Information provided by USCIS (Mar. 12, 2015).

Identified Issues

Stakeholders have raised concerns regarding agency policy and practice in provisional waiver adjudications.

2.3 NBC I-601A Report

(Mar. 3, 2013 to Jan. 31, 2015)*

	FY 2013 TOTAL*	FY 2014 TOTAL	FY 2015 YTD	TOTAL SINCE MARCH 3, 2013
Receipted	25,777	47,311	19,459	92,547
Rejected	6,363	9,125	3,042	18,530
Accepted	19,414	38,186	16,417	74,017
Approved	4,470	27,536	12,231	44,237
Denied	1,451	11,356	4,975	17,782
Administratively Closed	108	263	107	478
Pending	6	377	11,145	11,520

Source: Information provided by USCIS (Feb. 22, 2015).

87 Information provided by USCIS (Mar. 12, 2015).

88 "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule," 78 Fed. Reg. 535, 552.

89 8 C.F.R. § 212.7(e)(4)(i).

90 Information provided by USCIS (Feb. 22, 2015).

91 DHS Policy Memorandum, "Expansion of the Provisional Waiver Program," (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf (accessed Mar. 7, 2015).

92 *Id.*

2.4 USCIS Data on Reasons for Provisional Waiver Denials

(Mar. 4, 2013 to Jan. 31, 2015)

ACTION TAKEN	TOTALS (AS OF JAN. 31, 2015)	PERCENT BY ACTION
Approvals	44,237	70.78%
Denied – Abandonment	1,244	1.99%
Denied – Discretion	23	0.04%
Denied – In Removal Proceedings	192	0.31%
Denied – May Be Subject to Add'l Ground of Inadmissibility	4,498	7.20%
Denied – No Approved IR or Widow(er) Petition	158	0.25%
Denied – No Extreme Hardship to Spouse or Parent	9,921	15.87%
Denied – No Qualifying Relative	524	0.84%
Denied – Other	467	0.75%
Denied – Pending Adjustment of Status	35	0.06%
Denied – Prior I-601A	5	0.01%
Denied – Scheduled Interview Prior to January 3, 2013	55	0.09%
Denied – Subject to Final Removal Order	589	0.94%
Admin Closed	478	0.76%
Withdrawn	71	0.11%
Total adjudicated I-601As	**62,497**	100.00%

Source: Information provided by USCIS (Feb. 22, 2015).

Specifically, and as described in the Ombudsman's 2014 Annual Report, concerns centered on USCIS' interpretation of the "reason to believe" standard applied when determining whether an applicant appears to be inadmissible on grounds other than unlawful presence.[93] In a number of cases, USCIS issued summary denials without due consideration of whether an applicant's criminal offense fell within the "petty offense" or "youthful offender" exceptions,[94] or was not a crime of moral turpitude that would render the applicant inadmissible.[95] USCIS denied cases where applicants had only minor criminal arrests or convictions, such as driving without a license or disorderly conduct, which may not constitute a bar to admissibility. Summary denials also were raised by stakeholders in cases where fraud inadmissibility was alleged, but no specific facts to support the legal elements of fraud and misrepresentation inadmissibility were cited. Organizations sent correspondence to the USCIS Director raising these concerns and seeking revision of applicable standards.[96] The Ombudsman also raised these concerns in a letter to the Director. USCIS published new guidance on "reason to believe" analysis in criminal inadmissibility issues,[97] but stakeholders continue to report summary denials on criminal grounds in which it appears USCIS did not analyze evidence in the record to determine whether "petty offense" or "youthful offender" exceptions applied.

The Ombudsman also received a number of requests for case assistance seeking review of summary denials that dealt with matters that could have been addressed if there were a channel to correct service error. Provisional waiver applicants are not permitted to file Motions to Reopen/Reconsider or appeals.[98] USCIS reopened approximately 20 percent of the inquiries presented by the Ombudsman during the reporting period.

Ongoing Concerns

Requests for case assistance submitted to the Ombudsman, as well as information provided by stakeholders and USCIS

93 *See* Ombudsman's Annual Report 2014, p. 11.

94 INA § 212(a)(2)(A)(ii)(I).

95 INA § 212(a)(2)(A)(i).

96 Letter from American Immigration Lawyers Association (AILA) to USCIS Director Mayorkas (Aug. 6, 2013); Letter from Catholic Legal Immigration Network (CLINIC) to USCIS Director Mayorkas (Aug. 5, 2013); Letter from Ombudsman to the Director (Feb. 7, 2014).

97 USCIS Webpage, "Guidance Pertaining to Applicants for Provisional Unlawful Presence Waivers" (Jan. 24, 2014); http://www.uscis.gov/sites/default/files/files/nativedocuments/2014-0124_Reason_To_Believe_Field_Guidance_Pertaining_to_Applicants_for_Provisional_Unlawful_Presence_Waivers-final.pdf (accessed May 7, 2015).

98 "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule," 78 Fed. Reg. at 554.

during this reporting period, continue to demonstrate concerns with:

- Summary denials in "reason to believe" cases, either on criminal, fraud, smuggling, or prior unlawful presence and reentry grounds;
- RFEs that do not assess particular evidence previously provided by the applicant;
- Inconsistent application of the "extreme hardship" standard; and
- The lack of any administrative appeal or other mechanism to correct administrative error.[99]

On December 16, 2014, the Ombudsman met with the USCIS Associate Director for the Field Operations Directorate and leaders from the NBC, which has long maintained open communication channels with stakeholders.[100] During this meeting, USCIS officials reiterated that the final determination on admissibility rests with DOS. For that reason, USCIS takes a cautious approach when the facts of the case may give rise to grounds of inadmissibility other than unlawful presence. In addition, while acknowledging RFEs often use standardized language listing all possible additional evidence, USCIS believes such RFEs are a useful mechanism for conducting a wide search for information.[101]

When asked about summary denials in cases involving criminal issues, USCIS indicated its adjudicators generally do not undertake legal analysis of criminal grounds of inadmissibility. The USCIS guidance on provisional waivers from January 24, 2014 requires USCIS officers to review all evidence submitted to determine whether there may be a petty offense or youthful offender exception to criminal inadmissibility when making "reason to believe" determinations.[102] Based on discussions in this meeting, the Ombudsman resubmitted case assistance requests to USCIS where the Ombudsman believed documentation presented by the applicant indicated the criminal ground fell under an exception. After review, USCIS reopened a number of cases and other requests remain pending.[103]

USCIS would receive more prompt feedback regarding necessary changes in the program if it permitted Motions to Reopen/Reconsider or appeals. Stakeholders have compiled cases over many months to document to USCIS the need to make corrections.[104] This is inefficient for USCIS, as well as for the applicants in the provisional waiver process, as it does not allow for prompt correction of errors and hinders the timely processing of immigrant waivers, a major goal of this program.

Case Example—Standardized RFEs and Extreme Hardship Denial

In one recent example of a provisional waiver denial, the applicant had first been granted termination of removal proceedings by ICE based on substantially the same evidence later presented to USCIS in support of a provisional waiver. The applicant, a Honduran man in a same-sex marriage with a U.S. citizen, has lived in the United States for 14 years. He had medical documentation; presented extensive documentation of discrimination and mistreatment of homosexuals and same-sex couples in Honduras; and presented evaluations showing psychological hardship to the U.S. citizen spouse. A standardized RFE was issued, which did not identify any particular deficiency with the application. USCIS then issued a denial based on the medical and psychological documentation being more than a year old. The evidence that homosexual marriage was not legal in Honduras and that such unions would subject the couple to harassment, violence, and discrimination was similarly dismissed as outdated. Without specific notice in RFEs, stakeholders are unaware of deficiencies in the filing and cannot easily assess what evidence is needed to overcome them.

[99] Of the requests for case assistance submitted to the Ombudsman, 125 pertained to Form I-601A provisional waivers. Forty-three percent of these requests for case assistance alleged administrative error, 31percent sought to challenge summary denials on criminal, smuggling, prior unlawful presence and reentry, or fraud grounds; and 26 percent sought reconsideration of denials that attorneys found inconsistent with extreme hardship standards applied elsewhere, such as in I-601 adjudications, or where such denials disregarded compelling documentation.

[100] Director Rodriguez reiterated this point in the USCIS Response to the Ombudsman's 2014 Annual Report, which was received on June 9, 2015.

[101] Information provided to the Ombudsman (Dec. 16, 2014). *See also* USCIS Policy Memorandum, "Requests for Evidence and Notices of Intent to Deny;" http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20(Final).pdf (accessed May 18, 2015). ("[A]n RFE is not to be avoided; it is to be used when the facts and the law warrant. At the same time, an RFE is not to be issued when the evidence already submitted establishes eligibility or ineligibility in all respects for the particular benefit or service. An unnecessary RFE can delay case completion and result in additional unnecessary costs to both the government and the individual").

[102] USCIS Webpage, "Guidance Pertaining to Applicants for Provisional Unlawful Presence Waivers" (Jan. 24, 2014); http://www.uscis.gov/sites/default/files/files/nativedocuments/2014-0124_Reason_To_Believe_Field_Guidance_Pertaining_to_Applicants_for_Provisional_Unlawful_Presence_Waivers-final.pdf (accessed May 7, 2015).

[103] In these cases, attorneys had provided briefs and certified criminal records supporting the petty offense exception under INA § 212(a)(2)(A)(ii).

[104] In addition to the letters to USCIS Director Mayorkas from AILA on August 6, 2013 and CLINIC on August 5, 2013 regarding "reason to believe" denials, AILA wrote to USCIS on March 13, 2015 urging the agency to reconsider broad denials for "reason to believe," to evaluate the use of template requests for evidence on extreme hardship, to re-evaluate the lack of appeals and motions, and to create additional guidance for extreme hardship standard and the burden of proof needed, among other concerns.

Case Example—Reason to Believe Denial

In some cases, applicants seek to contest factual and legal determinations USCIS has made in provisional waiver decisions, but without a motion to reopen or an appeal available. Applicants lack a forum to present these arguments. In one example, USCIS denied a provisional waiver application, alleging there was reason to believe the individual was inadmissible due to prior unlawful presence in the United States from 1990 to 1993 (prior to the individual's most recent entry). USCIS stated the multiple entries created reason to believe the applicant was inadmissible for having triggered the inadmissibility ground under INA section 212(a)(9)(C), commonly known as the "permanent bar" for prior unlawful presence and illegal reentry. The applicant argued in the original submission that INA section 212(a)(9)(C) is only applicable to unlawful presence accrued after April 1, 1997, and to reentries after April 1, 1998, when the new section of law became effective.[105] These arguments were not addressed in the denial or in the subsequent negative response to the Ombudsman.

Forty-three percent of requests for case assistance submitted to the Ombudsman since the beginning of the I-601A program have involved denials for administrative error. For example, some denials were based on failure to provide evidence of payment of the required immigrant visa fee to DOS, when the applicant supplied documentation that the payment had been made. In one case the applicant paid the visa fees twice, just to be sure she would not have a problem with the provisional waiver. Lacking the option for filing a Motion to Reopen/Reconsider or appeal, applicants have had to rely on the Ombudsman's case resolution services; otherwise, there is no recourse to have USCIS re-examine such errors, and individuals would have to re-file and again pay filing fees.

Conclusion

Provisional waivers have the potential to help tens of thousands of eligible immigrants avoid lengthy periods of family separation. However, there is no remedy, aside from re-filing or seeking Ombudsman case assistance, to correct administrative errors, or erroneous factual findings and legal interpretations. When the regulations are revised to expand the Provisional Waiver program USCIS should afford applicants the option to file Motions to Reopen/Reconsider or an appeal, along with clarifying extreme hardship factors and the circumstances that may lead to its presumption.

Extreme Hardship

Responsible USCIS Offices: Office of Policy and Strategy and Field Operations and Service Center Operations Directorates

As discussed above, as part of the Administration's executive action on immigration, Secretary Johnson issued a memorandum on November 20, 2014, directing USCIS to expand access to the Provisional Waiver program to all statutorily eligible classes of relatives for whom an immigrant visa is immediately available.[106] The Secretary stated, "The purpose behind today's announcement remains the same as in 2013—family unity."[107] He also noted "[t]o date, approximately 60,000 individuals have applied for the provisional waiver, a number that … is less than was expected."[108] In addition, the Secretary directed USCIS to clarify the factors contemplated in determining whether the "extreme hardship" standard has been met, and to consider criteria by which a presumption of extreme hardship may be determined to exist such that it would provide for broader use of the waiver.[109] These changes will improve the program and assist numerous families who would have otherwise faced long periods of separation, as they waited for processing of their waivers from overseas.

Background

Applicants for an immigrant visa abroad or those eligible to file Form I-485, *Application to Register Permanent Residence or Adjust Status* in the United States, but are subject to grounds of inadmissibility, may file Form I-601 to request a waiver on several grounds, including fraud,

[105] USCIS Policy Memorandum, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of §§ 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF (accessed May 7, 2015).

[106] *See* DHS Policy Memorandum, "Expansion of the Provisional Waiver Program" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf (accessed Mar. 13, 2015). *See also* 78 Fed. Reg. 535-75 (Jan. 3, 2013). In discussing the presumption of hardship, the Secretary cited to the example of the presumption applied by regulations under the 1997 Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100; 8 C.F.R. § 240.64(d).

[107] DHS Policy Memorandum, "Expansion of the Provisional Waiver Program" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf (accessed Mar. 13, 2015).

[108] *Id.*

[109] *Id.*

unlawful presence, and lesser criminal grounds.[110] I-601 waivers also require a showing of extreme hardship to a qualifying relative.[111] Since 2012, I-601 waivers filed by immigrant visa applicants from overseas are sent to the Phoenix Lockbox, a USCIS receipting center, and are adjudicated by the NSC, under USCIS' Service Center Operations Directorate.[112]

Conversely, applicants who are not eligible to file Form I-485 in the United States, but who are residing in the United States and have a U.S. citizen spouse or parent may file Form I-601A prior to departing for an immigrant visa appointment at a consulate overseas.[113] The provisional waiver only waives grounds of inadmissibility for unlawful presence and applicants must show extreme hardship to a U.S. citizen or Lawful Permanent Resident spouse or parent is still required.

The extreme hardship standard has long been a requirement for many different immigration benefits and forms of relief. With both I-601 and I-601A waivers, once the requisite familial relationship is established and basic eligibility requirements are met, the next step is demonstrating that the qualifying relative will suffer extreme hardship if the foreign national applicant is not admitted to the United States. In addition to being one of the factors for various waivers of inadmissibility, including for fraud[114] and criminal conduct,[115] extreme hardship was a requirement for suspension of deportation,[116] and be a requirement for relief under the Nicaraguan Adjustment and Central American Relief Act (NACARA),[117] self-petitioning under VAWA,[118] and one of the waivers of the joint petition requirement for conditional residents.[119] Despite the recurrence of the term in immigration law, "extreme hardship" is not defined in the statute or the regulations and the federal courts have not specifically defined it in case law.[120] In the words of the Board of Immigration Appeals (BIA), it "is not a definable term of fixed and inflexible content or meaning."[121]

Instructions to both Forms I-601[122] and I-601A[123] categorize hardship factors into five groups: health-related factors, financial considerations, education-related factors, personal considerations, and special factors. Extreme hardship generally means something more than commonplace hardship,[124] and depends upon the facts and circumstances unique to each case.[125] Between October

[110] INA §§ 212(a)(9)(B)(v), 212(i), and 212(h). With few exceptions, eligibility to file for adjustment of status in the United States is limited to persons who are lawfully admitted to the United States; that is, inspected, admitted, or paroled. *See* INA § 245(a)-(c) or (i). Therefore, many persons are unable to file for adjustment or for an I-601 waiver while in the United States.

[111] INA §§ 212 (a)(9)(B)(v), 212(i), and 212(h).

[112] USCIS Webpage, "Transition to Centralized I-601 Filing" (May 31, 2012); cited in Ombudsman's Annual Report 2013, p.25.

[113] 8 C.F.R. § 212.7(e). *See also* section on "Provisional and Other Immigrant Waivers," *supra* of this Report. 78 Fed. Reg. 535-75 (Jan. 3, 2013).

[114] INA § 212(i).

[115] INA § 212(h).

[116] Former INA § 244(a)(1996).

[117] Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, tit. II, 111 Stat. 2160, 2193–2201 (1997), as amended.

[118] INA § 204(a)(1)(A)-(B).

[119] INA § 216(c)(4)(C).

[120] *See generally* DHS Policy Memorandum, "Expansion of the Provisional Waiver Program" (Nov. 20, 2014); http://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf (accessed Mar. 13, 2015).

[121] *Matter of Hwang,* 10 I&N Dec. 448, 451 (BIA 1964); *see also Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999).

[122] *See* USCIS Webpage, "Instructions for Applications for Waiver of Grounds of Inadmissibility" (Dec. 16, 2012); http://www.uscis.gov/sites/default/files/files/form/i-601instr.pdf (accessed Apr. 3, 2015).

[123] *Id.*

[124] *Matter of Pilch*, 21 I&N Dec. 627, 631 (BIA 1996).

[125] *Matter of Hwang,* 10 I&N Dec. 448, 451 (BIA 1964).

1, 2013 and January 31, 2015, USCIS adjudicated 62,497 Form I-601A applications, denying nearly 16 percent for lack of extreme hardship.[126] The success of a waiver often hinges on the applicant establishing extreme hardship.

Identified Issue

From the start of the Provisional Waiver program in 2013, through March 2015, over 26 percent of provisional waiver-related requests for case assistance submitted to the Ombudsman were from applicants questioning USCIS' application of the extreme hardship standard and/or claiming inconsistent adjudication of hardship between NSC, which adjudicates Forms I-601, and NBC, which adjudicates Forms I-601A. Specifically, applicants perceive NBC may be applying a standard of proof that is higher than the required preponderance of the evidence.[127] As described in precedent decisions cited by USCIS' materials, preponderance requires the evidence demonstrate the applicant's claim is

> "[P]robably true, where the determination of truth is made based on the factual circumstances of each individual case .... Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine where the fact to be proven is probably true. Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is 'more likely than not' or 'probably true,' the applicant or petitioner has satisfied the standard of proof."[128]

USCIS training materials note the preponderance standard should be the same in I-601A and I-601 adjudications, although no examples are given that might clarify its meaning.[129]

Some cases reviewed by the Ombudsman during this reporting period seem to indicate USCIS' use of a standard that appears higher than preponderance. In such cases, applicants were denied on extreme hardship grounds despite voluminous particularized evidence of such hardship to their qualifying relative. Furthermore, evidence supplied by applicants was sometimes dismissed without evaluation of its credibility, relevance, or probative value.

Stakeholders filing requests for case assistance with the Ombudsman also question whether the evidence of hardship initially submitted with their application was reviewed prior to issuance of an RFE. USCIS requests seeking additional hardship evidence sometimes use standardized language and do not analyze evidence submitted, depriving applicants of notice of particular deficiencies perceived by the adjudicator. Nonetheless, denials are sometimes very specific in basing a decision on lack of a particular document not previously requested. Applicants may not seek review of such decisions through normal administrative channels; i.e., Motions to Reopen/Reconsider or appeal, because they are not available to provisional waiver applicants.[130]

[126] Information provided by USCIS (Feb. 6, 2015).

[127] Information provided through requests for case assistance. While it is difficult to directly compare I-601 and I-601A adjudications of extreme hardship, stakeholders perceive, and Ombudsman inquiries demonstrate, that sometimes a stricter standard is being applied by USCIS for I-601As. As the two applications differ, and are adjudicated by different USCIS offices, it is difficult to compare them directly in available data. *See also* Information provided by USCIS (Feb. 6, 2015); AILA's letter to the DHS Senior Counsel to the Secretary, "Re: Recommendation on the Expansion of the Provisional Waiver Program and Additional Guidance on Extreme Hardship" (Mar. 13, 2015) in which stakeholder reports of provisional waiver denials on extreme hardship are also discussed.

[128] *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

[129] Information provided by USCIS (Feb. 22, 2015). USCIS' I-601 training materials on extreme hardship state that the standard of proof the applicant must meet is "preponderance," and cite to *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). USCIS' I-601A training materials on program overview and extreme hardship indicate the assessment of whether extreme hardship is established and whether discretion is warranted is "the same for both forms," and furthermore "the same for any waiver that requires the applicant to demonstrate that his/her removal or inadmissibility would cause extreme hardship" to a qualifying relative. USCIS Training Materials, "Extreme Hardship & Discretion: Adjudicating I-601" (Mar. 4, 2012); "Provisional Unlawful Presence Waiver Form I-601A: Program Overview" (Jun. 4, 2012); "Adjudicating Form I-601A: Extreme Hardship and Discretion" (Jul. 9, 2012).

[130] "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule," 78 Fed. Reg. at 553.

Case Examples

A provisional waiver applicant was denied for insufficient hardship to her U.S. citizen spouse. The applicant and her spouse lived with three elderly relatives (parents and an 86-year-old grandfather). The couple also had a young U.S. citizen child. The dependent relatives had significant medical needs and required constant attention from the applicant and her U.S. citizen spouse in the home. The family's documentation showed a close-knit family with a small income. While several documents were supplied to prove the applicant's income and expenses, USCIS found financial hardship to be lacking, as the dependent relatives in the household had not shown whether they had any income. USCIS issued a general RFE containing standardized language about extreme hardship, and did not request any particular document. Yet the denial was very specific as to the documents pertaining to the dependents' income that the adjudicator found to be lacking. The Ombudsman has brought this case to USCIS' attention, but the agency declined to reopen the case.

In another case, USCIS concluded that the applicant lacked sufficient financial and emotional hardship evidence. The denial indicated the applicant may have underreported his income in some tax years, as evidenced by the funds he sent to his relatives abroad. The adjudicator further questioned why the applicant did not supply more evidence of financial obligations, and found the applicant had failed to prove that sufficient income could not be earned in Mexico to support the family. None of these documents had been requested in the general RFE sent to the applicant prior to the denial. Instead, the standardized RFE recited the law but did not analyze any of the submitted documents for credibility or probative value. In response to the RFE, the applicant had supplied 28 particular documents to support specific hardships that his qualifying relative, the U.S. citizen spouse, would face. The couple had a U.S. citizen child and were expecting a second child. The applicant ran a janitorial services business which supplied the family's entire financial support. The U.S. citizen spouse was a student in a community college who had three sisters, including one who was disabled and with whom she had always maintained a close bond. Her parents were also living in the United States. Additionally, the applicant supplied 14 more specific documents on personal and financial hardship. The Ombudsman brought this case to USCIS' attention, and the agency reopened and approved the waiver.

In another example, a provisional waiver applicant was denied on extreme hardship grounds despite voluminous supporting evidence. The applicant submitted with his waiver application 247 pages of detailed hardship documents relating to the family's financial, medical, and psychological situation, as well as country conditions. USCIS sent an RFE with a recitation of the law and a generalized request that the applicant needed to demonstrate extreme hardship, but with no discussion of any deficiency in the documents submitted or what was missing. The applicant responded with an additional 20 exhibits supporting the details of the family's situation, the losses that separation would cause, and the medical and financial situation of the qualifying relative. The final denial stated, for the first time, that there was insufficient evidence of the family's finances to evaluate whether it was "extreme," and that there was insufficient evidence to establish that the qualifying spouse would be impacted by the needs of several family members with medical conditions that required care. Prior to the decision, the applicant had supplied financial documents including tax returns, paycheck stubs, rent receipts, medical bills, utility bills, and loans. He also provided documents supporting the medical conditions and the impact on the qualifying relative. After an inquiry by the Ombudsman, USCIS reopened this case and approved it.

In a meeting with the Ombudsman on December 16, 2014, NBC leadership and staff explained that the extreme hardship determination process for provisional waiver applicants, in comparison to I-601 waiver applicants, is more demanding. NBC leadership and staff further clarified that many I-601 applicants have already left the United States and are therefore currently experiencing the hardship, whereas the hardship to the qualifying relative in the I-601A context is prospective. When addressing the issue of standardized language RFEs, NBC leadership and staff again reiterated that forthcoming hardship makes it difficult for an adjudicating officer to deduce the type of documentation an applicant should submit in order to meet the standard, thus broad requests for all evidence are made.

Ongoing Plan of Action

The Ombudsman suggests several steps that will improve current provisional waiver adjudications, especially in light of the announced expansion of the waiver program.

The Legal Standard and RFEs. While USCIS considers the regulatory changes prescribed by the Secretary's Memorandum, it should re-emphasize the standard used to make an extreme hardship determination—preponderance of the evidence and provide adjudicators with case examples to demonstrate when the standard has been met. USCIS should also ensure adjudicators analyze all evidence supplied by provisional waiver applicants for relevance, probative value, and credibility, and issue RFEs that specify particular areas of evidence sought providing applicants with adequate notice of deficiencies. Further, the agency should consider an avenue for administrative review; the current prohibition on motions and appeals means USCIS lacks a process for self-correction, and applicants lack the means for administrative review of erroneous denials.

Presumption of Extreme Hardship in I-601A Applications. USCIS could create a presumption of extreme hardship consistent with that applied in NACARA applications.[131]

Under the regulations, NACARA applicants shall be presumed to have established that deportation or removal from the United States would result in extreme hardship to a U.S. citizen or Legal Permanent Resident spouse, parent, or child.[132] The regulations state a presumption of extreme hardship shall be rebutted if a preponderance of evidence in the record establishes that it is more likely than not that neither the applicant nor the qualified relative would suffer extreme hardship if the applicant were deported or removed from the United States.[133]

The NACARA presumption was created because applicants were deemed generally to have had similar experiences making them eligible for the extreme hardship determination. In the context of I-601A waiver applicants, there are certain common factors or experiences for many applicants that could also justify adopting an extreme hardship presumption. These could include, but are not limited to:

- Length of time in the United States—no less than 5 years of physical presence in the United States;
- Length of marriage—no less than 3 years;
- Family ties—one immediate family member other than the qualifying relative who is a U.S. citizen or Lawful Permanent Resident;
- Work history—No less than 3 years of work history;
- Severe medical condition—chronic or prolonged illness or injury; and
- Country of origin has safety, political, and natural disaster concerns

The hardship factors considered by USCIS in provisional waiver applications[134] are consistent with the factors used in NACARA.[135]

Once the presumption is established, the burden would shift to the government. The creation of a presumption transfers the focus of inquiry, such that an adjudicator can evaluate whether there is sufficient evidence in the record to disprove extreme hardship.[136] The presumption is also overcome when the evidence in the record shows no factors associated with the extreme hardship.[137]

Conclusion

Issuing clarifying guidance on extreme hardship and a presumption of hardship under certain conditions would expand the use of this program and improve consistency in adjudications. Doing so will also help achieve the goal of family unity that the program is intended to serve. The Ombudsman will continue to work with USCIS and DHS leadership to address issues in the provisional waiver program and promote family unity.

Military Immigration Issues

Responsible USCIS Offices: Field Operations and Service Center Operations Directorates

Members of Congress and U.S. military leaders have consistently emphasized to DHS that military immigration issues, including military naturalization, regularization of military dependent immigration status, and preserving military family unity, are critical aspects of military

[131] 8 C.F.R. §§ 240.60-240.70.
[132] 8 C.F.R. § 240.64(d)(1).
[133] 8 C.F.R. § 240.64(d)(2).

[134] These factors include: health-related factors, financial considerations, education-related factors, personal considerations, and special factors. *See* USCIS Webpage, "Instructions for Application for Provisional Unlawful Presence Waiver" (Mar. 4, 2013); http://www.uscis.gov/sites/default/files/files/form/i-601ainstr.pdf (accessed May 4, 2015).
[135] 8 C.F.R. § 240.58(b).
[136] 8 C.F.R. § 240.64(d)(3).
[137] 8 C.F.R. § 240.64(d)(2).

readiness.[138] The Ombudsman continues to review USCIS' support of members of the U.S. military and their families through the administration of immigration benefits and services. In previous years, the Ombudsman reviewed and commented on the USCIS military naturalization process and the delivery of immigration services to military family members.[139] Through site visits to USCIS field offices, teleconferences with USCIS staff, and stakeholder engagement, the Ombudsman has learned that USCIS continues to enhance outreach efforts to service members and their parents, spouses and children.

Background

The INA authorizes USCIS to expedite the naturalization process for current members of the U.S. armed forces, recently discharged members, and deceased service-members.[140] Certain foreign nationals may also enlist in the military and earn U.S. citizenship through the Military Accession Vital to the National Interest (MAVNI) program[141] if they have special, highly needed skills, such as having expertise in languages that are critical to military operations.[142]

USCIS established the "Naturalization at Basic Training Initiative" in August 2009 with the U.S. Army to provide noncitizen enlistees the opportunity to naturalize when they graduate from basic training.[143] Under this initiative, USCIS conducts all naturalization processing including the capture of biometrics, the naturalization interview and administration of the *Oath of Allegiance* on the military installation. Since 2009, USCIS expanded the initiative to the Navy, Air Force, and the Marine Corps in 2013. Fort Jackson in South Carolina became the first military installation in the nation with an onsite USCIS office in 2012, under the Charleston Field Office.[144] The Fort Jackson sub-office has processed over 3,065 naturalization applications for soldiers, averaging over 600 each year.[145] In February 2015, USCIS opened their second sub-office in support of the Naturalization at Basic Training Initiative.[146] Co-located at Fort Benning in Georgia, the sub-office features full-time USCIS officers as well as a biometrics agent. Both installations serve as basic training sites for the U.S. Army, and USCIS is considering additional co-located offices in the other two Army basic training locations: Fort Knox in Kentucky and Fort Sill in Oklahoma.

These USCIS sub-offices at military bases help ensure that foreign national soldiers proceed through the naturalization application process while simultaneously going through basic training. Once a service member graduates from basic training, they receive orders for assignments at duty-stations both home and overseas, which makes the process

138 *See* Letter from Lofgren, Thonberry, Conyers, Pence, et. al, Members of the House of Representatives to then Secretary of Homeland Security Janet Napolitano (Jul. 9, 2010); *see* Letter from then Secretary of Homeland Security Janet Napolitano to Zoe Lofgren, Member of the House of Representatives (Aug. 30, 2010), http://cmsny.org/wp-content/uploads/Napolitano-Letter-08.30.101.pdf (accessed May 19, 2015).

139 *See* Ombudsman's Annual Reports 2010, pp. 63-66; 2009, pp. 37-39; and 2008, p. 58.

140 INA § 328; INA § 329. *See also* Executive Order No. 13269 (Jul. 3, 2002), 67 Fed. Reg. 45287 (Jul. 8, 2002).

141 Department of Defense, "Military Accession Vital to the National Interest;" http://www.goarmy.com/benefits/additional-incentives/mavni.html (accessed May 4, 2015).

142 Foreign nationals must be a nonimmigrant (E, F, H, I, J, K, L, M, O, P, Q, R, S, T, TC, TD, TN, U or V status), be in status as an asylee, refugee, Temporary Protected Status (TPS), or be a recipient of the DACA program. Applicants must legally reside in the United States for a minimum of 2 years prior to joining the military (excluding DACA) without a single absence from the country lasting longer than 90 days. Applicants must have a high school diploma and a qualifying score on the Armed Forces Qualification Test. See Department of Defense, "Military Accession Vital to the National Interest;" http://www.goarmy.com/benefits/additional-incentives/mavni.html (accessed May 4, 2015).

143 USCIS Webpage, "Fact Sheet: Naturalization Through Military Service" (Nov. 12, 2014); http://www.uscis.gov/news/fact-sheets/naturalization-through-military-service-fact-sheet (accessed Apr. 6, 2015).

144 Emilie Arroyo, Federal Officials Push for More Citizenship for Military Members, Feb. 25, 2015; http://www.scnow.com/news/state/article_c9490d8b-b0de-58f9-b59e-eb43841cb208.html (accessed Apr. 6, 2015).

145 Information provided by USCIS (Apr. 22, 2015).

146 Emilie Arroyo, Federal Officials Push for More Citizenship for Military Members, Feb. 25, 2015; http://www.scnow.com/news/state/article_c9490d8b-b0de-58f9-b59e-eb43841cb208.html (accessed Apr. 6, 2015).

of finalizing a naturalization application increasingly difficult to coordinate. Having USCIS officers co-located to handle processing alleviates challenges with scheduling in-person interviews at a time and location feasible for service members and enables them to partake in required military training without interruption. It also prevents delays caused by file transfers between USCIS offices, which would be required after members of the Armed Services move around the country and the world after basic training ends.

Until 2013, USCIS was required to process military-related naturalization applications within 6 months of filing.[147] While no longer required by law to meet this timeframe, USCIS continues to adjudicate military-related naturalization applications within this goal. During calendar year 2014, USCIS naturalized 3,569 military service members both in the United States and overseas.[148] Since 2002, USCIS has naturalized 102,266 members of the military and 2,318 military spouses, with 11,548 of those service members becoming U.S. citizens during naturalization ceremonies that USCIS undertook in 34 foreign countries, some in remote locations thousands of miles from the nearest USCIS office: Afghanistan, Albania, Australia, Bahrain, China (Hong Kong), Cuba (Guantanamo), Djibouti, El Salvador, Georgia, Germany, Greece, Haiti, Honduras, Iceland, Iraq, Italy, Jamaica, Japan, Jordan, Kenya, Korea, Kosovo, Kuwait, Kyrgyzstan, Libya, Mexico, the Philippines, Qatar, South Korea, Spain, Thailand, Turkey, the United Arab Emirates, and the United Kingdom.[149]

USCIS provides a toll-free help line, 1-877-CIS-4MIL (1-877-247-4645), and an email address, militaryinfo.nsc@dhs.gov, for members of the military and their families.[150] In districts with large military populations, USCIS has designated Immigration Services Officers who coordinate with military liaison officers to provide service members and their families with immigration benefits information, expedite fingerprinting, perform interviews, and conduct naturalization ceremonies at major military installations.

Every military installation also has a designated point-of-contact, generally in the personnel division or the Judge Advocate General's Office, to assist members of the military prepare and file naturalization applications. USCIS officers work closely with these individuals to coordinate information sessions with service members and military family communities.

Providing Immigration Services to Military Members and Their Families. Throughout the reporting period, USCIS has taken steps to improve the delivery of immigration services to military members and their families. The Ombudsman understands that USCIS conducted outreach engagements to service members and military families on installations across the country, sharing information about naturalization and parole in place.

Implementation of Discretionary Relief for Military Families. In 2013, USCIS issued long-awaited guidance providing parole in place for spouses, children, and parents of active members of the Armed Forces of the United States and other military family members.[151] Parole in place is an exercise of USCIS discretionary authority to parole into the United States an individual who, although already physically present in the United States, was not previously lawfully admitted.[152] This discretionary authority is statutory and enables the Department to make case-by-case determinations for urgent humanitarian reasons or significant public benefit.[153] The spouse, child, or parent of a service member who is paroled in place may then become eligible to adjust status and become a Lawful Permanent Resident of the United States. Generally, a person cannot adjust status unless he or she has been "admitted or paroled" into the United States.[154] If not for parole in place, these family members would need to leave the United States to consular process, often triggering multiple year inadmissibility bars, and would face long-term separation from their service member.[155] This policy provides better consistency in USCIS' exercise of discretionary relief and helps ensure that our military personnel can focus on their readiness, rather than their families' immigration status.

147 INA § 328(g). Repealed, Pub. L. 110-382, § 4. 122 Stat. 4089 (2008).

148 Information provided by USCIS (Apr. 22, 2015).

149 USCIS Webpage, "Fact Sheet: Naturalization Through Military Service" (Nov. 12, 2014); http://www.uscis.gov/news/fact-sheets/naturalization-through-military-service-fact-sheet (accessed Apr. 6, 2015).

150 USCIS Webpage, "Military" (Feb. 17, 2011); http://www.uscis.gov/military (accessed Apr. 6, 2015).

151 USCIS Policy Memorandum, "Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)" (Nov. 15, 2013); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf (accessed Mar. 9, 2015).

152 *Id.*

153 INA § 212(d)(5); 8 U.S.C § 1182 (d)(5).

154 INA § 245(a).

155 INA § 212(a)(9)(i) and INA § 212 (a)(9)(ii).

USCIS reported that prior to February 2014, they did not track parole in place requests from military family members.[156] In FY 2014, 2,514 requests were made by the spouse, parent, and/or child of active-duty, reserve or veteran service-members representing over 52 countries of origin.[157] To date in FY 2015, USCIS has received 1,809 parole in place requests from military family members representing 45 different countries of origin.[158] USCIS indicated that the average processing time of parole in place requests was 93.24 days for FY 2014 and 66.64 days for FY 2015 to date.[159] While some USCIS Field Offices have shared information about how their office evaluates and processes these requests, no clear field guidance has been shared by USCIS Headquarters.[160]

During FY 2015, the Ombudsman conducted outreach visits to Fort Bragg, North Carolina; Fort Benning, Georgia; Fort Jackson, South Carolina; and Camp Lejeune, North Carolina to meet with stakeholders and USCIS to learn about the delivery of immigration benefits and services in those areas. The Ombudsman strongly supports USCIS efforts to assist the Armed Forces of the United States in their essential mission, and will continue to monitor the actions taken to support military personnel and their families.

The Haitian Family Reunification Parole Program

Responsible USCIS Office: Refugee, Asylum and International Operations Directorate

On December 18, 2014, USCIS implemented the Haitian Family Reunification Parole (HFRP) program to expedite family reunification for certain Haitian family members of U.S. citizens and Lawful Permanent Residents and to promote a safe, legal, and orderly migration from Haiti to the United States. The HFRP program will allow eligible Haitians who are beneficiaries of an approved Form I-130, Petition for Alien Relative to join family members in the United States up to 2 years before their immigrant visas become available.[161] Through this program, DHS anticipates paroling 5,000 Haitians into the United States by 2016.[162]

Background

In response to the devastating earthquake in January 2010, then Secretary of Homeland Security Janet Napolitano designated Haiti for Temporary Protection Status (TPS) based on extraordinary and temporary conditions within the country, citing the economic damage, in billions of dollars, to the Haitian economy.[163] According to the International Organization for Migration, approximately 80,000 Haitians remain displaced.[164] These dire conditions persist, leading Secretary Johnson to reauthorize Haiti's TPS designation in 2014.[165]

On October 17, 2014, in an effort to further assist Haiti, DHS announced the HFRP program.[166] The program was initiated to promote family reunification and enable Haitians to send more remittances back to foster the Haitian economy.[167] Additionally, the program has the potential to save lives by providing an alternative to migrating by sea.

Program Eligibility. The HFRP program allows eligible beneficiaries to process through the U.S. Consulate in Port-Au-Prince, Haiti, and come to the United States as parolees in order to wait for an available immigrant visa. USCIS will assess eligibility on a case-by-case basis, evaluating criteria pertinent to both the petitioner and beneficiary. Petitioners must be U.S. citizens or Lawful Permanent Residents who filed a Form I-130 that was approved on or before December 8, 2014 and whose qualifying family

156 Information provided by USCIS (May 19, 2015).
157 *Id.*
158 *Id.*
159 *Id.*
160 Information provided by USCIS (May 5, 2015). During a training held for legal representatives in Greensboro, North Carolina in August 2014, USCIS Raleigh Field Office shared information about how it evaluates and processes military parole in place requests locally.

161 "Implementation of Haitian Family Reunification Parole Program; Notice," 79 Fed. Reg. 75581 (Dec. 18, 2014).
162 USCIS Teleconference, "USCIS Invitation: Haitian Family Reunification Parole (HFRP) Program" (Feb. 26, 2015).
163 "Extension of the Designation of Haiti for Temporary Protected Status; Notice," 79 Fed. Reg. 11808 (Mar. 3, 2014). Congress proposed the Haitian Family Reunification Parole Program (FRPP) to President Obama by a letter of support on December 15, 2011; http://www.cgdev.org/doc/migration/US%20Congress%20-%20HFRPP%20-%2015DEC11.pdf (accessed Mar. 10, 2015). This letter highlighted the widespread support for this program, including local government and then DHS Secretary Napolitano.
164 International Organization for Migration, "Five Years After 2010 Earthquake, Thousands of Haitians Remain Displaced" (Jan. 9, 2015); http://www.iom.int/news/five-years-after-2010-earthquake-thousands-haitians-remain-displaced (accessed Apr. 6, 2015).
165 79 Fed. Reg. at 11814; *see* INA § 244(b)(1)(C).
166 USCIS Webpage, "DHS to Implement Haitian Family Reunification Parole Program" (Oct. 17, 2014); http://www.uscis.gov/news/dhs-implement-haitian-family-reunification-parole-program (accessed Apr. 6, 2015).
167 79 Fed. Reg at 75582.

relationship is not as an "immediate relative."[168] An eligible beneficiary is a Haitian citizen residing in Haiti: (1) who is already the beneficiary of an approved I-130 petition; (2) whose immigrant visa is not yet available but is expected to become available within the next 18 to 30 months; and (3) whose petitioning relative in the United States receives a letter from the DOS National Visa Center (NVC) inviting them to participate in the program.[169]

Application Process. On March 12, 2015, the NVC sent out the first round of invitation letters to 7,000 identified eligible petitioners.[170] The invitation included instructions on how to file a completed Form I-131, *Application for Travel Document* and submit the required fee or fee waiver request to apply for parole under the HFRP program.[171] Recipients of the NVC invitations are being asked to respond within 6 months of the invitation letter to enable greater coordination with visa number availability.[172] The NVC will process the petitioner's submission and forward eligible files to the U.S. Consulate in Port-Au-Prince. The beneficiary must present him or herself to the consulate, along with the required medical examination and any requested documentation. If determined admissible, DHS will parole the individual into the United States for a period of 3 years.[173]

Ongoing Concerns

Stakeholders have raised concerns regarding the capacity at the U.S. Consulate to meet the demands of eligible beneficiaries. DOS has stated that the U.S. Consulate in Port-Au-Prince has the capacity to process approximately 5,000 beneficiaries under this program, but USCIS has already identified 7,000 approved I-130 petitions that meet the criteria for this program.[174] Most I-130 petitions have derivative as well as primary beneficiaries, which will likely result in additional interviews and document review. The Ombudsman will closely monitor the HFRP program as its gets underway.

[168] *See* INA § 201(b)(2)(A)(i). USCIS Webpage, "The Haitian Family Reunification Parole (HFRP) Program" (May 7, 2015); http://www.uscis.gov/HFRP#Eligibility for HFRP (accessed on May 7, 2015). Immediate relatives may seek immigrant visas to travel to the United States immediately upon the approval of immigrant visa petitions filed on their behalf.

[169] 79 Fed. Reg. at 75582. If an immigrant visa becomes available for a beneficiary who is not an "immediate relative" while the Form I-131 is pending, the beneficiary may select to complete the parole process, if desired.

[170] Information provided by USCIS (Mar. 17, 2015).

[171] 79 Fed. Reg. at 75582.

[172] USCIS Teleconference, "USCIS Haitian Family Reunification Parole (HFRP) Program" (Feb. 26, 2015).

[173] USCIS Teleconference, "USCIS Haitian Family Reunification Parole (HFRP) Program" (Feb. 26, 2015).

[174] USCIS Teleconference, "USCIS Haitian Family Reunification Parole (HFRP) Program" (Feb. 26, 2015); *see also* 79 Fed. Reg. at 75583.

Business and Employment

U.S. immigration policy fosters economic growth, responds to labor market needs, and enhances U.S. global competitiveness. In this year's Annual Report, the Ombudsman reviews issues involving temporary nonimmigrant petitions (H-2A, H-2B, H-1B, L-1, and O-1), investor immigrant petitions (EB-5), immigrant petitions, and employment authorization applications. The Ombudsman continues to be concerned with the quality and consistency of adjudications and the issuance of unduly burdensome Requests for Evidence.

The H-2 Temporary Worker Programs

Responsible USCIS Office: Service Center Operations Directorate

While USCIS approved over 20,000 employer petitions for H-2 workers in FY 2014,[175] the Ombudsman continued to receive reports of processing delays in both the H-2A agricultural temporary worker and H-2B nonagricultural temporary worker programs. Such delays can have severe economic consequences for petitioning U.S. employers, including spoilage of harvestable fruits and vegetables, loss of valuable livestock, and disruptions of scheduled events or delivery of services. From the employer's perspective, the fact that three separate agencies govern the H-2 processes can be perplexing. The agencies—DOL, DOS, and USCIS—generally perform their individual program steps autonomously.

Complicating matters further, in March 2015, a Florida federal district court ruled DOL lacks authority under the INA to issue regulations for the H-2B program. The court vacated the 2008 H-2B regulations under which DOL was administering the program.[176] As H-2B employers moved to fill gaps in their spring and summer workforces, the court's decision resulted in a brief shutdown of the H-2B program.[177] While the stay was lifted 2 weeks later, allowing processing of labor certifications and petitions to move forward, the H-2B cap for the second half of the fiscal year was then reached on March 26, 2015.[178] On June 5, 2015, USCIS reopened the cap and began accepting H-2B petitions for workers with employment

[175] Information provided by USCIS (Apr. 30, 2015).

[176] *Perez v. Perez*, No. 3:14-cv-682 (N.D. Florida, Mar. 4, 2015).

[177] Under a subsequent court order issued March 18, 2015, DOL was permitted to resume temporarily processing H-2B requests for prevailing wages and applications for labor certification under the 2008 H-2B rule through April 15, 2015, which was further extended by the court to May 15, 2015. *Perez v. Perez*, No. 3:14-cv-682 (N.D. Florida, Mar. 18, 2015).

[178] USCIS Webpage, "Cap Count for H-2B Nonimmigrants" (Apr. 30, 2015); http://www.uscis.gov/working-united-states/temporary-workers/cap-count-h-2b-nonimmigrants (accessed May 19, 2015).

start dates in the second half of the fiscal year, citing low visa usage, only to close it in a little over a week.[179]

The Ombudsman continues to remain concerned regarding the administration of these programs, especially the coordination among the three agencies with different regulatory roles. To explore areas of collaboration in the H-2 programs, the Ombudsman convened an interagency working group, and continues to encourage coordination and more efficient practices, especially in USCIS processing.

Background

The H-2 programs are designed to provide U.S. businesses with short-term agricultural (H-2A)[180] and nonagricultural (H-2B)[181] labor when there are not sufficient U.S. workers who are able, willing, qualified, and available to perform the identified temporary work or services. H-2A occupations involve agricultural employment of a temporary or seasonal nature. H-2B jobs involve nonagricultural employment ranging across industries, including landscaping, outdoor amusement, construction, and seafood, when the employment is temporary based on a one-time, seasonal, peak load, or intermittent basis.[182] There is a yearly limit of 66,000 visas for H-2B workers, allocated in equal amounts in the first and second half of the year.[183] There is no corollary yearly limit on the number of H-2A workers who may be admitted each year. In FY 2014, DOS issued 89,274 H-2A visas and 68,102 H-2B visas.[184]

Generally, before filing a petition with USCIS for H-2 workers, an employer must obtain a valid Temporary Employment Certification from DOL by filing Employment and Training Administration (ETA) Form 9142, *Application for Temporary Employment Certification*.[185] Once DOL issues the certification, the employer submits it to USCIS with Form I-129, *Petition for a Nonimmigrant Worker.* H-2 petitions may request multiple workers, so long as the information provided in the petition to USCIS, such as the dates of need, job duties, and worksite locations matches information listed in the Temporary Employment Certification issued by DOL.[186] USCIS examines the Temporary Employment Certification and confirms whether the need and the job are both temporary in nature.[187] After the petition is approved by USCIS, the potential foreign worker applies for an H-2 nonimmigrant visa at a DOS consulate or embassy abroad. The foreign worker is interviewed by DOS to determine admissibility and knowledge of the work to be performed. When the visa is issued, the foreign worker applies for admission to the United States at a port of entry.

Ongoing Concerns

Pursuant to the 2008 regulations under which DOL operated for most of the reporting period, petitioning employers could not begin the H-2B process with DOL more than 120 calendar days before their date of need.[188] For H-2A filings, petitioning employers cannot be required to file earlier than 45 calendar days before their date of need.[189] While USCIS continues to prioritize H-2A petitions and attempts to complete these adjudications within a matter of days,[190] H-2B filings are not prioritized. Petitioners may request premium processing[191] of H-2B petitions by paying an additional $1,225[192] (separate from the underlying filing fee of $325)[193] to obtain a decision within 15 calendar days.[194] Due to these imposed tight timeframes, a delay in processing at any of the involved agencies would likely result in less time for the next phase of the process and, in particular, less time for workers to obtain their visas and enter the United States by the employer's date of need. At present, there is no cross-agency system for tracking H-2 processing, starting with DOL through DOS visa approval. Therefore, the total H-2 processing time remains unknown.

179 USCIS Press Release, "USCIS to Reopen H-2B Cap for the Second Half of the Fiscal Year 2015" (Jun. 5, 2015); http://www.uscis.gov/news/alerts/uscis-reopen-h-2b-cap-second-half-fiscal-year-2015 (accessed Jun. 9, 2015); USCIS email to stakeholders, "USCIS Reaches Cap for the Second Half of Fiscal Year 2015" (Jun. 15, 2015).

180 INA § 101(a)(15)(H)(ii)(a); 8 C.F.R. § 214.2(h)(5).

181 INA § 101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6).

182 8 C.F.R. § 214.2(h)(6)(ii)(B).

183 INA §§ 214(g)(1)(B) and 214(g)(10).

184 U.S. Department of State Webpage, "Table XVI(B) Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards) Fiscal Years 2010-2014;" http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2014AnnualReport/FY14AnnualReport-TablXVIB.pdf (accessed Apr. 30, 2015). The H-2B number includes beneficiaries who are exempt from the H-2B cap.

185 20 C.F.R. § 655 Subpart A and B.

186 8 C.F.R. § 214.2(h)(2)(ii).

187 8 C.F.R. § 214.2(h)(5)(iv)(A); 8 C.F.R. § 214.2(h)(6)(ii).

188 20 C.F.R. § 655.15(b) (2009). During most of this reporting period, DOL operated the H-2B program under regulations promulgated in 2008. The Department was subsequently subject to litigation that resulted in an injunction of those regulations. *Perez v. Perez*, No. 3:14-cv-682 (N.D. Florida, Mar. 4, 2015).

189 *See* INA § 218(c)(1); *see also* 20 C.F.R. § 655.130(b).

190 USCIS Adjudicator's Field Manual (AFM) Ch. 31.4(c).

191 *See* USCIS Webpage, "How Do I Use the Premium Processing Service?" (May 19, 2015); www.uscis.gov/forms/how-do-i-use-premium-processing-service (accessed May 19, 2015).

192 *See* USCIS Webpage, "I-907, Request for Premium Processing Service" (May 1, 2015); www.uscis.gov/i-907 (accessed May 19, 2015).

193 *See* USCIS Webpage, "H and L Filing Fees for Form I-129, Petition for a Nonimmigrant Worker" (Jun. 7, 2013); www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker (accessed Apr. 30, 2015).

194 USCIS Webpage, "How Do I Use the Premium Processing Service?" (May 19, 2015); http://www.uscis.gov/forms/how-do-i-use-premium-processing-service (accessed May 19, 2015).

Paper-Based Process. In 2012, DOL implemented the electronic filing of temporary labor applications in the H-2 programs through its iCERT Visa Portal System.[195] Conversely, development of USCIS' online H-2 petition has been delayed, although the agency continues to plan to deploy it as part of its Transformation program.[196] DOL also provides employers with notification and correspondence via email. As noted above, USCIS provides H-2B petitioners the option of requesting Premium Processing,[197] a service that includes expedited processing of cases, and also delivers receipting and other correspondence from the agency via email and by hard copy. Premium Processing is not available, however, to H-2A employers.[198]

For certain notifications and correspondence, USCIS allows applicants or petitioners who may be interested in faster delivery to include pre-paid courier service mailer envelopes along with their initial filing.[199] Otherwise, USCIS sends correspondence through regular mail via USPS. The Ombudsman continued to receive complaints regarding USCIS' failure to use the provided pre-paid envelopes. Specifically, it has been noted that USCIS' Vermont Service Center (VSC) was no longer accepting pre-paid Federal Express envelopes. At the Ombudsman's 2014 Annual Conference, USCIS explained the temporary shift in policy was due to the fact that several employers were negligent in paying their Federal Express account fees, and the agency, as the other party in the transaction, was being held responsible. USCIS has since returned to using pre-paid envelopes when provided.

Delays Due to Requests for Evidence. Both in 2014[200] and in this most recent reporting period, stakeholders were delayed in obtaining H-2 workers due to higher scrutiny and issuance of RFEs by USCIS. In some cases,

issuance of such RFEs resulted in delays of an additional 2 to 3 weeks caused by the agency's use of USPS regular mail delivery service. For example, one employer agent who submitted a request for case assistance with the Ombudsman filed an H-2A petition on behalf of the employer on October 31, 2014 with a November 15, 2014 start date requested. USCIS issued an RFE on November 19, 2014. USCIS did not utilize the return next day courier envelope provided and instead sent the request by regular USPS mail. The agent did not receive the notice until December 1, 2014. Furthermore, the agent was confused by the duplicative nature of the RFE, as the documents requested were submitted with the initial petition. The employer immediately submitted a duplicate copy of the documents to USCIS using overnight mail. The Ombudsman contacted USCIS, and assisted in having the agency review and adjudicate the H-2A petition within a day of the communication.

A shift to electronic processing, whether via online submission and/or email communication options, would result in faster processing, reduced costs, enhanced customer service, and better data collection.

Communication between the three agencies regarding approvals of H-2 petitions is also generally conducted on paper. Although each agency has a level of electronic

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195 "Electronic Filing of H-2A and H-2B Labor Certification Applications Through the iCERT Visa Portal System," 77 Fed. Reg. 59670 (Sept. 28, 2012).

196 Transformation seeks to move the agency from a paper-based application and adjudication process to an electronic one; see USCIS Webpage, "Office of Transformation Coordination" (Oct. 1, 2012); http://www.uscis.gov/about-us/directorates-and-program-offices/office-transformation-coordination (accessed Mar. 11, 2015). *See infra* section "Transformation: Modernizing Systems, Case Processing, and Customer Service" of this Report.

197 *See* USCIS Webpage, "How Do I Use the Premium Processing Service?" (May 19, 2015); www.uscis.gov/forms/how-do-i-use-premium-processing-service (accessed May 19, 2015).

198 *Id.*

199 *See* USCIS Webpage, "USCIS Service and Office Locator;" https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=SC (accessed Mar. 11, 2015). Items that may be sent via courier service include: approval notices (Form I-797), requests for evidence, notices of denial and/or intent to deny, and most travel documents.

200 Ombudsman's Annual Report 2014, p. 26.

access, DOL, DOS, and USCIS do not currently communicate their decisions to one another electronically. This introduces an additional layer of complexity that burdens the petitioning employer. For example, rather than DOL electronically sending USCIS an approved Temporary Employment Certification, petitioning employers are required to provide USCIS the signed original hard copy document.[201] USCIS also does not forward its approved H-2 petitions to DOS electronically. Instead, DOS's Kentucky Consular Center receives paper files from USCIS and scans and uploads the approved petition and supporting documentation into the DOS electronic system for access by embassies and consulates abroad.[202] According to DOS, this process takes approximately 3 days.[203]

Failure to Recognize Agents. Although permitted under the regulations,[204] USCIS currently does not capture in the agency's electronic case management systems information concerning an agent or petition preparer filing on behalf of a petitioning employer; USCIS only captures information regarding the employer. This is in contrast to the agency's process of electronically capturing information regarding the attorney and/or accredited representative of record. It also results in USCIS not consistently issuing notices or correspondence to agents who represent petitioning employers in the H-2 process, possibly further contributing to delays. Unlike attorneys or accredited representatives, who file Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative* requiring USCIS to communicate with them on behalf of the applicant/petitioner, agents have no such corresponding form. Stakeholders report USCIS often sends notices and correspondence directly to petitioning employers, notwithstanding the fact their petitions were filed through an agent as permitted by USCIS regulations.

H-2B Program Litigation. On March 4, 2015, the federal district court in the Northern District of Florida vacated DOL's 2008 H-2B regulations on the ground the agency lacked authority under the INA to issue regulations in the H-2B program.[205] These regulations established the standards and procedures for certifying an employer's request to petition for H-2B workers and determine prevailing wage rates. Responding to this decision, DOL immediately stopped accepting and processing requests for prevailing wage determinations and applications for Temporary Employment Certification in the H-2B program.[206] Thereafter, on March 5, 2015, USCIS also temporarily suspended adjudication of affected H-2B petitions.[207] Due to the impact the court's order had on petitioning employers, the court subsequently delayed its implementation at least twice, permitting the agencies to temporarily resume processing of H-2Bs. The lifting of the stay was predicated in part on DHS's and DOL's agreement to publish a new rule that would allow the H-2B program to continue without further interruption. Accordingly, USCIS and DOL each resumed processing in mid-March 2015.[208] On April 29, 2015, DOL and USCIS jointly published an interim final rule governing the H-2B program, along with a corresponding final rule to establish the prevailing wage methodology.[209] The new regulations became effective immediately upon publication. The rules include several provisions to expand recruitment of U.S. workers; strengthen worker protections; and continue the use of employer-provided surveys to establish a prevailing wage in certain limited situations.[210]

H-2 Interagency Working Group. To explore improvements in the H-2 process, in May 2014, the Ombudsman convened an interagency working group that includes DOL, DOS, and USCIS. The interagency working group has met several times over the last year and discussed a variety of topics affecting the H-2 programs, including: information sharing between agencies, mailing issues and alternatives to use of regular mail, and creation of a designated agent form. The Ombudsman also discussed H-2 processing issues at the office's 2014 Annual Conference on a panel with speakers from USCIS and employers.[211] The Ombudsman remains committed to working with USCIS,

201 8 C.F.R. § 214.2(h)(5)(i)(A).

202 The Kentucky Consular Center is a DOS facility located in Williamsburg, Kentucky. It supports the worldwide operations of the Bureau of Consular Affair's Visa Office. It uploads petition information into the DOS Petition Information Management System.

203 Ombudsman Teleconference, "H-1B and H-2B Filing Season," (Feb. 19, 2015).

204 *See,* e.g., 8 C.F.R. § 214.2(h)(i)(5)(A); 8 C.F.R. § 214.2(i)(F); 8 C.F.R. §§ 214.2(h)(6)(iii)(B) and 214.2(o)(2)(iv)(E).

205 *Perez v. Perez*, No. 3:14-cv-682 (N.D. Florida, Mar. 4, 2015). The same court had also enjoined DOL's final rule published in 2012 on the same grounds of lack of regulatory authority. *Bayou Lawn and Landscape Services, Inc. v. Solis*, 3:12-cv-183-MCR-CJK (N.D. Florida, Apr. 26, 2012); *aff'd Bayou Lawn and Landscape Services, Inc. v. Oates*, 713 F.3d 1080 (11th Cir. 2013).

206 *See* Office of Foreign Labor Certification Website, "Announcements" Mar. 4, 2015; http://www.foreignlaborcert.doleta.gov/ (accessed Mar. 11, 2015).

207 USCIS email to stakeholders, "USCIS Temporarily Suspends Adjudication of H-2B Petitions Following Court Order," Mar. 9, 2015.

208 *See* USCIS Webpage, "USCIS Resumes H-2B Adjudications; Premium Processing Remains Suspended" (Mar. 17, 2015); http://www.uscis.gov/news/uscis-resumes-h-2b-adjudications-premium-processing-remains-suspended (accessed Mar. 18, 2015); Office of Foreign Labor Certification Website, "'Announcements,' 'Prohibition of DOL H-2B Processing Temporarily Lifted;'" http://www.foreignlaborcert.doleta.gov/ (accessed May 19, 2015).

209 "Wage Methodology for the Temporary Non-Agricultural H-2B Program; Final Rule," 80 Fed. Reg. 24041 (Apr. 29, 2015); "Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule," 80 Fed. Reg. 24145 (Apr. 29, 2015).

210 *See* USCIS Webpage, "New Rules for the H-2B visa program announced by the U.S. Departments of Labor and Homeland Security;" http://www.uscis.gov/alerts-topics/visas-h-2a-and-h-2b (accessed Apr. 30, 2015).

211 Ombudsman 2014 Annual Conference (Nov. 6, 2014).

other government offices, and H-2 stakeholders to address issues affecting the H-2 programs.

High-Skilled Adjudication Issues

Responsible USCIS Offices: Service Center Operations Directorate and Office of Policy and Strategy

As discussed in Annual Reports since 2008, stakeholders continue to raise concerns with USCIS adjudication of nonimmigrant petitions for high-skilled beneficiaries, including H-1B (Specialty Occupations), L-1A (Intracompany Transferee Managers or Executives), L-1B (Specialized Knowledge Workers), and O-1 (Individuals with Extraordinary Ability or Achievement). Specifically, employers and their representatives provide examples to the Ombudsman of RFEs that appear to be redundant, seeking documentation that was previously provided; unnecessary, requesting information that is irrelevant or exceeds what is needed to complete the adjudication; and unduly burdensome in scope or intrusiveness. Notably, on March 23, 2015, USCIS issued the long-awaited L-1B Policy Guidance Memorandum in draft form with a scheduled implementation date of August 31, 2015.[212]

Background

Start-up firms, U.S. and international companies, and academic institutions use high-skilled visa programs to hire or transfer foreign employees to work in U.S. offices. Despite elevated RFE rates discussed below, in FY 2014 USCIS approved 96.5 percent of H-1B petitions it adjudicated, 80.3 percent of L-1A petitions, and 70.9 percent of L-1B petitions.[213]

The regulations describe when an RFE may be used, and what it must contain:

> If all required initial evidence is not submitted … USCIS in its discretion may deny the [application or petition] for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted ….
> (iii) … [i]f all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: … request more information or evidence from the applicant or petitioner ….
> (iv) … A request for evidence … will specify the type of evidence required … sufficient to give the applicant or petitioner adequate notice and sufficient information to respond ….[214]

Additionally, a USCIS Adjudicator's Field Manual (AFM) section is dedicated to RFEs,[215] and USCIS has issued numerous guidance memoranda to adjudicators on this matter since 2004.[216] The most recent, issued on June 3, 2013, instructs adjudicators that "an RFE is not to be issued when the evidence already submitted establishes eligibility or ineligibility in all respects for the particular benefit or service. An unnecessary RFE can delay case completion and result in additional unnecessary costs to both the government and the individual …."[217] Other agency efforts to address stakeholder concerns with the quality and consistency of adjudications include the RFE Template Project initiated in 2010,[218] and the Entrepreneurs in Residence program initiated in 2013.[219]

Notwithstanding these legal authorities, policy memoranda, and agency initiatives, RFE rates in the H-1B and L-1 categories at both the California Service Center (CSC) and VSC remain at or near historic highs.[220] ***See Figure 3.1,*** *H-1B, L-1A, L-1B RFE Rates.*

212 USCIS Policy Memorandum (PM-602-0111), "L-1B Adjudications Policy" (Mar. 24, 2015); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/2015-0324-Draft-L-1B-Memo.pdf (accessed May 18, 2015).

213 Information provided by USCIS (Apr. 30, 2015).

214 8 C.F.R. § 103.2(b)(8)(ii–iv).

215 AFM Ch. 10.5(a).

216 *See* Interoffice Memorandum, "Removal of the Standardized Request for Evidence Processing Timeframe Final Rule, 8 C.F.R. § 103.2(b)" (Jun. 1, 2007); http://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/June%202007/RFEFinalRule060107.pdf (accessed May. 19, 2010); and USCIS Memorandum, "Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)" (Feb. 16, 2005); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/rfe021605.pdf (accessed May. 19, 2010). The May 4, 2004 Interoffice Memorandum, "Requests for Evidence" is rescinded.

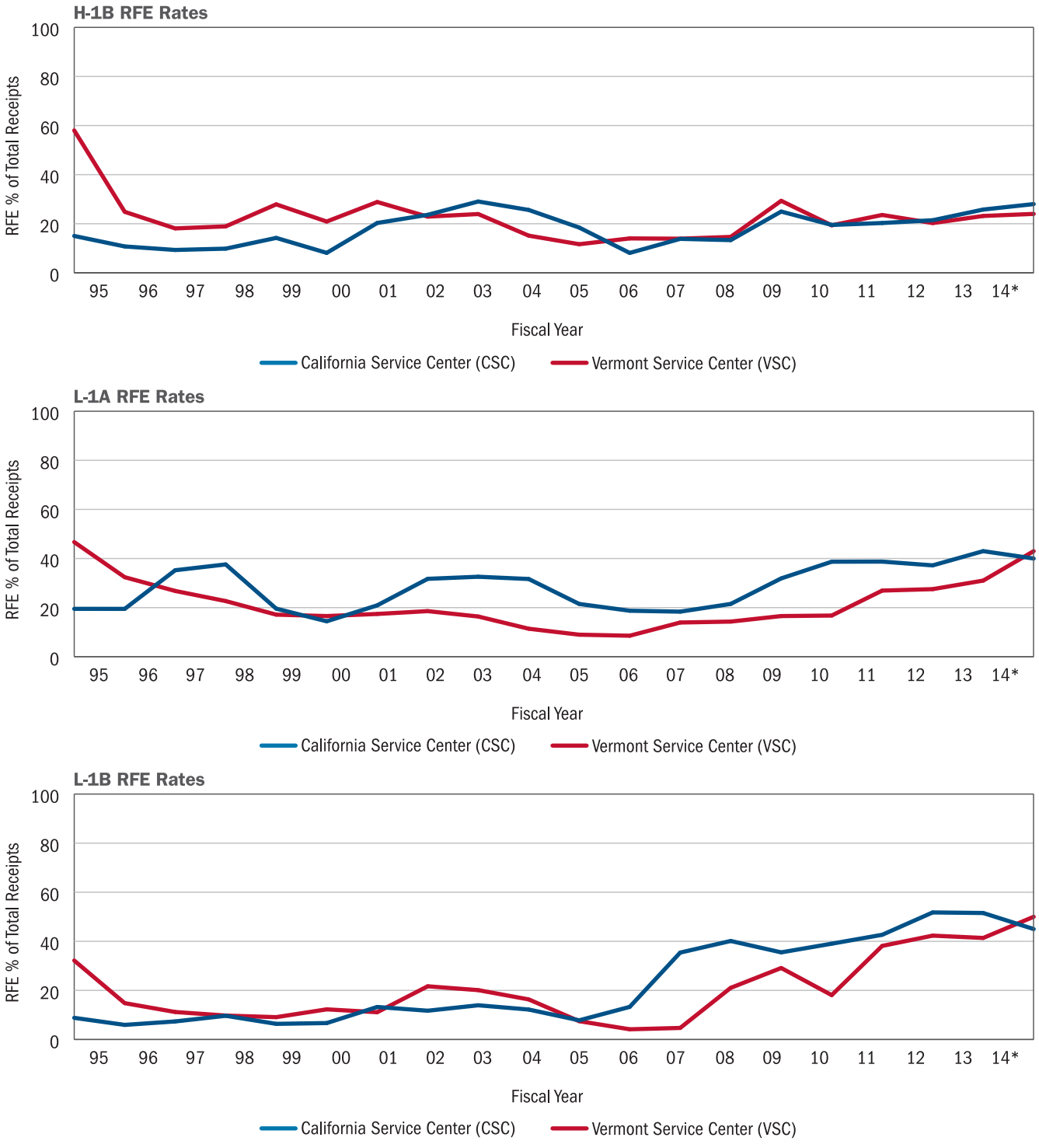
217 USCIS Policy Memorandum, "Requests for Evidence and Notices of Intent to Deny" (Jun. 3, 2013); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20%28Final%29.pdf (accessed Jun. 2, 2014). The USCIS Policy Memorandum was issued in response the U.S. Department of Homeland Security Office of Inspector General (OIG) Report, "The Effect of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers" (Jan. 5, 2012); http://www.oig.dhs.gov/assets/Mgmt/OIG_12-24_Jan12.pdf (accessed May 19, 2015).

218 USCIS Webpage, "Review and Revision of Request for Evidence Templates" (Jan. 6, 2015); http://www.uscis.gov/outreach/feedback-opportunities/review-and-revision-request-evidence-templates (accessed May 19, 2015).

219 *See generally* USCIS Webpage, "Entrepreneurs in Residence (EIR)" (Feb. 19, 2014); www.uscis.gov/about-us/entrepreneurs-residence-initiative/entrepreneurs-residence-eir (accessed May 18, 2015). S*ee also* USCIS Webpage, "Executives in Residence" (Apr. 22, 2014); www.uscis.gov/about-us/uscis-residence-programs/executives-residence (accessed May 19, 2015).

220 Information provided by USCIS (Apr. 30, 2015).

3.1 H-1B, L-1A, L-1B RFE Rates



Source: Information provided by USCIS (Nov. 23, 2009; Jan. 26, 2011; May 18, 2011; Apr. 4, 2013; May 29, 2014; Mar. 30, 2015).
*FY 2014 data includes RFEs and NOIDS.

To address these concerns, the Ombudsman made four formal recommendations[221] to USCIS in 2010:

- Implement new and expanded training to ensure that adjudicators understand and apply the "preponderance of the evidence" standard in adjudications;
- Require adjudicators to specify the facts, circumstances and/or derogatory information necessitating the issuance of an RFE;
- Establish clear adjudicatory L-1B guidelines through the structured notice and comment process of the Administrative Procedure Act; and
- Implement a pilot program requiring (1) 100 percent supervisory RFE review of one or more product lines, and (2) require an internal uniform checklist for adjudicators to complete prior to issuance of an RFE.

USCIS accepted the recommendation to develop new training materials for adjudicators on the preponderance of the evidence legal standard, and the agency began using these training materials in 2012.[222] The Ombudsman reviewed the training materials, and while they improve upon prior treatment of this subject, instructing adjudicators to carefully evaluate the evidence proffered to determine whether it is credible, probative, and relevant, they nevertheless could be made more useful. Specifically, as the Ombudsman noted in 2010,[223] preponderance of the evidence trainings should include actual examples from petitions, appropriately redacted. Examples of cases that are clearly approvable, clearly deniable, and those warranting the issuance of an RFE should be presented and discussed, and can be used to train adjudicators to identify any missing elements needed to complete the adjudication. Doing so would lead to more narrowly crafted RFEs, rather than ones that cite comprehensive descriptions of the law and regulations, and lists of possible documents that could serve as evidence. A training program on the preponderance of the evidence standard using detailed real-world case examples for each product line would better assist USCIS adjudicators to determine whether cases are approvable or deniable upon first review, resulting in the issuance of fewer, and more narrowly tailored RFEs.

The Ombudsman also continues to urge the agency to pilot an initiative requiring 100 percent supervisory review before an RFE is issued.[224] The agency could select the L-1B product line for such a pilot, as the annual volume of such filings is relatively small and implementation of new policy guidance warrants a qualitative review.[225] Although the pilot may cause a temporary increase in processing times, it will enhance a culture in which adjudicators carefully consider whether an RFE is needed before seeking supervisory review. Ultimately, this will help reduce the number of RFEs that are issued, and in the end, shorten processing times.

Ongoing Issues

H-1B Specialty Occupation Workers: Issues with Decisions Based on the DOL's Occupational Outlook Handbook. USCIS adjudicators use a variety of resources when evaluating whether the particular position offered to the foreign worker qualifies as a "specialty occupation."[226] Among the resources used and cited frequently by adjudicators is the DOL Bureau of Labor Statistics publication titled the *Occupational Outlook Handbook* (OOH).[227]

During this reporting period and in past years, stakeholders have presented the Ombudsman with H-1B decisions in which USCIS appears to misread or misapply the OOH.

Denial decisions that conclude that a given position is not a "specialty occupation" when the OOH states that most employers hire employees with a bachelor's degree in specific field of study, but some require only an associate's degree.

In one case,[228] USCIS quoted the OOH passage below, and issued a denial concluding that a "Computer Programmer" is not a specialty occupation:

> Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject.

[221] Ombudsman's Annual Report 2010, p. 48.

[222] *See* USCIS Webpage "USCIS and American Immigration Lawyers Association (AILA) Meeting" (May 29, 2012); http://www.uscis.gov/outreach/notes-previous-engagements/notes-previous-engagements-topic/policy-and-guidance/uscis-and-american-immigration-lawyers-association-aila-meeting (accessed May 18, 2015).

[223] Ombudsman's Annual Report 2010, p. 47.

[224] USCIS may find it useful to conduct concurrent pilots at both the California and the Vermont Service Centers to not only provide parity to petitioners without regard to the service center at which they file, but also to better enable the agency to assess and compare the results of the pilot.

[225] The agency received 325,276 H-1B petitions, and 14,684 L-1B petitions in FY 2014. Information provided by USCIS (Apr. 30, 2015).

[226] INA § 214(i)(1).

[227] *See generally* Bureau of Labor Statistics, U.S. Department of Labor, "Occupational Outlook Handbook, 2014-15 Edition;" http://www.bls.gov/ooh/ (accessed May 19, 2015).

[228] Information provided through a request for case assistance.

> Programmers who work in specific field, such as healthcare or accounting, may take classes in that field to supplement their degree in computer programming ….
>
> *As stated in the OOH, some employers will hire workers with an associate degree for Computer Programmer positions. Thus, a bachelor's degree in a specific specialty is not normally the minimum requirement for entry in the Computer Programmer position."* (Emphasis added.)

The conclusion that a bachelor's degree in a specific specialty is not *normally* the minimum requirement for entry in the computer programmer position is inconsistent with a plain English interpretation of the OOH's degree acknowledgment. The OOH states that "most computer programmers have a bachelor's degree," so it follows that possession of such a degree is the recognized *normal* entry-level requirement to fill the position of computer programmer. To read the passage otherwise would allow exceptions to undermine the general rule.

The DOL is clear on the eligibility of computer programmer to qualify as a specialty occupation. Its website states that "the INA allows employment of alien workers in certain specialty occupations (generally those requiring a bachelor's degree or its equivalent). Foreign workers such as engineers, teachers, *computer programmers*, medical doctors, and physical therapists may be employed under the H-1B, H-1B1, and E-3 visa classification" (emphasis added).[229] Moreover, in USCIS' February 26, 2015 Annual Report to Congress on the "Characteristics of H-1B Specialty Occupation Workers," the agency itself states, "Specialty occupations may include, but are not limited to, *computer systems analysts and programmers*, physicians, professors, engineers, and accountants" (emphasis added).[230] Nevertheless, over the past several years, the Ombudsman has reviewed a number of denials that relied on a contrary reading based on this unintended use of the OOH.

Denial decisions that conclude that a given position is not a "specialty occupation" based on the OOH, which states that multiple bachelor's degrees may qualify an individual to fill the position, and therefore a generic bachelor's degree would suffice.

In another case, a 2015 federal district court reversed USCIS' conclusion that a "Market Research Analyst" position is not a "specialty occupation."[231] In its decision, the court cited the OOH:

> Market research analysts typically need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, or computer science. Others have a background in business administration, one of the social sciences, or communications. Courses in statistics, research methods, and marketing are essential for these workers; courses in communications and social sciences—such as economics, psychology, and sociology—are also important.
>
> Many market research analyst jobs require a master's degree. Several schools offer graduate programs in marketing research, but many analysts complete degrees in other fields, such as statistics, marketing or a Masters of Business Administration (MBA) ….

And continued, stating:

> Based on this description, USCIS determined that "although a baccalaureate level training is typical, the position of Market Research Analyst[s] [sic] is an occupation that does not require a baccalaureate level education in a specific specialty as a normal, minimum for entry into the occupation." This interpretation of the evidence cannot be sustained. [USCIS'] approach impermissibly narrows the plain language of the statute. The first regulatory criterion does not restrict qualifying occupations to those for which there exists a single, specifically tailored and titled degree program. Indeed, such an interpretation ignores the statutory and regulatory allowance for occupations that requires the attainment of the "equivalent" of a specialized bachelor's degree as a threshold for entry. By including this language, Congress and the INA recognized that the needs of a "specialty occupation" can be met even where a specifically

[229] *See* DOL Webpage, "elaws Employment Law Guide—Work Authorization for non-U.S. Citizens: Workers in Professional and Specialty Occupations (H-1B, H-1B1, and E-3 Visas)" (Sept. 2009); www.dol.gov/elaws/elg/h1b.htm (accessed May 19, 2015).

[230] USCIS Fiscal Year 2014 Annual Report to Congress, "Characteristics of H-1B Specialty Occupation Workers," p. 2 (Feb. 26, 2015); http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-1B/h-1B-characteristics-report-14.pdf (accessed May 19, 2015).

[231] *See Raj and Company v. USCIS*, Case No. C14-123RSM (W.D. Wash. Jan. 14, 2015); http://hr.cch.com/ELD/RajUSCIS.pdf (accessed May 19, 2015).

> tailored baccalaureate program is not typically available for a given field ….[232]

In sustaining the petitioner's appeal, the court agreed that a generalized requirement that individuals in certain positions must have a bachelor's degree is an insufficient basis to find that such position constitutes a "specialty occupation." However, the court also held that the agency may not refuse to find a position to constitute a "specialty occupation" merely because more than one type of bachelor's degree program will satisfy the requirement. Stakeholders have presented the Ombudsman with RFEs and denial decisions in other occupations that rely inappropriately on similar statements found in the OOH.

H-1B Precedent Decision: Matter of Simeio Solutions, LLC. On April 9, 2015, USCIS' Administrative Appeals Office (AAO)[233] issued a rare precedent decision addressing when a reassignment of an H-1B worker requires the petitioning employer to file an amended H-1B petition that is supported by a DOL certified Labor Condition Application (Form ETA-9035).[234] As a precedent decision—one of only four issued in the last 3 years[235]—the holding in *Simeio* is binding on all USCIS H-1B petitioning employers nationwide.[236]

Since the *Simeio* decision was issued without accompanying guidance, the Ombudsman hosted a national teleconference on April 30, 2015, to seek stakeholder feedback and identify outstanding issues. Over 650 external stakeholders and government officials participated on the call. Of utmost importance to the affected stakeholder community was how the decision would be applied to H-1B employees who were previously reassigned with no amended filing based on prior practice.[237] On May 21, 2015, USCIS addressed some of these questions through its issuance of draft guidance, which established a 90-day timeframe for employers to submit amended filings.[238]

The Ombudsman notes that the *Simeio* case had been pending before AAO for nearly 4 years, and that this new agency interpretation was made without first providing the affected stakeholder community an opportunity to provide its input.[239] Some large employers have informed the Ombudsman that the decision could cost them millions in additional legal fees and filing costs.[240]

L-1A Intracompany Transferees. The Ombudsman received few requests for case assistance related to the L-1A program during the 2015 reporting period. Stakeholder concerns have focused on "new office" filings, particularly those seeking extensions, where the petitioner discloses that, at times, the beneficiary engages in some hands-on activities.

The L-1 nonimmigrant classification facilitates the temporary transfer of qualified executives, managers and specialized knowledge workers from the overseas offices of a multinational company to an affiliated company doing business in the United States.[241] USCIS regulations permit an L-1 beneficiary to enter the United States to establish a "new" office, but limits the period of stay to 1 year.[242] Pursuant to the AFM:

> The L beneficiary who is coming to the United States to open a new office may be classified as a manager or executive during the one year required to reach the "doing business" standard if the factors surrounding the establishment of the proposed organization are such that it can be expected that the organization will, within one year, support

[232] *See Raj and Company v. USCIS*, Case No. C14-123RSM (W.D. Wash. Jan. 14, 2015), p. 8; http://hr.cch.com/ELD/RajUSCIS.pdf (accessed May 19, 2015).

[233] Petitioners and applicants for certain categories of immigration benefits may appeal a negative decision to the agency's AAO, which conducts administrative review of those appeals to ensure consistency and accuracy in the interpretation of immigration law and policy. 8 C.F.R. § 103.3. *See* USCIS Webpage, "Administrative Appeals Office (AAO)" (May 12, 2014); http://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/administrative-appeals-office-aao (accessed May 19, 2015).

[234] 26 I&N Dec. 542. (AAO Apr. 9, 2015).

[235] USCIS has issued only six precedent or adopted decisions since 2010. *See* U.S. Department of Justice Webpage, "DHS/AAO/INS Decisions" (Apr. 23, 2015); http://www.justice.gov/eoir/dhs-aao-ins-decisions (accessed May 19, 2015).

[236] *See generally* 8 C.F.R. § 103.3(c).

[237] Letter from Efren Hernandez III, Director, Business and Trade Branch, to Lynn Shotwell, American Council on International Personnel, Inc. (Oct. 23, 2003).

[238] USCIS Webpage, "USCIS Guidance on When to File an Amended H-1B Petition After the Simeio Solutions Decision," http://www.uscis.gov/news/alerts/uscis-guidance-when-file-amended-h-1b-petition-after-simeio-solutions-decision (accessed May 22, 2015).

[239] Notes from Ombudsman's Monthly Teleconference (Apr. 30, 2015).

[240] The AAO has requested *amicus curiae* briefing in two other cases. On April 7, 2015, in connection with the agency's review of its long-held position that the beneficiary of an approved employment-based petition is not an "affected party" with legal standing in the proceeding, the AAO posted a Request for Amicus Brief "to allow concerned stakeholders the opportunity to provide input regarding a complex or unusual issue in a particular case or group of cases." USCIS Webpage, "USCIS Administrative Appeals Office: Request for Amicus Curiae Briefs;" http://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/AAO/3-27-15-AAOamicus.pdf (accessed May 19, 2015). Similarly, on August 18, 2011, USCIS posted a "Request for Amicus Brief" in connection with its response to the U.S. Court of Appeals for the Ninth Circuit's decision in *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Amicus%20Briefs/Amicus_Brief_Request_081611%20v2.pdf (accessed May 19, 2015).

[241] *See generally* INA § 101(a)(15)(L).

[242] 8 C.F.R. § 214.2(l)(1)(ii)(F).

> a managerial or executive position. The factors to be considered include amount of investment, intended personnel structure, product or service to be provided, physical premises, and viability of the foreign operation. It is expected that a manager or executive who is required to open a new business or office will be more actively involved in day-to-day operations during the initial phases of the business, but must also have authority and plans to hire staff and have wide latitude in making decisions about the goals and management of the organization.[243]

Petitioners have provided the Ombudsman with examples of RFEs and denials in "new" office L-1A extension cases. In reviewing these extension filings, it is appropriate that adjudicators examine whether the petitioner is actually "doing business,"[244] to ascertain the specific job duties that will be performed by the beneficiary under the extended petition, and to consider the "staffing of the new operation, including the number of employees and types of positions held …."[245] Yet, in some instances, it appears that adjudicators are placing undue emphasis on whether the beneficiary is too closely connected to the actual production work or services offered by the petitioning entity.

Many of these denials cite to *Matter of Church of Scientology,*[246] a 1988 Commissioner decision, for the proposition that "an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity."[247] While *Matter of Church of Scientology* is instructive, the critical inquiry is not whether the beneficiary sometimes gets involved in operations, but rather, whether the beneficiary is "primarily" engaged in tasks necessary to produce the products or provide service.[248] In a common sense application, this means a majority of the beneficiary's working time. The AFM ratifies this interpretation, stating:

> Eligibility requires that the duties of the position be primarily of an executive or managerial nature …. The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties relate to operation or policy management, not to the supervision of nonprofessional employees, performance of the duties of another type of position, or other involvement in the operational activities of the company. This does not mean that the executive or manager cannot regularly apply his or her technical or professional expertise to a particular problem. Certain positions necessarily require a manager or executive's application of his technical or professional expertise; adjudicators should therefore focus on the *primary* duties of the beneficiary.[249] (Emphasis added.)

Thus, under the INA and AFM, L-1A managers and executives are in fact permitted to engage in some hands-on activities, provided these activities are secondary to their principal and essential duties.

Another area of focus in L-1A adjudications is on the petitioning entity's organizational structure, i.e., the number of layers of management between the L-1A beneficiary and line workers. Increasingly, and especially in the context of start-up or international enterprises opening new offices in the United States, businesses are adopting less traditional, more flat management and reporting structures. Today, many L-1A executives and managers are being asked to manage facilities and lead workforces dispersed globally, and to do so with fewer intermediate layers of management. The Ombudsman urges USCIS to consider whether it would be helpful to update applicable regulations and guidance to assist adjudicators who are asked daily to review petitions that present this new business paradigm.

L-1B Specialized Knowledge Workers. For several years the Ombudsman has been urging USCIS to issue new regulations to replace existing regulations, AFM sections, policy memoranda, and non-precedent AAO decisions interpreting "specialized knowledge."[250] The original recommendation was made in the Ombudsman's 2010 Annual Report, along with an analysis of L-1B RFE rates.[251] USCIS did not concur with this recommendation, indicating instead that it planned to issue new, superseding policy guidance.

While stakeholders awaited the new guidance, L-1B RFE rates continued to climb, with RFEs issued in nearly one out of every two petitions filed in FY 2014, and denial

[243] AFM Ch. 32.6 (e).
[244] Doing business means the regular, systematic, and continuous provisions of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office or the qualifying organization in the United States and abroad. 8 C.F.R. 214.2(l)(1)(ii)(H).
[245] *See generally* 8 C.F.R. § 214.2(l)(14)(ii).
[246] 19 I&N Dec. 593, 604.
[247] *See* AFM Ch. 32.6(d).
[248] 19 I&N Dec. 593, 604.
[249] AFM Ch. 32.6(d).
[250] Ombudsman's Annual Reports 2010, p. 48; 2011, p. 29; 2013, p. 32; 2014, p. 24.
[251] Ombudsman's Annual Report 2010, p. 40.

rates reaching 35 percent.[252] According to one recently published report, USCIS' denial rate in "extension" cases (i.e., for "specialized knowledge" workers already holding this nonimmigrant status in the United States) was higher (41 percent) than the denial rate for initial L-1B filings (32 percent).[253] The implications of these numbers, and others cited in the report, are troubling; almost all extension beneficiaries were interviewed by a Department of State consular officer before obtaining their L-1B visas, and in many cases, USCIS had reviewed and approved a prior petition filed by the employer for the same beneficiary. The extension denial rates confirm stakeholder concerns regarding the quality and consistency of L-1B adjudications.

On November 20, 2014, as a part of executive action on immigration, the White House called on USCIS to "… clarify its guidance on temporary L-1 visas for foreign workers who transfer from a company's foreign office to its U.S. office."[254] On March 24, 2015, USCIS posted for a 45-day comment period its new draft L-1B Adjudications Policy Memorandum.[255] In releasing the draft L-1B guidance for public comment, USCIS Director León Rodriguez stated:

> This policy memorandum, when it goes into effect, will help companies in the United States better use the skills of talented employees in the global marketplace …, maintain the integrity of the L-1B program, while recognizing the fluid dynamics of the 21st century business world.[256]

As this Report is being finalized, the Ombudsman is tracking comments by stakeholders on the draft policy memorandum, and whether USCIS will make modifications in response to this feedback. Accordingly, the Ombudsman withholds further comment on the new policy memorandum and discussion of possible or actual impacts until after the memorandum becomes final.

Continued Concerns with the Administrative Appeals Process. Through the AAO and Motions to Reopen/Reconsider,[257] USCIS provides a formal process for petitioners and applicants to seek review of agency decisions. This course of action is costly; the filing fee is $630. While the AAO has reduced its processing time to 6 months or less, a delay of months in reversing an incorrect agency decision can have significant adverse impacts on both the sponsoring employer and the beneficiary. Moreover, publicly released data show that less than 10 percent of appeals in the agency's business product lines are successful.[258] Many legal representatives have reported that prior to filing a Motion to Reopen/Reconsider and appeal, employers make calculated business decisions whether to abandon their efforts to hire beneficiaries, or file anew under the plausible theory that another adjudicator will issue an approval for the same case with the same documentation. Until petitioners become more confident that the agency's administrative appeals process will afford them fair, meaningful, and timely review of the underlying decision, this course of action may remain underutilized. [259]

[252] Information provided by USCIS (Apr. 30, 2015).

[253] National Foundation for American Policy, "L-1B Denial Rates Increases Again for High Skill Foreign Nationals" (Mar. 2015); http://nfap.com/wp-content/uploads/2015/03/NFAP-Policy-Brief.L-1-Denial-Rates-Increase-Again.March-20151.pdf (accessed May 12, 2015). In addition, this report disclosed an aggregate L-1B denial rate for beneficiaries of Indian origin of 56 percent in the 5-year period of 2012 through 2014. The denial rate is 13 percent for nationals of all other countries in this same time period.

[254] The White House, Office of the Press Secretary Webpage, "Fact Sheet: Immigration Accountability Executive Action" (Nov. 20, 2014); https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action (accessed May 19, 2015).

[255] USCIS Policy Memorandum (PM-602-0111), "L-1B Adjudications Policy" (Mar. 24, 2015); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/2015-0324-Draft-L-1B-Memo.pdf (accessed May 18, 2015).

[256] USCIS Webpage, "USCIS Posts Updated L-1B Adjudications Policy for Public Feedback" (Mar. 24, 2015); http://www.uscis.gov/news/uscis-posts-updated-l-1b-adjudications-policy-public-feedback (accessed May 21, 2015).

[257] A Motion to Reopen is a request to the original decision maker to review a decision. The motion must be based on factual grounds, such as the discovery of new evidence or changed circumstances, and state the new facts to be provided in the reopened proceedings and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A Motion to Reconsider is a request to the original decision maker to review a decision based on new or additional legal arguments. The motion must establish that the decision was incorrect based on the evidence of record at the time of that decision, and it must state the reasons for reconsideration. A Motion to Reconsider must be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. 8 C.F.R. § 103.5(a)(3). *See* USCIS Webpage, "Questions and Answers: Appeals and Motions" (Dec. 31, 2013); www.uscis.gov/forms/questions-and-answers-appeals-and-motions (accessed May 19, 2015).

[258] In FYs 2011 through 2014, the AAO sustained 58 H-1B appeals out of 2,805 filed (2 percent) and 83 L-1 appeals out of 1,038 filed (8 percent). USCIS Webpage, "AAO Decision Data," http://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-decision-data (accessed May 19, 2015).

[259] The Ombudsman's Office notes that the AAO has recently taken an important step forward with the publication of its first AAO Practice Manual, addressing one of several of the suggestions offered to the AAO in the Ombudsman's 2014 Annual Report. *See* USCIS Webpage "USCIS' Administrative Appeals Office Introduces Its First Practice Manual" (Jan. 28, 2015); http://content.govdelivery.com/accounts/USDHSCIS/bulletins/ecec19 (accessed May 21, 2015).

The EB-5 Immigrant Investor Program

Responsible USCIS Office: Immigrant Investor Program Office

The EB-5 Immigrant Investor Program (EB-5 program) has surged in popularity in recent years as an effective way to attract foreign investment, to provide financing to large private and public projects, and for foreign nationals to obtain lawful permanent residency in the United States. While USCIS has hired new adjudicators and economists, it had 12,749 investor petitions (Form I-526, *Immigrant Petition by Alien Entrepreneur)* in its pending inventory as of March 31, 2015, with nearly 20 percent pending adjudication for more than a year.[260] EB-5 processing times have been getting longer, with the Form I-526 processing time at 14 months and the Form I-924, *Application for Regional Center Under the Immigrant Investor Pilot Program* at 12.1 months.[261] USCIS has provided technical assistance to Congress and is actively working with other DHS and government agencies to put safeguards in place to ensure program integrity.

Background

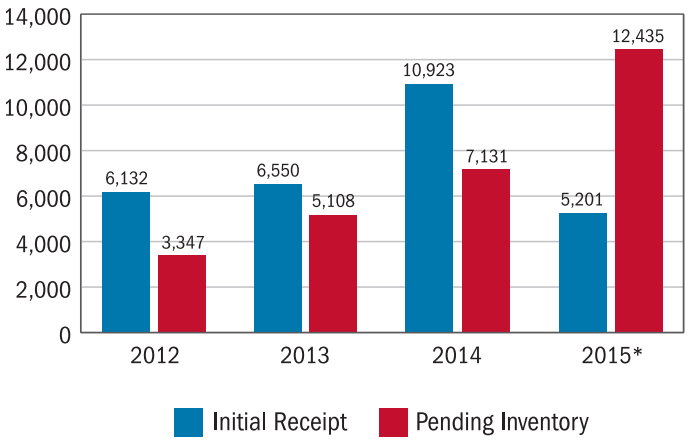
Congress established the EB-5 program as a tool to help stimulate the U.S. economy by encouraging foreign investors to make sizable capital investments in exchange for the privilege of immigrating to the United States as Lawful Permanent Residents.[262] By statute, a maximum of 10,000 immigrant visas per year are set aside for foreign investors and their immediate family members (spouses and unmarried children under 21 years of age).[263] To qualify, an applicant must invest a minimum of $1 million in a new or existing U.S. business,[264] or $500,000 in a business located in a Targeted Employment Area (an area that is experiencing an unemployment rate of at least 150 percent of the national average, or a rural area).[265] The investor must also establish that invested funds are placed at risk, are traceable to a lawful source, have or will create (or preserve) at least 10 full-time jobs for qualifying U.S. workers within 2.5 years of petition approval, and that he or she is otherwise admissible.[266]

In 1992, Congress modified the EB-5 provision, adding to it what is now referred to as the "Regional Center" program.[267] The Regional Center program facilitates the concentration of EB-5 immigrant investor capital into larger projects deemed more likely to have significant regional and national impact.[268] Today, 97 percent of EB-5 investment funds flow through the Regional Center program.[269]

USCIS administers the EB-5 program primarily through three forms: Form I-526; Form I-924; and Form I-829, *Petition by Entrepreneur to Remove Conditions.* ***Figure 3.2,*** *Form I-526 Volume and Pending Inventory at USCIS (Oct. 1, 2012 to Mar. 30, 2015)* depicts the increase in filing volume and pending inventory for Forms I-526 since 2012. This increased volume shows the attractiveness of the program to foreign investors, but it presents a significant challenge to USCIS as it seeks to keep pace with filings.

3.2 Form I-526 Volume and Pending Inventory at USCIS

*(Oct. 1, 2012 to Mar. 30, 2015)**



Source: Information provided by USCIS (Apr. 30, 2015).

[260] Information provided by USCIS (May 6, 2015).

[261] USCIS Webpage, "USCIS Processing Time Information for the Immigrant Investor Program Office" (May 12, 2015); https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed May 19, 2015).

[262] Immigration Act of 1990 § 121(b)(5), Pub. L. No. 101–649.

[263] INA § 203(b)(5)(A).

[264] INA § 203(b)(5)(C)(i).

[265] INA § 203(b)(5)(B)(ii). *See also* 8 C.F.R. § 204.6(f).

[266] 8 C.F.R. §§ 204.6 (e), (j) and 216.6(c)(1)(iv).

[267] Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriation Act, 1993, Pub. L. No. 102-395 (1992). *See also* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1998, Pub. L. No. 105-119 (1997). Unless extended, the statutory authority creating the Regional Center program will sunset on September 30, 2015.

[268] A "Regional Center" is defined as "any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." 8 C.F.R. § 204.6(e).

[269] Determined based upon data reported by the DOS Report of the Visa Office, Table V (Part 3), http://www.travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2014AnnualReport/FY14AnnualReport-TableV.pdf (accessed Apr. 30, 2015).

On December 3, 2012, USCIS announced the reorganization of the EB-5 program,[270] transferring EB-5 adjudications from the CSC to the Washington, DC-based Immigrant Investor Program Office (IPO), under the USCIS Field Operations Directorate. In doing so, USCIS warned stakeholders that processing times for all EB-5 petition types would likely temporarily increase.[271] As this reporting period closes, adjudication processing times are getting longer, with Form I-526 processing time at 14 months, Form I-924 processing at 12.1 months, and Form I-829 processing at 12.7 months.[272]

Ongoing Concerns

EB-5 Program Processing Times. IPO leadership confirmed to the Ombudsman that lengthy processing times are likely to remain for the foreseeable future. Backlogs and years-long processing times are disruptive to the orderly release of funds to job-creating projects, and delay the immigration process for foreign investors. Acknowledging the complexity of EB-5 program cases from an adjudicatory and national security perspective, the Ombudsman encourages USCIS to announce publicly its operational plan and timeline to reduce processing times and backlogs. This will allow investors and developers to better manage their expectations.

EB-5 Stakeholder Engagement. USCIS holds regular Quarterly EB-5 Stakeholder Engagements.[273] Stakeholders nevertheless want more interactive engagements to solve novel and challenging issues that arise in this program. Many stakeholders posit that a format that allows for dialogue rather than a traditional question and answer session or a listening engagement would better serve both USCIS and the EB-5 community.

EB-5 Visa Queues. In its May 2015 Visa Bulletin, DOS announced that the EB-5 visa category has become oversubscribed for Chinese nationals, and consequently, established a 2-year queue for EB-5 visa availability. As a result, with petition processing times in excess of a year, new EB-5 investors from China may encounter a 3-year wait or longer before they acquire Conditional Permanent Resident status. The establishment of an EB-5 cut-off date also raises new issues, including:

(1) Given the projected multi-year wait for petition approval to visa availability, when will USCIS determine the question of job creation;

(2) Whether investors will be required to redeploy their investment capital if the project in which they invested is completed before they immigrate or prior to the filing of Form I-829; and

(3) Whether the agency will allow investors to retain their original priority date if the project they invested in fails to create the required 10 jobs, and the investor is willing to reinvest in a new EB-5 project.

Addressing Abuse and Increasing Integrity in the EB-5 Program. USCIS is coordinating with the Security and Exchange Commission, DOJ, the Federal Bureau of Investigation, and other components of government to deter, detect, and eliminate abuse in the EB-5 program. Over the past several years, as well as within this reporting period, USCIS terminated several regional centers.[274]

New policies and protocols help ensure that the EB-5 investment capital can be traced to a lawful source, that jobs projected are in fact created, and that each EB-5 investor is otherwise admissible and does not pose a national security risk. As the agency continues these efforts, the Ombudsman also urges USCIS to consider creating a pathway for victims of EB-5 fraud that would allow them to reinvest and retain their original priority date.

On March 24, 2015, the DHS Inspector General issued a report addressing assertions advanced by some USCIS employees of access outside the normal adjudicatory process to decision-makers, which influenced individual adjudication outcomes in three cases.[275] On March 26, 2015, Ombudsman Odom testified before the U.S. House of Representatives Committee on Homeland Security, with Inspector General John Roth, regarding leadership challenges at the DHS specific to the EB-5 program. In her testimony, Ombudsman Odom stated:

[270] *See* USCIS Webpage, "Executive Summary: A Discussion about the EB-5 Immigrant Investor Program Teleconference" (Feb. 26, 2014); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED-EB5-ExecSummary_02-26-14.pdf (accessed Apr. 30, 2015). The IPO became operational on April 29, 2013.

[271] Ombudsman Office Notes from USCIS Stakeholder Meeting (Feb. 26, 2014).

[272] USCIS Webpage, "USCIS Processing Time Information for Immigrant Investor Program Office" (May 12, 2015); https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed May 19, 2015).

[273] USCIS held four EB-5 stakeholder meetings during this reporting period.

[274] Since 2008, USCIS has terminated 29 regional centers for various reasons. USCIS Webpage, "Terminated Regional Centers" (May 14, 2015); http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process/terminated-regional-centers (accessed May 18, 2015).

[275] DHS Office of Inspector General Memorandum, "Investigation into Employee Complaints about Management of U.S. Citizenship and Immigration Services' EB-5 Program" (Mar. 24, 2015); https://www.oig.dhs.gov/assets/Mga/OIG_mga-032415.pdf (accessed Apr. 30, 2015).

> The EB-5 program has presented USCIS with significant challenges over the years, due to many variables, including the complexity of projects and the financial arrangements with investors. My office, both prior to my arrival and during my tenure, has worked to resolve requests for case assistance from EB-5 Regional Centers and prospective investors, as well as on systemic issues, such as lengthy processing times, gaps in policy, and lack of deference to prior USCIS EB-5 decisions…. While some cases, like those in the EB-5 program, involve financially powerful interests… [i]n my experience working with Mr. Mayorkas, we did not always agree, but I always found his approach to be thoughtful and grounded on facts and the law. His direct engagement with EB-5 stakeholders and customers was responsive to the rising number of pleas by frustrated investors, regional center representatives, elected officials, and other individuals involved in these often large-scale, high-impact projects that faced lengthy processing delays.[276]

IPO leadership at USCIS is determined to reduce processing times and improve predictability and consistency in the EB-5 program, while simultaneously continuing to enhance overall program integrity. In the coming year, the Ombudsman will remain actively engaged in monitoring USCIS administration of this job-creating program.

Seasonal Delays in Employment Authorization Processing

Responsible USCIS Offices: Field Operations and Service Center Operations Directorates

Eligible individuals in the United States may apply for employment authorization by filing Form I-765, *Application for Employment Authorization* with USCIS. Applicants who receive EADs are then able to commence (or resume) employment, as well as apply for Social Security Numbers and driver's licenses. USCIS received 1,477,898 Forms I-765 in the reporting period.[277] While the agency adjudicates the vast majority of EAD applications within the 90-day regulatory processing timeframe, every year thousands of eligible individuals encounter processing delays. When processing of employment authorization applications is delayed, both individuals and their actual or would-be employers suffer adverse consequences. Applicants experience financial hardship due to job interruption and employment termination; they may lose or have difficulty renewing driver's licenses; business operations stall due to loss of employee services; and families face suspension of essential income and health benefits. Ombudsman data reveal a seasonal pattern with an increase in requests for case assistance in the summer months due to adjudications that exceed the agency's 90 day processing requirement. This section provides suggested steps USCIS could take to address these seasonal employment authorization processing delays.

Background

Eligible applicants include those who are filing or have a pending Form I-485, *Application to Register Permanent Residence or Adjust Status*; L-2 nonimmigrant status (spouses of L-1 nonimmigrants); individuals granted deferred action or DACA; those granted TPS;[278] and most recently, certain H-4 nonimmigrant status (spouses of H-1B nonimmigrants).[279] USCIS is required by regulation to adjudicate most EAD applications within 90 days of receipt.[280]

The 90-day processing clock stops if USCIS issues an RFE and resumes when USCIS receives the response to

[276] Ombudsman's Testimony before the U.S. House of Representatives Committee on Homeland Security, "Leadership Challenges at the Department of Homeland Security: Allegations of Improper Influence Regarding Special Visas" (Mar. 26, 2015).

[277] *See* USCIS Webpage, "Data Set: All USCIS Application and Petition Form Types" (Feb. 12, 2015); http://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types (accessed Apr. 28, 2015).

[278] INA § 244; 8 C.F.R. § 244.6.

[279] *See* "Employment Authorization for Certain H-4 Dependent Spouses," 80 Fed. Reg. 10283 (Feb. 25, 2015). Employment eligibility extended to H-4 dependent spouses of principal H-1B nonimmigrants who have already started the process of seeking lawful permanent resident status through employment.

[280] 8 C.F.R. § 274a.13(d). The 90-day regulatory requirement does not apply to two categories: (1) asylum applicants under 8 C.F.R. § 274a.12(c)(8); and (2) certain adjustment of status applicants under the Haitian Refugee Immigrant Fairness Act. For those seeking DACA, the 90-day regulatory time period starts after USCIS adjudicates the Form I-821D, *Consideration of Deferred Action for Childhood Arrivals* and makes a determination as to economic necessity under 8 C.F.R. § 274a.12(c)(14).

the RFE.[281] When USCIS issues a request for *initial*[282] evidence, the 90-day regulatory timeframe to complete the adjudication resets to the date USCIS receives the response.[283] Absent the issuance of an RFE, individuals reasonably expect that USCIS will adjudicate EAD applications within 90 days of receipt.

The Ombudsman has been tracking EAD issues since 2006,[284] and has issued recommendations three times on this subject.[285] In response to the Ombudsman's 2008 recommendations, USCIS agreed to accept status inquiries on EAD applications pending more than 75 days (excluding any stoppage related to the issuance of an RFE).[286] To make such an inquiry, the applicant or applicant's representative may contact the NCSC and request that an Approaching Regulatory Timeframe "service request" be created.[287] The service request is sent to the USCIS office of jurisdiction for prompt action. USCIS received 46,041 such service requests in FY 2014.[288]

In March 2015, the Ombudsman received a request for case assistance from an individual who filed for an EAD renewal in December 2014; the case was pending past the 90-day regulatory period.

The individual's employer had placed the applicant on Leave Without Pay. The Ombudsman contacted USCIS, and within 24 hours, the applicant's case was approved.

Customers regularly turn to the Ombudsman for case assistance when their Forms I-765 remain pending outside of the 90-day regulatory processing timeframe. During this reporting period (non-DACA) EAD inquiries comprised 12 percent of the Ombudsman's casework. Working in conjunction with USCIS service centers and Headquarters, the Ombudsman is frequently able to timely resolve most of these case inquiries.

The primary issue presented to the Ombudsman in requests for case assistance is delays in adjudication; other issues include mailing and delivery problems, and card production errors (misprinted names, gender or photos). The Ombudsman also receives EAD inquiries concerning TPS eligibility and Optional Practical Training[289] (OPT) filings.

Ongoing Concerns

Ombudsman data reveal a seasonal pattern with an increase in requests for case assistance in the summer months due to adjudications that exceed the agency's 90-day processing requirement. This increase appears to be related to several factors, including but not limited to:

(1) Predictable annual applications by students seeking OPT;

(2) Cyclical renewal of TPS status and the accompanying employment authorization applications; and

(3) Ongoing renewal of EADs issued in connection with the surge in the filing for adjustment of status (which continues to provide ancillary employment eligibility benefits) that occurred during the summer of 2007.

In light of these seasonal increases in EAD applications, the Ombudsman encourages the agency to prepare in advance. Possible adjustments the agency could make include:

- Shifting additional resources to the Form I-765 product lines during the summer months.

[281] USCIS Webpage, "Tip Sheet: Employment Authorization Applications Pending More than 75 Days" (Oct. 26, 2011); http://www.uscis.gov/forms/tip-sheet-employment-authorization-applications-pending-more-75-days (accessed Mar. 12, 2015).

[282] Initial evidence is defined as any piece of evidence specified by regulation or specifically requested on the form or form instructions. This term is in distinction to "additional evidence" which is evidence beyond that which is required by regulations, form, or form instructions, but which may assist in proving eligibility where the initial evidence submitted does not. USCIS Webpage, "Tip Sheet: Employment Authorization Applications Pending More than 75 Days" (Oct. 26, 2011); http://www.uscis.gov/forms/tip-sheet-employment-authorization-applications-pending-more-75-days (accessed Mar. 12, 2015).

[283] USCIS Interoffice Memorandum, "Case Management Timelines" (Oct 27, 2006); http://www.uscis.gov/sites/default/files/files/pressrelease/casemgmt.pdf (accessed Apr. 23, 2015).

[284] *See* Ombudsman's Annual Reports 2006, p. 75; 2008, p. 12; and 2012, p. 15.

[285] Ombudsman Recommendation 25, "Recommendation from the CIS Ombudsman to the Director, USCIS" (Mar. 20, 2006); http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_25_EAD_03-20-06.pdf (accessed Mar. 12, 2015); Ombudsman Recommendation 35, "Recommendations on USCIS Processing Delays for Employment Authorization Documents" (Oct. 2, 2008); http://www.dhs.gov/xlibrary/assets/cisomb_ead_recommendation_35.pdf (accessed Mar. 12, 2015); Ombudsman Recommendation, "Employment Authorization Documents: Meeting the 90 Day Mandate and Minimizing the Impact of Delay on Individuals and Employers" (Jul. 18, 2011); http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-documents-07182011.pdf (accessed Mar. 12, 2015).

[286] USCIS Response to Recommendation 35 (Jan. 2, 2009); https://www.dhs.gov/xlibrary/assets/uscis_response_to_cisomb_recommendation35_01_02_09.pdf.

[287] USCIS Webpage, "Tip Sheet: Employment Authorization Applications Pending More than 75 Days" (Oct. 26, 2011); http://www.uscis.gov/forms/tip-sheet-employment-authorization-applications-pending-more-75-days (accessed Mar. 12, 2015).

[288] Information provided by USCIS (Apr. 30, 2015).

[289] *See* 8 C.F.R §§ 214.2(f)(10-12) and 274a.12(b)(6)(iv).

- Re-examining the effectiveness of its current method of "sweeping" its pending Form I-765 inventory to identify and adjudicate EAD applications as they approach the 90-day mark. The Ombudsman learned that USCIS service centers and NBC use different methods to conducts these sweeps. While they appear to be effective in the vast majority of cases, the Ombudsman notes that some cases appear to be missed. At a minimum, sweeps should be uniform, routine, and conducted sufficiently in advance of 90 days to allow for the timely adjudication, production and mailing of the card to applicants.
- Conducting additional outreach to notify EAD applicants that they should file their applications 120 days prior to the expiration of their current employment document to minimize the chance of a lapse in work authorization.

Employment-Based Immigrant Petition (Form I-140) Processing

Responsible USCIS Offices: Service Center Operations Directorate and Office of Policy and Strategy

Stakeholders continue to report concerns pertaining to USCIS' handling of employment-based immigrant petitions. With extensive backlogs in certain employment-based preference categories due to statutory visa caps and potential changes to USCIS policies on petitioner-beneficiary rights, it is imperative that USCIS maintain clear and consistent communication with its stakeholders. In recent months, USCIS has taken steps to review its longstanding policy on who is an "affected party" for employment-based petitions. The Ombudsman encourages the agency to consider the significant case law supporting some form of legal standing for beneficiaries of a Form I-140 petition.

Background

Employment-based immigration in most cases is a three-step process.[290] First, the foreign national's prospective employer must apply for a labor certification from DOL.[291] DOL will issue the certification if there are no available, qualified, and willing U.S. workers for the position and if the foreign national's employment "will not adversely affect the wages and working conditions" of other workers.[292] The date the labor certification is filed with DOL becomes the "priority date," or the intending immigrant's place in the queue for an immigrant visa. Second, the employer must file Form I-140, *Immigrant Petition for Alien Worker* with USCIS and indicate what eligibility classification, or preference category, is being sought.[293] ***See Figure 3.3,*** *I-140 & I-360 Filing Receipts and Decision Rates by Preference Category* for the general filing data and decision rates.[294] Third, the foreign national applies for an immigrant visa.[295] If the foreign national is in the United States, the intending immigrant may apply to USCIS to "adjust" status to that of a Lawful Permanent Resident. If the foreign national resides abroad or prefers to receive an immigrant visa outside of the United States and re-enter as an immigrant, the process is completed at a DOS embassy or consulate.

An immigrant visa is available only if the numerical limit for the applicant's country of chargeability, and type of visa for which eligibility has been established, has not been reached for the fiscal year. By statute, generally up to 140,000 employment-based preference immigrant visas may be issued to eligible beneficiaries of approved immigrant petitions (and their eligible family members) in a fiscal year.[296]

The DOS Visa Bulletin, published monthly, summarizes the availability of immigrant numbers.[297] ***See Figure 3.4,*** *Visa Bulletin April 2015 No. 79 issued March 11, 2015.* When a country's demand oversubscribes the numerical limit, DOS must set a cut-off date, which means only applicants who have a priority date earlier than the cut-off date may be allocated an immigrant visa.[298] Countries with larger numbers of would-be immigrants, such as China and India, are subject to cut-off dates ranging from 4 to 11

[290] Certain qualified foreign nationals may apply for an employment-based visa through a truncated process based on their area of expertise or type of employment.

[291] INA § 203(b).

[292] INA § 212(a)(5)(A)(i)(II).

[293] INA § 204(a)(1)(F); 8 C.F.R. § 204.5(a).

[294] Information provided by USCIS (Nov. 18, 2014).

[295] INA § 245; 8 C.F.R. § 245.2(a)(3)(ii).

[296] INA § 201(d).

[297] DOS Webpage, "Visa Bulletin;" http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-april-2015.html (accessed Apr. 17, 2015).

[298] DOS publishes a monthly Visa Bulletin to denote the changes in the immigrant visa categories and to mark the dates that form the head of each immigrant visa queue. DOS Webpage, "Visa Bulletin;" http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-march-2015.html (accessed Mar. 10, 2015).

3.3 I-140 & I-360 Filing Receipts and Decision Rates by Preference Category

*(FY 2009 through 2014)**

	EB1			EB2			EB3*			EB4		
FY	Receipts	Approval Rate	Denial Rate	Receipts	Approval Rate	Denial Rate	Receipts	Approval Rate	Denial Rate	Receipts	Approval Rate	Denial Rate
2009	17,157	78%	22%	19,801	91%	9%	19,959	79%	21%	6,880	67%	33%
2010	17,584	79%	21%	38,563	93%	7%	23,470	76%	24%	4,847	77%	23%
2011	17,106	84%	16%	47,576	95%	5%	19,929	85%	15%	6,639	83%	17%
2012	17,609	84%	16%	45,870	94%	6%	10,926	81%	19%	5,934	74%	26%
2013	20,258	87%	13%	46,720	94%	6%	4,617	81%	19%	8,649	80%	20%
2014*	22,874	89%	11%	63,644	93%	7%	485	18%	82%	6,949	81%	19%
Grand Total	112,588			262,174			79,386			39,898		

*USCIS has confirmed the accuracy of these numbers. USCIS approval and denial rates are calculated from decisions made in that fiscal year and do not necessarily reflect applications and petitions filed that same fiscal year.

Source: Information provided by USCIS (Nov. 18, 2014).

3.4 Visa Bulletin April 2015 No. 79 issued March 11, 2015

EMPLOYMENT BASED	ALL CHANGEABILITY AREAS EXCEPT THOSE LISTED	CHINA-MAINLAND BORN	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	01APR11	01SEP07	C	C
3rd	01OCT14	01JAN11	08JAN04	01OCT14	01OCT14
Other Workers	01OCT14	15AUG05	08JAN04	01OCT14	01OCT14
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th Targeted Employment Areas/ Regional Centers	C	C	C	C	C

Source: DOS Webpage (Mar. 11, 2015).

years.[299] Every month DOS reviews and adjusts its cut-off dates based on "reasonable estimates"[300] that include consideration of USCIS' adjustment of status application inventory and U.S. consulate demands.

When the DOS Visa Bulletin is current for an employment-based preference category, if the employer has not already filed an immigrant petition, the employer and beneficiary may elect to concurrently file Forms I-140 and I-485, *Application to Register Permanent Residence or Adjust Status*. USCIS first adjudicates the I-140 petition, and upon approval, will then adjudicate the Form I-485. USCIS has stated that it will issue a decision on the I-140 petition as soon as it is available, irrespective of the pending I-485 application.[301]

When a cut-off date retrogresses after the filing of an adjustment application, the beneficiary becomes ineligible to receive an immigrant visa. USCIS will hold the applicant's Form I-485 until the priority date is again current. After the Form I-485 is pending over 180 days, the applicant may change or "port" to a new position that is in

[299] DOS Webpage, "Visa Bulletin;" http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-march-2015.html (accessed Mar. 10, 2015). Actual wait times may in fact be longer than indicated by the cut-off dates, as forward movement does not correlate to the waiting time. *See* Ombudsman's Annual Report 2010, pp. 23-30.

[300] INA § 203(g).

[301] Information provided by USCIS (Apr. 8, 2015).

the "same or similar" occupation as the position stated on the original Form I-140.[302]

If USCIS takes action with respect to the I-140 petition subsequent to approval, such as issuing a Notice of Intent to Revoke, the notice will be sent to the petitioner and, if applicable, the petitioner's legal representative. The beneficiary receives no notice. If the petitioning employer elects not to respond to USCIS' request or notice, the agency may revoke its approval of the I-140 petition, and the beneficiary may be left without the required underlying petition. The beneficiary has significant interest in the underlying petition, but may not become aware of its revocation until USCIS adjudicates the individual's I-485 application.

Ongoing Concerns

Stakeholders continue to bring to the Ombudsman concerns about USCIS' communication with petitioners and applicants in the employment-based immigration process. With long visa queues, these frustrations will continue until USCIS takes action.

USCIS Processing Times. Petitioners and applicants identify ongoing frustrations with USCIS posted processing times for concurrently filed I-140 and I-485 applications.[303] USCIS currently posts that it is processing I-140 petitions within 4 to 8 months of filing, and 9 months for I-485 applications.[304] These processing times are sequential. That is, USCIS first adjudicates the I-140 and then the I-485 (provided a visa number is available as published in the Visa Bulletin), so individuals must add the two processing times together to understand how long it will take to complete processing. However, many petitioners report waiting over a year just for a decision on I-140 petitions.[305] USCIS publishes no information on the percentage of petitions actually adjudicated within the processing time goal or posted processing time. As discussed in the section titled *Calculating Processing Times* of this Report, a more transparent methodology for calculating processing times would better inform applicants, manage expectations, and help conserve USCIS resources that currently are directed to responding to requests for case status.

Petition Upgrades and Downgrades. While waiting to complete employment-based processing, an applicant may change visa preference categories because of career advancement or to take advantage of movement in the different preference category queues. The petitioning employer must file a new Form I-140 with USCIS. If the petition is approved, the beneficiary may file a request with USCIS to use the second I-140 petition to determine eligibility for an immigrant visa, resulting in an "upgrade" or "downgrade" of the beneficiary's preference category. Typically changes occur between employment-based third preference (EB-3) to employment-based second preference (EB-2). Applicants report difficulties in receiving information verifying USCIS' receipt of the request for a new preference category.

USCIS systems do not record an applicant's request to upgrade or downgrade the preference category for the pending Form I-485 application, and USCIS does not send the applicant a written acknowledgement that the I-485 will be adjudicated under the new preference category. The applicant is thus left to wait and hope that the agency received the request and is taking appropriate action. An applicant who calls USCIS' NCSC to confirm receipt and acceptance of the request to change preference category will need to open an inquiry using USCIS' Service Request Management Tool. To respond to the service request, the USCIS service center must retrieve the file, review its contents, and make a determination for the applicant. Stakeholders would greatly benefit from better tracking and communication for preference category changes; it would also better inform DOS of visa demand to more precisely set cut-off dates in the Visa Bulletin.

Applicant's Rights and Approved I-140s. Applicants have long questioned USCIS' interpretation of who is an "affected party" when appealing or responding to the denial or revocation of an approved employment-based petition.[306] USCIS has taken the position and courts have held that only the petitioner—and not the beneficiary—has legal standing before the agency.[307] ***See Figure 3.5,*** *Rate of I-140 Revocations to Receipts by Preference Category.*

Specifically, the EB-3 preference category, which has experienced some of the longest wait times in the visa

[302] AC21 § 106(a); INA § 204(j).

[303] USCIS processing times differ from DOS visa queues, which are based on annual visa limits.

[304] USCIS Webpages, "USCIS Processing Time Information for the Nebraska Service Center" (Feb. 28, 2015); https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed Apr. 29, 2015); USCIS Webpage, "USCIS Processing Time Information for the Texas Service Center" (Feb. 28, 2015); https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed Apr. 29, 2015).

[305] In FY 2014, the Ombudsman received 100 requests for case assistance that had been pending with USCIS over 1 year.

[306] 8 C.F.R. § 103.3(a)(1)(iii)(B).

[307] *De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998) (the court held that a foreign national has legal standing when the statute's text, structure, or legislative history does not preclude such action.); *Taneja v. Smith*, 795 F.2d 355 & 358 n. 7 (4th Cir.1986) (the court held that the foreign national "was in the 'zone of interest' of the statute and had standing to challenge" the denial of his prospective employer's visa application).

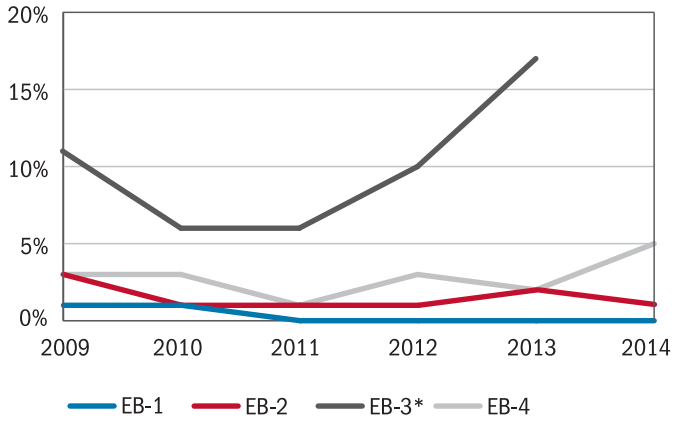
queues, is now showing significant spikes in revocation and denial rates. This trend can have significant adverse results.

An employee with a pending Form I-290B, *Notice of Appeal or Motion* requested case assistance from the Ombudsman. The employee's Form I-485 application was denied because USCIS determined that he lacked an underlying approved I-140 petition. In 2010, USCIS had approved his former employer's I-140 petition, but later revoked it in 2014. The employee believed that the portability provisions preserved his legal right to adjust status based on the previously approved I-140, so long as that petition was not revoked for cause, such as fraud or willful misrepresentation. The individual attempted to resolve this issue with USCIS but could not obtain information regarding the petitioner's I-140 petition. His only option was to file a motion with a $630 filing fee requesting review of the I-485 application and the legal applicability of the portability provision to his petition. The Ombudsman contacted USCIS, which granted the applicant's motion and reopened his I-485 application.

In this example, USCIS' policy prevented the beneficiary from accessing key information needed to contest a denial because the beneficiary was not deemed to be an "affected party." Congress established specific rights in AC21 for beneficiaries of employment-based immigrant petitions. Several courts have now questioned this analysis, finding that the beneficiary does in fact have standing to seek redress in an issue of immigrant petition portability.[308]

On April 7, 2015, USCIS recognized the need to review its policy and called for *amicus curiae* briefing on this issue. Specifically, the AAO announced it was seeking

3.5 Rate of I-140 Revocations to Receipts by Preference Category



*EB-3 2014 was omitted to avoid skewing the chart; there was a 136 percent revocation rate (658 revocations issued and 485 petitions received).

Source: Information provided by USCIS (Nov. 18, 2014).

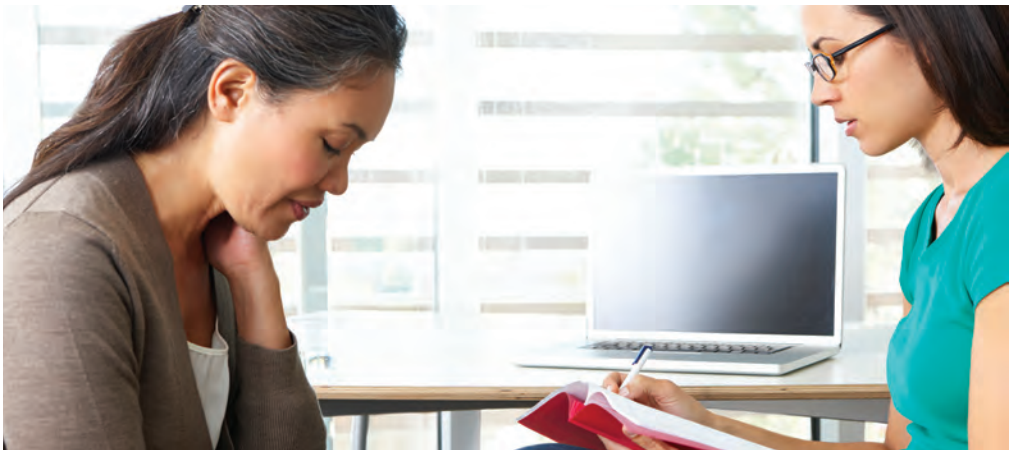
amicus briefs on whether the beneficiaries of certain immigrant visa petitions have standing to participate in the administrative adjudication process.[309] The Ombudsman encourages the AAO to publish the briefs received on this issue and to promptly clarify the legal standard pertaining to beneficiary standing in response to the recent court activity in this area.

Conclusion

Extensive employment-based visa backlogs and changing USCIS policies on petitioner-beneficiary rights require that USCIS maintain clear and consistent communication with its stakeholders. The Ombudsman will continue to monitor USCIS policy development in this area.

[308] *See,* e.g., *Kurapati v. USCIS*, 775 F.3d 1255 (11th Cir. 2014) (the beneficiary of an I-140 visa petition is within the zone of interests protected by the I-140 visa petition process); *see also Patel v. USCIS*, 732 F.3d 633 (6th Cir. 2013); *De Jesus Ramirez v. Reich*, 156 F.3d 1273 (D.C. Cir. 1998); *Taneja v. Smith,* 795 F.2d 355 (4th Cir.1986)*;* and *Stenographic Machines, Inc. v. Regional Administrator for Employment and Training,* 577 F.2d 521 (7th Cir. 1978).

[309] USCIS Webpage, "USCIS Administrative Appeals Office: Request for Amicus Curiae Briefs;" http://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/AAO/3-27-15-AAOamicus.pdf (accessed Apr. 17, 2015).



Humanitarian

U.S. immigration law provides humanitarian relief for immigrants in the most desperate situations. This reporting period, USCIS developed and implemented the in-country refugee/parole program for Central American minors in El Salvador, Guatemala, and Honduras. As noted in prior Annual Reports, the Ombudsman continues to be concerned with ongoing adjudication issues and delays in the processing of Special Immigrant Juvenile petitions, fee waiver requests, INA section 204(l) and humanitarian reinstatement requests, and asylum applications. U visas, T visas, and VAWA programs, which provide protection for victims of domestic violence, trafficking, and other crimes, are critical to vulnerable populations.

Special Immigrant Juveniles

Responsible USCIS Offices: Field Operations Directorate, Office of Policy and Strategy, and Office of Chief Counsel

The Special Immigrant Juvenile (SIJ) program is designed to "help children in the United States who have been abused, abandoned, or neglected."[310] The program has seen significant legislative and policy changes over the years—1997, 1998, 1999, 2004, 2008, and 2009. Stakeholders report and the Ombudsman has observed adjudication inconsistencies regarding consent requirements, age-inappropriate interviewing techniques, and delayed processing times for SIJ adjudications. Inconsistent with the statutory scheme and USCIS' own training materials, adjudicators continue to seek evidence underlying state court dependency orders. The Ombudsman brought these concerns to USCIS' attention this year as well as in prior Annual Reports,[311] and continues to receive reports from stakeholders experiencing difficulties with pending or recently adjudicated petitions.

Background

Statutory and Regulatory Framework. Congress established the SIJ category in 1990 to provide protection to qualifying children lacking legal immigration status.[312] To be eligible for SIJ status, a juvenile court must declare the child to be dependent on the court, or legally commit the child to the custody of a state agency or an individual appointed by a state or juvenile court; the court must also

[310] *See generally* USCIS Webpage, "Special Immigrant Juveniles (SIJ) Status" (May 28, 2014); http://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status (accessed May 27, 2015).

[311] Ombudsman's Annual Reports 2014, pp. 13-15; 2013, pp. 14-16; 2012, pp. 21-22; and 2011, pp. 20-21.

[312] Immigration Act of 1990, Pub. L. No. 101–649 at § 153(a)(3)(J) (Nov. 29, 1990). Historically, U.S. government efforts to protect children resulted in a gap for immigrant children who were protected during their childhood but grew into adults with no legal immigration status. *See generally* "Regulating Consent: Protecting Undocumented Immigrant Children from their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law," Angela Lloyd, 15 B.U. Pub. Int. L.J. 237, at 1.

declare the child cannot be reunited with one or both of the child's parents due to abuse, neglect, abandonment, or a similar basis under state law.[313] An administrative or judicial proceeding must also determine it would not be in the best interests of the child to be returned to the child's or parents' country of citizenship or last habitual residence.[314]

Congress amended the SIJ definition in 1997 by restricting it to only those juveniles deemed eligible for long-term foster care.[315] The amendment also required "express consent" to the dependency order, which the statute did not define, to serve "as a precondition to the grant of [SIJ] status."[316] Congress expressed its intent in these limitations to qualify "those juveniles for whom this relief was created, namely abandoned, neglected, or abused children, by requiring the Attorney General [now the Secretary of Homeland Security] to determine that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining [immigration] status … rather than for the purpose of obtaining relief from abuse or neglect."[317]

USCIS issued two policy memoranda in 1998 and 1999 instructing adjudicators to request information to enable them to make independent findings regarding abuse, abandonment, neglect, and best interests.[318] This was in stark contrast to SIJ final regulations published in 1993, which recognized that it "would be both impractical and inappropriate for the Service to routinely re-adjudicate judicial or social service agency administrative determinations …."[319] In 2004, USCIS issued a third Policy Memorandum, reminding adjudicators not to "second-guess" findings made by state courts because "express consent is limited to the purpose of determining [SIJ] status, and not for making determinations of dependency status."[320] In the same memorandum, USCIS instructs adjudicators to examine state court orders for independent assurance that courts acted in an "informed" way, and consent to SIJ only if the adjudicator was aware of the facts that formed the basis for the juvenile court's rulings.[321] This squarely contradicts the agency's instruction not to "second-guess" findings made by state courts.

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) further amended the SIJ statute by clarifying that the Secretary of Homeland Security must consent to the grant of SIJ status, and no longer give express consent to the state court dependency order "serving as a precondition to the grant" of SIJ status.[322] The previous statutory language provided no definition of express consent, which contributed to the confusion over whether USCIS should examine state court findings for independent assurance that the court acted in an informed way. By eliminating the "express consent" requirement, TVPRA recognized state court authority and "presumptive competence"[323] over determinations of dependency, abuse, neglect, abandonment, reunification, and the best interests of children. TVPRA also removed the need for a state court to determine eligibility for long-term foster care, and replaced it with a requirement that the state court determine whether reunification with one or both parents was viable due to abuse, neglect, abandonment, or a similar basis found under state law.[324] Accordingly, in a fourth policy memorandum issued in 2009, USCIS instructed adjudicators to "ensure that juvenile court orders submitted as evidence with an SIJ petition" include this new statutory language regarding reunification.[325]

Stakeholder Concerns. In 2010 and 2011, stakeholders reported receiving RFEs seeking detailed information regarding the content of state court orders. Stakeholders also reported age-inappropriate interviewing techniques by immigration officers, such as the use of language that was not appropriate for children. They recounted problems

313 INA § 101(a)(27)(J).

314 *Id.*

315 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (Nov. 26, 1997); *see Gao v. Jenifer,* 185 F.3d 548, at 552 (1999).

316 *Id.*

317 H.R. Conf. Rep. 105-405, at 130 (Nov. 13, 1997).

318 INS Memorandum, "Interim Field Guidance relating to Public Law 105-119 (Sec. 113) amending Section 101(a)(27)(J) of the INA–Special Immigrant Juveniles" (Aug. 7, 1998) (Copy with the Ombudsman); INS Memorandum, "Special Immigrant Juveniles - Memorandum #2: Clarification of Interim Field Guidance" (Jul. 9, 1999); http://www.uscrirefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_2_Special_Immigrant_Juvenile_Status/5_4_2_3_Published_Decisions_and_Memoranda/Cook_Thomas_SpecialImmigrantJuvenilesMemorandum.pdf (accessed Jun. 1, 2015).

319 "Special Immigrant Status; Final Rule," 58 Fed. Reg. 42843-51, 42847 (Aug. 12, 1993).

320 USCIS Interoffice Memorandum, "Memorandum #3–Field Guidance on Special Immigrant Juvenile Status Petitions" (May 27, 2004); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf (accessed May 27, 2015).

321 *Id.*

322 TVPRA § 235(d)(1).

323 *Gao v. Jenifer,* 185 F.3d 548 (1999) at 556, *citing Holmes Fin. Assocs. v. Resolution Trust Corp.,* 33 F.3d 561, 565 (6th Cir. 1994).

324 TVPRA § 235(d)(1)(B).

325 USCIS Interoffice Memorandum, HQOPS 70/8.5 "Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions" (Mar. 24, 2009). http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf

with USCIS not meeting statutory processing times,[326] a lack of procedures for requesting expedited review of SIJ petitions for those in jeopardy of aging out of eligibility, and repeated denials of fee waiver requests in cases where applicants appeared to be *prima facie* eligible. These concerns prompted the Ombudsman to issue formal recommendations in April 2011.[327] Since the publication of these recommendations, the Ombudsman has continued providing USCIS with stakeholder feedback, examples of problem cases, and other information relevant to improving SIJ adjudication.

SIJ Adjudication Training. SIJ is a complex area which has undergone substantial legislative change that now supersedes existing regulations and written policy guidance. As a result, training is essential to ensure that adjudicators have the necessary resources to apply the law appropriately and consistently. In early 2014, USCIS held a training session for regional selectees who then provided training materials to USCIS adjudicators in the field.[328] All USCIS officers adjudicating SIJ petitions are now required to review these training materials. The new training module includes instruction on USCIS' consent requirement and directs adjudicators to accept court orders containing or supplemented by specific findings of fact. Although the training offers a sample court order that represents the type of factual findings required in a juvenile state court order, it does not clarify in layman's terms what qualifies as a "specific finding of fact." As a result, adjudicators have issued requests for exhaustive factual findings instead of focusing on verifying that a state court has made the requisite SIJ findings.

The 2015 Perez-Olano Settlement. In 2014, Plaintiffs in the *Perez-Olano* class action moved for class-wide enforcement of the terms of the settlement due to ongoing reports and concerns of violations of the terms of the 2005 settlement agreement.[329] As a result of subsequent settlement of that motion,[330] USCIS has recently agreed that it will retroactively and proactively adhere to important statutory protections for children at risk of aging out after they have been the subject of a valid state court dependency order.[331]

Ongoing Concerns

The Ombudsman continues to find inconsistencies in the adjudication of SIJ petitions, the application of legal principles, and the factual evaluations that are undertaken under USCIS' consent authority.

Inconsistencies in the application of USCIS' consent function. In many cases, adjudicators continue to seek evidence underlying state court dependency orders, apparently applying the pre-2008 analytical tools that were used to understand and apply "express consent," despite changes in the TVPRA amendments that reformed this requirement. In the years since the TVPRA amended SIJ requirements, it appears that the notion of USCIS "consent" to the grant has grown increasingly complex. While RFEs and Notices of Intent to Deny (NOIDs) often state that USCIS is not reviewing the state court process, the practical effect is a *de novo* review of the state court's assessment pertaining to the abuse, neglect, or abandonment of the child. Congress, through statute, has removed from USCIS the burdens of determining a child's best interests; whether a child has been abused, abandoned, or neglected; and whether reunification with one of more parents is viable. Yet, in its adjudications, USCIS has continued to assess those findings, and has even gone a step further to assess whether the court exercised its jurisdiction in accordance with state law.

[326] TVPRA § 235(d)(2) requires that USCIS complete SIJ adjudications within 180 days of filing.

[327] Ombudsman Recommendation 47, "Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices" (Apr. 15, 2011); http://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf (accessed June 23, 2015). The Ombudsman recommended that USCIS: (1) standardize its practices of: (a) providing specialized training for those officers adjudicating SIJ petitions, (b) establishing dedicated SIJ units or Points of Contact (POCs) at local offices, and (c) ensuring adjudications are completed within the statutory timeframe; (2) cease requesting the evidence underlying juvenile court determinations of foreign child dependency; and (3) issue guidance, including agency regulations, regarding adequate evidence for SIJ filings, including general criteria for what triggers an interview for the SIJ petition, and make this information available on the USCIS website.

[328] *See generally* Ombudsman's Annual Report 2014, pp. 13-15.

[329] *See generally* The Center for Human Rights and Constitutional Law Foundation Webpage; http://immigrantchildren.org/Perez_Olano_Case.html (accessed Mar. 10, 2015). "For the first two and one-half years following approval of the Settlement … the agency regularly granted class members SIJ benefits even if they were no longer subjects of valid dependency orders at the time they filed Form I-360 SIJ applications provided they were under 21. Recently, however, CIS changed course; the agency now demands that class members be both under 21 years of age and the subject of valid dependency orders at the time they apply for SIJ benefits."

[330] *Perez-Olano, et al. v. Holder, et al.,* Order Approving Stipulation Re: Motion to Enforce of Settlement, Case No. CV 05-3604 (C.D. Cal.) (Mar. 27, 2015), http://www.uscis.gov/sites/default/files/USCIS/Laws/Legal%20Settlement%20Notices/PerezOlanoOrder.pdf.

[331] USCIS Press Release, "Settlement Agreement in *Perez-Olano, et al. v. Holder, et al.,* Case No. CV 05-3604, in U.S. District Court for the Central District of California," http://www.uscis.gov/laws/legal-settlement-notices/settlement-agreement-perez-olano-et-al-v-holder-et-al-case-no-cv-05-3604-us-district-court-central-district-california (Apr. 27, 2015) (accessed May 28, 2015).

Consent is not defined in statute, but USCIS, through policy, has determined that it means making sure the petition is *bona fide*.[332] Language often included in RFEs and NOIDs explains that this entails making sure that immigration benefits were not the primary purpose for pursuing a state court order.[333] In cases the Ombudsman has reviewed, USCIS looks to whether a state court made an "informed decision," properly exercised its jurisdiction as a juvenile court, acted "in accordance with state law," or had a "factual basis" for its findings.

Processing times. The statute requires that USCIS complete SIJ adjudications within 180 days of filing.[334] The Ombudsman has received an increasing number of requests for assistance for SIJ cases that remain pending beyond this designated timeframe. It is possible that the recent *Perez-Olano* stipulation will address some of these delays, but at the expense of further taxing resources as USCIS reopens and prioritizes previously denied cases.

Interviewing practices that are not age-appropriate. Through stakeholder engagements and requests for assistance, the Ombudsman has been made aware that some adjudicators in field offices have engaged in concerning interviewing practices. These include reliance on Forms I-213, *Record of Deportable/Inadmissible Alien* to question credibility,[335] prolonged interrogation-style interviewing, and questioning petitioners on details about family members and abuse, abandonment, or neglect.

Inconsistencies between interview statements and information on the Form I-213 have been treated as fraud indicators and have yielded RFEs, NOIDs, and denials in SIJ applications. RFEs should only be issued when a petitioner fails to demonstrate "it is more likely than not that each of the required elements has been met."[336] This preponderance of the evidence standard is generally met when court orders reflect findings on all of the SIJ-required elements. An RFE is only proper if a statement entered into a Form I-213 overcomes the standard of proof that is met via a complete state court order. Interviews have also reportedly increased in duration. Stakeholders report that interviews were previously around 20 minutes in duration and now typically exceed an hour.

While USCIS officials have referenced the rising number of unaccompanied children crossing the border as a possible reason for this heightened scrutiny in the interview, it is not clear why USCIS would depart from interview practices used for other forms of relief. In asylum interviews, another context where a minor is interviewed as a principal applicant for protective benefits, officers are encouraged to regard applicants as children first and applicants second. Key guidelines from the Asylum Officers' Basic Training Course were incorporated into 2014 SIJ Training and should be guiding interview practices. Of particular importance is guidance that an "officer may encounter gaps or inconsistencies in the child's testimony … [t]he child may be unable to present testimony concerning every fact in support of the claim, not because of a lack of credibility, but owing to age, gender, cultural background, or other circumstances."[337]

Conclusion

In the coming weeks, the Ombudsman intends to issue formal recommendations that USCIS: (1) centralize SIJ adjudication to improve the quality and consistency of decisions;[338] and (2) issue updated regulations to clarify policy guidance and the limitations of USCIS' consent

[332] USCIS Memorandum, HQOPS 70/8.5 "Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions" (Mar. 24, 2009); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf (accessed Jun. 1, 2015)("[T]he consent determination … is an acknowledgement that the request for SIJ classification is *bona fide*.")

[333] USCIS Interoffice Memorandum, "Memorandum #3 – Field Guidance on Special Immigrant Juvenile Status Petitions" (May 27, 2004); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf (accessed May 27, 2015). "Express consent means that the Secretary … has "determine[d] that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence." USCIS Memorandum, HQOPS 70/8.5 "Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions" (Mar. 24, 2009). ("The consent determination by the Secretary … is an acknowledgement that the request for SIJ classification is bona fide. This means that the SIJ benefit was not 'sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment'" (citing H.R. Rep. No. 105-405).)

[334] TVPRA § 235(d)(2).

[335] The *Record of Deportable/Inadmissible Alien* (Form I-213) is a form that is completed by CBP or ICE officials at the time a foreign national is apprehended.

[336] USCIS Policy Memorandum PM-602-0085, "Requests for Evidence and Notices of Intent to Deny" (Jun. 3, 2013); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20(Final).pdf (accessed Jun. 11, 2015).

[337] *Guidelines for Children's Asylum Claims*, USCIS Asylum Officer Basic Training Course (Sept. 1, 2009), at 33. In these training materials, USCIS acknowledges eight factors that influence a child's development and five factors that accelerate or stunt child development.

[338] As this Report was being finalized, the Ombudsman has learned that USCIS intends to centralize SIJ adjudications. However, the Ombudsman remains concerned that the location for this adjudication be provided with the appropriate tools and techniques, including the correct legal standards of review of the petition and the underlying principles associated with this vulnerable category.

authority. These steps would substantially improve adjudications and end the agency's current practice of seeking evidence underlying state court dependency orders.

The Affirmative Asylum Backlog

Responsible USCIS Office: Refugee, Asylum and International Operations Directorate

A substantial backlog of affirmative asylum applications pending before USCIS has led to lengthy case processing times for tens of thousands of asylum seekers.[339] Spikes in requests for reasonable and credible fear determinations, which have required the agency to redirect resources away from affirmative asylum adjudications, along with an uptick in new affirmative asylum filings, are largely responsible for the backlog and processing delays. Although USCIS has taken various measures to address these pending asylum cases, such as hiring additional staff, modifying scheduling priorities, and introducing new efficiencies into credible and reasonable fear adjudications, the backlog continues to mount.

Background

Over the past 4 years, USCIS' backlog of affirmative asylum cases has swelled. ***See Figure 4.1,*** *Affirmative Asylum Filings.*[340] At the end of FY 2011, 9,274 affirmative asylum cases were pending before USCIS.[341] By the end of December 2014, that figure reached 73,103—an increase of over 700 percent.[342] Over the course of this period, there has been a sharp increase in: (1) credible and reasonable fear claims, (2) affirmative asylum applications, and (3) asylum applications from Unaccompanied Alien Children in removal proceedings.[343]

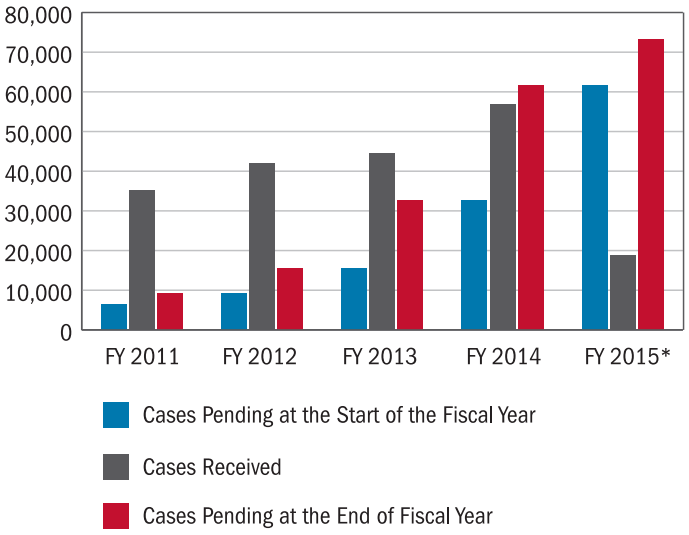
Credible and Reasonable Fear Claims. A surge in credible and reasonable fear claims since FY 2012 has strained the resources of the Refugee, Asylum, and International Operations (RAIO) Directorate's Asylum Division.

Credible fear cases arise when certain foreign nationals who are subject to expedited removal claim a fear of returning to their home countries.[344] Reasonable fear cases arise when particular foreign nationals who illegally re-entered the United States following a prior order of removal, or who have been convicted of an aggravated felony and are subject to administrative removal from the United States, similarly express a fear of return.[345] USCIS Asylum Officers adjudicate credible and reasonable fear claims to determine whether the applicants qualify for the opportunity to seek relief before an Immigration Judge.[346] Since many of these individuals are detained, USCIS prioritizes their cases.

In FY 2011, USCIS' credible fear receipts totaled 11,337.[347] In FY 2014, the number of those receipts had nearly quintupled, reaching 51,001.[348] While USCIS received 3,290

4.1 Affirmative Asylum Filings

*(Oct. 1, 2010 to Dec. 31, 2014)**



Source: Information provided by USCIS (Apr. 28, 2015).

339 USCIS Webpage, "Asylum Office Workload" (Jan. 28, 2015); http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-AffirmativeAsylum-Oct-Nov-Dec2014.pdf (accessed Mar. 9, 2015).

340 Information provided by USCIS (Apr. 28, 2014); USCIS Webpage, "Asylum Office Workload" (Jan. 28, 2015); http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-AffirmativeAsylum-Oct-Nov-Dec2014.pdf (accessed Mar. 9, 2015); USCIS Asylum Quarterly Stakeholder Meeting Notes (Nov. 14, 2014), p.1.

341 Information provided by USCIS (Apr. 28, 2014).

342 USCIS Webpage, "Asylum Office Workload" (Jan. 28, 2015); http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-AffirmativeAsylum-Oct-Nov-Dec2014.pdf (accessed Mar. 9, 2015).

343 Information provided by USCIS (Jan. 20, 2015).

344 Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. No. 104—208, 110 Stat. 3009 (1996)—546; *see also* INA § 235(b)(1)(A) and 8 C.F.R. § 235.3.

345 INA §§ 237(a)(2)(A)(iii) and 241(a)(5).

346 INA §§ 235(b)(1)(B)(ii) and (v); *see also* 8 C.F.R. §§ 208.31(e) and 208.16.

347 USCIS Webpage, "Credible Fear Nationality Report" (Apr. 11, 2014); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/AdditionalStatisticRequestedApril2014AsylumStakeholderEngagement.pdf (accessed Mar. 9, 2015).

348 USCIS Webpage, "Credible Fear Workload Report" (Oct. 28, 2014); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_Credible_Fear_and_Reasonable_Fear_FY14_Q4.pdf (accessed Mar. 9, 2015).

reasonable fear claims in FY 2011,[349] the agency took in 9,084 such claims in 2014.[350] Various factors have contributed to this rapid rise in credible and reasonable fear submissions, including widespread crime and violence in Central America, where a majority of the applicants originate.[351]

These substantial increases demand considerable USCIS personnel and resources. For example, many Asylum Offices now send officers to various detention facilities around the nation to conduct credible and reasonable fear interviews. Such assignments deplete resources previously dedicated to affirmative asylum applications.

New Affirmative Asylum Applications. At the same time that the high volume of credible and reasonable fear claims has stretched resources for adjudicating existing affirmative asylum filings, the rate of new affirmative asylum filings has grown. In FY 2011, asylum seekers filed 35,067 affirmative asylum applications with USCIS.[352] In FY 2014, asylum seekers filed 56,912 affirmative asylum applications, a 62 percent increase.[353] Even viewed in isolation, this trend in affirmative asylum receipts poses challenges to timely case processing.

Unaccompanied Alien Children. Asylum applications from Unaccompanied Alien Children (UACs)—referring to certain minors in removal proceedings who are eligible to file with USCIS under the TVPRA—have also contributed to the affirmative asylum backlog.[354] At the end of FY 2013, 868 asylum cases filed by individuals under the TVPRA were pending before USCIS.[355] One year later, that number totaled 2,986.[356] By the end of the first quarter of FY 2014 (December 31, 2014), the figure had grown to 4,221.[357] USCIS prioritizes interviews of new TVPRA asylum applicants over backlogged adult applicants.[358]

Impacts of Backlog

The trends described above have helped create and perpetuate an affirmative asylum backlog that imposes far-reaching psychological and practical consequences on asylum seekers in the United States. USCIS' asylum interview scheduling priorities dictate which applicants sustain the impact of those effects. Prior to December 26, 2014, the Asylum Division scheduled interviews on a "last in, first out" basis under which the agency prioritized newly-filed applications over long-pending ones, in significant part to deter frivolous applications filed with the aim of receiving employment authorization.[359] Thus, while older filers continued to wait for asylum interviews, recent filers moved more rapidly through the adjudication process. This lengthy delay for backlogged applicants has brought anxiety, uncertainty, and a host of practical challenges to many thousands of asylum seekers. As discussed below, the Asylum Division has now begun scheduling interviews on a "first in, first out" basis.[360]

Data in Action

From October 1, 2014 through March 5, 2015, 68 percent of the requests for case assistance received by the Ombudsman that related to affirmative asylum applications concerned applicants who had not yet been scheduled an asylum interview. ***See Figure 4.2,*** *Affirmative Asylum Requests for Case Assistance Received.* The next largest category of submissions—those involving affirmative asylum applicants who had completed interviews but had not yet received a final decision in their cases—comprised a quarter of total requests.

In their requests for case assistance, backlogged applicants frequently noted feelings of anxiety and frustration in the face of long processing times. Often they described a sense

[349] USCIS Webpage, "Reasonable Fear Nationality Report" (Apr. 11, 2014); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/AdditionalStatisticRequestedApril2014AsylumStakeholderEngagement.pdf (accessed Mar. 9, 2015).

[350] USCIS Webpage, "Reasonable Fear Workload Report" (Oct. 28, 2014); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_Credible_Fear_and_Reasonable_Fear_FY14_Q4.pdf (accessed Mar. 9, 2015).

[351] *See* U.S. Government Accountability Office Report, "Central America: Information on Migration of Unaccompanied Children from El Salvador, Guatemala, and Honduras" GAO-15-362 (Feb. 27, 2015); http://www.gao.gov/products/GAO-15-362 (accessed Mar. 4, 2015).

[352] Information provided by USCIS (Apr. 28, 2014).

[353] USCIS Asylum Quarterly Stakeholder Meeting Notes (Nov. 14, 2014), p.1.

[354] *See* USCIS Policy Memorandum, "Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children" (May 28, 2013); http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf (accessed Mar. 9, 2015).

[355] USCIS Webpage, "Refugees, Asylum and Parole System MPA and PRL Report 10/01/13—9/30/14" (Nov. 11, 2014); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_Minors_FY14_11_11_14_2.pdf (accessed Mar. 9, 2015).

[356] *Id.*

[357] USCIS Webpage, "Refugees, Asylum and Parole System MPA and PRL Report 10/01/14—12/31/14" (Jan. 7, 2015); http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-MinorsFY15-Q1.pdf (accessed Mar. 9, 2015).

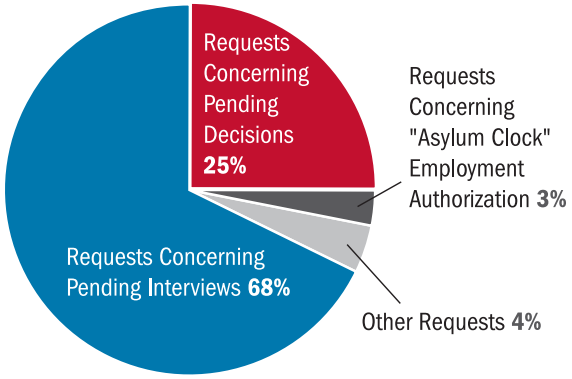
[358] USCIS Webpage, "USCIS Processing of Asylum Cases" (date not provided); http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/USCIS_Reponds_to_Humanitarian_Caseload.pdf (accessed Mar. 9, 2015).

[359] Information provided by USCIS (Jan. 20, 2015).

[360] USCIS Webpage, "USCIS Processing of Asylum Cases;" http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/USCIS_Reponds_to_Humanitarian_Caseload.pdf (accessed Mar. 9, 2015).

4.2 Affirmative Asylum Requests for Case Assistance Received

(Oct. 1, 2014 to Mar. 5, 2015)



Source: Information provided through requests for case assistance.

of instability and uncertainty hanging over their lives in the United States.

Many applicants also expressed fear for the safety and well-being of family members who remained overseas and on whose behalf the applicants could petition only upon the successful outcome of their pending cases. One individual requesting assistance from the Ombudsman stated, "[I]'m a father of two girls … we have not seen each other since … 2012 … and I have not seen my wife since that time also, I came here because am not safe there and they are not safe there …. I can't find words to describe what does it mean to be away from my family living here safe and they are there in danger."

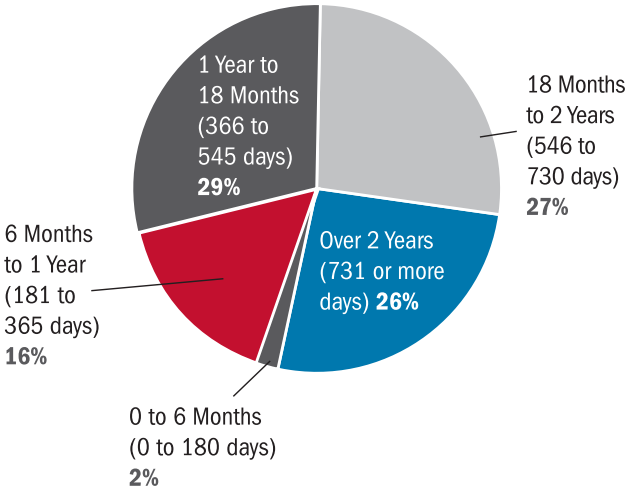
Ombudsman data also indicate the length of the wait times experienced by backlogged applicants. ***See Figure 4.3,*** *Affirmative Asylum Interview Wait Times Based on Requests for Case Assistance Submitted to the Ombudsman.* Of the applicants submitting requests for case assistance who had not yet received interviews, only one had been waiting for an interview less than 6 months after filing an affirmative asylum application. Approximately 25 percent of these applicants, on the other hand, had been waiting over 2 years to be interviewed.

USCIS Response and Ombudsman Assistance

In response to many of these inquiries, the Ombudsman directly contacted Asylum Offices concerning pending interviews. The Ombudsman also met with officials from the Asylum Division, at both Headquarters and at local Asylum Offices around the country, to discuss the backlog and potential ameliorative measures.

4.3 Affirmative Asylum Interview Wait Times Based on Requests for Case Assistance Submitted to the Ombudsman

(Oct. 1, 2014 to Mar. 5, 2015)



Source: Information provided through requests for case assistance.

The Asylum Division has taken the following steps, among other actions to address the backlog: (1) making new hires; (2) establishing new scheduling priorities; and (3) introducing new credible and reasonable fear adjudication efficiencies.

New Hires. USCIS has substantially increased hiring in recent years to address the rise in credible and reasonable fear claims and affirmative asylum applications. USCIS scaled up its Asylum Officer corps from 203 officers in 2013 to 350 officers in January 2015.[361] Further, the Asylum Division obtained authorization to elevate its total number of Asylum Officer positions to 448.[362]

However, USCIS acknowledges a high turnover rate among Asylum Officers.[363] One Asylum Office noted that, on average, its Asylum Officers serve in the position for only 14 months.[364] Thus, even as newly authorized officers are hired and trained, the departure of more seasoned officers compromises USCIS' capacity to efficiently meet its caseload and reduce the affirmative asylum backlog.

Scheduling Priorities. On December 26, 2014, the Asylum Division implemented new affirmative asylum scheduling priorities as follows:

- First Priority: Rescheduled interviews

[361] Information provided by USCIS (Jan. 20, 2015).
[362] USCIS Webpage, "USCIS Processing of Asylum Cases;" http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/USCIS_Reponds_to_Humanitarian_Caseload.pdf (accessed Mar. 9, 2015).
[363] Information provided by USCIS (Jan. 20, 2015).
[364] Information provided by USCIS (Jan. 27, 2015).

- Second Priority: Applications filed by children
- Third Priority: All other pending affirmative asylum applications in the order in which they were received[365]

These new scheduling priorities replace the "last in, first out" model with a "first in, first out" approach that targets the longest-pending applications. While this comes as welcome news to many applicants, new filers could now face the same prospect of lengthy processing times previously endured by older filers. USCIS officials, meanwhile, remain concerned that this new scheduling approach could attract frivolous applications submitted for the purpose of obtaining employment authorization amidst the system's lengthy wait times.

In May 2015, USCIS indicated that it would begin publishing estimated wait times for asylum interviews that would provide asylum seekers who had filed asylum applications but not yet received asylum interviews with an approximate timetable—roughly a 2 to 3-month range—within which those interviews would take place.[366]

Credible and Reasonable Fear Adjudication Efficiencies. USCIS has implemented a range of policy and procedural changes in the credible and reasonable fear contexts that have had the effect of shortening case processing times. For example, USCIS increasingly relies on telephonic and videoconference interviews in these adjudications. In FY 2014, USCIS conducted over 59 percent of credible fear interviews and 25 percent of reasonable fear interviews via telephone or videoconference.[367] In May 2014, USCIS altered the standard note-taking format for reasonable fear interviews from a "Sworn Statement" to a "Q and A" model, under which the interviewing Asylum Officer may take more streamlined notes and need not review those notes in their entirety with the applicant.[368] The following month, the agency announced an update in its credible and reasonable fear quality assurance review policy, resulting in substantially less Headquarters review of credible and reasonable fear decisions rendered by the field.[369] All of these shifts have made credible and reasonable fear adjudications more efficient, freeing personnel to target a larger volume of cases, including applications in the affirmative asylum backlog. However, stakeholders have expressed concern that measures such as the enhanced use of remote interview technologies impair Asylum Officers' ability to determine credibility and otherwise erode adjudication quality.

The Ombudsman has also disseminated information to stakeholders regarding two means by which affirmative asylum applicants may potentially accelerate their interview dates: (1) interview expedite requests; and (2) interview "Short Lists." First, each Asylum Office accepts and evaluates requests for expedited interviews, granting or denying those requests based on humanitarian factors, such as documented medical exigencies, as well as the Asylum Office's available resources.[370] Depending on the Asylum Office, applicants may make these requests in-person or via email. Some Asylum Offices also maintain Short Lists, containing the names of backlogged applicants who have volunteered to make themselves available for interviews scheduled on short notice due to unforeseen interview cancellations or other developments.[371] Backlogged applicants may wish to contact their local Asylum Office to inquire about the availability of such a list.

Conclusion

The asylum program data presented in this section demonstrate the costs of the affirmative asylum backlog. Though USCIS has undertaken an array of initiatives to mitigate these impacts and shorten delays, inventory levels continue to grow by thousands of applications each month.[372] The Ombudsman has requested that USCIS provide information on any projections of when, and to what extent, the backlog will be reduced. The Ombudsman will continue to monitor processing times, engage with USCIS and stakeholders, and actively explore measures for bringing relief to waiting asylum seekers.

365 USCIS Webpage, "USCIS Processing of Asylum Cases;" http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/USCIS_Reponds_to_Humanitarian_Caseload.pdf (accessed Mar. 9, 2015).

366 *See* USCIS Asylum Quarterly Stakeholder Meeting Notes (May 5, 2015), p. 5.

367 Information provided by USCIS (Jan. 20, 2015).

368 USCIS Policy Memorandum, "Updated Guidance on Reasonable Fear Note-Taking" (May 9, 2014); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2014/MEMO_Updated_Guidance_on_Reasonable_Fear_Note_Taking.pdf (accessed Mar. 9, 2015).

369 USCIS Policy Memorandum, "Changes to Credible Fear and Reasonable Fear Cases Requiring Quality Assurance Review" (Jun. 11, 2014); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2014/MEMO_Changes_to_CF_and_RF_Cases_Requiring_QA_Review_6.11.14.pdf (accessed Mar. 9, 2015).

370 *See* USCIS Asylum Quarterly Stakeholder Meeting Notes (Aug. 11, 2014), p. 1.

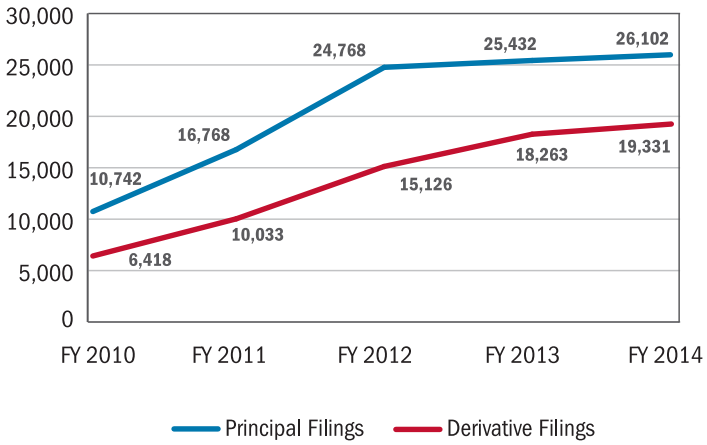
371 *Id.*

372 USCIS Webpage, "Asylum Office Workload" (Jan. 28, 2015); http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-AffirmativeAsylum-Oct-Nov-Dec2014.pdf (accessed Mar. 9, 2015).

Immigration Benefits for Victims of Domestic Violence, Trafficking, and Other Violent Crimes

Victims of domestic violence, human trafficking, and other specified crimes may seek humanitarian immigration relief. Specifically, these programs include U nonimmigrant status, T nonimmigrant status, and self-petitioning for adjustment of status under VAWA.[373] The Ombudsman continues to monitor processing times, quality of RFE and adjudications, and outreach to this vulnerable population.[374]

4.4 U Visa Filings



Source: Information provided by USCIS (May 7, 2015).

Background

U Visas. U visas are available to individuals who have suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity, who possess information concerning criminal activity and who have been, are being, or are likely to be, helpful in the investigation or prosecution of criminal activity.[375] U visas are statutorily capped at 10,000 per fiscal year, not including derivatives.[376] In December 2014, USCIS announced that it had approved the statutory limit of 10,000 U visas for the sixth straight fiscal year.[377] USCIS continued to review petitions for eligibility and will resume issuing decisions on October 1, 2015 (the first day of FY 2016).[378] Applicants who have been approved conditionally can seek to renew their grants of deferred action and employment authorization until the next year's allotment of visas becomes available. Since the program was implemented in 2008, more than 116,471 victims and their family members have received U visas.[379]

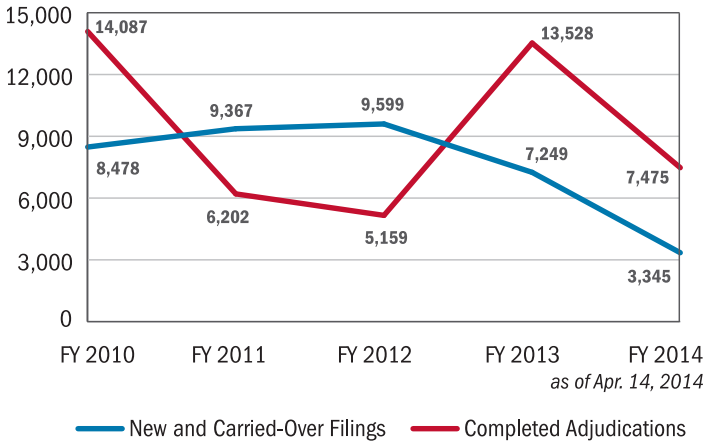
T Visas. T visas are available to victims of severe forms of trafficking who comply with requests for assistance from law enforcement in the investigation or prosecution of human trafficking cases.[380] T visa applications and adjustments of status for T visa holders have not come close to reaching the statutory cap of 5,000 per year;[381] less than 1,000 T visas have been granted to trafficking survivors each year since the enactment of TVPRA.[382] Stakeholders have shared with the Ombudsman that many trafficking victims have difficulty establishing eligibility for the strict interpretation of the legal definition of trafficking victims. In particular, stakeholders seek to have the interpretation of INA section 101(a)(15)(T)(i) expanded by policy memorandum or regulation to clarify that "in the [United States] on account of trafficking" includes persons who can be in the United States on account of trafficking because they escaped a severe form of trafficking in a different country.

VAWA Self-Petitioning Immigrants. Recognizing that immigrant victims of domestic violence may remain in an abusive relationship because immigration status is often tied to the abuser, Congress passed the Violence Against Women Act in 1994.[383] VAWA created a self-petitioning process that allows victims to submit their own petitions for permanent residence without the abuser's knowledge

[373] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322; *see also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386; *see also* TVPRA.
[374] *See* Ombudsman's Annual Report 2014, p. 34.
[375] INA § 101(a)(15)(U).
[376] Victims of Trafficking and Violence Protection Act of 2000 § 1513(c)(2)(A), Pub. L. No. 106-386. *See also* 8 C.F.R. § 214.14(d)(1).
[377] *See* USCIS Press Release, "USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year" (Dec. 11, 2013); http://www.uscis.gov/news/alerts/uscis-approves-10000-u-visas-5th-straight-fiscal-year (accessed Apr. 24, 2015).
[378] *See* USCIS Press Release, "USCIS Approves 10,000 U Visas for 6th Straight Fiscal Year" (Dec. 11, 2014); http://www.uscis.gov/news/uscis-approves-10000-u-visas-6th-straight-fiscal-year (accessed Apr. 24, 2015).
[379] *Id.*
[380] INA § 101(a)(15)(T).
[381] INA § 214(o) (2008); 8 C.F.R. § 245.23(l).
[382] Information provided by USCIS (Apr. 21, 2015).
[383] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322. *See also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193.

or consent.[384] Those eligible for VAWA relief include the current or former abused spouse of a U.S. citizen or Lawful Permanent Resident, the abused child of a U.S. citizen or Lawful Permanent Resident, and the abused parent of a U.S. citizen.[385]

4.5 VAWA



Source: Information provided by USCIS (May 7, 2015).

Ongoing Concerns

Processing Times. As of April 2015, posted processing times were 8 months for U nonimmigrant status petitions (or pre-approvals when the U visa cap has been reached), 5 months for VAWA self-petitions, and 4 months for T nonimmigrant status applications.[386] The USCIS VAWA Unit at the Vermont Service Center, which adjudicates U, T, and VAWA applications/petitions, will need to be adequately resourced to ensure that USCIS meets its processing time goal of 6 months for all applications.

Stakeholders have expressed confusion regarding the reporting of processing times for U petitions in particular. The VAWA Unit adjudicates filings on a "first in, first out" basis; therefore, a petitioner's place on the waitlist will be determined by receipt date of the initial U petition, and not the date of the conditional approval. The USCIS website states that petitions filed on or before March 4, 2014 are being processed.[387] The date of the last petition approved under the FY 2014 U visa cap and does not accurately reflect the processing time for conditional U status grants.

VAWA Employment Authorization for Nonimmigrant Victims. Section 106 of the INA, enacted on January 5, 2006, provides for employment authorization for abused spouses of certain nonimmigrants.[388] However, USCIS has not implemented this provision. USCIS published on December 12, 2012 a draft Policy Memorandum, titled *Eligibility for Employment Authorization upon Approval of a Violence Against Women Act (VAWA) Self-Petition; and Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants*, but this draft policy has yet to be finalized.[389] The Ombudsman continues to receive case assistance requests from potentially eligible applicants who are victims and who may not be able to escape abuse because of the delay in implementation of INA section 106.

U and T Visa Law Enforcement Certifications. Law enforcement certification of the crime and the victim's helpfulness is required for U visas, but not for T visas or VAWA eligibility.[390] While law enforcement certifications are one critical component in establishing an individual's eligibility for these protections, the certification is only one of the pieces of evidence that USCIS considers. Stakeholders report to the Ombudsman that in some cases they continue to experience challenges in successfully securing law enforcement certifications, in particular, from law agencies at the state and local level.

Over the past year, the USCIS Customer Service and Public Engagement Directorate has continued to engage with stakeholders. Specifically, it emphasized training for federal, state, and local law enforcement, to increase awareness of the T and U visa programs and to promote greater understanding among law enforcement of the purpose for certification and for the USCIS adjudicatory process. During FY 2014 and the first half of FY 2015 to date, USCIS hosted 20 national engagements on Us, Ts, and VAWA for 4,069 people.[391] The Ombudsman is also leading the effort to update the DHS U Visa Law Enforcement

[384] Violent Crime Control and Law Enforcement Act of 1994, § 40701, Pub. L. No. 103-322. *See also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193.

[385] INA §§ 204(a)(1)(A)(iii), (vii) and (B)(ii), (iii); 8 C.F.R. §§ 204.2(c), (e).

[386] USCIS Webpage, "USCIS Processing Times" (Apr. 13, 2015); https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed Apr. 24, 2015).

[387] *Id.*

[388] Section 816 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162 (2006).

[389] USCIS Draft Policy Memorandum, "Eligibility for Employment Authorization upon Approval of a Violence Against Women Act (VAWA) Self-Petition; and, Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants" (Dec. 12, 2012); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Draft%20Memorandum%20for%20Comment/VAWA-Authorized-EADs-PM.pdf (accessed Apr. 24, 2015). This draft Policy Memorandum provides guidance on employment authorization eligibility for battered spouses of certain A, E, G, and H nonimmigrants.

[390] INA § 101(a)(15)(U)(i). *See also* USCIS Webpage, "Form I-918, Supplement B, U Nonimmigrant Status Certification" (Jan. 15, 2013); http://www.uscis.gov/sites/default/files/files/form/i-918supb.pdf (accessed Apr. 24, 2015).

[391] Information provided by USCIS (Apr. 24, 2015).

Certification Resource Guide.[392] This guide is available to law enforcement officials to support investigations and prosecutions involving immigrant victims of crime, and is being provided in response to requests for more guidance from law enforcement officials and domestic violence advocates alike. USCIS has a website dedicated to resources for law enforcement agencies, and a video on how to complete certifications required for the adjudication of these visas.[393]

Parole for U Conditional Grantees. Stakeholder organizations have raised concerns with DHS, USCIS, and the Ombudsman regarding individuals outside the United States who have approved U petitions and may be in vulnerable situations while awaiting visa availability.[394] U principals and derivatives who receive conditional approval but are residing outside of the United States must wait until a visa is available to consular process and enter the United States.[395] Since the U visa cap has been reached in each fiscal year since 2009, U petitioners deemed eligible are put on a waiting list. If they are in the United States, both the principals and derivatives receive deferred action and employment authorization.[396] For those outside the United States, there is no corresponding relief except the possibility of humanitarian parole. Conditional grantees of the U visa program, who must wait for years outside of the United States for a U visa, may be subject to violence and harm in the country they are forced to reside in abroad. According to stakeholders, derivative conditional grantees seeking parole for humanitarian reasons from abroad are often minor children of the principal conditional grantee, which further supports the need for reunification.

A principal U conditional grantee contacted the Ombudsman for assistance with the delay of his son's derivative U petition. The son's petition had been pending with the USCIS Vermont Service Center well past posted processing times; the case had been pending 18 months.

The father was very concerned for the safety and well-being of his son due to the growing gang violence and unrest in his neighborhood in Central America. One day after a request for case assistance with the Ombudsman was filed, the derivative son was killed by a stray bullet from a gang fight. If parole had been available, this tragic outcome may have been avoided.

Parole is a benefit provided at the discretion of USCIS on a case-by-case basis to allow immigrants who would otherwise be inadmissible to enter the United States either for "urgent humanitarian reasons" or "significant public benefit."[397] Individuals residing outside of the United States may seek parole by filing Form I-131, *Application for Travel Document*; Form I-134, *Affidavit of Support*; and submitting a detailed explanation of the need for the parole, evidence of the circumstances, and the applicable $360 filing fee with USCIS.[398]

USCIS' Humanitarian Affairs Branch Office under the RAIO adjudicates parole requests for individuals outside the United States, including those from U conditional grantees. The Humanitarian Affairs Branch staff triages requests for humanitarian parole and attempts to provide immediate processing for individuals experiencing life-threatening medical emergencies, or involving children under the age of 16 or individuals who are physically and/or mentally challenged.[399] Approximately 25 percent of humanitarian parole requests are approved.[400]

USCIS regulations explicitly provide that individuals residing outside of the United States may be eligible for parole while they wait for U visa availability.[401] Parole has been used in a variety of situations, for example, placing orphaned Haitian children with their American adoptive

[392] DHS U Visa Resource Guide (Jul. 20, 2012); http://www.dhs.gov/u-visa-law-enforcement-certification-resource-guide (accessed Apr. 24, 2015).

[393] *See* USCIS Webpage, "Blue Campaign: T and U Visa Benefit Certification" (Jun. 16, 2014); http://www.uscis.gov/videos/blue-campaign-t-and-u-visa-benefit-certification (accessed Apr. 24, 2015). *See also* USCIS Webpage, "Information for Law Enforcement Agencies and Judges" (Aug. 25, 2014); http://www.uscis.gov/tools/resources/information-law-enforcement-agencies-and-judges (accessed May 19, 2015).

[394] *See* Letter from ASISTA Immigration Assistance to Director Rodriguez (Oct. 23, 2014); http://www.asistahelp.org/documents/news/Parole_Policy_Letter_10_58C53CA4523D9.pdf (accessed Apr. 25, 2015).

[395] 8 C.F.R. § 214.14(d)(2).

[396] *Id.*

[397] 8 C.F.R. § 212.5(b) (2013).

[398] USCIS Webpage, "Humanitarian Parole" (Oct. 10, 2014); http://www.uscis.gov/humanitarian/humanitarian-parole (accessed Jan. 26, 2015).

[399] USCIS Webpage, "Humanitarian Parole Program" (Feb. 2011); http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources for Congress/Humanitarian Parole Program.pdf (accessed Apr. 25, 2015).

[400] USCIS "Humanitarian Parole Presentation;" http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources for Congress/Humanitarian Parole Program.pdf (accessed Apr. 25, 2015).

[401] 8 C.F.R. § 214.14(d)(2) states, "USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list."

parents after the devastating 2010 earthquake,[402] and the most recent Haitian Family Reunification Program, discussed later in this chapter.

The Ombudsman is reviewing options for USCIS to develop a parole program for U visa petitioners and derivatives residing abroad to enter the United States while waiting for their visas to be issued. A parole program would address the current inconsistent treatment of conditional grantees based on their location at the time of the grant, and ensure they are not exposed to violence and potential harm while waiting in their home countries.

Conclusion

The U, T, and VAWA programs provide critical humanitarian immigration relief. They also support the effective investigation and prosecution of specified criminal activity. Ensuring a safe haven for those entitled to such relief but unable to take advantage of it due to visa limits and agency delays is within the agency's own regulatory authority and should be pursued. The Ombudsman will consider issuing formal recommendations on parole for U visa grantees and their family members.

Fee Waiver Processing Issues

Responsible USCIS Offices: Office of Intake and Document Production, and Field Operations and Service Center Operations Directorates

USCIS' Office of Intake and Document Production (OIDP), which supports both the Field Operations and Service Center Operations Directorates, administers the system of fee waivers for immigration applications and petitions. Fee waivers are critical to populations who cannot access immigration benefits because of their inability to afford the required fees, including elderly, indigent, or disabled applicants. This year's Report summarizes ongoing problems experienced by individuals requesting fee waivers.

Background

In 2010, USCIS standardized and clarified fee waiver criteria and procedures through the development of Form I-912, *Request for Fee Waiver* and the accompanying Policy Memorandum, *Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule: Revisions to Adjudicator's Field Manual (AFM) Chapter 10.9, AFM Update AD11-26*.[403] Prior to 2010, there was no standardized form for requesting a fee waiver, leading to stakeholder complaints that fee waiver handling was unpredictable and confusing.

The current standards for fee waiver adjudications are encompassed in the Policy Memorandum, as well as in the instructions to Form I-912. Individuals may seek fee waivers for limited application types, and eligibility is based on any one of these grounds: (1) current receipt of a means-tested public benefit; (2) household income that is at or below 150 percent of the Federal Poverty Income Guidelines; or (3) financial hardship.[404]

USCIS revised Form I-912 in May 2013,[405] and published tips for filing fee waivers in January 2014.[406] As discussed in the Ombudsman's 2014 Annual Report, the changes to the instructions and Form I-912 altered the counting of household size to include certain non-related household members, a change that has been criticized by stakeholders, and that is not included in the Policy Memorandum.[407] In March 2015, USCIS published a notice of additional proposed revisions to Form I-912.[408] The proposed revisions double the length of the fee waiver form from five pages to 10 pages. The tips for fee waivers contain useful information including an email to contact the USCIS lockboxes, where USCIS performs fee waiver adjudications. The lockboxsupport@dhs.gov email address is the only contact that the public has to raise questions directly with the agency about rejections or denials of fee waivers.

The Ombudsman raised fee waiver cases with OIDP in 2014 and 2015, met USCIS personnel in pursuit of systemic

[402] USCIS Press Release, "Secretary Napolitano Announces Humanitarian Parole Policy for Certain Haitian Orphans," Jan. 18, 2010; http://www.dhs.gov/news/2010/01/18/secretary-announces-humanitarian-parole-policy-certain-haitian-orphans (accessed May 20, 2015).

[403] USCIS Policy Memorandum, "Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule: Revisions to the Adjudicator's Field Manual (AFM) Chapter 10.9, AFM Update AD11-26" (Mar. 13, 2011); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/March/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf (accessed Apr. 23, 2015).

[404] USCIS Webpage, "Instructions for Request for Fee Waiver" (May 10, 2013); http://www.uscis.gov/sites/default/files/files/form/i-912instr.pdf (accessed Apr. 23, 2015).

[405] USCIS Webpage, "Forms Update" (May 2013); http://www.uscis.gov/forms-updates (accessed May 14, 2015).

[406] USCIS Webpage, "Tips for Filing Form I-912, Request for Fee Waiver" (Jan. 15, 2014); http://www.uscis.gov/forms/tips-filing-form-i-912-request-fee-waiver (accessed Apr. 23, 2015).

[407] Ombudsman's Annual Report 2014, p. 54.

[408] "Agency Information Collection Activities: Application for Fee Waivers and Exemption, Form I-912; Revision of a Currently Approved Collection," 80 Fed. Reg. 13880 (Mar. 17, 2015).

solutions, and held a series of stakeholder engagements to seek resolution of systemic fee waiver issues. At those meetings, USCIS stressed that the lockbox support email was the problem-solving mechanism that customers needed to use when a fee waiver was rejected or denied inappropriately. USCIS and the Ombudsman agreed that those with fee waiver inquiries should first seek review with USCIS via lockboxsupport@dhs.gov. If no satisfactory response is received in 5 business days, the fee waiver applicant may request assistance from the Ombudsman.

Ongoing Concerns

The Ombudsman received case inquiries on fee waivers during the reporting period that demonstrate continued issues with consistency of adjudications and processing of fee waivers. During a January 22, 2015 stakeholder teleconference on fee waivers, non-governmental groups and legal organizations that represent large numbers of fee waiver applicants in filings for Form N-400, *Application for Naturalization* and Form I-90, *Application to Replace Permanent Resident Card* presented detailed information about continuing problems with fee waiver rejections and denials. Stakeholders reported inconsistent adjudications; standardized, non-specific language in rejection notices; and failure to follow published eligibility criteria, including household counting and income standards. These problems caused long delays to access a benefit for which applicants are eligible to apply.

Pro se Applicants. In addition, stakeholders report concerns about the impact on *pro se* applicants who lack clear information about how to respond to standardized rejections and denials of fee waiver requests, since little information is provided on the notices. Community-based organizations filing fee waiver requests reported concerns that unrepresented individuals may forego the benefit originally sought for lack of clear information on how to respond to multiple template rejection notices.[409] These organizations later expressed concerns that the 2015 proposed revisions to Form I-912 will also pose a barrier to the *pro se* applicants, as the doubling of the length of the form and number of questions on the form vastly complicates its completion.[410]

Template Rejection Notices. Stakeholders report that USCIS rejection notices in many qualified cases contain standardized language that fails to distinguish a particular deficiency. As a result, applicants and their attorneys spend many hours re-submitting such applications with nearly identical documentation to support eligibility. Attorneys report and the Ombudsman has observed through case assistance requests that USCIS often finally approves a fee waiver application upon the third or fourth re-submission, even when that re-submission has documentation identical to that contained in the first request.

In addition to delays and often the need for legal representation to re-submit a fee waiver application, the rejection notices undermine administrative efficiency. Results seem to indicate that USCIS adjudicators spend time reviewing and re-reviewing unnecessary re-submissions which could have been avoided if the application was thoroughly reviewed the first time, or if the applicant was provided with a notice of deficiency specifying the particular ground(s) of ineligibility or missing documentation.[411]

Inconsistent Adjudications. Ombudsman case assistance requests illustrate how shifting standards that do not adhere to published guidance can result in inappropriate fee waiver denials. In one example, a fee waiver was denied for a disabled applicant who received a federal means-tested benefit, had no other income, and experienced financial hardship; in short, the individual appeared to be eligible under all three grounds of the Form I-912 instructions. Despite the supporting documentation, the applicant was denied without explanation.

In other cases, fee waiver applicants were denied on one basis, despite a showing of eligibility on another. For example, one applicant indicated eligibility on the basis of receiving a means-tested public benefit, and documentation of that benefit was included in the submission. However, the application was denied on a basis that he did not demonstrate eligibility under the requirement of a household income at or below the 150 percent of the Federal Poverty Income Guidelines. Another case was denied on the grounds that the applicant failed to show income below the 150 percent standard; however, USCIS did not address the applicant's documentation showing receipt of Social Security Disability, a means-tested benefit.

[409] Notes from Ombudsman Teleconference, "Stakeholder Fee Waiver" (Jan. 22, 2015).

[410] Information provided by stakeholders regarding "Agency Information Collection Activities: Application for Fee Waivers and Exemption, Form I-912; Revision of a Currently Approved Collection," 80 Fed. Reg. 13880 (Mar. 17, 2015).

[411] Notes from Ombudsman Teleconference, "Stakeholder Fee Waiver" (Jan. 22, 2015). *See also* Information provided through requests for case assistance.

In some cases, applicants attempt to increase documentation with every re-submission, even when they lack specific information about what USCIS seeks, due to the generic rejection language. For one application, a recipient of a means-tested benefit filed for a fee waiver with documentation of the benefit, and was rejected twice without explanation or basis for the rejection. The applicant's attorney then re-filed with a copy of the applicant's tax return as supporting documentation. The tax return demonstrated that the applicant received no income. The USCIS Lockbox requested more information on the applicant's particular circumstances that resulted in no income, and requested further documentation to verify that the applicant was receiving support from community organizations.

Stakeholders report that USCIS sometimes requests unnecessary and duplicative documentation, which also results in multiple submissions of the same fee waiver request.[412] The Ombudsman received case assistance requests from three different applicants who submitted fee waiver requests based on income below the required amount and received overly burdensome RFEs. The applicants supplied their 2013 tax returns for fee waiver requests submitted in 2014. Nonetheless, in November 2014, USCIS requested copies of these applicants' 2014 tax returns, which none of the applicants had yet prepared, as the tax year was not yet ended and the Federal filing deadline was 6 months in the future (April 15, 2015).[413]

Household Size and Income Calculations. Stakeholders report confusing and inconsistent instructions from USCIS on how to calculate income and how to count household size for determining the applicable income for the Federal Poverty Income Guidelines. In one case, a naturalization applicant seeking a fee waiver with documentation of his income below 150 percent of the Federal Poverty Income Guidelines received two rejections by the USCIS Lockbox without explanation, at which point he sought assistance from the Ombudsman. In another, where a minor applicant in foster care with no income filed his fee waiver with supporting documentation, the USCIS Lockbox returned the fee waiver stating that the applicant failed to file with the proper fee. In another fee waiver request where an applicant presented documentation that her monthly income was well below the 150 percent limit, a sole income of $920 per month, USCIS rejected the fee waiver as unqualified.[414] The elderly applicant in this case was receiving a means-tested benefit, lived in a household of two which included herself and her profoundly disabled adult son, and suffered multiple rejections of her fee waiver application before submitting her inquiry through the Ombudsman.

The counting of household size was affected by changes that USCIS made to the Form I-912 instructions in 2013, which now states that non-family members are to be included in counting household size in certain circumstances.[415] The current form instructions contradict the guidance in USCIS' Policy Memorandum, which does not require counting non-family members in household calculations.[416] The Policy Memorandum limited the household count to include the applicant, spouse, any parents living with the applicant, and specific categories of adult sons or daughters living in the household.[417] However, the instructions to the Form I-912, as revised in 2013, contain a different calculation of household size: in addition to family members in the household, the applicant is advised to count a person living with them who contributes 50 percent or more of applicant's support. Fee waiver applicants must include the income documentation for these non-related individuals as well.[418]

In contrast, on the Form I-864, *Affidavit of Support Under Section 213A of the Act,* household size is defined differently in the regulations.[419] Non-family members

412 Notes from Ombudsman Teleconference, "Stakeholder Fee Waiver" (Jan. 22, 2015).

413 Information provided through requests for case assistance.

414 Information provided through requests for case assistance. This income level is below the published limit per year for a household of one on the Form I-912P, which provides the USCIS income guidelines for fee waiver calculation.

415 USCIS Webpage, "Instructions for Request for Fee Waiver" (May 10, 2013); http://www.uscis.gov/sites/default/files/files/form/i-912instr.pdf (accessed Apr. 23, 2015). The form began an extension process in August 2012, noting that "…USCIS will be evaluating whether to revise the Form I-912." "Agency Information Collection Activities: Under Section 245A of the INA, Form I–687; Extension, Without Change, of a Currently Approved Collection," 77 Fed. Reg. 50521 (Aug. 21, 2012). On October 30, 2012, USCIS published the 30 day notice required under the Paperwork Reduction Act, stating they had received no comments in response to the 60-day notice published that August, and that they were revising the form. "Application for Fee Waivers and Exemptions," 77 Fed. Reg. 65703 (Oct. 30, 2012).

416 USCIS Policy Memorandum, "Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule: Revisions to the Adjudicator's Field Manual (AFM) Chapter 10.9, AFM Update AD11-26" (Mar. 13, 2011); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/March/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf (accessed Apr. 23, 2015).

417 USCIS Policy Memorandum at p. 6, Step 2, "Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule: Revisions to the Adjudicator's Field Manual (AFM) Chapter 10.9, AFM Update AD11-26" (Mar. 13, 2011).

418 USCIS Webpage, "Instructions for Request for Fee Waiver" at p. 4, Step 2, 3-5 (May 10, 2013); http://www.uscis.gov/sites/default/files/files/form/i-912instr.pdf (accessed Apr. 23, 2015).

419 8 C.F.R. § 213a.1(1).

are not included in household size for Form I-864 income calculations unless they are dependents on the tax return of the applicant, or if a person has previously been sponsored by an applicant. Consistency in counting household size across USCIS applications would improve clarity and assist USCIS customers.

Even in areas where there is clarity, USCIS is not always consistent on how it determines the household size and income resulting in multiple rejections in fee waiver cases. Stakeholders report that spouses with no presence in the household of the fee waiver applicants, and even when living in separate countries, are requested to provide income documentation by USCIS. The Form I-912 instructions require counting of spouses in the household size, and presentation of their income documentation, unless there is an order of legal separation.[420] Legal separation orders from courts are not commonly obtained by many low-income foreign nationals. Additionally, stakeholders report that indigent applicants are often in transitional housing situations where inclusion of a non-related person's income has no bearing on the individual's access to that income and thus to their eligibility for a fee waiver.

Conclusion

The large volume of vague and unsubstantiated fee waiver rejections prevents otherwise eligible low-income and vulnerable applicants from seeking benefits before USCIS. The mechanisms for the public to resolve fee waiver problems remain inadequate to address systemic problems. The public can sometimes resolve an individual case through repeated re-submissions, by contacting lockbox support, or by seeking assistance from an agency liaison, congressional offices, and the Ombudsman. But these methods are time-consuming, cause delay and confusion to the applicants, and can only resolve one case at a time. The Ombudsman urges USCIS to address systemic issues of rejections and inconsistent decisions on fee waiver criteria and to provide more responsiveness from the USCIS Lockbox for the public to resolve individual fee waiver case problems. Individuals may contact USCIS' lockbox support email box to resolve a fee waiver issue, but stakeholders report delays of up to 30 days for a response, and in some cases no response at all. Public engagement on the systemic issues stakeholders experience would help USCIS identify ongoing issues and possible ameliorative actions to improve administration of the fee waiver program.

The Ombudsman has raised these same issues with fee waivers in prior Annual Reports. In response to the 2013 Annual Report, USCIS stated, "just over 98 percent of decisions reviewed as part of the quality assurance program were found to be accurate, and has improved to 98.82 percent in FY 2013."[421] However, the issues of unfair rejections and denials have persisted. USCIS also committed to reviewing decision notices for the need to provide more specific information and hosting a national stakeholder engagement.[422] Yet, generic notices of rejection and denial continue.

Humanitarian Reinstatement for Surviving Relatives Under Immigration and Nationality Act Section 204(l) and the Regulations

Responsible USCIS Office: Service Center Operations Directorate

For immigrant families, the death of a family member often triggers an inability of surviving family members to seek immigration status because USCIS revokes approved family-based petitions automatically upon the death of the sponsoring petitioner.[423] Besides the avenue of relief open to widows/widowers of U.S. citizens,[424] there are two remedies that may preserve the surviving relative's ability to immigrate: statutory reinstatement under INA section 204(l), and humanitarian reinstatement under 8 C.F.R. § 205.1(a)(3)(i)(C). The statutory reinstatement process under INA section 204(l) protects, among other listed groups, certain surviving relatives who are in the United States and who had an approved petition at the time of the qualifying relative's death.[425] Humanitarian reinstatement allows

[420] USCIS Webpage, "Instructions for Request for Fee Waiver" (May 10, 2013); http://www.uscis.gov/sites/default/files/files/form/i-912instr.pdf (accessed Apr. 23, 2015).

[421] DHS Webpage, "USCIS Response to the Citizenship and Immigration Services Ombudsman's (CISOMB) 2013 Annual Report to Congress" (Nov. 12, 2014); http://www.dhs.gov/publication/2013-uscis-response (accessed May 8, 2015).

[422] *Id.*

[423] 8 C.F.R. § 205.1(a)(3)(i)(B).

[424] INA § 201(b)(2)(A)(i).

[425] *See* Ombudsman Recommendation 55, "Improving the Adjudication of Applications and Petitions Under Section 204(l) of the Immigration and Nationality Act" (Nov. 26, 2012); http://www.dhs.gov/publication/improving-adjudication-under-ina-section-204l (accessed Mar. 9, 2015).

certain surviving beneficiaries to continue to qualify for an immigration benefit if they request and obtain approval of a discretionary reinstatement of a petition on humanitarian grounds.[426] This relief is sometimes granted to the principal beneficiary of a Form I-130, *Petition for Alien Relative* if the petition was approved prior to the death of the petitioner.[427]

Background

In 2009, Congress enacted INA section 204(l), broadening the availability of relief for surviving relatives as long as they resided in the United States at the time of the death of the qualifying relative, and if they continued to reside in the country at the time of application.[428] In December 2012, USCIS issued guidance for INA section 204(l) reinstatement for those persons with approved petitions at the time of the qualifying relative's death.[429] Survivors seeking coverage under INA section 204(l) in this circumstance are subject to a discretionary evaluation, but a showing of the humanitarian and hardship factors needed for humanitarian reinstatement under the regulation is not required. Instead, the request will be approved if it is consistent with "the furtherance of justice."[430]

The requirements for humanitarian requests for reinstatement are outlined in regulations and administrative guidance.[431] Reinstatement is the only possible relief for surviving beneficiaries who are not residing in the United States, who cannot meet the requirements of INA section 204(l), or who are not widows/widowers of U.S. citizens.

An affidavit of support from a substitute sponsor must accompany the request, and supporting documentation of enumerated hardship and humanitarian factors is required.[432]

Ongoing Concerns

As noted in the Ombudsman's 2013 and 2014 Annual Reports, stakeholders report, among other issues: variances and long delays in the handling of INA section 204(l) and humanitarian reinstatement requests; inability to ascertain which office will take jurisdiction over such requests; difficulty determining receipt of requests by USCIS; rejection of requests by service center mailrooms; template denials; confusion between humanitarian reinstatement and INA section 204(l) requirements; and the inability of *pro se* applicants to overcome these challenges to seeking relief.[433] These and other concerns continue in this reporting period, as demonstrated by the inquiries received by the Ombudsman and feedback from stakeholders.

Lack of a USCIS Form, Standardized Procedures, and Consistent Instructions. USCIS lacks a standardized process for receiving and adjudicating INA section 204(l) and humanitarian reinstatement requests. In addition, USCIS does not post processing times for either type of reinstatement request.

There is no USCIS form for making a reinstatement request under INA section 204(l) or a humanitarian reinstatement request under the regulations. The USCIS website instructs people to send written requests for humanitarian reinstatement to the responsible USCIS office.[434] Similarly, surviving relatives who seek coverage under INA section 204(l) are instructed to make reinstatement requests to USCIS by letter.[435]

Generally, to apply for immigration benefits an applicant must complete a required form and comply with accompanying instructions that specify where the application is to be filed.[436] The requirement of consistent and impartial collection of data through forms and the reduction of burden on the applicant applies across the

426 8 C.F.R. § 205.1(a)(3)(i)(C).

427 *See* USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed Apr. 13, 2015).

428 Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83 (2009). This Act expanded survivor coverage to: beneficiaries of a pending or approved immediate relative petition; beneficiaries of a pending or approved family-based visa petition, including the principal and any derivatives; derivative beneficiaries of a pending or approved employment-based visa petition; beneficiaries of a pending or approved refugee/asylee petition; derivatives of T and U nonimmigrants; and derivative asylees.

429 USCIS Policy Memorandum, "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act" (Dec. 16, 2010); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf (accessed Mar. 9, 2015). For an in-depth discussion of the survivor benefits in INA § 204(l), *see* Ombudsman Recommendation 55, "Improving the Adjudication of Applications and Petitions Under Section 204(l) of the Immigration and Nationality Act" (Nov. 26, 2012); http://www.dhs.gov/publication/improving-adjudication-under-ina-section-204l (accessed Apr. 13, 2015).

430 USCIS Policy Memorandum, "Approval of Petitions and Applications after the Death of the Qualifying Relative Under New Section 204(l) of the Immigration and Nationality Act" (Dec. 16, 2010), p. 6; http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf (accessed Mar. 9, 2015).

431 8 C.F.R. § 205.1(a)(3)(i)(C); AFM Ch. 21.2(h)(1)(C).

432 INA §§ 213A(f)(5)(B), 212(a)(4)(C); 8 C.F.R. § 213a.2(a)(2)(ii).

433 *See* Ombudsman's Annual Reports 2013, pp. 18-20; 2014, pp. 42-46.

434 AFM Ch. 21.2(h)(1)(C) does not list any specific address for submission of a reinstatement letter. It states generally that requests should be submitted to the USCIS district or service center office that approved the Form I-130 or to the USCIS office with jurisdiction over the adjustment of status application.

435 USCIS Policy Memorandum, "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act" (Dec. 16, 2010), p. 6; http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf (accessed Mar. 9, 2015).

436 USCIS Webpage, "Forms;" http://www.uscis.gov/forms (accessed Mar. 9, 2015).

federal government through the Paperwork Reduction Act (PRA). Adherence to the PRA enables USCIS to adjudicate the merits of individual circumstances through the provision of consistent information and the application of standard legal criteria.[437]

Since USCIS priorities and normal procedures are established around form receipting at centralized locations—not around letters received by USCIS local offices—applicants have experienced problems with slow and irregular handling of humanitarian reinstatement and INA section 204(l) requests by USCIS. The imprecise process of submitting individualized letters in each case without a specific application form poses substantial challenges to uniformity in processing and is inconsistent with the letter and spirit of PRA.

Stakeholders suggest that USCIS develop a form for applicants seeking benefits as survivors under INA section 204(l) or humanitarian reinstatement. Doing so would permit processing of requests through established USCIS channels—that is, receipting by lockboxes and case tracking through adjudication. Use of a form would increase USCIS' administrative efficiency, as well as assist a vulnerable population that has consistently been frustrated in seeking benefits. In particular, the development of such a standardized form and instructions would benefit *pro se* applicants who face considerable barriers to clear information on the processing of survivor requests.

A form with instructions would provide consistent information needed by USCIS to screen for eligibility for benefits under INA section 204(l) or regulatory humanitarian reinstatement. The letter requests sent to USCIS result in frequent complaints of mishandling and misrouting. USCIS processing centers and local offices are not set up to treat incoming mail without a form as an application for a benefit. Officers would be assisted in performing their adjudications properly by creation of a publicly available form and instructions.[438]

Furthermore, under the PRA, the solicitation of information by an applicant for reinstatement is a sufficiently substantial collection of information that warrants requirement of a form. The PRA applies to collections of information from 10 or more persons where uniform categories of information are sought by the government.[439] Both INA section 204(l) relief and humanitarian reinstatement solicit standardized information. The number of persons to whom these instructions apply is potentially large, as all too often petitioners or qualifying relatives die in the years between when individuals have a petition filed and when immigration processing is actually completed.

The premise of the PRA is to "ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government" and to "improve the quality and use of Federal information to strengthen decision making, accountability, and openness in Government and society."[440] The regularized collection of information in forms, in contrast to soliciting letters providing widely ranging information, would allow USCIS to play the critical role outlined for agencies in the PRA: collecting and managing information in order to promote openness, reduce burdens on the public, increase program efficiency and effectiveness, and improve the integrity, quality, and utility of information to all users within and outside the government.[441]

USCIS stated in its response to the Ombudsman's 2012 recommendation on INA section 204(l) implementation that development of a form was impractical because it would delay implementation of the law, which was enacted in 2009.[442] Six years have passed since INA section 204(l) was enacted, and implementation still remains incomplete due to the lack of public information and uniform processing.[443]

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437 Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 44 U.S.C. § 3501; *see also* 5 C.F.R. § 1320.3(h).

438 Information provided by USCIS (Jul. 16, 2014). In a meeting with one USCIS service center in 2014, and another in 2015, the managers of the unit designated to adjudicate reinstatement requests agreed that development of a form would regularize the processing.

439 Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. § 3502(3)(A)(i).

440 PRA, 44 U.S.C. § 350.

441 Office of Management and Budget Policy Memorandum, "Memorandum For the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies" (Apr. 7, 2010); https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf (accessed May 19, 2015).

442 USCIS Response to Recommendation 55 (Jun. 3, 2013); http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/Response%20to%20Formal%20Recommendation%2055.pdf (accessed Apr. 13, 2015).

443 Forms can help regularize agency receipt and processing of requests through USCIS lockbox facilities, as USCIS did in an analogous example with development of the Form I-912, *Request for Fee Waiver* in 2010. The Form I-912 is presented without fee to USCIS lockboxes, which scan the requests upon receipt. USCIS Webpage, "Instructions for Request for Fee Waiver (Form I-912)" (May 10, 2013); http://www.uscis.gov/sites/default/files/files/form/i-912instr.pdf (accessed May 19, 2015).

Case Example

Survivors seeking humanitarian reinstatement often face obstacles of poorly explained steps in seeking relief from USCIS. One request for case assistance submitted to the Ombudsman involves a person whose U.S. citizen father died in 2005, after an I-130 petition had been approved on behalf of his married daughter. In 2006, the daughter began corresponding with USCIS, seeking reinstatement of her petition. Repeated attempts to obtain a decision were made at in-person InfoPass visits to the local USCIS office and by correspondence to CSC. Four years later, in 2010, USCIS stated that it could no longer locate the petition or the reinstatement request. The applicant persisted, and in 2013, she re-filed a request for reinstatement. The applicant was then told by USCIS that she needed to include a request to recreate the I-130 petition in order to obtain an adjudication of the I-130. The Ombudsman has made repeated inquiries on this case in 2014 and 2015, with no resolution to date.

Conclusion

Humanitarian reinstatement and INA section 204(l) reinstatement requests require the creation of a standard form and accompanying instructions. The agency cannot properly comply with the requirements of the PRA by continuing its current filing practices. Surviving relatives will greatly benefit from a uniform process, and the agency will achieve great efficiency and quality in adjudications if a standard form were adopted.

In-Country Refugee/ Parole Program for Central American Minors

Responsible USCIS Office: Refugee, Asylum, and International Operations Directorate

In recent years, unprecedented numbers of unaccompanied minors from Central America have been apprehended crossing the U.S. southern border.[444] Many of these children suffer violence and exploitation during their cross-country passage.[445] Through the newly-established Refugee/Parole Program for Central American Minors (CAM), qualifying parents who reside in the United States and have children in Central America can petition for those children to join them stateside as refugees or parolees. This program offers vulnerable youth in this region the prospect of protection in the United States without a dangerous trek to the U.S. border.

Background

The term UACs refers to certain minors lacking parental support and lawful immigration status.[446] The number of UACs from El Salvador, Honduras, and Guatemala who have been apprehended by CBP grew from 10,146 in FY 2012 to 51,705 in FY 2014.[447] Various forces account for this rise, including widespread crime and poverty in these countries, the children's desire for reunification with their parents in the United States, and heightened sophistication among human smuggling networks.[448] Individuals seeking to exploit these minors, in combination with other hazards of passage, harm many children making this northward journey.[449]

In response to these developments, USCIS' RAIO Directorate, in partnership with DOS, launched CAM

444 *See* CBP Webpage, "Southwest Border Unaccompanied Alien Children;" http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children (accessed Apr. 25, 2015).

445 *See* "Review of the President's Emergency Supplemental Request," before the Senate Committee on Appropriations, 113th Cong. 2nd Sess. (Jul. 10, 2014) (statement of Secretary of Homeland Security Jeh Johnson); http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations (accessed Mar. 4, 2015).

446 HSA § 462; 6 U.S.C. § 279(g)(2); *see also* Ombudsman Recommendation 57, "Ensuring a Fair and Effective Asylum Process for Unaccompanied Children" (Sept. 20, 2012); http://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-process-for-uac.pdf (accessed Mar. 31, 2015).

447 CBP Webpage, "Southwest Border Unaccompanied Alien Children;" http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children (accessed Apr. 25, 2015).

448 *See* U.S. Government Accountability Office Report, "Central America: Information on Migration of Unaccompanied Children from El Salvador, Guatemala, and Honduras," GAO-15-362 (Feb. 2015); http://www.gao.gov/products/GAO-15-362 (accessed Mar. 4, 2015).

449 "Review of the President's Emergency Supplemental Request," before the Senate Committee on Appropriations, 113th Cong. 2nd Sess. (2014) (statement of Secretary of Homeland Security Jeh Johnson); http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations (accessed Mar. 4, 2015). ("[T]he long journey for a child, in the custody of a criminal smuggling organization, from Central America to the United States is dangerous. Many of the children are exploited, abused and hurt.")

on December 1, 2014.[450] CAM enables certain foreign national parents who reside in the United States to petition for their children living in Central America. From within their own countries, the petitioned children may then seek refugee or parole status stateside.[451] USCIS first determines whether those children qualify for refugee status.[452] If USCIS finds that a child does not qualify for refugee status, USCIS may consider, on a case-by-case basis, whether the child qualifies for parole.[453] In some instances, other family members of the petitioned children may also qualify under CAM.

Program Eligibility. To be eligible for consideration under CAM, the minor (a Qualifying Child) must be: (1) a national of and resident in El Salvador, Honduras, or Guatemala (minors living in the United States are ineligible); (2) unmarried; (3) under the age of 21; and (4) have at least one parent, referred to as the Qualifying Parent, who is lawfully present in the United States under one of the following statuses or categories: Permanent Resident Status, TPS, parole, deferred action, Deferred Enforced Departure, or withholding of removal.[454]

Certain family members of the Qualifying Child may also be eligible for CAM. First, unmarried children of the Qualifying Child who are under 21 may qualify for CAM as derivative beneficiaries.[455] For example, if a 20-year-old Qualifying Child is herself the mother of a 2-year-old child, the child may be eligible under CAM. Likewise, under certain circumstances, a Qualifying Child's parent who resides with the child in Central America and is the legal spouse of the Qualifying Parent residing in the United States may gain CAM program access.[456] This scenario might arise, for example, when a woman departs from El

[450] *See* USCIS Webpage, "In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors—CAM)" (Feb. 9, 2015); http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam (accessed Mar. 4, 2015).

[451] *Id.*

[452] *See* Refugee Processing Center Webpage, "U.S. Refugee Admissions Program Central American Minors Flowchart" (Jan. 22, 2015); http://www.wrapsnet.org/Portals/1/CAM%20Handout.pdf (accessed Mar. 4, 2015).

[453] *Id.*

[454] USCIS Webpage, "In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors—CAM)" (Feb. 9, 2015); http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam (accessed Mar. 4, 2015).

[455] *Id.*

[456] *Id.*

Salvador and takes up residence in the United States, while her child and husband remain together in El Salvador. Assuming the woman is lawfully present in the United States in one of the aforementioned statuses or categories, both her child and husband in El Salvador could be eligible under CAM.

Finally, in situations where a Qualifying Parent's eligible legal spouse resides in Central America with the Qualifying Child as well as additional children, the additional children may be eligible under CAM as derivative beneficiaries of the eligible legal spouse.[457] For example, if USCIS denied independent refugee or parole status to the sibling of a Qualifying Child, that sibling may still be eligible for CAM as the unmarried child of the legal spouse of the Qualifying Parent.

Application Process. Qualifying Parents initiate the CAM application process by filing Form DHS-7699, *Affidavit of Relationship (AOR) for Minors Who Are Nationals of El Salvador, Guatemala, and Honduras* (CAM-AOR)[458] under the guidance of one of over 300 DOS-affiliated resettlement agencies located throughout the United States.[459] ***See Figure 4.6,*** *CAM Program Flow Chart.*[460] There is no fee for filing this application.[461] In consultation with these resettlement agencies, a Resettlement Support Center, operated by the International Organization for Migration (IOM) in Central America under the funding and direction of DOS, conducts pre-screening interviews of Qualifying Children claimed on the CAM-AOR.[462]

Following these interviews, Qualifying Parents and biological Qualifying Children must complete mandatory DNA testing to confirm the claimed parent-child relationships.[463] Though the Qualifying Parent bears the costs of DNA testing for each claimed biological child, DOS reimburses those costs where initial test results are confirmatory and where no subsequent tests are required.[464] Parent-child DNA tests at qualifying testing centers fall along a range of price points, including tests offered at $395 and $675.[465] Some domestic resettlement agencies may offer loans covering those costs to the Qualifying Parents.[466]

Upon the receipt of confirmatory DNA test results, USCIS Refugee Officers conduct interviews of the Qualifying Children in Central America. These interviews are distinct from the pre-screening interviews previously conducted by the Resettlement Support Center. USCIS then decides whether a Qualifying Child qualifies for refugee status and is otherwise admissible to the United States.[467] If so, and if the child meets further criteria such as health and sponsorship requirements, the child will receive travel assistance from IOM and join the Qualifying Parent(s) in the United States as a refugee.[468] On a case-by-case basis, where USCIS denies refugee status to the Qualifying Child, the agency may consider that child for parole status in the United States.[469] Children who qualify for parole under CAM must pay for their own travel to the United States.[470] Qualifying Children "facing imminent danger" in Central America may be eligible for expedited processing of CAM applications and/or the provision of safe shelter.[471]

457 Information provided by USCIS (Mar. 19, 2015).

458 *See* Refugee Processing Center Webpage, "Frequently Asked Questions" (Jan. 23, 2015); http://www.wrapsnet.org/Portals/1/PUBLIC%20FAQs%20Jan%202015%20FINAL.docx (accessed Mar. 10, 2015).

459 Refugee Processing Center Webpage, "Department of State Bureau of Population, Refugees, and Migration Office of Admissions—Refugee Processing Center Affiliate Directory" (Feb. 20, 2015); http://www.wrapsnet.org/Portals/1/Affiliate%20Directory%20Posting/FY%202014%20Affiliate%20Directory/Public%20Affiliate%20Directory%202-20-15.pdf (accessed Mar. 4, 2015).

460 Information provided by USCIS (Mar. 22, 2015).

461 USCIS Webpage, "In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors—CAM)" (Feb. 9, 2015); http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam (accessed May 4, 2015).

462 *See* Refugee Processing Center Webpage, "U.S. Refugee Admissions Program Central American Minors Flowchart" (Jan. 22, 2015); http://www.wrapsnet.org/Portals/1/CAM%20Handout.pdf (accessed Mar. 4, 2015).

463 *Id.*

464 *See* Refugee Processing Center Webpage, "Frequently Asked Questions" (Jan. 23, 2015); http://www.wrapsnet.org/Portals/1/PUBLIC%20FAQs%20Jan%202015%20FINAL.docx (accessed Mar. 10, 2015).

465 *See* American Association of Blood Banks (AABB) Webpage, "AABB Accredited Relationship (DNA) Testing Facilities" (no date provided); http://www.aabb.org/SA/FACILITIES/Pages/RTestAccrFac.aspx (accessed Mar. 31, 2015); *see also,* Universal Genetics Webpage, "DNA Testing Fee Schedule," (no date provided); http://www.dnatestingforpaternity.com/fees.html (accessed Mar. 31, 2015); Affiliated Genetics Webpage, "Immigration Testing;" http://www.affiliatedgenetics.com/?product=immigration-testing (accessed Mar. 31, 2015).

466 Information provided by USCIS (Mar. 19, 2015).

467 *See* USCIS CAM Teleconference Notes (Mar. 31, 2015), p. 1.

468 *See* Refugee Processing Center Webpage, "U.S. Refugee Admissions Program Central American Minors Flowchart" (Jan. 22, 2015); http://www.wrapsnet.org/Portals/1/CAM%20Handout.pdf (accessed Mar. 4, 2015).

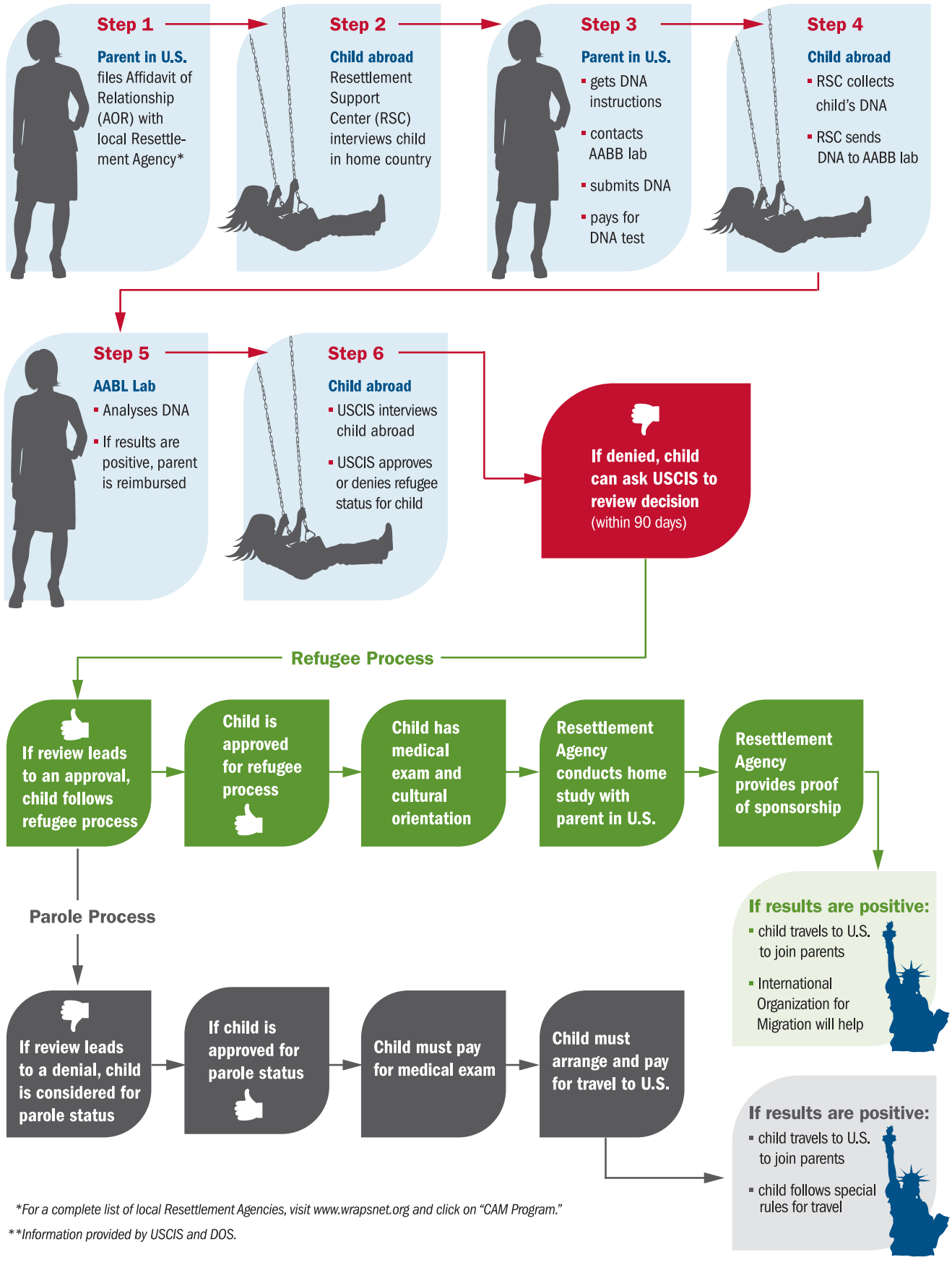
469 *See* Refugee Processing Center Webpage, "Frequently Asked Questions" (Jan. 23, 2015); http://www.wrapsnet.org/Portals/1/PUBLIC%20FAQs%20Jan%202015%20FINAL.docx (accessed Mar. 10, 2015).

470 *Id.*

471 "Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration's Central American Minors Refugee/Parole Program," before the Subcommittee on Immigration and The National Interest of the U.S. Senate Committee on the Judiciary, 114th Cong. 2nd Sess. 3 (Apr. 23, 2015) (written statement of Simon Henshaw, Principal Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, U.S. Department of State); http://www.judiciary.senate.gov/imo/media/doc/04-23-15%20Henshaw%20Testimony.pdf (accessed Apr. 25, 2015).

4.6 Central American Minors (CAM) Program Flow Chart

Last updated Mar. 6, 2015



**For a complete list of local Resettlement Agencies, visit www.wrapsnet.org and click on "CAM Program."*

***Information provided by USCIS and DOS.*

Additionally, USCIS will determine whether other family members also qualify under the program.[472] A Qualifying Child's own children may derive refugee status on the basis of the Qualifying Child's refugee claim.[473] By contrast, a Qualifying Child's parent who resides with the Qualifying Child in Central America and who is the legal spouse of the Qualifying Parent must establish a refugee claim independent of the Qualifying Child's claim.[474] Where such a legal spouse does receive refugee status through CAM and has children who are not Qualifying Children, those children may derive refugee status through the parent.[475]

Ongoing Concerns

DNA Testing. The costs of mandatory DNA tests to confirm biological relationships claimed on the CAM-AOR may present barriers to applicants otherwise willing and able to file under CAM. While DOS reimburses those costs upon receipt of confirmatory test results, some Qualifying Parents may be unable to afford the fees upfront, particularly where these parents claim multiple Qualifying Children. Crucially, only some DOS-affiliated domestic resettlement agencies may be offering loans to Qualifying Parents to cover the costs of DNA tests.[476] The Ombudsman encourages the widespread adoption of such loan programs by DOS-affiliated domestic resettlement agencies as a tool for enabling broader access to the joint USCIS-DOS CAM program.

Public Engagement and Program Implementation. USCIS, in partnership with DOS, has performed a range of public outreach to publicize the CAM program and educate stakeholders about the application process. This outreach has included USCIS website information provided in English and Spanish; engagement sessions in Silver Spring, Maryland and Falls Church, Virginia; and events hosted at the Salvadoran and Honduran embassies in Washington, DC.[477] USCIS also led an English language public teleconference on CAM on March 31, 2015 and a Spanish language teleconference on May 6, 2015.[478] Furthermore, USCIS and DOS have discussed CAM through over 40 media outlets both domestic and in Central America.[479]

Despite these efforts, since CAM's December 31, 2014 launch, applicant participation in the program has been modest relative to the scale of recent CBP apprehensions of Central American UACs. As of March 22, 2015, USCIS reported that the CAM program had received "over 300" applications.[480] By April 23, 2015, this total had climbed to 565 applications—439 applications for El Salvador, 114 for Honduras, and 12 for Guatemala.[481] ***See Figure 4.7,*** *CAM Applications per Country.* The majority of Qualifying Parents filing Form DS-7699 were Honduran and Salvadoran nationals lawfully present in the United States under TPS.[482] As of April 23, 2015, USCIS had not yet conducted any interviews of CAM applicants in Central America, though the agency aims to commence those interviews in the spring or summer of 2015 after the receipt of the applicants' DNA test results.[483]

These relatively low filing totals reflect, in part, CAM's status as a newly-established program. At the same time, the recent growth in these totals underscores the program's ultimate potential to protect Qualifying Children on a broad scale. In demonstration of this potential, the number of CAM applicants as of March 31, 2015—565—amounts to only a fraction of the 51,705 Central American UACs apprehended by CBP in FY 2014 or even the 9,802 such

472 USCIS Webpage, "In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors—CAM)" (Feb. 9, 2015); http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam (accessed May 4, 2015).

473 *Id.*

474 *See* Refugee Processing Center Webpage, "Frequently Asked Questions" (Jan. 23, 2015); http://www.wrapsnet.org/Portals/1/PUBLIC%20FAQs%20Jan%202015%20FINAL.docx (accessed Mar. 10, 2015).

475 Information provided by USCIS (Mar. 22, 2015).

476 *Id.*

477 *Id.*

478 USCIS CAM Teleconference Notes (Mar. 31, 2015), p. 7; USCIS Webpage, "The Central American Minors (CAM) Refugee/Parole Program" (Apr. 21, 2015); http://www.uscis.gov/outreach/upcoming-national-engagements/central-american-minors-cam-refugeeparole-program (accessed Apr. 25, 2015).

479 "Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration's Central American Minors Refugee/Parole Program," before the Subcommittee on Immigration and The National Interest of the U.S. Senate Committee on the Judiciary, 114th Cong. 2nd Sess. 3 (2015) (written statement of Simon Henshaw, Principal Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, U.S. Department of State); http://www.judiciary.senate.gov/imo/media/doc/04-23-15%20Henshaw%20Testimony.pdf (accessed Apr. 25, 2015); *see also* information provided by USCIS (Mar. 22, 2015).

480 USCIS CAM Teleconference Notes (Mar. 31, 2015), p. 7.

481 "Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration's Central American Minors Refugee/Parole Program," before the Subcommittee on Immigration and The National Interest of the U.S. Senate Committee on the Judiciary, 114th Cong. 2nd Sess. 3 (2015) (written statement of Simon Henshaw, Principal Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, U.S. Department of State); http://www.judiciary.senate.gov/imo/media/doc/04-23-15%20Henshaw%20Testimony.pdf (accessed Apr. 25, 2015).

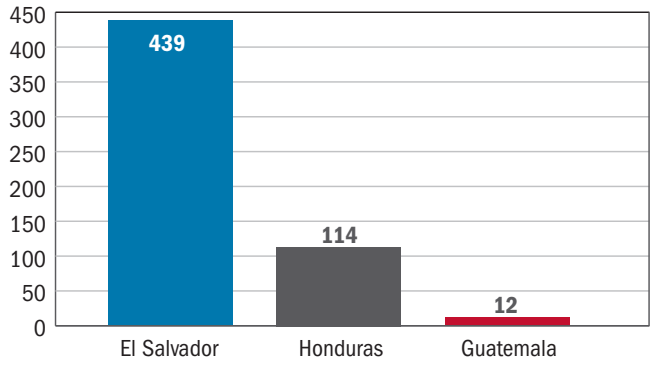
482 Notes on "Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration's Central American Minors Refugee/Parole Program," before the Subcommittee on Immigration and The National Interest of the U.S. Senate Committee on the Judiciary, 114th Cong. 2nd Sess. 3 (2015) (Apr. 25, 2015).

483 *Id.*

UACs apprehended in FY 2015 as of March 31, 2015.[484] Accordingly, while USCIS and DOS have already undertaken various useful initiatives to publicize CAM, even more comprehensive public engagement, both domestically and abroad, would help extend awareness of the program to broader segments of relevant populations, stimulate higher applicant participation, and secure protection for a greater number of endangered children.

4.7 CAM Applications per Country

(Dec. 1, 2014 to Apr. 23, 2015)



Source: Information provided by DOS (Apr. 25, 2015).

[484] CBP Webpage, "Southwest Border Unaccompanied Alien Children;" http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children (accessed Apr. 25, 2015).

Conclusion

CAM represents an important complement to USCIS' existing humanitarian programs. Following CAM's launch in December 2014, the Ombudsman met with RAIO Directorate officials to discuss the program's ongoing implementation and will continue to monitor the program's progress in addressing the plight of qualifying Central American children.

Interagency, Customer Service, and

In this year's Annual Report, the Ombudsman focuses on the proper delivery of USCIS notices and documents, recording or withdrawal of a legal representative, USCIS' calculation of processing times, and the Transformation initiative.

Process Integrity

Customer Service: Ensuring Proper Delivery of Notices and Documents

Responsible USCIS Offices: Office of Intake and Document Production, Field Operations and Service Center Operations Directorates, and the Customer Service and Public Engagement Directorate

Every year, USCIS sends millions of notices, decisions, and documents to applicants and petitioners and their attorneys through USPS. Some of these mailings inform individuals of a required next step in the application process for an immigration benefit, such as fingerprinting, an interview, or an RFE. When time sensitive notices are not received, individuals often do not take the required action, and the application or petition may be denied for abandonment. USCIS also mails decision notices and immigration documents, including EADs, Travel Documents, and Permanent Resident Cards, which when not properly delivered can leave individuals without the ability to obtain or renew their driver's licenses, apply for Social Security Numbers, start or continue employment without interruption, or travel outside of the United States. The proper delivery of documents and effectiveness of USCIS' change of address systems are thus critical.

Background

USCIS generally mails notices and documents to the applicant or petitioner and mails courtesy copies to the attorney or accredited representative of record.[485] Notices and documents are mailed to the addresses provided to USCIS on the submitted form unless USCIS is notified of an address change. There is an exception for notices issued to VAWA self-petitioners; these notices are mailed to "safe" addresses.[486]

[485] 8 C.F.R. § 103.2(b)(19).

[486] "Notices of Decisions and Documents Evidencing Lawful Status; Final Rule," 79 Fed. Reg. 64299 (Oct. 29, 2014).

USCIS published a final rule amending its regulations on the issuance of notices and documents on October 29, 2014, which became effective on January 27, 2015.[487] As a result, applicants and petitioners may indicate on the revised Form G-28, *Notice of Entry of Appearance as Attorney or Representative* whether they would like USCIS to mail original notices and documents to their attorney or accredited representative. This has the potential to benefit thousands of represented individuals and employers who may now designate a more permanent address to receive their original notices and documents.

Change of Address. USCIS regulations require most non-U.S. citizens to notify USCIS of a change of address within 10 days of moving.[488] Individuals must submit a completed Form AR-11, *Change of Address* by mail or through USCIS' website.[489] In addition to the Form AR-11, applicants and petitioners must contact USCIS to update the address for each pending matter before the agency by calling NCSC[490] or submitting a service request online.[491] According to USCIS, their systems are updated to reflect new addresses within 5 business days.[492] Stakeholders report, however, that documents or notices are often mailed to a previous address despite the submission of a timely change of address to USCIS.

Secure Mail Initiative. On May 2, 2011, USCIS announced that it completed implementation of the Secure Mail Initiative, under which certain immigration documents are delivered to customers via USPS Priority Mail with Delivery Confirmation.[493] Individuals who receive notification that their Form I-485, *Application to Register Permanent Residence or Adjust Status*; Form I-765, *Application for Employment Authorization*; or Form I-131, *Application for Travel Document* has been approved may now call the NCSC to obtain the tracking number and then monitor delivery status via USPS's website. USCIS recommends that customers wait at least 2 weeks after receiving an approval notice before contacting the NCSC for the tracking number. USCIS has also stated that they are in discussions with USPS on address validation and improving delivery services.

Pre-Paid Mailing Labels. In October 2014, USCIS announced that it would accept pre-paid courier service mailing labels with envelopes submitted with initial filings for advance parole travel documents, re-entry permits, and refugee travel documents filed with the service centers or the NBC. USCIS will also accept pre-paid mailing labels to send approval and denial notices issued by the service centers.[494]

Returned Secure Documents. Between October 1, 2011 and September 19, 2014, USCIS received 141,263 undeliverable notices and Permanent Resident Cards issued in connection with Forms I-485. In addition, USCIS reports receiving

[487] USCIS Webpage, "Final Rule: Notices of Decisions and Documents Evidencing Lawful Status. Effective Jan. 27, 2015" (Jan. 27, 2015); http://www.uscis.gov/news/alerts/final-rule-notices-decisions-and-documents-evidencing-lawful-status-effective-jan-27-2015 (accessed May 18, 2015). *See also* 79 Fed. Reg. at 64305. Through this final rule, which became effective on January 27, 2015, DHS amended its regulations in six major ways:

1) USCIS clarified that it will send notices "only to the applicant or petitioner when…unrepresented." 8 C.F.R. § 103.2(b)(19)(i);
2) USCIS further noted that it will send notices to the applicant or petitioner and to the attorney or accredited representative of record if USCIS was properly notified of the representation by an attorney or accredited representative. 8 C.F.R. § 103.2(b)(19)(ii)(A);
3) USCIS will also send original notices and documents to the attorney or accredited representative if the applicant or petitioner specified such action on a signed Form G-28 with a courtesy copy to the applicant or petitioner. 8 C.F.R. § 103.2(b)(19)(ii)(A);
4) USCIS stated that it will send electronic notifications to the applicant or petitioner and the attorney or accredited representative unless the applicant or petitioner specifically requests to receive correspondence via mail, or if USCIS determines that the issuance of a paper notice or decision is warranted. 8 C.F.R. § 103.2(b)(19)(ii)(B);
5) Unless specifically requested by the applicant or petitioner, USCIS will send the approval notice, or Form I-797, *Notice of Action* with the tear-off I-94, *Arrival-Departure Record* to the applicant's or petitioner's attorney or accredited representative where a signed, current Form G-28 is properly filed. 8 C.F.R. § 103.2(b)(19)(ii)(C);
6) USCIS further stated that it will send Permanent Resident Cards and EADs only to the applicant or petitioner, unless the applicant or petitioner specifically consented for the document to be sent to the attorney or accredited representative. 8 C.F.R. § 103.2(b)(19)(iii).

[488] INA §§ 265 and 266; 8 C.F.R. Part 265.

[489] USCIS Webpage, "Change of Address Information" (Feb. 4, 2014); http://www.uscis.gov/addresschange (accessed Apr. 23, 2015). Service Requests for a change of address can be initiated by either calling the NCSC or completing a request on USCIS' webpage at http://www.uscis.gov/addresschange. Service Requests are sent through USCIS' Service Request Management Tool and routed to the USCIS office of jurisdiction.

[490] The NCSC can be reached at 1-800-375-5283. At the AILA Spring Conference held on April 17, 2015, USCIS noted that 25 to 35 percent of the NCSC call volume involves change of address issues.

[491] USCIS Webpage, "Change of Address;" https://egov.uscis.gov/coa/displayCOAForm.do (accessed Mar. 12, 2015).

[492] Information provided by USCIS (Oct. 2, 2014).

[493] USCIS Webpage, "USCIS Improves Delivery of Immigration Documents through Secure Mail Initiative" (May 2, 2011); http://www.uscis.gov/news/uscis-improves-delivery-immigration-documents-through-secure-mail-initiative (accessed Mar. 10, 2015).

[494] *See* USCIS Webpage, "Clarification: USCIS Customers Can Select Delivery Service to Receive Certain Documents" (Aug. 20, 2014); http://www.uscis.gov/news/alerts/clarification-uscis-customers-can-select-delivery-service-receive-certain-documents (accessed Mar. 11, 2015); USCIS Webpage, "USCIS Service and Office Locator: Use of a Courier Service to Receive Certain Notices, Decisions or Travel Documents; https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=SC (accessed Mar. 10, 2015).

201,865 undeliverable EADs and/or notices for Forms I-765 and I-131 in the same time period.[495]

Despite improvements that USCIS has made to its online change of address system[496] and that undelivered notices and/or documents comprise only a small portion of USCIS' workload, thousands of individuals continue to be affected by mailing issues. Undelivered notices and documents must be re-sent to a new address; in many cases, a new application or petition must be submitted, with new filings fees, to replace the lost document. USCIS incurs costs for storing undelivered notices and documents and for resending them.

On November 6, 2014, representatives from USCIS' Customer Service Public Engagement Division and USPS participated in a panel at the Ombudsman's Annual Conference titled "Change of Address and Mailing Issues: Delivery of USCIS Correspondence and Documents." USCIS observed that the change of address system is complex and that the agency receives approximately 500,000 change of address requests and 250,000 non-delivery inquiries annually via the NCSC and USCIS website. USCIS data for the 3 most recent fiscal years show that the spouses of U.S. citizens, refugees or asylees, and parents of U.S. citizens have been the populations primarily affected by undelivered documents and notices for Form I-485 applications.[497] ***See Figure 5.1,*** *Undelivered Documents and/or Notices by Fiscal Year.*

Identified Issues

The Ombudsman receives a significant number of requests for case assistance due to undelivered or mis-delivered

5.1 Undelivered Documents and/or Notices by Fiscal Year

FORM / BENEFIT TYPE	FY 2012	FY 2013	FY 2014	TOTAL
I-485	52,464	46,892	41,907	141,263
I-765 and I-131	59,610	75,179	67,076	201,865

Source: Information provided by USCIS (Oct. 2, 2014).

5.2 Top Six Class Preferences where the Permanent Resident Card and/or I-485 Notice was Undelivered and/or Destroyed or Not Returned

PREFERENCE CATEGORY	FY 2012	FY 2013	FY 2014	TOTAL
Spouse of a U.S. Citizen – Conditional (CR6)	7,850	6,864	4,874	19,588
Spouse of a U.S. Citizen (IR6)	3,854	3,131	2,060	8,775
Refugees, Asylees, or Cuban/ Haitian Entrants (RE6)	2,655	1,763	1,637	6,055
Parent of a U.S. Citizen (IR0)	1,937	2,289	1,696	5,922
Refugees, Asylees, or Cuban/ Haitian Entrants (RE8)	2,771	1,534	1,468	5,773
Professional holding an advanced degree or of exceptional ability (E26)	1,934	1,852	1,172	4,958

Source: Information provided by USCIS (Oct. 2, 2014).

[495] Information provided by USCIS (Oct. 2, 2014).

[496] *See* USCIS Webpage, "Change of Address" (Feb. 4, 2014); http://www.uscis.gov/addresschange (accessed Apr. 23, 2015).

[497] Information provided by USCIS (Oct. 2, 2014). USCIS' data show that the most returned Permanent Resident Cards are for applicants applying for adjustment of status based on an approved immigrant visa petition filed by a U.S. citizen spouse or parent or an approved refugee or asylee application. USCIS data did not differentiate between I-765/I-131 combination cards and stand-alone documents.

5.3 Summary of Type of Travel Document and/or Notice that was Undelivered and/or Destroyed or Not Returned

TYPE OF TRAVEL DOCUMENT	FY 2012	FY 2013	FY 2014	TOTAL
Reentry Permit	42,254	58,860	51,117	152,051
Permanent Resident Applying for Refugee Travel Document	16,835	15,940	15,203	47,978
Asylee or Refugee Applying for Refugee Travel Document	516	549	742	1,807

Source: Information provided by USCIS (Oct. 2, 2014).

notices and documents. The Ombudsman works to resolve mailing issues that arise after applicants and petitioners have properly updated their addresses with USCIS.

Change of Address. **Many applicants and petitioners are unaware that the submission of Form AR-11 by itself does not update USCIS systems for pending applications or petitions, and that USCIS requires individuals with pending applications or petitions to either call the NCSC or submit a service request online.** USCIS may consider a notice or document mailed to the previous address as properly delivered if an applicant or petitioner only submits Form AR-11 and USPS does not return the notice or document. Applicants and petitioners who do not receive a notice or document sent to a previous address may have to re-file and again pay filing fees to replace the lost document or continue immigration processing.

If a notice or document was delivered to a previous address and a change of address service request was submitted prior to the notice or document production, the applicant or petitioner in most cases must still file a new application to obtain a replacement upon showing that the change of address was submitted to USCIS. In that event, the customer is not required to re-pay the filing fee.[498] USCIS processes applications to replace lost or undelivered documents in the same manner and processing time as the original application.

Delivery of Documents. Even with the Secure Mail Initiative, USPS's website only shows delivery confirmation to a zip code, and not to an address, often leaving applicants and petitioners unable to prove to USCIS that the document or notice was not received. According to USCIS policy, if USPS does not return a document or notice to USCIS, and there has been no change of address submitted, USCIS will consider the notice or document as properly delivered, and the applicant must re-file and again pay the filing fee in order to obtain a replacement document or continue immigration processing.

Case Examples

An applicant submitted a request for case assistance to the Ombudsman in June 2014 after not receiving an EAD. In September 2013, the applicant submitted Form I-765, which was approved in November 2013. After monitoring USCIS' online case status for updates, the applicant's attorney placed four calls to the NCSC because neither the attorney nor the applicant received the EAD. The attorney confirmed the mailing address with USCIS during each of the four calls. The attorney requested the tracking number for the EAD mailing, but USCIS was not able to provide it at the time of the calls. During the fourth call placed in January 2014, USCIS informed the attorney that the EAD was returned to USCIS as undeliverable. In February 2014, the applicant filed a second Form I-765, again paying filing fees. Neither the applicant nor the attorney received the approval notice, which was issued in April 2014 according to the USCIS website. The attorney called the NCSC to confirm the applicant's address and to place a service request. In June 2014, USCIS' online case status website indicated that the post office returned the notice as undeliverable. Despite USCIS having the correct mailing address in its system and refiling, the applicant continued to have problems receiving notices and spent over 12 months waiting for the delivery of the EAD.

Another applicant updated his address with USCIS following entry into the United States and payment of the immigrant visa fee in November 2013. USCIS mailed the Permanent Resident Card to the old address, and USPS returned the card to USCIS as undeliverable in March 2014. USCIS re-mailed the card in July 2014; however, the card was sent to the applicant at an incorrect address in a different state. USCIS was unable to explain the reason this incorrect address was entered as the applicant's mailing address when the card was re-sent. The Permanent Resident Card was eventually mailed to the customer's correct address in that same month.

[498] Information provided by USCIS (Oct. 2, 2014).

In a third example, an applicant's Form I-751, *Petition to Remove* Conditions on Residence was approved in October 2013, but the Permanent Resident Card was returned to USCIS as undeliverable in November. The applicant submitted Form AR-11, made multiple phone calls to the NCSC to verify the mailing address, and attended multiple InfoPass appointments at the local USCIS office to have the Permanent Resident Card re-sent. In August 2014, the applicant submitted a request for case assistance to the Ombudsman. USCIS promptly corrected the applicant's mailing address in its systems and successfully mailed the Permanent Resident Card in September 2014.

Ongoing Plan of Action

The Ombudsman encourages USCIS to expand delivery service using pre-paid mailing labels provided by customers to send Permanent Resident Cards and EADs. The Ombudsman also encourages USCIS to consider the use of USPS delivery with Signature Confirmation. The Ombudsman recognizes that the cost of sending documents via Signature Confirmation is higher than Delivery Confirmation; however, the benefits of having the recipient sign to confirm receipt of important documents may offset the cost of USCIS storing undelivered documents, searching for an updated address, and resending the document to the new address via Delivery Confirmation. Based on feedback received by the Ombudsman, applicants and petitioners may be willing to pay for the additional cost of Signature Confirmation. The Ombudsman will continue to monitor mailing issues and looks forward to additional dialogue with USCIS on delivery and change of address matters.

Issues with USCIS Intake of Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*

Responsible USCIS Offices: Office of Intake and Document Production, and Field Operations and Service Center Operations Directorates

The Ombudsman frequently hears concerns from attorneys that Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative* is not properly recorded when submitted after an application or petition has been filed with USCIS. Similarly, stakeholders bring cases to the Ombudsman's attention where notices of withdrawal of representation are not captured in USCIS systems, and attorneys continue to receive notices as the attorney of record. The Ombudsman discussed issues with rejections of Forms G-28 in the 2014 Annual Report,[499] and USCIS has yet to implement procedures to provide notice to an applicant/petitioner or to the attorney or accredited representative upon rejection of a Form G-28. Failure to properly record the legal representative may prevent individuals and employers from receiving notice of USCIS actions or the delivery of secure documents. It raises concerns pertaining to an individual's right to counsel.

Background

As described in the Ombudsman's 2014 Annual Report to Congress, an applicant or petitioner filing for immigration benefits with USCIS may be represented, at no cost to the government, by an attorney or an accredited representative of a recognized organization.[500] In addition, whenever an examination is required under the regulations, the individual has the right to be represented before USCIS by an attorney or accredited representative.[501] Once an attorney or accredited representative has filed a properly completed Form G-28 on behalf of an applicant or petitioner, USCIS is required to serve documents and notices to the legal representative.[502]

On March 6, 2015, USCIS published a revised Form G-28, which is part of a final rule that became effective on January 27, 2015. The revised Form G-28 includes two new data collection points that allow applicants and petitioners to tell USCIS whether they want to receive their notices and secure documents directly, or whether they want USCIS to send them to their legal representatives.[503] USCIS noted on its website that it will only accept the revised Form G-28 on and after May 18, 2015.[504]

499 *See* Ombudsman's Annual Report 2014, pp. 53-54.

500 8 C.F.R. § 103.2(a)(3); *see* Ombudsman's Annual Report 2014, pp. 53-54.

501 8 C.F.R. § 292.5(b).

502 8 C.F.R. § 292.5(a). A Form G-28 submitted without the required information in Item Numbers 1.-1.a -1.c or 2.a-2.c of the form instructions will be rejected. Instructions for Form G-28 (Rev. 03/04/15). In such instances, USCIS will send original notices and correspondence to the attorney or accredited representative noted on the Form G-28, with a copy to the applicant or petitioner. USCIS Policy Memorandum, *Representation and Appearances and Interview Techniques; Revisions to Adjudicator's Field Manual* (AFM) *Chapters 12 and 15*; AFM *Update AD11-42*, PM-602-0055.1 (May 23, 2012).

503 8 C.F.R. § 103.2(b)(19) (2014).

504 USCIS Webpage, "G-28, Notice of Entry of Appearance as Attorney or Accredited Representative" (May 15, 2015); http://www.uscis.gov/g-28 (accessed May 18, 2015).

In February 2014, the Ombudsman brought to USCIS' attention issues regarding acceptance of Form G-28, and the agency confirmed that it does not notify attorneys when their Forms G-28 have been rejected. In March 2015, USCIS updated the G-28 Filing Tips on USCIS' website to address the new form version.[505] These tips continue to include guidance related to avoiding rejections. USCIS has acknowledged problems with its method for handling Form G-28 rejections, and indicated it has formulated a number of solutions that are being reviewed by agency leadership.

USCIS does not track the number of applications and petitions submitted with a Form G-28. According to USCIS, during a 90-day period, approximately 15-16 percent of filings to the lockbox receipting facilities were submitted with a Form G-28. USCIS further estimated that, of that volume, less than five percent of Forms G-28 were rejected. USCIS Service Center Operations estimates that approximately two-thirds of its direct-filed petitions and applications were submitted with a Form G-28; its primary caseload of employment-based filings tends to be prepared by attorneys. USCIS procedures are to leave the form in the file without sending notice of rejection to the attorney, and the agency does not capture statistics on Form G-28 rejections.[506]

Identified Issue

Stakeholders also have raised issues regarding USCIS processing and pairing of Form G-28 submitted after the initial filing of an application or petition. Additionally, withdrawal of representation while a case is pending with USCIS continues to be a challenge. Until these issues are resolved by an electronic or other dedicated portal for entering and withdrawing as counsel of record, these problems have to be addressed in USCIS mailrooms where correspondence, including a newly filed Form G-28, are connected to a pending case and then captured in USCIS systems. In discussions with the Ombudsman, USCIS urged attorneys submitting Form G-28 subsequent to the filing of an application or petition to include the receipt number with the new attorney notice form. The Ombudsman believes that these issues are operational and unrelated to USCIS policy pertaining to Form G-28 acceptance or withdrawal of representation.

When USCIS fails to record a Form G-28, the attorney does not receive notices and other correspondence from USCIS. Applicants and petitioners may be relying on their attorney to receive secure documents, as well as explain communications from USCIS. Additionally, NCSC and officials at local offices will not provide case status or other information to the attorney because he or she does not appear as the attorney of record, as indicated by the USCIS systems. Attorneys then may request assistance from the Ombudsman or Congressional offices.

Conclusion

While a review of and adherence to mailroom procedures, as well as quality assurance efforts, related to Form G-28 acceptance and withdrawal would help ameliorate this issue, USCIS also could consider an electronic portal or dedicated mailbox specifically for the submission of Forms G-28 and withdrawal of representation. Doing so would help address the difficulties of connecting Forms G-28 submitted as stand-alone correspondence to USCIS service centers with pending cases, help prevent Forms G-28 from getting misplaced or lost among the high volume of service center correspondence, and shorten the time for mailroom processing and data entry of information for the new attorney of record or the withdrawal of representation.

Calculating Processing Times

Responsible USCIS Offices: Office of Performance and Quality and the Customer Service and Public Engagement Directorate

The Ombudsman has previously reported on USCIS processing times and their impact on customer service. Both USCIS and the Ombudsman use the processing times posted on USCIS' website to manage customer inquiries and make decisions that impact customer service.[507] When posted processing times do not accurately reflect actual processing times, those seeking immigration benefits naturally become frustrated, are unable to make personal or professional plans, and make inquiries to USCIS through the NCSC and at InfoPass appointments, as well as seek case assistance from the Ombudsman and Congressional offices. The Ombudsman has brought these concerns to USCIS, and urges the agency to consider new approaches to calculating case processing times that more accurately convey to individuals and employers how long a case will take to be adjudicated and where the case is within the processing queue.

[505] USCIS Webpage, "Filing Your Form G-28;" http://www.uscis.gov/forms/filing-your-form-g-28 (accessed Apr. 27, 2015).
[506] Information provided by USCIS (Mar. 4, 2015).
[507] *See* USCIS Webpage "e-Request;" https://egov.uscis.gov/e-Request/Intro.do?locale=en_US (accessed Jan. 2, 2014).

5.4 Example of USCIS Inventory and Cycle Time Calculation

MONTH	MONTHLY RECEIPTS	MONTHLY COMPLETIONS	END OF THE MONTH PENDING BALANCE	CYCLE TIME (IN MONTHS)
Feb 15	500	500	2,000	4.0
Jan 15	500	750	2,000	4.0
Dec 14	500	500	2,250	4.5
Nov 14	500	250	2,250	4.5
Oct 14	500	500	2,000	4.0

Background

USCIS' Office of Performance and Quality (OPQ) calculates processing time goals, also referred to as "cycle times." The calculation uses the number of cases pending with the responsible USCIS office or service center against the monthly completion rate,[508] rather than real time adjudications data. The calculated processing time provides an estimate of the elapsed time associated with specific types of cases (e.g., Form N-400, *Application for Naturalization* or Form I-485) that are pending with USCIS. Upon publication of the 2007 fee rule, USCIS established new processing time goals.[509]

USCIS calculates the cycle time for a particular application or petition type by subtracting the number of cases received each month from the total number of pending cases. Take for example, a USCIS program with an active inventory of 2,000 cases. If the receipt rate matches the completion rate, e.g., 500 cases are completed each month and 500 cases are received each month, the program would set a 4 month processing time goal. If the completion rate or receipt rate does not equal each other, e.g., the program receives 500 cases and completes 250 cases, the cycle time would change. ***See Figure 5.4*** for an example.[510]

USCIS' website displays charts with the processing time goals for most form types adjudicated at field offices and service centers.[511] If the field office or service center is meeting its processing time goal, the chart will list the processing time in months (e.g., 6 months). If the office has fallen behind its processing time goal, the chart will list the filing date of the last case that the office completed before updating the chart.[512] For example, the USCIS Chicago Field Office lists its processing times for three form types: Form N-400; Form I-485; and Form N-600, *Application for Certificate of Citizenship*. As shown in the chart below, the Chicago Field Office is experiencing processing delays for Forms N-400 and I-485, and lists the date of applications they are currently adjudicating as of February 28, 2015. The Chicago Field Office is meeting or exceeding its processing time goal for Form N-600 applications and, therefore, lists the 5 month processing time goal for this type of application.[513] ***See Figure 5.5,*** *Processing Time Information for Chicago Field Office.*

The posted processing times determine when a customer may file a service request with the NCSC. It also affects when the customer may file a request with the Ombudsman.[514]

In the context of certain concurrent filings, the processing times for each form must be aggregated to determine when USCIS is scheduled to complete the adjudication. For example, the NSC posts a processing time goal for Form I-140, *Immigrant Petition for Alien Worker* and Form I-485. As of April 5, 2015, using data from January 31, 2015, the NSC was adjudicating Form I-140 petitions in 4 months and adjudicating Form I-485 employment-based applications filed before September 16, 2014 (assuming a current priority date). USCIS' website does not make clear that these processing times must be added together before

[508] Information provided by USCIS (Oct. 15, 2014).
[509] "USCIS Fee Schedule; Final Rule," 75 Fed. Reg. 58962 (Sept. 24, 2010).
[510] Information provided by USCIS as an example (Oct. 15, 2014).
[511] USCIS Webpage, "USCIS Processing Time Information;" https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed Apr. 2, 2015).
[512] This date would not, however, account for cases that are considered to fall outside normal processing because they require additional agency review, such as extended background checks or investigations conducted through or on behalf of other agencies.
[513] Information provided by USCIS (Apr. 3, 2015). *See also* USCIS Webpage, "USCIS Processing Time Information;" https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed May 11, 2015).
[514] Ombudsman Webpage, "Frequently Asked Questions" (Jan. 29, 2015); http://www.dhs.gov/cisomb-faqs (accessed May 7, 2015).

5.5 Processing Time Information for Chicago Field Office

FORM	FORM NAME	PROCESSING TIMEFRAME
I-485	Application to Register Permanent Residence or to Adjust Status	April 28, 2014
N-400	Application for Naturalization	September 8, 2014
N-600	Application for Certification of Citizenship	5 Months

Source: USCIS Webpage, "USCIS Processing Time Information" (Feb. 28, 2015).

the adjudication is completed and the applicant receives a final decision for the concurrently-filed I-485 application.[515]

Ongoing concerns

Stakeholders continue to report substantial confusion with USCIS processing times. The Ombudsman brought these concerns to USCIS' attention in April 2014 through an informal recommendation and discussed them in the 2014 Annual Report.[516] Following conversations, USCIS convened a working group to consider new approaches to calculating case processing times. The Ombudsman recently sought to continue discussions with USCIS; however, the agency responded that it will not be making near-term changes, and once Transformation has successfully been accomplished, the electronic process will be used to provide more accurate processing time information to applicants and petitioners.

Conclusion

The Ombudsman continues to urge USCIS to review how it publishes its processing times. Providing processing times which accurately reflect the actual length of adjudications informs customers of factors such as the percentage of applications or petitions completed within the posted processing time and would offer customers more transparency. The USCIS Office of Transformation Coordination (OTC) anticipates improvements in its ability to report accurate processing times but this will not take effect in the near future. Greater clarity is needed into how the agency processes concurrently filed forms and how processing times should be interpreted in these cases. Posting appropriate caveats about concurrent filing and aggregating processing times or the need to calculate additional time where an RFE is issued would assist in managing expectations for those seeking benefits and augment their understanding of why the benefit has not been completed in the posted processing time. In the end, these steps will reduce customer inquiries.

Transformation: Modernizing USCIS Systems, Case Processing, and Customer Service

Responsible USCIS Office: Office of Transformation Coordination

USCIS' effort to reengineer business processes from paper-based adjudications to an electronic environment is known as "Transformation."[517] By March 2015, 1.1 million customers had used available Transformation processes, such as setting up user accounts, paying the immigrant visa fee, filing for immigration benefits, or tracking applications and petitions through the USCIS ELIS.[518] Long before the majority of form types are scheduled to be available through Transformation, however, the agency is significantly re-designing its new system's architecture, and has just temporarily discontinued the electronic filing in USCIS ELIS of Forms I-539, *Application to Extend/ Change Nonimmigrant Status* and I-526, *Immigrant Petition by Alien Entrepreneur*.

Background: Features, Staffing, Costs, and Outreach

The OTC leads the agency's reengineering efforts of its electronic environment. The Ombudsman observes agency work on new developments through USCIS Transformation Program Management Reviews, monthly meetings that

[515] In another example, on its Processing Times Webpage, USCIS published the following announcement pertaining to the DACA program: "Please note that the 90-day period for adjudicating Form I-765 category (c)(33) filed together with Form I-821D, requesting deferred action for childhood arrivals, does not begin until we have made a decision on your request for deferred action." USCIS Webpage, "USCIS Processing Time Information;" https://egov.uscis.gov/cris/processTimesDisplayInit.do (accessed Apr. 21, 2015).

[516] Ombudsman's Annual Report 2014, pp. 49-51.

[517] *See generally* USCIS Webpage, "USCIS ELIS" (Mar. 30, 2015); http://www.uscis.gov/uscis-elis (accessed May 21, 2015).

[518] USCIS Presentation, "Office of Transformation Coordination Program Management Review (PMR)" (Mar. 12, 2015).

review planning activities, execution, and risk management, and include reports on milestones and achievements.

USCIS Electronic Immigration System. In May 2012, USCIS launched the foundational online platform of the new system, the USCIS ELIS.[519] Individuals and employers can access USCIS ELIS and create an account via a web portal that allows account users to check status updates, manage information, and undertake certain filing activity. These activities currently include payment of the immigrant visa fee; filing of Forms I-539, Forms I-526, and Forms I-90; and an online account-based document library for multiple filings by EB-5 immigrant investors. Customers who select to file Forms I-90 by paper are also provided instructions on how to access their new online customer account in USCIS ELIS to access case notices and update features.[520]

Attorney access to USCIS ELIS has been recently expanded. In response to stakeholder requests and the Ombudsman's suggestion in the 2014 Annual Report,[521] USCIS now allows attorneys or accredited representatives with a Form G-28 to submit fee payments on their clients' behalf for Permanent Resident Card filings.[522] By July 2015, USCIS plans to provide a USCIS ELIS process for certain third parties to pay the immigrant visa fee.[523]

Transformation Restructurings. Transformation was initially slated for completion in 2013. The program has, however, experienced numerous delays and cost.[524] The following structural changes have most significantly reshaped USCIS' approach to Transformation:

- Revision of the "marathon" IT development and contract model to more agile "sprints." This approach utilizes incremental validation of program requirements, development, and testing.
- Reevaluation of the USCIS ELIS front-end user experience resulted in new IT "architecture" and a revamping of back-end processing capabilities. The OTC has also reengineered the underlying storage and platform for USCIS ELIS to increase speed and storage capabilities. This reengineered system is referred to as "USCIS ELIS 2."

The estimated total life-cycle costs to implement Transformation were increased in April 2015 from $2.6 billion to $2.9-$3.1 billion, and development is currently expected to be completed in 2018.[525] The development is funded entirely out of the Premium Processing fees charged by the agency.[526]

USCIS Adjudicators' Experience with USCIS ELIS. In a 2014 internal survey, a majority of adjudicators scored USCIS ELIS system-usability in the mid-range. Common feedback included that the system "[m]et most needs with anomalies/slow operations" and "[m]eets some needs with some operations easy/major anomalies." The next biggest number of adjudicators found it was "[n]ot helpful most of the time."[527] The same year, the OTC enhanced USCIS ELIS code and infrastructure in order to improve system speed by more than 200 percent.[528] The OTC continues to send teams to the USCIS service centers where officers perform adjudications using USCIS ELIS to observe the systems in action and, to the extent possible, resolve issues in real-time.

Transformation and Case Status Updates. USCIS ELIS user-based accounts are now providing enrolled customers real-time updates on the status of their applications and petitions, as well as the ability to receive notices and decisions electronically. Applicants can also update appointment and address information. Previously submitted data is automatically populated for new filings.

Outreach. USCIS conducts ongoing outreach to stakeholders related to Transformation. Between June 1, 2014 and March 31, 2015, USCIS hosted 16 engagements on Transformation topics, 10 of which focused on the Form I-90 release and two of which focused on the EB-5 community. These events included demonstrations and

[519] USCIS Webpage, "USCIS Launches Online Immigration System, USCIS ELIS" (May 22, 2012); http://www.uscis.gov/news/uscis-launches-online-immigration-system-uscis-elis (accessed May 21, 2015).

[520] USCIS Webpage, "E-Filing Form I-90 Using USCIS ELIS" (May 14, 2015); http://www.uscis.gov/uscis-elis/e-filing-form-i-90-using-uscis-elis (accessed May 21, 2015). The USCIS Webpage states, "Beginning in **April 2015**, USCIS will process **all** Form I-90 applications in USCIS' Electronic Immigration System (USCIS ELIS). A USCIS online account gives you an opportunity to track the progress of your request electronically, even if you file a paper application. If you filed a paper Form I-90 with USCIS, but do not have an existing USCIS online account, an online account will be automatically created for you. If you filed a paper application, you will receive a **USCIS Account Acceptance Notice** with instructions on how to access your USCIS online account." (Emphasis in original.)

[521] Ombudsman's Annual Report 2014, p. 62.

[522] Information provided by USCIS (Apr. 29, 2015).

[523] Information provided by USCIS (Apr. 30, 2015).

[524] U.S. Government Accountability Report, "USCIS Transformation: Improvements to Performance, Human Capital, and Information Technology Management Needed as Modernization Proceeds," GAO-07-1013R (Jul. 17, 2007); http://www.gao.gov/assets/100/95013.pdf (accessed May 21, 2015); U.S. Government Accountability Report, "Immigration Benefits: Consistent Adherence to DHS's Acquisition Policy Could Help Improve Transformation Program Outcomes," GAO-12-66 (Nov. 2011), pp. 10, 16, 19, 30; http://www.gao.gov/new.items/d1266.pdf (accessed May 21, 2015).

[525] Information provided by USCIS (Apr. 30, 2015).

[526] Information provided by USCIS (Apr. 29, 2015).

[527] Information provided by USCIS (Apr. 28, 2015).

[528] Information provided by USCIS (Apr. 29, 2015).

training for individual customers, attorneys, international student advisors, business groups, and community-based organizations to address general questions on USCIS ELIS processes.[529]

Ongoing Concerns

At the same time these developments have assisted customers, new problems have arisen. Stakeholders have contacted the Ombudsman requesting assistance with resolving account set-up issues. In 2014, USCIS launched an online help form to assist with questions about USCIS ELIS,[530] but this information is not easily accessible to users on USCIS' website.

During the introduction of these first USCIS ELIS product lines, stakeholders have raised concerns regarding functionality and customer service responsiveness. When given the choice, they often choose to submit paper-based applications and petitions, evidently believing that there is limited benefit to filing via USCIS ELIS. Adjudicators have similarly expressed concerns pertaining to system usability.

Customer Usage. As user numbers exceed one million, the vast majority of which are required to use USCIS ELIS to submit the immigrant visa fee, the agency must continue to monitor customer satisfaction with filing on USCIS ELIS and the rate at which new customers opt for this over paper filing for the available benefits. Approximately 15 percent of all USCIS ELIS users participate in polling about their experience on an ongoing basis. As of March 2015, 88.6 percent of this small cross-section of customers reported being "satisfied" with the platform.[531] Ongoing monitoring of the customer usage is needed as USCIS ELIS user demand increases.

A fraction of those filing Forms I-539 and I-526 choose to do so via USCIS ELIS. Since May 2012, the agency received a total of 472,061 Form I-539 filings, of which 20 percent (93,803) were filed through USCIS ELIS.[532] The findings of a 2014 study conducted by USCIS are leading the service to consider the "the advantages and disadvantages to turning off the Form I-539 in USCIS ELIS."[533]

The USCIS ELIS Form I-526 has gained almost no traction in the EB-5 Immigrant Investor community. In FY 2015, as of March 31, 2015, only 77 Forms I-526 petitions have been filed using USCIS ELIS. The OTC stated "lack of awareness" was the cause of the low utilization; due to this low level, the OTC is reviewing and weighing discontinuing this form in USCIS ELIS.[534] Attorneys representing I-526 petitioners have observed that they are not using USCIS ELIS for I-526 filings because the document upload process and restrictions do not easily allow them to organize and logically present the petition to USCIS.

Online Assistance. USCIS has a designated Customer Contact Center and USCIS ELIS Technical Help Desk for USCIS ELIS users.[535] This information is on the USCIS ELIS website, but the Ombudsman could only locate it after a series of clicks that are not intuitive or user-friendly. At a minimum, making this information more prominent would greatly assist users in accessing help for their most common questions and problems.

Stakeholders seek assistance from the Ombudsman to try to resolve USCIS ELIS account initiation and other administrative issues. The Ombudsman has analyzed nearly 200 cases since FY 2014 in which USCIS ELIS customers repeatedly could not resolve failed Lawful Permanent Resident card deliveries. The majority of these cases showed customers had made multiple service requests via NCSC and had waited 6 months to a year for delivery. Individuals reported losing travel, employment, or educational opportunities because they did not timely obtain their cards.

Oversight. In February 2015, the U.S. Government Accountability Office (GAO) designated the Transformation program "high-risk," due to cost overruns, and launched a

[529] Information provided by USCIS (Apr. 30, 2015).

[530] *See* USCIS Webpage, "ELIS Contact Us;" https://egov.uscis.gov/cris/contactus (accessed May 21, 2015).

[531] USCIS Presentation, "Office of Transformation Coordination Program Management Review (PMR)" (Mar. 12, 2015).

[532] Information provided by USCIS (Apr. 29, 2015). This figure represents all Forms I-539 filed with USCIS, including ones that could not be submitted electronically; USCIS ELIS is available for most form-types except customers requesting an extension of T visa or U visa status, which must be filed directly at the VSC.

[533] Information provided by USCIS (Apr. 28, 2015).

[534] Information provided by USCIS (Apr. 29, 2015).

[535] *Id.* USCIS stated that OTC has developed a "Customer Contact Center (CCC) to address USCIS ELIS inquiries. The CCC opened for business on October 7, 2013 …. All the resources located at the CCC are 100 percent dedicated to USCIS ELIS customer inquiries. Staff at the CCC has increased to [18] …. Additionally, [USCIS] acquired a Technical Help Desk (THD) team to address USCIS ELIS technical issues. The [13] ELIS Technical Help Desk (THD) contractors … assist USCIS ELIS customers who call with technical questions."

review of the day-to-day management of the OTC.[536] The GAO report stated:

> [I]t is unclear whether the department is positioned to successfully deliver [Transformation] capabilities. Its key requirements were approved in 2011, but in 2013 they were revised due to risks with the program's approach. Since then, the program has produced a draft requirements document, but it has not yet demonstrated the extent to which it can meet any of the draft document's six key capability requirements using its new system architecture. Further, between July 2011 and September 2014, the program's life-cycle cost estimate increased from approximately $2.1 billion to approximately $2.6 billion.

Conclusion

The Ombudsman continues to track customer feedback on Transformation and to assist customers who are unable to resolve their concerns directly with the Customer Contact Center and the USCIS ELIS Technical Help Desk.

[536] U.S. Government Accountability Report, "High-Risk Series: An Update," GAO-15-290 (Feb. 11, 2015); http://www.gao.gov/assets/670/668415.pdf (accessed May 21, 2015), p. 43.

Appendices

Recommendations Update

Ombudsman Recommendations to Improve the Quality and Consistency in Notices to Appear (NTAs)

Responsible USCIS Offices: Field Operations and Service Center Operations Directorates, Office of Policy and Strategy, and Office of Chief Counsel

As noted in the 2014 Annual Report, the Ombudsman published recommendations titled *Improving the Quality and Consistency in Notices to Appear (NTAs)* on June 11, 2014. On September 30, 2014, USCIS responded to these recommendations.

Background

Under the Immigration and Nationality Act, USCIS, ICE and CBP may each initiate a removal proceeding by preparing and serving Form I-862, *Notice to Appear* on a respondent and the Immigration Court. While statutory and regulatory provisions outline the initiation, nature, and potential outcome of removal proceedings, policy memoranda make clear enforcement priorities; procedures for drafting and reviewing NTAs; and the proper exercise of prosecutorial discretion. In November 2011, USCIS released revised guidance on issuance of NTAs and referral of certain cases to ICE, focusing on DHS-established enforcement priorities, efficiency while enhancing national security, and public safety.[537] In USCIS, a wide range of officials in asylum, field and service center locations may draft and issue NTAs. There is no requirement that these NTAs be reviewed and approved by attorneys in the USCIS Office of the Chief Counsel or in any other DHS legal program. Stakeholder and case assistance feedback indicates that the lack of attorney involvement in USCIS-generated NTAs has led to the issuance of unnecessary and inaccurate charging documents, creating additional work for ICE and hardship to individuals and families. The ensuing inefficiencies also undermine the intent of the 2011 policy guidance of increased efficiency and coordination. The recommendations issued by the Ombudsman were designed to ensure that those placed into removal proceedings receive a full and fair hearing, including proper notice of all charges and a meaningful opportunity to respond.

[537] *See infra* section "Executive Immigration Reform" of this Report for more on the new department-wide enforcement priorities announced by DHS and their implementation through the Priority Enforcement Program.

Recommendations

To improve the quality and consistency of NTAs, and to ensure they are in compliance with DHS and USCIS policies, the Ombudsman recommended that USCIS:

1) Provide additional guidance for NTA issuance with input from ICE and the Executive Office for Immigration Review (EOIR);

2) Require USCIS attorneys to review NTAs prior to their issuance and provide comprehensive legal training; and

3) Create a working group with representation from ICE and EOIR to improve tracking, information-sharing, and coordination of NTA issuance.

USCIS Response to the Ombudsman's Recommendations

On September 30, 2014, USCIS responded to the Ombudsman's recommendations. USCIS stated that it concurred with most of the recommendations and outlined steps it has or will be taking as a result:

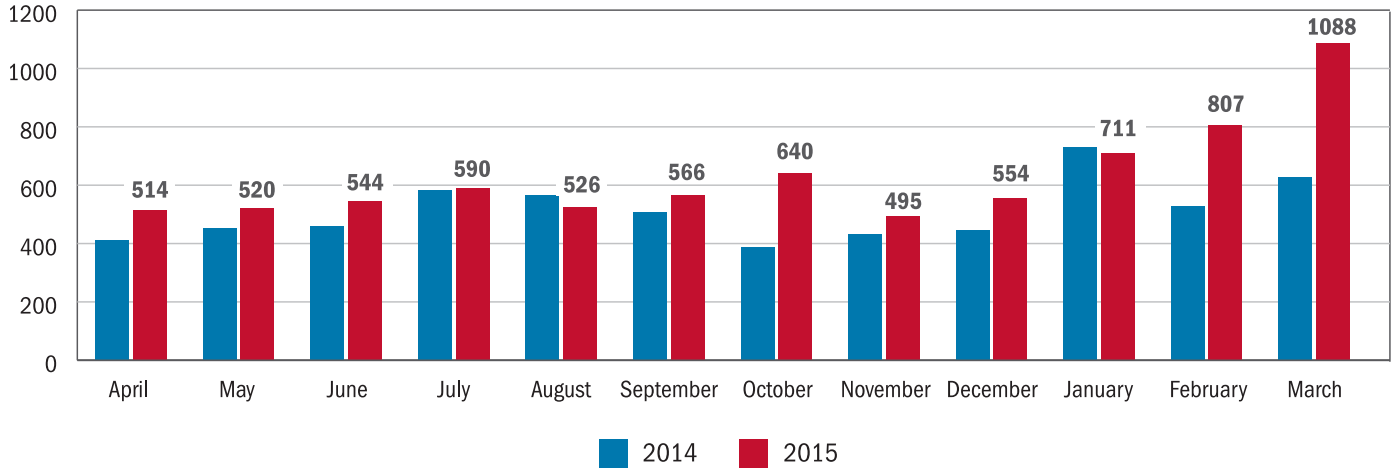
- USCIS sought input from ICE as it reviewed and updated its agency guidance for NTA issuance. This guidance remains under DHS review.

- USCIS updated the NTA section of the Consolidated Handbook of Adjudications Procedures (CHAP) to clarify NTA issuance to P.O. Boxes.
- USCIS stated that the "How to Issue an NTA" training module presentation is available agency-wide and that it is reviewing how to include this training as part of the component's training program.
- USCIS stated that it would create a working group with ICE and EOIR to review the USCIS NTA production statistics captured by various USCIS systems and to recommend solutions to improve the issuance process.

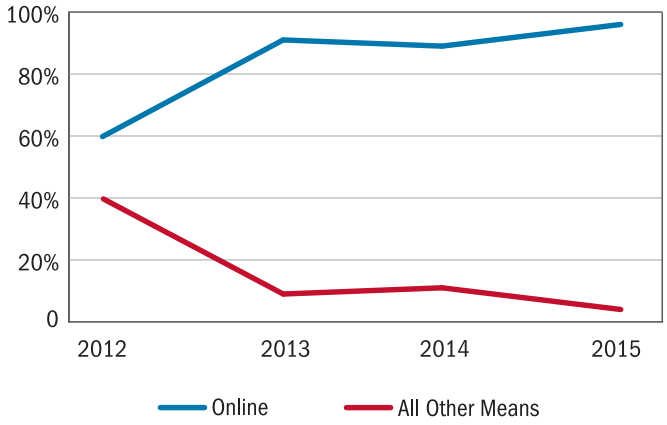
In response to the second recommendation, USCIS stated that it "cannot concur with the recommendation regarding attorney review of all NTAs prior to issuance," but will take the recommendation under advisement.

The Ombudsman by the Numbers

Requests for Case Assistance Received by Month for the 2014 and 2015 Reporting Periods

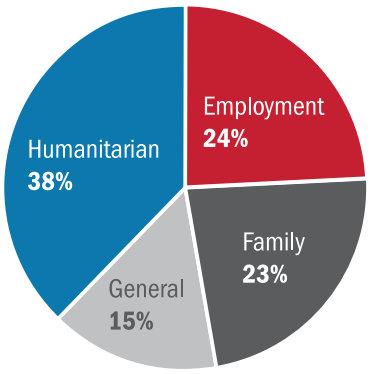


Case Submission Methods



Case Submission by Category

2015 Reporting Period

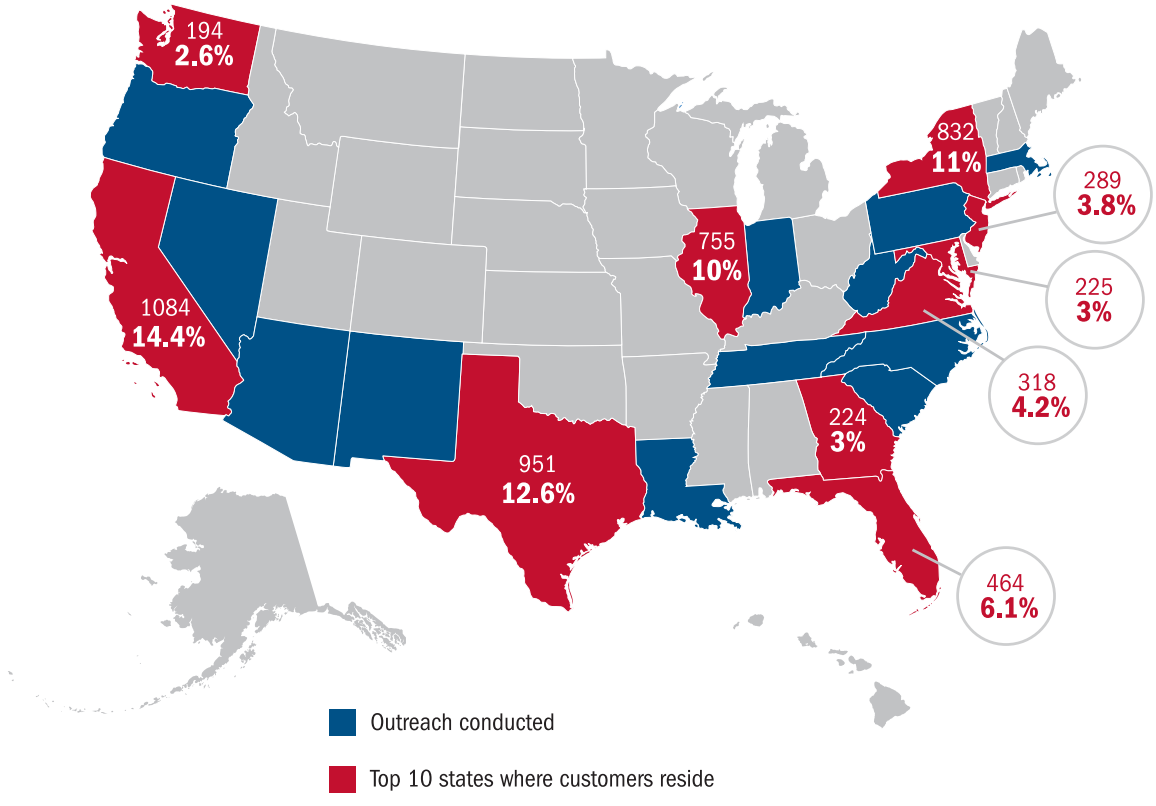


Requests for Case Assistance Comparison for the 2014 and 2015 Reporting Periods Received Regarding Forms I-821D (DACA), I-601, I-601A, and I-765

PRIMARY FORM TYPE	PRIMARY FORM TYPE NAME	2014 REPORTING PERIOD	2015 REPORTING PERIOD	PERCENT INCREASE IN 2015
I-821D*	Consideration of Deferred Action for Childhood Arrivals	924	1,564	69.26%
I-601	Application for Waiver of Grounds of Inadmissibility	90	66	-26.67%
I-601A	Application for Provisional Unlawful Presence Waiver	23	109	373.91%
I-765	Application for Employment Authorization	434	904	108.29%

*Includes initial and renewal DACA applications

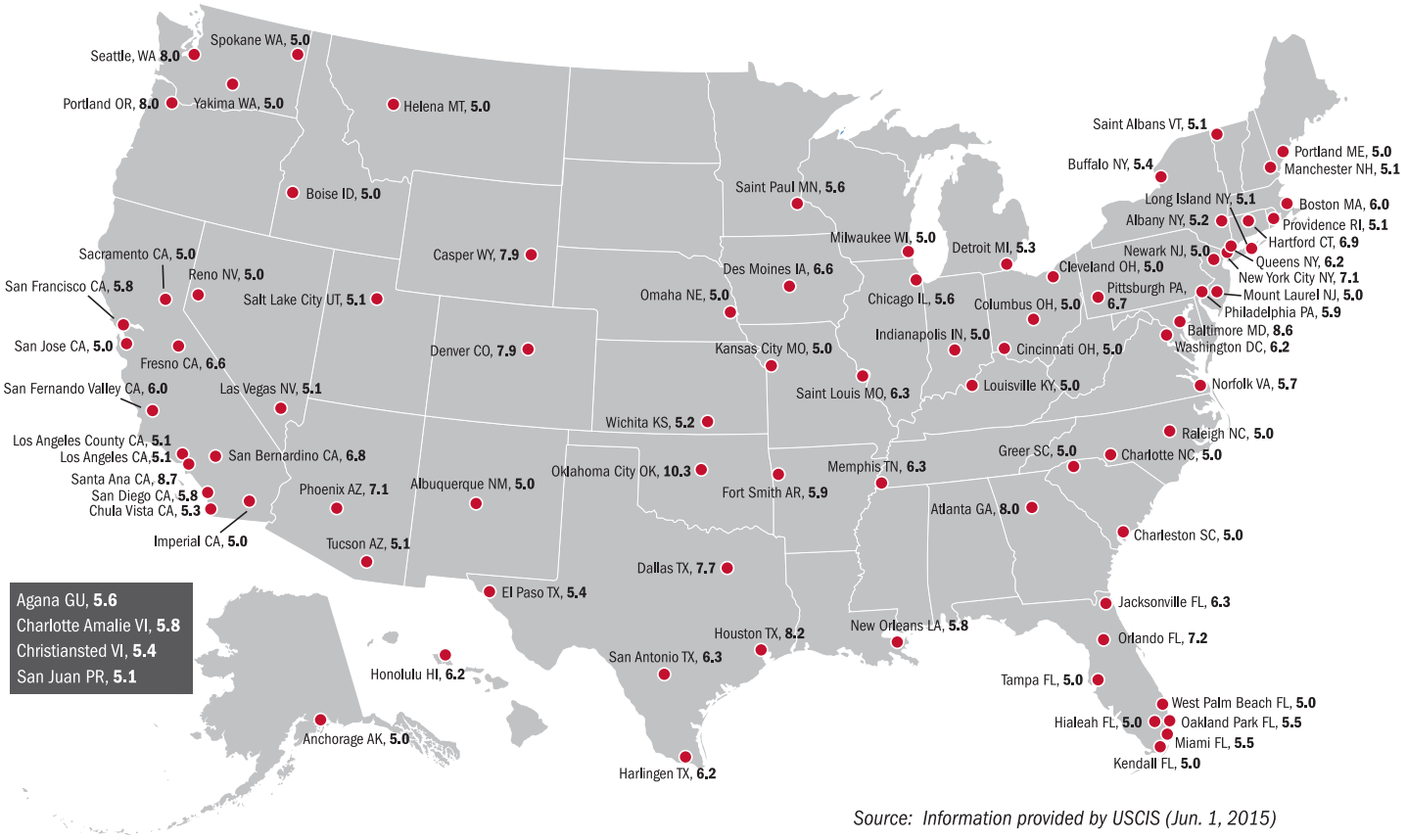
United States Map Highlighting States where Outreach was Conducted and the Top 10 States where Customers Reside*



*Indicates number of cases per state and percentage of case load

6.6 Average Processing Times for USCIS Field Office for Forms N-400, *Application for Naturalization*

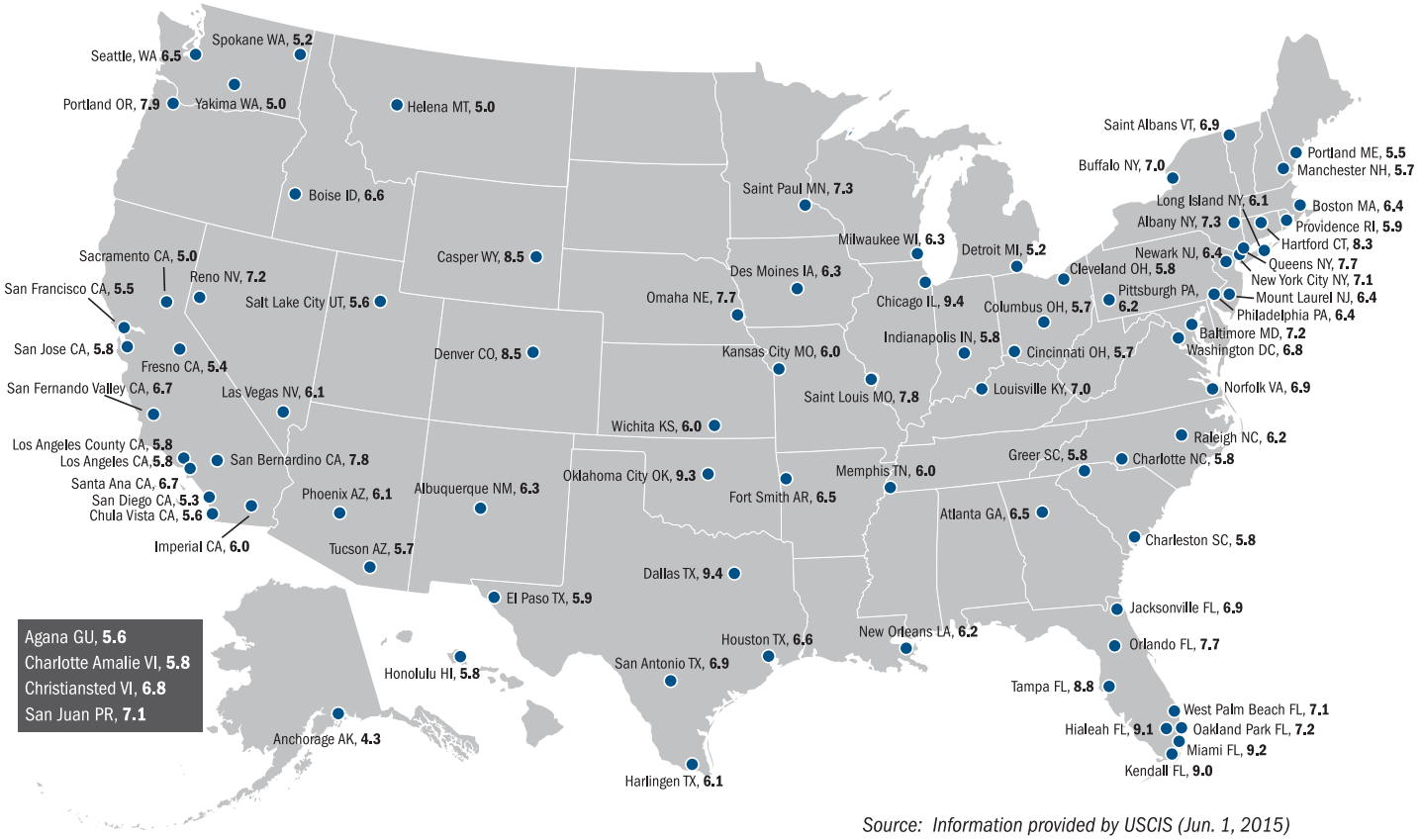
(Oct. 1, 2014 to Mar. 31, 2015)



Source: Information provided by USCIS (Jun. 1, 2015)

6.7 Average Processing Times for USCIS Field Office for Forms I-485, *Application to Register Permanent Residence or Adjust Status*

(Oct. 1, 2014 to Mar. 31, 2015)



Source: Information provided by USCIS (Jun. 1, 2015)

Homeland Security Act—Section 452—Citizenship and Immigration Services Ombudsman

SEC. 452. CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN.

(a) IN GENERAL—Within the Department, there shall be a position of Citizenship and Immigration Services Ombudsman (in this section referred to as the 'Ombudsman'). The Ombudsman shall report directly to the Deputy Secretary. The Ombudsman shall have a background in customer service as well as immigration law.

(b) FUNCTIONS—It shall be the function of the Ombudsman—

1) To assist individuals and employers in resolving problems with the Bureau of Citizenship and Immigration Services;

2) To identify areas in which individuals and employers have problems in dealing with the Bureau of Citizenship and Immigration Services; and

3) To the extent possible, to propose changes in the administrative practices of the Bureau of Citizenship and Immigration Services to mitigate problems identified under paragraph (2).

(c) ANNUAL REPORTS—

1) OBJECTIVES—Not later than June 30 of each calendar year, the Ombudsman shall report to the Committee on the Judiciary of the House of Representatives and the Senate on the objectives of the Office of the Ombudsman for the fiscal year beginning in such calendar year. Any such report shall contain full and substantive analysis, in addition to statistical information, and—

(A) Shall identify the recommendation the Office of the Ombudsman has made on improving services and responsiveness of the Bureau of Citizenship and Immigration Services;

(B) Shall contain a summary of the most pervasive and serious problems encountered by individuals and employers, including a description of the nature of such problems;

(C) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which action has been taken and the result of such action;

(D) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which action remains to be completed and the period during which each item has remained on such inventory;

(E) Shall contain an inventory of the items described in subparagraphs (A) and (B) for which no action has been taken, the period during which each item has remained on such inventory, the reasons for the inaction, and shall identify any official of the Bureau of Citizenship and Immigration Services who is responsible for such inaction;

(F) Shall contain recommendations for such administrative action as may be appropriate to resolve problems encountered by individuals and employers, including problems created by excessive backlogs in the adjudication and processing of immigration benefit petitions and applications; and

(G) Shall include such other information as the Ombudsman may deem advisable.

2) REPORT TO BE SUBMITTED DIRECTLY—Each report required under this subsection shall be provided directly to the committees described in paragraph (1) without any prior comment or amendment from the Secretary, Deputy Secretary, Director of the Bureau of Citizenship and Immigration Services, or any other officer or employee of the Department or the Office of Management and Budget.

(d) OTHER RESPONSIBILITIES—The Ombudsman—

1) shall monitor the coverage and geographic allocation of local offices of the Ombudsman;

2) shall develop guidance to be distributed to all officers and employees of the Bureau of Citizenship and Immigration Services outlining the criteria for referral of inquiries to local offices of the Ombudsman;

3) shall ensure that the local telephone number for each local office of the Ombudsman is published and available to individuals and employers served by the office; and

4) shall meet regularly with the Director of the Bureau of Citizenship and Immigration Services to identify serious service problems and to present recommendations

for such administrative action as may be appropriate to resolve problems encountered by individuals and employers.

(e) PERSONNEL ACTIONS —

1) IN GENERAL—The Ombudsman shall have the responsibility and authority—

(A) To appoint local ombudsmen and make available at least 1 such ombudsman for each State; and

(B) To evaluate and take personnel actions (including dismissal) with respect to any employee of any local office of the Ombudsman.

2) CONSULTATION—The Ombudsman may consult with the appropriate supervisory personnel of the Bureau of Citizenship and Immigration Services in carrying out the Ombudsman's responsibilities under this subsection.

(f) RESPONSIBILITIES OF BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES— The Director of the Bureau of Citizenship and Immigration Services shall establish procedures requiring a formal response to all recommendations submitted to such director by the Ombudsman within 3 months after submission to such director.

(g) OPERATION OF LOCAL OFFICES —

1) IN GENERAL—Each local ombudsman—

(A) shall report to the Ombudsman or the delegate thereof;

(B) may consult with the appropriate supervisory personnel of the Bureau of Citizenship and Immigration Services regarding the daily operation of the local office of such ombudsman;

(C) shall, at the initial meeting with any individual or employer seeking the assistance of such local office, notify such individual or employer that the local offices of the Ombudsman operate independently of any other component of the Department and report directly to Congress through the Ombudsman; and

(D) at the local ombudsman's discretion, may determine not to disclose to the Bureau of Citizenship and Immigration Services contact with, or information provided by, such individual or employer.

(2) MAINTENANCE OF INDEPENDENT COMMUNICATIONS—Each local office of the Ombudsman shall maintain a phone, facsimile, and other means of electronic communication access, and a post office address, that is separate from those maintained by the Bureau of Citizenship and Immigration Services, or any component of the Bureau of Citizenship and Immigration Services.

Requests for Case Assistance: Scope of Assistance Provided to Individuals

The Office of the Citizenship and Immigration Services Ombudsman (Ombudsman's Office), established by the Homeland Security Act of 2002, assists individuals and employers in resolving case problems with U.S. Citizenship and Immigration Services (USCIS). The Ombudsman's Office also reviews USCIS policies and procedures, and recommends changes to mitigate identified problems in USCIS' administrative practices.

Pursuant to this statutory authority, the Ombudsman's Office reviews individual cases to provide assistance by examining facts, reviewing relevant data systems, and analyzing applicable laws, regulations, policies and procedures. After assessing each case in this manner, the Ombudsman's Office may contact USCIS service centers, field offices, and other facilities to request that USCIS engage in remedial actions. If the Ombudsman's Office is unable to assist, it will inform the individual or employer that the matter is outside the scope of the Ombudsman's authority or otherwise does not merit further action.

The Ombudsman's Office is not an appellate body and cannot question USCIS decisions that were made in accordance with applicable procedures and law. Additionally, the Ombudsman's Office does not have the authority to command USCIS to reopen a case, or to reverse any decisions the agency may have made.

The Ombudsman's Office is an office of last resort. Assistance should only be sought when an individual or employer has attempted to obtain redress through all other available means. Prior to requesting the Ombudsman's Office assistance in a particular case, individuals and employers should make reasonable efforts to resolve any issues directly

with USCIS, using mechanisms such as the e-Service Request, National Customer Service Center, and InfoPass.

The jurisdiction of the Ombudsman's Office is limited by statute to problems involving USCIS. The Ombudsman does not have the authority to assist with problems that individuals or employers experience with U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), the U.S. Department of State (DOS), the Executive Office for Immigration Review (EOIR), or the U.S. Department of Labor (DOL). However, it may be possible for the Ombudsman's Office to assist if the application involves both USCIS and another DHS component or government agency.

The Ombudsman's Office provides case assistance to address the following procedural matters:

- Typographic errors in immigration documents
- Cases that are 60 days past normal processing times
- USCIS' failure to schedule biometrics appointments, interviews, naturalization oath ceremonies, or other appointments
- Change of address and mailing issues, including non-delivery of notices of action and/or completed immigration documents (e.g., Employment Authorization Cards, Permanent Resident Cards, etc.), except where USCIS properly mailed the notice or document to the individual's address on file and it was not returned
- Cases where the beneficiary may "age-out" of eligibility for the requested immigration benefit
- Refunds in cases of clear USCIS error
- Lost files and/or file transfer problems

The Ombudsman's Office provides case assistance to address the following substantive matters:

- Clear errors of fact, or gross and obvious misapplication of the relevant law by USCIS in Requests for Evidence, Notices of Intent to Deny, and denials
- Applications and petitions that were improperly rejected by USCIS
- Ongoing, systemic issues that should be subjected to higher level review (e.g., the exercise of discretion, the misapplication of evidentiary standards, USCIS employees failing to comply with its policies, etc.)
- Cases where an individual is in removal proceedings before the Immigration Court and has an application or petition pending before USCIS that may have a bearing on the outcome of removal proceedings
- Certain cases involving U.S. military personnel and their families (e.g., citizenship for military members and dependents; family-based survivor benefits for the immediate relatives of armed forces members, etc.)

Ombudsman Request for Case Assistance Process

Helping Individuals and Employers Resolve Problems with USCIS

Before asking the Ombudsman for help with an application or petition, try to resolve the issue with USCIS by:

- Obtaining information about the case at USCIS My Case Status at **www.uscis.gov.**
- Submitting an e-Request with USCIS online at **https://egov.uscis.gov/e-Request.**
- Contacting the USCIS National Customer Service Center (NCSC) for assistance at **1-800-375-5283**.
- Making an InfoPass appointment to speak directly with a USCIS Immigration Services Officer in a field office at **www.infopass.uscis.gov.**

Option 1
Submit an online request for case assistance available on the Ombudsman's website at **www.dhs.gov/cisombudsman.**

RECOMMENDED PROCESS

Option 2
Download a printable case assistance form (Form DHS-7001) from the Ombudsman's website **www.dhs.gov/cisombudsman.**

Submit a signed case assistance form and supporting documentation by:

Email:
cisombudsman@hq.dhs.gov

Fax:
(202) 357-0042

Mail:
Office of the Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security
Attention: Case Assistance
Mail Stop 0180
Washington, DC 20528-0180

Individuals submitting a request from outside the United States cannot use the online request form and must submit a hard copy case assistance request form.

Request Assistance

If you are unable to resolve your issue with USCIS, you may request assistance from the Ombudsman. Certain types of requests involving refugees, asylees, victims of violence, trafficking, and other crimes must be submitted with a handwritten signature for consent purposes. This can be done using Option 1 to the left and uploading a signed Form DHS-7001 to the online case assistance request.

AFTER RECEIVING A REQUEST FOR CASE ASSISTANCE, THE OMBUDSMAN:

STEP 1
Provides a case submission number to confirm receipt.

STEP 2
Reviews the request for completeness, including signatures and a Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, if submitted by a legal representative.

STEP 3
Assesses the current status of the application or petition, reviews relevant laws and policies, and determines how the Ombudsman can help.

STEP 4
Contacts USCIS field offices, service centers, asylum offices, or other USCIS offices to help resolve difficulties the individual or employer is encountering.

STEP 5
Communicates to the customer the actions taken to help.

Acronyms

AAO Administrative Appeals Office

AC21 American Competitiveness in the 21st Century Act

AFM Adjudicator's Field Manual

AOR Affidavit of Relationship

BIA Board of Immigration Appeals

CAM Central American Minors

CSC California Service Center

DACA Deferred Action for Childhood Arrivals

DAPA Deferred Action for Parents of Americans and Lawful Permanent Residents

DHS U.S. Department of Homeland Security

DOL U.S. Department of Labor

DOJ U.S. Department of Justice

DOS U.S. Department of State

EAD Employment Authorization Document

ELIS Electronic Immigration System

EOIR Executive Office for Immigration Review

ETA Employment and Training Administration

FLETC Federal Law Enforcement Training Center

FY Fiscal Year

GAO U.S. Government Accountability Office

HAB Humanitarian Affairs Branch

HFRP Haitian Family Reunification Parole

HSA Homeland Security Act

HSI Homeland Security Investigations

ICE U.S. Immigration and Customs Enforcement

INA Immigration and Nationality Act

INS Immigration and Naturalization Service

IOM International Organization for Migration

MAVNI Military Accessions Vital to the National Interest

MOU Memorandum of Understanding

NACARA Nicaraguan Adjustment and Central American Relief Act

NBC National Benefits Center

NCSC National Customer Service Center

NOID Notice of Intent to Deny

NRC National Records Center

NSC Nebraska Service Center

NTA Notice to Appear

NVC National Visa Center

OIDP Office of Intake and Document Production

OIG Office of Inspector General

ONPT Outside Normal Processing Time

OOH Occupational Outlook Handbook

OPT Optional Practical Training

OTC Office of Transformation Coordination

PRA Paperwork Reduction Act

PREA Prison Rape Elimination Act

RAIO Refugee, Asylum, and International Operations

RFE Request for Evidence

SAVE Systematic Alien Verification for Entitlements

SIJ Special Immigrant Juveniles

SMI Secure Mail Initiative

SRMT Service Request Management Tool

TPS Temporary Protected Status

TSC Texas Service Center

TVPRA Trafficking Victims Protection Reauthorization Act

UAC Unaccompanied Alien Children

USCIS U.S. Citizenship and Immigration Services

USPS U.S. Postal Service

VAWA Violence Against Women Act

VSC Vermont Service Center

Homeland Security

Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security

Mail Stop 0180
Washington, DC 20528
Telephone: (202) 357-8100
Toll-free: 1-855-882-8100

http://www.dhs.gov/cisombudsman

Send your comments to: **cisombudsman@hq.dhs.gov**