U.S. Department of Homeland Security's Responses
to Senator Flake's and Senator McCain's June 13, 2014 Letter

1. **What were the intended geographic destinations for the family units dropped at the bus stations in Arizona? Were removal proceedings initiated and were these family units issued a notice to appear in immigration court? To date, how many family units have reported to the local ICE officer within 15 days of their arrival at that destination?**

   For one week in June, CBP had transferred 940 adults with children from its Rio Grande Valley Sector to its Tucson Sector, where it had additional capacity to process them. Once in Tucson, the Border Patrol completed intake processing before transferring them to ICE custody. CBP is no longer doing this. The intake processing includes fingerprinting and photographing individuals older than 14 years of age; conducting criminal, national security, and immigration background checks; and assessing whether the individuals have any medical conditions.

   After ICE took custody of these individuals, pursuant to its standard operating procedures, ICE Enforcement and Removal Operations (ERO) Phoenix Field Office personnel reviewed each case and took appropriate enforcement action based on governing law and the agency's national security and public safety enforcement priorities. Individuals who did not remain in custody were notified of the ICE ERO office nearest to the address given as their final destination and received instructions to report to that ICE ERO office within 15 days. ICE ERO also informed these individuals that their immigration cases—including an assessment of any appropriate conditions of release—would be managed by the receiving field office. The receiving offices would be notified of these transfers through internal docket control and management systems used by all ERO offices

   Based on current information, only one of those families dropped off in Arizona indicated that they intended to remain in Arizona. Sixty percent of those adults who were told to report with their families to ICE field offices within 15 days reported within that time, while 40 percent did not. Individuals who do not appear for immigration removal proceedings as required are likely to be ordered removed in absentia. ICE Enforcement and Removal Operations (ERO) will take appropriate enforcement action with respect to these individuals based on its national security, public safety, and border security priorities, including those related to recent arrivals and fugitive aliens.

   As Secretary Johnson has testified, DHS is building additional detention capacity for adults who cross the border illegally in the Rio Grande Valley with their children. For this purpose DHS has established a temporary facility for adults with children on the Federal Law Enforcement Training Center's campus at Artesia, New Mexico. Beginning August 1, the Karnes County Residential Center (Karnes) in Karnes City, Texas will also begin detaining and processing for removal of adults with children apprehended while crossing the southwest border. Given the influx of families illegally migrating from Central America, Karnes was recently converted from an adult detention facility to one suitable for housing adults with children. The establishment of these facilities will allow ICE to increase its capacity to house

and expedite the removal of adults with children in a manner that complies with the law and our values. Artesia and Karnes are among several facilities that DHS will use to increase our capacity to hold and expedite the removal of adults with children illegally crossing the southwest border.

2. **Anecdotal reports suggest that UACs were among the family units dropped at the Phoenix and Tucson bus stations; what processes are followed to ensure that those claiming to be family units actually are family units?**

   Children traveling with their families or legal guardians are not considered unaccompanied children. While ICE had transferred to bus stations adults traveling with children in Arizona, unaccompanied children are not dropped off at bus stations. Rather, they are transferred to HHS custody, as required by law. As part of CBP Border Patrol and ICE ERO intake processes, career law enforcement officers employ interview techniques to gather familial and other background information, and also assess the behavior traits of those they are interviewing to help ensure accurate assessments and determinations.

3. **Are removal proceedings currently being initiated for the wave of UACs from Central America crossing into the U.S. illegally in Texas and are they being given notices to appear in immigration court? If so, what percentage of those crossing illegally this year?**

   Yes. CBP generally issues Notices to Appear (NTAs) in immigration court for all unaccompanied children apprehended at the border.

4. **Are any UACs from Central America currently crossing into the U.S. illegally in Texas being paroled into the U.S.? If so, what percentage of those crossing illegally this year? If so, who makes that decision on a case-by-case basis and for what period of time?**

   As required by law, CBP seeks to transfer all UAC to HHS custody within 72 hours. HHS is required to place the child in the least restrictive setting that is in the best interest of the child.

   DHS's goal is to quickly and safely process unaccompanied children and then transport them from CBP custody to HHS, as the law requires.

5. **Are any UACs from Central America crossing into the U.S. illegally in Texas seeking asylum? If so, what percentage of those crossing illegally this year?**

   Yes, however, the number has been very small. For FY 2014 through June, less than 1 percent of unaccompanied children from Central American countries crossing into the United States illegally in Texas have requested asylum while in CBP custody.

6. **If UACs from Central America crossing into the U.S. illegally are not in removal proceedings, not seeking asylum, and not being paroled, and have not voluntarily departed or been ordered removed, on what basis are they remaining in the U.S.?**

Unaccompanied children apprehended at the border are generally placed into removal proceedings by virtue of the issuance and filing of an NTA. Immigration cases on the non-detained docket may take several years to reach completion. Generally, unaccompanied children should either be in removal proceedings, or have been ordered removed or granted relief.

7. What percent of all those issued notices to appear actually appear in immigration court? What are the repercussions for those who fail to appear?

ICE does not record or statistically report on the number of unaccompanied children who have been issued a NTA and who do not appear for their immigration court proceedings, and defers to the U.S. Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR), which manages the immigration court docket. However, those who do not appear in court may be ordered removed in absentia by an immigration judge, and ICE ERO will take appropriate enforcement action based on its national security, public safety, and border security priorities, including those related to recent arrivals and fugitive aliens.

8. What are the possible and common adjudicatory outcomes for a UAC who is paroled into the U.S., seeking asylum, or has been issued a notice to appear in immigration court and is in removal proceedings? Over the past two years, what percent of UACs annually apprehended have received each of these outcomes? What is the average timeline for these adjudicatory outcomes?

As required by law, unaccompanied children from non-contiguous countries apprehended at the border and sought to be removed by DHS must be placed in standard removal proceedings under section 240 of the Immigration and Nationality Act (INA). USCIS has initial jurisdiction over all asylum applications filed by unaccompanied children. An immigration judge will generally continue the removal proceedings of an unaccompanied child to allow the child to pursue his or her asylum case before the asylum office. An asylum officer may grant asylum or determine an applicant is not eligible for asylum and refer the case back to the immigration court. The unaccompanied child may then renew his or her claim for asylum before the immigration judge. In Fiscal Year (FY) 2013, USCIS granted asylum to 35 percent of the 180 asylum applications from unaccompanied children in removal proceedings that USCIS adjudicated. USCIS referred 117 of the applications back to the immigration court after determining these unaccompanied children were not eligible for asylum status. In FY 2014 through the 3rd quarter, USCIS adjudicated 167 cases and granted asylum to 64.7 percent of the applications and referred 59 cases back to the immigration court after determining these unaccompanied children were not eligible for asylum status. In FY 2014, 74 percent of asylum applications filed with USCIS by unaccompanied children in removal proceedings were filed more than 300 days after apprehension. Unaccompanied children in removal proceedings may also be eligible for other forms of relief, such as special immigrant juvenile status.

With respect to the annual percentage of unaccompanied children who have been ordered removed from the United States or granted asylum by an immigration judge, we refer you to

DOJ EOIR, which manages the immigration court docket and would be best equipped to provide the information you have requested with respect to the average timelines for concluding immigration proceedings in such cases.

9. **Specifically, over the past two years what percent of UACs annually apprehended have voluntarily departed or received final orders of removal? What percentage of those granted voluntary departure, or subject to a final order of removal, has actually left the U.S.?**

ICE has received notification concerning the issuance of final removal orders for 10 unaccompanied children who were apprehended in FY 2012, and has confirmed departure dates[1] for seven. ICE has received notification concerning the issuance of final removal orders for four unaccompanied children who were apprehended in FY 2013, and has confirmed departure dates for three. Please note that most of the children apprehended in these years are still in removal proceedings, which are conducted by the Executive Office for Immigration Review at DOJ.

Regarding those granted voluntary departure, if ICE ERO becomes aware that an unaccompanied child or any other individual did not timely comply with the terms of voluntary departure or his/her final orders, ICE ERO will take appropriate enforcement action based on its national security, public safety, and border security priorities.

In FY 2013, 16,666 unaccompanied children from Mexico were apprehended and granted voluntary return. In FY 2014 through June 25, 11,130 unaccompanied children from Mexico were apprehended and granted voluntary return.

10. **What percentage of those UACs released or discharged this year were released or discharged to immediate family members? What percentage were released to sponsors? Where in the U.S. were UACs released or discharged this year (please provide the specific number of people released to each geographic area in each state)?**

By law, DHS is responsible for transferring unaccompanied children to the Department of Homeland Health and Human Services (HHS). As a result, DHS defer to HHS for this information.

11. **What case load impact will released or discharged UACs have on state and local resources at these locations? Specifically, what are the impacts to state and local health care, indigent services, and child welfare and protective services? Will states have the option to apply for federal financial assistance or reimbursements for costs related to these services?**

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[1] A confirmed departure date is the date an alien is confirmed removed from the United States. Such a date may be verified a number of ways (e.g., an ICE ERO officer either witnessed the departure of the alien by meeting the alien at the airport and seeing the alien board the plane; an ICE ERO officer actually escorted the alien to their country of origin; or, in the case of voluntary departure, their departure is verified by having the consulate official in the country of origin fill out the voluntary departure form and mail it back to ICE, along with a receipt of the airline ticket, bus ticket, etc.).

DHS defers to HHS.

12. What steps are taken to ensure that the UAC remains in the custody of those into whose custody they are released or discharged? What steps are taken to ensure that those to whom the UACs are released or discharged have not been involved in the UAC's illegal crossing?

DHS defers to HHS.

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

Homeland Security

August 25, 2014

The Honorable Robert W. Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte:

Thank you for your June 19, 2014 letter regarding the influx of families and unaccompanied children on the southern border.

I am pleased to report that since our coordinated, government-wide response to this influx began, the numbers of unaccompanied children and adults with children being apprehended along the southwest border have dropped dramatically. The decrease in apprehensions in July and so far in August is good news and reflects a positive trend that we hope continues. However, the numbers are still high and we will continue to work to guard against a reverse trend. Our message continues to be that our border is not open to illegal migration and unless an individual qualifies for some form of humanitarian relief, we will send him or her back consistent with our laws and values.

To address the situation on the southwest border, our strategy has been three-fold: (1) process the increased tide of unaccompanied children through the system as quickly and safely as possible; (2) stem the increased tide of illegal migration into the Rio Grande Valley; and (3) do these things in a manner consistent with our laws and values as Americans. DHS, together with our interagency partners, has already made great progress. To continue to address this situation, the President requested an emergency supplemental appropriation of $3.7 billion, including $1.5 billion for DHS to support additional detention and removal facilities, as well as increased activities to disrupt and dismantle the human smuggling organizations that lure these individuals into the dangerous journey from Central America.

Despite the absence of the critical supplemental funding request thus far, DHS will continue to do everything possible with its available resources to support the government-wide response to this situation. Accordingly, on August 1 DHS notified Congress of its intention to reprogram funds to ensure that U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) operations in this respect could continue through the end of the fiscal year. DHS, with the approval of our appropriations committees, has transferred or reprogrammed $405 million away from other key homeland security priorities to support the

response to the situation on the border. Supplemental funding remains critical to ensure that DHS can continue the significant strides made to date, as described below.

With the help of additional resources, CBP is now efficiently and effectively moving unaccompanied children through CBP processing to the care and custody of the Department of Health and Human Services (HHS) generally within the 72 hours required by law. Given the declining apprehensions over the last several weeks, DHS has been able to ramp down the use of its processing center in Nogales, Arizona. Occupancy in our newly created 1,000-bed processing center in McAllen, Texas has also decreased. HHS has scaled back its expanded use of shelter space provided by the Department of Defense at Lackland, Texas, Ventura, California, and Fort Sill, Oklahoma. However, these facilities remain ready to assist in our efforts as necessary should apprehensions increase.

DHS places unaccompanied children apprehended at the border in removal proceedings. Children retain the right, like adults, to assert a claim of asylum or seek other protections available under our laws. But, unless the child has been granted asylum or some other protection in this country, he or she will be sent back, and we have sought additional resources to do that quickly.

DHS has also built additional detention capacity for adults who cross the border illegally in the Rio Grande Valley with their children, including a temporary facility for adults with children on the Federal Law Enforcement Training Center's campus at Artesia, New Mexico, and the Karnes County Residential Center in Karnes City, Texas. The establishment of these facilities has helped ICE increase its capacity to house and expedite the removal of adults with children in a humane manner that complies with federal law and provides for the safety, security, and medical needs of all occupants. Removals from the Artesia facility of adults with children who recently crossed the border illegally in the Rio Grande Valley began on July 14, while removals from the Karnes facility began on August 11. Meanwhile, we continue to expand use of the Alternatives to Detention program to ensure individuals appear before immigration judges as required for removal proceedings.

We have also made progress in getting out our message that there is no free pass at the end of the dangerous journey. According to reporting and interviews with recent border crossers, smuggling networks had been engaged in deliberative misinformation campaigns that suggested that "permisos" and other legal immigration documents were available to migrants. To counter this misinformation, we have intensified our public awareness campaigns in Spanish, with radio, print, and TV spots, to communicate the dangers of sending unaccompanied children on the long journey from Central America to the United States and of putting children into the hands of criminal smuggling organizations. DHS is also stressing that Deferred Action for Childhood Arrivals (DACA) does not apply to children who arrive in the United States, now or in the future, and that to be considered for DACA, individuals must have continually resided in the United States since June 2007. We have made clear that the "earned path to citizenship" contemplated by the Senate bill passed last year will not apply to individuals who cross the border now or in the future, but only to those who have been in the country for the last two and a half years. We are confident that our message is being heard.

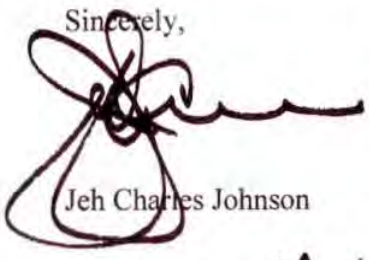
Together with the Department of Justice, ICE has also vigorously pursued the human smuggling organizations that promote and facilitate the flow of migrants across our southern border. ICE has been surging resources for targeted enforcement operations focused on the logistics networks of human smuggling organizations along the southwest border. We are arresting and prosecuting smugglers, and seizing the fruits of their illegal smuggling activity. We are not just targeting these networks in the United States; we are working with ICE Homeland Security Investigations special agents and others in Mexico and Central America to exchange intelligence and information to target smugglers south of the U.S.-Mexico border. These efforts have paid off. On August 6, for example, Guatemalan law enforcement officials, with the assistance of ICE and CBP, arrested seven alleged members of a suspected human smuggling criminal network. These individuals are believed to be key members of a confederation of Central American smuggling organizations who recruit and transport migrants to the United States through Arizona and South Texas.

Our Mexican and Central American partners have responded admirably to calls for assistance. We will continue to engage with these countries on repatriation and reintegration of their citizens, and dedication of their consular resources to this effort. Tackling root causes of this migration is a long-term and interagency project that must involve Congress as well.

I have been personally engaged in keeping Congress updated on the Department's response to the situation on the southwest border—and we will continue to do so. I have directed my staff to be forthright in bringing to me every conceivable, lawful option for consideration to address this problem. In cooperation with the other agencies of our government that are dedicating resources to the effort, with the support of Congress, and in cooperation with the Governments of Mexico and of Central American nations, we are stemming this tide. I also continue to believe that any potential DHS operational or policy changes are no substitute for comprehensive immigration reform passed by Congress. While we continue to support legislative efforts, we remain committed to effective immigration enforcement that prioritizes our national security, border security, and public safety.

Thank you again for your letter and your interest in this important matter. Should you wish to discuss this further, please do not hesitate to contact me.

Sincerely,



Jeh Charles Johnson

See also attached personal note..

Enclosure

cc: The Honorable John Conyers, Jr.

U.S. Department of Homeland Security's Responses to Chairman Goodlatte's June 19, 2014 Letter

EXCERPTS FROM JUNE 19 LETTER:

1. **The number of Special Immigrant Juvenile visa petitions filed in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

2. **The number of Special Immigrant Juvenile visa petitions filed in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry;**

3. **The number of Special Immigrant Juvenile visa petitions approved in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

4. **The number of Special Immigrant Juvenile visa petitions approved in fiscal years 2010, 2011. 2012, 2013 and for each month in fiscal year 2014 (to date) for unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry;**

5. **The number of Special Immigrant Juvenile visa petitions denied in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

6. **The number of Special Immigrant Juvenile visa petitions approved in fiscal years 2010, 2011. 2012, 2013 and for each month in fiscal year 2014 (to date) for unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry;**

RESPONSE TO REQUESTS 1-6:

The following chart shows the receipts and approvals of those with a classification of "Special Immigrant Juvenile" for fiscal years (FY) 2010 to 2014 (through May). Please note that U.S. Citizenship and Immigration Services (USCIS) does not separately track how many Special Immigrant Juvenile petitions are filed by unaccompanied children (UAC) and how many are filed by alien minors who are accompanied by adults. USCIS also does not keep statistics on the citizenship of Special Immigrant Juvenile petitioners or their manner of arrival.

U.S. Citizenship and Immigration Services Petition for Amerasian, Widow(er), or Special Immigrant (I-360) Receipts with a Classification of Special Immigrant Juvenile (C) for Approvals and Receipt for Fiscal Years 2005 to 2014 (May)		
FY	Approval	Receipts
2010	1,590	1,646
2011	1,869	2,226
2012	2,726	2,968
2013	3,432	3,994
2014	2,909	3,439
Grand Total	**12,526**	**14,273**

7. **The number of applications for asylum and withholding of removal filed by or on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry that were denied in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

8. **The number of applications for asylum and withholding of removal filed by or on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry that were granted in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

9. **The number of applications for asylum and withholding of removal filed by or on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry that were denied in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

RESPONSE TO REQUESTS 7-9:

The following tables provide the number of asylum applications filed with USCIS by UAC from contiguous and non-contiguous countries. As defined at 6 U.S.C. § 279(g)(2), "an unaccompanied child is a child who: has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States or no parent or legal guardian in the United States is available to provide care and physical custody." Undocumented immigrant minors who are accompanied by adults who are not their parents or legal guardians may still be UAC under this statutory definition. Pursuant to the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA), with the exception of certain UAC from contiguous countries whom DHS may permit to

withdraw their applications for admission and will be returned to their home country, UAC apprehended at the border are placed in removal proceedings under section 240 of the *Immigration and Nationality Act*. Although these UAC are in removal proceedings before the U.S. Department of Justice (DOJ) Executive Office of Immigration Review (EOIR), the TVPRA gives USCIS initial jurisdiction over asylum applications filed by UAC. When USCIS does not grant asylum to such applicants, their cases are returned to immigration court, where the asylum claim is considered by an immigration judge during the course of removal proceedings.

Unlike asylum applications filed by UAC, USCIS does not have jurisdiction over asylum applications filed by alien minors in removal proceedings who are accompanied by a parent or legal guardian. DHS defers to the DOJ EOIR for information related to the number of asylum applications filed by such individuals with the immigration courts.

Mexican* UACs in Removal Proceedings Filing Pursuant to TVPRA

	FY 2011	FY 2012	FY 2013	FY 2014	Oct	Nov	Dec	Jan	Feb	Mar	April	May	June
Filed	26	31	23	23	3	1	2	3	2	3	3	5	1
Granted	6	8	8	2	1	-	-	-	-	-	-	1	-
Not granted and returned to removal proceedings	7	3	6	2	1	-	-	-	-	-	-	1	-

Non-Mexican UACs in Removal Proceedings Filing Pursuant to TVPRA

	FY 2011	FY 2012	FY 2013	FY 2014	Oct	Nov	Dec	Jan	Feb	Mar	April	May	June
Filed	562	388	705	1,414	104	125	124	127	152	197	204	221	160
Granted	123	120	51	101	1	6	4	8	16	12	14	16	24
Not granted and returned to removal proceedings	151	153	96	59	5	8	10	13	6	2	3	7	5

Source: USCIS Asylum Division, Refugees, Asylum and Parole System (RAPS) reports RACL1433-1434, June 25, 2014.

NOTES: Cases granted or returned to removal proceedings may have been filed in a previous fiscal year. Individuals may have entered the US in previous fiscal years. Does not include uninterviewed returned or administratively closed cases.

*No Canadian UACs in removal proceedings have filed for asylum with USCIS pursuant to the TVPRA.

Report Key	
Filed	The total number of new asylum cases received and reopened.
Granted	The number of cases USCIS approved for asylum status.
Not granted and returned to removal proceedings	The number of cases USCIS interviewed, did not approve and returned to the Immigration Judge.

10. The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);

11. The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally between ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);

RESPONSE TO REQUESTS 10-11:

U.S. Customs and Border Protection (CBP) is responsible for immigration enforcement at and between ports of entry. CBP's Office of Field Operations (OFO) operates at the ports of entry, and CBP Border Patrol operates between the ports of entry.

The following tables provide the number of UAC from contiguous and non-contiguous countries encountered at the ports of entry and apprehended between ports entry. When CBP determines a child meets the definition of a UAC, CBP must process the child in accordance with the TVPRA.

Unaccompanied Alien Children Apprehended at a Port of Entry

	FY 2011	FY 2012	FY 2013	FY 14 to date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun
Contiguous	1199	1693	1484	1086	123	97	125	113	113	170	123	113	109
Non-Contiguous	127	315	932	2256	99	175	172	126	177	247	321	466	473
Total	1326	2008	2416	3342	222	272	297	239	290	417	444	579	582

Note: CBP OFO transitioned to a new processing system in July 2011; hence the data in Fiscal Year 2011 is reflective, but not complete. FY 2010 data is unavailable

Unaccompanied Alien Children Apprehended Between the Ports of Entry

	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 to date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	13615	11713	13943	17219	10112	1550	1363	1057	1209	1359	1820	1754	1438
Non-Contiguous	4796	4236	10460	21540	35387	2636	2987	3274	2504	3495	5367	5958	9166
Total	18411	15949	24403	38759	45499	4186	4350	4331	3713	4854	7187	7712	10604

12. The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);

In answering this question, DHS assumes that you are inquiring about children who are traveling with an adult who represents themselves as their parent or legal guardian. CBP's OFO data systems lack the capability to query in the above manner, as OFO does not input a "family unit" into its SIGMA system. The numbers calculated below are derived by excluding those children deemed to be UAC from the total number of children encountered by CBP at ports of entry. For this calculation, CBP considers the rest of those children encountered at the border to be traveling with adults. These encounters may include children who were initially deemed to be UAC, but later identified as not being accompanied by a legal guardian.

Adults Traveling with Children Apprehended at the Ports of Entry												
	FY 2011	FY 2012	FY 2013	FY 14 to Date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	2,027	3,685	4,589	4823	475	654	723	664	464	640	680	523
Non-Contiguous	1,584	2,999	4,415	4380	394	423	566	442	439	616	684	816
Total	3,611	6,684	9,004	9,203	869	1,077	1,289	1,106	903	1,256	1,364	1,339

13. The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally between ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);

Adults Traveling with Children Apprehended between Ports of Entry													
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 to Date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	11,531	6,190	5,035	3,997	2208	319	271	263	220	219	276	300	340
Non-Contiguous	818	712	1,401	4,482	19861	1035	1286	1590	1053	1620	2935	3380	6,962
Total	12,349	6,902	6,436	8,479	22,069	1,354	1,557	1,853	1,273	1,839	3,211	3,680	7,302

14. The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were granted humanitarian parole;

The TVPRA requires that all UAC whom DHS seeks to remove, excluding those who are eligible to withdraw their application for admission and be returned to their home country under the contiguous country exception of the TVPRA (national or habitual resident of contiguous territory, ability to make an independent decision, no fear of return, and not a victim of trafficking), must be placed in removal proceedings under section 240 of the *Immigration and Nationality Act*. Thus, those UAC are not granted parole, but are placed in removal proceedings and transferred to the Department of Health and Human Services (HHS) as required under the TVPRA.

15. The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were not placed in removal proceedings;

As described above, the TVPRA specifies that if DHS is seeking removal of an unaccompanied child, then the child must generally be processed under the *Immigration and Nationality Act* § 240. The UAC from contiguous countries and who meet the requirements detailed in section 235

of the TVPRA are not processed for removal proceedings, but are allowed to withdraw their application for admission and will be returned to their home country.

CBP has two separate systems of record for tracking UAC. CBP data is sometimes combined as requested. CBP's OFO transitioned to a new system of record in 2011; therefore, data for fiscal year 2010 represents CBP Border Patrol information only.

Unaccompanied Children Apprehended at and between the Ports of Entry processed as other than 240 Removal Proceedings													
	FY 2010*	FY 2011	FY 2012	FY 2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	13034	12,071	14,664	17,598	11857	1603	1387	1107	1238	1400	1895	1782	1445
Non-Contiguous	1	6	7	4	4	0	0	0	0	0	0	2	2
Total	13035	12077	14671	17602	11861	1603	1387	1107	1238	1400	1895	1784	1447

*Note: Border Patrol Data Only

16. The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were granted humanitarian parole;

In answering this question, DHS assumes that you are inquiring about children who are traveling with an adult who represents themselves as their parent or legal guardian. CBP's OFO data systems lack the capability to query in the above manner, as OFO does not input a "family unit" into its SIGMA system. The numbers calculated below are derived by excluding those children deemed to be UAC from the total number of children encountered by CBP at ports of entry. For this calculation, CBP considers the rest of those children encountered at the border to be traveling with adults. These encounters may include children who were initially deemed to be UAC, but later identified as not being accompanied by a legal guardian.

At this time, CBP systems only track information for all paroles in the aggregate. This can include advance paroles (e.g., individuals adjusting status, Cuban parole, and other categories), in addition to humanitarian parole. Adults traveling with children who are encountered at ports of entry are generally not granted parole; rather, adults with children are removed pursuant to INA § 235, or placed in removal proceedings pursuant to INA § 240, as applicable. Adults traveling with children apprehended between the ports of entry are not granted humanitarian parole by CBP.

Adults Traveling with Children Apprehended at Ports of Entry and Granted Humanitarian Parole												
	2011	2012	2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	186	388	591	452	50	52	56	75	51	64	70	34
Non-Contiguous	120	425	1,176	1,533	183	211	234	195	164	177	197	172
Total	306	813	1,767	1,985	233	263	290	270	215	241	267	206

Note: Data reflective of port of entry apprehensions only.

17. The number and percentage of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were granted humanitarian parole and who have not appeared at U.S. Immigration and Customs Enforcement Offices for processing as ordered or have not appeared at scheduled immigration court dates;

UAC are not paroled into the United States by CBP. DHS is required by law to transfer UAC to HHS, which is the agency responsible for determining the placement of UAC. HHS is required to place the child in the least restrictive setting that is in the best interest of the child during the pendency of their removal proceedings. ICE conducts a review to determine appropriate detention and/or parole. At this time, ICE is unable to provide a statistical analysis of those individuals who have not reported to onward ICE offices.

ICE Enforcement and Removal Operations (ERO) works in coordination with HHS to receive case information, including information about placement outcomes and EOIR proceedings. However, DHS's authority is limited to transferring UAC to HHS's custody and care. Once the transfer is effectuated, the sole care and custody responsibility falls under HHS' purview and jurisdiction, while DHS continues to prosecute the immigration case.

ICE does not record or statistically report on the number of UAC who have been issued a Notice to Appear and who have absconded from their immigration court proceedings, and defers to the EOIR with respect to this information. However, those who do not appear in court will likely be ordered removed *in absentia* by the immigration judge and ICE ERO will take appropriate enforcement action based on its national security, public safety, and border security priorities, including those related to recent arrivals and fugitive aliens.

18. The number and percentage of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were placed in removal proceedings and who have not appeared at scheduled immigration court dates;

DHS defers to the DOJ EOIR for this information.

19. The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were not ordered removed through the expedited removal process or otherwise placed in removal proceedings;

When CBP apprehends and processes adults traveling with children who are determined to be a family unit (i.e., parent/legal guardian with at least one foreign born child), generally the disposition of the adult guides the outcome of the case. Therefore, the processing for adults traveling with children apprehended may be reflected in the data system in a variety of ways (e.g., crew member detained, deferred inspection, voluntary return).

Adults Traveling with Children Apprehended at and between Ports of Entry Processed as other than Removal or Expedited Removal													
	FY 2010*	FY 2011	FY 2012	FY 2013	FY 14 to date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	11,414	9,069	7,925	3,683	4,401	519	509	592	652	483	519	621	506
Non-Contiguous	1	1,132	1,990	251	2,247	250	270	339	299	244	278	295	272
Total	11,415	10,201	9,915	3,934	6,648	769	779	931	951	727	797	916	778

*Note: Border Patrol Data Only

20. The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry who were removed in in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date), and;

As described above, the TVPRA specifies that if DHS is seeking removal of an unaccompanied child, then the child must generally be processed under *Immigration and Nationality Act* § 240, with limited exceptions for those who are citizens or habitual residents of a contiguous country. Therefore, CBP does not remove UAC from the United States. Rather, those UAC from contiguous countries and who meet the requirements detailed in section 235 of the TVPRA are allowed to withdraw their application for admission and will be returned to their home country.

Unaccompanied Children Apprehended between Ports of Entry and Returned by CBP Border Patrol													
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	13,080	11,113	13,538	16816	11225	1527	1330	1024	1173	1326	1774	1706	1365
Non-Contiguous	31	34	71	65	86	8	6	8	4	13	9	15	23
Total	13,111	11,147	13,609	16,881	11,311	1,535	1,336	1,032	1,177	1,339	1,783	1,721	1,388
Unaccompanied Children Apprehended at Ports of Entry and Returned by CBP Office of Field Operations													
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	196	1,094	1,608	1324	1043	108	90	128	124	106	158	126	100
Non-Contiguous	126	279	512	1123	2382	110	179	180	158	187	271	325	490
Total	322	1,373	2,120	2,447	3,425	218	269	308	282	293	429	451	590

ICE ERO is generally responsible for the removal of UAC if so ordered by an immigration judge. The following table represents removals of individuals who were UAC when initially transferred to ICE.

Unaccompanied Children Removals														
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 to date	FY 2013 lag*	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	692	699	576	548	284	12	40	38	27	32	37	36	30	32
Non-Contiguous	998	996	1,233	1320	951	21	113	109	117	112	109	159	97	114
Total	1,690	1,695	1,809	1,868	1,235	33	153	147	144	144	146	195	127	146

Please note that beginning in FY 2009, ICE began to "lock" removal statistics on October 5, as the end of a FY and counted only the individuals whose removal or return was already confirmed. Individuals removed or returned in that FY but not confirmed until after October 5 were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE includes the removals and returns confirmed after October 5th into the next FY.

21. The number alien minors accompanied by adults from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry who were removed in in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date), and

Adults Traveling with Children Apprehended between Ports of Entry and Removed by CBP Border Patrol													
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	11,402	6,060	4,879	3,856	2,044	295	258	254	196	205	248	280	308
Non-Contiguous	7	14	172	1,218	4,709	275	323	470	357	356	755	1,054	1,119
Total	11,409	6,074	5,051	5,074	6,753	570	581	724	553	561	1,003	1,334	1,427

CBP OFO data systems lack the capability to query in the above manner.

Adults Traveling with Children Apprehended at or between Ports of Entry and Removed by ICE														
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 to date	FY 2013	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	219	188	172	150	66	2	8	11	7	7	4	7	14	6
Non-Contiguous	123	106	92	95	60	2	5	6	7	8	4	11	9	8
Total	342	294	264	245	126	4	13	17	14	15	8	18	23	14

22. The authorities by which unaccompanied alien minors and alien minors accompanied by adults apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry are being transferred to varying facilities within the interior of the United States. Are localities being notified ahead of the transfer? If not, why not?

The transfer of DHS detainees from one area of responsibility to another is part of the routine detention and removal process. The *Immigration and Nationality Act* and *Homeland Security Act of 2002* vest DHS with the authority to transfer aliens to another State and release those individuals in that State, as opposed to other locations.

Specifically, the *Immigration and Nationality Act* § 241(g) (8 U.S.C. § 1231(g)), states that the Secretary of Homeland Security "…shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." This statute has been interpreted as providing DHS the authority "to transfer aliens from one detention center to another." [*Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995).] The Federal Government has broad discretion to determine how to implement the immigration laws, including the appropriate location for processing aliens, where to transfer them, and whether to release such aliens under an order of supervision.

In addition, with the implementation of the *Homeland Security Act*, the care of UAC was transferred from the former Immigration and Naturalization Service to the Director of the Office of Refugee Resettlement (ORR) of HHS. [*See* 6 U.S.C. § 279(a).] Additionally, the TVPRA requires any department or agency of the Federal Government that has an unaccompanied child in custody to transfer the child to HHS within 72 hours of determining that such child is unaccompanied
[8 U.S.C. § 1232(b)(3)]. Accordingly, DHS is required to transfer UACs to ORR facilities that are located throughout the United States. After ICE transfers custody of an unaccompanied child to ORR, it has no further role with respect to subsequent placement or relocation decisions made by ORR.

Annual Report 2014

Citizenship and Immigration Services
Ombudsman

June 27, 2014

Homeland Security

Annual Report 2014

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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 27, 2014

The Honorable Patrick Leahy
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 Chuck Grassley
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 2014 Annual Report.

I am available to provide additional information upon request.

Sincerely,

Maria M. Odom
Citizenship and Immigration Services Ombudsman

www.dhs.gov/cisombudsman

A Message from the Ombudsman

I am honored to submit the second Annual Report to Congress of my tenure as the Citizenship and Immigration Services Ombudsman. In this Report, we detail USCIS's accomplishments and challenges across the spectrum of family, humanitarian, and employment-based immigration.

Having spent my career in the immigration field, I recognize USCIS's achievements in turning the legacy Immigration and Naturalization Service into the more agile and customer-oriented agency it is today. In the past are years-long processing times for naturalization and green card applications. The addition of the USCIS Lockbox operations and the National Benefits Center have brought about more efficient and reliable intake and filing processes. The days when many immigrants feared approaching the agency for information have been replaced by a commitment to outreach with community relations officers who play a vital role in connecting USCIS to the communities it serves. Indeed, public engagement has become fundamental to the way USCIS conducts its work and is regularly part of developing new policy and initiatives.

USCIS service centers have also demonstrated that the agency can manage high volume, for example by successfully implementing the Deferred Action for Childhood Arrivals program. Their work requires constant adjustment to rising and shifting workloads, while addressing customer inquiries, vetting individuals, and screening for eligibility for immigration benefits.

This year, USCIS promptly and efficiently implemented the U.S. Supreme Court decision in *Windsor*,[1] holding Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. Almost immediately following the June 26, 2013 decision, USCIS began adjudicating immigration benefits submissions filed on behalf of same-sex spouses. USCIS effectively tracked previously filed cases and reopened those that were denied solely because of DOMA. The agency response to *Windsor* shows its capacity to provide world-class service.

USCIS also issued guidance during this reporting period providing parole in place for spouses, children, and parents of active members of the U.S. Armed Forces and other military family members. This long-awaited policy ensures that our military personnel can focus on their readiness, rather than their families' immigration status.

Near the close of this reporting period, USCIS issued needed guidance pertaining to the Provisional Waiver program, an important tool to support family unity that should be expanded to include other immigrant categories in the future. In the same manner as the Windsor response, the agency is to be commended for proactively reopening and re-adjudicating provisional waiver cases impacted by the new policy.

USCIS's efforts to address gaps in policy and improve operations in the EB-5 Immigrant Investor program are noteworthy. Shortly before publication of our 2013 Annual Report, USCIS issued comprehensive new policy guidance. The agency also relocated its adjudications unit to Washington, D.C.; hired a new program office lead, adjudicators, and economists; and re-started stakeholder engagements. The result is a transparent and rejuvenated investment and job creation program, with a focus on customer service and integrity.

As we close another reporting period, however, challenges that USCIS customers currently face still mirror difficulties of decades past. Many of these challenges lie with the USCIS Service Center Operations Directorate, where over 50 percent of USCIS adjudications are performed. Service centers, as well as certain field offices, still struggle with ensuring quality and consistency in adjudications. Overly burdensome and unnecessary Requests for Evidence (RFEs) continue to erode trust in our immigration system, delay adjudications, and diminish confidence in adjudicators' understanding of law and policy. Erroneous template denials and the incorrect application of evidentiary standards cause hardship to individuals and employers.

[1] *United States v. Windsor*, 570 U.S. 12 (2013) (Docket No. 12-307).

Service centers continue to operate under inconsistent local rules that lead to disparities in adjudications. Shifts in production priorities still require more vigilant and strategic planning to avoid significant backlogs in other product lines, such as those that developed this past year in family-based petitions for immediate relatives. Meanwhile, many customers still receive inadequate and vague information about pending cases, and they are unable to rely on posted processing times due to the manner in which the agency calculates them.

In this year's Report, we address ongoing concerns regarding policy and field office adjudications of Special Immigrant Juvenile (SIJ) petitions, which offer immigration relief to children who are found by a state court to be abused, neglected, or abandoned. Many of these SIJ issues were the subject of Ombudsman recommendations in 2011. We also discuss persistent challenges in high skilled adjudications, including RFEs. Again, we include adjudications data (RFE and approval rates) for key nonimmigrant employment categories, and, for the first time, data pertaining to decisions by USCIS's Administrative Appeals Office.

I am hopeful that some of the longstanding issues discussed in this Report will be addressed through USCIS's new Quality Driven Workplace Initiative. The agency has converted employee performance standards from quantitative to qualitative measures, seeking to foster an environment in which quality decisions and customer service are front and center priorities. Over the past decade, USCIS has accomplished much, but the agency must continue to seize every opportunity to fully complete its transformation.

During this reporting period, my office received approximately 6,100 requests for case assistance – over one third more than we received in each of the two previous years. While I welcome the stakeholder recognition of our effectiveness at performing our statutory mission, I also believe this 35 percent increase in our casework underscores the need for USCIS to improve the quality of adjudications and service delivery across all product lines.

In August 2013, I became Chair of the Department of Homeland Security's Blue Campaign, the unified voice for DHS's efforts to combat human trafficking. Working in collaboration with law enforcement, government, non-governmental, and private organizations, the Campaign strives to protect the basic right of freedom. I am very proud of the work of my colleagues in the Department and across the entire U.S. government to combat the heinous crime of modern day slavery, and I thank the many Members of Congress who are working arduously to make our communities safe, especially our youth, from those who exploit humans as a commodity.

Today's immigrants, like those who came before them, dream that the future will be better in America for their children and their grandchildren. Whether they are fleeing persecution, throwing off the shackles of human trafficking, reuniting with family, or hoping to start a new business, immigration is essential to and enriches our country.

I want to thank Secretary of Homeland Security Jeh Johnson, Deputy Secretary Alejandro Mayorkas, and USCIS Acting Director Lori Scialabba for their support and continued collaboration. I am privileged to play a role in helping to make the U.S. immigration system more efficient, responsive, and just.

Sincerely,

Maria M. Odom
Citizenship and Immigration Services Ombudsman

Executive Summary

Executive Summary

The Office of the Citizenship and Immigration Services Ombudsman's (Ombudsman) 2014 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

The Ombudsman, established by the Homeland Security Act of 2002, assists individuals and employers in resolving problems with USCIS. Ombudsman policy and casework is carried out by fewer than 30 full-time professionals with wide-ranging skills and areas of subject matter expertise in immigration law.

From April 1, 2013 to March 31, 2014, the Ombudsman received 6,135 requests for case assistance, an increase of over 35 percent from the 2013 reporting period. Approximately 89 percent of requests during the reporting period were received through the Ombudsman's Online Case Assistance system. Overall, 34 percent of requests were for humanitarian-based matters; 27 percent for family-based matters; 23 percent for employment-based matters, and 16 percent for general-immigration matters (such as applications for naturalization). In 70 percent of case assistance requests submitted to the Ombudsman, individuals and employers first contacted USCIS's National Customer Service Center, and 28 percent appeared at InfoPass appointments at a USCIS local field office in an effort to resolve the matter directly with the agency. The Ombudsman is committed to reviewing all incoming requests for case assistance within 30 days and taking action to resolve 90 percent of requests within 90 days.

This year, the Ombudsman visited communities and stakeholders in regions across the United States. Despite the lapse in federal government funding, which ceased office operations for over two weeks in October 2013, the Ombudsman held its third Annual Conference on October 24, 2013. The conference featured an update on immigration reform legislative developments from the White House Domestic Policy Council's Senior Policy Director for Immigration; a plenary panel on approaches and lessons learned from large-scale legal services responses; and panel discussions on challenges in high-skilled immigration, credible fear screenings, and waivers of inadmissibility, among other issues. Through in-person engagements and teleconferences, the Ombudsman reached thousands of stakeholders. During the first two quarters of Fiscal Year (FY) 2014, the Ombudsman conducted 60 outreach activities and is on pace to complete over 150 for the year. The Ombudsman also recently revised its website content to clarify the office's scope of case assistance and provide Frequently Asked Questions and tips to assist individuals and employers when filing requests for case assistance with the office.

On March 24, 2014, the Ombudsman issued recommendations titled *Employment Eligibility for Derivatives of Conrad State 30 Program Physicians*, which seek to ensure that spouses of foreign medical doctors accepted into the Conrad State 30 program are able to obtain employment authorization. On June 11, 2014, the Ombudsman issued recommendations titled *Improving the Quality and Consistency in Notices to Appear*, which is the charging document that initiates removal proceedings. Additionally, the Ombudsman identified five systemic issues that were brought to USCIS's attention through briefing papers and meetings with agency leadership:

- Special Immigrant Juvenile adjudications;
- USCIS processing times;
- Agency responses to service requests submitted through the Service Request Management Tool;
- USCIS policy and practice in accepting Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, and
- Challenges in the process for payment of the Immigrant Visa Fee using USCIS's Electronic Immigration System (ELIS).

The Ombudsman worked to promote interagency liaison through interagency meetings including:

- Monthly meetings with the U.S Department of State (DOS) and USCIS on the visa queues aimed at ensuring the transparent, orderly, and predictable movement of Visa Bulletin cut-off dates; and
- 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 other DHS systems used to verify immigration status and benefits eligibility.

Additionally, since August 2013, Ombudsman Odom has served as the Chair of the Blue Campaign Steering Committee (Blue Campaign), which is the unified voice for DHS's efforts to combat human trafficking. Working in collaboration with law enforcement, government, non-governmental and private organizations, the Blue Campaign provides information on training and outreach, how traffickers operate, and victim assistance. Since September 2013, Ombudsman Odom also has served as Acting Co-Chair of the DHS Council for Combating Violence Against Women.

Key Developments and Areas of Study

Families and Children

Provisional and Other Immigrant Waivers of Inadmissibility

The Provisional Unlawful Presence Waiver program holds out the promise of an effective solution to a longstanding challenge in family immigration. In 2012, USCIS consolidated Form I-601, *Application for Waiver of Grounds of Inadmissibility* waiver adjudications in one USCIS service center rather than allowing adjudications to continue at a number of USCIS offices overseas. In 2013, USCIS sought to further address the difficulties of the overseas waiver process by implementing a stateside provisional waiver for immediate relatives of U.S. citizens who are required to travel abroad to complete the immigration visa process at a DOS consulate abroad. In January 2014, USCIS issued new guidance crucial to ensuring the success of the Provisional Waiver program. While this guidance addresses the most pressing stakeholder concerns, other aspects of the provisional waiver process remain problematic, such as denials where USCIS found the applicant inadmissible for fraud or a willful misrepresentation without a full examination of the information contained in the record or without first affording the applicant the opportunity to respond. There is no appeal available for a denial of a provisional waiver.

Special Immigrant Juveniles

The Ombudsman is concerned with USCIS's interpretation and application of its Special Immigration Juvenile (SIJ) "consent" authority. This interpretation has led to unduly burdensome and unnecessary Requests for Evidence (RFEs) for information concerning underlying state court orders, and in some cases, unwarranted denials. Other issues reported to the Ombudsman include USCIS questioning state court jurisdiction, concerns with age-outs and decisions for individuals nearing age 21, and inconsistent child appropriate interviewing techniques. The Ombudsman has brought these issues to USCIS's attention and in this Report presents initial recommendations calling for clarification of policy and centralized SIJ adjudications to improve consistency.

The Deferred Action for Childhood Arrivals Program

Nearly two years since the start of the Deferred Action for Childhood Arrivals (DACA) program, USCIS has approved more than 560,000 applications for individuals who were brought to the United States as children. Through this program, thousands of young people now have the ability to continue their education and work lawfully in the United States. Despite the successful program launch, DACA represents approximately 15 percent of the requests for case assistance received by the Ombudsman during this reporting period. Many of these cases are pending past USCIS's six-month processing goal due to background checks and issuance of RFEs. In other case assistance requests submitted to the Ombudsman, USCIS issued template denials that provide limited information as to the basis for denial; inconsistent with agency policy, some of these denials were issued without USCIS first issuing an RFE or Notice of Intent to Deny. As the renewal process for DACA benefits begins in summer 2014, the Ombudsman will continue to engage with stakeholders and USCIS to resolve long-pending cases and address any future issues.

Employment

Highly Skilled Workers: Longstanding Issues with H-1B and L-1 Policy and Adjudications

Stakeholders continue to report concerns regarding the quality and consistency of adjudications of high-skilled petitions. There are ongoing issues with the application of the preponderance of the evidence legal standard and gaps in agency policy. Stakeholders cite redundant and unduly burdensome RFEs, and data reveal an RFE rate of nearly 50 percent in one key high-skilled visa category. Employers continue to seek the Ombudsman's assistance to resolve case matters and systemic issues in high-skilled adjudications.

The H-2 Temporary Worker Programs

Stakeholders are increasingly turning to the Ombudsman for case assistance related to the H-2 temporary worker programs. During this reporting period, the Ombudsman received an increase in requests for case assistance, most submitted by small and medium-sized businesses petitioning for multiple workers, with some requesting 100 or more foreign nationals to fill their temporary labor needs. Stakeholders report receiving RFEs for petitions that were approved in prior years for the same employer with identical temporary need and in the same sector. In May 2014, the Ombudsman hosted an interagency meeting with the U.S. Department of Labor, DOS and DHS to review the entire H-2 process and begin to address these concerns.

The EB-5 Immigrant Investor Program

The Immigrant Investor program has presented USCIS with significant challenges due to many variables, including the complexity of projects, the financial arrangements with investors, and the attribution of job creation to the investment. In April 2013, USCIS relocated adjudications to Washington, D.C. and issued new guidance addressing several longstanding stakeholder concerns. While stakeholders continued to raise concerns with adjudication delays, the Ombudsman received fewer requests for case assistance (61 requests) than in the 2013 reporting period (441 requests). The new adjudications unit and updated policy guidance usher in a new era for this increasingly popular investment and job-creating program.

Humanitarian

DHS Initiatives for Victims of Abuse, Trafficking, and Other Crimes

DHS and USCIS initiatives support vital immigration protections for victims of trafficking and other violent crimes. Starting in 2013, Ombudsman Odom became Chair of the Blue Campaign Steering Committee and Acting Co-Chair of the DHS Council on Combating Violence Against Women. Working alongside USCIS, other DHS components, law enforcement, and community partners, the Blue Campaign and the Council helped advance the Department's commitment to increasing awareness of human trafficking and strengthening humanitarian programs and relief.

USCIS Processing of Immigration Benefits for Victims of Domestic Violence, Trafficking, Sexual Assault, and Other Violent Crimes

USCIS continues to devote attention to improve services for victims eligible for immigration benefits. This year USCIS made improvements in processing times for VAWA self-petitioners, U status petitioners, and T status applicants. The DHS Deputy Secretary committed to continuing to address processing times for these benefit categories, and stakeholders have emphasized the importance of providing interim employment authorization where USCIS does not meet the 180-day processing time goal. Stakeholders also continue to raise concerns about RFEs in the adjudication of these humanitarian benefits. For example, VAWA self-petitioners and applicants for conditional residence waivers due to battery or extreme cruelty report receiving RFEs that seek the type of documentation used to prove a good faith marriage in non-VAWA family-based cases (e.g., original marriage certificates, original joint bank account statements, etc.). RFEs increase processing times and may require additional attention from legal service providers, diminishing their capacity to assist victims. As USCIS trains new officers in the Vermont Service Center VAWA Unit, the Ombudsman will continue to monitor the quality of RFEs.

Increases in Credible and Reasonable Fear Requests and the Effect on Affirmative Asylum Processing

Within the past three years, there has been a significant increase in the number of foreign nationals, many of them recent arrivals at the U.S. southern border, expressing fear of returning to their home countries and triggering credible and reasonable fear interview referrals to USCIS from CBP and ICE. USCIS has shifted resources, made new hires, and updated agency guidance to address the rising number of credible and reasonable fear claims. Despite these efforts, the seven-fold increase in credible fear claims – a product of a confluence of factors including regional violence and economic conditions in Mexico, El Salvador, Honduras, and Guatemala – has resulted in lengthy delays for affirmative asylum processing and a significant increase in asylum case referrals to the Immigration Courts.

Humanitarian Reinstatement and Immigration and Nationality Act Section 204(l) Reinstatement

Humanitarian reinstatement is a regulatory process under which family-based beneficiaries whose approved petitions are revoked automatically upon the death of the petitioner may continue to seek immigration benefits if certain factors are established. There is also a streamlined reinstatement process, covered under Immigration and Nationality Act (INA) section 204(l), for certain surviving relatives who are in the United States and had an approved petition at the time of the qualifying relative's death. Gaps in guidance, lack of uniform procedures, and imprecise evidentiary requirements from USCIS in the handling of humanitarian and INA section 204(l) reinstatement cases are inconsistent with the remedial and humanitarian nature of this relief.

Interagency, Process Integrity, and Customer Service

USCIS Processing Times and their Impact on Customer Service

Individuals and employers seeking immigration benefits set expectations based on processing times, and they have important customer service impacts. USCIS call centers will not initiate service requests with USCIS local offices and service centers to check case status until cases are outside posted processing times. Similarly, in FY 2014, the Ombudsman instituted a new policy not to accept requests for case assistance, absent urgent circumstances, until cases have been pending 60 days past USCIS posted processing times. Stakeholders have raised concerns regarding USCIS processing time accuracy, the method by which they are calculated, and the timeliness with which they are posted. The Ombudsman urges USCIS to consider new approaches to calculating case processing times.

USCIS Customer Service: Ensuring Meaningful Responses to Service Requests

USCIS generates "service requests" through the Service Request Management Tool based on inquiries from individuals and employers, which are transferred to the USCIS facility where the matter is pending. USCIS service centers and local offices then respond, often with general templates that provide little information other than the case remains pending. In these circumstances, stakeholders find it necessary to make repeat requests, schedule InfoPass appointments at USCIS local offices, or submit requests for case assistance to Congressional offices and the Ombudsman. These repeat requests increase the overall volume of calls and visits to USCIS – amplifying the level of frustration customers experience and costing the agency, as well as individuals and employers, both time and money. Unhelpful responses to USCIS service requests continue to be a pervasive and serious problem.

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

USCIS is not issuing notice to attorneys or accredited representatives when it rejects Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*. The rejection of a notice of appearance, without any notification to the submitting attorney or accredited representative, raises concerns pertaining to the fundamental right to counsel. It also creates practical difficulties when the attorney or accredited representative is not notified of USCIS actions, and is, therefore, unable to inform the client of or advise on how to respond to agency actions, including interview notices, RFEs, and denials. USCIS has acknowledged problems with its current method for handling Form G-28 rejections. The agency indicated that it has formulated a number of solutions that are being reviewed by agency leadership.

Fee Waiver Processing Issues

Fee waivers are important to vulnerable segments of the immigrant community, including elderly, indigent, or disabled applicants. This year's Report provides an update of issues described in the Ombudsman's 2013 Annual Report, including improvements made by USCIS. The Report also summarizes stakeholder reports of continued problems that affect certain aspects of fee waiver processing, including inconsistencies in guidance and the application of fee waiver standards. USCIS has rapidly sought to resolve individual cases the Ombudsman has brought to the agency's attention, but systemic issues remain and require a review of guidance and form instructions, as well as agency intake procedures.

USCIS Administrative Appeals Office: Ensuring Autonomy, Transparency, and Timeliness to Enhance the Integrity of Administrative Appeals

In the 2013 Annual Report, the Ombudsman discussed issues pertaining to the Administrative Appeals Office (AAO), including a lack of transparency regarding AAO policies and procedures, and challenges for *pro se* individuals who seek information in plain English about the administrative appeals process. Over the past year, USCIS eliminated lengthy processing times once cases reach the AAO and revised its website content. However, stakeholders still report issues stemming from the manner in which the AAO receives, reviews, and decides appeals. Of particular concern is the need for an AAO practice manual; the absence of any up-to-date statutory or regulatory standard for AAO operations; the AAO's lack of direct authority to designate precedent decisions; and the length of time for cases to be transferred to the AAO from USCIS service centers and field offices for review, and vice versa for remand. In this Report, the Ombudsman publishes AAO data, provided by USCIS, for select form types. The Ombudsman will further evaluate and discuss this data with USCIS in the coming year to better understand the disparities in the AAO sustain and dismissal rates among immigration benefit types.

Data Quality and its Impact on those Seeking Immigration and Other Benefits

Individuals report issues with the USCIS SAVE program verifying a foreign national's immigration status with a benefit-granting agency, such as a state driver's license office or a local Social Security Administration (SSA) office. SAVE uses data from DHS, DOS, the U.S. Department of Justice and other agencies to verify an individual's immigration status, usually at the time the individual is applying for a state or local benefit. USCIS has taken steps to resolve certain quality issues and improve customer service but problems persist. In April 2013, the Ombudsman convened an interagency working group, the Data Quality Forum, to focus on issues pertaining to DHS data sharing and integrity. While communication and new working relationships have developed as a result of this forum, data sharing challenges remain and addressing them will require a renewed commitment on the part of participating offices.

Problems with Payment of the Immigrant Visa Fee via ELIS

In May 2013, USCIS began requiring that immigrant visa recipients use USCIS's Electronic Immigration System (ELIS) to pay the $165 fee to cover the cost of producing their Permanent Resident Cards. Electronic payment of this fee is problematic for a variety of reasons: 1) computer access is required in order to make the payment, and USCIS has not specified any alternative method for payment; 2) the visa recipient must create an ELIS account in order to make the payment, with no provision for payment by an attorney or other authorized representative; 3) the need for a credit card or a bank account makes payment impossible for some visa applicants; and 4) the account registration process, which requires the user to answer a series of questions, is available only in English. USCIS is consulting with counsel and privacy authorities to develop a payment option for representatives of the visa recipient.

Table of Contents

Ombudsman's Office Overview

The Office of the Citizenship and Immigration Services Ombudsman's (Ombudsman)[1] mission 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 U.S. 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. ***See Appendix 2:*** *U.S. Department of Homeland Security Organizational Chart.*
- **Impartial.** The Ombudsman works in a neutral, impartial manner to improve the delivery of immigration benefits and services.
- **Confidential.** Individuals, employers, and their legal representatives 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 assistance and requesting 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's attention for resolution; and
- Facilitating interagency collaboration and conducting outreach to a wide range of public and private stakeholders.

As of the date of this Report, the Ombudsman has fewer than 30 full-time employees with diverse backgrounds and areas of subject matter expertise in immigration law and policy. These individuals include attorneys who previously worked for non-governmental organizations representing families and vulnerable populations; private sector business immigration experts; and former USCIS, U.S. Department of Labor, and U.S. Department of State (DOS) adjudicators and staff.

Since Fiscal Year (FY) 2011, the Ombudsman's budget has been reduced by more than $900,000[3]; at the same time requests for case assistance have significantly risen. The office has reached this lower funding level through attrition, as well as cuts to travel, training and contracts. The Ombudsman has benefited from the DHS Rotational Program with individuals coming to the office for temporary assignments to assist with casework, fielding general inquiries from the public, and redesigning the Ombudsman's website. The President's FY 2015 Budget request to Congress for DHS sought to return the office to its prior funding level. The Ombudsman is pleased that the FY 2015 budget request reaffirms its mission and work.

Requests for Case Assistance

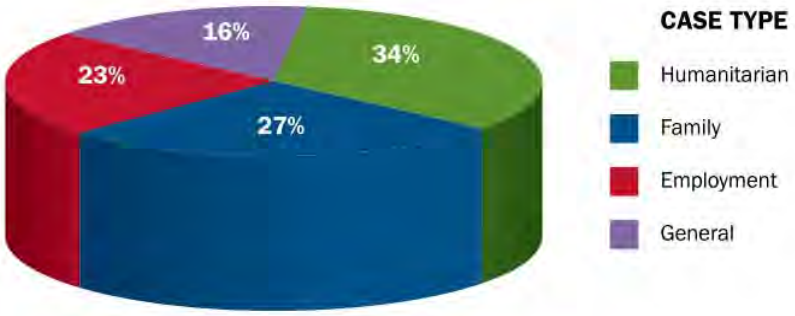
In the 2014 reporting period (April 1, 2013 - March 31, 2014), the Ombudsman received 6,135 case assistance requests, an increase of more than 35 percent from the 2013 reporting period total. Case assistance requests involved the following subject matter: Humanitarian, Family, Employment, and General. ***See Figure 1:*** *Case Submission by Category.* This year requests for case assistance related to the Deferred Action for Childhood Arrivals program contributed to a significant increase in humanitarian-related requests received by the Ombudsman, representing 15 percent of all such requests.

[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. ***See Appendix 1:*** *Homeland Security Act - Section 452 - Citizenship and Immigration Services Ombudsman.*

[3] *See* Office of the Citizenship and Immigration Services Ombudsman Expenditure Plans for Fiscal Years 2012 to 2014.

FIGURE 1: CASE SUBMISSION BY CATEGORY



The Ombudsman's jurisdiction is limited by statute to case problems involving USCIS.[4] Individuals, employers, and their legal representatives may contact the Ombudsman after encountering problems with USCIS in the processing of their immigration-related applications and petitions. Approximately 47 percent of case assistance requests received during the reporting period were submitted directly by individuals and employers, and 53 percent were submitted by attorneys or accredited representatives. The top five states from which the Ombudsman received case assistance requests are: California, Texas, New York, Florida and Illinois. ***See Figure 2:*** *Top Five States for Case Submissions.*

The Ombudsman encourages individuals and employers to submit requests for assistance through the Ombudsman's Online Case Assistance, but they can also submit a request via mail, email and facsimile. Approximately 89 percent of case assistance requests during the reporting period were received by the Ombudsman through the online system. ***See Figure 3:*** *Case Submission Mode.*

FIGURE 2: TOP FIVE STATES FOR CASE SUBMISSIONS

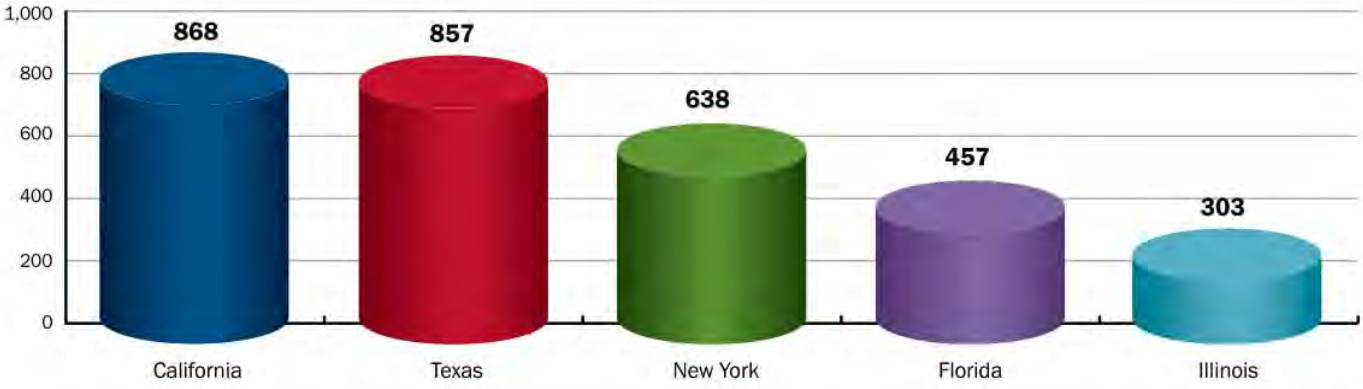
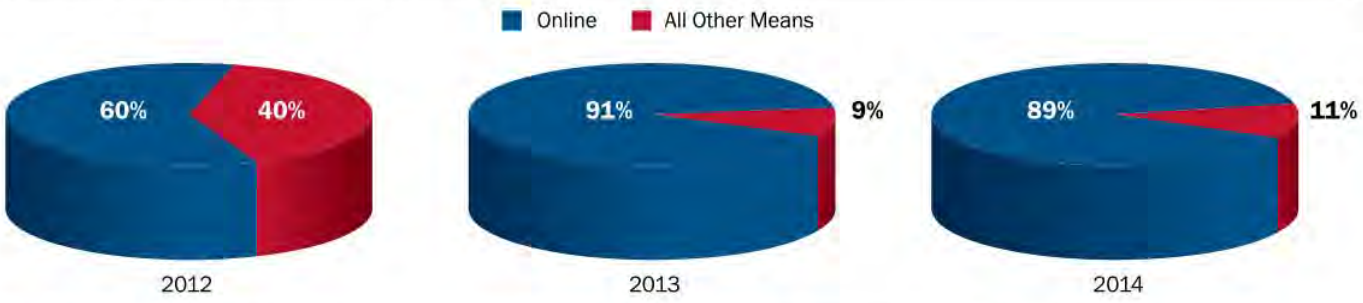


FIGURE 3: CASE SUBMISSION MODE

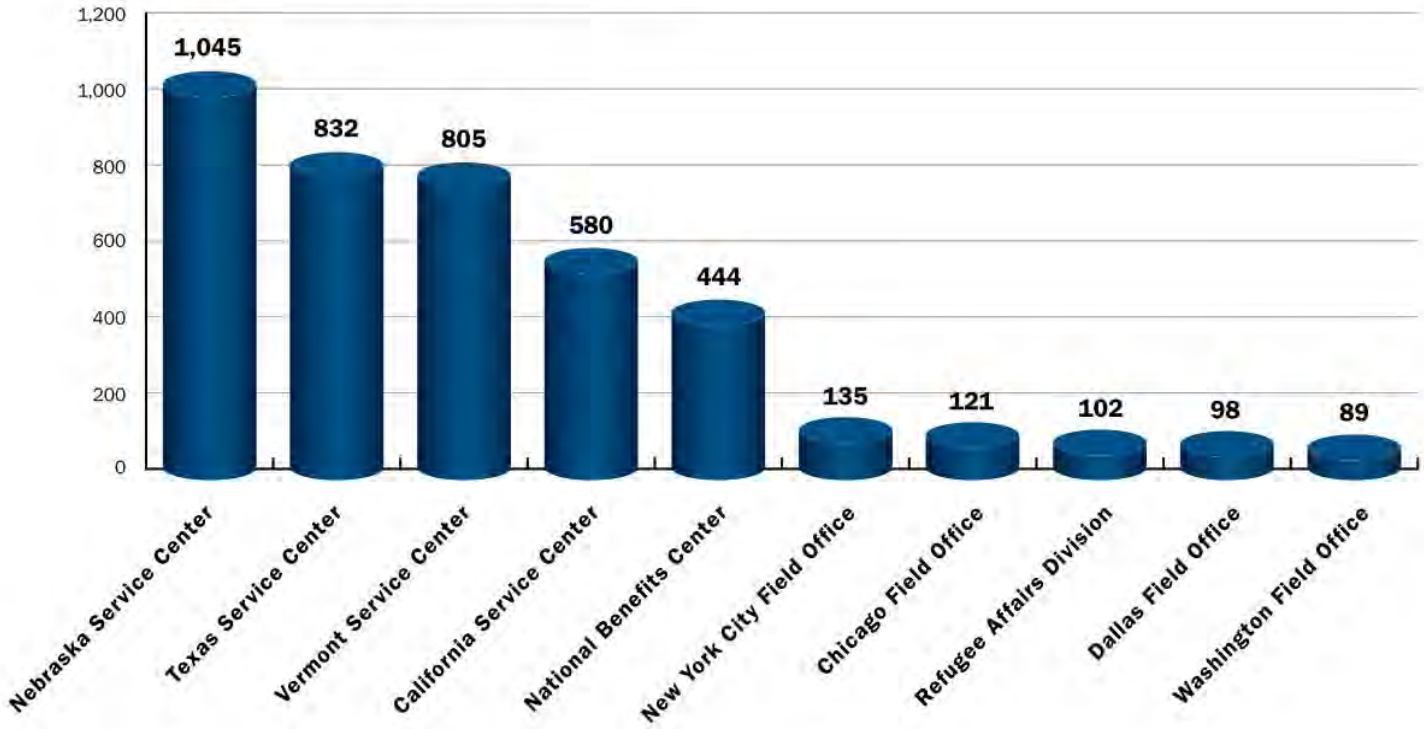


[4] HSA § 452(b)(1). Jurisdiction may extend to issues involving both USCIS and another government entity. The Ombudsman does not provide legal advice.

The Ombudsman evaluates each request for case assistance by examining facts, reviewing relevant DHS data systems and analyzing applicable laws, regulations, policies and procedures. After assessing the case assistance request, the Ombudsman may contact USCIS service centers, field offices, or other facilities to request they review the matter and take action as appropriate. ***See Figure 4:*** *Top Ten USCIS Facilities Contacted.*

In certain scenarios, the Ombudsman will expedite a request based on an emergency or hardship.[5] In deciding whether to expedite, the Ombudsman adheres to the same criteria as USCIS.[6] When a case assistance request falls outside of the Ombudsman's jurisdiction, the individual or employer is referred to the pertinent government agency. ***See Figure 5:*** *Ombudsman Case Assistance Request Process.*

FIGURE 4: TOP TEN USCIS FACILITIES CONTACTED



[5] Individuals or employers requesting expedited handling should clearly state so in Section 10 (Description) of Form DHS-7001, *Case Assistance Form* and 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.

[6] U.S. Department of Justice Memorandum, "Service Center Guidance for Expedite Requests on Petitions and Applications" (Nov. 30, 2001). *See also* USCIS Webpage, "Expedite Criteria" (Jun. 17, 2011); http://www.uscis.gov/forms/expedite-criteria (accessed Mar. 14, 2014). 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; U.S. Department of Defense or National Interest Situation; USCIS error; and compelling interest of USCIS.

FIGURE 5: OMBUDSMAN CASE ASSISTANCE REQUEST 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**.

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 below and uploading a signed Form DHS-7001 to the online case assistance request.

OPTION 1

Submit an online request for case assistance available on the Ombudsman's website at www.dhs.gov/cisombudsman. This is the 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, D.C. 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.

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.

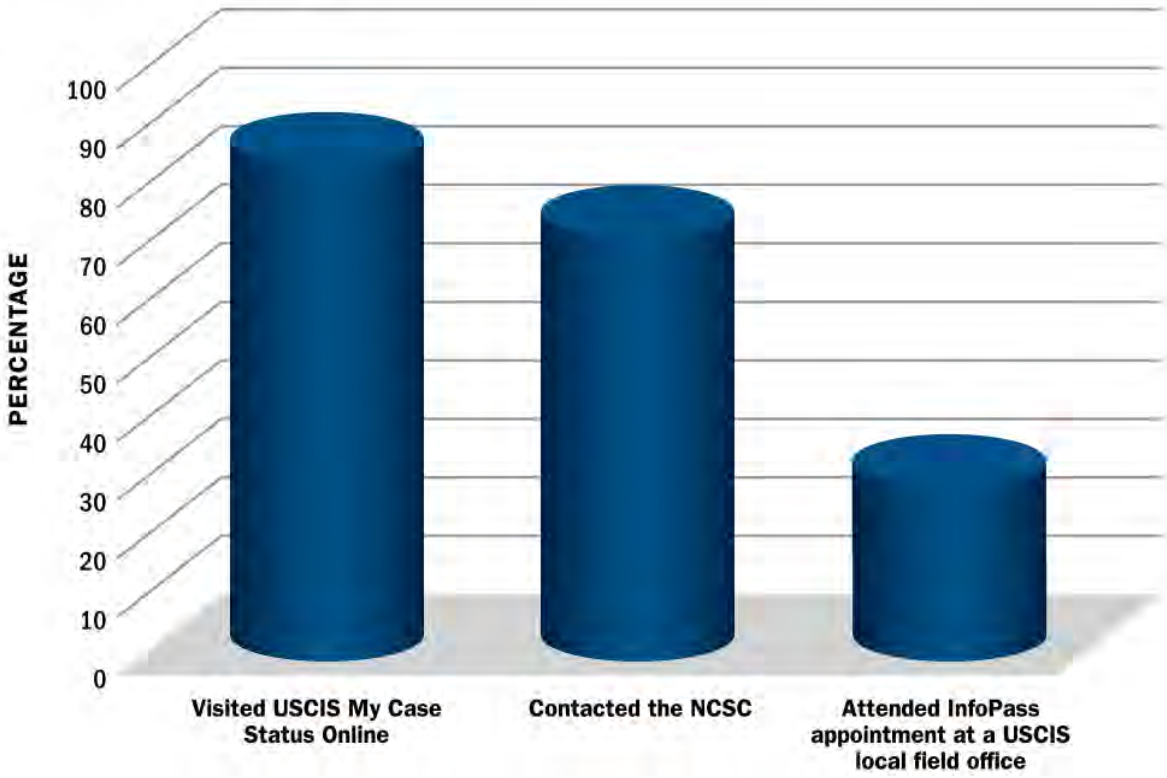
The Ombudsman is an office of last resort. Prior to contacting the Ombudsman, individuals and employers must attempt to resolve issues directly with USCIS through the agency's available customer service options. These include: My Case Status;[7] the National Customer Service Center (NCSC);[8] InfoPass;[9] and the e-Service Request tool.[10]

Individuals, employers, and their legal representatives are now required to indicate prior attempted actions when submitting case assistance requests to the Ombudsman. In 70 percent of case assistance requests submitted to the Ombudsman, individuals and employers first contacted the NCSC, while 28 percent appeared at InfoPass appointments at a USCIS local field office. ***See Figure 6:*** *Prior Actions Taken.*

The Ombudsman recognizes that individuals and employers seeking assistance often have waited long periods of time for resolution of their cases. For that reason, the Ombudsman recently revised its website content and stated its commitment to review all incoming requests for case assistance within 30 days and take action to resolve 90 percent of requests within 90 days of receipt. The revised content also makes clear the requirement 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. Finally, it provides the scope of case review, Frequently Asked Questions, and tips to assist individuals and employers with filing case assistance requests.[11] ***See Appendix 3:*** *Ombudsman Scope of Case Assistance.*

When the Ombudsman is not able to resolve a request for case assistance using standard protocols, often due to pending background checks, the request is escalated to USCIS Headquarters. The Ombudsman then works directly with USCIS Headquarters officials and monitors the issue on a regular basis until it is resolved. The Ombudsman will continue to work with USCIS to improve the efficiency and effectiveness of this process.

FIGURE 6: PRIOR ACTIONS TAKEN



[7] *See* USCIS Webpage, "My Case Status;" https://egov.uscis.gov/cris/Dashboard/CaseStatus.do (accessed Apr. 3, 2014).

[8] The National Customer Service Center can be reached at 1-800-375-5283.

[9] InfoPass is a free online service that allows individuals to schedule an in-person appointment with a USCIS Immigration Services Officer. InfoPass appointments may be made by accessing the USCIS Webpage at http://infopass.uscis.gov/ (accessed Mar. 14, 2014).

[10] USCIS Webpage, "e-Request;" https://egov.uscis.gov/e-Request/Intro.do (accessed Mar. 14, 2014).

[11] *See* Ombudsman Webpage, "Ombudsman – Case Assistance, Help with a Pending Application or Petition;" http://www.dhs.gov/case-assistance (accessed Apr. 3, 2014).

Outreach

In-Person Engagements

During this reporting period, the Ombudsman visited communities and stakeholders in regions across the United States.[12] The Ombudsman conducted USCIS site visits and meetings with state and local officials, Congressional offices, employers and communities with emerging immigrant populations. The Ombudsman views in-person engagements as essential to its mission and continues to monitor the impact of budget limitations. The Ombudsman is committed to expanding the use of technology and alternative means to interact with the public and USCIS offices around the country by holding engagements via video conference and teleconference.

Teleconferences

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

- *USCIS Customer Service* (March 20, 2014)
- *Provisional I-601A Waivers* (February 21, 2014)
- *Naturalization Disability Waivers and Access to Immigration Services* (January 23, 2014)
- *The Ombudsman's 2013 Annual Report* (July 17, 2013)
- *The Process after USCIS Approves a U Visa: A Conversation with Department of State Representatives* (June 12, 2013)
- *USCIS's Temporary Suspension of Certain H-2B Adjudications* (May 30, 2013)
- *Fee Waivers at USCIS: How Are They Working for You?* (April 30, 2013)

Through in-person engagements and teleconferences, the Ombudsman reached thousands of stakeholders. During the first two quarters of FY 2014, the Ombudsman conducted 60 outreach activities and is on pace to complete more than 150 this year.

The Ombudsman's Annual Conference

Despite the lapse in federal government funding, which ceased office operations for over two weeks in October 2013, the Ombudsman held its third Annual Conference on October 24, 2013. Attendees included individuals from non-governmental organizations, the private sector and federal and state entities. The White House Domestic Policy Council Senior Policy Director for Immigration Felicia Escobar updated attendees on immigration reform legislative developments. The keynote panel featured a discussion of approaches and lessons learned from large-scale legal services responses. Other panel discussions addressed the following areas: challenges in high-skilled immigration; autonomy, transparency, and timeliness of decisions at the USCIS Administrative Appeals Office; credible fear screenings; DHS data systems; and waivers of inadmissibility (Provisional Unlawful Presence Waivers).[13]

Recommendations and Interagency Liaison

The Ombudsman is required to identify areas in which individuals and employers have problems in dealing with USCIS and, to the extent possible, propose 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.

On March 24, 2014, the Ombudsman published recommendations titled *Employment Eligibility for Derivatives of Conrad State 30 Program Physicians*, which seek to ensure that spouses of foreign medical doctors accepted into the Conrad State 30 program are able to obtain employment authorization. On June 11, 2014, the Ombudsman published recommendations titled *Improving the Quality and Consistency of Notices* to Appear, which are the charging documents issued by USCIS to initiate removal proceedings.

[12] Northeast: Dewey Beach, DE; New York, NY; Jersey City, NJ; and Worcester and Boston, MA. Midwest: Chicago, IL and Kansas City, MO. Mid-Atlantic: Baltimore, MD; Washington, D.C.; and Falls Church, VA. Southeast: Macon, GA; Miami, FL; Memphis and Nashville, TN; and Greensboro, Raleigh and Charlotte, NC. Southwest: El Paso and Dallas, TX; and Phoenix, Tucson, and Nogales, AZ. West: San Francisco and Los Angeles, CA.

[13] *See* DHS Blog Posting, "Ombudsman's Third Annual Conference: Working Together to Improve Immigration Services" (Oct. 24, 2013); http://www.dhs.gov/blog/2013/10/24/ombudsman%E2%80%99s-third-annual-conference-working-together-improve-immigration-services (accessed Mar. 14, 2014).

Additionally, the Ombudsman identified five systemic issues that were brought to USCIS's attention through briefing papers and meetings with agency leadership. Discussed in detail in later sections of this Annual Report, these issues pertain to: Special Immigrant Juvenile adjudications; USCIS processing times; Agency responses to service requests submitted through the Service Request Management Tool; USCIS policy and practice in accepting Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*; and Challenges in the process for payment of the Immigrant Visa Fee.

Among other activities, the Ombudsman worked to promote interagency liaison through:

- Monthly meetings with DOS and USCIS on the visa queues aimed at ensuring the transparent, orderly, and predictable movement of Visa Bulletin cut-off dates; and
- Quarterly data quality working group meetings with USCIS, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and the DHS Office of the Chief Information Officer to facilitate problem-solving related to the Systematic Alien Verification for Entitlements (SAVE) program[14] and other DHS systems used to verify immigration status and benefits eligibility.

On March 21, 2013, then-Secretary of Homeland Security Janet Napolitano announced the creation of the Council for Combating Violence Against Women. Ombudsman Odom has served as Acting Co-Chair of this council since September 2013.

On August 29, 2013, Ombudsman Odom was appointed the Department's Chair of the Blue Campaign Steering Committee (Blue Campaign), which is the unified voice for DHS's efforts to combat human trafficking. Working in collaboration with law enforcement and government, non-governmental and private organizations, the Blue Campaign provides information on training and outreach, how traffickers operate and victim assistance.

The Ombudsman's Annual Report

The Ombudsman submits an Annual Report to Congress by June 30 of each calendar year, pursuant to section 452(c) of the Homeland Security Act. At the time of publication, the Ombudsman has not yet received USCIS's response to the 2013 Annual Report.

[14] The Systematic Alien Verification for Entitlements program is a web-based service that helps federal, state and local benefit-issuing agencies, institutions, and licensing agencies determine the immigration status of benefit applicants to ensure only those entitled to benefits receive them. *See* USCIS Webpage, "Systematic Alien Verification for Entitlements" (Nov. 20, 2013); http://www.uscis.gov/save (accessed Apr. 29, 2014). *See* section of this Report on "Data Quality and its Impact on those Seeking Immigration and Other Benefits."

Key Developments and Areas of Study

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.[15] The areas of study presented in this year's Report are organized as follows:

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

[15] HSA § 452(c)(1)(B).

Families and Children

Family reunification has long been a pillar of U.S. immigration policy. The USCIS Provisional Unlawful Presence Waiver program advances family unity in a concrete and meaningful way, and recent guidance addresses some of the most pressing stakeholder concerns. The Ombudsman previously made recommendations and continues to bring to USCIS's attention issues with policy and practice in the processing of Special Immigrant Juvenile self-petitions. Pervasive and serious problems persist in this area. In the Deferred Action for Childhood Arrivals program, USCIS has provided discretionary relief to more than 560,000 individuals who were brought to the United States as children.

Provisional and Other Immigrant Waivers of Inadmissibility

Responsible USCIS Offices:[16]
Field Operations and Service Center Operations Directorates

The Provisional Unlawful Presence Waiver program holds out the promise of an effective solution to a longstanding challenge in family reunification. In 2012, USCIS consolidated adjudication of Form I-601, *Application for Waiver of Grounds of Inadmissibility* in one USCIS service center rather than allowing adjudications to continue at a number of USCIS offices overseas. In 2013, USCIS sought to further address the difficulties of the overseas waiver process by implementing a stateside provisional waiver for immediate relatives of U.S. citizens who are required to travel abroad to complete the immigration visa process at a U.S. Department of State (DOS) consulate abroad.[17] In January 2014, USCIS issued new guidance crucial to ensuring the success of the Provisional Waiver program.

Background

In 1996, Congress enacted unlawful presence bars that have come to be called the "three-year" and "ten-year" bars.[18]

[16] Homeland Security Act of 2000 § 452(c)(1)(E) requires that the Ombudsman "identify any official of [USCIS] who is responsible" for inaction-related Ombudsman recommendations "for which no action has been taken" or USCIS "pervasive and serious problems encountered by individuals and employers." For the first time, in this Annual Report, the Ombudsman identifies the responsible USCIS component. Where more than one USCIS office is listed, coordination is needed among USCIS components.

[17] "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule," 78 Fed. Reg. 535-75 (Jan. 3, 2013).

[18] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208. Immigration and Nationality Act (INA) § 212 (a)(9)(B)(i)(I) is known commonly as the three-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 a request for readmission. INA § 212(a)(9)(B)(i)(II) is commonly known as the ten-year bar, which is triggered by one year or more of unlawful presence and a departure from the United States, followed by a request for readmission.

An individual seeking a waiver of either the three-year or ten-year bar must demonstrate to the satisfaction of the Secretary of Homeland Security that refusal of admission would result in extreme hardship to a qualifying relative as a matter of law and in the exercise of discretion.[19] Until June 4, 2012, waivers of the three-year and ten-year bars could only be sought by applicants after leaving the United States in order to apply for an immigrant visa at a DOS consulate abroad.[20] This led to lengthy periods of family separation since waiver processing took months, if not a year or longer, to complete.[21]

Since the enactment of the unlawful presence bars, many foreign nationals with close family ties in the United States have been dissuaded from seeking Lawful Permanent Residence. After residing in the United States for many years, others traveled abroad for what they hoped would be a temporary period, only to encounter prolonged adjudication delays or denials of their waiver requests. Even individuals approved for such waivers abroad may have been forced to endure separation from relatives for months.[22] Under prior waiver procedures, these applicants had no choice but to travel overseas to complete their application for an immigrant visa.

Centralized I-601 Processing. On June 4, 2012, USCIS centralized Form I-601 processing at the Nebraska Service Center (NSC).[23] This was intended to improve consistency in decision-making and reduce the time applicants waited overseas for waiver decisions while they were completing the immigration visa process at a DOS consulate abroad.[24] USCIS announced a processing time target of three months for the newly centralized waiver process.[25] In February 2014, USCIS published a processing time of seven months for these waivers.[26]

While wait times for decisions have been longer than previously announced, the uniformity of filing and centralizing adjudication in one USCIS office is a welcome development.

Provisional Waivers. On January 9, 2012, USCIS announced its plan to establish a Provisional Waiver program.[27] Following the publication of proposed regulations, a comment period, and the issuance of final regulations, the plan took effect on March 4, 2013.[28] Now, immediate relatives of U.S. citizens, who wish to apply for an immigrant visa and who require a waiver of inadmissibility for unlawful presence only, are permitted to submit a waiver application from within the United States prior to departing for an immigrant visa interview at a U.S. embassy or consulate abroad.[29] Applicants submit Form I-601A, *Application for Provisional Unlawful Presence Waiver* along with the appropriate filing fee to a USCIS Lockbox facility in Chicago, Illinois.[30] Stakeholders welcomed this change and deemed it critical to preserving family unity.

Shortly after implementation, stakeholders raised concerns with USCIS's interpretation of the "reason to believe" standard applied when determining whether a provisional waiver applicant appears to be inadmissible on grounds other than unlawful presence.[31] National organizations representing immigrants cited denials by USCIS where applicants had minor criminal arrests or convictions for misdemeanor crimes, such as driving without a license or disorderly conduct, without any apparent analysis of supporting evidence demonstrating the underlying crime would not be a bar to admissibility. In a number of the aforementioned cases, USCIS issued summary denials without due consideration of whether an applicant's criminal offense fell within the "petty offense" or "youthful offender" exceptions,[32] or was not a crime of moral

[19] INA § 212(a)(9)(B)(v).

[20] INA § 245(a) and (c).

[21] *See* USCIS Webpage, "USCIS to Centralize Filing and Adjudication for Certain Waivers of Inadmissibility in the United States" (May 31, 2012); http://www.uscis.gov/news/uscis-centralize-filing-and-adjudication-certain-waivers-inadmissibility-united-states (accessed May 20, 2013); *see also* Ombudsman Recommendation 45, "Processing of Waivers of Inadmissibility" (Jun. 10, 2010); http://www.dhs.gov/ombudsman-recommendation-processing-waivers-inadmissibility (accessed Apr. 29, 2014).

[22] *Id.* "Currently, applicants experience processing times from one month to more than a year depending on their filing location. This centralization will provide customers with faster and more efficient application processing and consistent adjudication."

[23] *Id.*

[24] *Id.*

[25] USCIS Webpage, "Form I-601 Centralized Lockbox Filing" (May 14, 2014); http://www.uscis.gov/outreach/notes-previous-engagements/form-i-601-centralized-lockbox-filing (accessed Jun. 23, 2014).

[26] USCIS Webpage, "USCIS Processing Time Information for the Nebraska Service Center" (Feb. 2014); https://egov.uscis.gov/cris/processingTimesDisplay.do (accessed May 9, 2014).

[27] "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Proposed Rule," 77 Fed. Reg. 19901 (Jan. 9, 2012).

[28] 78 Fed. Reg. 535-75 (Jan. 3, 2013).

[29] *Id.*

[30] USCIS Webpage, "I-601A, Application for Provisional Unlawful Presence Waiver" (Jun. 27, 2013); http://www.uscis.gov/i-601a (accessed Apr. 22, 2014).

[31] *Supra* note 28.

[32] INA § 212(a)(2)(A)(ii).

turpitude that would render the applicant inadmissible.[33] Due to these case examples, national organizations appealed to the USCIS Director to revise applicable standards.[34]

USCIS also denied a number of cases based on fraud or misrepresentation grounds of inadmissibility because of the applicant's prior history of encounters with immigration authorities.[35] These cases were denied without due consideration of documentation establishing the nature of these prior encounters. For example, the Ombudsman reviewed cases where applicants who had been refused entry at the border were alleged to have provided a false name or date of birth. In some of these cases, the applicant disputed that any false information was provided, and instead stated that there was a data entry error. Countervailing evidence was reportedly not considered, as these provisional waivers were summarily denied. In other cases, applicants wished to present evidence that the facts of the cases did not satisfy the legal definition of "willful misrepresentation of a material fact,"[36] and thus did not support a denial. These summary denials were made without the issuance of Requests for Evidence (RFE) or a full examination of the information on record.

The Ombudsman received a number of case assistance requests connected with these concerns. Applicants requested the Ombudsman's assistance in obtaining further review of summary denials since provisional waiver applicants are not permitted to file a motion to reopen/reconsider or an appeal of a denial.

In August 2013, USCIS suspended adjudication of 4,400 provisional waiver applications where the agency had determined there might be "reason to believe" the applicant was inadmissible on a ground other than unlawful presence.[37] On January 24, 2014, USCIS published a Policy Memorandum titled *Guidance Pertaining to Applicants for Provisional Unlawful Presence* instructing adjudicators to review all information in the record, taking into account the nature of a particular charge or conviction as well as the ultimate disposition, before making a final determination of whether there is "reason to believe" criminal inadmissibility grounds apply.[38]

On February 7, 2014, Ombudsman Odom sent a letter to the USCIS Acting Director noting the new "clear, consistent standard for adjudicators to apply to future provisional waiver cases" but also describing stakeholder concerns related to reopening cases previously denied and revisiting guidance on fraud and willful misrepresentation.[39] On March 18, 2014, USCIS announced that it would reopen under its own motion provisional waiver applications that had been denied prior to January 24, 2014, solely on the basis that a criminal offense might pose a "reason to believe" that the applicant was inadmissible.[40] Thereafter, USCIS moved the 4,400 "reason to believe" provisional waiver applications that had been placed on hold back into the normal flow of work for adjudication at the National Benefits Center.[41]

Ongoing Concerns

USCIS's new guidance addresses the most pressing stakeholder concerns, and the Ombudsman will closely monitor implementation. There are other aspects of the provisional waiver process that remain problematic, such as denials where USCIS found the applicant inadmissible for fraud or a willful misrepresentation without a full examination of the information contained in the record.[42] The Ombudsman has urged USCIS to issue guidance specifying the nature and type of evidence required to support a finding of inadmissibility under the Immigration and Nationality Act section 212(a)(6)(C)(i), and to afford applicants an opportunity to present new evidence and

[33] INA § 212(a)(2)(A)(i)(I).

[34] Letter from the American Immigration Lawyers Association to USCIS Director Mayorkas (Aug. 6, 2013); Letter from the Catholic Legal Immigration Network to USCIS Director Mayorkas (Aug. 5, 2013).

[35] INA § 212(a)(6)(C)(i) provides that "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the [INA] is inadmissible."

[36] INA § 212(a)(6)(C)(i).

[37] Information provided by USCIS (Sept. 19, 2013).

[38] USCIS Policy Memorandum, "Guidance Pertaining to Applicants for Provisional Unlawful Presence" (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 Apr. 21, 2014). The Policy Memorandum states, "USCIS officers should review all evidence in the record, including any evidence submitted by the applicant or the attorney of record. If, based on all evidence in the record, it appears that the applicant's criminal offense: (1) falls within the "petty offense" or "youthful offender" exception under INA section 212(a)(2)(A)(ii) at the time of the I-601A adjudication, or (2) is not a CIMT under INA section 212(a)(2)(A)(i)(I) that would render the applicant inadmissible, then USCIS officers should not find a reason to believe that the individual may be subject to inadmissibility under INA section 212(a)(2)(A)(i)(I) at the time of the immigrant visa interview solely on account of that criminal offense. The USCIS officer should continue with the adjudication to determine whether the applicant meets the other requirements for the provisional unlawful presence waiver, including whether the applicant warrants a favorable exercise of discretion."

[39] Letter from Ombudsman Odom to USCIS Acting Director Lori Scialabba (Feb. 7, 2014).

[40] USCIS Public Engagement Division, Message: Form I-601A, Provisional Unlawful Presence Waiver (Mar. 18, 2014)

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

[42] *See* INA § 212(a)(6)(C)(i).

request reconsideration of cases previously denied for fraud or willful misrepresentation of a material fact.[43]

Special Immigrant Juveniles

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

In this Annual Report section, the Ombudsman raises concerns with USCIS's interpretation and application of its Special Immigration Juvenile (SIJ) "consent" authority. This interpretation has led to unduly burdensome and unnecessary RFEs for information concerning underlying state court orders, and ultimately denials in some cases. Other issues reported to the Ombudsman include USCIS questioning state court jurisdiction, concerns with age-outs and decisions for individuals nearing age 21, and ensuring child appropriate interviewing techniques. The Ombudsman brought these issues to USCIS's attention and presented initial recommendations calling for clarification of policy and for centralized SIJ adjudication to improve consistency.

Background

In 1990, Congress established the SIJ category to provide protection to children without legal immigration status.[44] For a child 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 declare the child cannot be reunited with one or both of his or her parents due to abuse, neglect, or abandonment.[45] In addition, an administrative or judicial proceeding must have determined 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.[46]

In 1997, Congress amended the SIJ definition to safeguard the process from fraud or abuse by including only those juveniles deemed eligible for long-term foster care.[47]

The amendment also required the "express consent" of the Attorney General (now the Secretary of Homeland Security) "to the dependency order serving as a precondition to the grant of [SIJ] status."[48] By making these amendments, Congress aimed "to limit the beneficiaries … to those juveniles for whom it was created, namely abandoned, neglected, or abused children, by requiring the Attorney General 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."[49] With these amendments, Congress also sought to address concerns for potential abuse in the SIJ program by restricting grantees from later petitioning for their parents.[50]

USCIS published final SIJ regulations in 1993, recognizing that it "would be both impractical and inappropriate for the Service to routinely re-adjudicate judicial or social service agency administrative determinations …"[51] USCIS then

[43] *Supra* note 39.

[44] Immigration Act of 1990, Pub. L. No. 101–649 at § 153(a)(3)(J), 104 Stat 4978 (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.

[45] INA § 101(a)(27)(J).

[46] *Id.*

[47] 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).

[48] *Id.*

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

[50] 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); Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status; 58 Fed. Reg. 42843-51, 42847 (Aug. 12, 1993).

[51] Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status; 58 Fed. Reg. 42843-51, Supplemental Information at 42847 (Aug. 12, 1993).

issued policy memoranda in 1998 and 1999, instructing adjudicators to request information necessary to make independent findings regarding abuse, abandonment, neglect and best interests.[52] In 2004, USCIS issued a third Policy Memorandum, instructing adjudicators to examine state court orders for independent assurance that courts acted in an "informed" way.[53] The memorandum also provided that adjudicators should not "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."[54] However, in that memorandum, USCIS instructed adjudicators to give express consent only if the adjudicator was aware of the facts that formed the basis for the juvenile court's rulings.

The 2008 Trafficking Victims Protection Reauthorization Act (TVPRA) again amended the SIJ statute.[55] TVPRA clarified that the Secretary of Homeland Security must consent to the grant of SIJ status, and not to the dependency order serving as a precondition to a grant of SIJ status.[56] TVPRA thus recognized state court authority and "presumptive competence"[57] over determinations of dependency, abuse, neglect, abandonment, reunification, and best interests of children. In addition, TVPRA 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 is viable.[58]

In 2010 and 2011, stakeholders reported receiving RFEs from USCIS asking for detailed information regarding the underlying state court order. Stakeholders also reported age-inappropriate interviewing techniques by immigration officers, such as, use of language that is not suitable for children. They recounted problems with USCIS not meeting statutory processing times, 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.[59] 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. In 2012, USCIS partnered with state courts to train judges on the SIJ process.[60]

On February 27, 2014, USCIS held a "train-the-trainer" session for regional selectees who then provided training to USCIS adjudicators in the field. All USCIS officers adjudicating SIJ petitions are now required to take this training. The new training module includes instruction on USCIS's consent requirement and directs adjudicators to accept court orders containing or supplemented by specific findings of fact. The training offers a sample court order that adequately represents the type of factual findings required in a juvenile state court order. The written training, however, states that adjudicators may issue an RFE "if the record does not reflect that there was a ***sufficient*** factual basis for the court's findings." *(emphasis added).*[61] This instruction is inconsistent with the supplementary training materials, which present sample court orders that do not have exhaustive factual findings, but satisfy USCIS's limited role of verifying that a state court has made the requisite SIJ findings. As a result, stakeholders continue to receive problematic RFEs and denials reflecting adjudicators' overly expansive search for records supporting the factual findings

[52] Immigration and Naturalization Service Policy 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. 18, 2014).

[53] 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 Jun. 18, 2014).

[54] *Id.*

[55] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) §235(d)(1), Pub. L. No. 110-457, 122 Stat. 5044 (2008).

[56] TVPRA § 235(d)(1).

[57] *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).

[58] TVPRA § 235(d)(1)(B).

[59] 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 Mar. 19, 2014). The Ombudsman recommended that USCIS: (1) standardize its practices of: (a) providing specialized training for those officers adjudicating Special Immigrant Juvenile (SIJ) status; (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.

[60] *Supra* note 41.

[61] USCIS SIJ Training (Feb. 27, 2014).

of state courts, including full court transcripts, and, in some cases, any and all evidence submitted in the underlying proceeding.[62]

Case Example

In May 2014, the Ombudsman received a request for case assistance involving an SIJ-based RFE issued subsequent to the release of USCIS's new field training. In this case, the state court order presented by the petitioner appeared to include requisite factual findings for SIJ eligibility. However, the adjudicator issued an RFE requesting the following: "a copy of the original application for guardianship, a complete transcript of ***any*** hearing held in front of ***any*** judge regarding your temporary or permanent guardianship, copies of ***any and all*** documents submitted to ***any*** judge during ***any*** hearing regarding your guardianship." *(emphasis added)*

Ongoing Concerns

USCIS Interpretation of Consent. The Ombudsman continues to receive reports and requests for case assistance from stakeholders where USCIS has called into question the validity of court orders and their content by:

- Requesting that petitioners provide information and/or documents that substantiate a state court order;
- Raising concerns of alleged fraud or misrepresentation in the state court process, particularly in cases dealing with reunification with one parent, as permitted by TVPRA;[63]
- Reinterpreting state law by deeming that a particular state court did not have jurisdiction to issue a dependency order; and
- Refusing to accord "full faith and credit" to a state court order issued in a state different from the petitioner's current state of residence.[64]

The Ombudsman received and continues to evaluate other emerging SIJ issues, including USCIS's adherence to its obligations under the 2005 *Perez-Olano* settlement agreement.[65] Under this settlement, the agency committed not to deny or revoke any new, pending, or reopened SIJ petition "on account of age or dependency status, if, at the time the class member files or filed a complete application for SIJ classification, he or she was under 21 years of age or was the subject of a valid dependency order that was subsequently terminated based on age." SIJ regulations have historically protected children under 21 years of age to "minimize confusion caused by dissimilar state laws" and to "allow students and other young persons who continue to be dependent upon the juvenile court after reaching the age of eighteen to qualify for SIJ status."[66]

The Ombudsman will continue to monitor and work to address SIJ issues with USCIS. In the coming year, the Ombudsman may issue additional recommendations calling for the agency to: 1) clarify its limited consent authority; and 2) centralize SIJ adjudication to improve quality and consistency of decisions.

The Deferred Action for Childhood Arrivals Program

Responsible USCIS Office:

Service Center Operations Directorate

Nearly two years since the inception of the Deferred Action for Childhood Arrivals (DACA) program, USCIS has approved over 560,000 DACA applications for individuals who were brought to the United States as children.[67] Through this program, thousands of young people now have the ability to continue their education and work lawfully in the United States. DACA represents approximately 15 percent of the requests for case assistance received by the Ombudsman during this reporting period. Many of these cases are pending beyond USCIS's six-month processing goal due to background checks. In other cases, USCIS has issued template denials that provide limited information as to the basis for denial.

[62] Such Requests for Evidence (RFEs) raise privacy concerns. In many states, providing records of juvenile proceedings would be a violation of state confidentiality laws. *See* e.g., N.J.S.A. 9:2-1, 9:2-3 ("The records of such proceedings, including all papers filed with the court, shall be withheld from indiscriminate public inspection, but shall be open to inspection by the parents, or their attorneys, and to no other person except by order of the court made for that purpose.") New Jersey Rule, R. 1:38-3(d)(13), excludes from public access: "Child custody evaluations, reports, and records pursuant to ... N.J.S.A. 9:2-1, or N.J.S.A. 9:2-3." Additionally, juvenile court records often contain information not only about the SIJ applicant, but also about siblings and other persons who are not before USCIS. These RFEs also impose significant burdens on counsel who, in many cases, would have to seek special permission from the state court to disclose such documents.

[63] TVPRA § 235(d)(1)(A).

[64] U.S. Constitution, Art. IV, Sec. 1.

[65] *Perez-Olano, et al. v. Holder*, Case No. CV-05-3604 at 8 (C.D. Cal. 2005).

[66] 58 Fed. Reg. 42843-01, Supplemental Information at *42847 (Aug. 12, 1993); Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119, § 113, 111 Stat. 2440 (Nov. 26, 1997).

[67] *See* USCIS Webpage, "Secretary Johnson Announces Process for DACA Renewal" (Jun. 5, 2014); http://www.uscis.gov/news/secretary-johnson-announces-process-daca-renewal (accessed Jun. 18, 2014).

Background

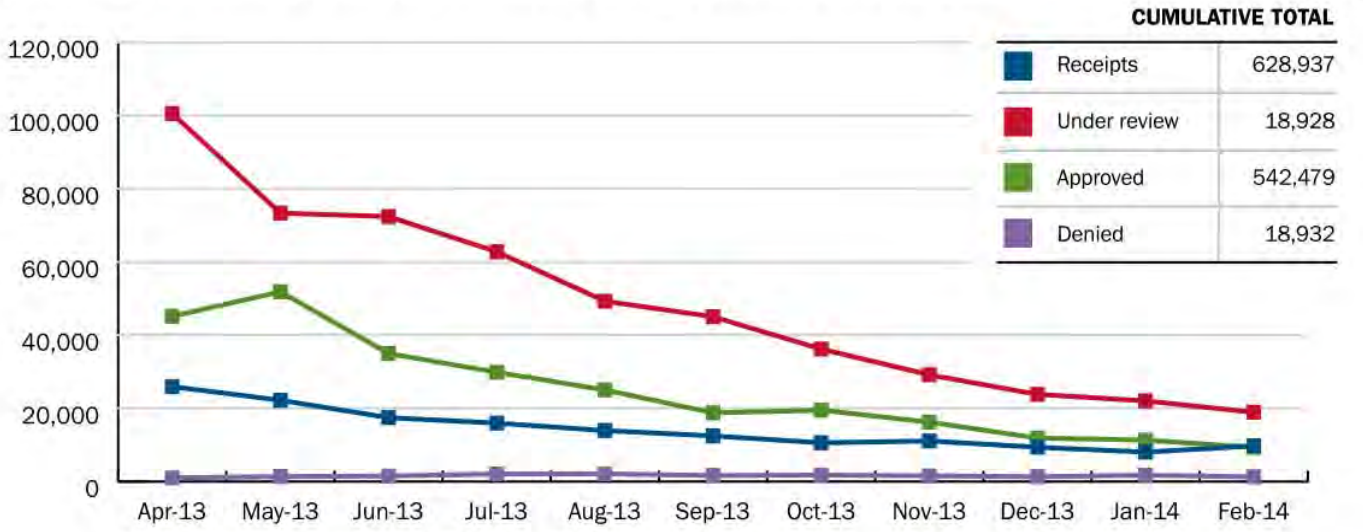
On June 15, 2012, the Secretary of Homeland Security announced that certain individuals who came to the United States as children and meet several requirements may request deferred action under the DACA program.[68] Within 60 days of the announcement and following robust public engagement, USCIS implemented a process for receiving, reviewing, and adjudicating DACA requests.[69]

As of March 10, 2014, individuals submitted 658,430 DACA applications and USCIS granted 542,479 of these requests. ***See Figure 7:*** *Deferred Action for Childhood Arrivals Adjudication Data.*

Ongoing Concerns

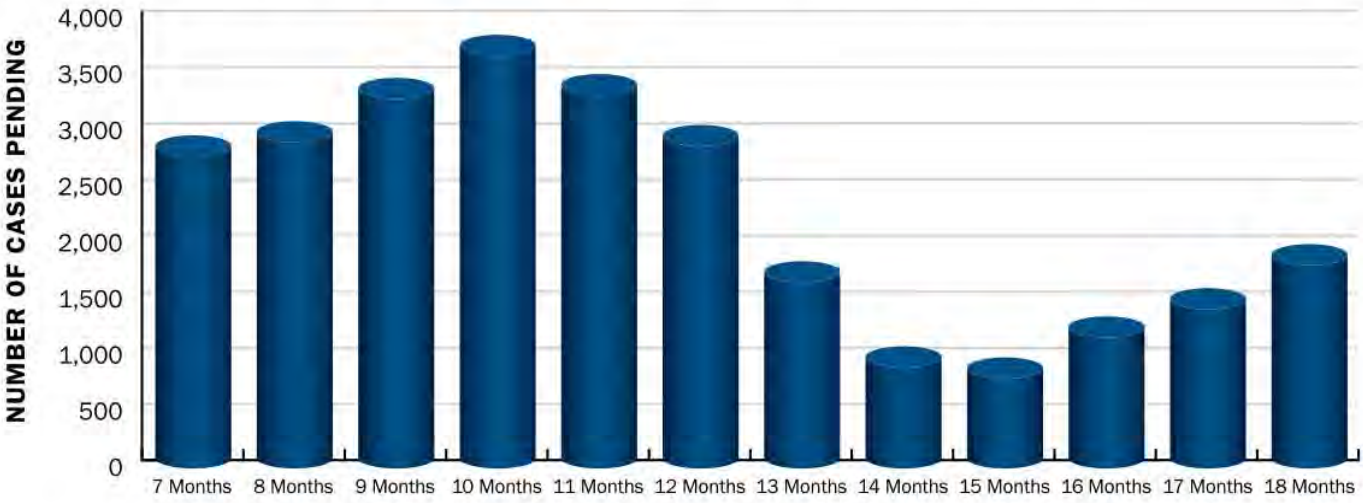
The Ombudsman has identified issues in DACA processing based on requests for case assistance, feedback from stakeholders, and information provided by USCIS.

FIGURE 7: DEFERRED ACTION FOR CHILDHOOD ARRIVALS ADJUDICATION DATA



Source: Information provided by USCIS (Apr. 28, 2014).

FIGURE 8: DEFERRED ACTION FOR CHILDHOOD ARRIVALS CASES PENDING PAST SIX MONTHS



Source: Information provided by USCIS (Apr. 28, 2014).
Includes data through March 7, 2014.

[68] 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. 29, 2014).

[69] *See* USCIS Webpage, "Consideration of Deferred Action for Childhood Arrivals Process" (Apr. 9, 2014); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process, (accessed May 12, 2014). *See* e.g., USCIS Public Engagement, "Deferred Action for Childhood Arrivals Stakeholder Conference Call" (Nov. 21, 2012); http://www.uscis.gov/outreach/notes-previous-engagements/deferred-action-childhood-arrivals-stakeholder-conference-call (accessed Apr. 3, 2013).

Processing Times. Approximately seven months after the official start of the DACA program, USCIS announced a six-month processing time for all DACA applications.[70] While processing started at all four USCIS service centers, in February 2013, USCIS centralized most of the DACA workload at the NSC.[71] USCIS also shifted resources in response to declining DACA receipts and to address a growing backlog of Forms I-130, *Petition for Alien Relative* filed for immediate relatives. As of January 6, 2014, there were 71,949 DACA cases pending with USCIS service centers for more than six months (with 66,470 of these cases pending at the NSC),[72] 31 percent pending background checks, and 25 percent pending due to issuance of Requests for Evidence.[73] ***See Figure 8:*** *Deferred Action for Childhood Arrivals Cases Pending Past Six Months.* USCIS provided data to the Ombudsman showing that as of May 16, 2014, there were 12,061 DACA cases pending past six months, with 17 percent pending background checks and 8 percent pending RFEs.

The majority of DACA-related requests for case assistance received by the Ombudsman pertain to cases outside published processing times, many of which have been pending for a year or more. A large number of cases are on hold due to pending policy guidance on issues such as education accreditation.[74] The NSC increased its staffing for the DACA unit to a total of 150 adjudicators by April 2014. USCIS acknowledged the additional adjudicators were needed to handle delays in processing background checks. The agency also allocated additional resources at the NSC to address individual DACA cases that were delayed due to background checks. It anticipated most backlogged cases would be resolved by the end of May 2014.[75] The Ombudsman will continue to monitor DACA processing times as the program enters its first renewal period.

Template Denials. USCIS issued many DACA denial notices using template letters wherein adjudicators select a box from a list identifying the general basis for denial. However, the narrative language accompanying the check boxes is often limited and vague, and does not provide applicants a reason for the denial of the DACA application. According to USCIS, adjudicators are to issue an RFE or Notice of Intent to Deny (NOID) before denying a DACA application. The largest categories for RFEs pertain to the following eligibility requirements: continuous residence, current enrollment in school, and physical presence in the United States on June 15, 2012.[76] The Ombudsman received case assistance requests for DACA applications where, inconsistent with agency policy, USCIS did not issue an RFE or NOID prior to the denial, which is concerning since there is no formal appeal process or option for a motion to reopen/reconsider for DACA denials. Individuals may request review of the denial decision through the Service Request Management Tool process if they can demonstrate that: 1) USCIS incorrectly denied the application based on abandonment, or 2) USCIS mailed the RFE to the wrong address.[77] USCIS has reopened 1,656 cases for these reasons.[78] Otherwise, the only other recourse for applicants is to file a new application and pay the $465 filing fee again.

Employment Authorization Documents and Mailing Issues. Stakeholders have raised concerns about Employment Authorization Documents (EADs) issued following the approval of a DACA application. While the U.S. Postal Service shows the document as "delivered," some applicants report they never received their EADs. In most cases, USCIS requires the applicant to pay an additional $85 for the biometrics fee in order to obtain a replacement card. Currently, USCIS has no plans to begin mailing EADs via certified mail. The Ombudsman will be reviewing USCIS EAD mailing issues in the coming year.

DACA Renewals. Applicants began applying for DACA, with two-year grants of deferred action and EADs, on August 15, 2012. The renewal process begins in summer 2014. Most DACA renewals will be adjudicated at the NSC.

[70] USCIS Webpage, "USCIS Processing Time Information" (May 6, 2014); https://egov.uscis.gov/cris/processTimesDisplay.do (accessed May 8, 2014).

[71] USCIS shifted resources to address growing backlogs of immediate relative Forms I-130, *Petition for Alien Relative*. *Supra* note 41.

[72] Information provided by USCIS (Jan. 30, 2014).

[73] *Id.*

[74] Information provided by USCIS (Mar. 23, 2014, Apr. 9, 2014 and Apr. 28, 2014).

[75] Information provided by USCIS (Apr. 9, 2014 and Apr. 28, 2014). USCIS noted that more complex background check cases may take longer than six months to process.

[76] *Id.*

[77] USCIS Webpage, "Frequently Asked Questions" (Dec. 6, 2013); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (accessed May 9, 2014). There are no other bases to reopen denied Deferred Action for Childhood Arrivals applications.

[78] *Supra* note 41.

On December 18, 2013, USCIS published a notice of proposed revisions to Form I-821D, *Consideration of Deferred Action for Childhood Arrivals (DACA)* and instructions in the Federal Register.[79] Multiple stakeholders provided feedback on the proposed revisions, requesting that USCIS: 1) simplify parts of the form, 2) make explicit the evidentiary requirements for DACA renewal, and 3) adjust the instruction to file a renewal application four months prior to the expiration of the applicant's DACA period to account for the current six-month processing time.[80]

Following this comment period, USCIS published a second revised DACA form on April 4, 2014, which was available for comment until May 5, 2014.[81] The revised form addresses the aforementioned concerns such as the narrow renewal period; USCIS extended it from 120 days to 150 days.[82] Additionally, USCIS updated its DACA website page to include preliminary information regarding the renewal process.[83]

USCIS Community Outreach. USCIS recognizes there may be individuals eligible to request DACA benefits who have not yet come forward. The agency plans to expand the reach of the DACA program through the development of educational materials in multiple languages and the use of social media and digital engagement to reach individuals in remote locations.[84] USCIS will also collaborate with teachers, parent associations, employers, and other nontraditional stakeholders who can serve as liaisons to hard-to-reach immigrant communities.

Conclusion

USCIS's improvements in the Provisional Unlawful Presence Waiver program serve to advance consistency and minimize delays for thousands of individuals and their families. The Ombudsman urges USCIS to study issues presented in this Annual Report related to SIJs and USCIS's limited "consent" authority. USCIS has demonstrated through DACA that the agency can successfully operationalize discretionary decision-making, by establishing formal filing procedures and processing protocols, including posted processing times. The Ombudsman encourages USCIS to do the same to address long-standing issues in the processing of non-DACA deferred action requests. The Ombudsman continues to engage with the DACA community and legal service providers, and to work to resolve long pending cases, as the renewal process begins.

[79] "Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D; Revision of a Currently Approved Collection," 78 Fed. Reg. 76636 (Dec. 18, 2013).

[80] Letter from the American Immigration Council to USCIS, "Re: Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D; Revision of a Currently Approved Collection, OMB Control Number 1615-0124, 78 Fed. Reg. 76636 (Dec. 18, 2013)" (Feb. 18, 2014); Letter from the Catholic Legal Immigration Network to USCIS, "Re: Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D; Revision of a Currently Approved Collection" (Feb. 14, 2014).

[81] 79 Fed. Reg. 18925 (Apr. 4, 2014).

[82] *Id.* USCIS plans to send notice in a postcard to applicants reminding them of the renewal period, but the exact time notice will be sent is unclear.

[83] USCIS Webpage, "Consideration of Deferred Action for Childhood Arrivals Process" (Apr. 9, 2014); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process (accessed May 16, 2014). Both the draft Form I-821D and the information on the USCIS Webpage are subject to change until the form and renewal process are finalized.

[84] *Supra* note 41.

Employment

U.S. employment-based immigration programs are designed to foster economic growth, respond to labor market needs and improve U.S. global competitiveness. The Ombudsman is pleased to report on progress in the EB-5 Immigrant Investor program. However, as discussed in prior Ombudsman Annual Reports, there are longstanding issues with USCIS policy and practice in the high-skilled categories, as well as emerging issues in the seasonal and agricultural programs.

Highly Skilled Workers: Longstanding Issues with H-1B and L-1 Policy and Adjudications

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

Stakeholders continue to report concerns regarding the quality and consistency of adjudications of high-skilled petitions. There are ongoing issues with the application of the preponderance of the evidence legal standard and gaps in policy. Stakeholders cite redundant and unduly burdensome Requests for Evidence (RFEs), and data reveal an RFE rate of nearly 50 percent for L-1B petitions and nearly 43 percent for L-1A petitions in the first half of Fiscal Year (FY) 2014.[85] Employers continue to seek the Ombudsman's assistance to resolve individual case matters and systemic issues in high-skilled adjudications.

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. Most employers seeking to employ a foreign national in a high-skilled occupation use one of the following visa programs: the H-1B (Specialty Occupation), L-1A (Intracompany Transferee Manager or Executive) and L-1B (Specialized Knowledge). In the past four years, USCIS issued policy guidance for the H-1B program,[86] and drafted much needed guidance for the L-1B program that remains pending.

[85] Information provided by USCIS (Apr. 28, 2014 and May 29, 2014).

[86] USCIS Policy Memorandum, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" (Jan. 8. 2010); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf (accessed May 16, 2014). USCIS Policy Memorandum, "H-1B Anti-Fraud Initiatives—Internal Guidance and Procedures in Response to Findings Revealed in H-1B Benefit Fraud and Compliance Assessment" (Oct. 31, 2008).

Requests for Evidence. USCIS RFE rates have continued to rise in recent years. ***See Figure 9:*** *H-1B, L-1A and L-1B RFE Rates.* Issuance of unnecessary RFEs is inefficient for USCIS because they interrupt normal processing and require adjudicators to review cases more than once. The agency also incurs administrative costs for storing, retrieving, and matching files with RFE responses after they are submitted. For petitioners, RFEs can disrupt business operations and planning, and result in delays for product development or client services. For beneficiaries and their families who depend on timely adjudication, RFEs can negatively impact arrangements to move to or within the United States, the transition to their children's schools, and the significant life choices and commitments foreign nationals make when accepting employment in the United States. Additionally, the issuance of unduly burdensome RFEs erodes stakeholder confidence in the agency's adjudications and increases the legal costs associated with these filings.

The following is an example of such an RFE, which was issued to more than one petitioner by both the California Service Center (CSC) and Vermont Service Center (VSC) for L-1A extensions.

> *USCIS acknowledges that you filed this petition to extend the [stay of a] beneficiary admitted to the United States under an L blanket petition. Thus, the beneficiary's qualifications and duties in the managerial capacity have not been examined by USCIS, and the record is insufficient to establish that the position qualifies for the classification … Your submitted written statement was not corroborated by evidence in the record. You may still submit evidence to satisfy this requirement, [including] but not limited to:*
>
> - *A letter from an authorized representative in the U.S. entity describing the beneficiary's expected managerial decisions. The letter should describe the beneficiary's typical managerial duties, and the percentage of time to be spent on each. In addition, the letter should address:*
>   - *How the beneficiary will manage the organization … or component of the organization;*
>   - *How the beneficiary will supervise and control the work of other supervisory, professional or managerial employees or manage an essential function …*
>   - *Whether the beneficiary will have authority to hire and fire, or recommend similar personnel actions … if other employees will be directly supervised …*
>   - *How the beneficiary will make decisions on daily operation of the activity or function under his or her authority. If the beneficiary will be a first-line supervisor, submit evidence showing the supervised employees will be professionals.*
> - *An organizational chart or diagram showing the U.S. entity's organizational structure and staffing levels. The chart or diagram should list all employees in the beneficiary's immediate division, department or team by name, job title, and summary of duties, educational level, and salary …*
> - *Copies of the U.S. entity's payroll summary, and Forms W-2, W-8 and 1099-Misc showing wages paid to all employees under the beneficiary's direction.*
> - *Copies of all employment agreements entered into by newly hired employees who will be managed by the beneficiary.*

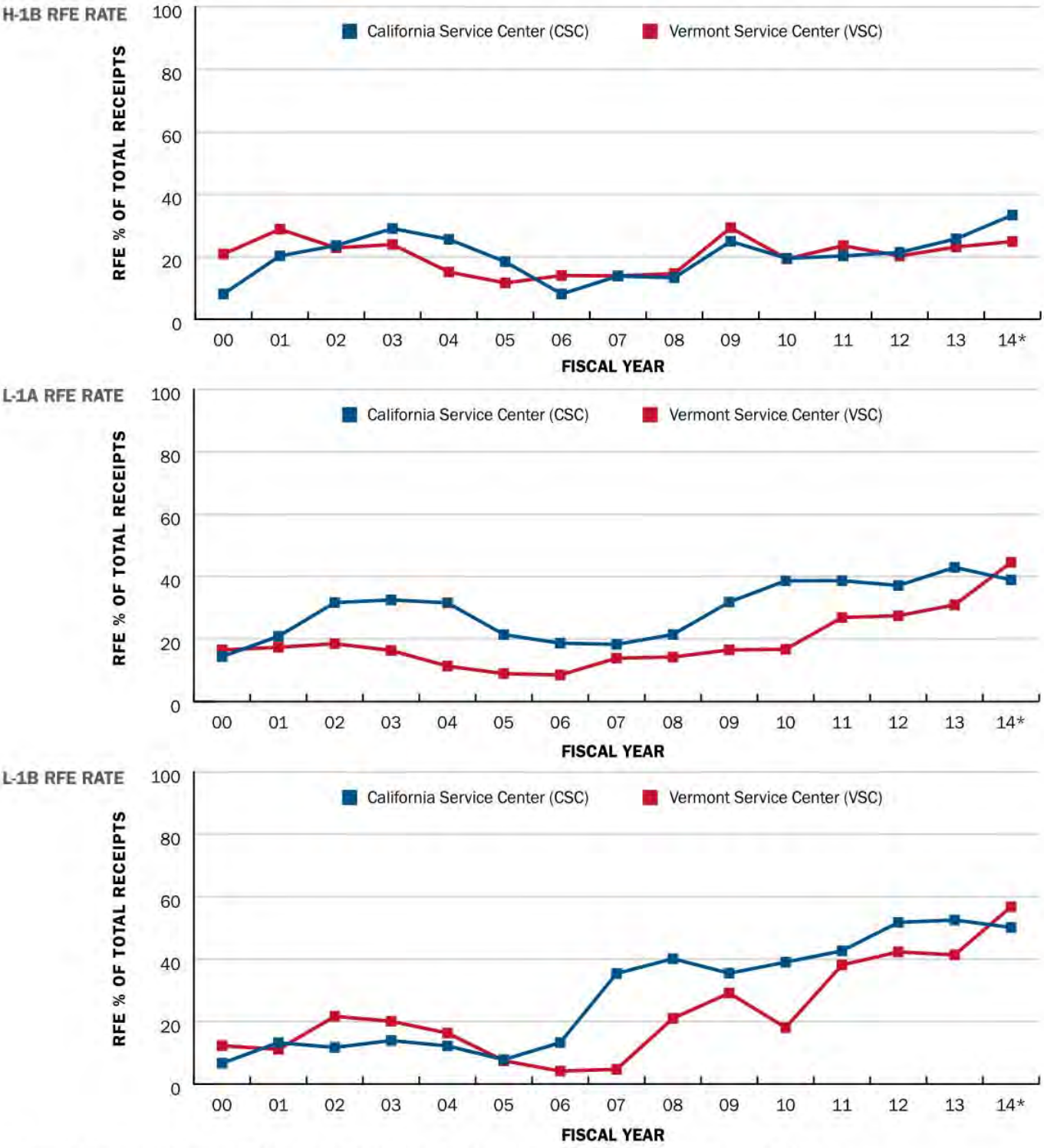
In one case, the petitioner responded to this RFE but excluded the list of all employees, their payroll summaries and employment agreements, noting that it considered this information confidential and proprietary. The petitioner did provide alternative evidence to establish the *bona fides* of the petition, describing the beneficiary's duties in the U.S. position, organizational charts showing the positions and educational degrees held by employees, and copies of the evaluations the beneficiary issued to direct reports. USCIS's denial decision stated:

> *According to the chart provided, it appears that the beneficiary's position … may oversee fourteen employees with professional degrees. However, USCIS notes that, although specifically requested, employee names and quarterly reports were intentionally omitted by the petitioner, citing company policy. Without the requested information or similar documentary evidence, USCIS cannot determine whether the subordinates managed by the beneficiary exist. For the forgoing reasons … [t]he burden of proof … has not been met.*

This RFE is unduly burdensome and demands confidential, propriety information. The petitioner in this case is a large well-established firm, and the beneficiary had already worked for the petitioner for three years as a manager in the United States at the time the extension was submitted. When the Ombudsman inquired about this RFE, USCIS responded that the RFE was appropriate, but after repeated discussions agreed to review the denial, reopened the matter, and issued an approval.

On June 3, 2013, USCIS issued a Policy Memorandum titled *Requests for Evidence and Notices of Intent to Deny.*[87] USCIS instructed adjudicators to issue an RFE only if "the officer determines that the totality of the evidence submitted does not meet the applicable standard of proof."[88] Otherwise, the adjudicator should approve or deny the petition.[89]

FIGURE 9: H-1B, L-1A, AND L-1B RFE RATES



Source: Information provided by USCIS (Nov. 23, 2009; Jan. 26, 2011; May 18, 2011; Apr. 4, 2013; May 29, 2014).

** FY 2014 includes data through March 23, 2014.*

[87] 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 Jun. 2, 2014).

[88] *Id.*, p. 2.

Despite issuance of clarifying guidance nearly a year ago, RFE rates in high-skilled visa programs have remained high through the first half of FY 2014. The Ombudsman continues to review case assistance requests with RFEs such as the following:

> *The evidence you submitted is insufficient to show that the U.S. entity is currently doing business. You submitted a print out from the website of the Secretary of the Commonwealth of Massachusetts that the U.S. entity was organized on July 12, 2012. In the petition, there is a 2012 Form Schedule C for the U.S. entity. You submitted a sublease agreement for the U.S. entity's premise, but the space is "residency type." The evidence is also insufficient to show that [redacted] has authority to sublicense [sic] the space to the U.S entity. You include articles about the U.S. entity and the beneficiary. The most recent contract between a third party and the U.S. entity is November 22, 2013. The evidence includes two 2013 Miscellaneous Income Form 1099s addressed to the beneficiary and the U.S. entity. The most recent invoice is dated December 18, 2013.*
>
> *You may still submit evidence to satisfy this requirement. Evidence may include:*
>
> - *The most recent annual report, which describes the state of the U.S. entity's finances.*
> - *Securities and Exchange Commission Form 10-K.*
> - *Federal or state income tax returns.*
> - *Audited financial statements, including balance sheets and statements of income and expenses describing the U.S. entities business operations.*
> - *Major sales invoices identifying gross sale amounts reported on the income and expenses statement or on corporate income tax returns.*
> - *Shipper's exports declarations for in-transit goods, if applicable.*
> - *The U.S. entity's U.S. Customs and Border Protection forms, Entry Summary and Customs Bond that show business activity.*
> - *Business bank statement that show business activity.*
> - *Vendor, supplier, or customer contracts.*
> - *Third party license agreements.*
> - *Loan and credit agreements.*

A review of this excerpt reveals that the petitioner advanced both probative and credible evidence in support of its requirement to demonstrate that the L-1A petitioner is conducting business in the United States. Absent derogatory information, the evidence submitted appears to establish that it is "more likely than not" – the preponderance of the evidence standard – that the petitioner is conducting business in the United States.

Despite high RFE rates in 2013, USCIS approved more than 94 percent of H-1Bs filed, 83 percent in the L-1A classification, and 67 percent in the L-1B classification.[90] High RFE rates coupled with high approval rates indicate USCIS needs to better articulate evidentiary requirements.

USCIS's issuance of such unduly burdensome RFEs consumes both USCIS and employer resources as well as delays final action on otherwise approvable filings. RFEs such as those described above demonstrate that additional training and quality assurance is needed to ensure USCIS adjudicators are aware of and adhering to current USCIS guidance and policy.

Entrepreneurs in Residence. In May 2013, USCIS completed its Entrepreneurs in Residence (EIR) initiative, which brought together USCIS and private-sector experts in an effort to provide immigrant entrepreneurs with pathways that are clear, consistent, and aligned with business realities.[91] This initiative was widely publicized by the agency,[92] and many were optimistic that if given sufficient resources, time and latitude, EIR could positively influence and modernize agency policies and practices. As part of the initiative, EIR representatives visited USCIS service centers to train adjudicators, and helped develop an "Entrepreneur Pathways" website dedicated to providing information about U.S. immigration avenues available to foreign entrepreneurs.[93] From the EIR initiative, USCIS developed *Startup 101* training that has been incorporated in the Basic Immigration Officer Training Course (Basic).[94] USCIS has not quantified the initiative's impact, such as changes in approval or RFE rates for start-up companies. On May 8,

[89] *Id. See also* 8 C.F.R. § 103.2(b)(8)(i).

[90] *Supra* note 85.

[91] USCIS Webpage, "USCIS Announces 'Entrepreneurs in Residence' Initiative" (Oct. 11, 2011); http://www.uscis.gov/news/public-releases-topic/business-immigration/uscis-announces-entrepreneurs-residence-initiative (accessed Apr. 9, 2014).

[92] *See generally* USCIS Webpage, "Entrepreneur in Residence;" http://search.uscis.gov/search/docs?utf8=%E2%9C%93&sc=0&query=%22entrepreneur+in+residence%22+&m=&affiliate=uscis_gov&commit=Search (accessed Apr. 9, 2014). *See also* USCIS Webpage, "Entrepreneurs in Residence Information Summit" (Feb. 24, 2012); http://www.uscis.gov/outreach/notes-previous-engagements/entrepreneurs-residence-information-summit (accessed Jun. 12, 2014).

[93] USCIS Webpage, "Entrepreneur Pathways;" http://www.uscis.gov/eir (accessed Apr. 9, 2014).

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

2013, USCIS announced the next phase of the initiative, now called Executives in Residence, would focus on the areas of performing arts, healthcare and information technology.[95]

Ombudsman's Past Recommendations. The Ombudsman issued recommendations to USCIS in the Ombudsman's 2010 Annual Report to address pervasive and serious issues in the high-skilled programs. The Ombudsman recommended that USCIS expand training of its adjudicators on the legal standard of proof, preponderance of the evidence, which is the standard for most petitions and applications for immigration benefits.[96] USCIS concurred with this recommendation, and its Offices of Human Capital and Training and Chief Counsel developed training that provided specific examples for several immigrant and nonimmigrant classifications.[97] USCIS piloted this training at Basic in February 2012, and finalized the material after revisions were made in the third quarter of 2012.[98]

This 2012 training module is allocated four hours of classroom time during the six and a half week Basic curriculum, which covers a wide range of subjects including ethics, decision writing, interviewing techniques, and immigration law basics. While there may not be time for in-depth discussion of the legal standard at Basic, there is no mandatory refresher course for USCIS adjudicators pertaining to the preponderance of the evidence legal standard.

The Ombudsman also previously recommended that USCIS conduct supervisory review of all RFEs at one or more of its service centers and in one or more product lines as a quality control pilot measure.[99] The agency declined to adopt this recommendation, noting that it routinely conducts quality reviews.[100] It deemed 100 percent supervisor RFE review to be too time-consuming and resource-intensive, despite the enormous costs for the agency in preparing RFEs and reviewing responses in tens of thousands of cases.[101]

The Ombudsman supports USCIS's efforts to clarify the L-1B standard.[102] In 2010, the Ombudsman recommended that USCIS re-write L-1B regulations using the Administrative Procedure Act notice and comment process.[103] Several years prior, USCIS issued multiple policy memoranda attempting to better define "specialized knowledge."[104] These memoranda focused on Congressional intent, and a 1970 Congressional Report noted, "the present immigration law and its administration have restricted the exchange and development of managerial personnel from other nations vital to American companies competing in modern-day world trade."[105] Despite these efforts, employers struggle to decipher USCIS policy and practice in the high-skilled visa programs.

[95] USCIS Webpage, "USCIS to Expand Entrepreneurs in Residence Initiative"; http://www.uscis.gov/news/uscis-expand-entrepreneurs-residence-initiative (accessed Apr. 9, 2014). *See also* USCIS Webpage, "Executives in Residence" (Apr. 4, 2014); http://www.uscis.gov/about-us/uscis-residence-programs/executives-residence (accessed Apr. 23, 2014).

[96] Ombudsman Annual Report 2010 (Jun. 30, 2010), p. 47; http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf (accessed May 16, 2014).

[97] *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 Jun. 23, 2014).

[98] USCIS response to Ombudsman Annual Report 2010 (Nov. 9, 2010), p. 6; http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Annual%20Reports/cisomb-2010-annual-report-response.pdf (accessed Jun. 23, 2014).

[99] *Supra* note 96, p. 48.

[100] *Supra* note 98, p. 9.

[101] *Id.* USCIS, at times, has conducted 100 percent supervisory review of RFEs upon the issuance of new policy.

[102] *See generally* USCIS Teleconference Recap, "L-1B Specialized Knowledge" (Jun. 14, 2011).

[103] *Supra* note 96, p. 36. *See also* Ombudsman Annual Report 2011 (Jun. 2011), p. 26; http://www.dhs.gov/xlibrary/assets/cisomb-annual-report-2011.pdf (accessed May 16, 2014) and Ombudsman Annual Report 2013 (Jun. 2013), p. 30; http://www.dhs.gov/sites/default/files/publications/cisomb_2013_annual_report%20508%20final_1.pdf (accessed May 16, 2014). *See* Administrative Procedure Act, Pub. L. No. 79-404; 5 U.S.C. § 551 (1946).

[104] Immigration and Naturalization Service (INS) Policy Memorandum, "Interpretation of Specialized Knowledge," (Mar. 9, 1994); INS Policy Memorandum, "Interpretation of Specialized Knowledge," HQSCOPS 70/6.1 (Dec. 20, 2002); USCIS Policy Memorandum, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks," (Sept. 9, 2004).

[105] *See generally* H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815 (Leg. Hist.).

Ongoing Concerns

Below is an overview of challenges – many of them longstanding – in agency policy and adjudication of petitions for high-skilled workers.

The Legal Standard for Adjudications: Preponderance of the Evidence. USCIS's adjudicator training lacks a concentrated exploration of the preponderance of the evidence standard. Basic curriculum does not include hypothetical examples of employment cases that can be used to train adjudicators on how to apply the "more likely than not" preponderance test. Exploring how various factual scenarios could turn the case from an approval to a denial, or warrant the issuance of an RFE, would be highly instructive. The Ombudsman previously recommended this approach, but the training module covers this important subject matter only in the abstract. The Ombudsman urges USCIS to reinforce this training for all USCIS adjudicators by developing and requiring refresher courses on a regular basis.

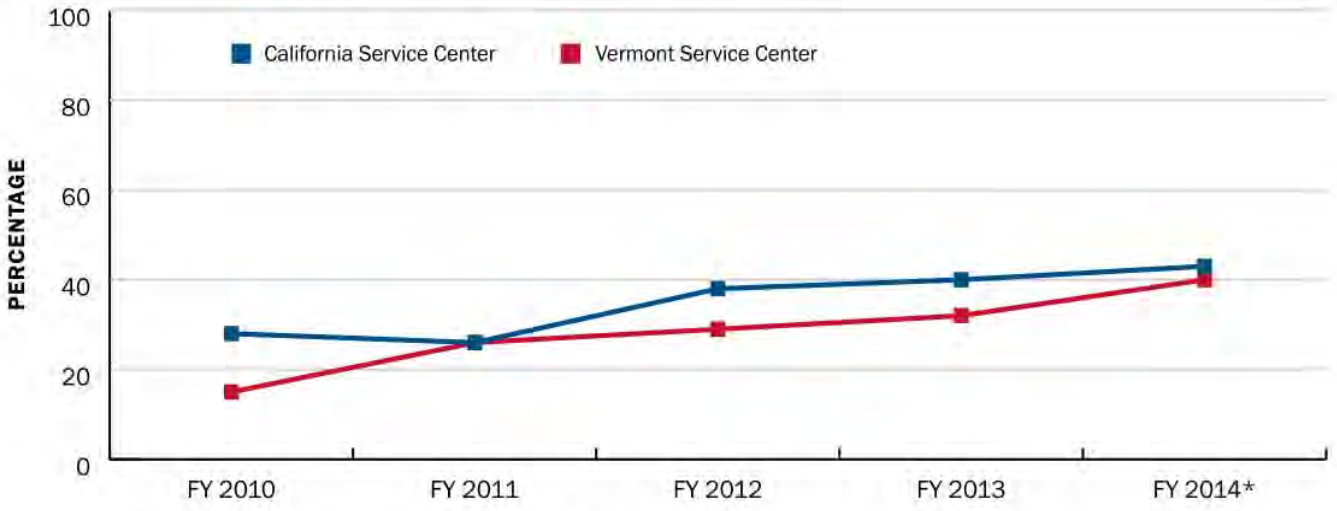
Gaps in L-1B Policy and Requests for Evidence. New L-1B guidance or regulations are needed to clarify the definition of "specialized knowledge."[106] The Immigration and Nationality Act (INA) does not precisely define "specialized knowledge," and RFE rates for L-1Bs show that this legal standard is not well understood by employers or USCIS adjudicators. Stakeholders report receiving RFEs that request information already provided with the initial filing, business information not directly relevant to adjudication, or otherwise confidential or proprietary corporate information.

The Ombudsman continues to monitor high RFE rates in the high-skilled worker visa programs. In 2004, CSC and VSC issued RFEs in 16 and 12 percent of L-1B petitions, respectively. In 2013, the CSC L-1B RFE rate was 51.5 percent, and 41.4 percent at the VSC.[107] In the first two quarters of FY 2014, the CSC RFE rate was at 50 percent, and at 56.7 percent at the VSC.[108]

L-1B Denial Rates. USCIS L-1B denial rates have also increased in recent years.[109] Five years ago, there was a 20 percent denial rate overall for the L-1B category. Today, denial rates are at 40 and 32 percent for FY 2013 for the CSC and VSC, respectively.[110] Data from FY 2014 reflects a similar denial rate at both service centers. ***See Figure 10:*** *L-1B Denial Rates.*

It is difficult to identify the root cause of the high RFE and denial rates. The Ombudsman recognizes that USCIS cannot prevent the receipt of improperly prepared L-1B submissions. However, the sustained high rate of RFEs and denials in this visa classification indicates several possibilities: USCIS adjudicators are not receiving the right information from petitioners, adjudicators do not fully understand the legal standards for establishing L-1B specialized knowledge, or petitioners do not understand what USCIS adjudicators are looking for in an L-1B filing.

FIGURE 10: L-1B DENIAL RATES



Source: Information provided by USCIS (Apr. 28, 2014).

**FY 2014 includes data through March 24, 2014.*

[106] *See* Immigration and Nationality Act (INA) § 101(a)(15)(L).

[107] *Supra* note 94.

[108] *Id.*

[109] *Id.* USCIS collects data by fiscal year, which means some cases are receipted in one fiscal year and issued a decision in the subsequent fiscal year.

[110] *Id.*

The H-2 Temporary Worker Programs

Responsible USCIS Office:
Service Center Operations Directorate

Stakeholders are increasingly turning to the Ombudsman for case assistance related to the H-2 programs. During this reporting period, the Ombudsman received a sharp increase in the number of requests for case assistance, most submitted by small- and medium-sized businesses petitioning for multiple workers, with some requesting 100 or more workers to fill their temporary labor needs. Stakeholders raise concerns with issuance of RFEs where similar petitions were approved in prior years for the same employer with identical temporary need in the same sector and for the same or similar workers. The Ombudsman also received requests for case assistance from Members of Congress whose constituents are negatively impacted by delays in H-2 adjudications.

Background

Under the H-2 programs, U.S. employers may petition to hire foreign workers when they anticipate a temporary shortage of domestic labor.[111] H-2 status is for workers who perform certain agricultural (H-2A) or nonagricultural jobs (H-2B) on a temporary basis due to seasonal, peak load, intermittent or one-time occurrence needs.[112] Industries that rely on the timely processing of H-2 petitions include agriculture, landscaping, hospitality, horse racing, ski resorts, mobile entertainment (circuses), and crabbing, among others.

There is a statutory limit on the number of H-2B non-agricultural workers that may be admitted each fiscal year. Visas are allocated in two allotments, with 33,000 available from October 1 to March 31, and the remaining 33,000 available in the second half of the fiscal year, from April 1 to September 30.[113] In FY 2013, the U.S. Department of State (DOS) reported that 57,600 H-2B workers were admitted to the United States.[114] There is no corollary limit on the number of agricultural workers who may be admitted, and DOS reported that 74,192 H-2A visas were issued in 2013.[115] Generally, periods of admission may not exceed one year.[116]

The H-2 programs are highly regulated, and in all cases require substantive review by three distinct agencies: the U.S. Department of Labor (DOL), USCIS, and DOS. The employer first files Employment and Training Administration (ETA) Form 9142, *Application for Temporary Labor Certification* with DOL demonstrating there are insufficient workers in the local labor pool who are willing, able, qualified, and readily available to fill the temporary need. This involves conducting a local recruitment campaign and coordination with the appropriate State Workforce Agency. Additionally, the employer must prove that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Employer petitioners and others involved in the H-2 process are prohibited from collecting a "job placement fee" or other compensation (either direct or indirect) at any time from workers as a pre-condition to their recruitment or employment.[117]

Once DOL issues the Temporary Labor Certification, the employer submits to USCIS Form I-129, *Petition for Nonimmigrant Worker*. USCIS reviews the Temporary Labor Certification issued by DOL, and examines whether the need and the job are both temporary in nature (i.e., one time, seasonal, peak load or intermittent). USCIS prioritizes H-2A agricultural worker filings and typically completes these adjudications within a matter of days.[118] Non-agricultural H-2B filings are not prioritized, but petitioners may request premium processing to obtain a decision within 15 calendar days.[119]

The prospective foreign worker beneficiary then applies for a H-2 nonimmigrant visa at a DOS consulate abroad and is interviewed to determine admissibility, as well as if the applicant is aware of the work that will be performed, including the location and the applicable wage rate. DOS also probes whether or not the beneficiary paid a prohibited "job placement fee" at any time during the process.[120] Following visa issuance, the beneficiary presents himself or herself for admission to the United States at a U.S. Customs and Border Protection port of entry.

[111] *See* INA § 101(a)(15)(H)(ii)(a)-(b).
[112] 8 C.F.R. § 214.2(h)(6)(ii).
[113] INA §§ 214(g)(1)(B) and 214(g)(10).
[114] U.S. Department of State Webpage, "Table XVI(B) Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards) Fiscal Years 2009-2013;" http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXVIB.pdf (accessed May 14, 2014).
[115] *Id.*
[116] 8 C.F.R. § 214.2(h)(5)(iv)(A).
[117] 20 C.F.R. § 655 Subpart A and B.
[118] Adjudicator's Field Manual Ch. 31.4(c).
[119] USCIS Webpage "How Do I Use the Premium Processing Service?" (Jun. 6, 2013); http://www.uscis.gov/forms/how-do-i-use-premium-processing-service (accessed May 16, 2014).
[120] 9 FAM 41.53 N2.2(c).

Delays at any point in this process can have severe economic consequences for U.S. employers, including spoilage of harvestable fruits and vegetables, loss of valuable livestock, or disruptions of scheduled events or delivery of services. Employers may not begin the H-2B filing process more than 90 calendar days and no less than 75 calendar days before the employer's date of need, and for H-2A filings an application cannot be filed 45 calendar days before the employer's date of need.[121] Processing delays with any entity involved in the life-cycle of these temporary worker filings, whether at DOL, USCIS, or DOS, heightens the need for the next agency in line to act swiftly on such filings.

Ongoing Concerns

Stakeholder concerns have focused on the increased issuance of RFEs by the VSC. One stakeholder representing multiple employers filing H-2B petitions at both the VSC and CSC provided the Ombudsman data indicating that the VSC is placing higher scrutiny on the "temporariness" or "seasonality" of occupations, resulting in a high issuance of RFEs. Between January 1 and March 30, 2014, one of the stakeholder's employer members received 146 RFEs out of 300 petitions pending with the VSC for landscapers, a traditionally recognized seasonal and temporary job. H-2 stakeholders are questioning why USCIS is issuing RFEs for seasonality for occupations that have long been recognized and approved by DOL and USCIS in prior years. FY 2014 data shows that the VSC RFE issuance rate is 35 percent whereas the CSC rate over the same time frame is at 7 percent. ***See Figure 11:*** *H-2B (Temporary Nonagricultural Worker) Adjudication Data.*

Another common complaint is repetitive RFEs to verify business information year after year. For example, one ranch employer brought an H-2 case to the Ombudsman where USCIS issued RFEs for three consecutive years seeking the same business information for the petitioner.

In May 2014, the Ombudsman convened an interagency meeting between DOL, DOS and DHS to review aspects of the H-2 process. The Ombudsman expects to discuss further H-2 processing issues at the office's 2014 Annual Conference.

The EB-5 Immigrant Investor Program

Responsible USCIS Office:
Immigrant Investor Program Office

The Immigrant Investor program has historically presented USCIS with significant challenges due to many variables, including the complexity of projects, the financial arrangements with investors, and the attribution of job creation to the investment. During this reporting period, USCIS relocated adjudication to Washington, D.C. and issued new guidance addressing several longstanding stakeholder concerns. While stakeholders continued to raise concerns with adjudication delays, the Ombudsman received fewer requests for case assistance (61 requests) than in the 2013 reporting period (441 requests). The new adjudication unit and the updated policy guidance usher in a new era for this increasingly popular investment and job-creating program.

FIGURE 11: H-2B (TEMPORARY NONAGRICULTURAL WORKER) ADJUDICATION DATA

FISCAL YEAR	SERVICE CENTER	RECEIPTS	APPROVALS	DENIALS	REQUESTS FOR EVIDENCE
2012		4,287	4,143	272	1,276
	California Service Center	1,381	1,355	74	334
	Vermont Service Center	2,906	2,788	198	942
2013		4,720	4,490	168	1,427
	California Service Center	1,547	1,466	31	338
	Vermont Service Center	3,173	3,024	137	1,089
2014*		3,653	3,319	61	918
	California Service Center	1,250	1,182	16	85
	Vermont Service Center	2,403	2,137	45	833

Source: Information provided by USCIS (May 13, 2014).

**FY 2014 includes data through March 31, 2014.*

[121] 20 C.F.R. §§ 655.15(b) and 655.130(b).

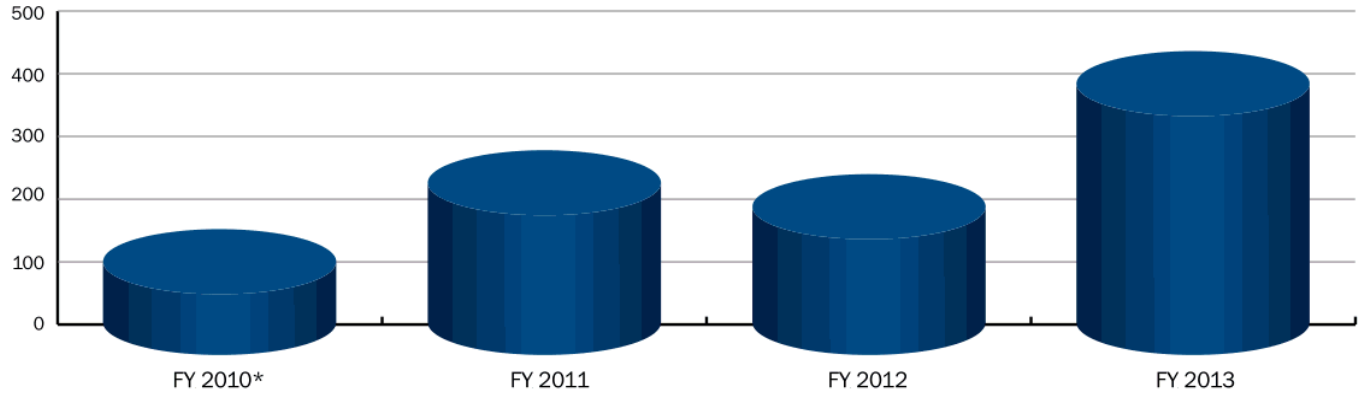
Background

In 1990, Congress established the fifth employment-based preference category (EB-5), which offers Legal Permanent Residence to immigrants who make significant investments in commercial enterprises that create U.S. jobs.[122] Congress allocated 10,000 visas annually under this category for qualified foreign entrepreneurs, their spouses, and children.[123] To be eligible for EB-5 status, a foreign entrepreneur must invest a minimum of $500,000 in an enterprise that will "directly create" 10 full-time positions for U.S. workers over a two-year period.[124]

In 1992, shortly after launching the EB-5 preference category, Congress authorized the "Regional Center" Pilot program to encourage the concentration of EB-5 investor capital in projects likely to have greater regional and national impacts.[125] Today, the vast majority of EB-5 investments flow through the Regional Center Pilot program.

The EB-5 program has become an increasingly attractive pathway for individuals with investment capital to immigrate to the United States. Individual immigrant investor filings, submitted on Form I-526, *Immigrant Petition by Alien Entrepreneur*, increased 504 percent between FY 2008 and 2013.[126] Project developers and financiers across the United States are now working with EB-5 Regional Centers, as well as with state and municipal governments, to use EB-5 funds as one part of financing for large-scale commercial and public development projects. Form I-924, *Application For Regional Center Under the Immigrant Investor Pilot Program* filings have also increased over the same period. ***See Figure 12:*** *Form I-924, Application for Regional Center Under the Immigrant Investor Pilot Program.*

FIGURE 12: FORM I-924, APPLICATION FOR REGIONAL CENTER UNDER THE IMMIGRANT INVESTOR PILOT PROGRAM



Source: Information provided by USCIS (May 16, 2014).

**Form I-924 came into use on November 23, 2010.*

[122] Immigration Act of 1990 § 121(b)(5), Pub. L. No. 101–649; 8 U.S.C. § 1153(b)(5).

[123] INA § 203(b)(5)(A).

[124] INA § 203(b)(5)(B)(ii). Most foreign entrepreneurs invest in a "targeted employment area," defined as a rural or urban area that has experienced high unemployment (of at least 150 percent of the national average rate). Under 8 C.F.R. section 204.6(f), the amount of capital necessary to make a qualifying investment in a targeted employment area within the United States is $500,000.

[125] The Judiciary Appropriations Act of 1993 § 610, Pub. L. No. 102-395 (Oct. 6, 1992).

[126] Information provided by USCIS (Jan. 24, 2014).

Notwithstanding the increase in EB-5 program filings, USCIS has, from time-to-time, placed adjudication holds on Forms I-526, I-829, *Petition by Entrepreneur to Remove Conditions,* and I-924, as it worked to address novel legal issues.

On December 3, 2012, the USCIS Director announced that EB-5 adjudications would be transitioned from the CSC to a newly-established EB-5 adjudication unit in Washington, D.C. With this transition, USCIS organizationally realigned the EB-5 product line under the Field Operations Directorate, and designated this new unit as the Immigrant Investor Program Office (IPO). The IPO became operational on April 29, 2013. On May 30, 2013, USCIS issued a comprehensive EB-5 Policy Memorandum that addresses several longstanding stakeholder concerns, including when deference is afforded to prior adjudications.[127]

On December 12, 2013, the DHS Office of the Inspector General (OIG) issued a report titled *United States Citizenship and Immigration Services Employment Based Fifth Preference (EB-5) Regional Center Program.*[128] The OIG called on USCIS to:

- Update and clarify the EB-5 federal regulations to ensure program integrity, including increased oversight of regional centers;
- Establish formal memoranda of understandings with the Departments of Commerce and Labor and the Securities and Exchange Commission to provide expertise and assistance in the EB-5 program management and adjudications; and
- Conduct a comprehensive assessment of how EB-5 funds have effectively stimulated job growth.

In a response letter attached to the OIG report,[129] USCIS concurred with these recommendations, with the exception of the OIG's call on the agency to "quantify the impact of the EB-5 program on the U.S. economy." In rejecting this recommendation, USCIS stated that it is "not charged with conducting a broader assessment of the program's impact." Furthermore, USCIS "defended its policy of deferring to prior agency decisions involving the same investment project … [indicating] that an important element of consistency is that the agency must not upend settled and responsible business expectations by issuing contradictory decisions relating to the same investment projects," and that doing so "undermines program integrity, and is fundamentally unfair to … developers and investors [who] act in reliance on the approval." The Ombudsman concurs – deference is essential to consistency in EB-5 and other USCIS adjudications. It should be noted that the two recommendations in the December 2013 OIG report with which USCIS concurred were previously made by the Ombudsman in March 2009. USCIS indicated in its response to the OIG report that it intends to soon initiate formal rulemaking to replace the current framework of outdated and ambiguous EB-5 regulations.

[127] *See* USCIS Policy Memorandum, "EB-5 Adjudications Policy (PM-602-0083)" (May 30, 2014); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Approved%20as%20final%205-30-13).pdf (accessed May 13, 2014).

[128] *See* OIG Report, "United States Citizenship and Immigration Services' Employment-Based Fifth Preference (EB-5) Regional Center Program" (Dec. 12, 2013); http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-19_Dec13.pdf (accessed Mar. 31, 2014).

[129] *Id.*, pp. 21-33.

Ongoing Concerns

In January 2014, the Ombudsman held separate meetings with EB-5 stakeholders and USCIS IPO leadership. Stakeholders reported lengthy processing times in EB-5 product lines, and raised concerns regarding lack of information sharing and engagement between the agency and stakeholders. Stakeholders stated that USCIS adjudicators appeared to be implementing new guidance from the May 2013 EB-5 Policy Memorandum, including deference to prior adjudications involving the same regional center project. Ombudsman Odom communicated this feedback directly to responsible EB-5 program officials, including the new IPO Director.

Shortly after these meetings, on January 26, 2014, the IPO held a national teleconference. USCIS updated stakeholders on the transition of EB-5 adjudications from the CSC to the Washington, D.C.-based IPO, and noted that, due to the transition, processing times will likely temporarily increase throughout the remainder of FY 2014, as the IPO on-boards and trains approximately 100 new adjudicators, economists, and other staff. Adjudication of Form I-829 will remain in California for the remainder of 2014. Program leaders expressed determination that when the IPO is fully operational, USCIS will reduce processing times, and improve the predictability and consistency of EB-5 adjudications. Additionally, USCIS announced that it will redouble efforts to simultaneously enhance program integrity as it seeks to improve program efficiency.

Conclusion

The Ombudsman will continue to review RFEs in the high-skilled and H-2 programs and assess USCIS initiatives designed to improve the quality and consistency of adjudications. The Ombudsman anticipates continued USCIS and stakeholder engagements following the recent transition of the EB-5 unit from the CSC to Washington, D.C.

Humanitarian

USCIS humanitarian programs provide relief for immigrant victims of persecution, abuse, crime and trafficking. This Annual Report section discusses progress and challenges in USCIS processing of humanitarian immigration benefits, including lengthy processing times and unnecessary and unduly burdensome Requests for Evidence for certain victims. This section also includes a discussion of the seven-fold increase in credible fear claims – a product of a confluence of factors including regional violence and economic conditions in Mexico, El Salvador, Honduras, and Guatemala – resulting in lengthy affirmative asylum processing times.

DHS Initiatives for Victims of Abuse, Trafficking, and Other Crimes

DHS and USCIS initiatives support vital immigration protections for victims of trafficking and other violent crimes. During this reporting period, Ombudsman Odom became Chair of the Blue Campaign Steering Committee (Blue Campaign), DHS's interagency anti-trafficking initiative, and Acting Co-Chair of the DHS Council on Combating Violence Against Women. These leadership roles – working alongside USCIS, other DHS components, law enforcement, and community partners – helped advance the Department's commitment to increasing awareness of human trafficking and strengthening humanitarian programs and relief.

Background

Enacted in 1994, the Violence Against Women Act (VAWA) provides important immigration protections for victims of trafficking and other violent crimes.[130] VAWA immigration benefits include: 1) a self-petition process for victims of domestic violence to independently request Lawful Permanent Residence on their own behalf and eliminate the need for victims to rely on abusers in order to obtain Permanent Residence; 2) T nonimmigrant status for victims of human trafficking; and 3) U nonimmigrant status for victims of certain specified crimes.[131] DHS components, including USCIS, have implemented these provisions.

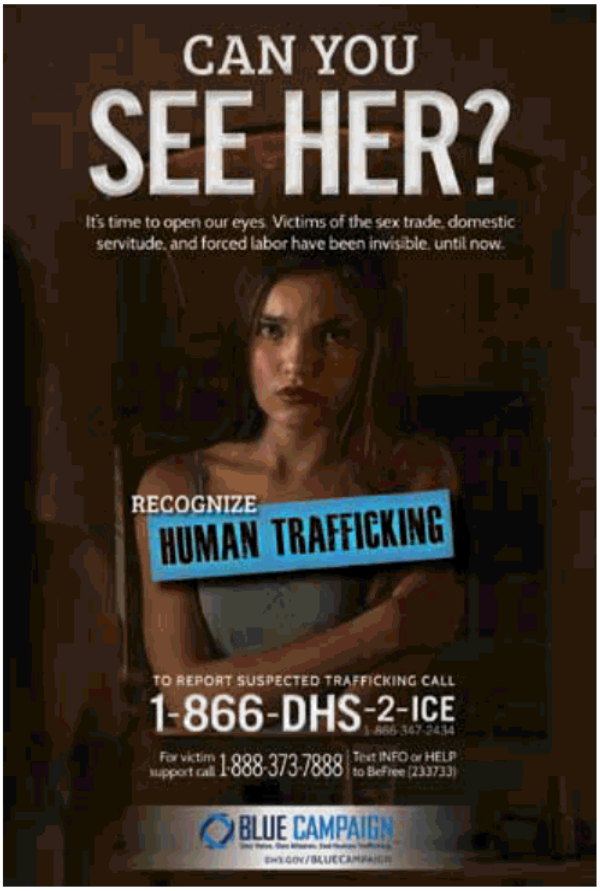
[130] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322; *see also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, and Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193.

[131] *Id.*

On March 7, 2013, the President signed into law the Violence Against Women Reauthorization Act of 2013.[132] This legislation includes reauthorization of the William Wilberforce Trafficking Victims' Protection Reauthorization Act of 2008,[133] which reasserts the U.S. Government's leadership role in the fight against modern-day slavery.[134]

DHS Blue Campaign. The Blue Campaign, launched in 2010 and formally chartered in August 2013, is the unified voice for DHS's nationwide efforts to combat human trafficking. Through interagency coordination, the Blue Campaign collaborates with law enforcement, first responders, prosecutors, government, non-governmental, faith-based, and private organizations to conduct training and outreach that expands awareness of human trafficking and helps to identify and protect victims and prosecute traffickers. Since its inception, the Ombudsman has contributed to the Blue Campaign by providing subject matter expertise and hosting stakeholder engagements. As Chair of the Blue Campaign, Ombudsman Odom works with DHS components across their various missions to prevent human trafficking, protect trafficking victims, investigate and assist in the prosecution of traffickers, and provide publicly available resources to the anti-trafficking community.

Under Ombudsman Odom's leadership, DHS completed with U.S. Departments of Justice (DOJ) and Health and Human Services (HHS) the development and release in January 2014 of the *Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States*, which coordinates the anti-human trafficking efforts of 19 federal agencies.[135] This five-year plan outlines four goals, eight objectives and more than 250 action items across agencies for services. The plan provides a roadmap for aligning federal efforts to aid victims, increase understanding among federal and non-federal entities who work to support victims, expand victims' access to services, and improve outcomes for survivors of human trafficking. The Blue Campaign has continued under Ombudsman Odom's leadership to establish partnerships outside the federal government, such as reaching an agreement with Western Union at the end of 2013 that provides training to hundreds of Western Union employees on human trafficking and how to report it. This agreement also extends the reach of Blue Campaign public awareness materials to Western Union facilities nationwide.



The Ombudsman provides case assistance to individuals seeking to resolve problems with applications and petitions for immigration relief, including immigrant victims of trafficking. The Ombudsman also 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.

As a part of the Blue Campaign, USCIS participated in training sessions for law enforcement agencies on protections for immigrant victims. USCIS also collaborated with U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations Victim Assistance program and Law Enforcement Parole Unit to train state and local police, and non-governmental and community-based organizations on indicators of human trafficking and

[132] 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 (Jan. 5, 2006); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 (Oct. 28, 2000); Violence Against Women Act of 2000; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (Sept. 13, 1994).

[133] William Wilberforce Trafficking Victims' Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457 (Dec. 9, 2008).

[134] *Id.* at § 235(d)(8).

[135] The President's Interagency Taskforce to Monitor and Combat Trafficking in Persons, "Coordination, Collaboration, Capacity, Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States, 2013-2017". (Jan. 2014); http://www.ovc.gov/pubs/FederalHumanTrafficking-StrategicPlan.pdf (accessed Apr. 28, 2014).

protections for immigrant victims.[136] In addition, through its Vermont Service Center (VSC) VAWA Unit, USCIS hosted quarterly public outreach events.

DHS Council on Combating Violence Against Women. In 2010, DHS created a working group to examine ways in which the Department could support the work of the Immigration Subcommittee of the White House Council on Women and Girls.[137] This working group met on a quarterly basis from fall 2010 to spring 2012, to coordinate and develop projects to support protections for immigrant women and children. Through the coordinated efforts of the working group, DHS provided training to personnel on protections for immigrant victims and section 1367 of VAWA (VAWA Confidentiality). The group organized regular public outreach to state and local immigration professionals and legal and domestic violence service providers to receive feedback about DHS-related issues impacting victims, and it published the *U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement.*[138] The group also established working relationships with HHS, DOJ, the U.S. Department of State, and various state, local, and tribal government agencies.

In an effort to formalize its work, DHS created the Council on Combating Violence Against Women (Council) in March 2013. The Council provides a forum to bring together experts from across DHS to identify and build consensus around the best approaches for combaing violence against women. The Council also identified initiatives that support combating violence against women already implemented across the Department for inclusion in a public resource guide.

Ombudsman Odom, who has been Acting Co-Chair of the Council since September 2013, plays a key role in coordinating stakeholder engagements and identifying areas for improvement of DHS's services and protections for victims. Additionally, the Council coordinates quarterly public webinars and teleconferences for DHS stakeholders including law enforcement, first responders, legal service providers, victim advocates, and others. On December 19, 2013 and January 28, 2014, the Council and ICE co-hosted a webinar on ICE's efforts to aid vulnerable populations. These efforts include the use of prosecutorial discretion on detention determinations through its Risk Classification Assessment Tool, stays of removal orders for U nonimmigrant status petitioners, and the agency's sexual abuse and assault prevention intervention efforts to reduce sexual assault of detained immigrants, among other initiatives.

USCIS Processing of Immigration Benefits for Victims of Domestic Violence, Trafficking, Sexual Assault, and Other Violent Crimes

Responsible USCIS Office:
Service Center Operations Directorate

USCIS continues to devote significant resources to outreach, training, and adjudication for immigration benefits for victims. The agency recognizes the need to meet processing time goals. As USCIS trains new adjudicators in the VAWA Unit, the Ombudsman will continue to monitor the quality of Requests for Evidence (RFEs) and overall processing of humanitarian programs.

Background

In 2000, USCIS established the VAWA Unit at the VSC to promote consistency in adjudications.[139] In May 2013, processing times were five months for T nonimmigrant status applications; 15 months for U nonimmigrant status petitions; and up to 19 months for VAWA self-petitions.[140] To address these lengthy processing times, USCIS added 30 staff to its VAWA Unit. In March 2014, processing times had reduced to about eight months for U nonimmigrant status petitions (or pre-approvals when the U visa cap has been reached) and five months for VAWA self-petitions, but were slightly longer for T nonimmigrant status applications, at six months.[141] At a December 6, 2013 stakeholder

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

[137] Immigration Subcommittee of the White House Council on Women and Girls Webpage, "Council on Women and Girls;" http://www.whitehouse.gov/administration/eop/cwg (accessed Apr. 9, 2014).

[138] DHS "U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement;" http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf (accessed May 9, 2014). This guide provides law enforcement agencies with information on the process to certify that a U nonimmigrant status petitioner has been the victim of a crime. It contains instructions on how to complete required forms and provides answers to frequently asked questions.

[139] "Report on the Operations of the Violence Against Women Act Unit at the USCIS Vermont Service Center, Report to Congress" (Oct. 22, 2010), P. 3; http://www.uscis.gov/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/vawa-vermont-service-center.pdf (accessed Apr. 29, 2014).

[140] *See* Ombudsman Annual Report 2013 (Jun. 2013), p. 11; http://www.dhs.gov/sites/default/files/publications/cisomb_2013_annual_report%20508%20final_1.pdf (accessed May 16, 2014).

[141] *Id.*

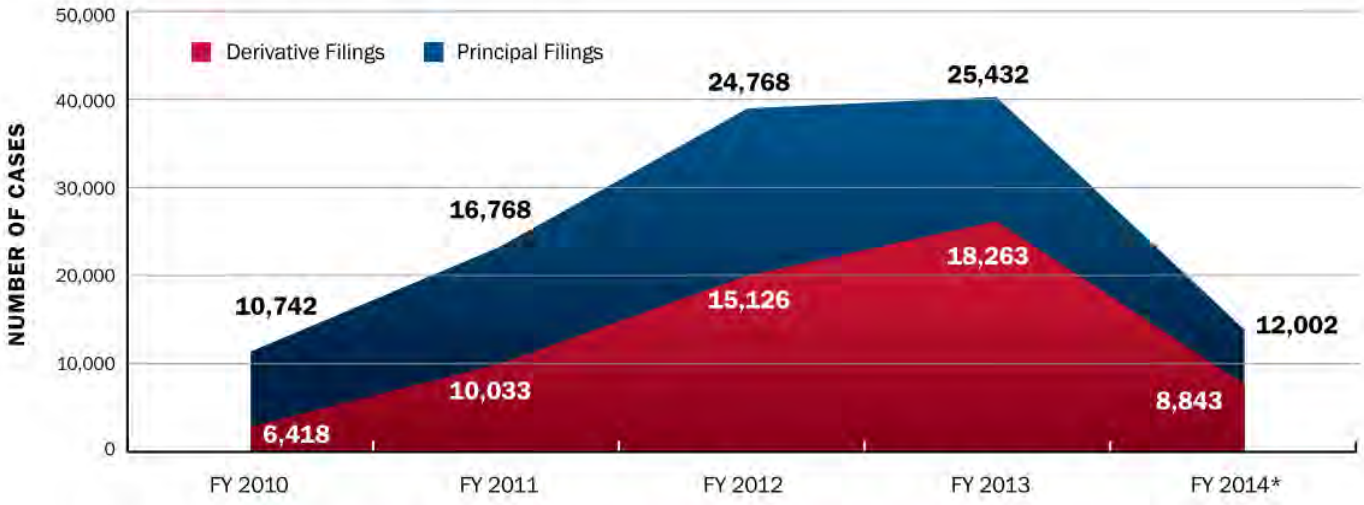
meeting, then-USCIS Director Alejandro Mayorkas stated his commitment to 180-day processing times at the VAWA Unit and not diverting resources to other immigration benefits. In a February 10, 2014 speech at a Blue Campaign stakeholder event, DHS Deputy Secretary Mayorkas committed to continuing to address processing times for these benefit categories.[142]

Each year, 10,000 U visas are available for victims of certain specified crimes, including domestic violence, sexual assault, and human trafficking, who aid law enforcement in the investigation and/or prosecution of those crimes.[143] In Fiscal Year (FY) 2014, for the fifth straight year, USCIS approved the statutory allotment of 10,000 petitions for U nonimmigrant status. ***See Figure 13:*** *U Petition Filings.* USCIS reached the limit earlier than in previous years, on December 11, 2013.[144] USCIS will continue to process U nonimmigrant status petitions for the remainder of the fiscal year, placing approvable cases on a waiting list, and providing petitioners interim employment benefits and deferred status until FY 2015 numbers become available on October 1, 2014.[145]

Over the past year USCIS has continued its extensive efforts to engage with the public, particularly emphasizing training for federal, state, and local law enforcement, to increase awareness of and access to the T and U visa programs. Between April 1, 2013 and March 31, 2014, USCIS conducted 24 outreach engagements regarding VAWA, U, and T nonimmigrant status petitions/applications.[146] Engagements ranged from in-person and webinar trainings to panel participation during conferences.[147]

USCIS training included VAWA Confidentiality, which provides protections to prevent abusive partners from using government resources to further perpetuate abuse. In particular, VAWA Confidentiality provides protections against governmental disclosure of certain information regarding a victim; prohibits the government from relying on information provided by the abuser, perpetrator, or the abuser's family members in a case against or for the benefit of the victim; and prohibits enforcement actions at protected locations (e.g., shelters, courthouses, rape crisis centers). Breaches of VAWA Confidentiality can lead to disciplinary action and/or a personal fine against a federal employee who discloses protected information. With the support of the Ombudsman, DHS created and launched in 2012 an online training program on immigration remedies for battered immigrants and VAWA Confidentiality requirements, and in 2013 released new policy guidance to ensure compliance with section 1367 of VAWA.

FIGURE 13: U PETITION FILINGS



Source: Information provided by USCIS (Apr. 28, 2014).

**FY 2014 includes data through April 14, 2014.*

[142] Ombudsman notes from Blue Campaign Stakeholder event (Feb. 10, 2014).

[143] Victims of Trafficking and Violence Protection Act of 2000 § 1513(c)(2)(A), P.L. 106-386. *See also* 8 C.F.R. § 214.14(d)(1).

[144] USCIS Webpage, "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. 21, 2014).

[145] 8 C.F.R. § 214.14(d)(2).

[146] *Supra* note 136.

[147] *Id.*

Ongoing Concerns

Processing Times. This year USCIS made improvements in processing times for VAWA self-petitioners and T nonimmigrant status applicants. Both are now being adjudicated within six months. Considerable progress also has been made on processing times for U nonimmigrant status applications. Currently, they are being adjudicated within eight months. The VAWA Unit will need to be adequately resourced to ensure that USCIS meets its processing time goal of six months. In addition, stakeholders have expressed confusion regarding how processing times are reported publicly for U nonimmigrant status petitions. On the USCIS website it states that petitions filed on or before February 11, 2013 are being processed. However, it is the Ombudsman's understanding that the date on the website reflects 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, which is currently approximately eight months.

Requests for Evidence. Stakeholders continue to raise concerns about RFEs in the adjudication of U nonimmigrant status petitions, VAWA self-petitions, and conditional residence waivers due to battery or extreme cruelty. Specifically for these types of petitions, USCIS must consider "any credible evidence" submitted.[148] This evidentiary requirement recognizes that abusers often deny victims access to important documents in a deliberate attempt to stop victims from seeking assistance. To ensure victims are afforded full protection under the law, USCIS adjudicators are directed to "give due consideration to the difficulties some self-petitioners may experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser's knowledge or consent."[149]

VAWA self-petitioners and their legal representatives report receiving RFEs requesting the type of documentation used to prove a good faith marriage in non-VAWA family-based cases (e.g., original marriage certificates, original joint bank account statements, etc.). Such RFEs seek evidence of a nature and type that is *not* required under the relevant regulations – thereby holding VAWA self-petitioners to a higher standard of proof than is actually required by applicable law and guidance. These RFEs, which can affect the quality of adjudication, add additional processing time to already delayed adjudications and may require additional attention from legal service providers, diminishing their capacity to assist victims.

For U nonimmigrant status petitions, stakeholders report an increase in RFEs that appear burdensome and unnecessary and other adjudication issues. For example, the Ombudsman recently assisted an individual whose petition was denied because, according to USCIS, the petitioner did not show the certifying official was the appropriate certifier. The individual had provided USCIS with evidence in the initial petition regarding the authority of the certifying official, who previously had signed certifications in other U nonimmigrant status petition cases that had been approved. Upon review of the Ombudsman's request, USCIS reopened and approved the case. In other RFEs, there were issues caused by the difference between the crime prosecuted and the qualifying crime listed on the U nonimmigrant status petition. For example, victims of trafficking may possess a signed law enforcement certification from the U.S. Department of Labor for involuntary servitude or peonage, which are qualifying U visa crimes,[150] but the alleged trafficker is prosecuted for another crime. RFEs and denials have been based on a misunderstanding or misapplication of this distinction.

It is time-consuming for petitioners and their representatives, often nonprofit agencies with limited resources, to respond to unnecessary RFEs. The Ombudsman has raised these concerns with USCIS, and understands that the VSC provides extensive training to its adjudicators on the requirements of the benefit types, as well as the dynamics of domestic violence and victimization.

VAWA Adjustment of Status. During the past year, there were delays in the scheduling of adjustment of status interviews for VAWA self-petitioners, specifically between the time the VAWA Unit approved the self-petition and the time it took to transfer the case to the National Benefits Center (NBC) for processing and scheduling of an interview at a USCIS local office. The VSC is currently transferring approved Forms I-360, *Petition for Amerasian, Widow(er), or Special Immigrant* with accompanying Forms I-485, *Application to Register Permanent Residence or Adjust Status* to the NBC within seven days of the final VSC adjudication action.[151] The delay in scheduling for some VAWA self-petitioners has been six months or more. The NBC is working to eliminate delays in its process, with a processing goal of ten days.[152]

[148] Victims of Trafficking and Violence Protection Act of 2000 §§ 1504(a)(2)(D), 1505(b)(7)(B), and 1513(o)(4), P.L. 106-386. *See also* Violent Crime Control and Law Enforcement Act of 1994 § 40701(a)(3)(H), P.L. 103-322.

[149] Immigration and Naturalization Service Policy Memorandum, "Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents" (Apr. 16, 1996).

[150] 8 C.F.R. § 214.14(b)(1).

[151] *Supra* note 136.

[152] *Id.*

VAWA Employment Authorization for Nonimmigrants Victims. Section 106 of the Immigration and Nationality Act (INA), enacted on January 5, 2006 in the Violence Against Women and Department of Justice Reauthorization Act of 2005,[153] provides employment authorization for battered spouses of certain nonimmigrants.[154] USCIS has not implemented this provision. On December 12, 2012, USCIS published 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,* which provides guidance on employment authorization eligibility for battered spouses of certain A, E, G, and H nonimmigrants. However, this draft policy has not been finalized. The Ombudsman continues to receive case assistance requests from potentially eligible applicants who are victims of abuse. In one recent request submitted to the Ombudsman, an abused spouse of an H-1B visa holder attempted to seek work authorization. USCIS denied her application and informed her that the agency is not currently approving such applications. Eligible victims of domestic violence may not be able to escape abuse because of the delay in implementation of INA section 106.

Increases in Credible and Reasonable Fear Requests and the Effect on Affirmative Asylum Processing

Responsible USCIS Office:
Refugee, Asylum, and International Operations Directorate

Within the past three years, there has been a significant increase in the number of foreign nationals, many of them recent arrivals at the U.S. southern border, expressing fear of returning to their home countries and triggering credible and reasonable fear interview referrals to USCIS from U.S. Customs and Border Protection (CBP) and ICE. USCIS shifted resources, made new hires, and updated agency training to address the rising number of credible and reasonable fear claims. Despite these efforts, delays have developed for affirmative asylum processing.

Background

Credible Fear. Expedited removal is the legal process under which a non-U.S. citizen is denied entry to and removed from the United States after seeking admission at a port of entry. Enacted in 1996, expedited removal applies to individuals at ports of entry ("arriving aliens") who have been found inadmissible to the United States by a CBP officer for any of the following reasons: 1) fraud or misrepresentation; 2) falsely claiming U.S. citizenship; 3) not possessing a valid, unexpired immigrant visa or other suitable entry document; 4) not possessing a passport valid for a minimum of six months from the date of expiration of the initial period of stay; or 5) not possessing a valid nonimmigrant visa or border crossing card at the time of application for admission.[155] The expedited removal process is also used to remove individuals unlawfully arriving in the United States by sea or those apprehended within 100 miles of a U.S. land border, who have not been admitted or paroled, and are unable to establish continuous physical presence in the United States for the two-year period immediately prior to the date of apprehension.[156]

A foreign national subject to expedited removal may be removed from the United States without a hearing before an immigration judge, unless that individual indicates an intention to apply for asylum or a fear of persecution, (i.e., a "credible fear").[157] If the individual expresses fear of persecution to either a CBP or ICE officer, the officer must make a referral for a credible fear interview by a USCIS Asylum Officer.[158]

Once a referral has been made, a USCIS Asylum Officer will conduct a credible fear interview, while the individual is detained,[159] to determine whether there is a "significant possibility … that the alien could establish eligibility for asylum."[160] If the foreign national is found to have a credible

[153] Violence Against Women and Department of Justice Reauthorization Act of 2005 § 844, Pub. Law No. 109-162. *See also* Immigration and Nationality Act (INA) § 106.

[154] 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.immigrantjustice.org/sites/immigrantjustice.org/files/Draft+Memo+-+Eligibility+for+Employment+Authorization+upon+Approval+of+a+VAWA+Self-Petition-December%202012.pdf (accessed May 14, 2014).

[155] Illegal Immigration Reform & Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101, Pub. Law No. 104 – 208, 110 Stat. 3009 (1996)–546, codified at 8 U.S.C. § 1101. INA § 235(b)(1)(A) and 8 C.F.R. § 235.3.

[156] INA § 235(b)(1)(A)(iii).

[157] INA § 235(b)(1)(A)(ii). CBP may choose to use normal removal proceedings under INA § 240 even when expedited removal procedures could otherwise be used. *See Matter of E-R-M & L-R-M*, 25 I&N Dec. 520 (BIA 2011).

[158] 8 C.F.R. §§ 208.30 (a) and 208.30 (c).

[159] INA § 235(b)(1)(B)(iii)(IV).

[160] INA § 235(b)(1)(B)(v); *see also* USCIS Policy Memorandum, "Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations" (Feb. 28, 2014). Link not available at this time.

fear of return to the home country, the individual will be referred to the Executive Office for Immigration Review (EOIR) for a hearing before an immigration judge.[161] USCIS referred 30,393 individuals to EOIR in FY 2013 and 16,467 individuals in the first half of FY 2014.[162] If the USCIS Asylum Officer issues a negative decision in a credible fear interview, the decision can be appealed to an immigration judge.[163] If the individual does not appeal the credible fear determination, he or she will be removed from the United States using the expedited removal procedure.[164]

Reasonable Fear. USCIS Asylum Officers are required to make reasonable fear determinations in two categories of cases referred by other DHS officers after a final order of removal has been issued or reinstated. In these cases, the individual is ordinarily removed without being placed in removal proceedings before an immigration judge.[165] The first category involves individuals who illegally re-entered the United States after having been ordered removed or individuals who voluntarily departed the United States while under an order of exclusion, deportation, or removal.[166] The second category involves foreign nationals who do not hold Legal Permanent Residence, were convicted of one or more aggravated felonies and are subject to administrative removal from the United States.[167]

Individuals in both categories are prohibited from challenging removability before an immigration judge or from seeking any form of relief from removal.[168] However, a person may not be removed from the United States if the individual is "more likely than not" to be persecuted or tortured in the country to which the individual would be returned upon the execution of a removal order.[169] Accordingly, if a foreign national subject to administrative removal is able to establish a "reasonable possibility" of future persecution, the person will be granted an opportunity to appear before an immigration judge and request withholding of removal or deferral of removal.[170]

In order to assess whether an individual facing administrative removal from the United States has a reasonable fear of persecution or torture, USCIS conducts a reasonable fear interview. Although USCIS states on its website that this interview will be conducted 10 days after ICE refers the case to the Asylum Office, due to the high volume of requests, USCIS currently strives to complete the reasonable fear process within 90 days of receiving a referral from ICE.[171] As of April 6, 2014, the average time to complete an interview at a USCIS Asylum Office is 4.2 days for a credible fear interview and 45.5 days for a reasonable fear interview.[172] When a USCIS Asylum Officer determines that a foreign national has a reasonable fear of persecution or torture, the officer refers the foreign national to Immigration Court for a withholding/deferral of removal hearing.[173] If the USCIS Asylum Officer determines that the foreign national does not have a reasonable fear of persecution or torture, the individual can request that an immigration judge review the negative reasonable fear finding.[174] If the individual does not appeal the USCIS Asylum Officer's negative reasonable fear finding, ICE will remove him or her from the United States.[175]

Increase in Credible and Reasonable Fear Claims. Between 2000 and 2009, USCIS received approximately 5,000 credible fear interview requests each year.[176] In 2009, the number of credible fear interview requests increased to 8,000.[177] In 2012, the number rose to 13,000, and in 2013, it tripled to 36,000.[178] Similarly, requests for reasonable fear interviews have also increased.[179] For many years USCIS received only a few hundred reasonable

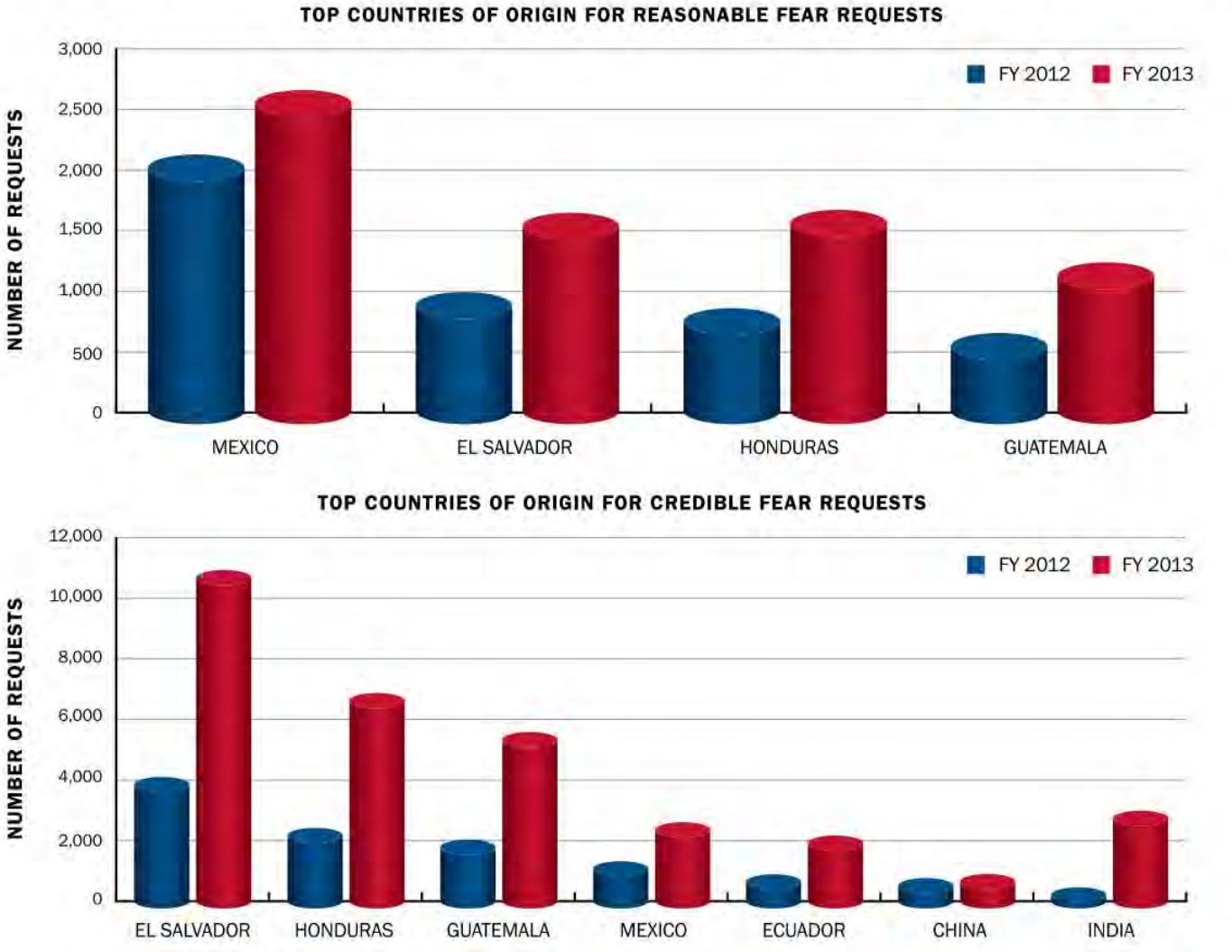
[161] INA § 235(b)(1)(B)(ii).
[162] *Supra* note 136.
[163] INA § 235(b)(1)(B)(iii)(III).
[164] INA § 235(b)(1)(B)(iii)(I).
[165] 8 C.F.R. § 208.31.
[166] INA § 241(a)(5).
[167] INA § 237(a)(2)(A)(iii).
[168] INA §§ 238(b) and (c), and 242(a)(2)(C) and 8 C.F.R. § 238.
[169] 8 C.F.R. § 208.16(c)(3).
[170] 8 C.F.R. §§ 208.31(e) and 208.16.
[171] USCIS Webpage, "Questions & Answers: Reasonable Fear Screenings" (Jun. 18, 2013); http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings (accessed Apr. 25, 2014). *See supra* note 135.
[172] Information provided by USCIS (Apr. 28, 2014).
[173] 8 C.F.R. §§ 208.31(e) and 208.16; *see* USCIS Webpage, "Questions & Answers: Reasonable Fear Screenings" (Jun. 18, 2013); http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings (accessed Apr. 25, 2014).
[174] 8 C.F.R. § 208.31(g).
[175] USCIS Webpage, "Questions & Answers: Reasonable Fear Screenings" (Jun. 18, 2013); http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings (accessed Apr. 25, 2014).
[176] Information provided by USCIS (Oct. 24, 2013).
[177] *Id.*

fear interview requests each year. In 2013, USCIS received 7,000 reasonable fear interview requests from ICE.[180] A total of 4,156 reasonable fear cases were referred to USCIS in the first five months of FY 2014.[181] ***See Figure 14:*** *Top Countries of Origin for Credible and Reasonable Fear Interview Requests.*

USCIS has prioritized credible and reasonable fear interviews over affirmative asylum hearings because applicants for the former are detained. In addition, USCIS prioritizes credible fear interviews over reasonable fear interviews. Due to limited resources and the recent rise in the number of requests for credible fear interviews, USCIS is now conducting reasonable fear interviews within 90 days and on average 45 days.[182] Nonetheless, stakeholders have reported that some individuals waited up to three months to be interviewed by a USCIS Asylum Officer and then waited an additional three months, all while detained, to receive a reasonable fear determination.[183]

USCIS endeavors to conduct credible fear interviews within 14 days of receiving a referral from CBP or ICE and reduced the credible fear interview timeframe in 2013.[184] At the beginning of FY 2013, 85 percent of individuals requesting

FIGURE 14: TOP COUNTRIES OF ORIGIN FOR CREDIBLE AND REASONABLE FEAR INTERVIEW REQUESTS



Source: Information provided by USCIS (Apr. 28, 2014).

[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *See* USCIS Asylum Division Quarterly Stakeholder Meeting Notes (Jul. 31, 2013), p.5; *see also* 8 C.F.R. § 208.7(a).
[182] *Supra* note 136.
[183] *Supra* note 176.

credible fear interviews were processed within 14 days of referral from ICE or CBP. A year later, by October 2013, USCIS was processing credible fear interviews within eight days.[185] To further streamline the credible fear interviews, USCIS began conducting telephonic credible fear interviews.[186] In FY 2013, 60 percent of credible fear interviews were conducted telephonically, and more than 68 percent of cases were conducted telephonically through the second quarter of FY 2014.[187]

USCIS revised its credible fear training, which was released to USCIS Asylum Officers in February 2014. The revised training emphasizes the requirement that the applicant demonstrate a "significant possibility"[188] of eligibility for asylum, withholding or removal, or deferral of removal rather than a "mere possibility."[189]

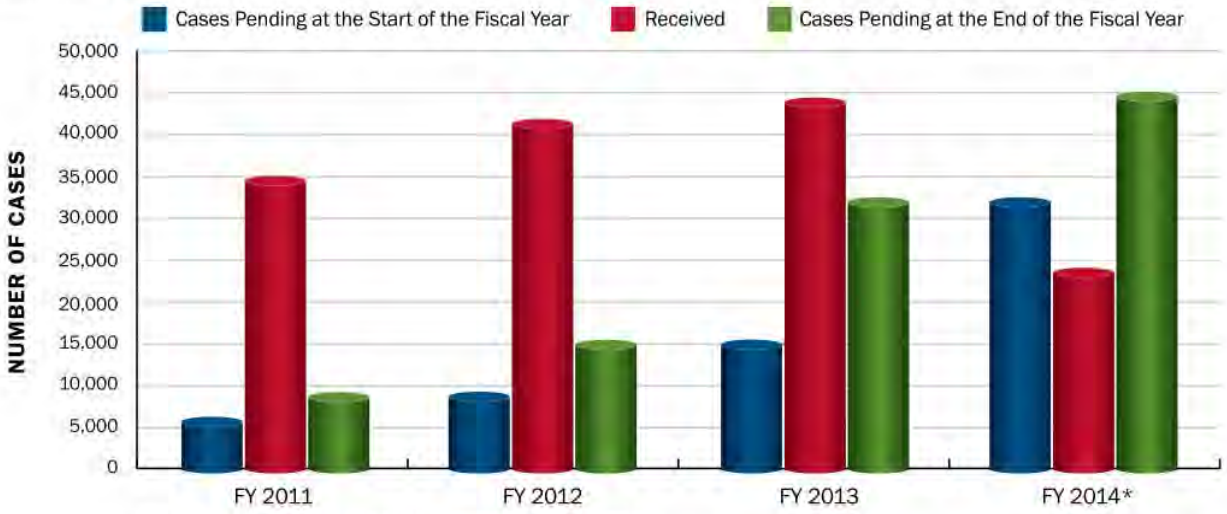
Ongoing Concerns

The Ombudsman continues to monitor steps taken by USCIS to streamline its credible and reasonable fear interview process and reduce backlogs while maintaining the integrity and protections afforded by U.S. asylum laws. The Ombudsman supports USCIS in its effort to increase staffing and eliminate backlogs.

Delays in Credible and Reasonable Fear Interviews. Many stakeholders have expressed concern regarding the delays in credible and reasonable fear interviews and communications between USCIS, CBP and ICE. USCIS's goal is to conduct reasonable fear interviews within 90 days of referral from ICE or CBP, and credible fear interviews within 14 days.[190] An individual may be detained by ICE for a significant period of time before and after making a request for a reasonable fear interview. Even with the increase in applications and lag in corresponding agency staffing levels, USCIS has stated its commitment to meet its policy and regulatory requirements.[191] The USCIS Refugee Asylum and International Operations Directorate is working to address these challenges through better coordination with ICE, for example, by accommodating credible fear interviews of detainees at certain USCIS Asylum Offices, rather than at DHS detention facilities.

Use of Telephonic Interviews. Since instituting telephonic interview processing in January 2013, remote USCIS Asylum Officers conducted more than 13,000 credible fear interviews.[192] Stakeholders stated concerns that the increased use of telephonic interviews limits the USCIS Asylum Officer's ability to evaluate credibility and appreciate

FIGURE 15: ASYLUM APPLICATION FILINGS



Source: Information provided by USCIS (Apr. 28, 2014).

**FY 2014 includes data through March 31, 2014.*

[184] *See supra* note 181; *see also* 8 C.F.R. § 208.7(a).

[185] *Supra* note 176.

[186] USCIS Asylum Division Quarterly Stakeholder Meeting (Mar. 19, 2013).

[187] *Supra* note 136.

[188] INA § 235(b)(1)(B)(v).

[189] USCIS Policy Memorandum, "Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations" (Feb. 28, 2014). Link not available at this time.

[190] Information provided by USCIS (May 8, 2014).

[191] *Supra* note 176.

[192] *Supra* note 136.

nuances in the foreign national's statements.[193] Specifically, they are concerned that, where an individual is referred for proceedings before an immigration judge, the Court will give undue weight to the summary of facts prepared by the USCIS Asylum Officer during the credible fear interview process, and fail to pay proper attention to the full statement made by the foreign national in applications for relief from removal.[194]

Impact on Affirmative Asylum. While USCIS continues to see an increase in requests for credible and reasonable fear interviews, the agency also faces an increase in receipts of affirmative asylum applications.[195] USCIS has prioritized requests by detainees and allocated its resources to those areas. Remaining resources are used to address affirmative asylum and Nicaraguan Adjustment and Central American Relief Act applications.[196] However, the result is that affirmative asylum application backlogs have arisen. As of April 23, 2014, USCIS faced a backlog of 45,193 cases.[197] The largest affirmative asylum application backlog is at the Los Angeles Asylum Office.[198] ***See Figure 15:*** *Asylum Application Filings.*

As the delay in affirmative asylum application adjudication grows, many asylum applicants are faced with difficulties in the United States such as employment and resettlement, while their families abroad continues to face adversity.

Applicants for asylum are not permitted to apply to bring their family to the United States unless and until their own asylum applications are approved and they are granted asylee status.[199] In the past year, the Ombudsman experienced a rise in the number of case assistance requests regarding delayed asylum application interviews and adjudication.

Case Example

An asylum applicant moved while he was waiting for his interview to be scheduled. His change of address request to USCIS and the interview notice crossed paths in the mail, causing him to miss his interview. The change of address was confirmed and his file was transferred to the new location. Having waited more than 180 days, he believed he was eligible for employment authorization, but was informed after applying that since he missed his interview, the asylum clock had stopped and he was considered ineligible. Rather than placing his file in queue for a rescheduled affirmative asylum interview, his file was placed in the new asylum office's backlog of new cases. For over a year he was unable to obtain work authorization. In response to the Ombudsman's inquiry, the USCIS Headquarters Refugee, Asylum, and International Operations Directorate agreed to expeditiously reschedule the interview.

New Funding and Hires. To meet the growing number of requests for credible and reasonable fear interviews, as well as affirmative asylum applications, USCIS requested additional funding, which Congress approved in August of 2013.[200] The USCIS Asylum Division received permission to increase its number of officers by 100, from 273 to 373 positions.[201] As of April 16, 2014, USCIS had 322 Asylum Officers on board, 15 additional candidates scheduled to enter on duty into USCIS Asylum Officer positions between April and July, and approximately 25 candidates selected to fill vacant Asylum Officer positions who are undergoing security screening prior to entering on duty.[202] In addition, USCIS has detailed 35 officers from other branches of USCIS to various Asylum Offices to conduct interviews.[203] The Ombudsman notes that additional adjudicative resources may be necessary to address the affirmative asylum backlog.

[193] *Id.*

[194] *Id.*

[195] *Supra* note 186.

[196] Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, Tit. II, Div. A (Nov. 19, 1997), as amended by Pub. L. No. 105-139, 111 Stat. 2644 (Dec. 2, 1997).

[197] USCIS Asylum Division Quarterly Stakeholder Meeting (Apr. 23, 2014).

[198] *Supra* note 136.

[199] 8 C.F.R. § 208.21(d).

[200] *Supra* note 197.

[201] *Supra* note 136.

[202] *Id.*

[203] *Supra* note 197.

Humanitarian Reinstatement and Immigration and Nationality Act Section 204(l) Reinstatement

Responsible USCIS Office:
Service Center Operations Directorate

Humanitarian reinstatement is a regulatory process under 8 C.F.R. section 205.1(a)(3)(i)(C) in which family-based beneficiaries whose approved petitions are revoked automatically upon the death of the petitioner may continue to seek immigration benefits if certain factors are established. There is also a streamlined reinstatement process, covered under INA section 204(l), for certain surviving relatives who are in the United States and had an approved petition at the time of the qualifying relative's death.[204] The 204(l) reinstatement applicant need not establish the multiple humanitarian factors required in traditional humanitarian reinstatement. Gaps in guidance, lack of uniform procedures, and imprecise evidentiary requirements from USCIS in the handling of humanitarian and INA section 204(l) reinstatement cases are inconsistent with the remedial and humanitarian nature of this relief.

Background

Humanitarian Reinstatement under the Regulations. USCIS regulations provide that certain family-based petitions are revoked automatically upon the death of a petitioner, and surviving beneficiaries may request that the petition be reinstated on humanitarian grounds.[205] This process, referred to as "humanitarian reinstatement," is a form of discretionary relief available to the principal beneficiary of a Form I-130, *Petition for Alien Relative* that was approved prior to the death of the petitioner.[206]

The requirements for discretionary requests for humanitarian reinstatement are outlined in regulations and administrative guidance.[207] Reinstatement is the only possible relief for surviving beneficiaries who cannot meet the requirements of INA section 204(l) or who are not widow/widowers of U.S. citizens. An affidavit of support from a substitute sponsor must accompany the request.[208]

The USCIS Adjudicator's Field Manual (AFM) lists the criteria considered in assessing whether discretion should be exercised favorably in response to a humanitarian reinstatement request: 1) the impact of revocations on the family unit in the United States, especially on U.S. citizen or Legal Permanent Resident relatives or other relatives living lawfully in the United States; 2) the beneficiary's advanced age or poor health; 3) the beneficiary having resided in the United States lawfully for a lengthy period; 4) the beneficiary's ties to his or her home country; and 5) significant delay in processing the case after approval of the petition and after a visa number has become available, if the delay is reasonably attributable to the government rather than the individual.[209] The AFM also states, "[A]lthough family ties in the United States are a major consideration, there is no strict requirement for the alien beneficiary to show extreme hardship to the alien, or to relatives already living lawfully in the United States, in order for the approval to be reinstated."[210] The AFM further provides that decisions on humanitarian reinstatement should be communicated in writing to the beneficiary, that there is no appeal, and that humanitarian reinstatement "may be appropriate when revocation is not consistent with the furtherance of justice, especially in light of the goal of family unity that is the underlying premise of our nation's immigration system."[211]

Before INA section 204(l), only widows and widowers of U.S. citizens could seek Legal Permanent Resident status after the death of a qualifying relative. Other eligible survivors were required to seek humanitarian reinstatement under 8 C.F.R. section 205.1(a)(3)(iii)(C)(2).

Reinstatement under INA Section 204(l). INA section 204(l) protects:

- Beneficiaries of a pending or approved immediate relative visa petition;
- Beneficiaries of a pending or approved family-based visa petition, including both the principal beneficiary and any derivative beneficiaries;
- Any derivative beneficiary of a pending or approved employment-based visa petition;
- Beneficiaries of a pending or approved refugee/asylee relative petition;

[204] *See* Ombudsman Recommendation, "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. 23, 2014).

[205] 8 C.F.R. § 205.1(a)(3)(i)(C).

[206] *See* USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed Apr. 1, 2014).

[207] 8 C.F.R. § 205.1(a)(3)(i)(C) and USCIS Adjudicator's Field Manual (AFM) Ch. 21.2(h)(1)(C).

[208] INA §§ 213(f)(5)(B), 212(a)(4)(C) and 8 C.F.R. § 213a.2(a)(2)(ii).

[209] AFM Ch. 21.2(h)(1) (C) (2013) and USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed May 13, 2014).

[210] *Id.*

[211] *Id.*

- Individuals admitted as derivative "T" or "U" nonimmigrants; and
- Derivative asylees.

In December 2012, USCIS issued guidance for reinstatement for those persons with approved petitions at the time of the qualifying relative's death seeking relief under INA section 204(l).[212] Survivors seeking coverage under INA section 204(l) are subject to a discretionary evaluation, but a showing of the factors needed for traditional humanitarian reinstatement is not required. Instead, the request will be approved if it is consistent with "the furtherance of justice."[213]

Data for Humanitarian Reinstatement and INA Section 204(l) Reinstatement. As reported in the Ombudsman's 2013 Annual Report, USCIS maintained no national data on humanitarian and INA section 204(l) reinstatement until November 2012, when the agency added an action code to its data system to account for reinstatement requests. The code, however, does not distinguish between a reinstatement request made under INA section 204(l) versus a humanitarian reinstatement request made under 8 C.F.R. section 205.1(a)(3)(i)(C).

After starting to collect data in November 2012, USCIS reports that in FY 2013 it received 3,257 requests for humanitarian and INA section 204(l) reinstatement, denied 632 requests and granted 262. In FY 2014, USCIS received 1,704 requests for humanitarian and INA section 204(l) reinstatement, denied 652 requests and approved 372. To date, there are 3,043 humanitarian and INA section 204(l) reinstatement requests pending with USCIS.[214] ***See Figure 16:*** *Humanitarian and INA Section 204(l) Reinstatement Requests.*

FIGURE 16: HUMANITARIAN AND INA SECTION 204(l) REINSTATEMENT REQUESTS

FISCAL YEAR		REQUESTS RECEIVED	REQUESTS GRANTED	REQUESTS DENIED
2013	**Service Center**	**3,257**	**262**	**632**
	California Service Center	2796	132	562
	National Benefits Center	2	1	1
	Vermont Service Center	459	129	69
2014	**Service Center**	**1,704**	**372**	**652**
	California Service Center	1,314	72	502
	National Benefits Center	92	20	0
	Vermont Service Center	291	280	150
	Texas Service Center	7	0	0

Source: Information provided by USCIS (May 29, 2014).

**As of April 28, 2014, there are 3,043 humanitarian reinstatement requests pending with USCIS.*

[212] 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 Apr. 29, 2014).

[213] *Id.*, p. 6.

[214] Information provided by USCIS (May 29, 2014).

[215] *Supra* note 140, p. 18.

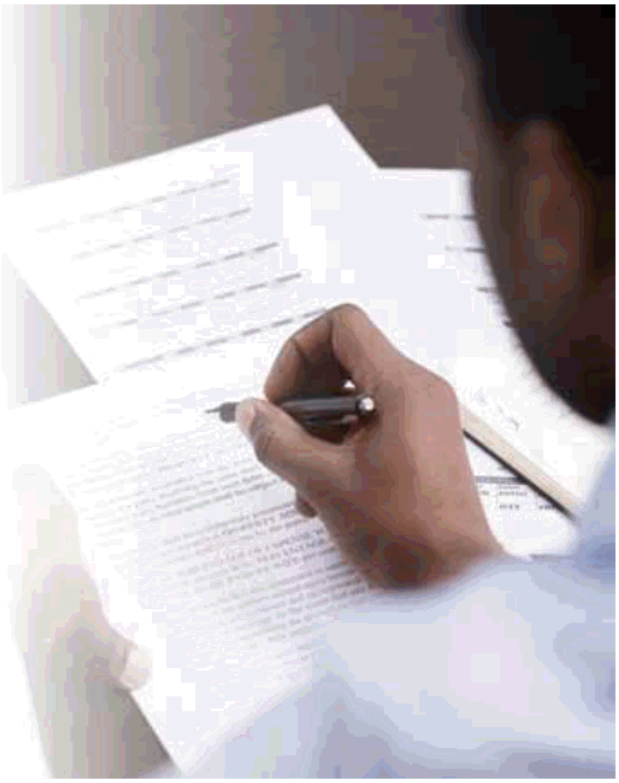
Ongoing Concerns

As noted in the Ombudsman's 2013 Annual Report, stakeholders continue to report, among other issues, variances and delays in the handling of humanitarian and INA section 204(l) reinstatement requests.[215] These and other concerns continue in 2014, as evidenced by the requests for case assistance received by the Ombudsman from humanitarian and INA section 204(l) reinstatement requestors.

Lack of Standardized Procedures. USCIS lacks a standardized process for receiving and processing humanitarian and INA section 204(l) reinstatement requests. Procedures for submitting such requests vary by USCIS office. Also, USCIS does not post processing times for reinstatement requests, nor does it issue receipt notices acknowledging the request.

Generally, for immigration benefits, there is a required form and accompanying instructions that specify where the application is to be filed.[216] This requirement helps USCIS issue receipt numbers and properly track cases. There is no standard USCIS form for making a humanitarian or INA section 204(l) reinstatement request. The USCIS website instructs individuals to send written requests for humanitarian reinstatement to the USCIS office that originally approved the petition.[217] With only an informal letter process, stakeholders have experienced slow and irregular handling of reinstatement requests by USCIS. The imprecise process of filing individualized letters in each case without a specific form poses challenges to uniformity in processing for a large agency responsible for hundreds of thousands of varied requests.

Stakeholders note that although basic humanitarian and INA section 204(l) reinstatement eligibility and instructions can be found on the USCIS website,[218] the information is unclear and difficult to find, particularly for pro se individuals. People report not knowing where to file the reinstatement request. Although the instructions on the USCIS website indicate that the humanitarian reinstatement request should be submitted to the office where the petition was approved,[219] in many cases the petition was filed years prior to the humanitarian reinstatement request by a petitioner who can no longer provide this information to the beneficiary. USCIS jurisdiction for the request also may have changed after the original filing for reasons unknown to the beneficiary, such as reallocation of resources or agency restructuring.[220]



[216] USCIS Webpage, "Forms"; http://www.uscis.gov/forms (accessed Apr. 15, 2014).

[217] *See* USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed May 9, 2014); *see also* USCIS 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 Apr. 29, 2014); *see also* USCIS Webpage, "Basic Eligibility for Section 204(l) Relief for Surviving Relatives" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/basic-eligibility-section-204l-relief-surviving-relatives (accessed May 9, 2014); *see also* AFM Ch. 21.2(h)(1)(C).

[218] USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed Apr. 15, 2014).

[219] *Id.*

[220] Information provided by USCIS (Apr. 9, 2014). For example, the Nebraska Service Center forwards reinstatement requests to the Vermont Service Center for decisions.

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Processing Inconsistencies and Delays. Stakeholders continue to report that USCIS has difficulty determining which USCIS office has jurisdiction over the request, that USCIS uses uninformative and often incorrect template denials, and that it fails to provide meaningful information to *pro se* applicants, causing lengthy processing delays and confusion to the public.

Case Example

In July 1993, USCIS approved Form I-130 on behalf of a child. In 2004, the petitioning father died. At that time, the beneficiary was still waiting for his immigrant visa appointment overseas. The beneficiary who was unrepresented did not apply for reinstatement, but did notify DOS that the petitioner had died. DOS notified USCIS, and in March 2011, the USCIS California Service Center (CSC) issued a denial of the reinstatement, stating that the evidence on record did not establish a favorable exercise of discretion. This was a surprise to the beneficiary, since he had not yet submitted a humanitarian reinstatement request. He retained counsel who wrote to USCIS and clarified that no request for reinstatement had been submitted, but that the beneficiary would like to present one. USCIS issued a second denial in May 2011, in which the CSC referenced the first denial and incorrectly concluded that the petitioner died prior to the approval of the family-based petition, thus no reinstatement could be considered. USCIS itself had confirmed in its first denial that the petition was approved in July 1993. The petitioner died almost ten years later in 2004. The beneficiary and counsel submitted a request for reinstatement with documentation, and pointed out the factual errors made by USCIS. The CSC reopened and adjudicated the case.

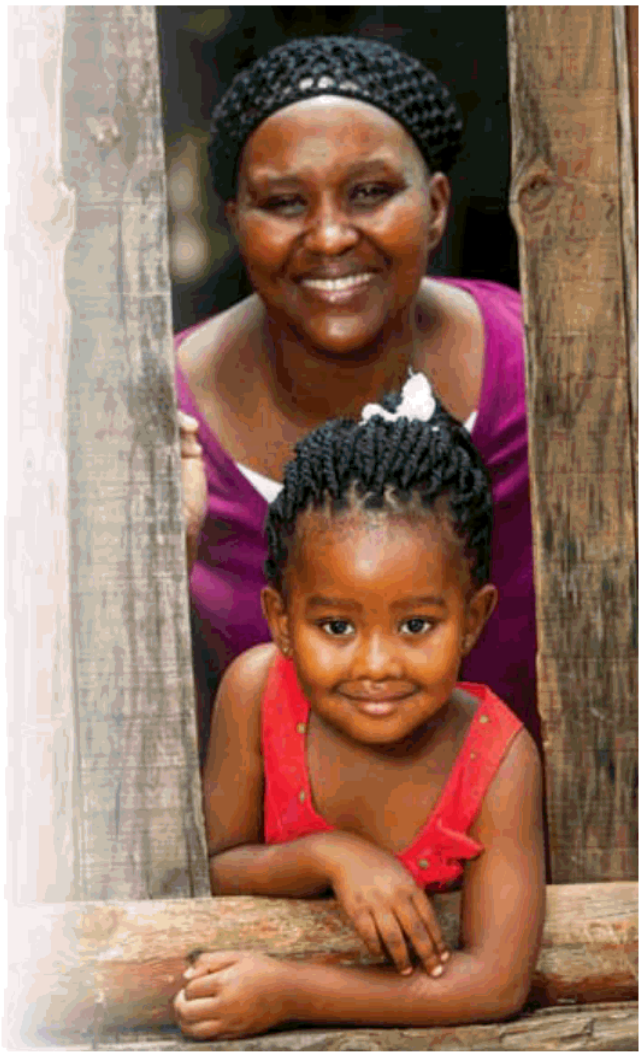
Stakeholders report that once the initial request for humanitarian reinstatement is denied, the CSC will not permit subsequent requests without the filing of Form I-290B, *Notice of Appeal or Motion* with a fee of $630, submitted within 30 days from USCIS's final decision.[221] This practice is problematic since it can take months to compile and submit additional evidence of humanitarian factors, or retain legal representation. Since humanitarian reinstatement has no appeal under the USCIS guidance in the AFM, resubmission of a request with additional evidence is the only possible avenue for further consideration of a case.[222] The Ombudsman raised this concern with USCIS Service Center Operations Directorate, which confirmed, "[t]here is no regulation or USCIS policy to limit the number of [reinstatement] requests that can be made following the death of the petitioner on an approved I-130."[223] However, it remains unclear whether this CSC local practice is standard agency policy.

[221] Information provided through requests for case assistance.

[222] AFM Ch. 21.1(h)(1)(C).

[223] Information provided by USCIS (Feb. 27, 2014).

Confusion between Humanitarian Reinstatement and INA section 204(l) Reinstatement. As described above, humanitarian and INA section 204(l) reinstatement have different legal authorities and eligibility standards. They also apply to different groups of people in the immigration process. However, perhaps because both requests concern survivors, and both lack a form, fee and normal receipting process at USCIS, stakeholders report that USCIS sometimes treats such cases interchangeably and requires persons requesting INA section 204(l) reinstatement to supply humanitarian and hardship documentation that should only be required for humanitarian reinstatement under 8 C.F.R. section 205.1(a)(3)(i)(C). Many survivors often do not understand the distinct requirements for these requests for relief.



Conclusion

During this reporting period, USCIS, in partnership with other DHS components, continued to work to increase public awareness of trafficking and domestic violence, and the immigration relief available to victims. Unnecessary RFEs need USCIS's attention because they contribute to these delays and impact the quality of adjudications. The dramatic increase in credible and reasonable fear interview referrals has required USCIS and other DHS components to shift resources. Nearly a quarter of affirmative asylum cases are now pending over one year. Additionally, improvements in the handling of requests for reinstatement for surviving family members are long overdue and merit agency attention.

Interagency, Process Integrity, and Customer Service

USCIS provides customer service through a wide variety of programs and initiatives. Between April 1, 2013, and March 31, 2014, USCIS hosted or participated in more than 3,200 stakeholder events, including eight national multilingual engagements and 557 local outreach events in languages other than English.[224] USCIS revised forms pertaining to fee waivers and appeals/motions, in an effort to be more clear, concise, and user-friendly. However, improvements are needed in USCIS's calculation of processing times, responses to service requests, and fee waiver processing.

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

USCIS Processing Times and their Impact on Customer Service

Responsible USCIS Offices:
Office of Performance and Quality and the Customer Service and Public Engagement Directorate

Expectations for individuals and employers seeking immigration benefits are set based on processing times, and they have important customer service impacts. USCIS call centers will not initiate service requests to check case status with USCIS local offices and service centers until cases are outside posted processing times.[225] Similarly, in Fiscal Year (FY) 2014, the Ombudsman instituted a new policy not to accept requests for case assistance until cases have been pending 60 days past posted processing times. Stakeholders have raised concerns regarding USCIS processing time accuracy, the method by which they are calculated, and the timeliness with which they are posted.

Background

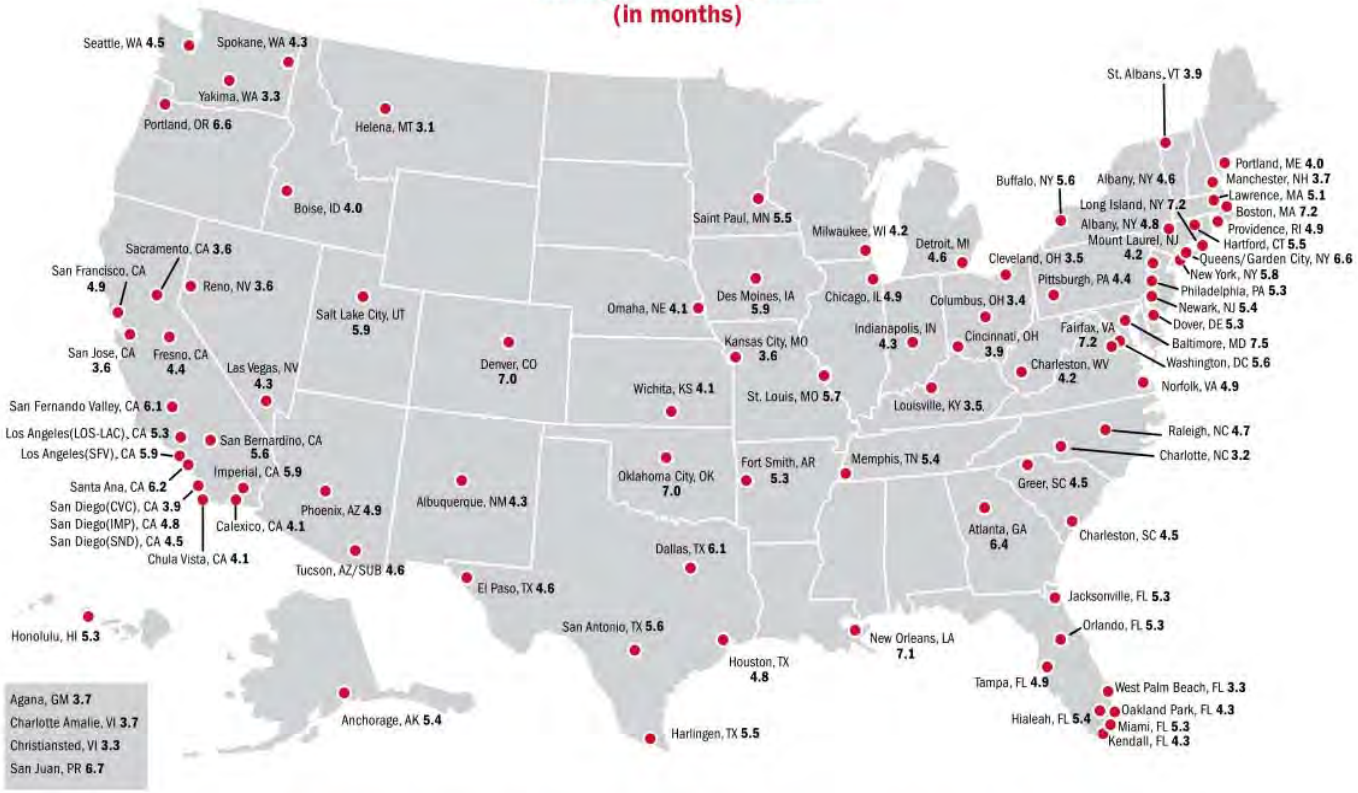
USCIS posts processing times for immigration petitions and applications on its website.[226] ***See Figure 17:*** *Average Processing Times for Forms N-400, Application for Naturalization, and I-485, Application to Register Permanent Residence or Adjust Status.*

Stakeholders rely on posted processing times when applying for immigration benefits. Individuals and employers seek accurate processing time information in order to make decisions about major life events such as immigration, travel, associated costs and timely filing of renewal applications.

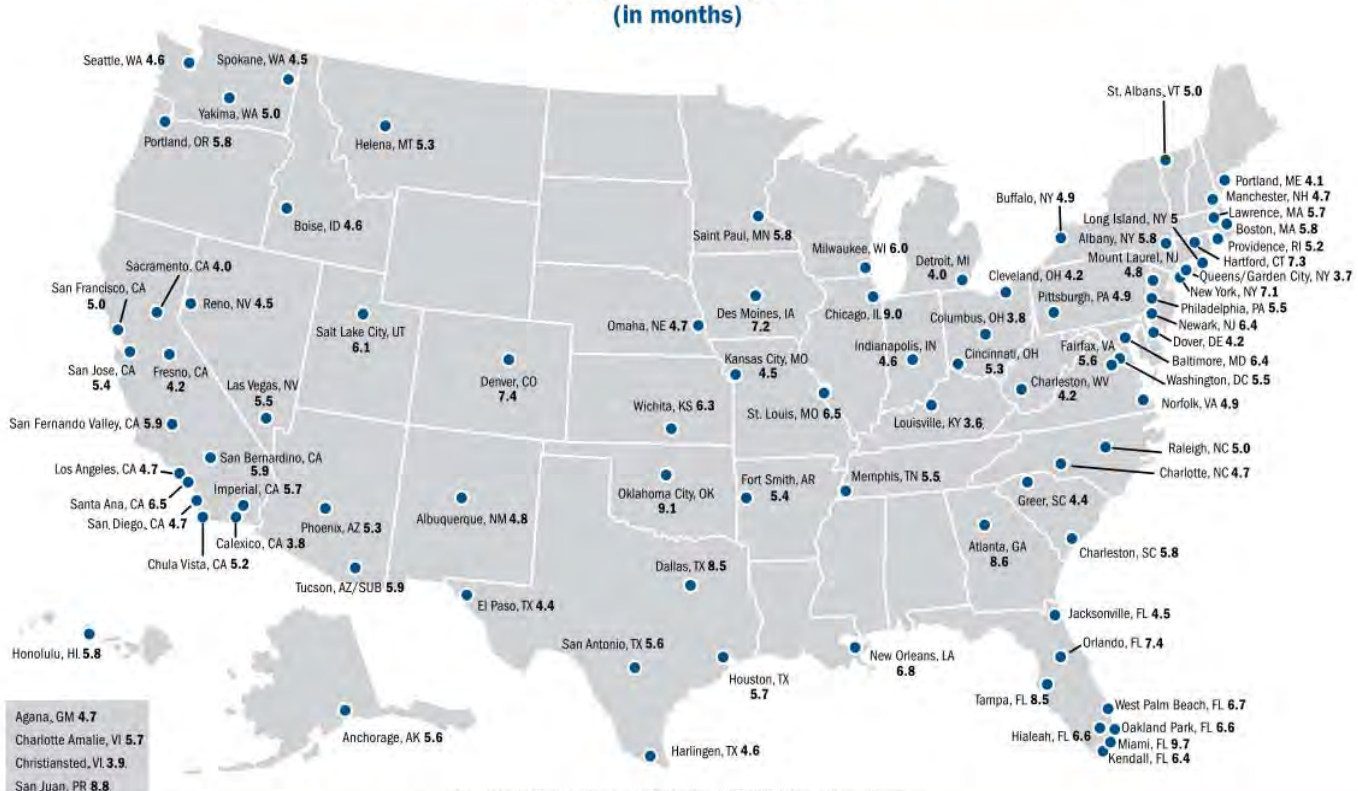
[225] *See* USCIS Webpage "e-Request;" https://egov.uscis.gov/e-Request/Intro.do?locale=en_US (accessed Jan. 2, 2014).
[226] USCIS Webpage, "USCIS Processing Time Information;" https://egov.uscis.gov/cris/processTimesDisplay.do (accessed Jan. 2, 2014).

FIGURE 17: AVERAGE PROCESSING TIMES FOR FORMS N-400 AND I-485

Application for Naturalization (N-400)
Average Processing Time
(in months)



Application to Register Permanent Residence or Adjust Status (I-485)
Average Processing Time
(in months)



Source: Information provided by USCIS (May 13, 2014).

For USCIS, processing times are important to measure agency performance in adjudication, identify operational challenges such as delays in resolving background checks, plan and implement new initiatives, and understand agency capacity in various offices.

Upon publication of the 2007 fee rule, USCIS established new processing time goals.[227] The USCIS Processing Time Information website states:

> USCIS usually processes cases in the order they are received. For each type of application or petition we have specific workload processing goals. For example, we try to process naturalization cases within five months of the date we receive them and immediate relative petitions (for the spouse, parent or minor child of a U.S. citizen) within six months of the receipt date. Sometimes the volume of cases we receive is so large that it prevents us from achieving our goals, but we never stop trying.[228]

USCIS calculates processing times for a particular application or petition type by subtracting the number of cases received each month from the total number of "active" pending cases (see below). For example, if the number of active pending cases was 200, and in each of the past four months USCIS received 50 cases, the processing time would be calculated as four months. This approach takes approvals and denials into account only insofar as the number of pending cases decreases when cases are completed.

Active pending cases are those cases that are available for processing, as opposed to cases that are waiting for visa availability or for applicants or petitioners to accomplish a step in the process, such as re-taking the naturalization test or responding to a Request for Evidence (RFE). Cases subject to delays due to background checks are included within the active pending cases for purposes of calculating processing times. The Ombudsman notes that USCIS customers may be unaware of what actions by USCIS or the applicant or petitioner may lead to tolling of processing times.

If USCIS is processing a particular type of application/petition in less time than the agency processing goal, the processing time will be the goal published in months (e.g., "Six Months").[229] For case types that are taking longer than the processing goal, USCIS lists the filing date (e.g., "December 26, 2013") of the cases it is currently processing.[230] Processing times are posted monthly, 30 days after the prior month's close. For example, April's processing times will be posted by May 30th.

Cases where USCIS has encountered difficulty in resolving background checks or has issued an RFE often take longer than posted processing times, with limited information available on how long USCIS will take to complete adjudication. Posted processing times also fail to take into account accelerations or delays that may be anticipated by USCIS based on workload shifts or changes in filing patterns. As such, processing times can increase significantly, without prior notice to the public.

Some applicants or petitioners have the option of upgrading certain types of filings to "premium processing."[231] Employers use premium processing to fill positions rapidly, but it is not available for all types of immigration filings. There is also a discretionary process for expediting applications or petitions for individuals or employers, but that process is limited to individuals who are confronted with specific compelling circumstances.[232]

Ongoing Concerns

Stakeholders are unable to accurately determine how long a case might take to be completed based on the methodology USCIS uses to calculate its posted adjudication timelines. These processing times are not an average processing time for all cases in a particular queue. Nor do they represent the time it may take for most cases to be completed.

When cases are outside processing times, individuals, employers, and their representatives schedule InfoPass appointments and initiate service requests online or by contacting the USCIS National Customer Service Center (NCSC).[233] They also request assistance from Congressional offices and the Ombudsman. USCIS, in turn, devotes significant resources to customer service inquiries that could otherwise be directed to adjudicating applications and petitions.

[227] "U.S. Citizenship and Immigration Services Fee Schedule; Final Rule," 75 Fed. Reg. 58961 (Sept. 24, 2010) (codified at 8 C.F.R. §§ 103, 204, 244 and 274).

[228] *Supra* note 226.

[229] *Id.*

[230] *Id.*

[231] Immigration and Nationality Act § 286(u). Premium processing is available for a fee of $1,225 for specific form types. *See* Instructions for Form I-907, *Request for Premium Processing Service*, OMB No. 1615-0048, Expires 10/31/2014; http://www.uscis.gov/sites/default/files/files/form/i-907instr.pdf (accessed May 14, 2014).

[232] USCIS Webpage, "Expedite Criteria" (Jun. 17, 2011); http://www.uscis.gov/forms/expedite-criteria (accessed Feb. 24, 2014).

[233] USCIS has informed the Ombudsman that call center contractors in Tier 1 and Immigration Service Officers in Tier 2 have access to the exact same posted processing time information as the public.

The Ombudsman urges USCIS to consider new approaches to calculating case processing times. USCIS could provide stakeholders more transparency in processing time information by stating the time, perhaps as a range, within which a certain percentage of cases are completed. For example, posted processing times could state that naturalization applications are adjudicated within six to eight months for 90 percent of cases. Processing times would also be improved if data were updated more timely.

USCIS Customer Service: Ensuring Meaningful Responses to Service Requests

Responsible USCIS Offices:
Field Operations and Service Center Operations Directorates

USCIS generates "service requests," through the Service Request Management Tool (SRMT), which are transferred to the USCIS facility where the matter is pending. USCIS service centers and local offices then respond, often with general templates that provide little information other than the case remains pending. In these circumstances, stakeholders find it necessary to make repeat requests, schedule InfoPass appointments at USCIS local offices, and/or submit requests for case assistance to Congressional offices and the Ombudsman. These repeat requests increase the overall volume of calls and visits to USCIS – amplifying the level of frustration experienced by customers and costing the agency, as well as individuals and employers, both time and money. Unhelpful responses to USCIS service requests continue to be a pervasive and serious problem.

Background

Inquiries from individuals and employers are often channeled through SRMT, an electronic system to track and transfer service requests. Where USCIS call center staff cannot resolve a customer's inquiry, the agency uses SRMT to transfer requests to a USCIS local office or service center. An individual can also make an e-Request to generate an SRMT inquiry.[234] The Customer Service and Public Engagement Directorate in most cases does not provide substantive responses to service requests. Rather, the USCIS office of jurisdiction provides the response to the customer.

On March 5, 2012, the Ombudsman issued recommendations regarding service requests.[235] The Ombudsman recommended that USCIS: 1) implement national quality assurance review procedures for service requests and make quality a priority; 2) establish a follow-up mechanism in the SRMT system so that USCIS employees can provide customers with multiple responses (e.g., initial, follow-up, final) for the same service request; 3) expand self-generated e-Requests to all form types; 4) pilot mandatory supervisory review of certain SRMT responses; and 5) post SRMT reports on the USCIS website and standardize the use of SRMT reports to identify spikes, trends, or other customer service issues. USCIS responded on June 14, 2012, stating:

> Quality has been and will continue to be a priority for USCIS – not only in terms of responses to service requests, but with respect to all of our customer interactions and related work. In line with this priority, USCIS formed an operational working group to focus on issues related to the Service Request Management Tool (SRMT). The working group, which held its initial meeting on March 22, 2012, will consider this recommendation as part of its efforts … USCIS would like to reiterate that both the Field Operations Directorate and the Service Center Operations Directorate have established SRMT quality review programs that track and analyze relevant data to ensure quality and identify potential areas for improvement.[236]

The acceptance, review, and resolution of service requests is a major USCIS customer service undertaking. During this reporting period, USCIS received 1,136,262 service requests.[237] The target response time for service requests is 15 calendar days for most inquiries. USCIS aims to respond in five calendar days for an expedite request and 30 days for Deferred Action for Childhood Arrivals denial reopening requests.[238] Approximately 60 percent of SRMTs meet these goals. The most prevalent reasons for contacting NCSC have been non-delivery of documents, processing times, change of address, and typographical error.[239] ***See Figure 18:*** *Top Four Service Request Types.*

[234] *Supra* note 225.

[235] USCIS Webpage, "USCIS Service Requests: Recommendations to Improve the Quality of Responses to Inquiries From Individuals and Employers;" http://www.dhs.gov/uscis-service-requests-recommendations-improve-quality-responses-inquiries-individuals-and-employers (accessed May 7, 2014).

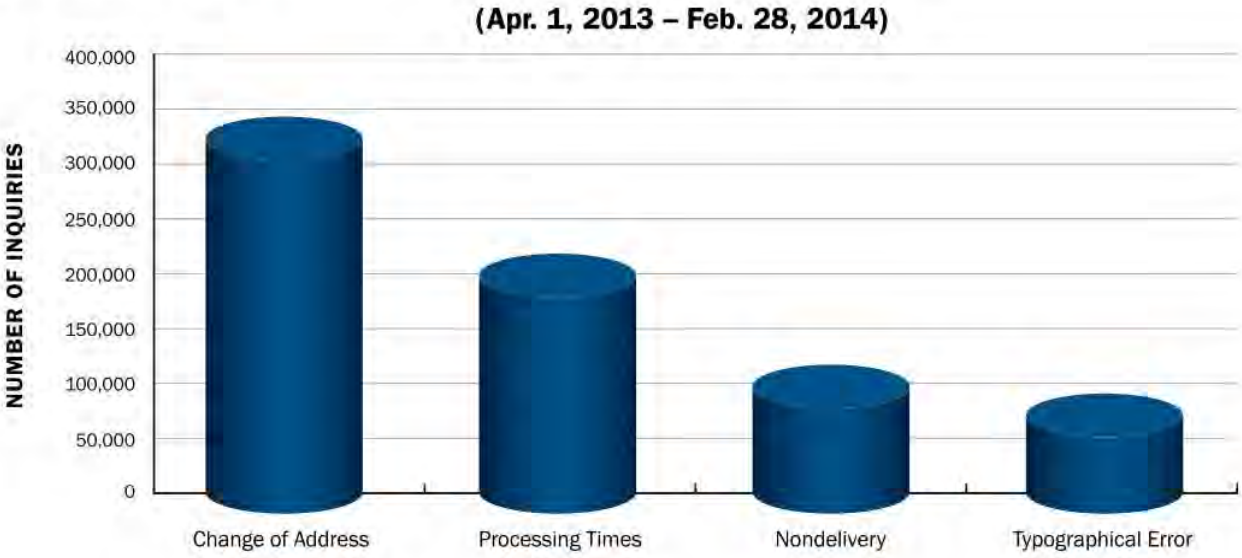
[236] USCIS Response to Recommendation 52 (Jun. 14, 2012); http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/USCIS%20Formal%20Response%20to%20Recommendation%2052.pdf (accessed Apr. 7, 2014).

[237] *Supra* note 224.

[238] *Id.*

[239] *Id.*

FIGURE 18: TOP FOUR SERVICE REQUEST TYPES



Source: Information provided by USCIS (Apr. 28, 2014).

USCIS has expanded e-Request capabilities, and individuals and employers now can generate SRMT inquiries online for cases beyond posted processing times, typographical errors, nondelivery of USCIS notices, and requests for special accommodations at a USCIS office. A total of 67,978 e-Requests were made during this reporting period. This self-generating service request capacity has been promoted through webinars, email messages, focus groups, a brochure distributed by USCIS community relations officers and through USCIS's crowd-sourcing site, Idea Community.

Since the Ombudsman issued its 2012 recommendations, USCIS formed a customer service working group. This working group met weekly between March 2012 and March 2013, and focused on SRMT reports and templates. The group continues to review the SRMT process.

With respect to a follow-up mechanism in SRMT, USCIS continues in various instances to provide an interim response (e.g., the file has been requested) and then close the request with no follow-up. Where the interim response does not answer the inquiry or resolve the problem, the individual or employer is left to initiate another service request or seek redress through other avenues. USCIS is no longer providing estimated case completion times in many responses to SRMTs.

Approximately 70 percent of all requests for assistance filed with the Ombudsman were submitted by individuals and employers who reported that they first attempted to resolve their problems by submitting a service request through the NCSC.[240] Despite these efforts, individuals and employers did not receive responses they considered to be satisfactory and sought assistance from the Ombudsman.

Ongoing Concerns

Responses to customer inquiries are valuable only where they include pertinent information, such as a projected timeline for adjudication or an explanation of processing delays that prompted the service request. Although some USCIS regions and service centers perform quality assurance reviews for service request responses – monitoring a sampling of responses to identify the response time, accuracy in spelling and grammar, and accuracy of the response – USCIS has not yet implemented a national quality assurance review to identify the accuracy or completeness of those responses.

In addition, customers are often told to wait a specified period of time before submitting another service request. In one case assistance request submitted to the Ombudsman, the petitioner stated,

> [A]ll we have received from the USCIS is a generic message stating "your case is under review and you should receive a notice of action in 30 days." Well we have [waited] many such 30 day periods without any action of notice or any clear message from USCIS. USCIS's lack of transparency is frustrating and overwhelming at times. We need help understanding why our case has been pending for an extended duration. Our concern is that USCIS has misplaced our case/paperwork …

[240] Information collected by the Ombudsman on Form DHS-7001, *Case Assistance Form.*

Ongoing delays and uninformative responses increase customer frustration and create additional work for USCIS, due to repeated customer inquiries.

With SRMT, USCIS has an effective process for receiving, tracking and transferring requests for assistance to USCIS field offices and service centers. However, individuals and employers continue to report agency responses are often uninformative and not timely. Ensuring meaningful responses to service requests is critical to successful customer service, and doing so would reduce the overall number of customer service interactions, thereby freeing resources that could be focused on adjudications and other agency needs.

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 the Field Operations and Service Center Directorates

USCIS is not issuing notice to attorneys or accredited representatives when it rejects a deficient Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative.* The rejection of a notice of appearance, without any notification to the submitting attorney or accredited representative, raises concerns pertaining to the fundamental right to counsel. It also creates practical difficulties when the attorney or accredited representative is not notified of USCIS actions, and is, therefore, unable to inform the client of or advise on how to respond to agency actions, including interview notices, requests for evidence, and denials.

Background

Under the regulations, applicants or petitioners appearing before USCIS may be represented, at no cost to the government, by an attorney or an accredited representative of a recognized organization.[241] 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 on the attorney or accredited representative.[242] 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.[243]

Failure to list an applicant or petitioner's attorney or accredited representative, without due cause, would constitute unwarranted interference by USCIS in the attorney or accredited representative client relationship. Failure to provide an attorney of record or accredited representative with notices and documents would greatly impede, if not extinguish, the attorney's or accredited representative's ability to zealously represent the client before USCIS. As such, it is critical that USCIS honor its obligation to serve documents and notices on the attorney of record or accredited representative, as specified in the regulations.[244]

Ongoing Concerns

Stakeholders have raised issues regarding USCIS acceptance of G-28 forms, and USCIS has confirmed that it is not notifying attorneys or accredited representatives where the form has been rejected.[245] When USCIS receives a technically deficient Form G-28, it marks the form invalid and places it upside down at the bottom of the non-record side of the administrative file without notifying the attorney or accredited representative that the Form G-28 was not properly filed. The attorney or accredited representative only becomes aware that he or she is not listed when the client begins to receive notices from USCIS, but the attorney or accredited representative does not. Failure to notify the customer or the attorney or accredited representative of a deficient Form G-28 denies the attorney or accredited representative the opportunity to correct the mistake and denies the customer the right to be represented.

[241] 8 C.F.R. §§ 103.2(a)(3) and 292.5(b). *See* definition of "Accredited Representative" at 8 C.F.R. § 292.1(a)(4).

[242] 8 C.F.R. § 292.5(a). A "properly completed Form G-28" is a notice of appearance containing sufficient information to determine that: 1) an attorney appears to be duly licensed; 2) an attorney-client relationship exists between the submitting attorney and the applicant or petitioner; and 3) there is a valid address to which notices and documents can be sent. A Form G-28 submitted without the required information in Item Numbers 1.-1.b.1 or 2.-2.b. will be rejected." *See* Instructions for Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, OMB No. 1615-01015, Expires 02/29/2016, http://www.uscis.gov/sites/default/files/files/form/g-28instr.pdf (accessed May 14, 2014).

[243] 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); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2012/May/AFMs5-23-12.pdf (accessed Apr. 29, 2014).

[244] 8 C.F.R. § 292.5(a).

[245] *See* USCIS Meeting With the American Immigration Lawyers Association, Questions and Answers (Oct. 23, 2013). "When a G-28 is found to be defective (i.e., invalid) at the Lockbox, the standard procedure is not to recognize it and move the case on for processing. The Lockbox does not send any notice to the attorney when the G-28 is invalid. When a case is rejected and the G-28 is defective (i.e., invalid) only the applicant/petitioner will receive the rejected application/petition and notice, but we do not notify the applicant/petitioner that their G-28 is invalid."

Case Example

After filing Form I-589, *Application for Asylum and Withholding of Removal* on behalf of the client, the attorney did not receive any notices of action or other correspondence from USCIS. The client, however, did receive USCIS mailings. The Ombudsman submitted an inquiry to USCIS and was able to determine that the attorney had inadvertently submitted an outdated version of Form G-28. Due, in part, to the attorney not receiving notice, the applicant missed the asylum interview and was referred to Immigration Court. After the Ombudsman requested further review, USCIS decided that since the Form G-28 was originally filed (and subsequently refiled two weeks later) that it would seek to terminate proceedings and provide the applicant with an affirmative asylum interview.

To resolve issues with Form G-28 rejections, USCIS suggests that legal representatives contact the Lockbox support email (Lockboxsupport@uscis.dhs.gov). This is only helpful where the attorney or accredited representative is aware that the Form G-28 was rejected.[246]

USCIS policy and practice relating to rejected Form G-28s is problematic for a number of practical reasons. Many applicants and petitioners rely on their attorney or accredited representative to receive notices and other correspondence from USCIS because they do not have a secure place to receive mail, they have limited proficiency in English, or they lack knowledge of U.S. legal procedures and rely on their legal representative to ensure deadlines are met and applications are filed with the appropriate office.

USCIS has acknowledged problems with its current method for handling Form G-28 rejections. The agency indicated that it has formulated a number of solutions that are being reviewed by agency leadership. To date, USCIS has not stated when these changes may be implemented, nor has it proposed any interim solutions.

Fee Waiver Processing Issues

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

Fee waivers are important to vulnerable segments of the immigrant community, including elderly, indigent, or disabled applicants. This year's Report provides an update of issues described in the Ombudsman's 2013 Annual Report,[247] including improvements made by USCIS, and summarizes stakeholder reports of continued problems that affect certain aspects of fee waiver processing.

Background

USCIS restructured and improved the fee waiver process in 2010, by publishing Form I-912, *Request for Fee Waiver.* When USCIS published the form, it stated:

> The proposed fee waiver form is the product of extensive collaboration with the public. In meetings with stakeholders, USCIS heard concerns that the absence of a standardized fee waiver form led to confusion about the criteria that had to be met as well as the adjudication standards … The new proposed fee waiver form is designed to verify that an applicant for an immigration benefit is unable to pay the fee for the benefit sought. The proposed form provides clear criteria and an efficient way to collect and process the information.[248]

USCIS also published guidance on fee waiver adjudication standards in a 2011 Policy Memorandum titled *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 AD11-2.*[249] This guidance supersedes and rescinds all prior memoranda regarding fee waivers.[250]

[246] American Immigration Lawyers Association, AILA FAQs: "Completing the New G-28 Form Answers Provided by USCIS Office of Intake and Document Production" (Oct. 11, 2013). *See also* Alan Lee, "G-28 Authorization of Representation Becomes a Trial for Attorneys/Other Representatives" ILW.com (Nov. 13, 2013); http://discuss.ilw.com/showthread.php?36220-Article-G-28-Authorization-Of-Representation-Becomes-A-Trial-For-Attorneys-Other-Representatives-by-Alan-Lee (accessed Jan. 17, 2014). Although USCIS has advised contacting the Lockbox Support e-mail for assistance with G-28 issues, the Lockbox filing tips clearly state, "If your client received a receipt notice, but you did not, it is likely that your G-28 was not properly filed. Do not send a follow-up Form G-28 to a Lockbox facility. Send follow-up Forms G-28 to the USCIS office where the case was assigned. Be sure to include the Receipt Number of the associated application/petition on Form G-28 in Part 3, Question 7." USCIS Webpage, "G-28 Notice of Entry of Appearance as Attorney or Accredited Representative: Tips for Lockbox Facility Filings" (Feb. 12, 2014); http://www.uscis.gov/forms/g-28-notice-entry-appearance-attorney-or-accredited-representative-tips-lockbox-facility-filings (accessed Jan. 17, 2014).

[247] Ombudsman Annual Report 2013 (Jun. 2013), pp. 47-49; http://www.dhs.gov/sites/default/files/publications/cisomb_2013_annual_report%20508%20final_1.pdf (accessed May 29, 2014).

[248] USCIS Webpage, "USCIS Published First-Ever Proposed Fee Waiver Form" (Nov. 22, 2010); Website link no longer available.

[249] 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. 29, 2014).

[250] *Id.*

USCIS revised Form I-912 and instructions in May 2013.[251] USCIS also published amended tips on fee waivers on its website.[252] The tips contain useful information and clarifications, including contact information for the receipting centers, referred to as Lockboxes (Lockboxsupport@uscis.dhs.gov), which can be used to inquire with USCIS about fee waiver denials.

Pursuant to established protocols, the Ombudsman does not accept fee waiver case assistance requests unless the applicant first attempts to resolve the problem through the Lockbox. The USCIS Lockbox support aims to respond to inquiries within five business days.

Ongoing Concerns

Calculating Household Size. The revised Form I-912 instructions changed the calculation of household size. The household total is critical, as it determines by reference to the Federal Poverty Guidelines whether the individual is income-eligible for a fee waiver.[253] It is unclear whether the applicant is included in counting the household size; some sections of Form I-912 and the instructions indicate the applicant should be counted, while others do not.[254]

In addition, the revised Form I-912 and instructions, for the first time, call for counting non-family members in household size, under certain circumstances. The 2011 Policy Memorandum does not call for non-family members to be counted in the household size calculation.[255] These inconsistencies cause confusion and can lead to unnecessary denials.

Fee Waiver Rejections. The Ombudsman's 2013 Annual Report recounted stakeholder concerns regarding multiple rejections of waiver applications by the USCIS Lockbox facilities, and inconsistent application of fee waiver standards. These concerns continued. The Ombudsman received reports that multiple, identical submissions were necessary before the request was favorably adjudicated, often based upon the same evidence included with the original submission. Stakeholders received rejections and denials even after submitting income documentation such as tax returns, or when USCIS disputes that a public benefit qualifies as a means-tested benefit, despite evidence presented to show that it is such a benefit. Stakeholders also recounted inconsistent decisions on fee waiver applications which, in all substantive respects, are identical. In a June 27, 2013 letter to USCIS, stakeholders stated:

> We are deeply concerned about the widespread pattern of denials of eligible applicants that our organizations and networks have been experiencing over the last few months … We are also concerned that USCIS's own systems for ensuring quality control have not identified this problem. While we appreciate USCIS's willingness to review individual case examples, we feel a case-by-case is not effective in this instance, and we are seeking a systemic resolution to what we see as a systemic problem.[256]

USCIS has rapidly sought to resolve individual cases brought to the agency's attention by the Ombudsman, but systemic issues remain and require a review of guidance and form instructions, as well as Lockbox intake procedures. The Ombudsman urges USCIS to host a public engagement on this program to hear stakeholder feedback.

USCIS Administrative Appeals Office: Ensuring Autonomy, Transparency, and Timeliness to Enhance the Integrity of Administrative Appeals

Responsible USCIS Office:
Administrative Appeals Office

In the 2013 Annual Report, the Ombudsman discussed issues pertaining to the Administrative Appeals Office (AAO), including a lack of transparency regarding AAO policies and procedures, and challenges for *pro se* individuals who seek information in plain English about the administrative appeals process. Over the past year, USCIS eliminated

[251] USCIS Webpage, "Forms Update". (May 2013); http://www.uscis.gov/forms-updates (accessed Apr. 29, 2014).

[252] 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. 21, 2014).

[253] *See* Form I-912P, *HHS Poverty Income Guidelines for Fee Waiver Request* states how much income is the limit per household size for fee waiver eligibility. *See* USCIS Webpage; http://www.uscis.gov/i-912p (accessed Apr. 14, 2014).

[254] Form I-912, *Request for Fee Waiver*, instructions at Section 5, line 9 asks, "other than you, how many others in your household depend on the stated income?" This directs that the applicant should not count himself. Section 5 does not have any other place to include the applicant. However, elsewhere on the Form I-912, at question 3 on page 4, it indicates that applicant should include him or herself in the household total. The Poverty Guidelines used for fee waivers are published as Form I-912P, *HHS Poverty Guidelines for Fee Waiver Request*; *see* USCIS Webpage, "I-912P, HHS Poverty Guidelines for Fee Waiver Request" (Jan. 28, 2014); http://www.uscis.gov/i-912p (accessed Apr. 14, 2014).

[255] *Supra* note 249.

[256] Letter from the Catholic Legal Immigration Network, Hebrew Immigrant Aid Society, and World Relief (Jun. 27, 2013).

lengthy processing times once cases reach the AAO and revised its website. However, stakeholders still report issues stemming from the manner in which the AAO receives, reviews, and decides appeals. Of particular concern is the need for an AAO practice manual; the absence of any up-to-date statutory or regulatory standard for AAO operations; the AAO's lack of direct authority to designate precedent decisions; and the length of time for cases to be transferred to the AAO from USCIS service centers and field offices for review, and vice versa for remand.

Background

With appellate jurisdiction over approximately 55 different immigration applications and petitions, the AAO is charged with reviewing certain decisions issued by USCIS service centers and district offices.[257] The authority to adjudicate appeals of these decisions is delegated to the AAO by the Secretary of Homeland Security, pursuant to the Homeland Security Act of 2002.[258]

In 2005, the Ombudsman published recommendations focusing on the transparency, quality and timeliness of the decisions issued by the AAO.[259] More than eight years later, USCIS has eliminated lengthy processing times for all case types once cases reach the AAO.[260] Additionally, the AAO has updated and revised its website content to provide AAO contact information and filing instructions. USCIS has also recently revised Form I-290B, *Notice of Appeal or Motion* and instructions; a new version was made available for use on February 12, 2014.[261]

Ongoing Concerns

Publication of an AAO Practice and Procedures Manual. Stakeholders regularly note that AAO procedures could be made more transparent through the publication of a practice manual providing procedural guidance.[262] The U.S. Department of Justice's (DOJ) Board of Immigration Appeals (BIA) and Executive Office for Immigration Review publish practice manuals as a public service to the parties who appear before them. These practice manuals are periodically updated and have been highly regarded by the public as being helpful guides and fostering greater uniformity in practice and decisions.[263] An AAO practice manual that provides substantive, procedural, and operational information in plain English and a user-friendly format would be similarly useful. Over the last year, the AAO has confirmed to the Ombudsman that it started drafting a practice manual similar in structure to that of the BIA; however, the AAO has not released a draft document or publicly stated a proposed publication date.[264]

Publication of Revised Regulations. Stakeholders have expressed concern regarding the AAO's autonomy, explaining that it is often thought of as an extension of USCIS service centers and field offices, and not an independent review panel.[265] Organizationally, the AAO is part of USCIS, but is independent of any specific USCIS district office or service center. Like other USCIS components, the AAO follows agency guidance and does not create new policy. The AAO consults with the USCIS Office of the Chief Counsel if an appeal involves novel or complex issues requiring legal interpretation and to develop uniform agency guidance. The AAO may also engage with USCIS adjudicating components on operational matters as well as on broad adjudication issues and trends.[266]

The lack of regulations governing the AAO's operations and role with respect to USCIS policies creates an impression among the public that the AAO merely "rubber-stamps" USCIS decisions. To avoid any appearance of bias, regulations could clearly articulate that the AAO is intended to function as an autonomous subcomponent of the agency, charged with providing appellants with a venue for administrative review of their immigration benefits claims.

[257] 8 CFR § 103.1(f)(3)(iii).

[258] Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective Mar. 1, 2003); *see also* 8 C.F.R. § 2.1 (2003).

[259] Ombudsman Recommendation 20 (Dec. 6, 2005); http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_12-07-05.pdf (accessed Apr. 29, 2014).

[260] USCIS Webpage, "AAO Processing Times" (May 12, 2014); http://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-processing-times (accessed Apr. 6, 2014). The AAO currently lists all case types as being "current," which the AAO defines as "[w]ithin six months or less from the time when [the AAO received] the appeal."

[261] USCIS Webpage, "Forms Update" (Jan. 2014); http://www.uscis.gov/forms-updates (accessed Apr. 29, 2014).

[262] Ombudsman Teleconference, "The USCIS Administrative Appeals Office (AAO)" (Dec. 19, 2012).

[263] *See* BIA Practice Manual; http://www.justice.gov/eoir/vll/qapracmanual/apptmtn4.htm, and Executive Office for Immigration Review's Immigration Court Practice Manual; http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (both accessed Apr. 6, 2014).

[264] Information provided by the AAO (Feb. 7, 2013 and Mar. 5, 2014).

[265] *Supra* note 262.

[266] Information provided by USCIS (Dec. 18, 2012).

Designating and Publishing Precedent Decisions. Pursuant to the regulations, AAO decisions may be designated as precedent by the Secretary of Homeland Security, with the Attorney General's approval.[267] The process for designating a precedent decision, described on the USCIS website, involves review by no fewer than seven entities within USCIS, as well as the Attorney General.[268] Due to this cumbersome process, precedent decisions are infrequently issued. The AAO did not issue a precedent decision in FY 2013; in FY 2012, the AAO published only one precedent decision;[269] no precedent decisions were issued in FY 2011;[270] and in FY 2010, the AAO published only two precedent decisions.[271]

More AAO precedent decisions would improve consistency in adjudications by offering USCIS adjudicators clearer paths to follow in assessing the legal and policy issues encountered in their assigned cases.[272] Since precedent decisions serve as binding legal authority for determining later cases involving similar facts or issues, the publication of more precedent decisions would also mean appellants and legal representatives would have additional information regarding legal and evidentiary requirements. While the AAO recognizes the need for precedent decisions, at the Ombudsman's 2013 Annual Conference, the AAO confirmed there is no current plan to allow it to independently make such designations.

Create a Searchable Index of Decisions. While AAO non-precedent decisions are generally made available on the USCIS website within weeks of issuance, they are not cataloged with a searchable index for quick review and retrieval. Creating a searchable index is not an AAO priority, given the availability of commercial legal research services. This, however, fails to take into account that *pro se* appellants and community-based organizations representing low-income immigrants may not be able to afford costly private research services. A searchable index of AAO decisions, similar to what other government agencies, such as the BIA, provide, would better serve USCIS customers.

Timely Forwarding of Appeals to the AAO. The AAO considers a case to be "current" as long as it is decided within six months from the date it is received by the AAO, and does not include the time the appeal was pending initially with the USCIS field office or service center of original jurisdiction. Appeals or motions are not filed directly with the AAO; instead they are filed with the USCIS field office, service center or Lockbox that made the decision.[273] Generally, upon submission of an appeal, the USCIS office that denied the application or petition is responsible for reviewing the appeal, and determining within 45 days of receipt whether to reverse the decision and reopen the case.[274] This is referred to as "initial field review." If the appeal is meritorious, the case will be reopened or reconsidered, whereas an unfavorable review results in the appeal being forwarded "promptly" to the AAO.[275] Stakeholders report that USCIS field offices and service centers are holding cases well beyond the 45-day period specified in regulations, prior to forwarding them to the AAO.[276] There are also delays in forwarding appeals remanded from the AAO back to USCIS field offices and service centers.

[267] 8 C.F.R. § 103.3(c).

[268] *See* USCIS webpage, "Administrative Appeals Office: Precedent Decisions;" http://www.uscis.gov/sites/default/files/USCIS/Laws/AAO/AAO%20DHS%20Precedent%20Decision%20Process%20Print%20Version.pdf (accessed Jan. 28, 2014).

[269] *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012); http://www.justice.gov/eoir/vll/intdec/vol25/3752.pdf (accessed Mar. 18, 2013).

[270] *Supra* note 266.

[271] *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010); http://www.justice.gov/eoir/vll/intdec/vol25/3699.pdf (accessed Mar. 18, 2013), and *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010); http://www.justice.gov/eoir/vll/intdec/vol25/3700.pdf (accessed Mar. 18, 2013).

[272] *Supra* note 262.

[273] *See* USCIS Webpage, "Direct Filing Address for Form I-290B, Notice of Appeal or Motion". (Apr. 3, 2014); http://www.uscis.gov/i-290b-addresses (accessed Apr. 10, 2014).

[274] 8 C.F.R. § 103.3(a)(2)(iii); *see also* USCIS webpage "The Administrative Appeals Office (AAO), Appeal Process" (Apr. 17, 2014); http://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/administrative-appeals-office-aao (accessed Apr. 29, 2014). Both indicate the appeal should be forwarded to the AAO within 45 days. However, the Adjudicator's Field Manual (AFM), Chapter 10.8(a)(1), "Preparing the Appellate Case Record: Administrative Appeals (AAO) Cases;" http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html (accessed Apr. 29, 2014) is silent on the number of days within which a decision must be made on the appeal and only states that if the arguments fail to overcome the basis for denial, "the appeal and related record must be promptly forwarded to the AAO."

[275] 8 C.F.R. § 103.3(a)(2)(iv); The Adjudicator's Field Manual (AFM), Chapter 10.8(a)(1), "Preparing the Appellate Case Record: Administrative Appeals (AAO) Cases;" http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html (accessed Apr. 29, 2014). The regulations and USCIS field guidance do not make clear what constitutes "promptly" for purposes of forwarding an appeal to the AAO.

[276] *Supra* note 262. Pursuant to 8 C.F.R. § 103.3(a)(2)(iii), "Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action. However, that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion under §103.5(a)(5)(i) of this part in order to make a new decision favorable to the affected party after 45 days of receipt of the appeal."

The AAO and other USCIS components are aware of this issue, which has become more apparent with the AAO eliminating its own processing delays. The AAO noted that because USCIS field offices do not necessarily use the same electronic case management system, the AAO cannot determine electronically when an appeal is received by a field office, how long the appeal remains pending, or when the appeal has actually been forwarded to the AAO for review.[277] The AAO did state that recent revisions to the Form I-290B and instructions, including a drop-down list to select the USCIS office that issued the denial decision,[278] should facilitate easier tracking of appeals. Additionally, USCIS informed the Ombudsman that the agency established a working group last year to improve tracking of appeals through the initial review process at USCIS field offices. As a result of this effort, USCIS stated that it will issue in the third quarter of FY 2014 standard operating procedures on reporting requirements for the disposition of Forms I-290B and conduct in FY 2014 a full inventory of this form type.

AAO Decisional Data. In the 2005 recommendations, the Ombudsman noted that statistics on AAO decision-making are not published by USCIS.[279] In its response to those recommendations, USCIS indicated that the AAO maintains detailed data on the number of appeals received, the number of adjudicator decisions that are sustained (approved) and dismissed (denied), and the total number of decisions issued each year.[280] At that time, USCIS stated that once technical issues were resolved, the data would be added to the USCIS website. While it has yet to be published on the agency website, below is AAO data, provided by USCIS, for select form types. ***See Figure 19:*** *AAO Select Receipts, Sustains, and Dismissals.* For initial benefit adjudication data, ***See Appendix 4:*** *Initial Benefit Adjudication Data for Commonly Appealed Form Types.*

USCIS noted that this data provides the disposition of appeals that have been transferred to the AAO, and does not include favorable dispositions during initial field review. Also, this data does not include other AAO dispositions (e.g., rejections, withdrawals, and remands).

The Ombudsman will further evaluate and discuss this data with USCIS in the coming year to better understand the disparities in the AAO sustain and dismissal rates among immigration benefit types. Publication of AAO decision statistics on a quarterly or annual basis would enhance transparency in administrative appeals.

FIGURE 19: AAO SELECT RECEIPTS, SUSTAINS, AND DISMISSALS

	2011			2012			2013		
	Receipts	Sustained	Dismissed	Receipts	Sustained	Dismissed	Receipts	Sustained	Dismissed
I-129 H-1B, Specialty Occupation	723	15	585	523	19	985	578	12	858
I-129 L-1, Intracompany Transferee	257	4	83	254	26	317	269	37	508
I-140 EB-1, Extraordinary Ability	206	11	184	203	14	282	179	8	193
I-140 EB-3, Professionals	533	24	651	392	77	1803	423	93	1619
I-212, Request for Admission After Deportation or Removal	179	9	193	115	40	161	86	36	88
I-360, Self-Petitioning Spouse of Abusive U.S. Citizen or Legal Permanent Resident	574	29	458	524	20	320	339	28	352
I-601, Waiver of Grounds of Inadmissibility	1347	435	1215	1167	490	1929	997	496	1737
I-918, U Nonimmigrant Status	216	12	190	221	4	183	166	0	119
N-600, Certificate for Citizenship	226	39	168	173	11	131	193	12	105

Source: Information provided by USCIS (Apr. 25, 2014).

[277] Information provided by USCIS (Feb. 7, 2013).

[278] *See* Form I-290B, *Notice of Appeal* or *Motion* and instructions on USCIS Webpage; http://www.uscis.gov/i-290b (accessed Apr. 10, 2014). Part 3, item 6 "USCIS Office Where Last Decision Issued" of Form I-290B asks the applicant to enter (if nonelectronic filing) or select from the drop-down (if electronic filing) the name of the office that denied or revoked the petition or application.

[279] *Supra* note 159.

[280] USCIS Response to Recommendation 20 (Dec. 19, 2005); http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_USCIS_Response-12-19-05.pdf (accessed Jan. 27, 2014).

Data Quality and its Impact on those Seeking Immigration and Other Benefits

Responsible USCIS Office:
Enterprise Services Directorate

Stakeholders reported issues with the USCIS Systematic Alien Verification for Entitlements (SAVE) program verifying a foreign national's eligibility with a benefit-granting agency, such as a state driver's license office or a local Social Security Administration (SSA) office. SAVE uses data from the U.S. Department of State, DHS, DOJ, and other agencies to verify an individual's immigration status, usually at the time the individual is applying for a state or local benefit, including drivers' licenses.[281] USCIS has taken steps to resolve certain quality issues but problems persist. In April 2013, the Ombudsman convened a working group, the Data Quality Forum, to focus on issues pertaining to DHS data sharing and integrity. While communication and new working relationships have developed as a result of this forum, data quality challenges remain and addressing them will require a renewed commitment on the part of participating offices.

Background

USCIS Verification Information Systems (VIS) is the technical infrastructure that enables USCIS to operate SAVE and E-Verify.[282] It is a nationally accessible database of selected immigration status information containing in excess of 100 million records. In 2013, VIS responded to approximately 25 million E-Verify queries, and approximately 11 million SAVE queries.[283] The E-Verify and SAVE programs rely on multiple data systems to verify an individual's immigration status.

On September 19, 2012, the DHS Office of the Inspector General (OIG) issued a report on the SAVE program. The OIG recommended implementation of a process to compile and trace SAVE benefit-applicant requests and referrals, and a process for SAVE database owners to report to the USCIS Verification Division whether changes to SAVE benefit-applicant records were made.[284] USCIS concurred with the first recommendation. USCIS responded to the second recommendation by stating that the SAVE program was not the owner of the records it uses to determine immigration status, and that the SAVE program does not have the authority to require database owners to report corrections to applicants' records.[285] The OIG directed and USCIS is working to develop internal procedures to report to the SAVE program whether USCIS records have been changed.[286] Since the SAVE program uses non-USCIS data, the Ombudsman offered to help coordinate with other DHS components and federal offices to develop a reporting system as the OIG suggested.

In response to the OIG report, USCIS and DHS partners have worked to improve the quality of data used to verify immigration status with the SAVE program. Specifically, the SAVE program has automated certain processing steps for select user agencies that eliminate the need for manual processing requests. The SAVE program now interfaces with USCIS Electronic Information System (ELIS) and CLAIMS 3, the central USCIS case management system, as well as DOJ systems.[287]

Starting in April 2013, the Ombudsman began hosting the Data Quality Forum to address data sharing challenges between USCIS and other federal agencies. Participants include DOJ, SSA, and DHS. Topics have ranged from U.S. Customs and Border Protection's (CBP) main data system, to the automation of the Form I-94, *Arrival/Departure Record*, to data stewardship policies and service level agreements.

The Ombudsman's 2013 Annual Conference included a roundtable discussion on USCIS data quality enhancements, user challenges, and access concerns with panelists from the USCIS Enterprise Services Directorate, the DHS Office of Civil Rights and Civil Liberties, and a state Refugee and Asylee services office.[288] They shared information on recent USCIS systems enhancements and user frustrations and challenges.

[281] USCIS Webpage, "SAVE," http://www.uscis.gov/save.

[282] DHS Privacy Impact Assessment, "Verification Information System Supporting Verification Programs" (Apr. 1, 2007); http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_vis.pdf (accessed Jun. 11, 2014).

[283] *Supra* note 224.

[284] U.S. Department of Homeland Security Office of Inspector General Report, "U.S. Citizenship and Immigration Services Systematic Alien Verification for Entitlements Program Issues" (Sept. 19, 2012); http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-125_Sep12.pdf.

[285] *Id.*, p.8.

[286] *Id.*

[287] *Supra* note 224.

[288] *See* DHS Blog Posting, "Ombudsman's Third Annual Conference: Working Together to Improve Immigration Services" (Oct. 24, 2013); http://www.dhs.gov/blog/2013/10/24/ombudsman%E2%80%99s-third-annual-conference-working-together-improve-immigration-services (accessed Mar. 14, 2014).

Recently, in anticipation of new immigration legislation, USCIS Verification began system testing high volume use of the E-Verify and SAVE programs.[289] The SAVE program enhanced its monitoring and compliance to ensure agency participants use the program to verify the immigration status information of benefit applicants in a fair, appropriate and lawful manner.

Ongoing Concerns

In the last year, USCIS improved its data sharing capabilities and quality. VIS quality assurance efforts are also ongoing, but issues remain:

Correcting Data Errors. USCIS interfaces with multiple IT systems to compile information into the Central Index System (CIS). This system is a repository of electronic data that provides its users access to biographical, and current and historical status information. CIS has 15 interfaces with eight other IT systems. This is one of the many systems E-Verify and the SAVE program use to verify immigration status for benefits-granting agencies. E-Verify and the SAVE program depend on the responsible agency to make the correction or addition to the feeder system, but cannot force compliance and at times cannot verify corrections. An enforceable policy for follow-up and verification of corrections resulting from a system's error report is needed.

Interagency Coordination. Government agencies and employers rely on information from USCIS systems in order to administer benefits and entitlement programs, and to make hiring and other significant decisions. Careful coordination is needed in exchanges between record owners and USCIS to ensure the accuracy of data. This requires a commitment to invest time and resources to improve systems. To date, USCIS has taken steps toward improving data quality by, for example, developing internal working groups and sponsoring research projects to assess data quality. However, USCIS does not control all data it relies on to verify immigration status. Active measures are needed to ensure data quality practices remain effective and keep pace with the rapid development of new information systems technologies.

USCIS relies on accurate data to strengthen and effectively administer the immigration system. When data quality falls short, customers experience delays in benefits and inaccurate decisions. The Ombudsman values USCIS's contribution to the Data Quality Forum, and looks forward to continuing to host meetings to improve interagency coordination and data quality.

Problems with Payment of the Immigrant Visa Fee via ELIS

Responsible USCIS Office:
Office of Transformation Coordination

In May 2013, USCIS began requiring that immigrant visa recipients pay, via USCIS's ELIS system, the $165 fee to cover the cost of producing their Permanent Resident Cards.[290] Electronic payment of this fee is problematic for a variety of reasons: 1) computer access is required in order to make the payment, and USCIS has not specified any alternative method for payment; 2) the visa recipient must create an ELIS account in order to make the payment, with no provision for payment by an attorney or other authorized representative; 3) the need for a credit card or a bank account makes payment impossible for some visa applicants; and 4) the account registration process, which requires the user to answer a series of questions, is available only in English.

Background

During the 2014 reporting period, USCIS continued its "Transformation" efforts, the fundamental reengineering of USCIS's business processes from paper-based adjudications to an electronic case review and management environment.[291] On May 22, 2012, USCIS launched the foundational release of the new system, ELIS, which integrates with other DHS systems such as U.S. Immigration and Customs Enforcement's Student and Exchange Visitor Information System and CBP's Arrival-Departure Information system.[292] This release included online account-based filing of Forms I-526, *Immigrant Petition by Alien Entrepreneur,* and I-539, *Application to Extend/Change Nonimmigrant Status.*[293]

[289] *Supra* note 220.

[290] USCIS Webpage "USCIS Immigrant Fee" (Aug. 21, 2013); http://www.uscis.gov/forms/uscis-immigrant-fee (accessed Apr. 29, 2014). USCIS offered its email for feedback at usics-elis-feedback@uscis.dhs.gov.

[291] *See generally* USCIS Webpage, "USCIS ELIS" (Apr. 16, 2014); http://www.uscis.gov/uscis-elis (accessed Apr. 28, 2014).

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

[293] *See* USCIS Webpage, "USCIS ELIS, Forms and Fees Available in USCIS ELIS" (Apr. 16, 2014); http://www.uscis.gov/uscis-elis (accessed Apr. 29, 2014). *See* section of this Report on "Problems with Payment of the Immigrant Visa Fee via ELIS."

In anticipation of its second release, USCIS held public engagements on the immigrant fee payment process via ELIS in May and August 2013.[294] Callers expressed concerns that some visa applicants have no computer access; and others, who can access a computer, do not have the computer-familiarity necessary to make an online payment. Callers also raised concerns about frequent error messages from ELIS; a non-intuitive registration process for the accounts; the barriers presented to certain visa applicants by the English-only interface; and the lack of technical support available to users. One attorney on the call described the new process as an "outrageous problem."

Since the USCIS immigrant fee payment process was added to ELIS, almost 500,000 ELIS accounts have been established by new immigrants.[295] According to USCIS, approximately 15 percent of new immigrants using ELIS pay after they enter the United States.[296]

The ELIS Customer Contact Center responded to 18,007 email inquiries from 42 countries since October 2013. Links are available on the ELIS landing page where customers create and log into accounts, and on the ELIS Help and Customer Support page.[297] The USCIS call center has 14 ELIS technical support agents to address technical inquiries. Despite not accepting overseas calls, many customers abroad are able to contact the ELIS technical support agents with the use of online communications for voice calling. Call center technical support agents have answered 65,871 telephonic inquiries since August 2013.[298]

Ongoing Concerns

Since June 2013, the Ombudsman has been receiving stakeholder reports that immigrant visa recipients are having difficulty using the new ELIS fee payment process. Of greatest concern are reports from organizations that represent low-income immigrant visa applicants who are not technologically proficient and do not typically have computer access. In addition to lacking access and know-how, these immigrants may not have bank accounts or credit/debit cards. Since ELIS does not permit attorneys or other representatives to pay the immigrant fee on behalf of their clients, these visa recipients face significant barriers to completing the immigration process. Stakeholders reported that individuals with valid immigrant visa packets were remaining overseas after consular interviews because they do not know how to use the ELIS system and feared coming to the United States without payment of the fee.

In August 2013, USCIS issued new instructions, *F4 Customer Guide – General Information: How Do I Pay the USCIS Immigrant Fee*, indicating if an individual is unable to pay the fee while abroad, the individual may travel to the United States, without penalty, and make the payment following admission.[299] However, these instructions are embedded in a three-page brochure, and they provide little information on how that payment should be made, and no information specifying what a customer should do if the customer does not receive a Request for Payment from USCIS. The customer guide is available in Chinese (Mandarin), French, Hindi, Korean, Portuguese, Spanish, Tagalog, Urdu and Vietnamese, as well as English. USCIS acknowledged that the translations contain inaccurate language stating that the fee must be paid abroad, and there is no plan to revise this literature, which is distributed after the consular appointment.

[294] *See* USCIS Webpage, "USCIS Immigrant Fee Transition to USCIS ELIS (Electronic Immigration System)" (May 10, 2013); http://www.uscis.gov/outreach/notes-previous-engagements/uscis-immigrant-fee-transition-uscis-elis-electronic-immigration-system (accessed Apr. 28, 2014); USCIS Customer Service and Public Engagement Directorate, "Webinar on Paying the USCIS Immigrant Fee" (Aug. 16, 2013); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/Upcoming%20National%20Engagement%20Pages/2013%20Events/August%202013/USCISImmigrantFee-webinar-invite.pdf (accessed May 14, 2014).

[295] *Supra* note 136.

[296] Information provided by USCIS (May 12, 2014). Approximately 50,000 accounts have been created for individuals filing Form I-539.

[297] USCIS Webpage, "USCIS Electronic Immigration System (USCIS ELIS) Log In;" https://elis.uscis.dhs.gov/cislogin/CISControllerAction.do?TAM_OP=login&ERROR_CODE=0x00000000&URL=%2F&AUTHNLEVEL=&OLDSESSION (accessed May 9, 2014); "USCIS ELIS Help and Customer Support" (Jan. 27, 2014); http://www.uscis.gov/uscis-elis/uscis-elis-help-and-customer-support (accessed May 9, 2014).

[298] Information provided by USCIS (May 7, 2014).

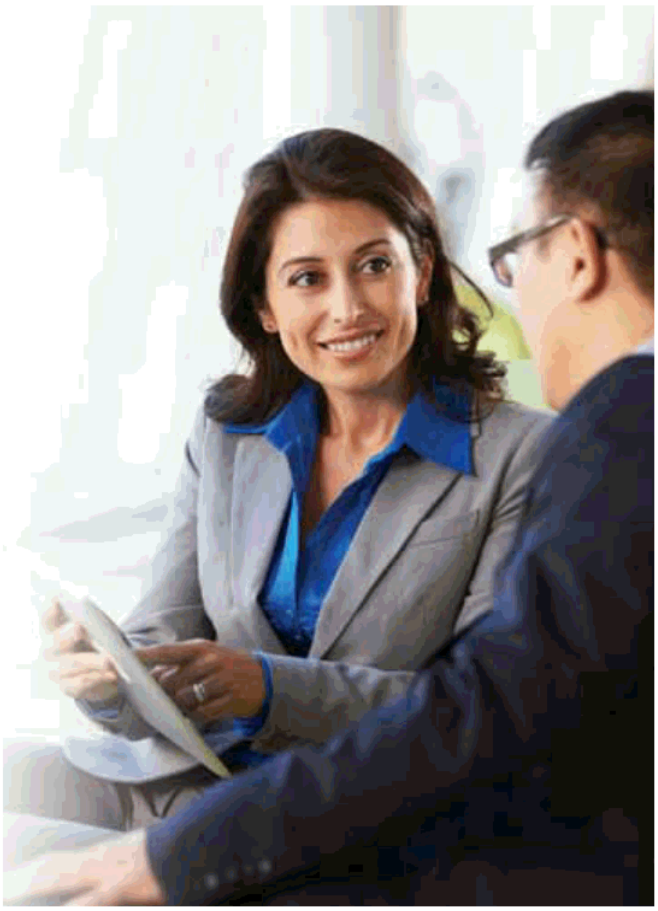
[299] USCIS Webpage, "F4 Customer Guide – General Information: How Do I Pay the USCIS Immigrant Fee" M-1113 (Aug. 2013); http://www.uscis.gov/sites/default/files/USCIS/Resources/How%20Do%20I%20Guides/F4en.pdf (accessed Apr. 28, 2014).

The Ombudsman suggested that USCIS take the following ameliorative actions:

- Change ELIS to allow an attorney or accredited representative with a Form G-28, on file to make the fee payment on the client's behalf. In a meeting with USCIS in April 2014, Transformation leaders stated USCIS is consulting with counsel and privacy authorities to develop a payment option for representatives of the visa recipient. USCIS likely will schedule a public engagement session when such changes are unveiled.
- Revise the foreign language instructions indicating that it is compulsory to pay the fee from abroad, and revise the instructions in English on the USCIS website to simply and clearly state that the applicant has the option of paying from overseas or in the United States, wherever the individual can access ELIS.
- Translate ELIS questions into Spanish and other languages.

Conclusion

USCIS continues to conduct robust public engagement. However, there are ongoing concerns with the AAO's authority and independence, the fee waiver process, and the methodology used to calculate processing times. The Ombudsman will continue to monitor USCIS's customer service efforts and looks forward to future developments.



Recommendations Updates

Employment Eligibility for Derivatives of Conrad State 30 Program Physicians

Responsible USCIS Offices:
Service Center Operations Directorate, Office of Policy and Strategy, and Office of the Chief Counsel

On March 24, 2014, the Ombudsman published recommendations titled *Employment Eligibility for Derivatives of Conrad State 30 Program Physicians.*[300]

Background

USCIS interprets relevant statutory and regulatory provisions as permitting J-2 nonimmigrant dependents of a J-1 (Exchange Visitor) medical doctor accepted into the Conrad State 30 program,[301] which provides a waiver of the two-year home-country physical presence requirement, to change only to H-4 nonimmigrant status. USCIS will not allow change of status to another, employment-authorized nonimmigrant status, even where the dependent independently qualifies for such status.[302] This policy appears to be at odds with the legislative intent, may have a chilling effect on Conrad State 30 applications, and may place an undue financial burden on international medical graduates and their families.

Recommendations

Accordingly, the Ombudsman recommended that USCIS:

1) Publish new regulations that permit independently eligible J-2 dependents of J-1 physicians approved for Conrad State 30 program waivers to change to other employment-authorized nonimmigrant classifications; or
2) Issue new policy guidance clearly explaining that J-2 visa holders, who are derivative beneficiaries of a Conrad State 30 program waiver, may change to any nonimmigrant status for which they are otherwise qualified and eligible.

Improving the Quality and Consistency of Notices to Appear

Responsible USCIS Offices:
Field Operations and Service Center Operations Directorates, Office of Policy and Strategy, and Office of the Chief Counsel

On June 11, 2014, the Ombudsman published recommendations titled *Improving the Quality and Consistency of Notices to Appear.*[303]

Background

Under the Immigration and Nationality Act, three agencies within DHS may initiate a removal proceeding by preparing and serving Form I-862, *Notice to Appear* (NTA) on a respondent and the Immigration Court.[304] These agencies include USCIS, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection.[305] While statutory and regulatory provisions outline the initiation, nature, and potential outcome of removal proceedings, agency policy memoranda makes clear enforcement priorities, procedures for drafting and reviewing NTAs, and

[300] Ombudsman Recommendation, "Employment Eligibility for Derivatives of Conrad State 30 Program Physicians" (Mar. 24, 2014); http://www.dhs.gov/publication/cisomb-recommendation-work-authorization-j2-physician-dependents (accessed Jun.17, 2014).

[301] Immigration and Nationality Act (INA) § 214(l). On September 28, 2012, through enactment of Pub. L. No. 112-176, the Conrad State 30 program was extended until September 30, 2015.

[302] Information provided by USCIS (Sept. 17, 2013). Prior to 2011, USCIS regularly approved requests for change of status for J-2s to employment-authorized nonimmigrant classifications, such as H-1B Specialty Occupation Worker, after the principal J-1 obtained a Conrad State 30 waiver. According to USCIS, subsequent to a revision of Form I-129, *Petition for a Nonimmigrant Worker*, in 2010, the agency began collecting information pertaining to J-2s in order to determine whether the principal was subject to the two-year home-residency requirement. It then began denying change of status applications filed by these dependents to change to classifications other than H-4. USCIS maintains that its policy has not changed in this area. Rather, the agency claims that denial of these applications for change of status is due to the collection of new information by USCIS via the revised Form I-129 (i.e., USCIS is now able to easily identify dependents who are subject to the two-year home-residency requirement).

[303] Ombudsman Recommendation, "Improving the Quality and Consistency in Notices to Appear (NTAs)" (Jun. 11, 2014); http://www.dhs.gov/publication/cisomb-nta-recommendation (accessed Jun.17, 2014).

[304] INA § 239(a); 8 U.S.C. § 1229(a) (2006); and 8 C.F.R. § 1003.14(a).

[305] This recommendation does not address the issuance of Notices to Appear (NTAs) by U.S. Customs and Border Protection (CBP) agents. It does discuss U.S. Immigration and Customs Enforcement's (ICE) priorities and legal review related to NTAs.

the proper exercise of prosecutorial discretion. In November 2011, USCIS released revised guidance on issuance of NTAs and referral of certain cases to ICE.[306] The guidance focused on DHS-established enforcement priorities and is an essential mechanism to streamline the NTA issuance process to promote efficiency while enhancing national security and public safety. Effective communication and collaboration to actualize DHS's priorities is a challenging but critical goal for NTA issuance.

In USCIS, a wide range of officials in asylum, field and service center locations may draft and issue NTAs.[307] There is no requirement that these NTAs be reviewed and approved by attorneys in the USCIS Office of the Chief Counsel (OCC) or in any other DHS legal program. OCC attorneys are not typically involved in designing or delivering training on NTA issuance.[308] Instead, USCIS offices and directorates have developed their own protocols and instructional materials, some of which have not been updated in years.[309] Stakeholder and case assistance feedback brought to the attention of the Ombudsman indicates the lack of attorney involvement in USCIS-generated NTAs has contributed 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 – increased efficiency and coordination.

USCIS does not track the number of NTAs that are returned as undeliverable, rejected by ICE, or terminated by the Executive Office for Immigration Review (EOIR), making it difficult to evaluate the agency's overall performance in this area.[310] However, the Ombudsman has identified a need for greater transparency and coordination within USCIS, and between USCIS, ICE and EOIR. The recommendations below seek to ensure that those placed into removal receive a full and fair hearing, including proper notice of all charges and a meaningful opportunity to respond.

Recommendations

To improve the quality and consistency of NTAs, and to ensure they are in compliance with DHS and USCIS policies, the Ombudsman recommends that USCIS:

1) Provide additional guidance for NTA issuance with input from ICE and 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.

[306] USCIS Policy Memorandum, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens" (Nov. 7, 2011); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf (accessed Apr. 29, 2014).

[307] Information provided by USCIS (Mar. 22, 2013).

[308] *Id.*

[309] *Id.* USCIS Office of the Chief Council does not have any separate guidance related to legal sufficiency review of NTAs by its headquarters or field attorneys.

[310] *Id.* USCIS informed the Ombudsman that the agency does not generally maintain a system to track the number of NTAs returned to USCIS by ICE, CBP or the Executive Office for Immigration Review due to erroneous information or faulty drafting. The agency also does not track how many of these returned NTAs were mailed again or delivered in person to the same respondent. According to USCIS, the agency "does not track the number of NTAs returned as undeliverable on a national level." Information provided by USCIS (Oct. 1, 2013).

Appendix 1: 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 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;

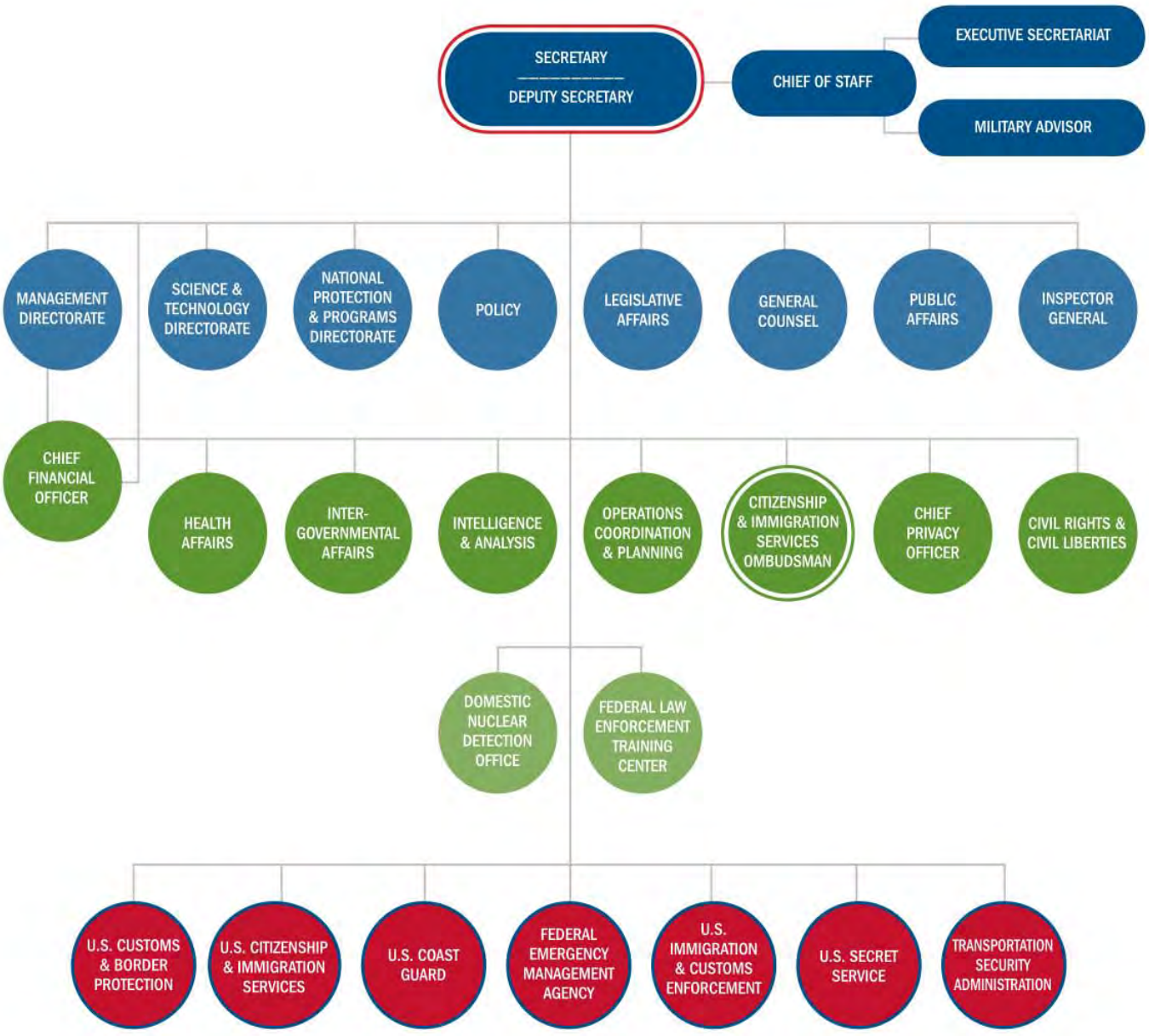
(B) may consult with the appropriate supervisory personnel of the Bureau of Citizenship and Immigration Services regarding the daily operation of the local office of such ombudsman;

(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.

Appendix 2: U.S. Department of Homeland Security Organizational Chart



Appendix 3: Ombudsman Scope of Case Assistance

Office of the Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security

Homeland Security

Requests for Case Assistance: Scope of Assistance Provided to Individuals

June 2013

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's 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's 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.)

Appendix 4: Initial Benefit Adjudication Data for Commonly Appealed Form Types

	2011			2012			2013		
	Receipts	Approvals	Denials	Receipts	Approvals	Denials	Receipts	Approvals	Denials
I-129 H-1B, Specialty Occupation	267,950	220,779	55,333	307,774	234,167	60,354	299,272	274,261	62,760
I-129 L-1, Intracompany Transferee	41,973	32,370	7,886	41,488	34,625	8,856	42,244	32,390	9,680
I-140 EB-1, Extraordinary Ability	5,012	2,930	1,560	4,940	3,789	1,892	5,689	4,377	1,482
I-140 EB-3, Professionals	18,501	18,740	3,064	10,428	12,217	2,650	4,094	6,862	1,518
I-212, Request for Admission After Deportation or Removal	587	220	181	1,083	368	244	2,992	925	373
I-360, Self-Petitioning Spouse of Abusive U.S. Citizen or Legal Permanent Resident	8,682	4,015	1,479	9,007	3,110	1,421	6,816	9,665	2,660
I-601, Waiver of Grounds of Inadmissibility	3,739	1,999	690	5,787	2,653	630	4,586	3,176	785
I-918, U Nonimmigrant Status	26,801	17,690	4,574	39,894	17,543	4,331	43,695	18,228	3,269
N-600, Certificate for Citizenship	57,606	56,746	4,792	62,862	48,914	4,013	63,599	60,038	5,329

Source: Information provided by USCIS (May 16, 2014).

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Homeland Security

Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security

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U.S. Department of Homeland Security's Responses to Representative Gosar's June 13, 2014 Letter

1. ***First and foremost,* what statutory authority, Presidential executive order, or memo from the Office of the Secretary is used as a basis for these transfers and the processes involved?**

The transfer of U.S. Immigration and Customs Enforcement (ICE) detainees from one ICE area of responsibility to another is part of the routine detention and removal process. The *Immigration and Nationality Act* (INA) and *Homeland Security Act of 2002* (HSA) vest the Department of Homeland Security (DHS) with the authority to transfer aliens to another state and release those individuals in that state as opposed to other locations. Specifically, INA § 241(g), 8 U.S.C. § 1231(g), states that the Secretary of DHS "shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." This statute has been interpreted as providing DHS the authority "to transfer aliens from one detention center to another." *Gandarillas-Zambrana v. Bd. of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995). With the implementation of the HSA, the care of unaccompanied children (UAC) was transferred from legacy Immigration and Naturalization Service (INS) to the Director of the Office for Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS). *See Homeland Security Act of 2002*, Pub. L. 107-296, § 462(a), 116 Stat. 2135, 2202 (codified at 6 U.S.C. § 279(a)). Further, the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA) requires any department or agency of the federal government that has an unaccompanied alien child in its custody to transfer the child to HHS within 72 hours of determining that such child is unaccompanied. *Trafficking Victims Protection Reauthorization Act*, ch. 235(b)(3) (2008), 122 Stat 5044 (2008) (codified at 8 U.S.C. § 1232(b)(3)) (TVPRA). Accordingly, ICE is required by law to transfer UAC to ORR facilities that are located throughout the United States. After ICE initially transfers the UAC to ORR, it no longer has responsibility for their care or custody, or subsequent placement or relocation decisions made by ORR HHS.

In addition, ICE transports UAC in accordance with the terms of the agency's appropriations acts. *See Consolidated Appropriations Act*, 2014, Pub. L. No. 113-76, 128 Stat. 5, 250.

   a. **Further, what appropriations are used to facilitate these actions (meaning, from which specific accounts within DHS)?**

Congress appropriates funds to ICE under the heading "Salaries and Expenses" to pay "for necessary expenses for enforcement of immigration and customs laws, [and] detention and removals," among other things. *See, e.g.*, *Consolidated Appropriations Act*, 2014, Pub. L. No. 113-76, 128 Stat. 5, 250; *Consolidated and Further Continuing Appropriations Act*, 2013, Pub. L. No. 113-6, 127 Stat. 198, 346-47. Amounts appropriated under the Salaries and Expenses heading are to be used, among other things, for "transportation of unaccompanied minor aliens." 128 Stat. 251; 127 Stat. 347.

2. Might it be possible that the Department, through CBP and ICE, is breaking federal laws regarding "alien smuggling" by acting in this way and transferring these individuals within the United States?

No. DHS is not violating 8 U.S.C. § 1324, *Bringing in and harboring certain aliens*, or other similar laws by processing and transferring the UAC to HHS. To the contrary, DHS is enforcing the laws that Congress has passed.

Through the HSA, Congress specifically transferred the responsibility for the care of UAC from INS to ORR. *See* 6 U.S.C. § 279(a). The HSA also makes ORR responsible for implementing placement determinations for UAC. 6 U.S.C. § 279(b)(1).

Within DHS, UAC are ordinarily apprehended and placed into removal proceedings by U.S. Customs and Border Protection (CBP). ICE assists with transportation of UAC to ORR custody. ICE's appropriations explicitly authorize ICE to pay for the transportation of UAC. *See Consolidated and Further Continuing Appropriations Act of 2013*, Pub. L. No. 113-6, 127 Stat. 198, 346-47 (appropriating ICE $5,394,402,000 for fiscal year (FY) 2013 and further providing "[t]hat of the total amount provided, not less than $2,753,610,000 is for detention and removal operations, including transportation of unaccompanied minor aliens ..."); *Consolidated Appropriations Act*, 2014, Pub. L. No. 113-76, 128 Stat. 5, 250 (appropriating ICE $5,229,461,000 for FY 2014 and further providing, "[t]hat of the total amount provided, not less than $2,785,096,000 is for detention and removal operations, including transportation of unaccompanied minor aliens ....")

ICE does not make placement determinations for unaccompanied minors as referenced in your letter or in the opinion you cite by Judge Andrew Hanen in *United States v. Nava-Martinez*, No. 1:13-cr-441, (S.D. Tex. Dec. 13, 2013). Instead, placements such as those are made by ORR.

a. Please see Section 1324 of Title 8, U.S.C. and explain to me how this statute does not apply to the Department.

Please see the answer to Question 2.

b. If the Department believes it is justified, please provide such justification.

Please see the answer to Question 2.

c. If the Department believes it is not justified after review of the U.S. Code, does it plan to cease these practices posthaste?

Please see the answer to Question 2.

3. **Please provide an explanation as to the evolution of this policy/process, including:**

    a. **Any earlier versions of the policy/process;**
    b. **When the policy/process was instituted in its current form;**
    c. **How and when the policy/process was distributed to personnel as instruction, in addition to providing the exact document outlining such instructions, in unredacted form;**
    d. **Any updates to the policy/process since the June 4 staff briefing; and**
    e. **Any and all potential updates to the policy/process that DHS is currently considering.**

The specific policy raised by this question is not clearly identified in your letter, which discussed several policies and practices. However, to the extent you are referring to ICE's general authority to transfer detainees from one facility to another, please refer to the response provided to question one, explaining that such transfers are consistent with ICE's statutory authority and relevant case law. To the extent that you are referring to the policies involving the transfer of unaccompanied minors, please note that ORR is responsible for the placement of such children as explained in response to questions one and two.

4. **When asked by staff at the June 4 briefing how much money was being spent to transport these illegal immigrants to other areas, ICE answered that it cost about $53,000 per flight, if it was a full flight. ICE then went on to describe how its hands are tied because they do not have enough detention beds, or enough money to contract with other facilities to detain these individuals.**

    a. **Does the Department not see the hypocrisy of this explanation?**
    b. **Might the Department rather wish to work with the Administration and Congress to outline this serious issue of a lack of infrastructure, provide a workable budget justification, and request that Congress appropriate the funds needed to raise the necessary infrastructure rather than spend $53,000 per flight to help get these individuals to their final destination?**

The Administration is eager to work with Congress to ensure that sufficient resources and authorities exist to continue our efforts. To that end, and to effectively address this urgent situation, the President has requested an emergency supplemental appropriation of $3.7 billion, including $1.5 billion for DHS to support additional detention and removal facilities and enhanced processes, as well as increased activities to disrupt and dismantle the human smuggling organizations that lure these individuals into the dangerous journey from Central America. More specifically, the request focuses on:

- deterrence, including increased detention and removal of adults with children and increased immigration court capacity to adjudicate these cases as quickly as possible;
- enforcement, including enhanced interdiction and prosecution of criminal networks, increased surveillance, and expanded collaborative law enforcement task force efforts;

- foreign cooperation, including improved repatriation and reintegration, intensified public information campaigns, and efforts to address the root causes of migration; and
- increased capacity for the care and transportation of UAC.

DHS looks forward to working with Congress to obtain the important funding.

5. **At the briefing, ICE explained that in the less than 2 weeks prior to June 4 that these policies/practices had been in place to transfer these individuals to Arizona, it had made 7 flights from Texas to various parts of Arizona.**

   a. **How many flights have occurred since then and/or to-date?**

There have not been any additional ICE flights like those from the CBP's Border Patrol's Rio Grande Valley Sector to Tucson Sector.

6. **What exact instructions are given to these detained individuals after they are processed and before they are released on what the Department has deemed a "parole" status?**

   a. **I am aware of the 15-day reporting requirement, but what exactly is said to them or given to them?**
   b. **Is any paperwork signed?**
   c. **Please provide a copy of any and all related documents.**

After ICE took custody of these individuals, pursuant to its standard operating procedures, the ICE Enforcement and Removal Operations (ERO) Phoenix Field Office personnel reviewed each case and took appropriate enforcement action based on governing law and the agency's national security and public safety enforcement priorities. Individuals who did not remain in custody were given a list of available services, notified of the ICE ERO office nearest to the address given as their final destination, and received instructions to report to that ICE ERO office within 15 days. ICE ERO also informed these individuals that their immigration cases—including an assessment of any appropriate conditions of release—would be managed by the receiving field office. The receiving offices were notified of these transfers through internal docket control and management systems used by all ICE ERO offices.

7. **As a percentage, what is the success rate to-date in terms of these individuals self-reporting to the regional ICE facility (as instructed by ICE prior to release) near their final destination for additional processing and adjudication?**

After CBP's Border Patrol processed the 940 adults with children (i.e., family unit members), due to lack of appropriate detention space, ICE paroled them into the United States. As you know, ICE has established family residential standards, developed in response to federal court litigation, generally providing for case management, health, education, and counseling services in family facilities. As a result, family detention bed space is generally more than double the cost of adult detention space; ICE has traditionally only maintained about 100 family detention beds. Since no family detention beds were available for these adults with

children, they were transported to bus stations after indicating to ICE their final destinations across the Nation. Approximately 60 percent of these adults reported timely to the appropriate ICE field offices at the final destinations they indicated. Individuals who do not appear for immigration removal proceedings as required are likely to be ordered removed in absentia. ICE ERO will take appropriate enforcement action with respect to these individuals based on its national security, public safety, and border security priorities, including those related to recent arrivals and fugitive aliens.

Since this time, ICE has added additional detention capacity for adults who cross the border illegally in the Rio Grande Valley with their children. For this purpose, DHS has established a temporary facility for adults with children on the Federal Law Enforcement Training Center's campus at Artesia, New Mexico. And, on August 1, 2014, ICE transitioned the Karnes County Civil Detention Center from an immigration detention facility housing adults to a residential facility to house adults with children. The establishment of these facilities will help ICE to increase its capacity to house and expedite the removal of adults with children in a manner that complies with federal law. DHS will continue working to increase our capacity to hold and expedite the removal of the influx of adults with children illegally crossing the southwest border.

8. **Do the transfers take place from Texas to states other than Arizona for any detainees which are not UAC or are not part of a family unit? I have heard reports about New York and Maryland in particular.**

The transfer of ICE detainees, including adults not part of a family unit, from one ICE area of responsibility to another is part of the routine detention and removal process, based on operational needs.

9. **Please describe in detail the ways in which the Yuma Sector has been incorporated thus far.**

    a. **Further, please describe the plans the Department is hoping to implement to further involve Yuma Sector in this process.**

In support of the Rio Grande Valley Sector effort to accommodate the processing and transfer of UAC, Yuma Sector provided both personnel and equipment to Rio Grande Valley Sector and the Nogales Processing Center in Tucson Sector (TCA). Since the onset of the UAC situation, Yuma Sector deployed 105 Border Patrol agents (including supervisors) and 11 vehicles to Rio Grande Valley Sector and 38 to the Nogales Processing Center. Within the last four months, Yuma Sector deployed an average of 35 agents per month, which represents approximately 4 percent of the Yuma Sector workforce.

At this time, there are no further plans for Yuma Sector in this process. Steady-state operations will be maintained by rotating agents in and out of these temporary assignments in 28-day iterations through the end of the fiscal year. The situation continues to be monitored and adjustments could be made as operational needs require.

10. In what specific ways does DHS plan to involve DOD in this process?

a. What about other departments of the government?

At the direction of President Obama and Secretary Johnson, the Federal Emergency Management Agency (FEMA) is leading the Unified Coordination Group responsible for addressing the influx of UAC that is creating a humanitarian situation along the southern border. This group includes DHS and its Components; HHS, the Department of Defense (DoD), the Department of Justice (DOJ), the Department of State (DOS); and the General Services Administration (GSA). The safety and well-being of the children are a top priority of the Federal Government. As the lead coordinating agency, FEMA is leveraging the capabilities of the Federal Government to support CBP, ICE, and HHS. These agencies have the lead roles in addressing the immediate needs of UAC.

Other U.S. Government agencies involved in issues related to the UAC migration surge include DoD, which provided temporary shelter space for HHS at its facilities in San Antonio, Texas; Ventura, California; and Fort Sill, Oklahoma. While HHS has scaled back its use of these shelter spaces, these facilities remain ready to assist in our efforts as necessary should apprehensions increase. DOS, working with DHS, is coordinating diplomatic outreach, public diplomacy, and messaging with domestic and international partners, and is committed to working with Central American governments of the UAC migration to address the complex root causes of migration. They are working closely with U.S. missions and partner governments in the region, as well as their embassies in the United States, to actively stress the dangers of irregular immigration through media engagements, public events, and outreach in at-risk communities. DOJ and the Corporation for National Community Service announced "justice AmeriCorps," a strategic partnership to increase national service opportunities, while enhancing the effective and efficient adjudication of immigration proceedings involving certain children who have crossed the U.S. border without a parent or legal guardian.

DHS and DOJ are continuing to work together to investigate, prosecute, and dismantle the smuggling organizations that are facilitating border crossings into the Rio Grande Valley. As of August 18, 2014, 363 smugglers and their associates had already been arrested on criminal charges, and more than 900 undocumented immigrants had been taken into custody. As of August 17, $713,300 in illicit profits had been seized from 438 bank accounts held by human smuggling and drug trafficking organizations. To date, HSI has seized over $839,000 in illicit proceeds, including derivative cash seizures.

DOJ is reassigning immigration judges as necessary to handle the cases arising from those crossing the border. Leveraging video teleconferencing technology, DOJ will help adjudicate these new cases as quickly as possible, and all cases will continue to be heard consistent with fairness and due process and all existing legal and procedural standards, including those for asylum applicants. Overall, DOJ's increased capacity and resources will allow for the acceleration of case processing, allowing ICE to return unlawful migrants from Central America to their home countries more quickly.

11. Please describe in detail the ways in which the detainees' consulates facilitate any part of this process once the detainees are state-side.

Each country has discretion in deciding what level of consular services it will provide. Consular officers may do a variety of things to assist a foreign national; the most common is speaking with the detained individual or arranging a visit. Consular officers may also assist in arranging legal representation and monitoring the progress of a case, but they have no concrete role in facilitating the outcome of individual cases. All foreign nationals who come into CBP custody are afforded the opportunity to contact a consular official of their native country. Additionally, appropriate consular officials are notified when an individual from a mandatory notification country is arrested. While a subject is in custody, consular officers have access to their citizens and will occasionally visit CBP facilities to collaborate with CBP officials and meet with citizens of their country.

12. Reports also indicate that DHS believes Arizona has seen a decline in illegal border crossings.

a. While many Members of Congress dispute that assessment based on the fact that DHS has no real metrics for accounting for crossings and periodically changes standards and definitions of "detained," "deported," and "turnaround," let us assume for the purposes of these questions that DHS' statements are true.

b. If true, why aren't Yuma Sector and Tucson Sector sending personnel assets to Texas for border and interior enforcement?

The metrics that are in place indicate a 26 percent decrease in apprehensions compared to the same period in FY 2013. Yuma Sector and Tucson Sector have both deployed assets to Texas to assist with the current situation as more particularly described in response to Question 9 above.

13. What law enforcement policies are in place to address illegal activity performed by these individuals after they are state-side?

a. When my staff posed this question at the June 4 briefing, the answer seemed to be that there was no policy whatsoever in place.

When state and local law enforcement officers arrest and fingerprint an individual for a criminal violation of state or local law, those fingerprints are sent to DHS to check against its immigration databases. If these checks reveal that an individual is unlawfully present in the United States or otherwise removable due to a criminal conviction, ICE takes enforcement action—prioritizing the removal of individuals who present the most significant threats to public safety, as determined by the severity of their crime, their criminal history, and other factors—as well as those who have repeatedly violated immigration laws.

14. Why did the Department decline to inform Congress and/or state and local officials about these transfers?

a. Is it true that ICE was coordinating, at least sporadically, with the Greyhound Company to arrange for the drop-off of these detainees?
b. Could no one at any level call anyone in Congress or at the state or local level to inform them of these transfers?

While the Department did not notify Congress and/or state and local government officials before enforcement actions were taken, such briefings began after the initial releases. Regarding coordination with transportation providers, pursuant to standard operating procedures, ICE ERO coordinates with commercial carriers as well as non-governmental and faith-based organizations to determine the number of individuals that transportation providers may accommodate based on their transportation schedule, resources, and capabilities to ensure detainees are processed quickly, safely, and humanely. .

15. Does DHS/ICE have any intentions of repaying the public and private services afforded to these individuals based on this reckless policy/practice of dropping off hundreds of illegal immigrants at bus stations all over the State of Arizona?

a. It is my understanding that at the June 4 briefing when my staff posed this question, the Department replied that no reimbursements had been made, and that there was no such plan in place to do so.
b. Has a plan been formulated since the June 4 briefing when this question was posed?
c. Was a remedy to this injustice to local communities ever even considered by anyone at the Department?

One source of border security funding available to Arizona is Operation Stonegarden, a grant program administered by FEMA that supports enhanced cooperation and coordination among federal, state, local, tribal, and territorial law enforcement agencies in a joint mission to secure the borders of the United States. Among its goals, Operation Stonegarden is intended to support border states by increasing the capability to prevent, protect against, and respond to border security issues and encourage local operational objectives. Secretary Johnson announced the FY 2014 Operation Stonegarden funding allocations on July 25, which included more than $12.4 million in funding for Arizona—an 8-percent increase over the FY 2013 funding level. Overall, the southwest border received more than 86 percent of the total grant monies available under this program. This increased funding will further enhance the ability of law enforcement agencies within the state to support CBP missions along the southwest border and augment security efforts in the region. Since FY 2009, Arizona has received approximately $80 million in Operation Stonegarden funding, including more than $21.5 million in combined FY 2012 and FY 2013 funding that Arizona grant recipients are currently expending.

16. Please reaffirm in writing the statements from the June 4 briefing which indicated DHS/ICE/CBP made no transfers of these individuals without giving them proper amounts food, water, hygiene items, clothing, or shelter.

a. Please elaborate on everything the Department gives these individuals before dropping them at their next transfer stations.

As stated during the June 4 briefing to Congressional staff members and in subsequent correspondence with members of Congress, as well as state and local officials, before their release, ICE ERO Phoenix offered individuals access to phones to arrange for transportation to their destination and/or to contact their consulate. They were given a bag lunch and bottled water; families with infants were provided diapers and baby food. All property in the individuals' possession at the time they were transferred to ICE from CBP was returned to them.

17. Please provide figures outlining the total amount of money spent by the Department on these transfers (to any state) to-date.

a. The Department may also provide this figure without consideration of salaries.

The total cost to ICE to transfer unprocessed adults with children via air transport from the Rio Grande Valley area (during the time period of May 24, 2014 to June 15, 2014), was approximately $630,000. Please note that this figure reflects the total cost of the ICE missions flown, which include additional legs of these flights that were used to transport other detainees for different purposes.

18. Please provide the figures totaling the number of individuals ICE processed in each calendar year since 2004.

ICE Initial Book-ins, Calendar Years 2004 through 2014 Year-to-Date[1]

Calendar Year	Book-ins
2004	208,890
2005	217,637
2006	247,575
2007	297,335
2008	396,369
2009	372,703
2010	370,699
2011	443,922
2012	479,522
2013	433,022
2014 YTD	228,918

[1] FY 2014 year-to-date is as of June 30, 2014. Data provided represents initial book-ins to ICE custody. Aliens may have been booked in more than once.

19. Please provide the figures totaling the number of contract and non-contract beds ICE had available in each calendar year since 2004.

Number of Funded Beds, FYs 2004 through 2014

FY	Number of Funded Beds
2004	19,444
2005	18,500
2006	20,800
2007	27,500
2008	32,000
2009	33,400
2010	33,400
2011	33,400
2012	34,000
2013	34,000
2014	34,000

20. Please provide the average cost, on a state-by-state basis, of a detention bed fee for one night from each calendar year since 2004.

Average Cost of Detention Bed Fee, FYs 2009 through 2014

ICE ERO Area of Responsibility	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Atlanta	$ 92.52	$ 96.03	$ 91.95	$ 95.71	$ 99.44
Baltimore	$ 110.74	$ 100.55	$ 96.28	$ 100.21	$ 99.66
Boston	$ 119.59	$ 114.73	$ 109.85	$ 114.34	$ 111.66
Buffalo	$ 147.96	$ 173.63	$ 166.25	$ 173.04	$ 226.08
Chicago	$ 88.26	$ 85.20	$ 81.58	$ 84.91	$ 71.57
Dallas	$ 86.37	$ 81.24	$ 77.78	$ 80.96	$ 87.32
Denver	$ 122.39	$ 121.24	$ 116.08	$ 120.83	$ 146.91
Detroit	$ 96.28	$ 84.91	$ 81.30	$ 84.63	$ 92.53
El Paso	$ 120.66	$ 129.32	$ 123.83	$ 128.89	$ 136.62
Houston	$ 105.52	$ 92.09	$ 88.17	$ 91.78	$ 100.16
Los Angeles	$ 121.82	$ 123.97	$ 118.70	$ 123.55	$ 133.22
Miami	$ 141.19	$ 139.41	$ 133.48	$ 138.94	$ 173.77
Newark	$ 150.29	$ 215.59	$ 206.42	$ 214.86	$ 158.23
New Orleans	$ 71.49	$ 69.99	$ 67.01	$ 69.75	$ 79.05
New York	$ 224.36	$ 113.99	$ 109.15	$ 113.61	$ 113.37
Philadelphia	$ 107.98	$ 108.03	$ 103.43	$ 107.66	$ 128.91
Phoenix	$ 105.43	$ 116.05	$ 111.12	$ 115.66	$ 122.85
Seattle	$ 124.83	$ 134.72	$ 128.99	$ 134.26	$ 131.67
San Francisco	$ 91.06	$ 83.47	$ 79.92	$ 83.19	$ 97.83
Salt Lake City	$ 95.87	$ 101.24	$ 96.93	$ 100.89	$ 110.10
San Antonio	$ 127.37	$ 135.58	$ 129.81	$ 135.12	$ 103.46
San Diego	$ 170.53	$ 194.84	$ 186.56	$ 194.19	$ 247.89
St Paul	$ 98.52	$ 98.70	$ 94.51	$ 98.37	$ 96.94
Washington	$ 98.21	$ 90.19	$ 86.35	$ 89.88	$ 102.52
ICE Total[2]	**$ 115.32**	**$ 116.88**	**$ 112.83**	**$ 118.14**	**$ 118.88**

[2] Please note that total ICE bed rate is not a straight average of Area of Responsibility rates but is the weighted average daily population.

WASHINGTON
LEGISLATIVE OFFICE

April 4, 2014

The Honorable Jeh Johnson
Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

The Honorable Alejandro Mayorkas
Deputy Secretary
U.S. Department of Homeland Security
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ROBERT REMAR
TREASURER

Re: Recommendations to DHS Relating to Immigration Enforcement and Border Safety

Dear Secretary Johnson and Deputy Secretary Mayorkas:

On behalf of the American Civil Liberties Union (ACLU), I write to congratulate you on your confirmations to lead the U.S. Department of Homeland Security. Under your leadership, the Department will have the opportunity to institute policy reforms that ensure due process, preserve family unity, and protect communities.

We urge you to proceed quickly with the review of the Department's immigration enforcement practices, as families and communities daily struggle and suffer under the threat of deportation. We respectfully submit the following recommendations relating to immigration enforcement and border safety. While these steps would not fully address the pervasive problems in the current system, they would mark significant improvements. All can be pursued wholly within existing executive authority, and should be pursued irrespective of legislative immigration reform and affirmative relief considerations.

I. Curb Record-Level Deportations

The Obama Administration has hit a dubious milestone, having deported two million individuals over the course of five years. Many of the individuals deported are among those who would be eligible for relief under the Senate-passed comprehensive immigration reform bill (S. 744) or proposals currently being considered in the House of Representatives. In FY 2013, over 260,000 people were deported through expedited removals or reinstatement, their cases never heard by an immigration judge – a full 70 percent of the total number of people deported that year. Over 65 percent of FY13 removals were people with no criminal history or who had been convicted only of minor misdemeanors such as driving without a license. These sad and shocking statistics are inconsistent with our history as a nation of immigrants, inconsistent with the Department's promise to focus its resources on national security and public safety, inconsistent with due process and fundamental fairness, and inconsistent with the President's commitment to a humane enforcement system.

To help mitigate the destructive impact of mass deportations on communities, family unity, and civil liberties, DHS should take the following steps, which are described in greater detail in the ACLU's "Recommendations to DHS to Address Record-Level Deportations"[1]:

- Replace ICE's overbroad 2011 civil enforcement priorities memo[2] with DHS-wide guidance that significantly limits the priority categories, including by a) eliminating level 2 and 3 offenders from Priority 1; b) narrowing the overbroad level 1 Priority 1, which should not include anyone who has served less than one year's imprisonment completed within the past five years or who has demonstrated substantial evidence of rehabilitation; c) narrowing the vaguely defined Priority 2 ("recent illegal entrants"); and d) eliminating Priority 3 ("fugitives" and immigration violators). The guidance should clarify that cases falling into the categories must still be assessed individually for equities, including the factors listed in ICE's 2011 prosecutorial discretion memo,[3] before they are pursued for removal by DHS agents, officers, or attorneys.
- Reform detainer policy to include, among other changes: strictly limiting the issuance of detainers, clarifying that "reason to believe" an individual is removable means "probable cause," and providing for review of detainer decisions at DHS headquarters to reduce the number of erroneous detainers issued, enhance oversight, and increase national uniformity. As part of the process of revising its detainer policy and practices, DHS should provide an opportunity for affected communities and groups to comment on detainer problems currently experienced across the country.
- End the use of deportations without hearings for individuals who are prima facie eligible for relief from removal or for prosecutorial discretion, and for all unrepresented individuals who agree to a stipulated removal; limit the use of expedited removal to individuals apprehended at a port of entry or while attempting to enter, consistent with DHS policy prior to 2004; and provide an administrative appeal process for immigrants to challenge an expedited or stipulated removal order, visa waiver removal order, voluntary departure, or other administrative order.
- Implement reforms to ensure that ICE's 2011 prosecutorial discretion memo is significantly strengthened and applied uniformly nationwide and extended to CBP, including by issuing a DHS-wide policy requiring all Notices to Appear to be consistent with the civil enforcement priorities and ICE's 2011 prosecutorial discretion memo, developing an objective assessment tool to score prosecutorial discretion factors, and establishing review processes at DHS Headquarters.

II. End Programs and Practices Violating Civil Liberties, Civil Rights, and Human Rights

287(g) and Secure Communities

ICE's partnerships with state and local law enforcement agencies for the enforcement of immigration law, via 287(g) agreements and Secure Communities, incentivize profiling based on race or ethnicity by local law enforcement, undermine community policing, and threaten public safety. The Administration has taken a positive step in eliminating the use of 287(g) "task force" models, but the 287(g) jail model still presents significant concerns. It is particularly problematic that ICE has not terminated agreements with jurisdictions where the ACLU and other organizations have documented enforcement practices that thwart ICE's civil enforcement priorities or where

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[1] *See* "Recommendations to DHS to Address Record-Level Deportations," American Civil Liberties Union (Jan. 22, 2014), *available at* https://www.aclu.org/sites/default/files/assets/14_1_22_aclu_recommendations_to_dhs_to_address_record-level_deportations_final2.pdf.

[2] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All ICE Employees (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[3] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

there is evidence of biased and discriminatory policing.[4] Of the 37 active 287(g) agreements, over one-third are operating in states that passed "show me your papers" laws in recent years (Arizona, Alabama, Georgia, South Carolina, Utah). Other 287(g) agreements are operating in locations with demonstrated records of hostility to immigrants, including Prince William County (VA), Wake County (North Carolina), Frederick County (Maryland), and others.

DHS should:

- Terminate all 287(g) agreements, including jail models, and not enter into any new 287(g) agreements;
- Short of terminating all agreements, terminate agreements with all jurisdictions where there is reason to believe (based on community complaints or otherwise) that enforcement practices are inconsistent with ICE's civil enforcement priorities and/or where there is biased and discriminatory policing. Such termination should not require a formal DOJ investigation; indeed, recurring budget language requires that "no funds . . . may be used to continue a delegation of law enforcement authority authorized under section 287(g) of the Immigration and Nationality Act (8 U.S.C. 1357(g)) if the Department of Homeland Security Inspector General determines that the terms of the agreement governing the delegation of authority have been violated"[5];
- Reform the use of ICE detainers as described above and further detailed in the ACLU's "Administrative Recommendations on ICE Immigration Detainers"[6];
- Decline to issue ICE detainers on individuals in jurisdictions where racial profiling or other discriminatory local enforcement practices occur, including but not limited to jurisdictions under consent decree with DOJ (indeed, such non-issuance should not require a formal DOJ investigation); and
- Publicly release, in a timely manner, the long-promised quarterly statistical analyses of Secure Communities, along with information reflecting outcomes of DHS/ICE investigation of jurisdictions that are statistical outliers or "anomalies." The quarterly analyses should include data on detainers issued for victims, witnesses, plaintiffs, and individuals engaged in a protected right.[7]

Operation Streamline

Operation Streamline is a partnership between DHS and DOJ to prosecute migrants in the federal criminal justice system for illegal entry (under 8 U.S.C. §1325) and illegal re-entry (under 8 U.S.C. §1326). DHS's role includes the apprehension and referral of migrants who could otherwise be channeled into the civil immigration enforcement system to DOJ for criminal prosecution. CBP also details its agents at the southwest border as Special Assistant U.S. Attorneys to assist DOJ and U.S.

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[4] *See* ACLU FOUNDATION OF GEORGIA, TERROR AND ISOLATION IN COBB: HOW UNCHECKED POLICE POWER UNDER 287(G) HAS TORN FAMILIES APART AND THREATENED PUBLIC SAFETY (Oct. 2009), *available at* http://www.acluga.org/download_file/view_inline/1505/392/ (reporting on Cobb County); ACLU FOUNDATION OF GEORGIA, THE PERSISTENCE OF RACIAL PROFILING IN GWINNETT TIME FOR ACCOUNTABILITY, TRANSPARENCY, AND AN END TO 287(G) (Mar. 2010), *available at* http://www.acluga.org/download_file/view_inline/1504/392/ (reporting on Gwinnet County). ACLU of North Carolina submitted 57 complaints to CRCL on behalf of immigrants held in Wake County Jail in 2010. *See* Stacy Davis, *Letter Reveals Complaints About Treatment at Wake Jail*, WRAL.COM (July 7, 2011), *available at* http://www.wral.com/news/state/story/9829279/. *See* Sirene Shebaya, *Frederick County Officials Shouldn't Be Enforcing Immigration Law*, BALTIMORE SUN (Dec. 10, 2012) *available at* http://articles.baltimoresun.com/2012-12-10/news/bs-ed-immigration-enforcement-20121210_1_immigration-status-immigration-law-law-enforcement.

[5] Consolidated Appropriations Act, 2014, H.R. 3547, 113th Cong. (2014) (enacted).

[6] *See* "Administrative Recommendations on ICE Immigration Detainers," American Civil Liberties Union (Jan. 22, 2014) *available at* https://www.aclu.org/sites/default/files/assets/14_1_22_aclu_administrative_recommendations_on_ice_detainers_final.pdf

[7] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel (June 17, 2011), *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf.

Marshals.[8] DHS's policy goal is to deter illegal migration, but it is virtually impossible to measure the multiple factors that inform a migrant's decision to cross, and the desire to reunite with family or find a job often outweighs any fear of prosecution.[9] It is also unclear that DHS can even collect the data necessary to assess deterrent effect with any accuracy. Meanwhile, the Attorney General has directed U.S. Attorneys to prioritize cases that deal with national security, violent crime, and financial fraud and cases that protect our most vulnerable communities.[10]

Prosecutions for illegal entry and illegal re-entry serve neither DHS nor DOJ goals. Yet illegal entry and illegal re-entry are now the most prosecuted federal crimes in the United States.[11] According to the Pew Research Center, the increase in §1326 convictions over the past two decades accounts for 48 percent of the growth in total convictions in federal courts over the period.[12] Incarceration costs alone for people with illegal entry and re-entry convictions have been estimated at $1 billion annually.[13] Streamline-related trials also present significant due process concerns.[14]

Operation Streamline, as a zero-tolerance program, should be eliminated as wasteful and counter to fundamental notions of prosecutorial discretion and fitting the punishment to the crime. But short of elimination, CBP should at a minimum significantly downscale its role in channeling unlawful migrants into the federal criminal justice system by:

- Deprioritizing §1325 and §1326 referrals for vulnerable individuals (for example, domestic violence survivors and the elderly), for individuals with significant U.S. ties (specifically, individuals with U.S. citizen minor children or spouses, veterans and members of the U.S. armed forces, and long-time former lawful permanent residents), and for individuals who have not, within the previous five years, completed sentences for serious, violent felonies; and
- Ending the practice of appointing Border Patrol attorneys or other DHS employees to act as Special Assistant U.S. Attorneys, or in any prosecutorial capacity, in §1325 and §1326 cases, to avoid inherent conflicts of interest.

CBP Use of Force

CBP's reform plans regarding use of force, outlined in September 2013, do not address mechanisms of reporting and oversight relating to all uses of force, individual accountability for unreasonable use of force, and transparency and communication regarding deaths that occur as a result of a CBP encounter, among other gaps.[15] Reform in these areas is essential to ending the culture of impunity that external stakeholders perceive at CBP. Since January 2010, at least 27 people have died following encounters with CBP officials in which force was used. That number includes seven

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[8] LISA SEGHETTI, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 8 (Cong. Research Serv., CRS Report for Congress R42138, Jan. 16, 2014).

[9] HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF U.S. BORDER PROSECUTIONS 24 n.40 (May 2013), *available at* http://www.hrw.org/sites/default/files/reports /us0513_ForUpload_2.pdf .

[10] U.S. DEPT. OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (Aug. 2013), *available at* http://www.justice.gov/ag/smart-on-crime.pdf. According to BJS statistics, in 2010 only 20 percent of defendants charged with illegal reentry had prior felony convictions for violent offenses. *See* HUMAN RIGHTS WATCH, *supra* note 9.

[11] In FY 2013, for example, U.S. Attorneys' offices filed criminal charges against almost 100,000 immigrants for illegal entry or illegal re-entry. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, AT NEARLY 100,000, IMMIGRATION PROSECUTIONS REACH ALL-TIME HIGH IN FY 2013 (Nov. 25, 2013) http://trac.syr.edu/immigration/reports/336/.

[12] Michael T. Light, et. al., Pew Research Hispanic Trends Project, *The Rise of Federal Immigration Crimes* (Mar. 18, 2014), *available at* http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/.

[13] ALISTAIR GRAHAM ROBERTSON, ET. AL., GRASSROOTS LEADERSHIP, OPERATION STREAMLINE: COSTS AND CONSEQUENCES (Sept. 2012), *available at* http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf.

[14] *See, e.g.,* HUMAN RIGHTS WATCH, *supra* note 9, at 76-80; JOANNA LYDGATE, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 12-15 (Jan. 2010), *available at* http://www.law.berkeley.edu/files /Operation_Streamline_Policy_Brief.pdf.

[15] *See* "U.S. Customs and Border Protection Use of Force Recommendations, Reviews and Next Steps," U.S. Customs and Border Protection (Sept. 25, 2013) *available at* http://www.cbp.gov/xp/cgov/border_security/bs/force_reviews.xml.

minors under 21, nine U.S. citizens, eight individuals alleged to be throwing rocks, and six individuals killed while on the Mexican side of the border.[16] To date, it is unknown whether CBP has conducted a thorough investigation of each of these incidents to determine whether the force used was justified and whether it could have been avoided through different tactics or training, better supervision, different tools, adherence to policy, or changes in policy. Moreover, the ACLU has documented a pattern of abusive use of force at ports of entry.[17]

DHS has taken a long-overdue first step by releasing CBP's 2010 Use of Force Policy Handbook, albeit redacted. But the agency continues to refuse to release the Police Executive Research Forum (PERF) review of CBP use of force. The DHS Office of Inspector General's September 2013 report on CBP use of force was limited in scope and heavily redacted.

To bring CBP into line with leading law enforcement standards relating to use of force, and to improve transparency and accountability to the public, DHS should:

- Request an independent review of all use-of-force fatalities in the last five years;
- Publicly release the PERF review, unredacted and in full;
- Implement all PERF recommendations; and
- Implement additional changes to CBP use of force policy and practice, including body-worn and dashboard cameras with strong privacy protections, as detailed by the ACLU[18] and other organizations.

Racial Profiling

The inappropriate use of race or ethnicity by CBP agents and officers has been well documented, most recently in a series of complaints filed by the ACLU of Arizona.[19] The Maricopa County Sheriff's Office, in fact, has said it was instructed by ICE to use race as a factor in immigration enforcement – contrary to controlling Ninth Circuit case law.[20] To help ensure that its enforcement activities do not inadvertently facilitate racial profiling or otherwise discriminatory policing, DHS should:

- Conduct a comprehensive review of DHS policies and practices relating to roving patrol stops and checkpoints to determine whether the agency is complying with the U.S. Constitution, applicable non-discrimination laws, and agency guidelines. This review should include

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[16] For a detailed list, *see* "ACLU Recommendations Regarding Use of Force by U.S. Customs and Border Protection Officers," note 1, *available at* https://www.aclu.org/sites/default/files/assets/14_02_24_aclu_use_of_force_recommendations_final.pdf.

[17] *See* Press Release, American Civil Liberties Union, ACLU Demands Federal Investigation Into Charges of Abuse by Border Agents (May 10, 2012), *available at* https://www.aclu.org/immigrants-rights/aclu-demands-federal-investigation-charges-abuse-border-agents; Complaint and request for investigation of abuse of power, excessive force, coercion, and unlawful confiscation of property by Customs and Border Protection at ports of entry along the U.S.-Mexico border, American Civil Liberties Union and ACLU Southern Border Affiliates (May 9, 2012), *available at* http://www.aclu.org/immigrants-rights/customs-and-border-protection-complaint

[18] *See* Press Release, American Civil Liberties Union, ACLU Calls New CBP Commitments Limited, Issues Detailed Recommendations on Use of Force (Sept. 25, 2013,) *available at* https://www.aclu.org/immigrants-rights/aclu-calls-new-cbp-commitments-limited-issues-detailed-recommendations-use-force.

[19] Complaint and request for investigation of unlawful roving patrol stops by U.S. Border Patrol in southern Arizona including unlawful search and seizure, racial profiling, trespassing, excessive force, and destruction of personal property, ACLU of Arizona and ACLU Border Litigation Project (Oct. 9, 2013), *available at* http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf; Complaint and request for investigation of abuses at U.S. Border Patrol interior checkpoints in southern Arizona, including unlawful search and seizure, excessive force, and racial profiling, ACLU of Arizona and ACLU Border Litigation Project (Jan. 15, 2014), *available at* http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2001%2015.pdf.

[20] Letter from Joseph Arpaio, Sheriff of Maricopa County, to Eric Holder, Attorney General and ICE Office of General Counsel (Jan. 6, 2014), *available at* http://www.mcso.org/MultiMedia/PressRelease/Arpaio%20Letter%20to%20Holder.pdf.

recommendations to reduce CBP's "100-mile zone" for investigative detentions and warrantless searches of vehicles to 25 miles, and for permissible incursions on private property to 10 miles;
- Expand the settlement in the case of *Jose Sanchez et al. v. U.S. Border Patrol et al.* nationwide, in particular the terms relating to 4th Amendment training and data collection[21];
- Issue clear guidance to all DHS officers (including local officers deputized under 287(g)) that race, ethnicity, and national origin may not be considered to any extent in determining removability or conducting any enforcement activity, except that officers may rely on race, ethnicity, and national origin in a specific individual description; and
- Urge DOJ to issue revised guidance on the use of racial profiling by federal law enforcement that closes the border integrity and national security loopholes and prohibits profiling based on actual or perceived religion, national origin, sexual orientation, or gender (including gender identity and expression).

An end to all 287(g) agreements and an end to or reform of the Department's reliance on Secure Communities, which incentivize the use of race and ethnicity by state and local law enforcement – as recommended above – will also help ensure that DHS enforcement activities do not inadvertently facilitate racial profiling or otherwise discriminatory policing.

Sensitive Locations Enforcement

DHS has recognized that immigration and border enforcement actions should not take place at, near, or focused on certain "sensitive locations," including schools, hospitals, institutions of worships, and sites of religious ceremonies. In recognition of the importance of strong guidance on the issue, Section 3721 of S. 744 forbade enforcement of immigration law in sensitive locations by ICE and CBP officers and agents except in exigent circumstances and with prior supervisory approval. Notwithstanding the ICE and CBP memoranda regarding sensitive locations enforcement, [22] the ACLU and other organizations have documented cases of immigration enforcement taking place at county courthouses, resulting in the apprehension of individuals who are in court to pay traffic tickets, to appear for hearings or mediation, and even to get married.[23] DHS enforcement at county courthouses deters people from accessing the courts for critical protections including domestic violence restraining orders, child custody, child support, child guardianship, and wage and hour and other labor protections.

DHS should issue new sensitive locations enforcement guidance that:

- Applies to all DHS components to ensure consistency, particularly on the issues of sensitive locations sites, exigent circumstances, exemption from restrictions, and prior approval requirements;
- Specifies that all courts (other than immigration courts) and their premises are "sensitive locations";
- Instructs all DHS personnel to cease using courts and other sensitive locations as a records source for immigration enforcement actions, unless the individual has been convicted of a crime (other than a state or local conviction that relates to a non-citizen's immigration status) for

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[21] Settlement agreement, *Sanchez v. U.S. Border Patrol,* CV12-5378-RJB (U.S.D.C. W.D. Wash. Sept. 20, 2013), *available at* https://aclu-wa.org/sites/default/files/attachments/2013-09-23--Fully%20Executed%20Settlement%20Agreement.pdf.

[22] *See* U.S. Immigration and Customs Enforcement, "Enforcement Actions at or Focused on Sensitive Locations" (Oct. 24, 2011), *available at* http://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf; U.S. Customs and Border Protection, "U.S. Customs and Border Protection Enforcement Actions at or Near Certain Community Locations," (Jan. 18, 2013) *available at* http://foiarr.cbp.gov/streamingWord.asp?i=1251.

[23] *See, e.g.,* Press Release, American Civil Liberties Union of Southern California, ACLU condemns ICE for 'bait and switch' courthouse policy (Feb. 10, 2014) http://www.aclusocal.org/press-release-aclu-condemns-ice-bait-switch-courthouse-policy/; Michael Kauffman, "Arrested for following the law," American Civil Liberties Union of Southern California (Oct. 17, 2013) http://www.aclusocal.org/arrested-following-law/.

which he or she served more than one year's imprisonment completed within the past five years, and which has not been expunged, set aside, or the equivalent;
- Instructs DHS personnel not to undertake enforcement actions based on requests from employees or others at sensitive locations sites and courts, absent exigent circumstances;
- Collects and publicizes data on enforcement actions at or near sensitive locations;
- Restricts enforcement at sites where court-ordered activities take place (such as mediation or supervised visitation); and
- Includes special protections for juveniles.

III. Strengthen Due Process and Human Rights Protections in Detention

Prolonged Detention Without Bond Hearings

ICE spends $2 billion annually on immigration detention to hold approximately 400,000 immigrants in a sprawling network of county jails, contract prisons, and ICE-run facilities across the country – simply to ensure they appear at hearings and comply with an immigration judge's final order when relevant. Many ICE detainees are incarcerated for months or even years while their cases are pending with the immigration courts and federal courts. A significant proportion of these individuals never receive the most basic element of due process: an immigration bond hearing to determine if their detention is even necessary. They are subjected to prolonged detention even though they ultimately may become permanent residents or qualify for other immigration relief.[24] Many detained immigrants pose no danger to public safety or flight risk that cannot be mitigated by alternatives. Federal courts have increasingly concluded that prolonged detention without constitutionally adequate review raises serious due process concerns, and that six months is the presumptive point in time after which a bond hearing is required.[25]

Unnecessary – and indefinite – detention causes severe psychological harm, particularly for individuals who have fled persecution or domestic violence, and traumatizes families both emotionally and economically. It also imposes a significant financial burden on U.S. taxpayers, even though effective and far less costly alternatives to detention are available, and routinely and successfully used in the criminal justice system.[26]

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[24] DHS subjects three main categories of individuals to prolonged detention without bond hearings: 1) individuals, often lawful permanent residents (LPRs), whom the government claims are subject to "mandatory detention" under 8 U.S.C. § 1226(c) because they are allegedly removable on certain criminal grounds; 2) individuals who are detained upon arrival in the United States, including asylum seekers who have established a "credible fear" of persecution, and LPRs with longstanding ties to the United States who are returning from brief trips abroad (See 8 C.F.R. § 1003.19(h)(2)(i)(B) (providing that immigration judges lack jurisdiction to conduct bond hearings for "arriving aliens")); and 3) individuals detained pending judicial review of their removal orders – their detention can span months and years while they wait for courts of appeals to decide their cases.

[25] *Rodriguez, et. al. v. Robbins, et. al.*, No. 12-56734 (9th Cir. 2013); *Reid v. Donelan*, NO. 13-cv-30125-MAP (D. Mass 2014).

[26] NATIONAL IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION (Aug. 2013), *available at* http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf. Julie Myers Wood and Steve J. Martin, "Smart alternatives to immigrant detention," *Washington Times* (Mar. 28, 2013), *available at* http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/. Alternatives to detention are recommended as cost-savers by the American Jail Association, American Probation and Parole Association, American Bar Association, Association of Prosecuting Attorneys, Heritage Foundation, International Association of Chiefs of Police, National Conference of Chief Justices, National Sheriffs' Association, Pretrial Justice Institute, Texas Public Policy Foundation (home to Right on Crime), and the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy. *See* American Jail Association, Resolution on Pretrial Justice (Oct. 24, 2010), *available at* http://www.pretrial.org/download/policy-statements/AJA%20Resolution%20on%20Pretrial%20Justice%202011.pdf; American Probation and Parole Association, APPA Supports Pretrial Supervision Services (June 15, 2010), *available at* http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IE_NewsRelease&wps_key=4ce5b0cc-e5d6-4407-bcab-096640386f02; American Bar Association, ABA Criminal Justice Standards on Pretrial Release – Third Edition (Oct. 28, 2002), *available at* http://www.pretrial.org/wpfb-file/aba-standards-on-pretrial-release-2002-pdf/; Association of Prosecuting Attorneys, Policy Statement on Pretrial Justice, *available at* http://www.pretrial.org/wp-

DHS should work with DOJ to ameliorate the impact of current detention practices by:

- Requiring a bond hearing before an immigration judge for all individuals detained more than six months, where the government must justify continued detention;
- Interpreting "custody" in the mandatory detention statute (8 U.S.C. § 1226(c)) to permit the use of forms of custody short of detention, such as electronic monitoring or house arrest;
- Construing 8 U.S.C. § 1226(c) to apply only to individuals who are taken into ICE custody at or near the time of their release from criminal custody, as the statute provides on its face; and
- Not applying 8 U.S.C. § 1226(c) to individuals with substantial challenge to removal, including claims for relief from removal.

Access to Counsel

Immigrants in removal proceedings must navigate an extraordinarily complex body of law, regulations, and procedures in order to mount effective defenses against deportation. The American Bar Association has observed: "Fundamental principles of fairness and due process demand that vulnerable individuals who aren't able to secure paid or pro bono counsel should have counsel appointed by the government."[27] DOJ's Executive Office for Immigration Review has noted the challenges created by non-represented cases for court efficiency, and the National Association of Immigration Judges wrote to members of Congress that "when noncitizens are represented by attorneys, Immigration Judges are able to conduct proceedings more expeditiously and resolve cases more quickly."[28] Recent studies have documented the considerable impact of legal representation on the outcomes of removal cases.[29] In recognition of the dire need, Section 3502 of S. 744 contains a provision requiring appointed counsel for unaccompanied children, people with severe mental disabilities, and other particularly vulnerable immigrants in removal proceedings.

The ACLU has urged DHS, DOJ, and HHS to take immediate steps to ensure that two classes of indigent unrepresented individuals in removal proceedings be afforded legal representation, either pro bono or at government expense: 1) all children and 2) all individuals with serious mental disabilities that render them unable to represent themselves (whether or not such individuals are in

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content/uploads/2013/02/APA-Pretrial-Policy-Statement.pdf; Matt Mayer, The Heritage Foundation, Heritage Web Memo 3455: Administrative Reforms Insufficient to Address Flawed White House Immigration and Border Security Policies (Jan. 10, 2012), *available at* http://www.heritage.org/research/reports/2012/01/administrative-reforms-in-immigration-and-border-security-policies; International Association of Chiefs of Police, "Law Enforcement's Leadership Role in the Pretrial Release and Detention Process (Feb. 2011), *available at* http://www.pretrial.org/wp-content/uploads/2013/02/IACP-LE-Leadership-Role-in-Pretrial-20111.pdf; National Conference of Chief Justices, Resolution 3, Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release (Jan. 13, 2013), *available at* http://www.pretrial.org/wp-content/uploads/2013/02/CCJ-Resolution-on-Pretrial-1.pdfhttp://www.pretrial.org/wp-content/uploads/2013/02/CCJ-Resolution-on-Pretrial-1.pdf; National Sheriffs' Association, National Sheriffs' Association Supports and Recognizes the Contribution of Pretrial Services Agencies to Enhance Public Safety (June 18, 2012), *available at* http://www.pretrial.org/wp-content/uploads/filebase/policy-statements/NSA%20Pretrial%20Resolution.pdf; Pretrial Justice Institute, The Solution, *available at* http://www.pretrial.org/solutions/; Marc Levin, Texas Public Policy Foundation, "Public Safety and Cost Control Solutions for Texas County Jails (Mar. 6, 2012), *available at* http://www.texaspolicy.com/center/effective-justice/reports/public-safety-and-cost-control-solutions-texas-county-jails; and Council on Foreign Relations' Independent Task Force, Task Force Report: U.S. Immigration Policy (July 2009), *available at* http://www.cfr.org/immigration/us-immigration-policy/p20030.

[27] James Silkenat, President-Elect, American Bar Association, Remarks at Human Rights First Dialogue on Detention, Washington, DC (April 2013), *available at* http://www.humanrightsfirst.org/wp-content/uploads/ABA-Silkenat-HRF-Dialogues-Detention.pdf.

[28] Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, p. 8, *in* U.S. COMM'N. ON INTERNATIONAL RELIGIOUS FREEDOM, ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf; Letter from Dana Marks, Nat'l. Association of Immigration Judges, to Members of Congress, March 22, 2013 (on file with the ACLU).

[29] *See* Steering Committee of the New York Immigration Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO LAW REVIEW 357, 357-416 (2011), *available at* http://cardozolawreview.com/Joomla1.5/content/33-2/NYIRS%20Report.33-2.pdf; Jaya Ramji-Nogales, Andrew I. Schoenholtz, Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

ICE detention at the time of their immigration proceedings). Federal statutory and constitutional laws require that these two groups of individuals receive legal representation, whether paid or pro bono, and no statute prohibits the government from providing such representation where individuals facing deportation are indigent. On April 22, 2013, ICE and EOIR made public commitments to ensure that unrepresented detained individuals with serious mental disorders can access legal counsel.[30] To fulfill these commitments and its additional legal obligations, ICE should:

- Continue to work closely with DOJ to implement April 22, 2013, commitments relating to detained individuals with serious mental disabilities;
- Cooperate with DOJ and HHS to develop and implement plans in a timely manner to expand access to counsel to all indigent unrepresented children in immigration proceedings; and
- Cooperate with DOJ to develop and implement plans in a timely manner for all individuals with serious mental disabilities who are unable to represent themselves and are not detained at the time of their immigration proceedings.

CBP Short-Term Detention Conditions

CBP's short-term detention system – including holding cells at Border Patrol stations, checkpoints, and ports of entry, and secondary inspection areas – is a black box. The scale of the system is unknown, the standards governing conditions not public, and oversight authority within the agency unclear. Complaints of CBP misconduct include verbal and physical abuse, denial of medical care, inadequate food and water, due process violations, exposure to extreme temperatures, extended use of bright lights and inadequate provision of space or bedding making sleep impossible, extreme overcrowding, and permanent confiscation of personal items (including legal documents, medication and personal identification). A major University of Arizona study for which 1,113 recent deportees were interviewed in 2010, 2011, and 2012 found that 45 percent of respondents reported not receiving sufficient food while in U.S. custody, 37 percent reported denial of medical attention, and 39 percent reported confiscation of personal property, including money and identity documents.[31] In the past three years, many media and NGO reports have documented cases that are consistent with these findings.[32]

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[30] *See* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to Thomas D. Homan, Acting Executive Associate Director, Enforcement and Removal Operations, Peter S. Vincent, Principal Legal Advisor, and Kevin Landy, Assistant Director, Office of Detention Policy and Planning, "Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees with Serious Mental Disorders or Conditions" (Apr. 22, 2013), *available at* http://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainess_mental_disorders.pdf; Memorandum from Brian M. O'Leary, Chief Immigration Judge, Executive Office for Immigration Review, to All Immigration Judges, "Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions" (Apr. 22, 2103), *available at* http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf.

[31] *See* JEREMY SLACK ET. AL., UNIV. OF ARIZONA, IN THE SHADOW OF THE WALL: FAMILY SEPARATION, IMMIGRATION ENFORCEMENT AND SECURITY 24, 26 (Mar. 15, 2013), *available at* http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013web.pdf.

[32] *See* Cindy Carcamo and Richard Simon, *Immigrant groups complain of 'icebox' detention cells*, LOS ANGELES TIMES (Dec. 5, 2013), *available at* http://www.latimes.com/nation/la-na-ff-detention-centers-20131206,0,2076586,full.story#axzz2mgEXgFJa; Rachael Bale, *Detained border crossers may find themselves sent to 'the freezers'*, CENTER FOR INVESTIGATIVE REPORTING (Nov. 18, 2013), *available at* http://cironline.org/reports/detained-border-crossers-may-find-themselves-sent-to-freezers-5574; Eric Lipton and Julia Preston, *As U.S. Plugs Border in Arizona, Crossings Shift to South Texas*, NEW YORK TIMES (June 16, 2013), *available at* http://www.nytimes.com/2013/06/17/us/as-us-plugs-border-in-arizona-crossings-shift-to-south-texas.html?_r=0&pagewanted=all; NO MORE DEATHS, CROSSING THE LINE: HUMAN RIGHTS ABUSES OF MIGRANTS IN SHORT TERM CUSTODY ON THE ARIZONA SONORA BORDER (Sept. 2008), *available at* http://www.nomoredeaths.org/Abuse-Report-Crossing-the-Line/View-category.html; BINATIONAL DEFENSE AND ADVOCACY PROGRAM, NORTHERN BORDER INITIATIVE, HUMAN RIGHTS VIOLATIONS OF MEXICAN MIGRANTS DETAINED IN THE UNITED STATES, MAY 2010-2011 (Jan. 2012), *available at* http://www.lawg.org/storage/documents/Mexico/informe-violaciones-derechos-humanos-pdib-27marzo12.pdf; KINO BORDER INITIATIVE, DOCUMENTED FAILURES: THE CONSEQUENCES OF IMMIGRATION POLICY AT THE U.S.-MEXICO BORDER (Feb. 13, 2013), *available at* http://www.jesuit.org/jesuits/wp-content/uploads/Kino_FULL-REPORT_web.pdf (One in four migrants surveyed alleged abuse at the hands of the Border Patrol, more than double the

DHS should take steps to reform CBP's detention practices, including by:

- Creating an office responsible for CBP detention operations, planning, and oversight;
- Publicly releasing comprehensive information on the location and capacity of CBP short-term detention facilities, including average daily populations in each location;
- Requiring CBP to comply with policies that provide NGOs and media access. These policies should be modeled after the directive issued by ICE, "Stakeholder Procedures for Requesting a Detention Facility Tour and/or Visitation," and ICE's Performance-Based National Detention Standard (2011) 7.2 "Interviews and Tours";
- Creating an online detainee locator for individuals in CBP custody, analogous to the system in place for individuals in ICE detention;
- Creating enforceable standards applicable to all CBP short-term custody facilities and hold rooms that address the provision of adequate nutrition, appropriate climate, and medical care; dissemination of legal information in commonly-spoken languages; access to lawyers, consular officials, family members, and non-governmental organizations; and policies for identifying asylum seekers and victims of violence and referring their cases to USCIS.

Solitary Confinement

The ACLU welcomed ICE's September 2013 directive on the use of solitary confinement in ICE detention, in particular its strong reporting and review requirements.[3] Compliance system-wide, however, is a significant challenge, as the policy relies on staff and officials in county jails and contract facilities across the country, as well as ICE officials, to submit to a new set of limitations and requirements relating to their facility operations. To ensure that the directive's intent is fully realized, ICE should:

- Rigorously oversee compliance with the new directive and hold accountable any facilities – including jails and contract facilities – that do not comply with the directive's requirements; and
- Regularly release data to Congress and the public related to the use of solitary confinement in ICE facilities.

PREA Implementation

The ACLU welcomed the March 2014 release of the DHS Prison Rape Elimination Act regulations to set standards to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities. These long-overdue standards must be implemented system-wide – not only in DHS-run facilities. DHS should:

- Move swiftly to implement the PREA rule in all ICE-run facilities and in all CBP facilities and hold rooms; and
- End the use of any jail or contract facility that does not comply with either the DOJ PREA rule or the DHS PREA rule within 180 days of the effective date of the DHS rule.

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rate of reported abuse by Mexican police, criminal gangs, or any other source.); NO MORE DEATHS, A CULTURE OF CRUELTY: ABUSE AND IMPUNITY IN SHORT-TERM U.S. BORDER PATROL CUSTODY (2011), *available at* http://nomoredeaths.org/cultureofcruelty.html (No More Deaths conducted interviews with 12,895 individuals released from Border Patrol custody. Of those, 10 percent reported physical abuse by CBP agents, including sexual assault, use of chokeholds, and hitting and kicking of detainees, while 13 percent reported verbal abuse, including the use of racial slurs. Only 20 percent of people in custody for more than two days reported receiving food, while the vast majority of those in need of emergency medical care or medications reported being denied treatment. Children reported denial of water at a higher rate than adults.); AMNESTY INTERNATIONAL, IN HOSTILE TERRAIN: HUMAN RIGHTS VIOLATIONS IN IMMIGRATION ENFORCEMENT IN THE US SOUTHWEST (2012), *available at* http://www.amnestyusa.org/sites/default/files/ai_inhostileterrain_final031412.pdf; WASHINGTON OFFICE ON LATIN AMERICA, BEYOND THE BORDER BUILDUP: SECURITY AND MIGRANTS ALONG THE U.S.-MEXICO BORDER (Apr. 2012), *available at* http://www.seguridadcondemocracia.org/administrador_de_carpetas/biblioteca_virtual/pdf/beyondborderbuildup_wola.pdf.

IV. Improve Efficiency and Accountability Department-wide

Uniform Complaint Process

Consistent documented deficiencies within DHS complaint systems have inhibited the Department's ability to identify civil rights, civil liberties, and other concerns, to resolve complaints appropriately, and to reform policies or training when systemic problems are identified. Despite significant advances in technology, the DHS complaint systems are outdated. For example, the DHS OIG has found that CBP's case management system to track use of force incidents and complaints is entirely inadequate, and that the agency has failed to appropriately integrate complaint data analysis into decision-making.[33] In addition, the current complaint practices lack transparency and are inconsistent with the Administration's Open Government Initiatives, sending individuals who file complaints – U.S. citizens and noncitizens who interact with officers at one of DHS's many component agencies – into a black hole. Complainants routinely wait years, only to receive form letters in response to serious complaints alleging misconduct and mismanagement. The numerous overlapping complaint filing avenues within DHS create confusion as to where complaints should even be filed. Given its complex structure and its officers' daily interactions with thousands of people, DHS should:

- Create a single multilingual on-line portal and telephone number through which individuals can file immigration- and border-related complaints; and
- Implement uniform complaint processing that provides complainants with the status and outcomes of their complaints; requires all complaints to be investigated by a neutral decision-maker; and makes complaints and their resolutions accessible on-line, while preserving the privacy and identity of complainants.

Proactive Disclosure of A-Files

Under 8 U.S.C.A. § 1229, aliens in removal proceedings are entitled to "have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States."[34] Currently, DHS relies entirely on the Freedom of Information Act (FOIA) to satisfy this statutory obligation. This policy not only wastes significant Departmental resources on processing A-file FOIA requests (which account for over 90 percent of USCIS FOIAs); it also means that the vast majority of individuals in removal proceedings are unable to access the documents necessary to ensure a fair hearing. The Ninth Circuit has held that the current FOIA process is inadequate to effectuate the government's statutory obligations under 8 U.S.C.A. §1229.[35] In order to fulfill its statutory obligations, reduce the resources needed to process FOIA requests, and increase fairness in immigration proceedings, DHS should:

- Adopt a policy of proactively providing a copy of their A-file to all individuals in immigration proceedings.

V. Conclusion

DHS should move quickly in implementing these administrative enforcement reforms to strengthen due process, civil liberties, and civil rights, and to protect families and communities. We urge you,

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[33] DHS OFFICE OF INSPECTOR GENERAL, CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS (Sept. 2013), *available at* http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf.
[34] 8 U.S.C.A. § 1229(a)
[35] *Dent v. Holder*, 627 F.3d 365, 374-75 (9th Cir. 2011).

as the newest leaders of the U.S. Department of Homeland Security, to prioritize these recommendations so that citizens and non-citizens alike enjoy the full protections of the U.S. Constitution.

Please contact Ruthie Epstein (repstein@aclu.org or 202-675-2316) or Chris Rickerd (crickerd@aclu.org or 202-675-2339) with any questions.

Sincerely,

Laura W. Murphy
Director
Washington Legislative Office

Cc: Esther Olavarria, Senior Counselor to the Secretary, U.S. Department of Homeland Security
Stevan E. Bunnell, General Counsel, U.S. Department of Homeland Security
Thomas Winkowski, Acting Director, U.S. Immigration and Customs Enforcement
Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection
Cecilia Munoz, Director, Domestic Policy Council, Executive Office of the President
Felicia Escobar, Senior Policy Director for Immigration, Domestic Policy Council, Executive Office of the President

July 29, 2014

VIA ELECTRONIC MAIL

U.S. Department of Homeland Security
FOIA/PA
The Privacy Office
245 Murray Lane SW
STOP-0655
Washington, DC 20528-0655
foia@hq.dhs.gov

Office of Civil Rights and Civil Liberties
U.S. Department of Homeland Security
Washington, DC 20528
CRCL@dhs.gov

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, SW, Stop 5009
Washington, DC 20536-5009
ICE-FOIA@dhs.gov

U.S. Citizenship and Immigration Services
National Records Center, FOIA/PA Office
P. O. Box 648010
Lee's Summit, MO 64064-8010
uscis.foia@dhs.gov

U.S. Customs and Border Protection
FOIA Officer
90 K Street NE, 9th Floor
Washington, DC 20229-1181
FOIA Officer/Public Liaison: Sabrina Burroughs
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Re: Freedom of Information Act (FOIA) Request

Dear FOIA Officers:

The American Immigration Council ("Immigration Council"), the National Immigration Project of the National Lawyers Guild ("NIPNLG"), and American Civil Liberties Union Foundation, Immigrants' Rights Project ("ACLU-IRP") ("Requestors") submit this letter as a request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.* We ask that this request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E) and that we be granted a fee waiver.

Request for Information

The Requestors request disclosure of the following records[1] that were prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security (DHS), the Office of Civil Rights and Civil Liberties (CRCL), U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and/or U.S. Citizenship and Immigration Services (USCIS)[2] that contain, discuss, refer, or relate to policies, regulations, practices, procedures, recommendations, and guidelines with respect to the implementation of INA § 235(b) ("expedited removal") since June 1, 2014. Such records shall include, but are not limited to, all policies, regulations, practices, procedures, recommendations and guidelines that address:

- When to apply INA § 235(b) and related regulations to families with minor children.

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[1] The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, regulations, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials or studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations.

[2] The term "CBP" means CBP Headquarters offices, including any divisions, subdivisions or sections therein; CBP field operations offices, including any divisions, subdivisions or sections therein; CBP offices at ports of entry, including any divisions, subdivisions or sections therein; and/or any other CBP organizational structures. The term "ICE" means ICE Headquarters offices (including but not limited to the Office of the Assistant Secretary (OAS), Enforcement and Removal Operations (ERO), Homeland Security Investigations (HIS), Management and Administration, Office of the Principal Legal Advisor (OPLA), and the Office of Detention Policy and Planning (ODPP), including any divisions, subdivisions or sections therein); ICE field offices, including any divisions, subdivisions or sections therein; local Offices of Chief Counsel; and any other ICE organizational structure. The term "USICIS" means USCIS Headquarters offices, regional offices, district offices, field offices and/or any other organizational structure.

- Application of 8 C.F.R. § 235.3(b)(2) to families with minor children.

- Detention of families with minor children who are potentially subject to expedited removal.

- When ICE or CBP officers must refer individuals for credible fear interviews, including individuals apprehended and/or detained by DHS in Artesia, New Mexico.

- Whether individuals apprehended and/or detained by DHS in Artesia, New Mexico, will have credible fear interviews.

- Resources that are available or needed to conduct expedited removal, including the credible fear interviews, for individuals apprehended and/or detained in Artesia, New Mexico, including the extent and configuration of physical space, communications resources, child care, interpretation, training, and staff.

- Procedures for conducting credible fear interviews for individuals apprehended and/or detained by DHS in Artesia, New Mexico.

- Timing and/or scheduling of credible fear interviews for individuals apprehended and/or detained by DHS in Artesia, New Mexico.

- Standards applicable in credible fear determinations, including with respect to individuals apprehended and/or detained by DHS in Artesia, New Mexico.

- Creation of a written or videotaped record during the expedited removal process, including the credible fear process, including with respect to individuals apprehended and/or detained by DHS in Artesia, New Mexico.

- The review process for credible fear determinations for individuals apprehended and/or detained by DHS in Artesia, New Mexico, including submission of the case to the Executive Office for Immigration Review and/or notice of a hearing before an immigration judge.

- Access to counsel, including advising individuals of their right to counsel, during the expedited removal process, including during the credible fear interview, including with respect to individuals apprehended and/or detained by DHS in Artesia, New Mexico.

- Access to interpreters during the expedited removal process, including with respect to individuals apprehended and/or detained by DHS in Artesia, New Mexico.

- Access to interpreters for other purposes for individuals apprehended and/or detained by DHS in Artesia, New Mexico.

- Public, media, and/or NGO access to the facility in Artesia, New Mexico at which DHS is detaining families with minor children, and to proceedings (including credible fear review proceedings and removal proceedings) at the facility.

- Access to individuals detained in Artesia, New Mexico, including access to counsel, procedures to receive and/or send mail, access to phones and other communications equipment, and/or access to medical attention.

- Issuance of expedited removal orders (I-860) to individuals apprehended and/or detained in Artesia, New Mexico.

- The physical removal of individuals detained in Artesia, New Mexico, including any processes or procedures leading to their removal.

- Handbooks, rules, manuals, or other written documents (excluding those that pertain specifically to an individual's case) provided to individuals detained in Artesia, New Mexico or to staff at the detention center.

Request for Expedited Processing

Expedited processing is warranted because there is "an urgency to inform the public about an actual or alleged federal government activity" by organizations "primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II). This request implicates a matter of urgent public concern, namely, government policies, procedures and practices related to implementation of the expedited removal process in Artesia, New Mexico.

There is "an urgency to inform the public" about this government activity because early reports about expedited removal processing and detention conditions raise serious due process concerns.[3] Further, attorneys and other service providers need to understand the relevant policies, procedures, and practices to serve the population of individuals in that facility more effectively and raise any potential challenges to those procedures in a timely manner. *See* 8 U.S.C. § 1252(e)(3)(B) (expedited removal process may be challenged within 60 days of implementation of challenged directive, guideline or procedure). Accordingly, the failure to expedite processing of this request would prejudice Requestors' right to seek judicial review by this statutory deadline.

Request for Waiver of Fees

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[3] *See, e.g.*, Hannah Rappleye and Lisa Riordan Seville, *Flood of Immigrant Families at Border Revives Dormant Detention Program,* NBC News, *available at*: http://www.nbcnews.com/storyline/immigration-border-crisis/flood-immigrant-families-border-revives-dormant-detention-program-n164461(last visited July 28, 2014); Michael Oleaga, *Immigrants' Rights Groups Discuss Conditions of Detained Mothers and Children at Artesia Family Detention Center,* Latin News, *available at*: http://www.latinpost.com/articles/17895/20140724/immigrants-rights-groups-artesia-family-detention-center.htm (last visited July 28, 2014).

Requestors ask that all fees associated with this FOIA request be waived. We are entitled to a waiver of all costs because disclosure of the information is "…likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). *See also* 6 C.F.R. § 5.11(k) (records furnished without charge or at a reduced rate if the information is in the public interest, and disclosure is not in commercial interest of institution). In addition, the Requestors have the ability to widely disseminate the requested information. *See Judicial Watch v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003) (finding a fee waiver appropriate when the requester explained, in detailed and non-conclusory terms, how and to whom it would disseminate the information it received).

A. Disclosure of the Information Is in the Public Interest

Disclosure of the requested information will contribute significantly to public understanding of government operations and activities related to expedited removal processing for families. Such information is of great public interest given the thousands of individuals who may be subject to expedited removal each year.[4]

Requestors have the capacity and intent to disseminate widely the requested information to the public.

The Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. Our policy department researches issues related to immigration, and regularly provides information to leaders on Capitol Hill, the media, and the general public. Our legal department works with other immigrants' rights organizations and immigration attorneys across the United States to advance the fair administration of immigration laws, including those relating to the removal process.

NIPNLG is a national non-profit that provides technical and litigation support to immigrant communities, legal practitioners, and all advocates seeking to advance the rights of noncitizens. The NIPNLG provides training to the bar and the bench on immigration consequences of criminal conduct, and is the author of four treatises on immigration law published by Thomson Reuters. In addition, NIPNLG staff present, and regularly publish practice advisories, on immigration law topics, which are disseminated to its members as well as to a large public audience through its website, www.nationalimmigrationproject.org.

The ACLU is a nationwide, nonprofit, and nonpartisan organization dedicated to protecting civil rights and civil liberties in the United States. It is the largest civil liberties organization in the

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[4] In FY 2013, ICE deported about 101,000 people through the expedited removal process. U.S. Immigration and Customs Enforcement, *FY 2013 ICE Immigration Removals*, December 2013, p. 4, *available at :* https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf (last visited July 28, 2014).

country, with offices in the fifty states and over 500,000 members. It publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, non-profit groups, and law students and law faculty—for either no cost or for a nominal fee through its public education department.

The ACLU also disseminates information through its high-traffic website, http://www.aclu.org. The website provides in-depth information on a range of civil liberties issues, addresses civil liberties issues that are currently in the news, and contains hundreds of documents relating to the ACLU's work. The website specifically features information obtained through FOIA. *See, e.g.*, http://www.aclu.org/safefree/torture/torturefoia.html; http://www.aclu.org/patriot_foia/index.html. The ACLU also publishes an electronic newsletter distributed to subscribers via email; airs regular podcasts; maintains a blog, http://blog.aclu.org; releases information via social media platforms such as Facebook and Twitter; and produces a television series on civil liberties issues.

One or more of the Requestors will post the information obtained through this FOIA on its publicly accessible website. The Requestors' websites collectively receive millions of page views per year—for example, the Immigration Council's website has received 1.2 million page views this year and likely will receive 2 million by the end of the year. One or more of the Requestors also will publish a summary of the information received and will disseminate that summary. Finally, the Requestors have regular contact with national print and news media and plan to share information gleaned from FOIA disclosures with interested media.

B. Disclosure of the Information Is Not Primarily in the Commercial Interest of the Requester

The Immigration Council, ACLU, and NIPNLG are not-for-profit organizations. The Requestors seek the requested information for the purpose of disseminating it to members of the public who have access to our public websites and other free publications, and not for the purpose of commercial gain.

* * *

Thank you for your prompt attention to this request. If you have any questions, please do not hesitate to contact us by telephone or email.

Sincerely,

Beth Werlin
Deputy Director, Legal Action Center
American Immigration Council
1331 G Street NW
Washington, DC 20005
(202) 507-7522
bwerlin@immcouncil.org

Trina Realmuto
National Immigration Project
of the National Lawyers Guild
14 Beacon St., Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8
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Omar C. Jadwat
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Fl.
New York, NY 10004
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NATIONAL
IMMIGRANT
JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

October 14, 2013

Jonathan Cantor
Acting Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, D.C. 20528-0655

Dear Mr. Cantor:

This is a request for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552. We request any and all records in the custody or control of the U.S. Department of Homeland Security ("DHS"), including its sub-components, the U.S. Citizenship and Immigration Service ("USCIS")(including the USCIS Asylum Division), U.S. Immigration and Customs Enforcement ("ICE") (including the Enforcement and Removal Office, "ERO," and Homeland Security Investigations, or "HSI"), U.S. Customs and Border Protection ("CBP)(including the Office of Field Operations, or "OFO"), the U.S. Border Patrol ("BP")(including the Office of Air and Marine Headquarters, or "OAM"), and the U.S. Coast Guard ("Coast Guard")that fit the following description:

For the period beginning January 1, 2010, to the present, any and all data regarding the processing of "credible fear" and "reasonable fear" interviews, including but not limited to:

1- Requests for credible fear interviews by individuals, broken down by individual request as follows:

   a. Date of initial apprehension and/or detention;
   b. Identity of agency or agencies involved in the apprehension of the individual;
   c. Name and location of the facility in which the individual was and/or is currently detained;

d. The individual's country of origin;
e. The individual's age;
f. The individual's gender;
g. Date of credible fear interview request by the individual, or expression of fear of return to his or her country of origin by the individual;
h. Date of referral to the Asylum Office;
i. Date of credible fear interview, if applicable;
j. Description of officer (including position, title and location where officer is stationed), performing credible fear interview, if applicable;
k. Description of how the credible fear interview was conducted, if applicable (i.e., in person, via telephone, or via videoconferencing);
l. Individual's stated basis for fear (i.e., fear of persecution due to race, religion, nationality, membership in a particular social group, or political opinion; or fear of torture);
m. Date of credible fear determination, if applicable;
n. Outcome of credible fear determination, if applicable;
o. Description of officer(including position, title and location where officer is stationed), completing credible fear determination, if applicable;
p. Date of filing the Notice to Appear with the Immigration Court, if applicable;
q. Date of release from detention, if applicable;
r. If released, manner of release, e.g. bond, parole or order of supervision;
s. If denied credible fear, whether the individual sought review by an immigration judge;
t. Date of withdrawal of credible fear request, if applicable;
u. Date on which the Asylum Office processed the withdrawal of the credible fear request, if applicable;
v. Any reason given for withdrawal of the credible fear request, if applicable;
w. Date of any order of removal entered at any point, if applicable, and the nature of such order (i.e., whether expedited or entered by an immigration judge);
x. If the individual was released from detention prior to a credible fear interview, any communications pertaining to the scheduling of a credible fear interview to ICE and/or the Asylum Office.

2- Requests for reasonable fear interviews by individuals, broken down by individual request as follows:

a. Date of initial apprehension and/or detention;
b. Identity of agency or agencies involved in the apprehension of the individual;
c. Name and location of the facility in which the individual was and/or is currently detained;
d. The individual's country of origin;
e. The individual's age;
f. The individual's gender;
g. Date of reasonable fear interview request by the individual, or expression of fear of return to his or her country of origin by the individual;
h. Whether the individual was subject to reinstatement of removal under INA § 241(a)(5) or an administrative order of removal under INA § 238(b);
i. If the individual was subject to reinstatement of removal, the date and nature of the reinstated order (e.g., expedited, stipulated, in absentia, or otherwise);
j. Date of referral to the Asylum Office;
k. Date of reasonable fear interview, if applicable;
l. Description of officer (including position, title and location where officer is stationed), performing reasonable fear interview, if applicable;
m. Description of how the reasonable fear interview was conducted, if applicable (i.e., in person, via telephone, or via videoconferencing);
n. Date of reasonable fear determination, if applicable;
o. Individual's stated basis for fear (i.e., fear of persecution due to race, religion, nationality, membership in a particular social group, or political opinion; or fear of torture)
p. Outcome of reasonable fear determination, if applicable;
q. Description of officer (including position, title and location where officer is stationed)completing reasonable fear determination, if applicable;
r. Date of release from detention, if applicable;
s. Date of filing of Notice to Appear with the Immigration Court, if applicable;
t. If denied reasonable fear, whether the individual sought

review by an immigration judge;

u. Date of withdrawal of reasonable fear request, if applicable;
v. Date on which the Asylum Office processed the withdrawal of the reasonable fear request, if applicable;
w. Any reason given for withdrawal of the reasonable fear request, if applicable.

As to requests 1 and 2, please assign a unique identifier for each individual (in lieu of an "alien number") such that the same identifier relates to the same individual across all DHS agencies' data in response to this request.

A report generated from DHS's computer databases is preferred. Please prepare the report in such a way that it will be accessible using a standard database program (such as Microsoft Access or Excel). Data in a delimited field database are also acceptable. If a delimited field database is used, please indicate the delimiter (tab, comma, etc.). Please produce with the records any metadata and load files, so that the records can be accessed, searched, and displayed in such a manner as would be available to a DHS user. If codes are employed, please also produce any documents in your possession explaining the codes employed, and what they signify.

In addition to the above-enumerated requests, please also provide the following documents:

3- Internal DHS memoranda, communications, and other written guidance, policy, goals, practice or training regarding the USCIS Asylum Division's adjudication of credible fear or reasonable fear interviews, including internal surveys conducted by the Asylum Division; methodology and/or protocols for reviewing, completing, and tracking cases; referral methodologies and/or protocols by all sub-components of DHS, including ICE (ERO and HSI, CBP(OFO), BP (including OAM), and the Coast Guard.

4- Training materials, including power points, outlines, and reading material relating to the credible and reasonable fear processes, developed by or for USCIS and/or the Asylum Division, including materials for internal use by USCIS and/or the Asylum Division as well as those disseminated to other DHS components, including ICE (including ERO and HSI), CBP (including OFO), BP (including OAM), and the Coast Guard;

5- Any other training materials developed or employed by any agency or component of the Department of Homeland Security, including but not limited to USCIS, ICE, CBP, BP, and the Coast Guard, reflecting or pertaining to the credible and reasonable fear processes, including but

not limited to the detection of any such fear and any guidelines for ensuring agency compliance with the credible and reasonable fear processes;

6- Any audits, monitoring, or supervision of the credible and/or reasonable fear processes and compliance with procedures for such processes;

7- Communications between or among USCIS (including the Asylum Division), ICE (including ERO and HSI), CBP (including OFO), BP (including OAM), and/or the Coast Guard relating to the adjudication of credible fear and reasonable fear interview requests, including any communications relating to referrals, custody determinations, logistics (such as transfers for individuals in DHS custody), and staffing;

8- Internal DHS memoranda, communications, and other written documents relating to backlogs or delays in the processing of credible fear or reasonable fear interview requests, decisions, and/or determinations;

9- Any outcome goals or similar measurements, milestones, or quotas related to expedited removals.

Electronic versions of the requested documents on compact discs are preferred.

Please construe this as an ongoing FOIA request, so that any records that come within the possession of the agency prior to your final response to this FOIA request should also be considered within the scope of the request. Please provide data that are current as of the day of final production of the data that is fully responsive to the request.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each item of data. If some portion or portions of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. 5 U.S.C. §552(b). To the extent that materials are excised, please "black out," rather than "whiting out" or "cutting out," these materials. We reserve the right to appeal any decision(s) to withhold information and expect that you will list the address and office to which such an appeal may be directed. 5 U.S.C. §552(a)(6)(A)(i).

Fee Waiver Request

Requestors are entitled to a waiver or reduction of all costs because the information sought "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the [Requestors'] commercial interest." 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k) (records must be furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of the institution); 6 C.F.R. § 5.11(d). Requestors have a proven

track record of compiling and disseminating information to the public about government functions and activities. Requestors will make any information that it receives as a result of this FOIA request available to the public, including the press, at no cost. The issue of immigration detention is one of significant public interest in general, and the issue of how the federal government processes immigrants in its custody who seek asylum and other protection-based relief is of significant interest in particular. Requestors have undertaken this work in the public interest and not for any private commercial interest. The primary purpose of this FOIA request is to obtain information to further the public's understanding of federal immigration detention policies and practices. Access to this information is necessary for the public to meaningfully evaluate the costs and consequences of federal immigration detention policies, including the process by which immigrants in government custody seek protection-based relief.

Disclosure in this case therefore meets the statutory criteria, and a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers of noncommercial requesters.'").

Because the documents subject to this request are not sought for any commercial use, we understand that no fee may be charged for the first two hours of search time or for the first 100 pages of duplication. 5 U.S.C. §552(a)(4)(A)(iv)(II). If you decline to waive these fees, and if these fees will exceed $100.00, please notify us of the amount of these fees before fulfilling this request.

Certification

Requestors certify that the above information is true and correct to the best of their knowledge. *See* 6 C.F.R. § 5.5(d)(3).

Please reply to this request within twenty working days, or as required by statute. 5 U.S.C. §552(a)(6)(A)(i). Please furnish records as soon as they are identified to the following individual and address:

Claudia Valenzuela
c/o National Immigrant Justice Center
208 South LaSalle, Suite 1818
Chicago, Illinois 60604

If you have any questions regarding this request, please contact Claudia Valenzuela via email at cvalenzuela@heartlandalliance.org or via phone at (312) 660-1308.

Sincerely,

Claudia Valenzuela

Claudia Valenzuela
National Immigrant Justice Center
Chicago, IL

The Advocates for Human Rights
Minneapolis, MN

American Civil Liberties Union (ACLU) of Southern California
Los Angeles, CA

Americans for Immigrant Justice
Miami, FL

American Immigration Lawyers Association
Washington, DC

American Gateways
Austin, TX

Lawyers' Committee for Civil Rights of the San Francisco Bay Area
San Francisco, CA

Florence Immigrant and Refugee Rights Project
Florence, AZ

Human Rights First
Washington, DC

Human Rights Watch
Washington, DC

Northwest Immigrant Rights Project
Seattle, WA

Women's Refugee Commission
Washington, DC

U.S. Department of Homeland Security's Responses
to Senator Flake's and Senator McCain's June 13, 2014 Letter

1. **What were the intended geographic destinations for the family units dropped at the bus stations in Arizona? Were removal proceedings initiated and were these family units issued a notice to appear in immigration court? To date, how many family units have reported to the local ICE officer within 15 days of their arrival at that destination?**

   For one week in June, CBP had transferred 940 adults with children from its Rio Grande Valley Sector to its Tucson Sector, where it had additional capacity to process them. Once in Tucson, the Border Patrol completed intake processing before transferring them to ICE custody. CBP is no longer doing this. The intake processing includes fingerprinting and photographing individuals older than 14 years of age; conducting criminal, national security, and immigration background checks; and assessing whether the individuals have any medical conditions.

   After ICE took custody of these individuals, pursuant to its standard operating procedures, ICE Enforcement and Removal Operations (ERO) Phoenix Field Office personnel reviewed each case and took appropriate enforcement action based on governing law and the agency's national security and public safety enforcement priorities. Individuals who did not remain in custody were notified of the ICE ERO office nearest to the address given as their final destination and received instructions to report to that ICE ERO office within 15 days. ICE ERO also informed these individuals that their immigration cases—including an assessment of any appropriate conditions of release—would be managed by the receiving field office. The receiving offices would be notified of these transfers through internal docket control and management systems used by all ERO offices

   Based on current information, only one of those families dropped off in Arizona indicated that they intended to remain in Arizona. Sixty percent of those adults who were told to report with their families to ICE field offices within 15 days reported within that time, while 40 percent did not. Individuals who do not appear for immigration removal proceedings as required are likely to be ordered removed in absentia. ICE Enforcement and Removal Operations (ERO) will take appropriate enforcement action with respect to these individuals based on its national security, public safety, and border security priorities, including those related to recent arrivals and fugitive aliens.

   As Secretary Johnson has testified, DHS is building additional detention capacity for adults who cross the border illegally in the Rio Grande Valley with their children. For this purpose DHS has established a temporary facility for adults with children on the Federal Law Enforcement Training Center's campus at Artesia, New Mexico. Beginning August 1, the Karnes County Residential Center (Karnes) in Karnes City, Texas will also begin detaining and processing for removal of adults with children apprehended while crossing the southwest border. Given the influx of families illegally migrating from Central America, Karnes was recently converted from an adult detention facility to one suitable for housing adults with children. The establishment of these facilities will allow ICE to increase its capacity to house

and expedite the removal of adults with children in a manner that complies with the law and our values. Artesia and Karnes are among several facilities that DHS will use to increase our capacity to hold and expedite the removal of adults with children illegally crossing the southwest border.

2. **Anecdotal reports suggest that UACs were among the family units dropped at the Phoenix and Tucson bus stations; what processes are followed to ensure that those claiming to be family units actually are family units?**

   Children traveling with their families or legal guardians are not considered unaccompanied children. While ICE had transferred to bus stations adults traveling with children in Arizona, unaccompanied children are not dropped off at bus stations. Rather, they are transferred to HHS custody, as required by law. As part of CBP Border Patrol and ICE ERO intake processes, career law enforcement officers employ interview techniques to gather familial and other background information, and also assess the behavior traits of those they are interviewing to help ensure accurate assessments and determinations.

3. **Are removal proceedings currently being initiated for the wave of UACs from Central America crossing into the U.S. illegally in Texas and are they being given notices to appear in immigration court? If so, what percentage of those crossing illegally this year?**

   Yes. CBP generally issues Notices to Appear (NTAs) in immigration court for all unaccompanied children apprehended at the border.

4. **Are any UACs from Central America currently crossing into the U.S. illegally in Texas being paroled into the U.S.? If so, what percentage of those crossing illegally this year? If so, who makes that decision on a case-by-case basis and for what period of time?**

   As required by law, CBP seeks to transfer all UAC to HHS custody within 72 hours. HHS is required to place the child in the least restrictive setting that is in the best interest of the child.

   DHS's goal is to quickly and safely process unaccompanied children and then transport them from CBP custody to HHS, as the law requires.

5. **Are any UACs from Central America crossing into the U.S. illegally in Texas seeking asylum? If so, what percentage of those crossing illegally this year?**

   Yes, however, the number has been very small. For FY 2014 through June, less than 1 percent of unaccompanied children from Central American countries crossing into the United States illegally in Texas have requested asylum while in CBP custody.

6. **If UACs from Central America crossing into the U.S. illegally are not in removal proceedings, not seeking asylum, and not being paroled, and have not voluntarily departed or been ordered removed, on what basis are they remaining in the U.S.?**

Unaccompanied children apprehended at the border are generally placed into removal proceedings by virtue of the issuance and filing of an NTA. Immigration cases on the non-detained docket may take several years to reach completion. Generally, unaccompanied children should either be in removal proceedings, or have been ordered removed or granted relief.

7. What percent of all those issued notices to appear actually appear in immigration court? What are the repercussions for those who fail to appear?

ICE does not record or statistically report on the number of unaccompanied children who have been issued a NTA and who do not appear for their immigration court proceedings, and defers to the U.S. Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR), which manages the immigration court docket. However, those who do not appear in court may be ordered removed in absentia by an immigration judge, and ICE ERO will take appropriate enforcement action based on its national security, public safety, and border security priorities, including those related to recent arrivals and fugitive aliens.

8. What are the possible and common adjudicatory outcomes for a UAC who is paroled into the U.S., seeking asylum, or has been issued a notice to appear in immigration court and is in removal proceedings? Over the past two years, what percent of UACs annually apprehended have received each of these outcomes? What is the average timeline for these adjudicatory outcomes?

As required by law, unaccompanied children from non-contiguous countries apprehended at the border and sought to be removed by DHS must be placed in standard removal proceedings under section 240 of the Immigration and Nationality Act (INA). USCIS has initial jurisdiction over all asylum applications filed by unaccompanied children. An immigration judge will generally continue the removal proceedings of an unaccompanied child to allow the child to pursue his or her asylum case before the asylum office. An asylum officer may grant asylum or determine an applicant is not eligible for asylum and refer the case back to the immigration court. The unaccompanied child may then renew his or her claim for asylum before the immigration judge. In Fiscal Year (FY) 2013, USCIS granted asylum to 35 percent of the 180 asylum applications from unaccompanied children in removal proceedings that USCIS adjudicated. USCIS referred 117 of the applications back to the immigration court after determining these unaccompanied children were not eligible for asylum status. In FY 2014 through the 3rd quarter, USCIS adjudicated 167 cases and granted asylum to 64.7 percent of the applications and referred 59 cases back to the immigration court after determining these unaccompanied children were not eligible for asylum status. In FY 2014, 74 percent of asylum applications filed with USCIS by unaccompanied children in removal proceedings were filed more than 300 days after apprehension. Unaccompanied children in removal proceedings may also be eligible for other forms of relief, such as special immigrant juvenile status.

With respect to the annual percentage of unaccompanied children who have been ordered removed from the United States or granted asylum by an immigration judge, we refer you to

DOJ EOIR, which manages the immigration court docket and would be best equipped to provide the information you have requested with respect to the average timelines for concluding immigration proceedings in such cases.

9. **Specifically, over the past two years what percent of UACs annually apprehended have voluntarily departed or received final orders of removal? What percentage of those granted voluntary departure, or subject to a final order of removal, has actually left the U.S.?**

   ICE has received notification concerning the issuance of final removal orders for 10 unaccompanied children who were apprehended in FY 2012, and has confirmed departure dates[1] for seven. ICE has received notification concerning the issuance of final removal orders for four unaccompanied children who were apprehended in FY 2013, and has confirmed departure dates for three. Please note that most of the children apprehended in these years are still in removal proceedings, which are conducted by the Executive Office for Immigration Review at DOJ.

   Regarding those granted voluntary departure, if ICE ERO becomes aware that an unaccompanied child or any other individual did not timely comply with the terms of voluntary departure or his/her final orders, ICE ERO will take appropriate enforcement action based on its national security, public safety, and border security priorities.

   In FY 2013, 16,666 unaccompanied children from Mexico were apprehended and granted voluntary return. In FY 2014 through June 25, 11,130 unaccompanied children from Mexico were apprehended and granted voluntary return.

10. **What percentage of those UACs released or discharged this year were released or discharged to immediate family members? What percentage were released to sponsors? Where in the U.S. were UACs released or discharged this year (please provide the specific number of people released to each geographic area in each state)?**

    By law, DHS is responsible for transferring unaccompanied children to the Department of Homeland Health and Human Services (HHS). As a result, DHS defer to HHS for this information.

11. **What case load impact will released or discharged UACs have on state and local resources at these locations? Specifically, what are the impacts to state and local health care, indigent services, and child welfare and protective services? Will states have the option to apply for federal financial assistance or reimbursements for costs related to these services?**

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[1] A confirmed departure date is the date an alien is confirmed removed from the United States. Such a date may be verified a number of ways (e.g., an ICE ERO officer either witnessed the departure of the alien by meeting the alien at the airport and seeing the alien board the plane; an ICE ERO officer actually escorted the alien to their country of origin; or, in the case of voluntary departure, their departure is verified by having the consulate official in the country of origin fill out the voluntary departure form and mail it back to ICE, along with a receipt of the airline ticket, bus ticket, etc.).

DHS defers to HHS.

12. What steps are taken to ensure that the UAC remains in the custody of those into whose custody they are released or discharged? What steps are taken to ensure that those to whom the UACs are released or discharged have not been involved in the UAC's illegal crossing?

DHS defers to HHS.

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

June 19, 2014

The Honorable Jeh Johnson
Secretary
U.S. Department of Homeland Security
3801 Nebraska Avenue, N.W.
Washington, D.C. 20528

Dear Secretary Johnson,

I am formally requesting information needed by the Committee in carrying out its oversight responsibilities regarding the unprecedented influx of unaccompanied alien minors and alien minors accompanied by adults seeking to enter the U.S. illegally along our southern border and the Department of Homeland Security's response to this immigration and national security crisis. My staff has already asked for some of this information, but as it has not yet all been provided (within the very reasonable timeframes requested), I feel it prudent to request the information in writing. Please provide me with:

1) The number of Special Immigrant Juvenile visa petitions filed in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);
2) The number of Special Immigrant Juvenile visa petitions filed in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry;
3) The number of Special Immigrant Juvenile visa petitions approved in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);
4) The number of Special Immigrant Juvenile visa petitions approved in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) for unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry;
5) The number of Special Immigrant Juvenile visa petitions denied in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);

6) The number of Special Immigrant Juvenile visa petitions denied in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) for unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry;
7) The number of applications for asylum and withholding of removal filed by or on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);
8) The number of applications for asylum and withholding of removal filed by or on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry that were granted in fiscal years 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);
9) The number of applications for asylum and withholding of removal filed by or on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry that were denied in fiscal years 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);
10) The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);
11) The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally along the border between ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);
12) The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);
13) The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally along our borders between ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);
14) The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were granted humanitarian parole;

15) The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were not placed in removal proceedings;
16) The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were granted humanitarian parole;
17) The number and percentage of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were granted humanitarian parole and who have not appeared at U.S. Immigration and Customs Enforcement offices for processing as ordered or have not appeared at scheduled immigration court dates;
18) The number and percentage of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were placed in removal proceedings and who have not appeared at scheduled immigration court dates;
19) The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were not ordered removed through the expedited removal process or otherwise placed in removal proceedings;
20) The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry who were removed in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);
21) The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry who were removed in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date); and
22) The authorities by which unaccompanied alien minors and alien minors accompanied by adults apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry are being transferred to varying facilities within the interior of the United States. Are localities being notified ahead of the transfer? If not, why not?

I appreciate your prompt provision of the requested information, but no later than June 23 for information that has already been requested and June 30, 2014 for all other information. If you have any questions, please contact me or have your staff contact Dimple Shah, Counsel to the Subcommittee on Immigration and Border Security (202-226-1978).

Sincerely,

Bob Goodlatte
Chairman

Cc. The Honorable John Conyers, Jr.

U.S. Department of Homeland Security's Responses to Chairman Goodlatte's June 19, 2014 Letter

EXCERPTS FROM JUNE 19 LETTER:

1. **The number of Special Immigrant Juvenile visa petitions filed in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

2. **The number of Special Immigrant Juvenile visa petitions filed in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry;**

3. **The number of Special Immigrant Juvenile visa petitions approved in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

4. **The number of Special Immigrant Juvenile visa petitions approved in fiscal years 2010, 2011. 2012, 2013 and for each month in fiscal year 2014 (to date) for unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry;**

5. **The number of Special Immigrant Juvenile visa petitions denied in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

6. **The number of Special Immigrant Juvenile visa petitions approved in fiscal years 2010, 2011. 2012, 2013 and for each month in fiscal year 2014 (to date) for unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry;**

RESPONSE TO REQUESTS 1-6:

The following chart shows the receipts and approvals of those with a classification of "Special Immigrant Juvenile" for fiscal years (FY) 2010 to 2014 (through May). Please note that U.S. Citizenship and Immigration Services (USCIS) does not separately track how many Special Immigrant Juvenile petitions are filed by unaccompanied children (UAC) and how many are filed by alien minors who are accompanied by adults. USCIS also does not keep statistics on the citizenship of Special Immigrant Juvenile petitioners or their manner of arrival.

U.S. Citizenship and Immigration Services Petition for Amerasian, Widow(er), or Special Immigrant (I-360) Receipts with a Classification of Special Immigrant Juvenile (C) for Approvals and Receipt for Fiscal Years 2005 to 2014 (May)		
FY	Approval	Receipts
2010	1,590	1,646
2011	1,869	2,226
2012	2,726	2,968
2013	3,432	3,994
2014	2,909	3,439
Grand Total	**12,526**	**14,273**

7. **The number of applications for asylum and withholding of removal filed by or on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry that were denied in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

8. **The number of applications for asylum and withholding of removal filed by or on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry that were granted in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

9. **The number of applications for asylum and withholding of removal filed by or on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry that were denied in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

RESPONSE TO REQUESTS 7-9:

The following tables provide the number of asylum applications filed with USCIS by UAC from contiguous and non-contiguous countries. As defined at 6 U.S.C. § 279(g)(2), "an unaccompanied child is a child who: has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States or no parent or legal guardian in the United States is available to provide care and physical custody." Undocumented immigrant minors who are accompanied by adults who are not their parents or legal guardians may still be UAC under this statutory definition. Pursuant to the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA), with the exception of certain UAC from contiguous countries whom DHS may permit to

withdraw their applications for admission and will be returned to their home country, UAC apprehended at the border are placed in removal proceedings under section 240 of the *Immigration and Nationality Act*. Although these UAC are in removal proceedings before the U.S. Department of Justice (DOJ) Executive Office of Immigration Review (EOIR), the TVPRA gives USCIS initial jurisdiction over asylum applications filed by UAC. When USCIS does not grant asylum to such applicants, their cases are returned to immigration court, where the asylum claim is considered by an immigration judge during the course of removal proceedings.

Unlike asylum applications filed by UAC, USCIS does not have jurisdiction over asylum applications filed by alien minors in removal proceedings who are accompanied by a parent or legal guardian. DHS defers to the DOJ EOIR for information related to the number of asylum applications filed by such individuals with the immigration courts.

Mexican* UACs in Removal Proceedings Filing Pursuant to TVPRA

	FY 2011	FY 2012	FY 2013	FY 2014	Oct	Nov	Dec	Jan	Feb	Mar	April	May	June
Filed	26	31	23	23	3	1	2	3	2	3	3	5	1
Granted	6	8	8	2	1	-	-	-	-	-	-	1	-
Not granted and returned to removal proceedings	7	3	6	2	1	-	-	-	-	-	-	1	-

Non-Mexican UACs in Removal Proceedings Filing Pursuant to TVPRA

	FY 2011	FY 2012	FY 2013	FY 2014	Oct	Nov	Dec	Jan	Feb	Mar	April	May	June
Filed	562	388	705	1,414	104	125	124	127	152	197	204	221	160
Granted	123	120	51	101	1	6	4	8	16	12	14	16	24
Not granted and returned to removal proceedings	151	153	96	59	5	8	10	13	6	2	3	7	5

Source: USCIS Asylum Division, Refugees, Asylum and Parole System (RAPS) reports RACL1433-1434, June 25, 2014.

NOTES: Cases granted or returned to removal proceedings may have been filed in a previous fiscal year. Individuals may have entered the US in previous fiscal years. Does not include uninterviewed returned or administratively closed cases.

*No Canadian UACs in removal proceedings have filed for asylum with USCIS pursuant to the TVPRA.

Report Key	
Filed	The total number of new asylum cases received and reopened.
Granted	The number of cases USCIS approved for asylum status.
Not granted and returned to removal proceedings	The number of cases USCIS interviewed, did not approve and returned to the Immigration Judge.

10. The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);

11. The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally between ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);

RESPONSE TO REQUESTS 10-11:

U.S. Customs and Border Protection (CBP) is responsible for immigration enforcement at and between ports of entry. CBP's Office of Field Operations (OFO) operates at the ports of entry, and CBP Border Patrol operates between the ports of entry.

The following tables provide the number of UAC from contiguous and non-contiguous countries encountered at the ports of entry and apprehended between ports entry. When CBP determines a child meets the definition of a UAC, CBP must process the child in accordance with the TVPRA.

Unaccompanied Alien Children Apprehended at a Port of Entry

	FY 2011	**FY 2012**	**FY 2013**	**FY 14 to date**	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun
Contiguous	1199	1693	1484	1086	123	97	125	113	113	170	123	113	109
Non-Contiguous	127	315	932	2256	99	175	172	126	177	247	321	466	473
Total	1326	2008	2416	3342	222	272	297	239	290	417	444	579	582

Note: CBP OFO transitioned to a new processing system in July 2011; hence the data in Fiscal Year 2011 is reflective, but not complete. FY 2010 data is unavailable

Unaccompanied Alien Children Apprehended Between the Ports of Entry

	FY 2010	**FY 2011**	**FY 2012**	**FY 2013**	**FY 14 to date**	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	13615	11713	13943	17219	10112	1550	1363	1057	1209	1359	1820	1754	1438
Non-Contiguous	4796	4236	10460	21540	35387	2636	2987	3274	2504	3495	5367	5958	9166
Total	18411	15949	24403	38759	45499	4186	4350	4331	3713	4854	7187	7712	10604

12. The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);

In answering this question, DHS assumes that you are inquiring about children who are traveling with an adult who represents themselves as their parent or legal guardian. CBP's OFO data systems lack the capability to query in the above manner, as OFO does not input a "family unit" into its SIGMA system. The numbers calculated below are derived by excluding those children deemed to be UAC from the total number of children encountered by CBP at ports of entry. For this calculation, CBP considers the rest of those children encountered at the border to be traveling with adults. These encounters may include children who were initially deemed to be UAC, but later identified as not being accompanied by a legal guardian.

Adults Traveling with Children Apprehended at the Ports of Entry												
	FY 2011	FY 2012	FY 2013	FY 14 to Date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	2,027	3,685	4,589	4823	475	654	723	664	464	640	680	523
Non-Contiguous	1,584	2,999	4,415	4380	394	423	566	442	439	616	684	816
Total	3,611	6,684	9,004	9,203	869	1,077	1,289	1,106	903	1,256	1,364	1,339

13. The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally between ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);

Adults Traveling with Children Apprehended between Ports of Entry													
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 to Date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	11,531	6,190	5,035	3,997	2208	319	271	263	220	219	276	300	340
Non-Contiguous	818	712	1,401	4,482	19861	1035	1286	1590	1053	1620	2935	3380	6,962
Total	12,349	6,902	6,436	8,479	22,069	1,354	1,557	1,853	1,273	1,839	3,211	3,680	7,302

14. The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were granted humanitarian parole;

The TVPRA requires that all UAC whom DHS seeks to remove, excluding those who are eligible to withdraw their application for admission and be returned to their home country under the contiguous country exception of the TVPRA (national or habitual resident of contiguous territory, ability to make an independent decision, no fear of return, and not a victim of trafficking), must be placed in removal proceedings under section 240 of the *Immigration and Nationality Act*. Thus, those UAC are not granted parole, but are placed in removal proceedings and transferred to the Department of Health and Human Services (HHS) as required under the TVPRA.

15. The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were not placed in removal proceedings;

As described above, the TVPRA specifies that if DHS is seeking removal of an unaccompanied child, then the child must generally be processed under the *Immigration and Nationality Act* § 240. The UAC from contiguous countries and who meet the requirements detailed in section 235

of the TVPRA are not processed for removal proceedings, but are allowed to withdraw their application for admission and will be returned to their home country.

CBP has two separate systems of record for tracking UAC. CBP data is sometimes combined as requested. CBP's OFO transitioned to a new system of record in 2011; therefore, data for fiscal year 2010 represents CBP Border Patrol information only.

Unaccompanied Children Apprehended at and between the Ports of Entry processed as other than 240 Removal Proceedings													
	FY 2010*	FY 2011	FY 2012	FY 2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	13034	12,071	14,664	17,598	11857	1603	1387	1107	1238	1400	1895	1782	1445
Non-Contiguous	1	6	7	4	4	0	0	0	0	0	0	2	2
Total	13035	12077	14671	17602	11861	1603	1387	1107	1238	1400	1895	1784	1447

*Note: Border Patrol Data Only

16. The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were granted humanitarian parole;

In answering this question, DHS assumes that you are inquiring about children who are traveling with an adult who represents themselves as their parent or legal guardian. CBP's OFO data systems lack the capability to query in the above manner, as OFO does not input a "family unit" into its SIGMA system. The numbers calculated below are derived by excluding those children deemed to be UAC from the total number of children encountered by CBP at ports of entry. For this calculation, CBP considers the rest of those children encountered at the border to be traveling with adults. These encounters may include children who were initially deemed to be UAC, but later identified as not being accompanied by a legal guardian.

At this time, CBP systems only track information for all paroles in the aggregate. This can include advance paroles (e.g., individuals adjusting status, Cuban parole, and other categories), in addition to humanitarian parole. Adults traveling with children who are encountered at ports of entry are generally not granted parole; rather, adults with children are removed pursuant to INA § 235, or placed in removal proceedings pursuant to INA § 240, as applicable. Adults traveling with children apprehended between the ports of entry are not granted humanitarian parole by CBP.

Adults Traveling with Children Apprehended at Ports of Entry and Granted Humanitarian Parole												
	2011	2012	2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	186	388	591	452	50	52	56	75	51	64	70	34
Non-Contiguous	120	425	1,176	1,533	183	211	234	195	164	177	197	172
Total	306	813	1,767	1,985	233	263	290	270	215	241	267	206

Note: Data reflective of port of entry apprehensions only.

17. The number and percentage of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were granted humanitarian parole and who have not appeared at U.S. Immigration and Customs Enforcement Offices for processing as ordered or have not appeared at scheduled immigration court dates;

UAC are not paroled into the United States by CBP. DHS is required by law to transfer UAC to HHS, which is the agency responsible for determining the placement of UAC. HHS is required to place the child in the least restrictive setting that is in the best interest of the child during the pendency of their removal proceedings. ICE conducts a review to determine appropriate detention and/or parole. At this time, ICE is unable to provide a statistical analysis of those individuals who have not reported to onward ICE offices.

ICE Enforcement and Removal Operations (ERO) works in coordination with HHS to receive case information, including information about placement outcomes and EOIR proceedings. However, DHS's authority is limited to transferring UAC to HHS's custody and care. Once the transfer is effectuated, the sole care and custody responsibility falls under HHS' purview and jurisdiction, while DHS continues to prosecute the immigration case.

ICE does not record or statistically report on the number of UAC who have been issued a Notice to Appear and who have absconded from their immigration court proceedings, and defers to the EOIR with respect to this information. However, those who do not appear in court will likely be ordered removed *in absentia* by the immigration judge and ICE ERO will take appropriate enforcement action based on its national security, public safety, and border security priorities, including those related to recent arrivals and fugitive aliens.

18. The number and percentage of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were placed in removal proceedings and who have not appeared at scheduled immigration court dates;

DHS defers to the DOJ EOIR for this information.

19. The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were not ordered removed through the expedited removal process or otherwise placed in removal proceedings;

When CBP apprehends and processes adults traveling with children who are determined to be a family unit (i.e., parent/legal guardian with at least one foreign born child), generally the disposition of the adult guides the outcome of the case. Therefore, the processing for adults traveling with children apprehended may be reflected in the data system in a variety of ways (e.g., crew member detained, deferred inspection, voluntary return).

Adults Traveling with Children Apprehended at and between Ports of Entry Processed as other than Removal or Expedited Removal													
	FY 2010*	FY 2011	FY 2012	FY 2013	FY 14 to date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	11,414	9,069	7,925	3,683	4,401	519	509	592	652	483	519	621	506
Non-Contiguous	1	1,132	1,990	251	2,247	250	270	339	299	244	278	295	272
Total	11,415	10,201	9,915	3,934	6,648	769	779	931	951	727	797	916	778
*Note: Border Patrol Data Only													

20. The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry who were removed in in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date), and;

As described above, the TVPRA specifies that if DHS is seeking removal of an unaccompanied child, then the child must generally be processed under *Immigration and Nationality Act* § 240, with limited exceptions for those who are citizens or habitual residents of a contiguous country. Therefore, CBP does not remove UAC from the United States. Rather, those UAC from contiguous countries and who meet the requirements detailed in section 235 of the TVPRA are allowed to withdraw their application for admission and will be returned to their home country.

Unaccompanied Children Apprehended between Ports of Entry and Returned by CBP Border Patrol													
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	13,080	11,113	13,538	16816	11225	1527	1330	1024	1173	1326	1774	1706	1365
Non-Contiguous	31	34	71	65	86	8	6	8	4	13	9	15	23
Total	13,111	11,147	13,609	16,881	11,311	1,535	1,336	1,032	1,177	1,339	1,783	1,721	1,388
Unaccompanied Children Apprehended at Ports of Entry and Returned by CBP Office of Field Operations													
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	196	1,094	1,608	1324	1043	108	90	128	124	106	158	126	100
Non-Contiguous	126	279	512	1123	2382	110	179	180	158	187	271	325	490
Total	322	1,373	2,120	2,447	3,425	218	269	308	282	293	429	451	590

ICE ERO is generally responsible for the removal of UAC if so ordered by an immigration judge. The following table represents removals of individuals who were UAC when initially transferred to ICE.

Unaccompanied Children Removals														
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 to date	FY 2013 lag*	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	692	699	576	548	284	12	40	38	27	32	37	36	30	32
Non-Contiguous	998	996	1,233	1320	951	21	113	109	117	112	109	159	97	114
Total	1,690	1,695	1,809	1,868	1,235	33	153	147	144	144	146	195	127	146

Please note that beginning in FY 2009, ICE began to "lock" removal statistics on October 5, as the end of a FY and counted only the individuals whose removal or return was already confirmed. Individuals removed or returned in that FY but not confirmed until after October 5 were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE includes the removals and returns confirmed after October 5th into the next FY.

21. The number alien minors accompanied by adults from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry who were removed in in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date), and

Adults Traveling with Children Apprehended between Ports of Entry and Removed by CBP Border Patrol													
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	11,402	6,060	4,879	3,856	2,044	295	258	254	196	205	248	280	308
Non-Contiguous	7	14	172	1,218	4,709	275	323	470	357	356	755	1,054	1,119
Total	11,409	6,074	5,051	5,074	6,753	570	581	724	553	561	1,003	1,334	1,427

CBP OFO data systems lack the capability to query in the above manner.

Adults Traveling with Children Apprehended at or between Ports of Entry and Removed by ICE														
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 to date	FY 2013	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	219	188	172	150	66	2	8	11	7	7	4	7	14	6
Non-Contiguous	123	106	92	95	60	2	5	6	7	8	4	11	9	8
Total	342	294	264	245	126	4	13	17	14	15	8	18	23	14

22. The authorities by which unaccompanied alien minors and alien minors accompanied by adults apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry are being transferred to varying facilities within the interior of the United States. Are localities being notified ahead of the transfer? If not, why not?

The transfer of DHS detainees from one area of responsibility to another is part of the routine detention and removal process. The *Immigration and Nationality Act* and *Homeland Security Act of 2002* vest DHS with the authority to transfer aliens to another State and release those individuals in that State, as opposed to other locations.

Specifically, the *Immigration and Nationality Act* § 241(g) (8 U.S.C. § 1231(g)), states that the Secretary of Homeland Security "…shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." This statute has been interpreted as providing DHS the authority "to transfer aliens from one detention center to another." [*Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995).] The Federal Government has broad discretion to determine how to implement the immigration laws, including the appropriate location for processing aliens, where to transfer them, and whether to release such aliens under an order of supervision.

In addition, with the implementation of the *Homeland Security Act*, the care of UAC was transferred from the former Immigration and Naturalization Service to the Director of the Office of Refugee Resettlement (ORR) of HHS. [*See* 6 U.S.C. § 279(a).] Additionally, the TVPRA requires any department or agency of the Federal Government that has an unaccompanied child in custody to transfer the child to HHS within 72 hours of determining that such child is unaccompanied
[8 U.S.C. § 1232(b)(3)]. Accordingly, DHS is required to transfer UACs to ORR facilities that are located throughout the United States. After ICE transfers custody of an unaccompanied child to ORR, it has no further role with respect to subsequent placement or relocation decisions made by ORR.

Annual Report 2014

Citizenship and Immigration Services
Ombudsman

June 27, 2014

Homeland Security

Annual Report 2014

Citizenship and Immigration Services
Ombudsman

June 27, 2014

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 27, 2014

The Honorable Patrick Leahy
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 Chuck Grassley
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 2014 Annual Report.

I am available to provide additional information upon request.

Sincerely,

Maria M. Odom
Citizenship and Immigration Services Ombudsman

www.dhs.gov/cisombudsman

A Message from the Ombudsman

I am honored to submit the second Annual Report to Congress of my tenure as the Citizenship and Immigration Services Ombudsman. In this Report, we detail USCIS's accomplishments and challenges across the spectrum of family, humanitarian, and employment-based immigration.

Having spent my career in the immigration field, I recognize USCIS's achievements in turning the legacy Immigration and Naturalization Service into the more agile and customer-oriented agency it is today. In the past are years-long processing times for naturalization and green card applications. The addition of the USCIS Lockbox operations and the National Benefits Center have brought about more efficient and reliable intake and filing processes. The days when many immigrants feared approaching the agency for information have been replaced by a commitment to outreach with community relations officers who play a vital role in connecting USCIS to the communities it serves. Indeed, public engagement has become fundamental to the way USCIS conducts its work and is regularly part of developing new policy and initiatives.

USCIS service centers have also demonstrated that the agency can manage high volume, for example by successfully implementing the Deferred Action for Childhood Arrivals program. Their work requires constant adjustment to rising and shifting workloads, while addressing customer inquiries, vetting individuals, and screening for eligibility for immigration benefits.

This year, USCIS promptly and efficiently implemented the U.S. Supreme Court decision in *Windsor*,[1] holding Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. Almost immediately following the June 26, 2013 decision, USCIS began adjudicating immigration benefits submissions filed on behalf of same-sex spouses. USCIS effectively tracked previously filed cases and reopened those that were denied solely because of DOMA. The agency response to *Windsor* shows its capacity to provide world-class service.

USCIS also issued guidance during this reporting period providing parole in place for spouses, children, and parents of active members of the U.S. Armed Forces and other military family members. This long-awaited policy ensures that our military personnel can focus on their readiness, rather than their families' immigration status.

Near the close of this reporting period, USCIS issued needed guidance pertaining to the Provisional Waiver program, an important tool to support family unity that should be expanded to include other immigrant categories in the future. In the same manner as the Windsor response, the agency is to be commended for proactively reopening and re-adjudicating provisional waiver cases impacted by the new policy.

USCIS's efforts to address gaps in policy and improve operations in the EB-5 Immigrant Investor program are noteworthy. Shortly before publication of our 2013 Annual Report, USCIS issued comprehensive new policy guidance. The agency also relocated its adjudications unit to Washington, D.C.; hired a new program office lead, adjudicators, and economists; and re-started stakeholder engagements. The result is a transparent and rejuvenated investment and job creation program, with a focus on customer service and integrity.

As we close another reporting period, however, challenges that USCIS customers currently face still mirror difficulties of decades past. Many of these challenges lie with the USCIS Service Center Operations Directorate, where over 50 percent of USCIS adjudications are performed. Service centers, as well as certain field offices, still struggle with ensuring quality and consistency in adjudications. Overly burdensome and unnecessary Requests for Evidence (RFEs) continue to erode trust in our immigration system, delay adjudications, and diminish confidence in adjudicators' understanding of law and policy. Erroneous template denials and the incorrect application of evidentiary standards cause hardship to individuals and employers.

[1] *United States v. Windsor*, 570 U.S. 12 (2013) (Docket No. 12-307).

Service centers continue to operate under inconsistent local rules that lead to disparities in adjudications. Shifts in production priorities still require more vigilant and strategic planning to avoid significant backlogs in other product lines, such as those that developed this past year in family-based petitions for immediate relatives. Meanwhile, many customers still receive inadequate and vague information about pending cases, and they are unable to rely on posted processing times due to the manner in which the agency calculates them.

In this year's Report, we address ongoing concerns regarding policy and field office adjudications of Special Immigrant Juvenile (SIJ) petitions, which offer immigration relief to children who are found by a state court to be abused, neglected, or abandoned. Many of these SIJ issues were the subject of Ombudsman recommendations in 2011. We also discuss persistent challenges in high skilled adjudications, including RFEs. Again, we include adjudications data (RFE and approval rates) for key nonimmigrant employment categories, and, for the first time, data pertaining to decisions by USCIS's Administrative Appeals Office.

I am hopeful that some of the longstanding issues discussed in this Report will be addressed through USCIS's new Quality Driven Workplace Initiative. The agency has converted employee performance standards from quantitative to qualitative measures, seeking to foster an environment in which quality decisions and customer service are front and center priorities. Over the past decade, USCIS has accomplished much, but the agency must continue to seize every opportunity to fully complete its transformation.

During this reporting period, my office received approximately 6,100 requests for case assistance – over one third more than we received in each of the two previous years. While I welcome the stakeholder recognition of our effectiveness at performing our statutory mission, I also believe this 35 percent increase in our casework underscores the need for USCIS to improve the quality of adjudications and service delivery across all product lines.

In August 2013, I became Chair of the Department of Homeland Security's Blue Campaign, the unified voice for DHS's efforts to combat human trafficking. Working in collaboration with law enforcement, government, non-governmental, and private organizations, the Campaign strives to protect the basic right of freedom. I am very proud of the work of my colleagues in the Department and across the entire U.S. government to combat the heinous crime of modern day slavery, and I thank the many Members of Congress who are working arduously to make our communities safe, especially our youth, from those who exploit humans as a commodity.

Today's immigrants, like those who came before them, dream that the future will be better in America for their children and their grandchildren. Whether they are fleeing persecution, throwing off the shackles of human trafficking, reuniting with family, or hoping to start a new business, immigration is essential to and enriches our country.

I want to thank Secretary of Homeland Security Jeh Johnson, Deputy Secretary Alejandro Mayorkas, and USCIS Acting Director Lori Scialabba for their support and continued collaboration. I am privileged to play a role in helping to make the U.S. immigration system more efficient, responsive, and just.

Sincerely,

Maria M. Odom
Citizenship and Immigration Services Ombudsman

Executive Summary

Executive Summary

The Office of the Citizenship and Immigration Services Ombudsman's (Ombudsman) 2014 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

The Ombudsman, established by the Homeland Security Act of 2002, assists individuals and employers in resolving problems with USCIS. Ombudsman policy and casework is carried out by fewer than 30 full-time professionals with wide-ranging skills and areas of subject matter expertise in immigration law.

From April 1, 2013 to March 31, 2014, the Ombudsman received 6,135 requests for case assistance, an increase of over 35 percent from the 2013 reporting period. Approximately 89 percent of requests during the reporting period were received through the Ombudsman's Online Case Assistance system. Overall, 34 percent of requests were for humanitarian-based matters; 27 percent for family-based matters; 23 percent for employment-based matters, and 16 percent for general-immigration matters (such as applications for naturalization). In 70 percent of case assistance requests submitted to the Ombudsman, individuals and employers first contacted USCIS's National Customer Service Center, and 28 percent appeared at InfoPass appointments at a USCIS local field office in an effort to resolve the matter directly with the agency. The Ombudsman is committed to reviewing all incoming requests for case assistance within 30 days and taking action to resolve 90 percent of requests within 90 days.

This year, the Ombudsman visited communities and stakeholders in regions across the United States. Despite the lapse in federal government funding, which ceased office operations for over two weeks in October 2013, the Ombudsman held its third Annual Conference on October 24, 2013. The conference featured an update on immigration reform legislative developments from the White House Domestic Policy Council's Senior Policy Director for Immigration; a plenary panel on approaches and lessons learned from large-scale legal services responses; and panel discussions on challenges in high-skilled immigration, credible fear screenings, and waivers of inadmissibility, among other issues. Through in-person engagements and teleconferences, the Ombudsman reached thousands of stakeholders. During the first two quarters of Fiscal Year (FY) 2014, the Ombudsman conducted 60 outreach activities and is on pace to complete over 150 for the year. The Ombudsman also recently revised its website content to clarify the office's scope of case assistance and provide Frequently Asked Questions and tips to assist individuals and employers when filing requests for case assistance with the office.

On March 24, 2014, the Ombudsman issued recommendations titled *Employment Eligibility for Derivatives of Conrad State 30 Program Physicians*, which seek to ensure that spouses of foreign medical doctors accepted into the Conrad State 30 program are able to obtain employment authorization. On June 11, 2014, the Ombudsman issued recommendations titled *Improving the Quality and Consistency in Notices to Appear*, which is the charging document that initiates removal proceedings. Additionally, the Ombudsman identified five systemic issues that were brought to USCIS's attention through briefing papers and meetings with agency leadership:

- Special Immigrant Juvenile adjudications;
- USCIS processing times;
- Agency responses to service requests submitted through the Service Request Management Tool;
- USCIS policy and practice in accepting Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, and
- Challenges in the process for payment of the Immigrant Visa Fee using USCIS's Electronic Immigration System (ELIS).

The Ombudsman worked to promote interagency liaison through interagency meetings including:

- Monthly meetings with the U.S Department of State (DOS) and USCIS on the visa queues aimed at ensuring the transparent, orderly, and predictable movement of Visa Bulletin cut-off dates; and
- 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 other DHS systems used to verify immigration status and benefits eligibility.

Additionally, since August 2013, Ombudsman Odom has served as the Chair of the Blue Campaign Steering Committee (Blue Campaign), which is the unified voice for DHS's efforts to combat human trafficking. Working in collaboration with law enforcement, government, non-governmental and private organizations, the Blue Campaign provides information on training and outreach, how traffickers operate, and victim assistance. Since September 2013, Ombudsman Odom also has served as Acting Co-Chair of the DHS Council for Combating Violence Against Women.

Key Developments and Areas of Study

Families and Children

Provisional and Other Immigrant Waivers of Inadmissibility

The Provisional Unlawful Presence Waiver program holds out the promise of an effective solution to a longstanding challenge in family immigration. In 2012, USCIS consolidated Form I-601, *Application for Waiver of Grounds of Inadmissibility* waiver adjudications in one USCIS service center rather than allowing adjudications to continue at a number of USCIS offices overseas. In 2013, USCIS sought to further address the difficulties of the overseas waiver process by implementing a stateside provisional waiver for immediate relatives of U.S. citizens who are required to travel abroad to complete the immigration visa process at a DOS consulate abroad. In January 2014, USCIS issued new guidance crucial to ensuring the success of the Provisional Waiver program. While this guidance addresses the most pressing stakeholder concerns, other aspects of the provisional waiver process remain problematic, such as denials where USCIS found the applicant inadmissible for fraud or a willful misrepresentation without a full examination of the information contained in the record or without first affording the applicant the opportunity to respond. There is no appeal available for a denial of a provisional waiver.

Special Immigrant Juveniles

The Ombudsman is concerned with USCIS's interpretation and application of its Special Immigration Juvenile (SIJ) "consent" authority. This interpretation has led to unduly burdensome and unnecessary Requests for Evidence (RFEs) for information concerning underlying state court orders, and in some cases, unwarranted denials. Other issues reported to the Ombudsman include USCIS questioning state court jurisdiction, concerns with age-outs and decisions for individuals nearing age 21, and inconsistent child appropriate interviewing techniques. The Ombudsman has brought these issues to USCIS's attention and in this Report presents initial recommendations calling for clarification of policy and centralized SIJ adjudications to improve consistency.

The Deferred Action for Childhood Arrivals Program

Nearly two years since the start of the Deferred Action for Childhood Arrivals (DACA) program, USCIS has approved more than 560,000 applications for individuals who were brought to the United States as children. Through this program, thousands of young people now have the ability to continue their education and work lawfully in the United States. Despite the successful program launch, DACA represents approximately 15 percent of the requests for case assistance received by the Ombudsman during this reporting period. Many of these cases are pending past USCIS's six-month processing goal due to background checks and issuance of RFEs. In other case assistance requests submitted to the Ombudsman, USCIS issued template denials that provide limited information as to the basis for denial; inconsistent with agency policy, some of these denials were issued without USCIS first issuing an RFE or Notice of Intent to Deny. As the renewal process for DACA benefits begins in summer 2014, the Ombudsman will continue to engage with stakeholders and USCIS to resolve long-pending cases and address any future issues.

Employment

Highly Skilled Workers: Longstanding Issues with H-1B and L-1 Policy and Adjudications

Stakeholders continue to report concerns regarding the quality and consistency of adjudications of high-skilled petitions. There are ongoing issues with the application of the preponderance of the evidence legal standard and gaps in agency policy. Stakeholders cite redundant and unduly burdensome RFEs, and data reveal an RFE rate of nearly 50 percent in one key high-skilled visa category. Employers continue to seek the Ombudsman's assistance to resolve case matters and systemic issues in high-skilled adjudications.

The H-2 Temporary Worker Programs

Stakeholders are increasingly turning to the Ombudsman for case assistance related to the H-2 temporary worker programs. During this reporting period, the Ombudsman received an increase in requests for case assistance, most submitted by small and medium-sized businesses petitioning for multiple workers, with some requesting 100 or more foreign nationals to fill their temporary labor needs. Stakeholders report receiving RFEs for petitions that were approved in prior years for the same employer with identical temporary need and in the same sector. In May 2014, the Ombudsman hosted an interagency meeting with the U.S. Department of Labor, DOS and DHS to review the entire H-2 process and begin to address these concerns.

The EB-5 Immigrant Investor Program

The Immigrant Investor program has presented USCIS with significant challenges due to many variables, including the complexity of projects, the financial arrangements with investors, and the attribution of job creation to the investment. In April 2013, USCIS relocated adjudications to Washington, D.C. and issued new guidance addressing several longstanding stakeholder concerns. While stakeholders continued to raise concerns with adjudication delays, the Ombudsman received fewer requests for case assistance (61 requests) than in the 2013 reporting period (441 requests). The new adjudications unit and updated policy guidance usher in a new era for this increasingly popular investment and job-creating program.

Humanitarian

DHS Initiatives for Victims of Abuse, Trafficking, and Other Crimes

DHS and USCIS initiatives support vital immigration protections for victims of trafficking and other violent crimes. Starting in 2013, Ombudsman Odom became Chair of the Blue Campaign Steering Committee and Acting Co-Chair of the DHS Council on Combating Violence Against Women. Working alongside USCIS, other DHS components, law enforcement, and community partners, the Blue Campaign and the Council helped advance the Department's commitment to increasing awareness of human trafficking and strengthening humanitarian programs and relief.

USCIS Processing of Immigration Benefits for Victims of Domestic Violence, Trafficking, Sexual Assault, and Other Violent Crimes

USCIS continues to devote attention to improve services for victims eligible for immigration benefits. This year USCIS made improvements in processing times for VAWA self-petitioners, U status petitioners, and T status applicants. The DHS Deputy Secretary committed to continuing to address processing times for these benefit categories, and stakeholders have emphasized the importance of providing interim employment authorization where USCIS does not meet the 180-day processing time goal. Stakeholders also continue to raise concerns about RFEs in the adjudication of these humanitarian benefits. For example, VAWA self-petitioners and applicants for conditional residence waivers due to battery or extreme cruelty report receiving RFEs that seek the type of documentation used to prove a good faith marriage in non-VAWA family-based cases (e.g., original marriage certificates, original joint bank account statements, etc.). RFEs increase processing times and may require additional attention from legal service providers, diminishing their capacity to assist victims. As USCIS trains new officers in the Vermont Service Center VAWA Unit, the Ombudsman will continue to monitor the quality of RFEs.

Increases in Credible and Reasonable Fear Requests and the Effect on Affirmative Asylum Processing

Within the past three years, there has been a significant increase in the number of foreign nationals, many of them recent arrivals at the U.S. southern border, expressing fear of returning to their home countries and triggering credible and reasonable fear interview referrals to USCIS from CBP and ICE. USCIS has shifted resources, made new hires, and updated agency guidance to address the rising number of credible and reasonable fear claims. Despite these efforts, the seven-fold increase in credible fear claims – a product of a confluence of factors including regional violence and economic conditions in Mexico, El Salvador, Honduras, and Guatemala – has resulted in lengthy delays for affirmative asylum processing and a significant increase in asylum case referrals to the Immigration Courts.

Humanitarian Reinstatement and Immigration and Nationality Act Section 204(l) Reinstatement

Humanitarian reinstatement is a regulatory process under which family-based beneficiaries whose approved petitions are revoked automatically upon the death of the petitioner may continue to seek immigration benefits if certain factors are established. There is also a streamlined reinstatement process, covered under Immigration and Nationality Act (INA) section 204(l), for certain surviving relatives who are in the United States and had an approved petition at the time of the qualifying relative's death. Gaps in guidance, lack of uniform procedures, and imprecise evidentiary requirements from USCIS in the handling of humanitarian and INA section 204(l) reinstatement cases are inconsistent with the remedial and humanitarian nature of this relief.

Interagency, Process Integrity, and Customer Service

USCIS Processing Times and their Impact on Customer Service

Individuals and employers seeking immigration benefits set expectations based on processing times, and they have important customer service impacts. USCIS call centers will not initiate service requests with USCIS local offices and service centers to check case status until cases are outside posted processing times. Similarly, in FY 2014, the Ombudsman instituted a new policy not to accept requests for case assistance, absent urgent circumstances, until cases have been pending 60 days past USCIS posted processing times. Stakeholders have raised concerns regarding USCIS processing time accuracy, the method by which they are calculated, and the timeliness with which they are posted. The Ombudsman urges USCIS to consider new approaches to calculating case processing times.

USCIS Customer Service: Ensuring Meaningful Responses to Service Requests

USCIS generates "service requests" through the Service Request Management Tool based on inquiries from individuals and employers, which are transferred to the USCIS facility where the matter is pending. USCIS service centers and local offices then respond, often with general templates that provide little information other than the case remains pending. In these circumstances, stakeholders find it necessary to make repeat requests, schedule InfoPass appointments at USCIS local offices, or submit requests for case assistance to Congressional offices and the Ombudsman. These repeat requests increase the overall volume of calls and visits to USCIS – amplifying the level of frustration customers experience and costing the agency, as well as individuals and employers, both time and money. Unhelpful responses to USCIS service requests continue to be a pervasive and serious problem.

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

USCIS is not issuing notice to attorneys or accredited representatives when it rejects Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*. The rejection of a notice of appearance, without any notification to the submitting attorney or accredited representative, raises concerns pertaining to the fundamental right to counsel. It also creates practical difficulties when the attorney or accredited representative is not notified of USCIS actions, and is, therefore, unable to inform the client of or advise on how to respond to agency actions, including interview notices, RFEs, and denials. USCIS has acknowledged problems with its current method for handling Form G-28 rejections. The agency indicated that it has formulated a number of solutions that are being reviewed by agency leadership.

Fee Waiver Processing Issues

Fee waivers are important to vulnerable segments of the immigrant community, including elderly, indigent, or disabled applicants. This year's Report provides an update of issues described in the Ombudsman's 2013 Annual Report, including improvements made by USCIS. The Report also summarizes stakeholder reports of continued problems that affect certain aspects of fee waiver processing, including inconsistencies in guidance and the application of fee waiver standards. USCIS has rapidly sought to resolve individual cases the Ombudsman has brought to the agency's attention, but systemic issues remain and require a review of guidance and form instructions, as well as agency intake procedures.

USCIS Administrative Appeals Office: Ensuring Autonomy, Transparency, and Timeliness to Enhance the Integrity of Administrative Appeals

In the 2013 Annual Report, the Ombudsman discussed issues pertaining to the Administrative Appeals Office (AAO), including a lack of transparency regarding AAO policies and procedures, and challenges for *pro se* individuals who seek information in plain English about the administrative appeals process. Over the past year, USCIS eliminated lengthy processing times once cases reach the AAO and revised its website content. However, stakeholders still report issues stemming from the manner in which the AAO receives, reviews, and decides appeals. Of particular concern is the need for an AAO practice manual; the absence of any up-to-date statutory or regulatory standard for AAO operations; the AAO's lack of direct authority to designate precedent decisions; and the length of time for cases to be transferred to the AAO from USCIS service centers and field offices for review, and vice versa for remand. In this Report, the Ombudsman publishes AAO data, provided by USCIS, for select form types. The Ombudsman will further evaluate and discuss this data with USCIS in the coming year to better understand the disparities in the AAO sustain and dismissal rates among immigration benefit types.

Data Quality and its Impact on those Seeking Immigration and Other Benefits

Individuals report issues with the USCIS SAVE program verifying a foreign national's immigration status with a benefit-granting agency, such as a state driver's license office or a local Social Security Administration (SSA) office. SAVE uses data from DHS, DOS, the U.S. Department of Justice and other agencies to verify an individual's immigration status, usually at the time the individual is applying for a state or local benefit. USCIS has taken steps to resolve certain quality issues and improve customer service but problems persist. In April 2013, the Ombudsman convened an interagency working group, the Data Quality Forum, to focus on issues pertaining to DHS data sharing and integrity. While communication and new working relationships have developed as a result of this forum, data sharing challenges remain and addressing them will require a renewed commitment on the part of participating offices.

Problems with Payment of the Immigrant Visa Fee via ELIS

In May 2013, USCIS began requiring that immigrant visa recipients use USCIS's Electronic Immigration System (ELIS) to pay the $165 fee to cover the cost of producing their Permanent Resident Cards. Electronic payment of this fee is problematic for a variety of reasons: 1) computer access is required in order to make the payment, and USCIS has not specified any alternative method for payment; 2) the visa recipient must create an ELIS account in order to make the payment, with no provision for payment by an attorney or other authorized representative; 3) the need for a credit card or a bank account makes payment impossible for some visa applicants; and 4) the account registration process, which requires the user to answer a series of questions, is available only in English. USCIS is consulting with counsel and privacy authorities to develop a payment option for representatives of the visa recipient.

Table of Contents

Ombudsman's Office Overview

The Office of the Citizenship and Immigration Services Ombudsman's (Ombudsman)[1] mission 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 U.S. 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. ***See Appendix 2:*** *U.S. Department of Homeland Security Organizational Chart.*
- **Impartial.** The Ombudsman works in a neutral, impartial manner to improve the delivery of immigration benefits and services.
- **Confidential.** Individuals, employers, and their legal representatives 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 assistance and requesting 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's attention for resolution; and
- Facilitating interagency collaboration and conducting outreach to a wide range of public and private stakeholders.

As of the date of this Report, the Ombudsman has fewer than 30 full-time employees with diverse backgrounds and areas of subject matter expertise in immigration law and policy. These individuals include attorneys who previously worked for non-governmental organizations representing families and vulnerable populations; private sector business immigration experts; and former USCIS, U.S. Department of Labor, and U.S. Department of State (DOS) adjudicators and staff.

Since Fiscal Year (FY) 2011, the Ombudsman's budget has been reduced by more than $900,000[3]; at the same time requests for case assistance have significantly risen. The office has reached this lower funding level through attrition, as well as cuts to travel, training and contracts. The Ombudsman has benefited from the DHS Rotational Program with individuals coming to the office for temporary assignments to assist with casework, fielding general inquiries from the public, and redesigning the Ombudsman's website. The President's FY 2015 Budget request to Congress for DHS sought to return the office to its prior funding level. The Ombudsman is pleased that the FY 2015 budget request reaffirms its mission and work.

Requests for Case Assistance

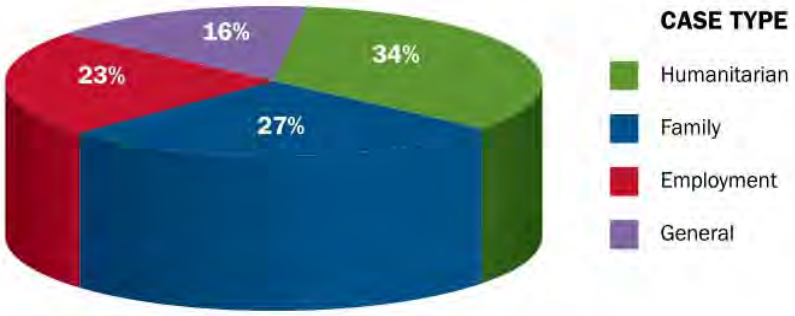
In the 2014 reporting period (April 1, 2013 - March 31, 2014), the Ombudsman received 6,135 case assistance requests, an increase of more than 35 percent from the 2013 reporting period total. Case assistance requests involved the following subject matter: Humanitarian, Family, Employment, and General. ***See Figure 1:*** *Case Submission by Category.* This year requests for case assistance related to the Deferred Action for Childhood Arrivals program contributed to a significant increase in humanitarian-related requests received by the Ombudsman, representing 15 percent of all such requests.

[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. ***See Appendix 1:*** *Homeland Security Act - Section 452 - Citizenship and Immigration Services Ombudsman.*

[3] *See* Office of the Citizenship and Immigration Services Ombudsman Expenditure Plans for Fiscal Years 2012 to 2014.

FIGURE 1: CASE SUBMISSION BY CATEGORY



The Ombudsman's jurisdiction is limited by statute to case problems involving USCIS.[4] Individuals, employers, and their legal representatives may contact the Ombudsman after encountering problems with USCIS in the processing of their immigration-related applications and petitions. Approximately 47 percent of case assistance requests received during the reporting period were submitted directly by individuals and employers, and 53 percent were submitted by attorneys or accredited representatives. The top five states from which the Ombudsman received case assistance requests are: California, Texas, New York, Florida and Illinois. ***See Figure 2:*** *Top Five States for Case Submissions.*

The Ombudsman encourages individuals and employers to submit requests for assistance through the Ombudsman's Online Case Assistance, but they can also submit a request via mail, email and facsimile. Approximately 89 percent of case assistance requests during the reporting period were received by the Ombudsman through the online system. ***See Figure 3:*** *Case Submission Mode.*

FIGURE 2: TOP FIVE STATES FOR CASE SUBMISSIONS

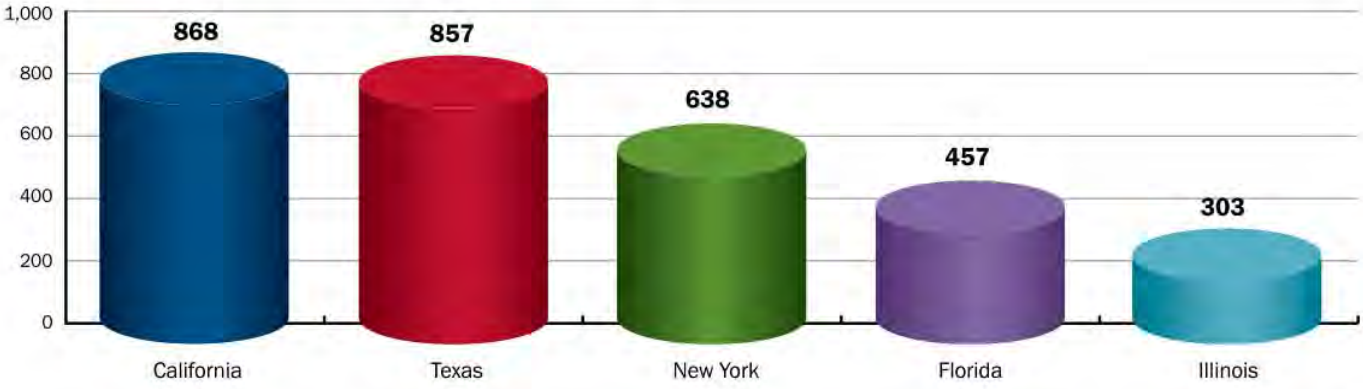
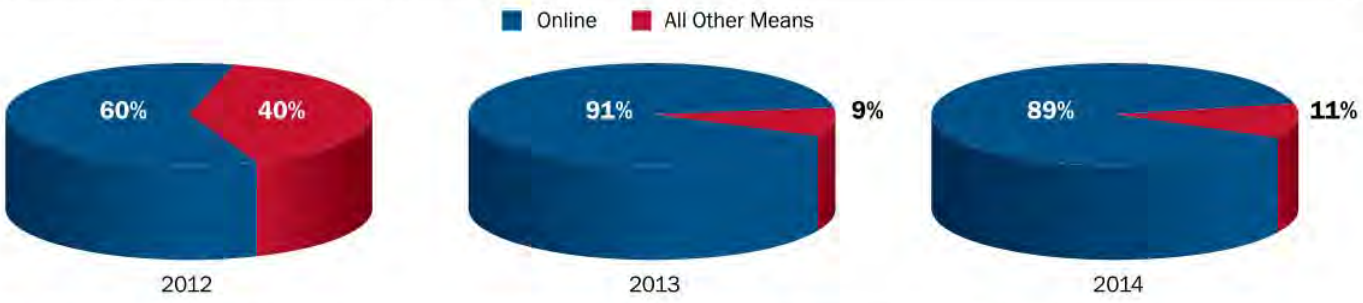


FIGURE 3: CASE SUBMISSION MODE

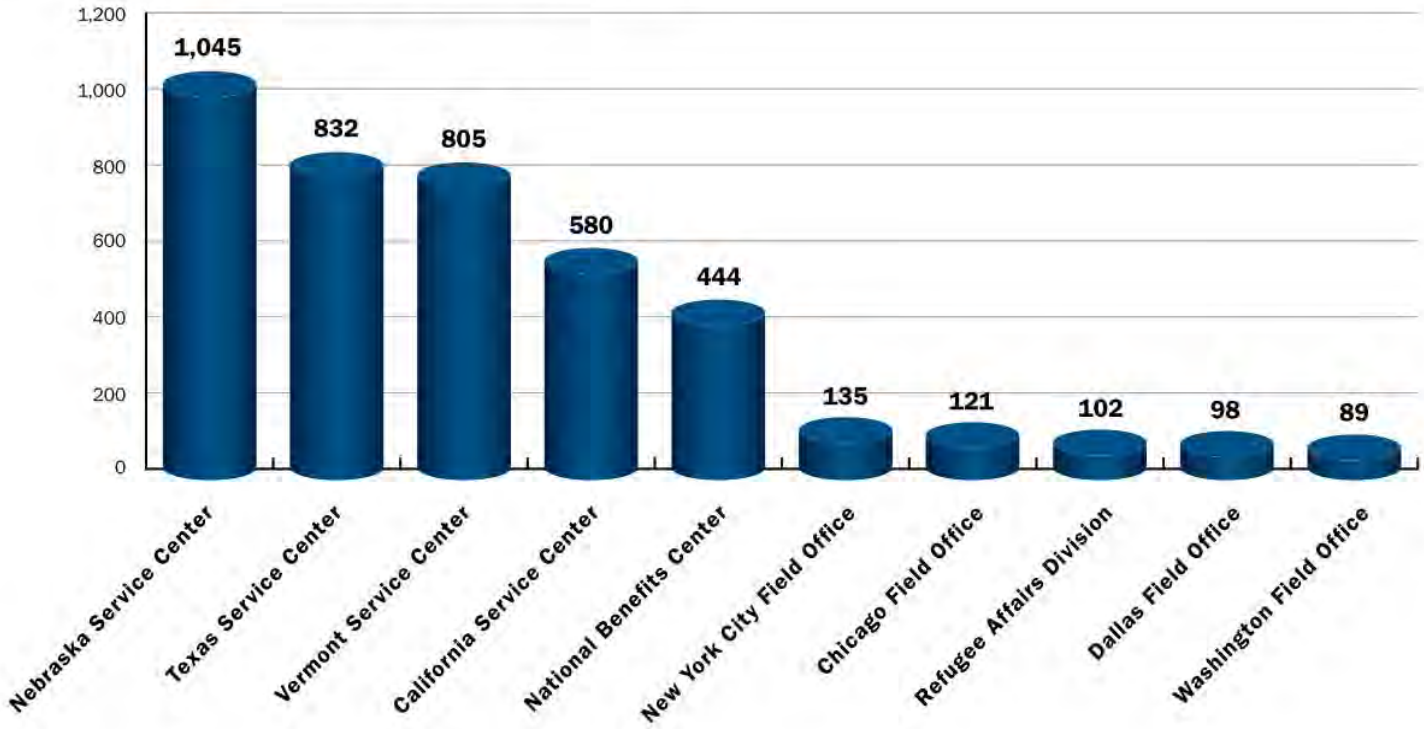


[4] HSA § 452(b)(1). Jurisdiction may extend to issues involving both USCIS and another government entity. The Ombudsman does not provide legal advice.

The Ombudsman evaluates each request for case assistance by examining facts, reviewing relevant DHS data systems and analyzing applicable laws, regulations, policies and procedures. After assessing the case assistance request, the Ombudsman may contact USCIS service centers, field offices, or other facilities to request they review the matter and take action as appropriate. ***See Figure 4:*** *Top Ten USCIS Facilities Contacted.*

In certain scenarios, the Ombudsman will expedite a request based on an emergency or hardship.[5] In deciding whether to expedite, the Ombudsman adheres to the same criteria as USCIS.[6] When a case assistance request falls outside of the Ombudsman's jurisdiction, the individual or employer is referred to the pertinent government agency. ***See Figure 5:*** *Ombudsman Case Assistance Request Process.*

FIGURE 4: TOP TEN USCIS FACILITIES CONTACTED



[5] Individuals or employers requesting expedited handling should clearly state so in Section 10 (Description) of Form DHS-7001, *Case Assistance Form* and 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.

[6] U.S. Department of Justice Memorandum, "Service Center Guidance for Expedite Requests on Petitions and Applications" (Nov. 30, 2001). *See also* USCIS Webpage, "Expedite Criteria" (Jun. 17, 2011); http://www.uscis.gov/forms/expedite-criteria (accessed Mar. 14, 2014). 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; U.S. Department of Defense or National Interest Situation; USCIS error; and compelling interest of USCIS.

FIGURE 5: OMBUDSMAN CASE ASSISTANCE REQUEST 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**.

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 below and uploading a signed Form DHS-7001 to the online case assistance request.

OPTION 1

Submit an online request for case assistance available on the Ombudsman's website at www.dhs.gov/cisombudsman. This is the 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, D.C. 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.

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.

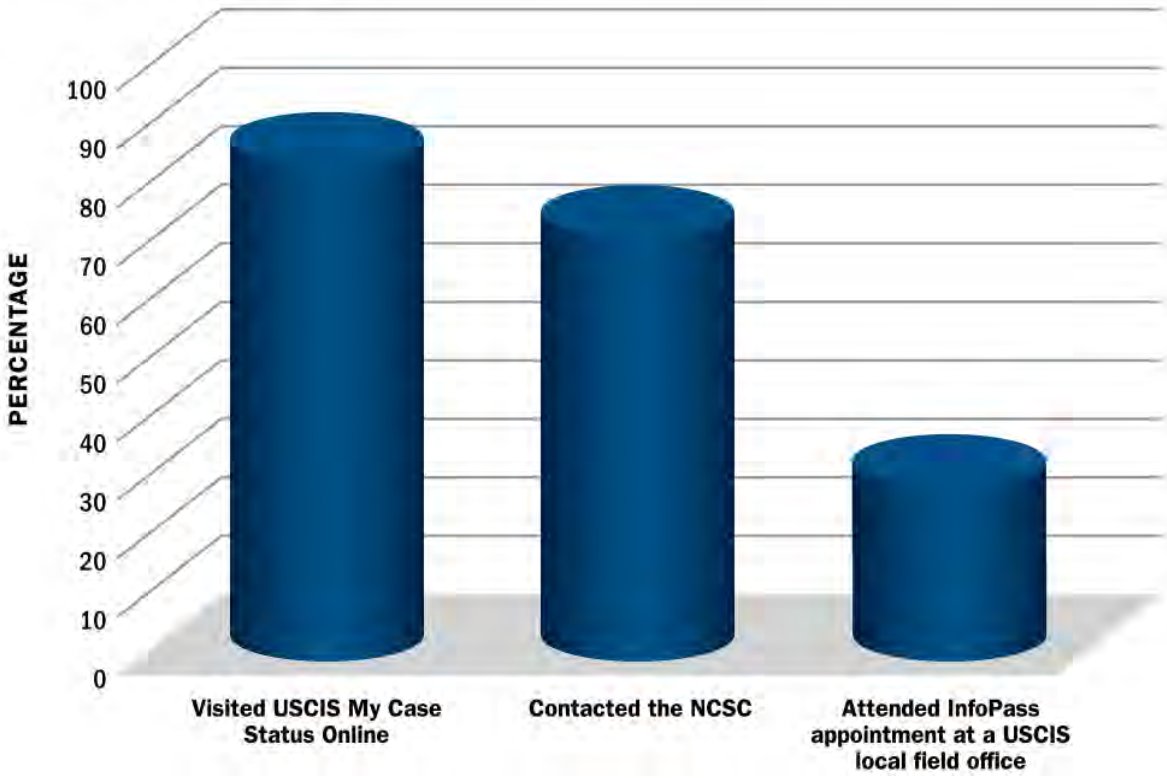
The Ombudsman is an office of last resort. Prior to contacting the Ombudsman, individuals and employers must attempt to resolve issues directly with USCIS through the agency's available customer service options. These include: My Case Status;[7] the National Customer Service Center (NCSC);[8] InfoPass;[9] and the e-Service Request tool.[10]

Individuals, employers, and their legal representatives are now required to indicate prior attempted actions when submitting case assistance requests to the Ombudsman. In 70 percent of case assistance requests submitted to the Ombudsman, individuals and employers first contacted the NCSC, while 28 percent appeared at InfoPass appointments at a USCIS local field office. ***See Figure 6:*** *Prior Actions Taken.*

The Ombudsman recognizes that individuals and employers seeking assistance often have waited long periods of time for resolution of their cases. For that reason, the Ombudsman recently revised its website content and stated its commitment to review all incoming requests for case assistance within 30 days and take action to resolve 90 percent of requests within 90 days of receipt. The revised content also makes clear the requirement 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. Finally, it provides the scope of case review, Frequently Asked Questions, and tips to assist individuals and employers with filing case assistance requests.[11] ***See Appendix 3:*** *Ombudsman Scope of Case Assistance.*

When the Ombudsman is not able to resolve a request for case assistance using standard protocols, often due to pending background checks, the request is escalated to USCIS Headquarters. The Ombudsman then works directly with USCIS Headquarters officials and monitors the issue on a regular basis until it is resolved. The Ombudsman will continue to work with USCIS to improve the efficiency and effectiveness of this process.

FIGURE 6: PRIOR ACTIONS TAKEN



[7] *See* USCIS Webpage, "My Case Status;" https://egov.uscis.gov/cris/Dashboard/CaseStatus.do (accessed Apr. 3, 2014).

[8] The National Customer Service Center can be reached at 1-800-375-5283.

[9] InfoPass is a free online service that allows individuals to schedule an in-person appointment with a USCIS Immigration Services Officer. InfoPass appointments may be made by accessing the USCIS Webpage at http://infopass.uscis.gov/ (accessed Mar. 14, 2014).

[10] USCIS Webpage, "e-Request;" https://egov.uscis.gov/e-Request/Intro.do (accessed Mar. 14, 2014).

[11] *See* Ombudsman Webpage, "Ombudsman – Case Assistance, Help with a Pending Application or Petition;" http://www.dhs.gov/case-assistance (accessed Apr. 3, 2014).

Outreach

In-Person Engagements

During this reporting period, the Ombudsman visited communities and stakeholders in regions across the United States.[12] The Ombudsman conducted USCIS site visits and meetings with state and local officials, Congressional offices, employers and communities with emerging immigrant populations. The Ombudsman views in-person engagements as essential to its mission and continues to monitor the impact of budget limitations. The Ombudsman is committed to expanding the use of technology and alternative means to interact with the public and USCIS offices around the country by holding engagements via video conference and teleconference.

Teleconferences

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

- *USCIS Customer Service* (March 20, 2014)
- *Provisional I-601A Waivers* (February 21, 2014)
- *Naturalization Disability Waivers and Access to Immigration Services* (January 23, 2014)
- *The Ombudsman's 2013 Annual Report* (July 17, 2013)
- *The Process after USCIS Approves a U Visa: A Conversation with Department of State Representatives* (June 12, 2013)
- *USCIS's Temporary Suspension of Certain H-2B Adjudications* (May 30, 2013)
- *Fee Waivers at USCIS: How Are They Working for You?* (April 30, 2013)

Through in-person engagements and teleconferences, the Ombudsman reached thousands of stakeholders. During the first two quarters of FY 2014, the Ombudsman conducted 60 outreach activities and is on pace to complete more than 150 this year.

The Ombudsman's Annual Conference

Despite the lapse in federal government funding, which ceased office operations for over two weeks in October 2013, the Ombudsman held its third Annual Conference on October 24, 2013. Attendees included individuals from non-governmental organizations, the private sector and federal and state entities. The White House Domestic Policy Council Senior Policy Director for Immigration Felicia Escobar updated attendees on immigration reform legislative developments. The keynote panel featured a discussion of approaches and lessons learned from large-scale legal services responses. Other panel discussions addressed the following areas: challenges in high-skilled immigration; autonomy, transparency, and timeliness of decisions at the USCIS Administrative Appeals Office; credible fear screenings; DHS data systems; and waivers of inadmissibility (Provisional Unlawful Presence Waivers).[13]

Recommendations and Interagency Liaison

The Ombudsman is required to identify areas in which individuals and employers have problems in dealing with USCIS and, to the extent possible, propose 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.

On March 24, 2014, the Ombudsman published recommendations titled *Employment Eligibility for Derivatives of Conrad State 30 Program Physicians*, which seek to ensure that spouses of foreign medical doctors accepted into the Conrad State 30 program are able to obtain employment authorization. On June 11, 2014, the Ombudsman published recommendations titled *Improving the Quality and Consistency of Notices* to Appear, which are the charging documents issued by USCIS to initiate removal proceedings.

[12] Northeast: Dewey Beach, DE; New York, NY; Jersey City, NJ; and Worcester and Boston, MA. Midwest: Chicago, IL and Kansas City, MO. Mid-Atlantic: Baltimore, MD; Washington, D.C.; and Falls Church, VA. Southeast: Macon, GA; Miami, FL; Memphis and Nashville, TN; and Greensboro, Raleigh and Charlotte, NC. Southwest: El Paso and Dallas, TX; and Phoenix, Tucson, and Nogales, AZ. West: San Francisco and Los Angeles, CA.

[13] *See* DHS Blog Posting, "Ombudsman's Third Annual Conference: Working Together to Improve Immigration Services" (Oct. 24, 2013); http://www.dhs.gov/blog/2013/10/24/ombudsman%E2%80%99s-third-annual-conference-working-together-improve-immigration-services (accessed Mar. 14, 2014).

Additionally, the Ombudsman identified five systemic issues that were brought to USCIS's attention through briefing papers and meetings with agency leadership. Discussed in detail in later sections of this Annual Report, these issues pertain to: Special Immigrant Juvenile adjudications; USCIS processing times; Agency responses to service requests submitted through the Service Request Management Tool; USCIS policy and practice in accepting Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*; and Challenges in the process for payment of the Immigrant Visa Fee.

Among other activities, the Ombudsman worked to promote interagency liaison through:

- Monthly meetings with DOS and USCIS on the visa queues aimed at ensuring the transparent, orderly, and predictable movement of Visa Bulletin cut-off dates; and
- Quarterly data quality working group meetings with USCIS, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and the DHS Office of the Chief Information Officer to facilitate problem-solving related to the Systematic Alien Verification for Entitlements (SAVE) program[14] and other DHS systems used to verify immigration status and benefits eligibility.

On March 21, 2013, then-Secretary of Homeland Security Janet Napolitano announced the creation of the Council for Combating Violence Against Women. Ombudsman Odom has served as Acting Co-Chair of this council since September 2013.

On August 29, 2013, Ombudsman Odom was appointed the Department's Chair of the Blue Campaign Steering Committee (Blue Campaign), which is the unified voice for DHS's efforts to combat human trafficking. Working in collaboration with law enforcement and government, non-governmental and private organizations, the Blue Campaign provides information on training and outreach, how traffickers operate and victim assistance.

The Ombudsman's Annual Report

The Ombudsman submits an Annual Report to Congress by June 30 of each calendar year, pursuant to section 452(c) of the Homeland Security Act. At the time of publication, the Ombudsman has not yet received USCIS's response to the 2013 Annual Report.

[14] The Systematic Alien Verification for Entitlements program is a web-based service that helps federal, state and local benefit-issuing agencies, institutions, and licensing agencies determine the immigration status of benefit applicants to ensure only those entitled to benefits receive them. *See* USCIS Webpage, "Systematic Alien Verification for Entitlements" (Nov. 20, 2013); http://www.uscis.gov/save (accessed Apr. 29, 2014). *See* section of this Report on "Data Quality and its Impact on those Seeking Immigration and Other Benefits."

Key Developments and Areas of Study

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.[15] The areas of study presented in this year's Report are organized as follows:

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

[15] HSA § 452(c)(1)(B).

Families and Children

Family reunification has long been a pillar of U.S. immigration policy. The USCIS Provisional Unlawful Presence Waiver program advances family unity in a concrete and meaningful way, and recent guidance addresses some of the most pressing stakeholder concerns. The Ombudsman previously made recommendations and continues to bring to USCIS's attention issues with policy and practice in the processing of Special Immigrant Juvenile self-petitions. Pervasive and serious problems persist in this area. In the Deferred Action for Childhood Arrivals program, USCIS has provided discretionary relief to more than 560,000 individuals who were brought to the United States as children.

Provisional and Other Immigrant Waivers of Inadmissibility

Responsible USCIS Offices:[16]
Field Operations and Service Center Operations Directorates

The Provisional Unlawful Presence Waiver program holds out the promise of an effective solution to a longstanding challenge in family reunification. In 2012, USCIS consolidated adjudication of Form I-601, *Application for Waiver of Grounds of Inadmissibility* in one USCIS service center rather than allowing adjudications to continue at a number of USCIS offices overseas. In 2013, USCIS sought to further address the difficulties of the overseas waiver process by implementing a stateside provisional waiver for immediate relatives of U.S. citizens who are required to travel abroad to complete the immigration visa process at a U.S. Department of State (DOS) consulate abroad.[17] In January 2014, USCIS issued new guidance crucial to ensuring the success of the Provisional Waiver program.

Background

In 1996, Congress enacted unlawful presence bars that have come to be called the "three-year" and "ten-year" bars.[18]

[16] Homeland Security Act of 2000 § 452(c)(1)(E) requires that the Ombudsman "identify any official of [USCIS] who is responsible" for inaction-related Ombudsman recommendations "for which no action has been taken" or USCIS "pervasive and serious problems encountered by individuals and employers." For the first time, in this Annual Report, the Ombudsman identifies the responsible USCIS component. Where more than one USCIS office is listed, coordination is needed among USCIS components.

[17] "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule," 78 Fed. Reg. 535-75 (Jan. 3, 2013).

[18] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208. Immigration and Nationality Act (INA) § 212 (a)(9)(B)(i)(I) is known commonly as the three-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 a request for readmission. INA § 212(a)(9)(B)(i)(II) is commonly known as the ten-year bar, which is triggered by one year or more of unlawful presence and a departure from the United States, followed by a request for readmission.

An individual seeking a waiver of either the three-year or ten-year bar must demonstrate to the satisfaction of the Secretary of Homeland Security that refusal of admission would result in extreme hardship to a qualifying relative as a matter of law and in the exercise of discretion.[19] Until June 4, 2012, waivers of the three-year and ten-year bars could only be sought by applicants after leaving the United States in order to apply for an immigrant visa at a DOS consulate abroad.[20] This led to lengthy periods of family separation since waiver processing took months, if not a year or longer, to complete.[21]

Since the enactment of the unlawful presence bars, many foreign nationals with close family ties in the United States have been dissuaded from seeking Lawful Permanent Residence. After residing in the United States for many years, others traveled abroad for what they hoped would be a temporary period, only to encounter prolonged adjudication delays or denials of their waiver requests. Even individuals approved for such waivers abroad may have been forced to endure separation from relatives for months.[22] Under prior waiver procedures, these applicants had no choice but to travel overseas to complete their application for an immigrant visa.

Centralized I-601 Processing. On June 4, 2012, USCIS centralized Form I-601 processing at the Nebraska Service Center (NSC).[23] This was intended to improve consistency in decision-making and reduce the time applicants waited overseas for waiver decisions while they were completing the immigration visa process at a DOS consulate abroad.[24] USCIS announced a processing time target of three months for the newly centralized waiver process.[25] In February 2014, USCIS published a processing time of seven months for these waivers.[26]

While wait times for decisions have been longer than previously announced, the uniformity of filing and centralizing adjudication in one USCIS office is a welcome development.

Provisional Waivers. On January 9, 2012, USCIS announced its plan to establish a Provisional Waiver program.[27] Following the publication of proposed regulations, a comment period, and the issuance of final regulations, the plan took effect on March 4, 2013.[28] Now, immediate relatives of U.S. citizens, who wish to apply for an immigrant visa and who require a waiver of inadmissibility for unlawful presence only, are permitted to submit a waiver application from within the United States prior to departing for an immigrant visa interview at a U.S. embassy or consulate abroad.[29] Applicants submit Form I-601A, *Application for Provisional Unlawful Presence Waiver* along with the appropriate filing fee to a USCIS Lockbox facility in Chicago, Illinois.[30] Stakeholders welcomed this change and deemed it critical to preserving family unity.

Shortly after implementation, stakeholders raised concerns with USCIS's interpretation of the "reason to believe" standard applied when determining whether a provisional waiver applicant appears to be inadmissible on grounds other than unlawful presence.[31] National organizations representing immigrants cited denials by USCIS where applicants had minor criminal arrests or convictions for misdemeanor crimes, such as driving without a license or disorderly conduct, without any apparent analysis of supporting evidence demonstrating the underlying crime would not be a bar to admissibility. In a number of the aforementioned cases, USCIS issued summary denials without due consideration of whether an applicant's criminal offense fell within the "petty offense" or "youthful offender" exceptions,[32] or was not a crime of moral

[19] INA § 212(a)(9)(B)(v).

[20] INA § 245(a) and (c).

[21] *See* USCIS Webpage, "USCIS to Centralize Filing and Adjudication for Certain Waivers of Inadmissibility in the United States" (May 31, 2012); http://www.uscis.gov/news/uscis-centralize-filing-and-adjudication-certain-waivers-inadmissibility-united-states (accessed May 20, 2013); *see also* Ombudsman Recommendation 45, "Processing of Waivers of Inadmissibility" (Jun. 10, 2010); http://www.dhs.gov/ombudsman-recommendation-processing-waivers-inadmissibility (accessed Apr. 29, 2014).

[22] *Id.* "Currently, applicants experience processing times from one month to more than a year depending on their filing location. This centralization will provide customers with faster and more efficient application processing and consistent adjudication."

[23] *Id.*

[24] *Id.*

[25] USCIS Webpage, "Form I-601 Centralized Lockbox Filing" (May 14, 2014); http://www.uscis.gov/outreach/notes-previous-engagements/form-i-601-centralized-lockbox-filing (accessed Jun. 23, 2014).

[26] USCIS Webpage, "USCIS Processing Time Information for the Nebraska Service Center" (Feb. 2014); https://egov.uscis.gov/cris/processingTimesDisplay.do (accessed May 9, 2014).

[27] "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Proposed Rule," 77 Fed. Reg. 19901 (Jan. 9, 2012).

[28] 78 Fed. Reg. 535-75 (Jan. 3, 2013).

[29] *Id.*

[30] USCIS Webpage, "I-601A, Application for Provisional Unlawful Presence Waiver" (Jun. 27, 2013); http://www.uscis.gov/i-601a (accessed Apr. 22, 2014).

[31] *Supra* note 28.

[32] INA § 212(a)(2)(A)(ii).

turpitude that would render the applicant inadmissible.[33] Due to these case examples, national organizations appealed to the USCIS Director to revise applicable standards.[34]

USCIS also denied a number of cases based on fraud or misrepresentation grounds of inadmissibility because of the applicant's prior history of encounters with immigration authorities.[35] These cases were denied without due consideration of documentation establishing the nature of these prior encounters. For example, the Ombudsman reviewed cases where applicants who had been refused entry at the border were alleged to have provided a false name or date of birth. In some of these cases, the applicant disputed that any false information was provided, and instead stated that there was a data entry error. Countervailing evidence was reportedly not considered, as these provisional waivers were summarily denied. In other cases, applicants wished to present evidence that the facts of the cases did not satisfy the legal definition of "willful misrepresentation of a material fact,"[36] and thus did not support a denial. These summary denials were made without the issuance of Requests for Evidence (RFE) or a full examination of the information on record.

The Ombudsman received a number of case assistance requests connected with these concerns. Applicants requested the Ombudsman's assistance in obtaining further review of summary denials since provisional waiver applicants are not permitted to file a motion to reopen/reconsider or an appeal of a denial.

In August 2013, USCIS suspended adjudication of 4,400 provisional waiver applications where the agency had determined there might be "reason to believe" the applicant was inadmissible on a ground other than unlawful presence.[37] On January 24, 2014, USCIS published a Policy Memorandum titled *Guidance Pertaining to Applicants for Provisional Unlawful Presence* instructing adjudicators to review all information in the record, taking into account the nature of a particular charge or conviction as well as the ultimate disposition, before making a final determination of whether there is "reason to believe" criminal inadmissibility grounds apply.[38]

On February 7, 2014, Ombudsman Odom sent a letter to the USCIS Acting Director noting the new "clear, consistent standard for adjudicators to apply to future provisional waiver cases" but also describing stakeholder concerns related to reopening cases previously denied and revisiting guidance on fraud and willful misrepresentation.[39] On March 18, 2014, USCIS announced that it would reopen under its own motion provisional waiver applications that had been denied prior to January 24, 2014, solely on the basis that a criminal offense might pose a "reason to believe" that the applicant was inadmissible.[40] Thereafter, USCIS moved the 4,400 "reason to believe" provisional waiver applications that had been placed on hold back into the normal flow of work for adjudication at the National Benefits Center.[41]

Ongoing Concerns

USCIS's new guidance addresses the most pressing stakeholder concerns, and the Ombudsman will closely monitor implementation. There are other aspects of the provisional waiver process that remain problematic, such as denials where USCIS found the applicant inadmissible for fraud or a willful misrepresentation without a full examination of the information contained in the record.[42] The Ombudsman has urged USCIS to issue guidance specifying the nature and type of evidence required to support a finding of inadmissibility under the Immigration and Nationality Act section 212(a)(6)(C)(i), and to afford applicants an opportunity to present new evidence and

[33] INA § 212(a)(2)(A)(i)(I).

[34] Letter from the American Immigration Lawyers Association to USCIS Director Mayorkas (Aug. 6, 2013); Letter from the Catholic Legal Immigration Network to USCIS Director Mayorkas (Aug. 5, 2013).

[35] INA § 212(a)(6)(C)(i) provides that "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the [INA] is inadmissible."

[36] INA § 212(a)(6)(C)(i).

[37] Information provided by USCIS (Sept. 19, 2013).

[38] USCIS Policy Memorandum, "Guidance Pertaining to Applicants for Provisional Unlawful Presence" (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 Apr. 21, 2014). The Policy Memorandum states, "USCIS officers should review all evidence in the record, including any evidence submitted by the applicant or the attorney of record. If, based on all evidence in the record, it appears that the applicant's criminal offense: (1) falls within the "petty offense" or "youthful offender" exception under INA section 212(a)(2)(A)(ii) at the time of the I-601A adjudication, or (2) is not a CIMT under INA section 212(a)(2)(A)(i)(I) that would render the applicant inadmissible, then USCIS officers should not find a reason to believe that the individual may be subject to inadmissibility under INA section 212(a)(2)(A)(i)(I) at the time of the immigrant visa interview solely on account of that criminal offense. The USCIS officer should continue with the adjudication to determine whether the applicant meets the other requirements for the provisional unlawful presence waiver, including whether the applicant warrants a favorable exercise of discretion."

[39] Letter from Ombudsman Odom to USCIS Acting Director Lori Scialabba (Feb. 7, 2014).

[40] USCIS Public Engagement Division, Message: Form I-601A, Provisional Unlawful Presence Waiver (Mar. 18, 2014)

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

[42] *See* INA § 212(a)(6)(C)(i).

request reconsideration of cases previously denied for fraud or willful misrepresentation of a material fact.[43]

Special Immigrant Juveniles

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

In this Annual Report section, the Ombudsman raises concerns with USCIS's interpretation and application of its Special Immigration Juvenile (SIJ) "consent" authority. This interpretation has led to unduly burdensome and unnecessary RFEs for information concerning underlying state court orders, and ultimately denials in some cases. Other issues reported to the Ombudsman include USCIS questioning state court jurisdiction, concerns with age-outs and decisions for individuals nearing age 21, and ensuring child appropriate interviewing techniques. The Ombudsman brought these issues to USCIS's attention and presented initial recommendations calling for clarification of policy and for centralized SIJ adjudication to improve consistency.

Background

In 1990, Congress established the SIJ category to provide protection to children without legal immigration status.[44] For a child 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 declare the child cannot be reunited with one or both of his or her parents due to abuse, neglect, or abandonment.[45] In addition, an administrative or judicial proceeding must have determined 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.[46]

In 1997, Congress amended the SIJ definition to safeguard the process from fraud or abuse by including only those juveniles deemed eligible for long-term foster care.[47]

The amendment also required the "express consent" of the Attorney General (now the Secretary of Homeland Security) "to the dependency order serving as a precondition to the grant of [SIJ] status."[48] By making these amendments, Congress aimed "to limit the beneficiaries … to those juveniles for whom it was created, namely abandoned, neglected, or abused children, by requiring the Attorney General 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."[49] With these amendments, Congress also sought to address concerns for potential abuse in the SIJ program by restricting grantees from later petitioning for their parents.[50]

USCIS published final SIJ regulations in 1993, recognizing that it "would be both impractical and inappropriate for the Service to routinely re-adjudicate judicial or social service agency administrative determinations …"[51] USCIS then

[43] *Supra* note 39.

[44] Immigration Act of 1990, Pub. L. No. 101–649 at § 153(a)(3)(J), 104 Stat 4978 (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.

[45] INA § 101(a)(27)(J).

[46] *Id.*

[47] 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).

[48] *Id.*

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

[50] 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); Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status; 58 Fed. Reg. 42843-51, 42847 (Aug. 12, 1993).

[51] Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status; 58 Fed. Reg. 42843-51, Supplemental Information at 42847 (Aug. 12, 1993).

issued policy memoranda in 1998 and 1999, instructing adjudicators to request information necessary to make independent findings regarding abuse, abandonment, neglect and best interests.[52] In 2004, USCIS issued a third Policy Memorandum, instructing adjudicators to examine state court orders for independent assurance that courts acted in an "informed" way.[53] The memorandum also provided that adjudicators should not "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."[54] However, in that memorandum, USCIS instructed adjudicators to give express consent only if the adjudicator was aware of the facts that formed the basis for the juvenile court's rulings.

The 2008 Trafficking Victims Protection Reauthorization Act (TVPRA) again amended the SIJ statute.[55] TVPRA clarified that the Secretary of Homeland Security must consent to the grant of SIJ status, and not to the dependency order serving as a precondition to a grant of SIJ status.[56] TVPRA thus recognized state court authority and "presumptive competence"[57] over determinations of dependency, abuse, neglect, abandonment, reunification, and best interests of children. In addition, TVPRA 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 is viable.[58]

In 2010 and 2011, stakeholders reported receiving RFEs from USCIS asking for detailed information regarding the underlying state court order. Stakeholders also reported age-inappropriate interviewing techniques by immigration officers, such as, use of language that is not suitable for children. They recounted problems with USCIS not meeting statutory processing times, 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.[59] 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. In 2012, USCIS partnered with state courts to train judges on the SIJ process.[60]

On February 27, 2014, USCIS held a "train-the-trainer" session for regional selectees who then provided training to USCIS adjudicators in the field. All USCIS officers adjudicating SIJ petitions are now required to take this training. The new training module includes instruction on USCIS's consent requirement and directs adjudicators to accept court orders containing or supplemented by specific findings of fact. The training offers a sample court order that adequately represents the type of factual findings required in a juvenile state court order. The written training, however, states that adjudicators may issue an RFE "if the record does not reflect that there was a ***sufficient*** factual basis for the court's findings." *(emphasis added).*[61] This instruction is inconsistent with the supplementary training materials, which present sample court orders that do not have exhaustive factual findings, but satisfy USCIS's limited role of verifying that a state court has made the requisite SIJ findings. As a result, stakeholders continue to receive problematic RFEs and denials reflecting adjudicators' overly expansive search for records supporting the factual findings

[52] Immigration and Naturalization Service Policy 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. 18, 2014).

[53] 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 Jun. 18, 2014).

[54] *Id.*

[55] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) §235(d)(1), Pub. L. No. 110-457, 122 Stat. 5044 (2008).

[56] TVPRA § 235(d)(1).

[57] *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).

[58] TVPRA § 235(d)(1)(B).

[59] 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 Mar. 19, 2014). The Ombudsman recommended that USCIS: (1) standardize its practices of: (a) providing specialized training for those officers adjudicating Special Immigrant Juvenile (SIJ) status; (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.

[60] *Supra* note 41.

[61] USCIS SIJ Training (Feb. 27, 2014).

of state courts, including full court transcripts, and, in some cases, any and all evidence submitted in the underlying proceeding.[62]

Case Example

In May 2014, the Ombudsman received a request for case assistance involving an SIJ-based RFE issued subsequent to the release of USCIS's new field training. In this case, the state court order presented by the petitioner appeared to include requisite factual findings for SIJ eligibility. However, the adjudicator issued an RFE requesting the following: "a copy of the original application for guardianship, a complete transcript of ***any*** hearing held in front of ***any*** judge regarding your temporary or permanent guardianship, copies of ***any and all*** documents submitted to ***any*** judge during ***any*** hearing regarding your guardianship." *(emphasis added)*

Ongoing Concerns

USCIS Interpretation of Consent. The Ombudsman continues to receive reports and requests for case assistance from stakeholders where USCIS has called into question the validity of court orders and their content by:

- Requesting that petitioners provide information and/or documents that substantiate a state court order;
- Raising concerns of alleged fraud or misrepresentation in the state court process, particularly in cases dealing with reunification with one parent, as permitted by TVPRA;[63]
- Reinterpreting state law by deeming that a particular state court did not have jurisdiction to issue a dependency order; and
- Refusing to accord "full faith and credit" to a state court order issued in a state different from the petitioner's current state of residence.[64]

The Ombudsman received and continues to evaluate other emerging SIJ issues, including USCIS's adherence to its obligations under the 2005 *Perez-Olano* settlement agreement.[65] Under this settlement, the agency committed not to deny or revoke any new, pending, or reopened SIJ petition "on account of age or dependency status, if, at the time the class member files or filed a complete application for SIJ classification, he or she was under 21 years of age or was the subject of a valid dependency order that was subsequently terminated based on age." SIJ regulations have historically protected children under 21 years of age to "minimize confusion caused by dissimilar state laws" and to "allow students and other young persons who continue to be dependent upon the juvenile court after reaching the age of eighteen to qualify for SIJ status."[66]

The Ombudsman will continue to monitor and work to address SIJ issues with USCIS. In the coming year, the Ombudsman may issue additional recommendations calling for the agency to: 1) clarify its limited consent authority; and 2) centralize SIJ adjudication to improve quality and consistency of decisions.

The Deferred Action for Childhood Arrivals Program

Responsible USCIS Office:

Service Center Operations Directorate

Nearly two years since the inception of the Deferred Action for Childhood Arrivals (DACA) program, USCIS has approved over 560,000 DACA applications for individuals who were brought to the United States as children.[67] Through this program, thousands of young people now have the ability to continue their education and work lawfully in the United States. DACA represents approximately 15 percent of the requests for case assistance received by the Ombudsman during this reporting period. Many of these cases are pending beyond USCIS's six-month processing goal due to background checks. In other cases, USCIS has issued template denials that provide limited information as to the basis for denial.

[62] Such Requests for Evidence (RFEs) raise privacy concerns. In many states, providing records of juvenile proceedings would be a violation of state confidentiality laws. *See* e.g., N.J.S.A. 9:2-1, 9:2-3 ("The records of such proceedings, including all papers filed with the court, shall be withheld from indiscriminate public inspection, but shall be open to inspection by the parents, or their attorneys, and to no other person except by order of the court made for that purpose.") New Jersey Rule, R. 1:38-3(d)(13), excludes from public access: "Child custody evaluations, reports, and records pursuant to ... N.J.S.A. 9:2-1, or N.J.S.A. 9:2-3." Additionally, juvenile court records often contain information not only about the SIJ applicant, but also about siblings and other persons who are not before USCIS. These RFEs also impose significant burdens on counsel who, in many cases, would have to seek special permission from the state court to disclose such documents.

[63] TVPRA § 235(d)(1)(A).

[64] U.S. Constitution, Art. IV, Sec. 1.

[65] *Perez-Olano, et al. v. Holder*, Case No. CV-05-3604 at 8 (C.D. Cal. 2005).

[66] 58 Fed. Reg. 42843-01, Supplemental Information at *42847 (Aug. 12, 1993); Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119, § 113, 111 Stat. 2440 (Nov. 26, 1997).

[67] *See* USCIS Webpage, "Secretary Johnson Announces Process for DACA Renewal" (Jun. 5, 2014); http://www.uscis.gov/news/secretary-johnson-announces-process-daca-renewal (accessed Jun. 18, 2014).

Background

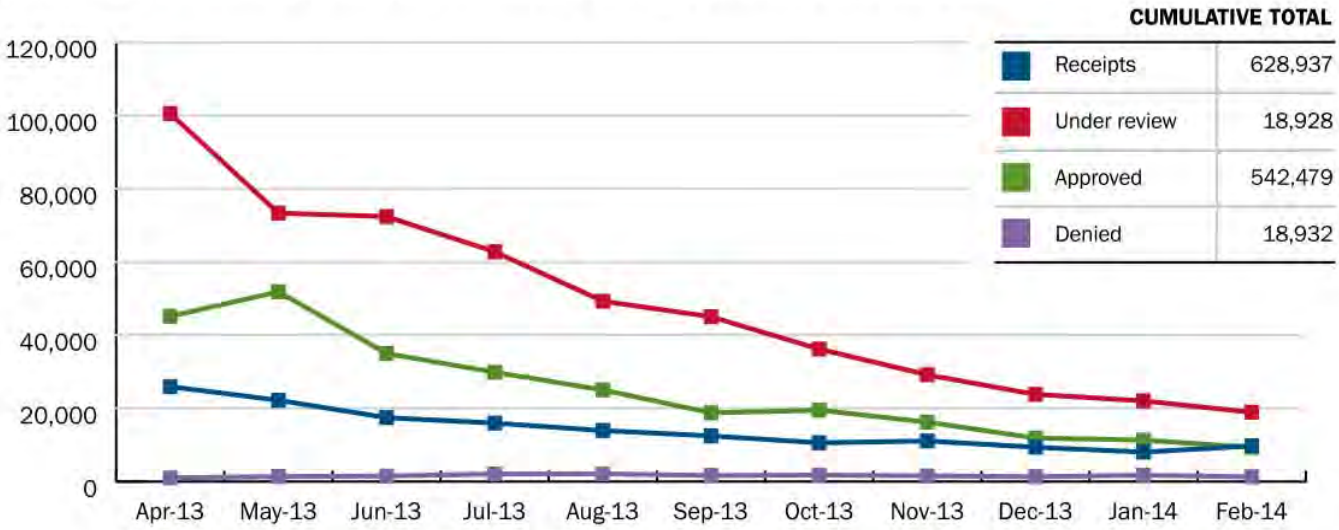
On June 15, 2012, the Secretary of Homeland Security announced that certain individuals who came to the United States as children and meet several requirements may request deferred action under the DACA program.[68] Within 60 days of the announcement and following robust public engagement, USCIS implemented a process for receiving, reviewing, and adjudicating DACA requests.[69]

As of March 10, 2014, individuals submitted 658,430 DACA applications and USCIS granted 542,479 of these requests. ***See Figure 7:*** *Deferred Action for Childhood Arrivals Adjudication Data.*

Ongoing Concerns

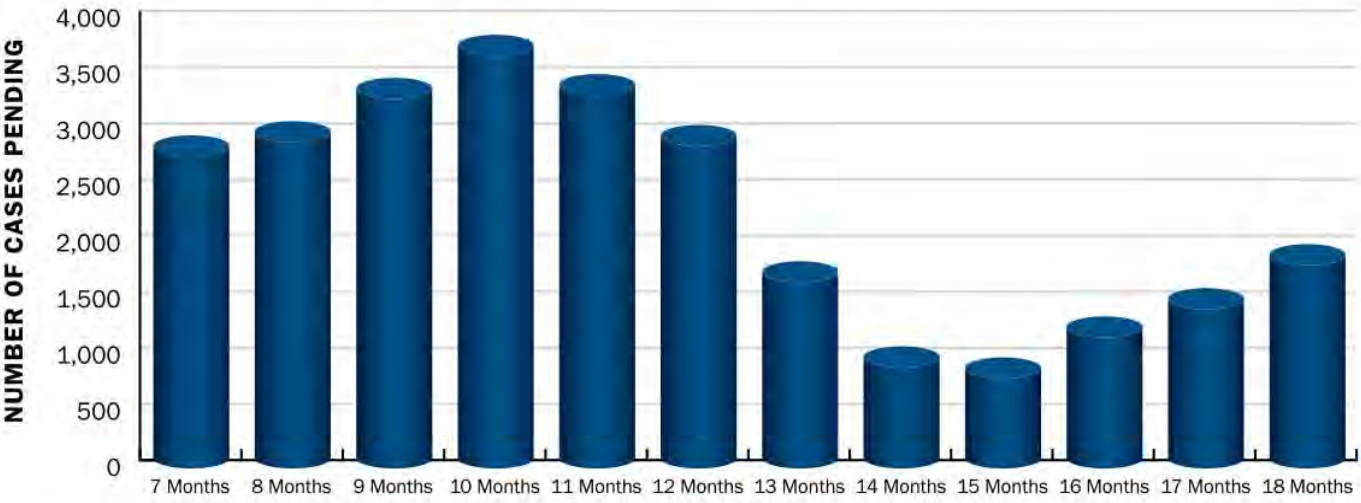
The Ombudsman has identified issues in DACA processing based on requests for case assistance, feedback from stakeholders, and information provided by USCIS.

FIGURE 7: DEFERRED ACTION FOR CHILDHOOD ARRIVALS ADJUDICATION DATA



Source: Information provided by USCIS (Apr. 28, 2014).

FIGURE 8: DEFERRED ACTION FOR CHILDHOOD ARRIVALS CASES PENDING PAST SIX MONTHS



Source: Information provided by USCIS (Apr. 28, 2014).
Includes data through March 7, 2014.

[68] 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. 29, 2014).

[69] *See* USCIS Webpage, "Consideration of Deferred Action for Childhood Arrivals Process" (Apr. 9, 2014); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process, (accessed May 12, 2014). *See* e.g., USCIS Public Engagement, "Deferred Action for Childhood Arrivals Stakeholder Conference Call" (Nov. 21, 2012); http://www.uscis.gov/outreach/notes-previous-engagements/deferred-action-childhood-arrivals-stakeholder-conference-call (accessed Apr. 3, 2013).

Processing Times. Approximately seven months after the official start of the DACA program, USCIS announced a six-month processing time for all DACA applications.[70] While processing started at all four USCIS service centers, in February 2013, USCIS centralized most of the DACA workload at the NSC.[71] USCIS also shifted resources in response to declining DACA receipts and to address a growing backlog of Forms I-130, *Petition for Alien Relative* filed for immediate relatives. As of January 6, 2014, there were 71,949 DACA cases pending with USCIS service centers for more than six months (with 66,470 of these cases pending at the NSC),[72] 31 percent pending background checks, and 25 percent pending due to issuance of Requests for Evidence.[73] ***See Figure 8:*** *Deferred Action for Childhood Arrivals Cases Pending Past Six Months.* USCIS provided data to the Ombudsman showing that as of May 16, 2014, there were 12,061 DACA cases pending past six months, with 17 percent pending background checks and 8 percent pending RFEs.

The majority of DACA-related requests for case assistance received by the Ombudsman pertain to cases outside published processing times, many of which have been pending for a year or more. A large number of cases are on hold due to pending policy guidance on issues such as education accreditation.[74] The NSC increased its staffing for the DACA unit to a total of 150 adjudicators by April 2014. USCIS acknowledged the additional adjudicators were needed to handle delays in processing background checks. The agency also allocated additional resources at the NSC to address individual DACA cases that were delayed due to background checks. It anticipated most backlogged cases would be resolved by the end of May 2014.[75] The Ombudsman will continue to monitor DACA processing times as the program enters its first renewal period.

Template Denials. USCIS issued many DACA denial notices using template letters wherein adjudicators select a box from a list identifying the general basis for denial. However, the narrative language accompanying the check boxes is often limited and vague, and does not provide applicants a reason for the denial of the DACA application. According to USCIS, adjudicators are to issue an RFE or Notice of Intent to Deny (NOID) before denying a DACA application. The largest categories for RFEs pertain to the following eligibility requirements: continuous residence, current enrollment in school, and physical presence in the United States on June 15, 2012.[76] The Ombudsman received case assistance requests for DACA applications where, inconsistent with agency policy, USCIS did not issue an RFE or NOID prior to the denial, which is concerning since there is no formal appeal process or option for a motion to reopen/reconsider for DACA denials. Individuals may request review of the denial decision through the Service Request Management Tool process if they can demonstrate that: 1) USCIS incorrectly denied the application based on abandonment, or 2) USCIS mailed the RFE to the wrong address.[77] USCIS has reopened 1,656 cases for these reasons.[78] Otherwise, the only other recourse for applicants is to file a new application and pay the $465 filing fee again.

Employment Authorization Documents and Mailing Issues. Stakeholders have raised concerns about Employment Authorization Documents (EADs) issued following the approval of a DACA application. While the U.S. Postal Service shows the document as "delivered," some applicants report they never received their EADs. In most cases, USCIS requires the applicant to pay an additional $85 for the biometrics fee in order to obtain a replacement card. Currently, USCIS has no plans to begin mailing EADs via certified mail. The Ombudsman will be reviewing USCIS EAD mailing issues in the coming year.

DACA Renewals. Applicants began applying for DACA, with two-year grants of deferred action and EADs, on August 15, 2012. The renewal process begins in summer 2014. Most DACA renewals will be adjudicated at the NSC.

[70] USCIS Webpage, "USCIS Processing Time Information" (May 6, 2014); https://egov.uscis.gov/cris/processTimesDisplay.do (accessed May 8, 2014).

[71] USCIS shifted resources to address growing backlogs of immediate relative Forms I-130, *Petition for Alien Relative*. *Supra* note 41.

[72] Information provided by USCIS (Jan. 30, 2014).

[73] *Id.*

[74] Information provided by USCIS (Mar. 23, 2014, Apr. 9, 2014 and Apr. 28, 2014).

[75] Information provided by USCIS (Apr. 9, 2014 and Apr. 28, 2014). USCIS noted that more complex background check cases may take longer than six months to process.

[76] *Id.*

[77] USCIS Webpage, "Frequently Asked Questions" (Dec. 6, 2013); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (accessed May 9, 2014). There are no other bases to reopen denied Deferred Action for Childhood Arrivals applications.

[78] *Supra* note 41.

On December 18, 2013, USCIS published a notice of proposed revisions to Form I-821D, *Consideration of Deferred Action for Childhood Arrivals (DACA)* and instructions in the Federal Register.[79] Multiple stakeholders provided feedback on the proposed revisions, requesting that USCIS: 1) simplify parts of the form, 2) make explicit the evidentiary requirements for DACA renewal, and 3) adjust the instruction to file a renewal application four months prior to the expiration of the applicant's DACA period to account for the current six-month processing time.[80]

Following this comment period, USCIS published a second revised DACA form on April 4, 2014, which was available for comment until May 5, 2014.[81] The revised form addresses the aforementioned concerns such as the narrow renewal period; USCIS extended it from 120 days to 150 days.[82] Additionally, USCIS updated its DACA website page to include preliminary information regarding the renewal process.[83]

USCIS Community Outreach. USCIS recognizes there may be individuals eligible to request DACA benefits who have not yet come forward. The agency plans to expand the reach of the DACA program through the development of educational materials in multiple languages and the use of social media and digital engagement to reach individuals in remote locations.[84] USCIS will also collaborate with teachers, parent associations, employers, and other nontraditional stakeholders who can serve as liaisons to hard-to-reach immigrant communities.

Conclusion

USCIS's improvements in the Provisional Unlawful Presence Waiver program serve to advance consistency and minimize delays for thousands of individuals and their families. The Ombudsman urges USCIS to study issues presented in this Annual Report related to SIJs and USCIS's limited "consent" authority. USCIS has demonstrated through DACA that the agency can successfully operationalize discretionary decision-making, by establishing formal filing procedures and processing protocols, including posted processing times. The Ombudsman encourages USCIS to do the same to address long-standing issues in the processing of non-DACA deferred action requests. The Ombudsman continues to engage with the DACA community and legal service providers, and to work to resolve long pending cases, as the renewal process begins.

[79] "Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D; Revision of a Currently Approved Collection," 78 Fed. Reg. 76636 (Dec. 18, 2013).

[80] Letter from the American Immigration Council to USCIS, "Re: Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D; Revision of a Currently Approved Collection, OMB Control Number 1615-0124, 78 Fed. Reg. 76636 (Dec. 18, 2013)" (Feb. 18, 2014); Letter from the Catholic Legal Immigration Network to USCIS, "Re: Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D; Revision of a Currently Approved Collection" (Feb. 14, 2014).

[81] 79 Fed. Reg. 18925 (Apr. 4, 2014).

[82] *Id.* USCIS plans to send notice in a postcard to applicants reminding them of the renewal period, but the exact time notice will be sent is unclear.

[83] USCIS Webpage, "Consideration of Deferred Action for Childhood Arrivals Process" (Apr. 9, 2014); http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process (accessed May 16, 2014). Both the draft Form I-821D and the information on the USCIS Webpage are subject to change until the form and renewal process are finalized.

[84] *Supra* note 41.

Employment

U.S. employment-based immigration programs are designed to foster economic growth, respond to labor market needs and improve U.S. global competitiveness. The Ombudsman is pleased to report on progress in the EB-5 Immigrant Investor program. However, as discussed in prior Ombudsman Annual Reports, there are longstanding issues with USCIS policy and practice in the high-skilled categories, as well as emerging issues in the seasonal and agricultural programs.

Highly Skilled Workers: Longstanding Issues with H-1B and L-1 Policy and Adjudications

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

Stakeholders continue to report concerns regarding the quality and consistency of adjudications of high-skilled petitions. There are ongoing issues with the application of the preponderance of the evidence legal standard and gaps in policy. Stakeholders cite redundant and unduly burdensome Requests for Evidence (RFEs), and data reveal an RFE rate of nearly 50 percent for L-1B petitions and nearly 43 percent for L-1A petitions in the first half of Fiscal Year (FY) 2014.[85] Employers continue to seek the Ombudsman's assistance to resolve individual case matters and systemic issues in high-skilled adjudications.

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. Most employers seeking to employ a foreign national in a high-skilled occupation use one of the following visa programs: the H-1B (Specialty Occupation), L-1A (Intracompany Transferee Manager or Executive) and L-1B (Specialized Knowledge). In the past four years, USCIS issued policy guidance for the H-1B program,[86] and drafted much needed guidance for the L-1B program that remains pending.

[85] Information provided by USCIS (Apr. 28, 2014 and May 29, 2014).

[86] USCIS Policy Memorandum, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" (Jan. 8. 2010); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf (accessed May 16, 2014). USCIS Policy Memorandum, "H-1B Anti-Fraud Initiatives—Internal Guidance and Procedures in Response to Findings Revealed in H-1B Benefit Fraud and Compliance Assessment" (Oct. 31, 2008).

Requests for Evidence. USCIS RFE rates have continued to rise in recent years. ***See Figure 9:*** *H-1B, L-1A and L-1B RFE Rates.* Issuance of unnecessary RFEs is inefficient for USCIS because they interrupt normal processing and require adjudicators to review cases more than once. The agency also incurs administrative costs for storing, retrieving, and matching files with RFE responses after they are submitted. For petitioners, RFEs can disrupt business operations and planning, and result in delays for product development or client services. For beneficiaries and their families who depend on timely adjudication, RFEs can negatively impact arrangements to move to or within the United States, the transition to their children's schools, and the significant life choices and commitments foreign nationals make when accepting employment in the United States. Additionally, the issuance of unduly burdensome RFEs erodes stakeholder confidence in the agency's adjudications and increases the legal costs associated with these filings.

The following is an example of such an RFE, which was issued to more than one petitioner by both the California Service Center (CSC) and Vermont Service Center (VSC) for L-1A extensions.

> *USCIS acknowledges that you filed this petition to extend the [stay of a] beneficiary admitted to the United States under an L blanket petition. Thus, the beneficiary's qualifications and duties in the managerial capacity have not been examined by USCIS, and the record is insufficient to establish that the position qualifies for the classification … Your submitted written statement was not corroborated by evidence in the record. You may still submit evidence to satisfy this requirement, [including] but not limited to:*
>
> - *A letter from an authorized representative in the U.S. entity describing the beneficiary's expected managerial decisions. The letter should describe the beneficiary's typical managerial duties, and the percentage of time to be spent on each. In addition, the letter should address:*
>   - *How the beneficiary will manage the organization … or component of the organization;*
>   - *How the beneficiary will supervise and control the work of other supervisory, professional or managerial employees or manage an essential function …*
>   - *Whether the beneficiary will have authority to hire and fire, or recommend similar personnel actions … if other employees will be directly supervised …*
>   - *How the beneficiary will make decisions on daily operation of the activity or function under his or her authority. If the beneficiary will be a first-line supervisor, submit evidence showing the supervised employees will be professionals.*
> - *An organizational chart or diagram showing the U.S. entity's organizational structure and staffing levels. The chart or diagram should list all employees in the beneficiary's immediate division, department or team by name, job title, and summary of duties, educational level, and salary …*
> - *Copies of the U.S. entity's payroll summary, and Forms W-2, W-8 and 1099-Misc showing wages paid to all employees under the beneficiary's direction.*
> - *Copies of all employment agreements entered into by newly hired employees who will be managed by the beneficiary.*

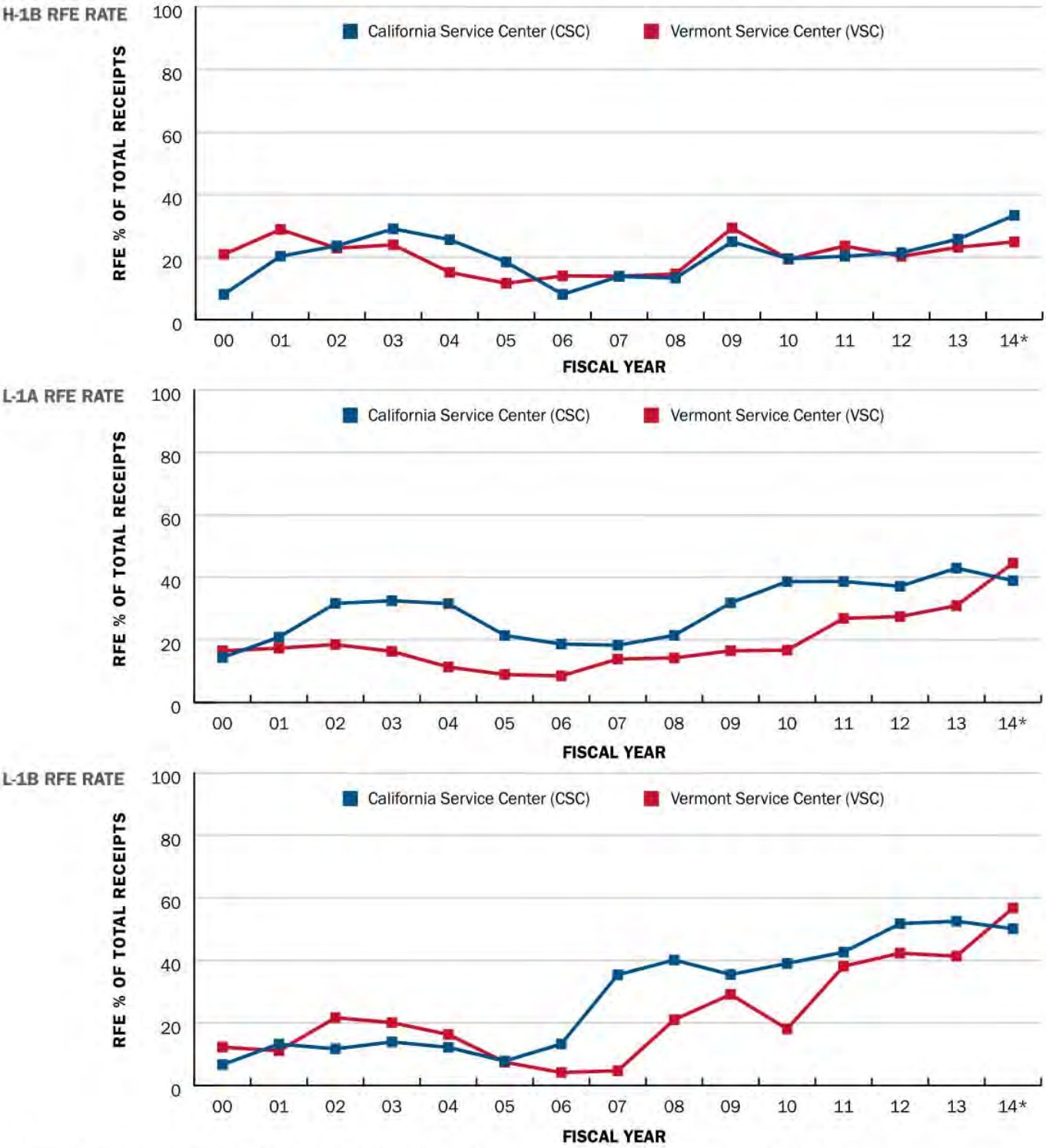
In one case, the petitioner responded to this RFE but excluded the list of all employees, their payroll summaries and employment agreements, noting that it considered this information confidential and proprietary. The petitioner did provide alternative evidence to establish the *bona fides* of the petition, describing the beneficiary's duties in the U.S. position, organizational charts showing the positions and educational degrees held by employees, and copies of the evaluations the beneficiary issued to direct reports. USCIS's denial decision stated:

> *According to the chart provided, it appears that the beneficiary's position … may oversee fourteen employees with professional degrees. However, USCIS notes that, although specifically requested, employee names and quarterly reports were intentionally omitted by the petitioner, citing company policy. Without the requested information or similar documentary evidence, USCIS cannot determine whether the subordinates managed by the beneficiary exist. For the forgoing reasons … [t]he burden of proof … has not been met.*

This RFE is unduly burdensome and demands confidential, propriety information. The petitioner in this case is a large well-established firm, and the beneficiary had already worked for the petitioner for three years as a manager in the United States at the time the extension was submitted. When the Ombudsman inquired about this RFE, USCIS responded that the RFE was appropriate, but after repeated discussions agreed to review the denial, reopened the matter, and issued an approval.

On June 3, 2013, USCIS issued a Policy Memorandum titled *Requests for Evidence and Notices of Intent to Deny.*[87] USCIS instructed adjudicators to issue an RFE only if "the officer determines that the totality of the evidence submitted does not meet the applicable standard of proof."[88] Otherwise, the adjudicator should approve or deny the petition.[89]

FIGURE 9: H-1B, L-1A, AND L-1B RFE RATES



Source: Information provided by USCIS (Nov. 23, 2009; Jan. 26, 2011; May 18, 2011; Apr. 4, 2013; May 29, 2014).

** FY 2014 includes data through March 23, 2014.*

[87] 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 Jun. 2, 2014).

[88] *Id.*, p. 2.

Despite issuance of clarifying guidance nearly a year ago, RFE rates in high-skilled visa programs have remained high through the first half of FY 2014. The Ombudsman continues to review case assistance requests with RFEs such as the following:

> *The evidence you submitted is insufficient to show that the U.S. entity is currently doing business. You submitted a print out from the website of the Secretary of the Commonwealth of Massachusetts that the U.S. entity was organized on July 12, 2012. In the petition, there is a 2012 Form Schedule C for the U.S. entity. You submitted a sublease agreement for the U.S. entity's premise, but the space is "residency type." The evidence is also insufficient to show that [redacted] has authority to sublicense [sic] the space to the U.S entity. You include articles about the U.S. entity and the beneficiary. The most recent contract between a third party and the U.S. entity is November 22, 2013. The evidence includes two 2013 Miscellaneous Income Form 1099s addressed to the beneficiary and the U.S. entity. The most recent invoice is dated December 18, 2013.*
>
> *You may still submit evidence to satisfy this requirement. Evidence may include:*
>
> - *The most recent annual report, which describes the state of the U.S. entity's finances.*
> - *Securities and Exchange Commission Form 10-K.*
> - *Federal or state income tax returns.*
> - *Audited financial statements, including balance sheets and statements of income and expenses describing the U.S. entities business operations.*
> - *Major sales invoices identifying gross sale amounts reported on the income and expenses statement or on corporate income tax returns.*
> - *Shipper's exports declarations for in-transit goods, if applicable.*
> - *The U.S. entity's U.S. Customs and Border Protection forms, Entry Summary and Customs Bond that show business activity.*
> - *Business bank statement that show business activity.*
> - *Vendor, supplier, or customer contracts.*
> - *Third party license agreements.*
> - *Loan and credit agreements.*

A review of this excerpt reveals that the petitioner advanced both probative and credible evidence in support of its requirement to demonstrate that the L-1A petitioner is conducting business in the United States. Absent derogatory information, the evidence submitted appears to establish that it is "more likely than not" – the preponderance of the evidence standard – that the petitioner is conducting business in the United States.

Despite high RFE rates in 2013, USCIS approved more than 94 percent of H-1Bs filed, 83 percent in the L-1A classification, and 67 percent in the L-1B classification.[90] High RFE rates coupled with high approval rates indicate USCIS needs to better articulate evidentiary requirements.

USCIS's issuance of such unduly burdensome RFEs consumes both USCIS and employer resources as well as delays final action on otherwise approvable filings. RFEs such as those described above demonstrate that additional training and quality assurance is needed to ensure USCIS adjudicators are aware of and adhering to current USCIS guidance and policy.

Entrepreneurs in Residence. In May 2013, USCIS completed its Entrepreneurs in Residence (EIR) initiative, which brought together USCIS and private-sector experts in an effort to provide immigrant entrepreneurs with pathways that are clear, consistent, and aligned with business realities.[91] This initiative was widely publicized by the agency,[92] and many were optimistic that if given sufficient resources, time and latitude, EIR could positively influence and modernize agency policies and practices. As part of the initiative, EIR representatives visited USCIS service centers to train adjudicators, and helped develop an "Entrepreneur Pathways" website dedicated to providing information about U.S. immigration avenues available to foreign entrepreneurs.[93] From the EIR initiative, USCIS developed *Startup 101* training that has been incorporated in the Basic Immigration Officer Training Course (Basic).[94] USCIS has not quantified the initiative's impact, such as changes in approval or RFE rates for start-up companies. On May 8,

[89] *Id. See also* 8 C.F.R. § 103.2(b)(8)(i).

[90] *Supra* note 85.

[91] USCIS Webpage, "USCIS Announces 'Entrepreneurs in Residence' Initiative" (Oct. 11, 2011); http://www.uscis.gov/news/public-releases-topic/business-immigration/uscis-announces-entrepreneurs-residence-initiative (accessed Apr. 9, 2014).

[92] *See generally* USCIS Webpage, "Entrepreneur in Residence;" http://search.uscis.gov/search/docs?utf8=%E2%9C%93&sc=0&query=%22entrepreneur+in+residence%22+&m=&affiliate=uscis_gov&commit=Search (accessed Apr. 9, 2014). *See also* USCIS Webpage, "Entrepreneurs in Residence Information Summit" (Feb. 24, 2012); http://www.uscis.gov/outreach/notes-previous-engagements/entrepreneurs-residence-information-summit (accessed Jun. 12, 2014).

[93] USCIS Webpage, "Entrepreneur Pathways;" http://www.uscis.gov/eir (accessed Apr. 9, 2014).

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

2013, USCIS announced the next phase of the initiative, now called Executives in Residence, would focus on the areas of performing arts, healthcare and information technology.[95]

Ombudsman's Past Recommendations. The Ombudsman issued recommendations to USCIS in the Ombudsman's 2010 Annual Report to address pervasive and serious issues in the high-skilled programs. The Ombudsman recommended that USCIS expand training of its adjudicators on the legal standard of proof, preponderance of the evidence, which is the standard for most petitions and applications for immigration benefits.[96] USCIS concurred with this recommendation, and its Offices of Human Capital and Training and Chief Counsel developed training that provided specific examples for several immigrant and nonimmigrant classifications.[97] USCIS piloted this training at Basic in February 2012, and finalized the material after revisions were made in the third quarter of 2012.[98]

This 2012 training module is allocated four hours of classroom time during the six and a half week Basic curriculum, which covers a wide range of subjects including ethics, decision writing, interviewing techniques, and immigration law basics. While there may not be time for in-depth discussion of the legal standard at Basic, there is no mandatory refresher course for USCIS adjudicators pertaining to the preponderance of the evidence legal standard.

The Ombudsman also previously recommended that USCIS conduct supervisory review of all RFEs at one or more of its service centers and in one or more product lines as a quality control pilot measure.[99] The agency declined to adopt this recommendation, noting that it routinely conducts quality reviews.[100] It deemed 100 percent supervisor RFE review to be too time-consuming and resource-intensive, despite the enormous costs for the agency in preparing RFEs and reviewing responses in tens of thousands of cases.[101]

The Ombudsman supports USCIS's efforts to clarify the L-1B standard.[102] In 2010, the Ombudsman recommended that USCIS re-write L-1B regulations using the Administrative Procedure Act notice and comment process.[103] Several years prior, USCIS issued multiple policy memoranda attempting to better define "specialized knowledge."[104] These memoranda focused on Congressional intent, and a 1970 Congressional Report noted, "the present immigration law and its administration have restricted the exchange and development of managerial personnel from other nations vital to American companies competing in modern-day world trade."[105] Despite these efforts, employers struggle to decipher USCIS policy and practice in the high-skilled visa programs.

[95] USCIS Webpage, "USCIS to Expand Entrepreneurs in Residence Initiative"; http://www.uscis.gov/news/uscis-expand-entrepreneurs-residence-initiative (accessed Apr. 9, 2014). *See also* USCIS Webpage, "Executives in Residence" (Apr. 4, 2014); http://www.uscis.gov/about-us/uscis-residence-programs/executives-residence (accessed Apr. 23, 2014).

[96] Ombudsman Annual Report 2010 (Jun. 30, 2010), p. 47; http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf (accessed May 16, 2014).

[97] *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 Jun. 23, 2014).

[98] USCIS response to Ombudsman Annual Report 2010 (Nov. 9, 2010), p. 6; http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Annual%20Reports/cisomb-2010-annual-report-response.pdf (accessed Jun. 23, 2014).

[99] *Supra* note 96, p. 48.

[100] *Supra* note 98, p. 9.

[101] *Id.* USCIS, at times, has conducted 100 percent supervisory review of RFEs upon the issuance of new policy.

[102] *See generally* USCIS Teleconference Recap, "L-1B Specialized Knowledge" (Jun. 14, 2011).

[103] *Supra* note 96, p. 36. *See also* Ombudsman Annual Report 2011 (Jun. 2011), p. 26; http://www.dhs.gov/xlibrary/assets/cisomb-annual-report-2011.pdf (accessed May 16, 2014) and Ombudsman Annual Report 2013 (Jun. 2013), p. 30; http://www.dhs.gov/sites/default/files/publications/cisomb_2013_annual_report%20508%20final_1.pdf (accessed May 16, 2014). *See* Administrative Procedure Act, Pub. L. No. 79-404; 5 U.S.C. § 551 (1946).

[104] Immigration and Naturalization Service (INS) Policy Memorandum, "Interpretation of Specialized Knowledge," (Mar. 9, 1994); INS Policy Memorandum, "Interpretation of Specialized Knowledge," HQSCOPS 70/6.1 (Dec. 20, 2002); USCIS Policy Memorandum, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks," (Sept. 9, 2004).

[105] *See generally* H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815 (Leg. Hist.).

Ongoing Concerns

Below is an overview of challenges – many of them longstanding – in agency policy and adjudication of petitions for high-skilled workers.

The Legal Standard for Adjudications: Preponderance of the Evidence. USCIS's adjudicator training lacks a concentrated exploration of the preponderance of the evidence standard. Basic curriculum does not include hypothetical examples of employment cases that can be used to train adjudicators on how to apply the "more likely than not" preponderance test. Exploring how various factual scenarios could turn the case from an approval to a denial, or warrant the issuance of an RFE, would be highly instructive. The Ombudsman previously recommended this approach, but the training module covers this important subject matter only in the abstract. The Ombudsman urges USCIS to reinforce this training for all USCIS adjudicators by developing and requiring refresher courses on a regular basis.

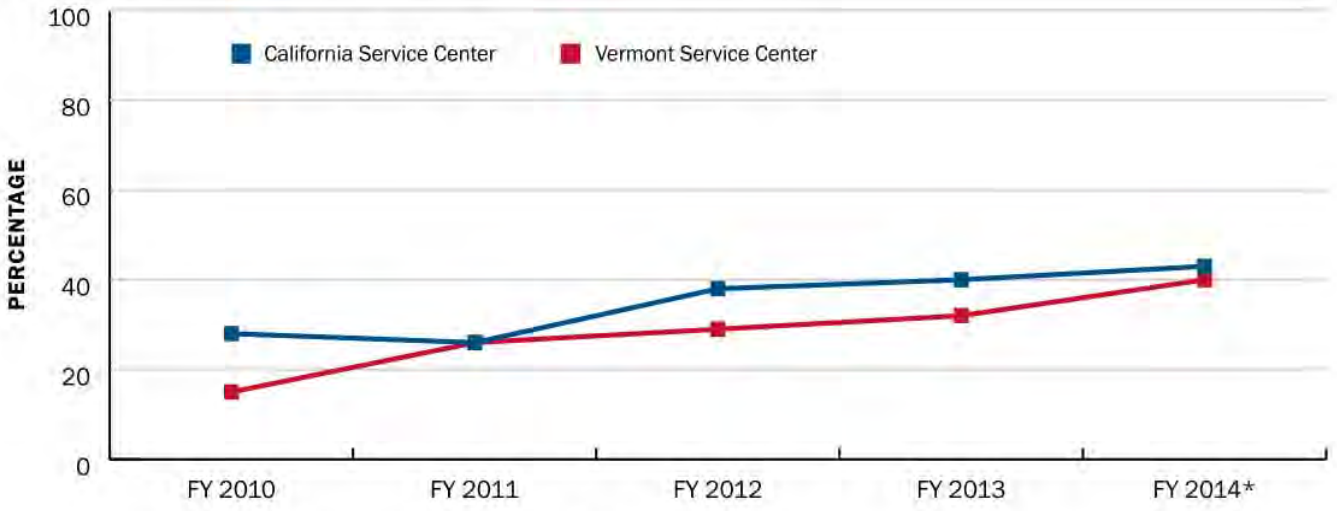
Gaps in L-1B Policy and Requests for Evidence. New L-1B guidance or regulations are needed to clarify the definition of "specialized knowledge."[106] The Immigration and Nationality Act (INA) does not precisely define "specialized knowledge," and RFE rates for L-1Bs show that this legal standard is not well understood by employers or USCIS adjudicators. Stakeholders report receiving RFEs that request information already provided with the initial filing, business information not directly relevant to adjudication, or otherwise confidential or proprietary corporate information.

The Ombudsman continues to monitor high RFE rates in the high-skilled worker visa programs. In 2004, CSC and VSC issued RFEs in 16 and 12 percent of L-1B petitions, respectively. In 2013, the CSC L-1B RFE rate was 51.5 percent, and 41.4 percent at the VSC.[107] In the first two quarters of FY 2014, the CSC RFE rate was at 50 percent, and at 56.7 percent at the VSC.[108]

L-1B Denial Rates. USCIS L-1B denial rates have also increased in recent years.[109] Five years ago, there was a 20 percent denial rate overall for the L-1B category. Today, denial rates are at 40 and 32 percent for FY 2013 for the CSC and VSC, respectively.[110] Data from FY 2014 reflects a similar denial rate at both service centers. ***See Figure 10:*** *L-1B Denial Rates.*

It is difficult to identify the root cause of the high RFE and denial rates. The Ombudsman recognizes that USCIS cannot prevent the receipt of improperly prepared L-1B submissions. However, the sustained high rate of RFEs and denials in this visa classification indicates several possibilities: USCIS adjudicators are not receiving the right information from petitioners, adjudicators do not fully understand the legal standards for establishing L-1B specialized knowledge, or petitioners do not understand what USCIS adjudicators are looking for in an L-1B filing.

FIGURE 10: L-1B DENIAL RATES



Source: Information provided by USCIS (Apr. 28, 2014).

**FY 2014 includes data through March 24, 2014.*

[106] *See* Immigration and Nationality Act (INA) § 101(a)(15)(L).

[107] *Supra* note 94.

[108] *Id.*

[109] *Id.* USCIS collects data by fiscal year, which means some cases are receipted in one fiscal year and issued a decision in the subsequent fiscal year.

[110] *Id.*

The H-2 Temporary Worker Programs

Responsible USCIS Office:
Service Center Operations Directorate

Stakeholders are increasingly turning to the Ombudsman for case assistance related to the H-2 programs. During this reporting period, the Ombudsman received a sharp increase in the number of requests for case assistance, most submitted by small- and medium-sized businesses petitioning for multiple workers, with some requesting 100 or more workers to fill their temporary labor needs. Stakeholders raise concerns with issuance of RFEs where similar petitions were approved in prior years for the same employer with identical temporary need in the same sector and for the same or similar workers. The Ombudsman also received requests for case assistance from Members of Congress whose constituents are negatively impacted by delays in H-2 adjudications.

Background

Under the H-2 programs, U.S. employers may petition to hire foreign workers when they anticipate a temporary shortage of domestic labor.[111] H-2 status is for workers who perform certain agricultural (H-2A) or nonagricultural jobs (H-2B) on a temporary basis due to seasonal, peak load, intermittent or one-time occurrence needs.[112] Industries that rely on the timely processing of H-2 petitions include agriculture, landscaping, hospitality, horse racing, ski resorts, mobile entertainment (circuses), and crabbing, among others.

There is a statutory limit on the number of H-2B non-agricultural workers that may be admitted each fiscal year. Visas are allocated in two allotments, with 33,000 available from October 1 to March 31, and the remaining 33,000 available in the second half of the fiscal year, from April 1 to September 30.[113] In FY 2013, the U.S. Department of State (DOS) reported that 57,600 H-2B workers were admitted to the United States.[114] There is no corollary limit on the number of agricultural workers who may be admitted, and DOS reported that 74,192 H-2A visas were issued in 2013.[115] Generally, periods of admission may not exceed one year.[116]

The H-2 programs are highly regulated, and in all cases require substantive review by three distinct agencies: the U.S. Department of Labor (DOL), USCIS, and DOS. The employer first files Employment and Training Administration (ETA) Form 9142, *Application for Temporary Labor Certification* with DOL demonstrating there are insufficient workers in the local labor pool who are willing, able, qualified, and readily available to fill the temporary need. This involves conducting a local recruitment campaign and coordination with the appropriate State Workforce Agency. Additionally, the employer must prove that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Employer petitioners and others involved in the H-2 process are prohibited from collecting a "job placement fee" or other compensation (either direct or indirect) at any time from workers as a pre-condition to their recruitment or employment.[117]

Once DOL issues the Temporary Labor Certification, the employer submits to USCIS Form I-129, *Petition for Nonimmigrant Worker*. USCIS reviews the Temporary Labor Certification issued by DOL, and examines whether the need and the job are both temporary in nature (i.e., one time, seasonal, peak load or intermittent). USCIS prioritizes H-2A agricultural worker filings and typically completes these adjudications within a matter of days.[118] Non-agricultural H-2B filings are not prioritized, but petitioners may request premium processing to obtain a decision within 15 calendar days.[119]

The prospective foreign worker beneficiary then applies for a H-2 nonimmigrant visa at a DOS consulate abroad and is interviewed to determine admissibility, as well as if the applicant is aware of the work that will be performed, including the location and the applicable wage rate. DOS also probes whether or not the beneficiary paid a prohibited "job placement fee" at any time during the process.[120] Following visa issuance, the beneficiary presents himself or herself for admission to the United States at a U.S. Customs and Border Protection port of entry.

[111] *See* INA § 101(a)(15)(H)(ii)(a)-(b).

[112] 8 C.F.R. § 214.2(h)(6)(ii).

[113] INA §§ 214(g)(1)(B) and 214(g)(10).

[114] U.S. Department of State Webpage, "Table XVI(B) Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards) Fiscal Years 2009-2013;" http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXVIB.pdf (accessed May 14, 2014).

[115] *Id.*

[116] 8 C.F.R. § 214.2(h)(5)(iv)(A).

[117] 20 C.F.R. § 655 Subpart A and B.

[118] Adjudicator's Field Manual Ch. 31.4(c).

[119] USCIS Webpage "How Do I Use the Premium Processing Service?" (Jun. 6, 2013); http://www.uscis.gov/forms/how-do-i-use-premium-processing-service (accessed May 16, 2014).

[120] 9 FAM 41.53 N2.2(c).

Delays at any point in this process can have severe economic consequences for U.S. employers, including spoilage of harvestable fruits and vegetables, loss of valuable livestock, or disruptions of scheduled events or delivery of services. Employers may not begin the H-2B filing process more than 90 calendar days and no less than 75 calendar days before the employer's date of need, and for H-2A filings an application cannot be filed 45 calendar days before the employer's date of need.[121] Processing delays with any entity involved in the life-cycle of these temporary worker filings, whether at DOL, USCIS, or DOS, heightens the need for the next agency in line to act swiftly on such filings.

Ongoing Concerns

Stakeholder concerns have focused on the increased issuance of RFEs by the VSC. One stakeholder representing multiple employers filing H-2B petitions at both the VSC and CSC provided the Ombudsman data indicating that the VSC is placing higher scrutiny on the "temporariness" or "seasonality" of occupations, resulting in a high issuance of RFEs. Between January 1 and March 30, 2014, one of the stakeholder's employer members received 146 RFEs out of 300 petitions pending with the VSC for landscapers, a traditionally recognized seasonal and temporary job. H-2 stakeholders are questioning why USCIS is issuing RFEs for seasonality for occupations that have long been recognized and approved by DOL and USCIS in prior years. FY 2014 data shows that the VSC RFE issuance rate is 35 percent whereas the CSC rate over the same time frame is at 7 percent. ***See Figure 11:*** *H-2B (Temporary Nonagricultural Worker) Adjudication Data.*

Another common complaint is repetitive RFEs to verify business information year after year. For example, one ranch employer brought an H-2 case to the Ombudsman where USCIS issued RFEs for three consecutive years seeking the same business information for the petitioner.

In May 2014, the Ombudsman convened an interagency meeting between DOL, DOS and DHS to review aspects of the H-2 process. The Ombudsman expects to discuss further H-2 processing issues at the office's 2014 Annual Conference.

The EB-5 Immigrant Investor Program

Responsible USCIS Office:
Immigrant Investor Program Office

The Immigrant Investor program has historically presented USCIS with significant challenges due to many variables, including the complexity of projects, the financial arrangements with investors, and the attribution of job creation to the investment. During this reporting period, USCIS relocated adjudication to Washington, D.C. and issued new guidance addressing several longstanding stakeholder concerns. While stakeholders continued to raise concerns with adjudication delays, the Ombudsman received fewer requests for case assistance (61 requests) than in the 2013 reporting period (441 requests). The new adjudication unit and the updated policy guidance usher in a new era for this increasingly popular investment and job-creating program.

FIGURE 11: H-2B (TEMPORARY NONAGRICULTURAL WORKER) ADJUDICATION DATA

FISCAL YEAR	SERVICE CENTER	RECEIPTS	APPROVALS	DENIALS	REQUESTS FOR EVIDENCE
2012		4,287	4,143	272	1,276
	California Service Center	1,381	1,355	74	334
	Vermont Service Center	2,906	2,788	198	942
2013		4,720	4,490	168	1,427
	California Service Center	1,547	1,466	31	338
	Vermont Service Center	3,173	3,024	137	1,089
2014*		3,653	3,319	61	918
	California Service Center	1,250	1,182	16	85
	Vermont Service Center	2,403	2,137	45	833

Source: Information provided by USCIS (May 13, 2014).

**FY 2014 includes data through March 31, 2014.*

[121] 20 C.F.R. §§ 655.15(b) and 655.130(b).

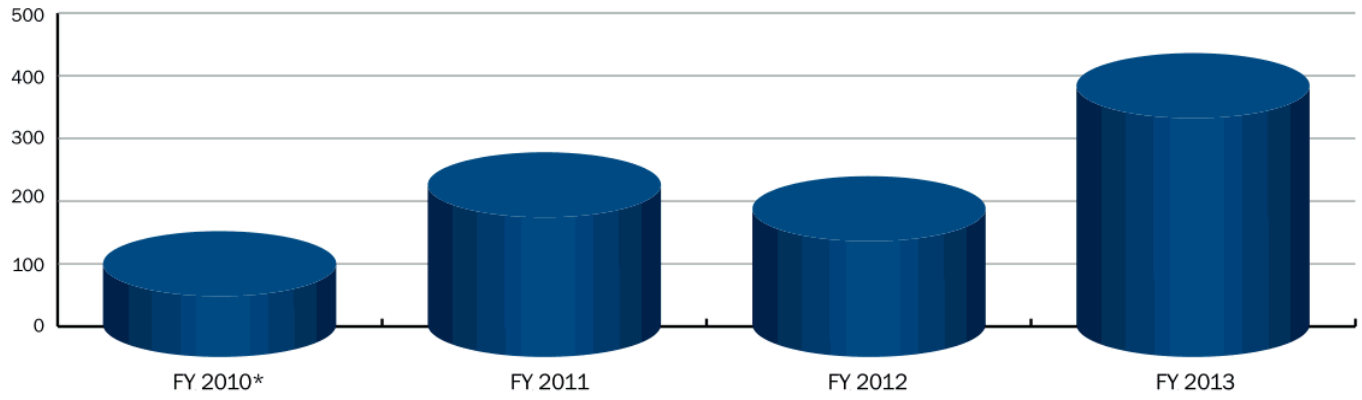
Background

In 1990, Congress established the fifth employment-based preference category (EB-5), which offers Legal Permanent Residence to immigrants who make significant investments in commercial enterprises that create U.S. jobs.[122] Congress allocated 10,000 visas annually under this category for qualified foreign entrepreneurs, their spouses, and children.[123] To be eligible for EB-5 status, a foreign entrepreneur must invest a minimum of $500,000 in an enterprise that will "directly create" 10 full-time positions for U.S. workers over a two-year period.[124]

In 1992, shortly after launching the EB-5 preference category, Congress authorized the "Regional Center" Pilot program to encourage the concentration of EB-5 investor capital in projects likely to have greater regional and national impacts.[125] Today, the vast majority of EB-5 investments flow through the Regional Center Pilot program.

The EB-5 program has become an increasingly attractive pathway for individuals with investment capital to immigrate to the United States. Individual immigrant investor filings, submitted on Form I-526, *Immigrant Petition by Alien Entrepreneur*, increased 504 percent between FY 2008 and 2013.[126] Project developers and financiers across the United States are now working with EB-5 Regional Centers, as well as with state and municipal governments, to use EB-5 funds as one part of financing for large-scale commercial and public development projects. Form I-924, *Application For Regional Center Under the Immigrant Investor Pilot Program* filings have also increased over the same period. ***See Figure 12:*** *Form I-924, Application for Regional Center Under the Immigrant Investor Pilot Program.*

FIGURE 12: FORM I-924, APPLICATION FOR REGIONAL CENTER UNDER THE IMMIGRANT INVESTOR PILOT PROGRAM



Source: Information provided by USCIS (May 16, 2014).

**Form I-924 came into use on November 23, 2010.*

[122] Immigration Act of 1990 § 121(b)(5), Pub. L. No. 101–649; 8 U.S.C. § 1153(b)(5).

[123] INA § 203(b)(5)(A).

[124] INA § 203(b)(5)(B)(ii). Most foreign entrepreneurs invest in a "targeted employment area," defined as a rural or urban area that has experienced high unemployment (of at least 150 percent of the national average rate). Under 8 C.F.R. section 204.6(f), the amount of capital necessary to make a qualifying investment in a targeted employment area within the United States is $500,000.

[125] The Judiciary Appropriations Act of 1993 § 610, Pub. L. No. 102-395 (Oct. 6, 1992).

[126] Information provided by USCIS (Jan. 24, 2014).

Notwithstanding the increase in EB-5 program filings, USCIS has, from time-to-time, placed adjudication holds on Forms I-526, I-829, *Petition by Entrepreneur to Remove Conditions,* and I-924, as it worked to address novel legal issues.

On December 3, 2012, the USCIS Director announced that EB-5 adjudications would be transitioned from the CSC to a newly-established EB-5 adjudication unit in Washington, D.C. With this transition, USCIS organizationally realigned the EB-5 product line under the Field Operations Directorate, and designated this new unit as the Immigrant Investor Program Office (IPO). The IPO became operational on April 29, 2013. On May 30, 2013, USCIS issued a comprehensive EB-5 Policy Memorandum that addresses several longstanding stakeholder concerns, including when deference is afforded to prior adjudications.[127]

On December 12, 2013, the DHS Office of the Inspector General (OIG) issued a report titled *United States Citizenship and Immigration Services Employment Based Fifth Preference (EB-5) Regional Center Program.*[128] The OIG called on USCIS to:

- Update and clarify the EB-5 federal regulations to ensure program integrity, including increased oversight of regional centers;
- Establish formal memoranda of understandings with the Departments of Commerce and Labor and the Securities and Exchange Commission to provide expertise and assistance in the EB-5 program management and adjudications; and
- Conduct a comprehensive assessment of how EB-5 funds have effectively stimulated job growth.

In a response letter attached to the OIG report,[129] USCIS concurred with these recommendations, with the exception of the OIG's call on the agency to "quantify the impact of the EB-5 program on the U.S. economy." In rejecting this recommendation, USCIS stated that it is "not charged with conducting a broader assessment of the program's impact." Furthermore, USCIS "defended its policy of deferring to prior agency decisions involving the same investment project … [indicating] that an important element of consistency is that the agency must not upend settled and responsible business expectations by issuing contradictory decisions relating to the same investment projects," and that doing so "undermines program integrity, and is fundamentally unfair to … developers and investors [who] act in reliance on the approval." The Ombudsman concurs – deference is essential to consistency in EB-5 and other USCIS adjudications. It should be noted that the two recommendations in the December 2013 OIG report with which USCIS concurred were previously made by the Ombudsman in March 2009. USCIS indicated in its response to the OIG report that it intends to soon initiate formal rulemaking to replace the current framework of outdated and ambiguous EB-5 regulations.

[127] *See* USCIS Policy Memorandum, "EB-5 Adjudications Policy (PM-602-0083)" (May 30, 2014); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Approved%20as%20final%205-30-13).pdf (accessed May 13, 2014).

[128] *See* OIG Report, "United States Citizenship and Immigration Services' Employment-Based Fifth Preference (EB-5) Regional Center Program" (Dec. 12, 2013); http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-19_Dec13.pdf (accessed Mar. 31, 2014).

[129] *Id.*, pp. 21-33.

Ongoing Concerns

In January 2014, the Ombudsman held separate meetings with EB-5 stakeholders and USCIS IPO leadership. Stakeholders reported lengthy processing times in EB-5 product lines, and raised concerns regarding lack of information sharing and engagement between the agency and stakeholders. Stakeholders stated that USCIS adjudicators appeared to be implementing new guidance from the May 2013 EB-5 Policy Memorandum, including deference to prior adjudications involving the same regional center project. Ombudsman Odom communicated this feedback directly to responsible EB-5 program officials, including the new IPO Director.

Shortly after these meetings, on January 26, 2014, the IPO held a national teleconference. USCIS updated stakeholders on the transition of EB-5 adjudications from the CSC to the Washington, D.C.-based IPO, and noted that, due to the transition, processing times will likely temporarily increase throughout the remainder of FY 2014, as the IPO on-boards and trains approximately 100 new adjudicators, economists, and other staff. Adjudication of Form I-829 will remain in California for the remainder of 2014. Program leaders expressed determination that when the IPO is fully operational, USCIS will reduce processing times, and improve the predictability and consistency of EB-5 adjudications. Additionally, USCIS announced that it will redouble efforts to simultaneously enhance program integrity as it seeks to improve program efficiency.

Conclusion

The Ombudsman will continue to review RFEs in the high-skilled and H-2 programs and assess USCIS initiatives designed to improve the quality and consistency of adjudications. The Ombudsman anticipates continued USCIS and stakeholder engagements following the recent transition of the EB-5 unit from the CSC to Washington, D.C.

Humanitarian

USCIS humanitarian programs provide relief for immigrant victims of persecution, abuse, crime and trafficking. This Annual Report section discusses progress and challenges in USCIS processing of humanitarian immigration benefits, including lengthy processing times and unnecessary and unduly burdensome Requests for Evidence for certain victims. This section also includes a discussion of the seven-fold increase in credible fear claims – a product of a confluence of factors including regional violence and economic conditions in Mexico, El Salvador, Honduras, and Guatemala – resulting in lengthy affirmative asylum processing times.

DHS Initiatives for Victims of Abuse, Trafficking, and Other Crimes

DHS and USCIS initiatives support vital immigration protections for victims of trafficking and other violent crimes. During this reporting period, Ombudsman Odom became Chair of the Blue Campaign Steering Committee (Blue Campaign), DHS's interagency anti-trafficking initiative, and Acting Co-Chair of the DHS Council on Combating Violence Against Women. These leadership roles – working alongside USCIS, other DHS components, law enforcement, and community partners – helped advance the Department's commitment to increasing awareness of human trafficking and strengthening humanitarian programs and relief.

Background

Enacted in 1994, the Violence Against Women Act (VAWA) provides important immigration protections for victims of trafficking and other violent crimes.[130] VAWA immigration benefits include: 1) a self-petition process for victims of domestic violence to independently request Lawful Permanent Residence on their own behalf and eliminate the need for victims to rely on abusers in order to obtain Permanent Residence; 2) T nonimmigrant status for victims of human trafficking; and 3) U nonimmigrant status for victims of certain specified crimes.[131] DHS components, including USCIS, have implemented these provisions.

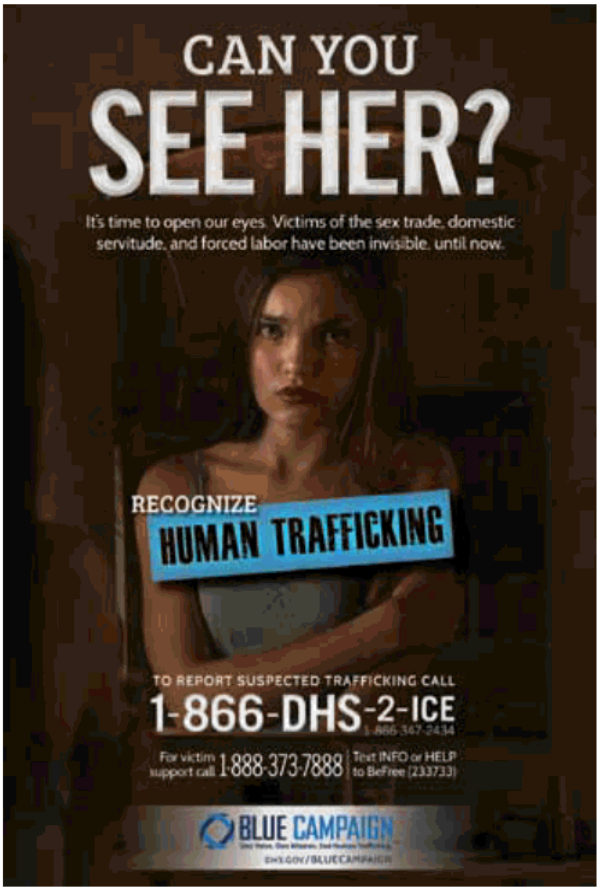
[130] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322; *see also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, and Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193.

[131] *Id.*

On March 7, 2013, the President signed into law the Violence Against Women Reauthorization Act of 2013.[132] This legislation includes reauthorization of the William Wilberforce Trafficking Victims' Protection Reauthorization Act of 2008,[133] which reasserts the U.S. Government's leadership role in the fight against modern-day slavery.[134]

DHS Blue Campaign. The Blue Campaign, launched in 2010 and formally chartered in August 2013, is the unified voice for DHS's nationwide efforts to combat human trafficking. Through interagency coordination, the Blue Campaign collaborates with law enforcement, first responders, prosecutors, government, non-governmental, faith-based, and private organizations to conduct training and outreach that expands awareness of human trafficking and helps to identify and protect victims and prosecute traffickers. Since its inception, the Ombudsman has contributed to the Blue Campaign by providing subject matter expertise and hosting stakeholder engagements. As Chair of the Blue Campaign, Ombudsman Odom works with DHS components across their various missions to prevent human trafficking, protect trafficking victims, investigate and assist in the prosecution of traffickers, and provide publicly available resources to the anti-trafficking community.

Under Ombudsman Odom's leadership, DHS completed with U.S. Departments of Justice (DOJ) and Health and Human Services (HHS) the development and release in January 2014 of the *Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States*, which coordinates the anti-human trafficking efforts of 19 federal agencies.[135] This five-year plan outlines four goals, eight objectives and more than 250 action items across agencies for services. The plan provides a roadmap for aligning federal efforts to aid victims, increase understanding among federal and non-federal entities who work to support victims, expand victims' access to services, and improve outcomes for survivors of human trafficking. The Blue Campaign has continued under Ombudsman Odom's leadership to establish partnerships outside the federal government, such as reaching an agreement with Western Union at the end of 2013 that provides training to hundreds of Western Union employees on human trafficking and how to report it. This agreement also extends the reach of Blue Campaign public awareness materials to Western Union facilities nationwide.



The Ombudsman provides case assistance to individuals seeking to resolve problems with applications and petitions for immigration relief, including immigrant victims of trafficking. The Ombudsman also 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.

As a part of the Blue Campaign, USCIS participated in training sessions for law enforcement agencies on protections for immigrant victims. USCIS also collaborated with U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations Victim Assistance program and Law Enforcement Parole Unit to train state and local police, and non-governmental and community-based organizations on indicators of human trafficking and

[132] 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 (Jan. 5, 2006); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 (Oct. 28, 2000); Violence Against Women Act of 2000; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (Sept. 13, 1994).

[133] William Wilberforce Trafficking Victims' Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457 (Dec. 9, 2008).

[134] *Id.* at § 235(d)(8).

[135] The President's Interagency Taskforce to Monitor and Combat Trafficking in Persons, "Coordination, Collaboration, Capacity, Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States, 2013-2017". (Jan. 2014); http://www.ovc.gov/pubs/FederalHumanTrafficking-StrategicPlan.pdf (accessed Apr. 28, 2014).

protections for immigrant victims.[136] In addition, through its Vermont Service Center (VSC) VAWA Unit, USCIS hosted quarterly public outreach events.

DHS Council on Combating Violence Against Women. In 2010, DHS created a working group to examine ways in which the Department could support the work of the Immigration Subcommittee of the White House Council on Women and Girls.[137] This working group met on a quarterly basis from fall 2010 to spring 2012, to coordinate and develop projects to support protections for immigrant women and children. Through the coordinated efforts of the working group, DHS provided training to personnel on protections for immigrant victims and section 1367 of VAWA (VAWA Confidentiality). The group organized regular public outreach to state and local immigration professionals and legal and domestic violence service providers to receive feedback about DHS-related issues impacting victims, and it published the *U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement.*[138] The group also established working relationships with HHS, DOJ, the U.S. Department of State, and various state, local, and tribal government agencies.

In an effort to formalize its work, DHS created the Council on Combating Violence Against Women (Council) in March 2013. The Council provides a forum to bring together experts from across DHS to identify and build consensus around the best approaches for combaing violence against women. The Council also identified initiatives that support combating violence against women already implemented across the Department for inclusion in a public resource guide.

Ombudsman Odom, who has been Acting Co-Chair of the Council since September 2013, plays a key role in coordinating stakeholder engagements and identifying areas for improvement of DHS's services and protections for victims. Additionally, the Council coordinates quarterly public webinars and teleconferences for DHS stakeholders including law enforcement, first responders, legal service providers, victim advocates, and others. On December 19, 2013 and January 28, 2014, the Council and ICE co-hosted a webinar on ICE's efforts to aid vulnerable populations. These efforts include the use of prosecutorial discretion on detention determinations through its Risk Classification Assessment Tool, stays of removal orders for U nonimmigrant status petitioners, and the agency's sexual abuse and assault prevention intervention efforts to reduce sexual assault of detained immigrants, among other initiatives.

USCIS Processing of Immigration Benefits for Victims of Domestic Violence, Trafficking, Sexual Assault, and Other Violent Crimes

Responsible USCIS Office:
Service Center Operations Directorate

USCIS continues to devote significant resources to outreach, training, and adjudication for immigration benefits for victims. The agency recognizes the need to meet processing time goals. As USCIS trains new adjudicators in the VAWA Unit, the Ombudsman will continue to monitor the quality of Requests for Evidence (RFEs) and overall processing of humanitarian programs.

Background

In 2000, USCIS established the VAWA Unit at the VSC to promote consistency in adjudications.[139] In May 2013, processing times were five months for T nonimmigrant status applications; 15 months for U nonimmigrant status petitions; and up to 19 months for VAWA self-petitions.[140] To address these lengthy processing times, USCIS added 30 staff to its VAWA Unit. In March 2014, processing times had reduced to about eight months for U nonimmigrant status petitions (or pre-approvals when the U visa cap has been reached) and five months for VAWA self-petitions, but were slightly longer for T nonimmigrant status applications, at six months.[141] At a December 6, 2013 stakeholder

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

[137] Immigration Subcommittee of the White House Council on Women and Girls Webpage, "Council on Women and Girls;" http://www.whitehouse.gov/administration/eop/cwg (accessed Apr. 9, 2014).

[138] DHS "U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement;" http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf (accessed May 9, 2014). This guide provides law enforcement agencies with information on the process to certify that a U nonimmigrant status petitioner has been the victim of a crime. It contains instructions on how to complete required forms and provides answers to frequently asked questions.

[139] "Report on the Operations of the Violence Against Women Act Unit at the USCIS Vermont Service Center, Report to Congress" (Oct. 22, 2010), P. 3; http://www.uscis.gov/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/vawa-vermont-service-center.pdf (accessed Apr. 29, 2014).

[140] *See* Ombudsman Annual Report 2013 (Jun. 2013), p. 11; http://www.dhs.gov/sites/default/files/publications/cisomb_2013_annual_report%20508%20final_1.pdf (accessed May 16, 2014).

[141] *Id.*

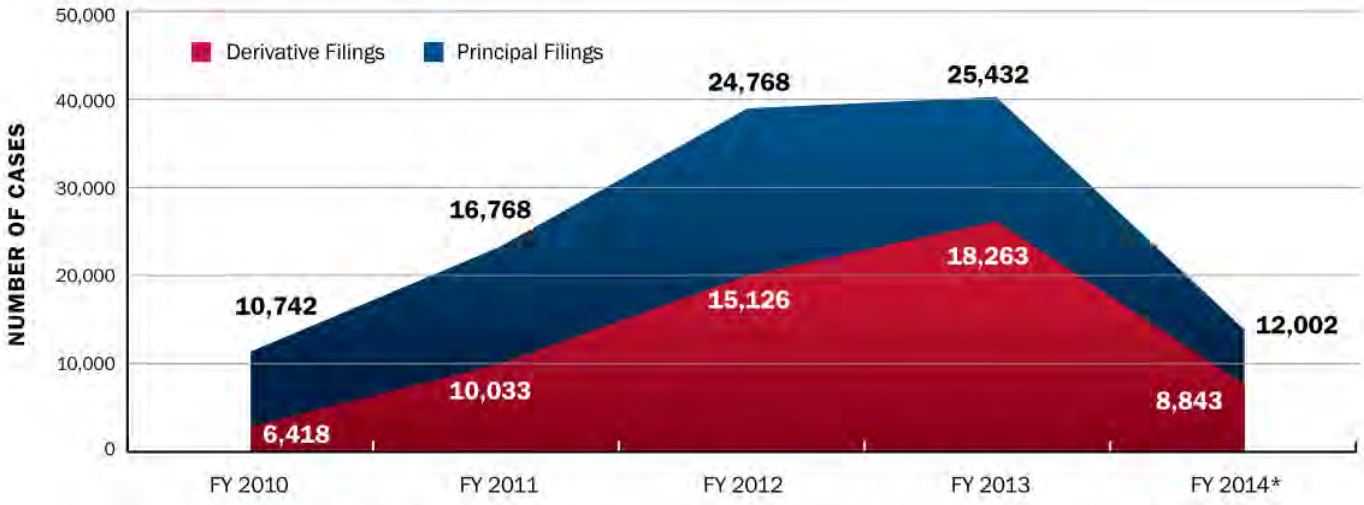
meeting, then-USCIS Director Alejandro Mayorkas stated his commitment to 180-day processing times at the VAWA Unit and not diverting resources to other immigration benefits. In a February 10, 2014 speech at a Blue Campaign stakeholder event, DHS Deputy Secretary Mayorkas committed to continuing to address processing times for these benefit categories.[142]

Each year, 10,000 U visas are available for victims of certain specified crimes, including domestic violence, sexual assault, and human trafficking, who aid law enforcement in the investigation and/or prosecution of those crimes.[143] In Fiscal Year (FY) 2014, for the fifth straight year, USCIS approved the statutory allotment of 10,000 petitions for U nonimmigrant status. ***See Figure 13:*** *U Petition Filings.* USCIS reached the limit earlier than in previous years, on December 11, 2013.[144] USCIS will continue to process U nonimmigrant status petitions for the remainder of the fiscal year, placing approvable cases on a waiting list, and providing petitioners interim employment benefits and deferred status until FY 2015 numbers become available on October 1, 2014.[145]

Over the past year USCIS has continued its extensive efforts to engage with the public, particularly emphasizing training for federal, state, and local law enforcement, to increase awareness of and access to the T and U visa programs. Between April 1, 2013 and March 31, 2014, USCIS conducted 24 outreach engagements regarding VAWA, U, and T nonimmigrant status petitions/applications.[146] Engagements ranged from in-person and webinar trainings to panel participation during conferences.[147]

USCIS training included VAWA Confidentiality, which provides protections to prevent abusive partners from using government resources to further perpetuate abuse. In particular, VAWA Confidentiality provides protections against governmental disclosure of certain information regarding a victim; prohibits the government from relying on information provided by the abuser, perpetrator, or the abuser's family members in a case against or for the benefit of the victim; and prohibits enforcement actions at protected locations (e.g., shelters, courthouses, rape crisis centers). Breaches of VAWA Confidentiality can lead to disciplinary action and/or a personal fine against a federal employee who discloses protected information. With the support of the Ombudsman, DHS created and launched in 2012 an online training program on immigration remedies for battered immigrants and VAWA Confidentiality requirements, and in 2013 released new policy guidance to ensure compliance with section 1367 of VAWA.

FIGURE 13: U PETITION FILINGS



Source: Information provided by USCIS (Apr. 28, 2014).

**FY 2014 includes data through April 14, 2014.*

[142] Ombudsman notes from Blue Campaign Stakeholder event (Feb. 10, 2014).

[143] Victims of Trafficking and Violence Protection Act of 2000 § 1513(c)(2)(A), P.L. 106-386. *See also* 8 C.F.R. § 214.14(d)(1).

[144] USCIS Webpage, "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. 21, 2014).

[145] 8 C.F.R. § 214.14(d)(2).

[146] *Supra* note 136.

[147] *Id.*

Ongoing Concerns

Processing Times. This year USCIS made improvements in processing times for VAWA self-petitioners and T nonimmigrant status applicants. Both are now being adjudicated within six months. Considerable progress also has been made on processing times for U nonimmigrant status applications. Currently, they are being adjudicated within eight months. The VAWA Unit will need to be adequately resourced to ensure that USCIS meets its processing time goal of six months. In addition, stakeholders have expressed confusion regarding how processing times are reported publicly for U nonimmigrant status petitions. On the USCIS website it states that petitions filed on or before February 11, 2013 are being processed. However, it is the Ombudsman's understanding that the date on the website reflects 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, which is currently approximately eight months.

Requests for Evidence. Stakeholders continue to raise concerns about RFEs in the adjudication of U nonimmigrant status petitions, VAWA self-petitions, and conditional residence waivers due to battery or extreme cruelty. Specifically for these types of petitions, USCIS must consider "any credible evidence" submitted.[148] This evidentiary requirement recognizes that abusers often deny victims access to important documents in a deliberate attempt to stop victims from seeking assistance. To ensure victims are afforded full protection under the law, USCIS adjudicators are directed to "give due consideration to the difficulties some self-petitioners may experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser's knowledge or consent."[149]

VAWA self-petitioners and their legal representatives report receiving RFEs requesting the type of documentation used to prove a good faith marriage in non-VAWA family-based cases (e.g., original marriage certificates, original joint bank account statements, etc.). Such RFEs seek evidence of a nature and type that is *not* required under the relevant regulations – thereby holding VAWA self-petitioners to a higher standard of proof than is actually required by applicable law and guidance. These RFEs, which can affect the quality of adjudication, add additional processing time to already delayed adjudications and may require additional attention from legal service providers, diminishing their capacity to assist victims.

For U nonimmigrant status petitions, stakeholders report an increase in RFEs that appear burdensome and unnecessary and other adjudication issues. For example, the Ombudsman recently assisted an individual whose petition was denied because, according to USCIS, the petitioner did not show the certifying official was the appropriate certifier. The individual had provided USCIS with evidence in the initial petition regarding the authority of the certifying official, who previously had signed certifications in other U nonimmigrant status petition cases that had been approved. Upon review of the Ombudsman's request, USCIS reopened and approved the case. In other RFEs, there were issues caused by the difference between the crime prosecuted and the qualifying crime listed on the U nonimmigrant status petition. For example, victims of trafficking may possess a signed law enforcement certification from the U.S. Department of Labor for involuntary servitude or peonage, which are qualifying U visa crimes,[150] but the alleged trafficker is prosecuted for another crime. RFEs and denials have been based on a misunderstanding or misapplication of this distinction.

It is time-consuming for petitioners and their representatives, often nonprofit agencies with limited resources, to respond to unnecessary RFEs. The Ombudsman has raised these concerns with USCIS, and understands that the VSC provides extensive training to its adjudicators on the requirements of the benefit types, as well as the dynamics of domestic violence and victimization.

VAWA Adjustment of Status. During the past year, there were delays in the scheduling of adjustment of status interviews for VAWA self-petitioners, specifically between the time the VAWA Unit approved the self-petition and the time it took to transfer the case to the National Benefits Center (NBC) for processing and scheduling of an interview at a USCIS local office. The VSC is currently transferring approved Forms I-360, *Petition for Amerasian, Widow(er), or Special Immigrant* with accompanying Forms I-485, *Application to Register Permanent Residence or Adjust Status* to the NBC within seven days of the final VSC adjudication action.[151] The delay in scheduling for some VAWA self-petitioners has been six months or more. The NBC is working to eliminate delays in its process, with a processing goal of ten days.[152]

[148] Victims of Trafficking and Violence Protection Act of 2000 §§ 1504(a)(2)(D), 1505(b)(7)(B), and 1513(o)(4), P.L. 106-386. *See also* Violent Crime Control and Law Enforcement Act of 1994 § 40701(a)(3)(H), P.L. 103-322.

[149] Immigration and Naturalization Service Policy Memorandum, "Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents" (Apr. 16, 1996).

[150] 8 C.F.R. § 214.14(b)(1).

[151] *Supra* note 136.

[152] *Id.*

VAWA Employment Authorization for Nonimmigrants Victims. Section 106 of the Immigration and Nationality Act (INA), enacted on January 5, 2006 in the Violence Against Women and Department of Justice Reauthorization Act of 2005,[153] provides employment authorization for battered spouses of certain nonimmigrants.[154] USCIS has not implemented this provision. On December 12, 2012, USCIS published 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,* which provides guidance on employment authorization eligibility for battered spouses of certain A, E, G, and H nonimmigrants. However, this draft policy has not been finalized. The Ombudsman continues to receive case assistance requests from potentially eligible applicants who are victims of abuse. In one recent request submitted to the Ombudsman, an abused spouse of an H-1B visa holder attempted to seek work authorization. USCIS denied her application and informed her that the agency is not currently approving such applications. Eligible victims of domestic violence may not be able to escape abuse because of the delay in implementation of INA section 106.

Increases in Credible and Reasonable Fear Requests and the Effect on Affirmative Asylum Processing

Responsible USCIS Office:
Refugee, Asylum, and International Operations Directorate

Within the past three years, there has been a significant increase in the number of foreign nationals, many of them recent arrivals at the U.S. southern border, expressing fear of returning to their home countries and triggering credible and reasonable fear interview referrals to USCIS from U.S. Customs and Border Protection (CBP) and ICE. USCIS shifted resources, made new hires, and updated agency training to address the rising number of credible and reasonable fear claims. Despite these efforts, delays have developed for affirmative asylum processing.

Background

Credible Fear. Expedited removal is the legal process under which a non-U.S. citizen is denied entry to and removed from the United States after seeking admission at a port of entry. Enacted in 1996, expedited removal applies to individuals at ports of entry ("arriving aliens") who have been found inadmissible to the United States by a CBP officer for any of the following reasons: 1) fraud or misrepresentation; 2) falsely claiming U.S. citizenship; 3) not possessing a valid, unexpired immigrant visa or other suitable entry document; 4) not possessing a passport valid for a minimum of six months from the date of expiration of the initial period of stay; or 5) not possessing a valid nonimmigrant visa or border crossing card at the time of application for admission.[155] The expedited removal process is also used to remove individuals unlawfully arriving in the United States by sea or those apprehended within 100 miles of a U.S. land border, who have not been admitted or paroled, and are unable to establish continuous physical presence in the United States for the two-year period immediately prior to the date of apprehension.[156]

A foreign national subject to expedited removal may be removed from the United States without a hearing before an immigration judge, unless that individual indicates an intention to apply for asylum or a fear of persecution, (i.e., a "credible fear").[157] If the individual expresses fear of persecution to either a CBP or ICE officer, the officer must make a referral for a credible fear interview by a USCIS Asylum Officer.[158]

Once a referral has been made, a USCIS Asylum Officer will conduct a credible fear interview, while the individual is detained,[159] to determine whether there is a "significant possibility … that the alien could establish eligibility for asylum."[160] If the foreign national is found to have a credible

[153] Violence Against Women and Department of Justice Reauthorization Act of 2005 § 844, Pub. Law No. 109-162. *See also* Immigration and Nationality Act (INA) § 106.

[154] 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.immigrantjustice.org/sites/immigrantjustice.org/files/Draft+Memo+-+Eligibility+for+Employment+Authorization+upon+Approval+of+a+VAWA+Self-Petition-December%202012.pdf (accessed May 14, 2014).

[155] Illegal Immigration Reform & Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101, Pub. Law No. 104 – 208, 110 Stat. 3009 (1996)–546, codified at 8 U.S.C. § 1101. INA § 235(b)(1)(A) and 8 C.F.R. § 235.3.

[156] INA § 235(b)(1)(A)(iii).

[157] INA § 235(b)(1)(A)(ii). CBP may choose to use normal removal proceedings under INA § 240 even when expedited removal procedures could otherwise be used. *See Matter of E-R-M & L-R-M*, 25 I&N Dec. 520 (BIA 2011).

[158] 8 C.F.R. §§ 208.30 (a) and 208.30 (c).

[159] INA § 235(b)(1)(B)(iii)(IV).

[160] INA § 235(b)(1)(B)(v); *see also* USCIS Policy Memorandum, "Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations" (Feb. 28, 2014). Link not available at this time.

fear of return to the home country, the individual will be referred to the Executive Office for Immigration Review (EOIR) for a hearing before an immigration judge.[161] USCIS referred 30,393 individuals to EOIR in FY 2013 and 16,467 individuals in the first half of FY 2014.[162] If the USCIS Asylum Officer issues a negative decision in a credible fear interview, the decision can be appealed to an immigration judge.[163] If the individual does not appeal the credible fear determination, he or she will be removed from the United States using the expedited removal procedure.[164]

Reasonable Fear. USCIS Asylum Officers are required to make reasonable fear determinations in two categories of cases referred by other DHS officers after a final order of removal has been issued or reinstated. In these cases, the individual is ordinarily removed without being placed in removal proceedings before an immigration judge.[165] The first category involves individuals who illegally re-entered the United States after having been ordered removed or individuals who voluntarily departed the United States while under an order of exclusion, deportation, or removal.[166] The second category involves foreign nationals who do not hold Legal Permanent Residence, were convicted of one or more aggravated felonies and are subject to administrative removal from the United States.[167]

Individuals in both categories are prohibited from challenging removability before an immigration judge or from seeking any form of relief from removal.[168] However, a person may not be removed from the United States if the individual is "more likely than not" to be persecuted or tortured in the country to which the individual would be returned upon the execution of a removal order.[169] Accordingly, if a foreign national subject to administrative removal is able to establish a "reasonable possibility" of future persecution, the person will be granted an opportunity to appear before an immigration judge and request withholding of removal or deferral of removal.[170]

In order to assess whether an individual facing administrative removal from the United States has a reasonable fear of persecution or torture, USCIS conducts a reasonable fear interview. Although USCIS states on its website that this interview will be conducted 10 days after ICE refers the case to the Asylum Office, due to the high volume of requests, USCIS currently strives to complete the reasonable fear process within 90 days of receiving a referral from ICE.[171] As of April 6, 2014, the average time to complete an interview at a USCIS Asylum Office is 4.2 days for a credible fear interview and 45.5 days for a reasonable fear interview.[172] When a USCIS Asylum Officer determines that a foreign national has a reasonable fear of persecution or torture, the officer refers the foreign national to Immigration Court for a withholding/deferral of removal hearing.[173] If the USCIS Asylum Officer determines that the foreign national does not have a reasonable fear of persecution or torture, the individual can request that an immigration judge review the negative reasonable fear finding.[174] If the individual does not appeal the USCIS Asylum Officer's negative reasonable fear finding, ICE will remove him or her from the United States.[175]

Increase in Credible and Reasonable Fear Claims. Between 2000 and 2009, USCIS received approximately 5,000 credible fear interview requests each year.[176] In 2009, the number of credible fear interview requests increased to 8,000.[177] In 2012, the number rose to 13,000, and in 2013, it tripled to 36,000.[178] Similarly, requests for reasonable fear interviews have also increased.[179] For many years USCIS received only a few hundred reasonable

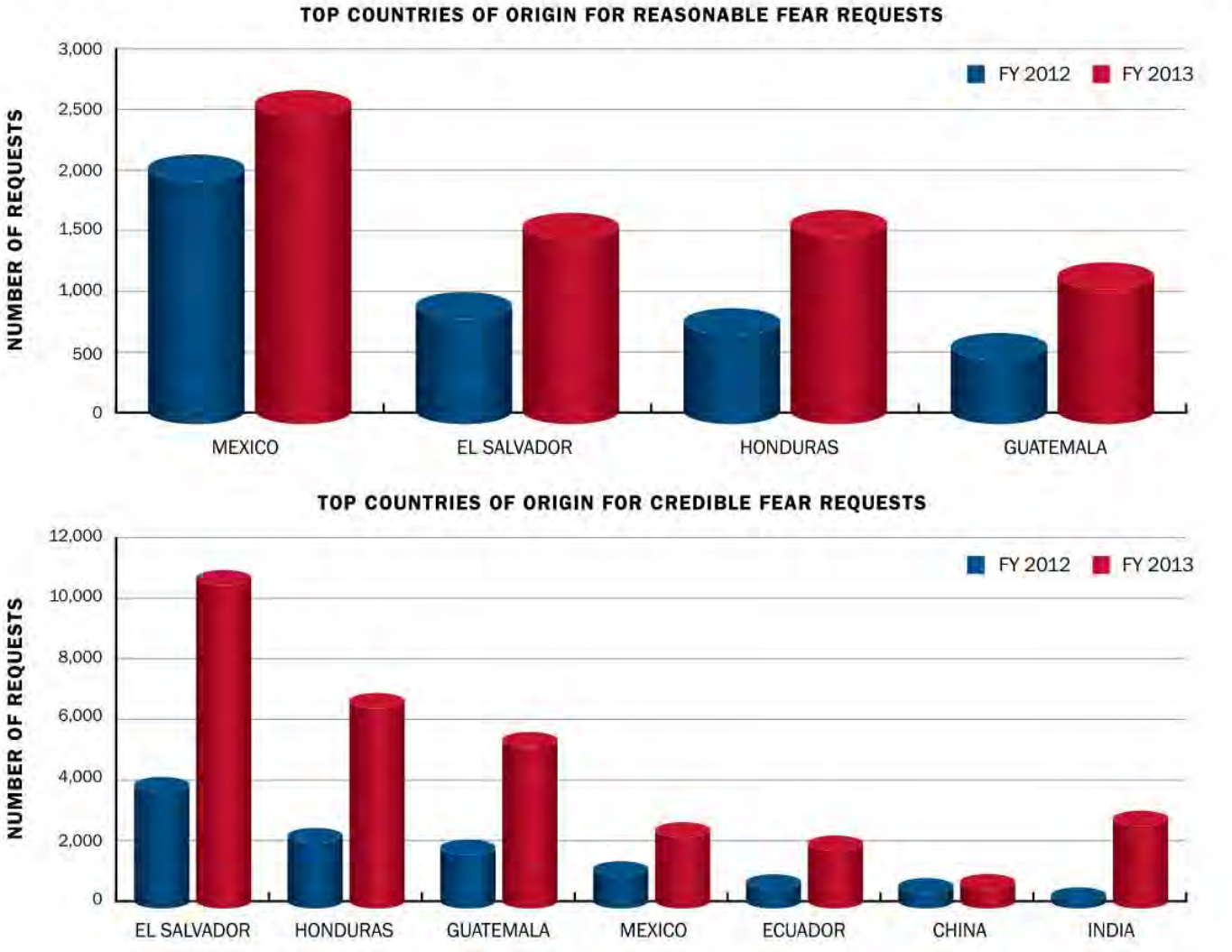
[161] INA § 235(b)(1)(B)(ii).
[162] *Supra* note 136.
[163] INA § 235(b)(1)(B)(iii)(III).
[164] INA § 235(b)(1)(B)(iii)(I).
[165] 8 C.F.R. § 208.31.
[166] INA § 241(a)(5).
[167] INA § 237(a)(2)(A)(iii).
[168] INA §§ 238(b) and (c), and 242(a)(2)(C) and 8 C.F.R. § 238.
[169] 8 C.F.R. § 208.16(c)(3).
[170] 8 C.F.R. §§ 208.31(e) and 208.16.
[171] USCIS Webpage, "Questions & Answers: Reasonable Fear Screenings" (Jun. 18, 2013); http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings (accessed Apr. 25, 2014). *See supra* note 135.
[172] Information provided by USCIS (Apr. 28, 2014).
[173] 8 C.F.R. §§ 208.31(e) and 208.16; *see* USCIS Webpage, "Questions & Answers: Reasonable Fear Screenings" (Jun. 18, 2013); http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings (accessed Apr. 25, 2014).
[174] 8 C.F.R. § 208.31(g).
[175] USCIS Webpage, "Questions & Answers: Reasonable Fear Screenings" (Jun. 18, 2013); http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings (accessed Apr. 25, 2014).
[176] Information provided by USCIS (Oct. 24, 2013).
[177] *Id.*

fear interview requests each year. In 2013, USCIS received 7,000 reasonable fear interview requests from ICE.[180] A total of 4,156 reasonable fear cases were referred to USCIS in the first five months of FY 2014.[181] ***See Figure 14:*** *Top Countries of Origin for Credible and Reasonable Fear Interview Requests.*

USCIS has prioritized credible and reasonable fear interviews over affirmative asylum hearings because applicants for the former are detained. In addition, USCIS prioritizes credible fear interviews over reasonable fear interviews. Due to limited resources and the recent rise in the number of requests for credible fear interviews, USCIS is now conducting reasonable fear interviews within 90 days and on average 45 days.[182] Nonetheless, stakeholders have reported that some individuals waited up to three months to be interviewed by a USCIS Asylum Officer and then waited an additional three months, all while detained, to receive a reasonable fear determination.[183]

USCIS endeavors to conduct credible fear interviews within 14 days of receiving a referral from CBP or ICE and reduced the credible fear interview timeframe in 2013.[184] At the beginning of FY 2013, 85 percent of individuals requesting

FIGURE 14: TOP COUNTRIES OF ORIGIN FOR CREDIBLE AND REASONABLE FEAR INTERVIEW REQUESTS



Source: Information provided by USCIS (Apr. 28, 2014).

[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *See* USCIS Asylum Division Quarterly Stakeholder Meeting Notes (Jul. 31, 2013), p.5; *see also* 8 C.F.R. § 208.7(a).
[182] *Supra* note 136.
[183] *Supra* note 176.

credible fear interviews were processed within 14 days of referral from ICE or CBP. A year later, by October 2013, USCIS was processing credible fear interviews within eight days.[185] To further streamline the credible fear interviews, USCIS began conducting telephonic credible fear interviews.[186] In FY 2013, 60 percent of credible fear interviews were conducted telephonically, and more than 68 percent of cases were conducted telephonically through the second quarter of FY 2014.[187]

USCIS revised its credible fear training, which was released to USCIS Asylum Officers in February 2014. The revised training emphasizes the requirement that the applicant demonstrate a "significant possibility"[188] of eligibility for asylum, withholding or removal, or deferral of removal rather than a "mere possibility."[189]

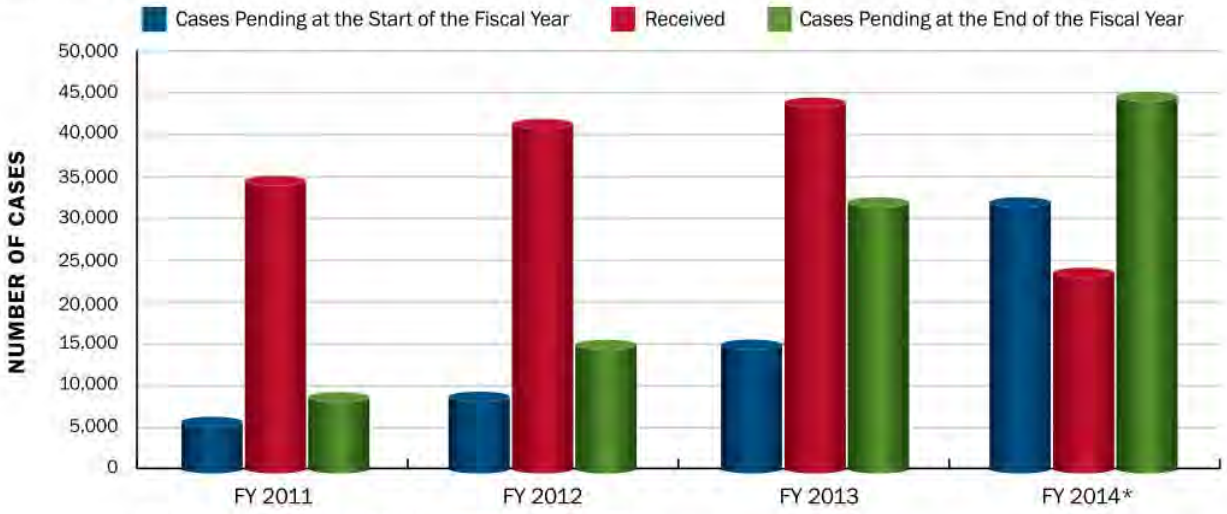
Ongoing Concerns

The Ombudsman continues to monitor steps taken by USCIS to streamline its credible and reasonable fear interview process and reduce backlogs while maintaining the integrity and protections afforded by U.S. asylum laws. The Ombudsman supports USCIS in its effort to increase staffing and eliminate backlogs.

Delays in Credible and Reasonable Fear Interviews. Many stakeholders have expressed concern regarding the delays in credible and reasonable fear interviews and communications between USCIS, CBP and ICE. USCIS's goal is to conduct reasonable fear interviews within 90 days of referral from ICE or CBP, and credible fear interviews within 14 days.[190] An individual may be detained by ICE for a significant period of time before and after making a request for a reasonable fear interview. Even with the increase in applications and lag in corresponding agency staffing levels, USCIS has stated its commitment to meet its policy and regulatory requirements.[191] The USCIS Refugee Asylum and International Operations Directorate is working to address these challenges through better coordination with ICE, for example, by accommodating credible fear interviews of detainees at certain USCIS Asylum Offices, rather than at DHS detention facilities.

Use of Telephonic Interviews. Since instituting telephonic interview processing in January 2013, remote USCIS Asylum Officers conducted more than 13,000 credible fear interviews.[192] Stakeholders stated concerns that the increased use of telephonic interviews limits the USCIS Asylum Officer's ability to evaluate credibility and appreciate

FIGURE 15: ASYLUM APPLICATION FILINGS



Source: Information provided by USCIS (Apr. 28, 2014).

**FY 2014 includes data through March 31, 2014.*

[184] *See supra* note 181; *see also* 8 C.F.R. § 208.7(a).

[185] *Supra* note 176.

[186] USCIS Asylum Division Quarterly Stakeholder Meeting (Mar. 19, 2013).

[187] *Supra* note 136.

[188] INA § 235(b)(1)(B)(v).

[189] USCIS Policy Memorandum, "Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations" (Feb. 28, 2014). Link not available at this time.

[190] Information provided by USCIS (May 8, 2014).

[191] *Supra* note 176.

[192] *Supra* note 136.

nuances in the foreign national's statements.[193] Specifically, they are concerned that, where an individual is referred for proceedings before an immigration judge, the Court will give undue weight to the summary of facts prepared by the USCIS Asylum Officer during the credible fear interview process, and fail to pay proper attention to the full statement made by the foreign national in applications for relief from removal.[194]

Impact on Affirmative Asylum. While USCIS continues to see an increase in requests for credible and reasonable fear interviews, the agency also faces an increase in receipts of affirmative asylum applications.[195] USCIS has prioritized requests by detainees and allocated its resources to those areas. Remaining resources are used to address affirmative asylum and Nicaraguan Adjustment and Central American Relief Act applications.[196] However, the result is that affirmative asylum application backlogs have arisen. As of April 23, 2014, USCIS faced a backlog of 45,193 cases.[197] The largest affirmative asylum application backlog is at the Los Angeles Asylum Office.[198] ***See Figure 15:*** *Asylum Application Filings.*

As the delay in affirmative asylum application adjudication grows, many asylum applicants are faced with difficulties in the United States such as employment and resettlement, while their families abroad continues to face adversity.

Applicants for asylum are not permitted to apply to bring their family to the United States unless and until their own asylum applications are approved and they are granted asylee status.[199] In the past year, the Ombudsman experienced a rise in the number of case assistance requests regarding delayed asylum application interviews and adjudication.

Case Example

An asylum applicant moved while he was waiting for his interview to be scheduled. His change of address request to USCIS and the interview notice crossed paths in the mail, causing him to miss his interview. The change of address was confirmed and his file was transferred to the new location. Having waited more than 180 days, he believed he was eligible for employment authorization, but was informed after applying that since he missed his interview, the asylum clock had stopped and he was considered ineligible. Rather than placing his file in queue for a rescheduled affirmative asylum interview, his file was placed in the new asylum office's backlog of new cases. For over a year he was unable to obtain work authorization. In response to the Ombudsman's inquiry, the USCIS Headquarters Refugee, Asylum, and International Operations Directorate agreed to expeditiously reschedule the interview.

New Funding and Hires. To meet the growing number of requests for credible and reasonable fear interviews, as well as affirmative asylum applications, USCIS requested additional funding, which Congress approved in August of 2013.[200] The USCIS Asylum Division received permission to increase its number of officers by 100, from 273 to 373 positions.[201] As of April 16, 2014, USCIS had 322 Asylum Officers on board, 15 additional candidates scheduled to enter on duty into USCIS Asylum Officer positions between April and July, and approximately 25 candidates selected to fill vacant Asylum Officer positions who are undergoing security screening prior to entering on duty.[202] In addition, USCIS has detailed 35 officers from other branches of USCIS to various Asylum Offices to conduct interviews.[203] The Ombudsman notes that additional adjudicative resources may be necessary to address the affirmative asylum backlog.

[193] *Id.*

[194] *Id.*

[195] *Supra* note 186.

[196] Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, Tit. II, Div. A (Nov. 19, 1997), as amended by Pub. L. No. 105-139, 111 Stat. 2644 (Dec. 2, 1997).

[197] USCIS Asylum Division Quarterly Stakeholder Meeting (Apr. 23, 2014).

[198] *Supra* note 136.

[199] 8 C.F.R. § 208.21(d).

[200] *Supra* note 197.

[201] *Supra* note 136.

[202] *Id.*

[203] *Supra* note 197.

Humanitarian Reinstatement and Immigration and Nationality Act Section 204(l) Reinstatement

Responsible USCIS Office:
Service Center Operations Directorate

Humanitarian reinstatement is a regulatory process under 8 C.F.R. section 205.1(a)(3)(i)(C) in which family-based beneficiaries whose approved petitions are revoked automatically upon the death of the petitioner may continue to seek immigration benefits if certain factors are established. There is also a streamlined reinstatement process, covered under INA section 204(l), for certain surviving relatives who are in the United States and had an approved petition at the time of the qualifying relative's death.[204] The 204(l) reinstatement applicant need not establish the multiple humanitarian factors required in traditional humanitarian reinstatement. Gaps in guidance, lack of uniform procedures, and imprecise evidentiary requirements from USCIS in the handling of humanitarian and INA section 204(l) reinstatement cases are inconsistent with the remedial and humanitarian nature of this relief.

Background

Humanitarian Reinstatement under the Regulations. USCIS regulations provide that certain family-based petitions are revoked automatically upon the death of a petitioner, and surviving beneficiaries may request that the petition be reinstated on humanitarian grounds.[205] This process, referred to as "humanitarian reinstatement," is a form of discretionary relief available to the principal beneficiary of a Form I-130, *Petition for Alien Relative* that was approved prior to the death of the petitioner.[206]

The requirements for discretionary requests for humanitarian reinstatement are outlined in regulations and administrative guidance.[207] Reinstatement is the only possible relief for surviving beneficiaries who cannot meet the requirements of INA section 204(l) or who are not widow/widowers of U.S. citizens. An affidavit of support from a substitute sponsor must accompany the request.[208]

The USCIS Adjudicator's Field Manual (AFM) lists the criteria considered in assessing whether discretion should be exercised favorably in response to a humanitarian reinstatement request: 1) the impact of revocations on the family unit in the United States, especially on U.S. citizen or Legal Permanent Resident relatives or other relatives living lawfully in the United States; 2) the beneficiary's advanced age or poor health; 3) the beneficiary having resided in the United States lawfully for a lengthy period; 4) the beneficiary's ties to his or her home country; and 5) significant delay in processing the case after approval of the petition and after a visa number has become available, if the delay is reasonably attributable to the government rather than the individual.[209] The AFM also states, "[A]lthough family ties in the United States are a major consideration, there is no strict requirement for the alien beneficiary to show extreme hardship to the alien, or to relatives already living lawfully in the United States, in order for the approval to be reinstated."[210] The AFM further provides that decisions on humanitarian reinstatement should be communicated in writing to the beneficiary, that there is no appeal, and that humanitarian reinstatement "may be appropriate when revocation is not consistent with the furtherance of justice, especially in light of the goal of family unity that is the underlying premise of our nation's immigration system."[211]

Before INA section 204(l), only widows and widowers of U.S. citizens could seek Legal Permanent Resident status after the death of a qualifying relative. Other eligible survivors were required to seek humanitarian reinstatement under 8 C.F.R. section 205.1(a)(3)(iii)(C)(2).

Reinstatement under INA Section 204(l). INA section 204(l) protects:

- Beneficiaries of a pending or approved immediate relative visa petition;
- Beneficiaries of a pending or approved family-based visa petition, including both the principal beneficiary and any derivative beneficiaries;
- Any derivative beneficiary of a pending or approved employment-based visa petition;
- Beneficiaries of a pending or approved refugee/asylee relative petition;

[204] *See* Ombudsman Recommendation, "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. 23, 2014).

[205] 8 C.F.R. § 205.1(a)(3)(i)(C).

[206] *See* USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed Apr. 1, 2014).

[207] 8 C.F.R. § 205.1(a)(3)(i)(C) and USCIS Adjudicator's Field Manual (AFM) Ch. 21.2(h)(1)(C).

[208] INA §§ 213(f)(5)(B), 212(a)(4)(C) and 8 C.F.R. § 213a.2(a)(2)(ii).

[209] AFM Ch. 21.2(h)(1) (C) (2013) and USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed May 13, 2014).

[210] *Id.*

[211] *Id.*

- Individuals admitted as derivative "T" or "U" nonimmigrants; and
- Derivative asylees.

In December 2012, USCIS issued guidance for reinstatement for those persons with approved petitions at the time of the qualifying relative's death seeking relief under INA section 204(l).[212] Survivors seeking coverage under INA section 204(l) are subject to a discretionary evaluation, but a showing of the factors needed for traditional humanitarian reinstatement is not required. Instead, the request will be approved if it is consistent with "the furtherance of justice."[213]

Data for Humanitarian Reinstatement and INA Section 204(l) Reinstatement. As reported in the Ombudsman's 2013 Annual Report, USCIS maintained no national data on humanitarian and INA section 204(l) reinstatement until November 2012, when the agency added an action code to its data system to account for reinstatement requests. The code, however, does not distinguish between a reinstatement request made under INA section 204(l) versus a humanitarian reinstatement request made under 8 C.F.R. section 205.1(a)(3)(i)(C).

After starting to collect data in November 2012, USCIS reports that in FY 2013 it received 3,257 requests for humanitarian and INA section 204(l) reinstatement, denied 632 requests and granted 262. In FY 2014, USCIS received 1,704 requests for humanitarian and INA section 204(l) reinstatement, denied 652 requests and approved 372. To date, there are 3,043 humanitarian and INA section 204(l) reinstatement requests pending with USCIS.[214] ***See Figure 16:*** *Humanitarian and INA Section 204(l) Reinstatement Requests.*

FIGURE 16: HUMANITARIAN AND INA SECTION 204(l) REINSTATEMENT REQUESTS

FISCAL YEAR		REQUESTS RECEIVED	REQUESTS GRANTED	REQUESTS DENIED
2013	**Service Center**	**3,257**	**262**	**632**
	California Service Center	2796	132	562
	National Benefits Center	2	1	1
	Vermont Service Center	459	129	69
2014	**Service Center**	**1,704**	**372**	**652**
	California Service Center	1,314	72	502
	National Benefits Center	92	20	0
	Vermont Service Center	291	280	150
	Texas Service Center	7	0	0

Source: Information provided by USCIS (May 29, 2014).

**As of April 28, 2014, there are 3,043 humanitarian reinstatement requests pending with USCIS.*

[212] 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 Apr. 29, 2014).

[213] *Id.*, p. 6.

[214] Information provided by USCIS (May 29, 2014).

[215] *Supra* note 140, p. 18.

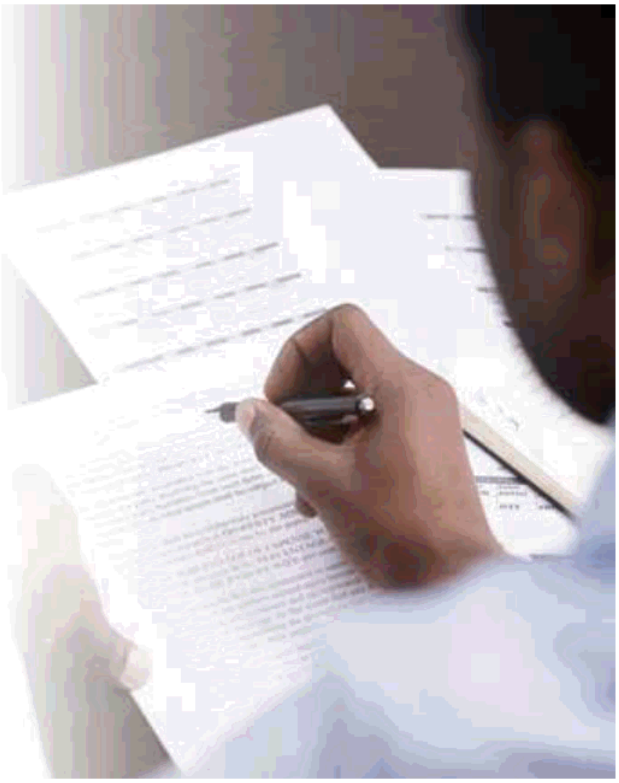
Ongoing Concerns

As noted in the Ombudsman's 2013 Annual Report, stakeholders continue to report, among other issues, variances and delays in the handling of humanitarian and INA section 204(l) reinstatement requests.[215] These and other concerns continue in 2014, as evidenced by the requests for case assistance received by the Ombudsman from humanitarian and INA section 204(l) reinstatement requestors.

Lack of Standardized Procedures. USCIS lacks a standardized process for receiving and processing humanitarian and INA section 204(l) reinstatement requests. Procedures for submitting such requests vary by USCIS office. Also, USCIS does not post processing times for reinstatement requests, nor does it issue receipt notices acknowledging the request.

Generally, for immigration benefits, there is a required form and accompanying instructions that specify where the application is to be filed.[216] This requirement helps USCIS issue receipt numbers and properly track cases. There is no standard USCIS form for making a humanitarian or INA section 204(l) reinstatement request. The USCIS website instructs individuals to send written requests for humanitarian reinstatement to the USCIS office that originally approved the petition.[217] With only an informal letter process, stakeholders have experienced slow and irregular handling of reinstatement requests by USCIS. The imprecise process of filing individualized letters in each case without a specific form poses challenges to uniformity in processing for a large agency responsible for hundreds of thousands of varied requests.

Stakeholders note that although basic humanitarian and INA section 204(l) reinstatement eligibility and instructions can be found on the USCIS website,[218] the information is unclear and difficult to find, particularly for pro se individuals. People report not knowing where to file the reinstatement request. Although the instructions on the USCIS website indicate that the humanitarian reinstatement request should be submitted to the office where the petition was approved,[219] in many cases the petition was filed years prior to the humanitarian reinstatement request by a petitioner who can no longer provide this information to the beneficiary. USCIS jurisdiction for the request also may have changed after the original filing for reasons unknown to the beneficiary, such as reallocation of resources or agency restructuring.[220]



[216] USCIS Webpage, "Forms"; http://www.uscis.gov/forms (accessed Apr. 15, 2014).

[217] *See* USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed May 9, 2014); *see also* USCIS 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 Apr. 29, 2014); *see also* USCIS Webpage, "Basic Eligibility for Section 204(l) Relief for Surviving Relatives" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/basic-eligibility-section-204l-relief-surviving-relatives (accessed May 9, 2014); *see also* AFM Ch. 21.2(h)(1)(C).

[218] USCIS Webpage, "Humanitarian Reinstatement" (Jun. 7, 2013); http://www.uscis.gov/green-card/green-card-through-family/humanitarian-reinstatement (accessed Apr. 15, 2014).

[219] *Id.*

[220] Information provided by USCIS (Apr. 9, 2014). For example, the Nebraska Service Center forwards reinstatement requests to the Vermont Service Center for decisions.

Processing Inconsistencies and Delays. Stakeholders continue to report that USCIS has difficulty determining which USCIS office has jurisdiction over the request, that USCIS uses uninformative and often incorrect template denials, and that it fails to provide meaningful information to *pro se* applicants, causing lengthy processing delays and confusion to the public.

Case Example

In July 1993, USCIS approved Form I-130 on behalf of a child. In 2004, the petitioning father died. At that time, the beneficiary was still waiting for his immigrant visa appointment overseas. The beneficiary who was unrepresented did not apply for reinstatement, but did notify DOS that the petitioner had died. DOS notified USCIS, and in March 2011, the USCIS California Service Center (CSC) issued a denial of the reinstatement, stating that the evidence on record did not establish a favorable exercise of discretion. This was a surprise to the beneficiary, since he had not yet submitted a humanitarian reinstatement request. He retained counsel who wrote to USCIS and clarified that no request for reinstatement had been submitted, but that the beneficiary would like to present one. USCIS issued a second denial in May 2011, in which the CSC referenced the first denial and incorrectly concluded that the petitioner died prior to the approval of the family-based petition, thus no reinstatement could be considered. USCIS itself had confirmed in its first denial that the petition was approved in July 1993. The petitioner died almost ten years later in 2004. The beneficiary and counsel submitted a request for reinstatement with documentation, and pointed out the factual errors made by USCIS. The CSC reopened and adjudicated the case.

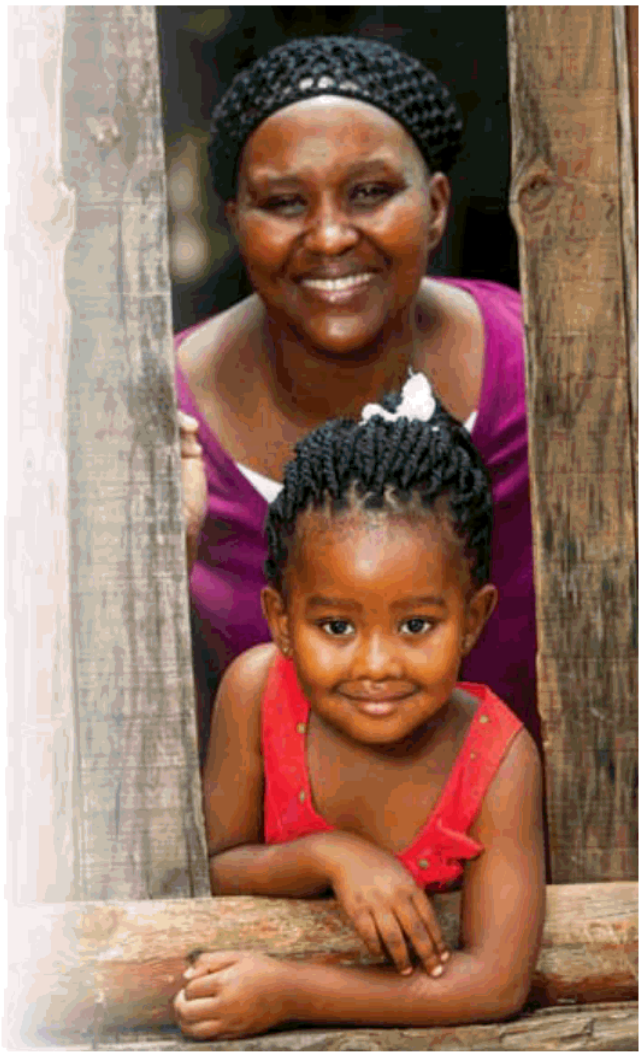
Stakeholders report that once the initial request for humanitarian reinstatement is denied, the CSC will not permit subsequent requests without the filing of Form I-290B, *Notice of Appeal or Motion* with a fee of $630, submitted within 30 days from USCIS's final decision.[221] This practice is problematic since it can take months to compile and submit additional evidence of humanitarian factors, or retain legal representation. Since humanitarian reinstatement has no appeal under the USCIS guidance in the AFM, resubmission of a request with additional evidence is the only possible avenue for further consideration of a case.[222] The Ombudsman raised this concern with USCIS Service Center Operations Directorate, which confirmed, "[t]here is no regulation or USCIS policy to limit the number of [reinstatement] requests that can be made following the death of the petitioner on an approved I-130."[223] However, it remains unclear whether this CSC local practice is standard agency policy.

[221] Information provided through requests for case assistance.

[222] AFM Ch. 21.1(h)(1)(C).

[223] Information provided by USCIS (Feb. 27, 2014).

Confusion between Humanitarian Reinstatement and INA section 204(l) Reinstatement. As described above, humanitarian and INA section 204(l) reinstatement have different legal authorities and eligibility standards. They also apply to different groups of people in the immigration process. However, perhaps because both requests concern survivors, and both lack a form, fee and normal receipting process at USCIS, stakeholders report that USCIS sometimes treats such cases interchangeably and requires persons requesting INA section 204(l) reinstatement to supply humanitarian and hardship documentation that should only be required for humanitarian reinstatement under 8 C.F.R. section 205.1(a)(3)(i)(C). Many survivors often do not understand the distinct requirements for these requests for relief.



Conclusion

During this reporting period, USCIS, in partnership with other DHS components, continued to work to increase public awareness of trafficking and domestic violence, and the immigration relief available to victims. Unnecessary RFEs need USCIS's attention because they contribute to these delays and impact the quality of adjudications. The dramatic increase in credible and reasonable fear interview referrals has required USCIS and other DHS components to shift resources. Nearly a quarter of affirmative asylum cases are now pending over one year. Additionally, improvements in the handling of requests for reinstatement for surviving family members are long overdue and merit agency attention.

Interagency, Process Integrity, and Customer Service

USCIS provides customer service through a wide variety of programs and initiatives. Between April 1, 2013, and March 31, 2014, USCIS hosted or participated in more than 3,200 stakeholder events, including eight national multilingual engagements and 557 local outreach events in languages other than English.[224] USCIS revised forms pertaining to fee waivers and appeals/motions, in an effort to be more clear, concise, and user-friendly. However, improvements are needed in USCIS's calculation of processing times, responses to service requests, and fee waiver processing.

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

USCIS Processing Times and their Impact on Customer Service

Responsible USCIS Offices:
Office of Performance and Quality and the Customer Service and Public Engagement Directorate

Expectations for individuals and employers seeking immigration benefits are set based on processing times, and they have important customer service impacts. USCIS call centers will not initiate service requests to check case status with USCIS local offices and service centers until cases are outside posted processing times.[225] Similarly, in Fiscal Year (FY) 2014, the Ombudsman instituted a new policy not to accept requests for case assistance until cases have been pending 60 days past posted processing times. Stakeholders have raised concerns regarding USCIS processing time accuracy, the method by which they are calculated, and the timeliness with which they are posted.

Background

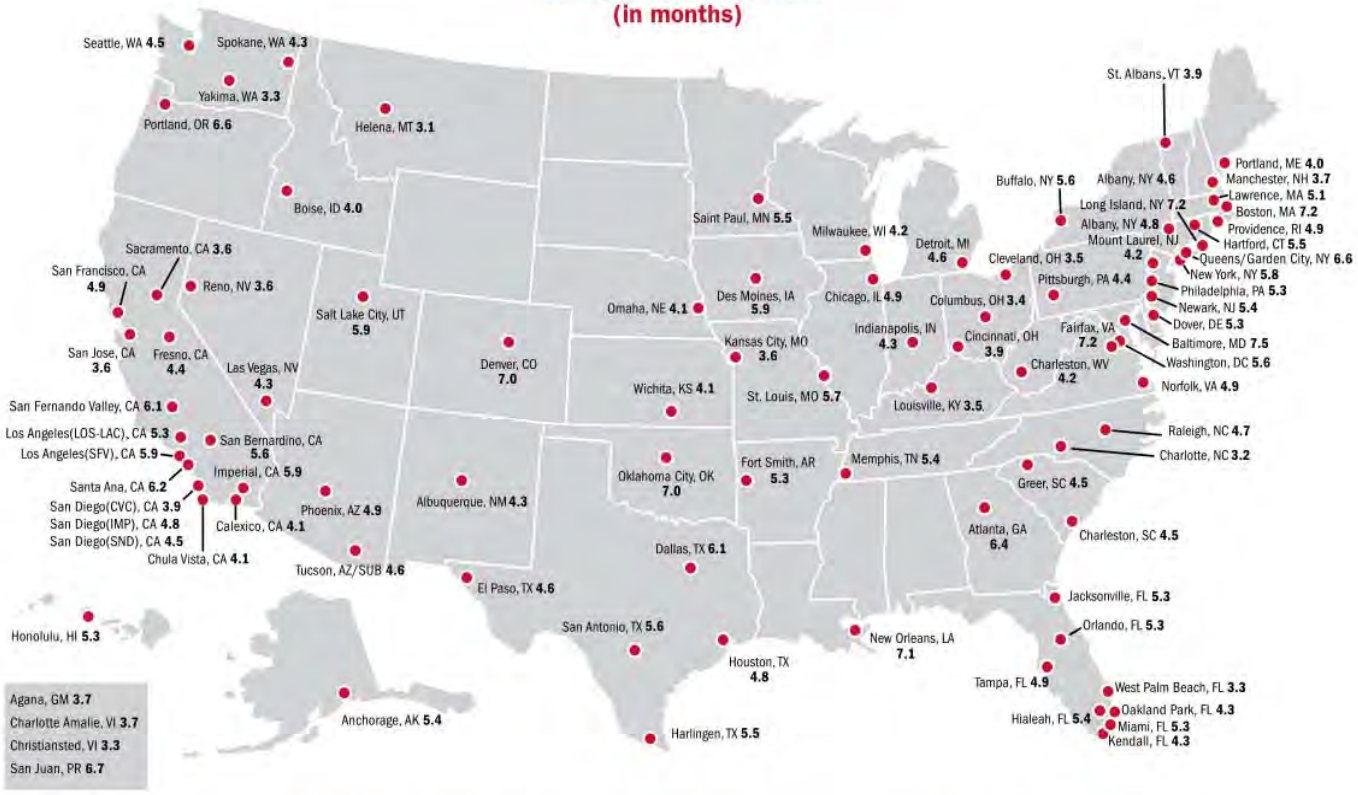
USCIS posts processing times for immigration petitions and applications on its website.[226] ***See Figure 17:*** *Average Processing Times for Forms N-400, Application for Naturalization, and I-485, Application to Register Permanent Residence or Adjust Status.*

Stakeholders rely on posted processing times when applying for immigration benefits. Individuals and employers seek accurate processing time information in order to make decisions about major life events such as immigration, travel, associated costs and timely filing of renewal applications.

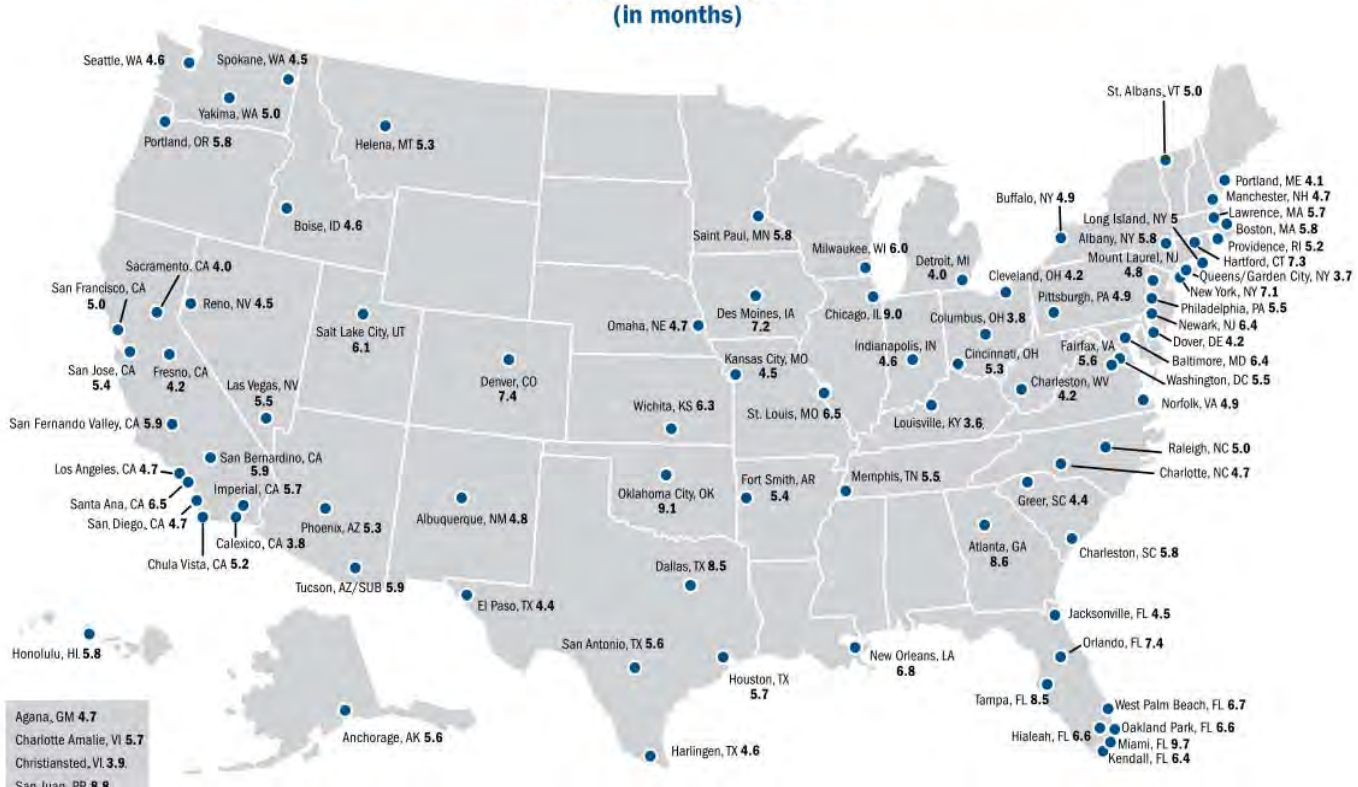
[225] *See* USCIS Webpage "e-Request;" https://egov.uscis.gov/e-Request/Intro.do?locale=en_US (accessed Jan. 2, 2014).
[226] USCIS Webpage, "USCIS Processing Time Information;" https://egov.uscis.gov/cris/processTimesDisplay.do (accessed Jan. 2, 2014).

FIGURE 17: AVERAGE PROCESSING TIMES FOR FORMS N-400 AND I-485

Application for Naturalization (N-400)
Average Processing Time
(in months)



Application to Register Permanent Residence or Adjust Status (I-485)
Average Processing Time
(in months)



Source: Information provided by USCIS (May 13, 2014).

For USCIS, processing times are important to measure agency performance in adjudication, identify operational challenges such as delays in resolving background checks, plan and implement new initiatives, and understand agency capacity in various offices.

Upon publication of the 2007 fee rule, USCIS established new processing time goals.[227] The USCIS Processing Time Information website states:

> USCIS usually processes cases in the order they are received. For each type of application or petition we have specific workload processing goals. For example, we try to process naturalization cases within five months of the date we receive them and immediate relative petitions (for the spouse, parent or minor child of a U.S. citizen) within six months of the receipt date. Sometimes the volume of cases we receive is so large that it prevents us from achieving our goals, but we never stop trying.[228]

USCIS calculates processing times for a particular application or petition type by subtracting the number of cases received each month from the total number of "active" pending cases (see below). For example, if the number of active pending cases was 200, and in each of the past four months USCIS received 50 cases, the processing time would be calculated as four months. This approach takes approvals and denials into account only insofar as the number of pending cases decreases when cases are completed.

Active pending cases are those cases that are available for processing, as opposed to cases that are waiting for visa availability or for applicants or petitioners to accomplish a step in the process, such as re-taking the naturalization test or responding to a Request for Evidence (RFE). Cases subject to delays due to background checks are included within the active pending cases for purposes of calculating processing times. The Ombudsman notes that USCIS customers may be unaware of what actions by USCIS or the applicant or petitioner may lead to tolling of processing times.

If USCIS is processing a particular type of application/petition in less time than the agency processing goal, the processing time will be the goal published in months (e.g., "Six Months").[229] For case types that are taking longer than the processing goal, USCIS lists the filing date (e.g., "December 26, 2013") of the cases it is currently processing.[230] Processing times are posted monthly, 30 days after the prior month's close. For example, April's processing times will be posted by May 30th.

Cases where USCIS has encountered difficulty in resolving background checks or has issued an RFE often take longer than posted processing times, with limited information available on how long USCIS will take to complete adjudication. Posted processing times also fail to take into account accelerations or delays that may be anticipated by USCIS based on workload shifts or changes in filing patterns. As such, processing times can increase significantly, without prior notice to the public.

Some applicants or petitioners have the option of upgrading certain types of filings to "premium processing."[231] Employers use premium processing to fill positions rapidly, but it is not available for all types of immigration filings. There is also a discretionary process for expediting applications or petitions for individuals or employers, but that process is limited to individuals who are confronted with specific compelling circumstances.[232]

Ongoing Concerns

Stakeholders are unable to accurately determine how long a case might take to be completed based on the methodology USCIS uses to calculate its posted adjudication timelines. These processing times are not an average processing time for all cases in a particular queue. Nor do they represent the time it may take for most cases to be completed.

When cases are outside processing times, individuals, employers, and their representatives schedule InfoPass appointments and initiate service requests online or by contacting the USCIS National Customer Service Center (NCSC).[233] They also request assistance from Congressional offices and the Ombudsman. USCIS, in turn, devotes significant resources to customer service inquiries that could otherwise be directed to adjudicating applications and petitions.

[227] "U.S. Citizenship and Immigration Services Fee Schedule; Final Rule," 75 Fed. Reg. 58961 (Sept. 24, 2010) (codified at 8 C.F.R. §§ 103, 204, 244 and 274).

[228] *Supra* note 226.

[229] *Id.*

[230] *Id.*

[231] Immigration and Nationality Act § 286(u). Premium processing is available for a fee of $1,225 for specific form types. *See* Instructions for Form I-907, *Request for Premium Processing Service*, OMB No. 1615-0048, Expires 10/31/2014; http://www.uscis.gov/sites/default/files/files/form/i-907instr.pdf (accessed May 14, 2014).

[232] USCIS Webpage, "Expedite Criteria" (Jun. 17, 2011); http://www.uscis.gov/forms/expedite-criteria (accessed Feb. 24, 2014).

[233] USCIS has informed the Ombudsman that call center contractors in Tier 1 and Immigration Service Officers in Tier 2 have access to the exact same posted processing time information as the public.

The Ombudsman urges USCIS to consider new approaches to calculating case processing times. USCIS could provide stakeholders more transparency in processing time information by stating the time, perhaps as a range, within which a certain percentage of cases are completed. For example, posted processing times could state that naturalization applications are adjudicated within six to eight months for 90 percent of cases. Processing times would also be improved if data were updated more timely.

USCIS Customer Service: Ensuring Meaningful Responses to Service Requests

Responsible USCIS Offices:
Field Operations and Service Center Operations Directorates

USCIS generates "service requests," through the Service Request Management Tool (SRMT), which are transferred to the USCIS facility where the matter is pending. USCIS service centers and local offices then respond, often with general templates that provide little information other than the case remains pending. In these circumstances, stakeholders find it necessary to make repeat requests, schedule InfoPass appointments at USCIS local offices, and/or submit requests for case assistance to Congressional offices and the Ombudsman. These repeat requests increase the overall volume of calls and visits to USCIS – amplifying the level of frustration experienced by customers and costing the agency, as well as individuals and employers, both time and money. Unhelpful responses to USCIS service requests continue to be a pervasive and serious problem.

Background

Inquiries from individuals and employers are often channeled through SRMT, an electronic system to track and transfer service requests. Where USCIS call center staff cannot resolve a customer's inquiry, the agency uses SRMT to transfer requests to a USCIS local office or service center. An individual can also make an e-Request to generate an SRMT inquiry.[234] The Customer Service and Public Engagement Directorate in most cases does not provide substantive responses to service requests. Rather, the USCIS office of jurisdiction provides the response to the customer.

On March 5, 2012, the Ombudsman issued recommendations regarding service requests.[235] The Ombudsman recommended that USCIS: 1) implement national quality assurance review procedures for service requests and make quality a priority; 2) establish a follow-up mechanism in the SRMT system so that USCIS employees can provide customers with multiple responses (e.g., initial, follow-up, final) for the same service request; 3) expand self-generated e-Requests to all form types; 4) pilot mandatory supervisory review of certain SRMT responses; and 5) post SRMT reports on the USCIS website and standardize the use of SRMT reports to identify spikes, trends, or other customer service issues. USCIS responded on June 14, 2012, stating:

> Quality has been and will continue to be a priority for USCIS – not only in terms of responses to service requests, but with respect to all of our customer interactions and related work. In line with this priority, USCIS formed an operational working group to focus on issues related to the Service Request Management Tool (SRMT). The working group, which held its initial meeting on March 22, 2012, will consider this recommendation as part of its efforts … USCIS would like to reiterate that both the Field Operations Directorate and the Service Center Operations Directorate have established SRMT quality review programs that track and analyze relevant data to ensure quality and identify potential areas for improvement.[236]

The acceptance, review, and resolution of service requests is a major USCIS customer service undertaking. During this reporting period, USCIS received 1,136,262 service requests.[237] The target response time for service requests is 15 calendar days for most inquiries. USCIS aims to respond in five calendar days for an expedite request and 30 days for Deferred Action for Childhood Arrivals denial reopening requests.[238] Approximately 60 percent of SRMTs meet these goals. The most prevalent reasons for contacting NCSC have been non-delivery of documents, processing times, change of address, and typographical error.[239] ***See Figure 18:*** *Top Four Service Request Types.*

[234] *Supra* note 225.

[235] USCIS Webpage, "USCIS Service Requests: Recommendations to Improve the Quality of Responses to Inquiries From Individuals and Employers;" http://www.dhs.gov/uscis-service-requests-recommendations-improve-quality-responses-inquiries-individuals-and-employers (accessed May 7, 2014).

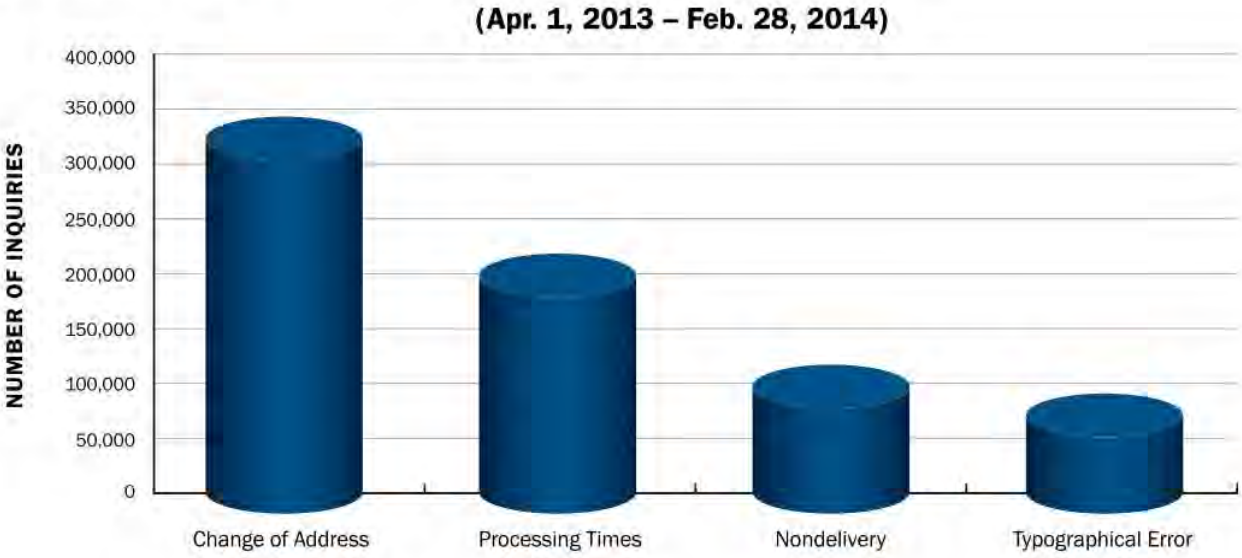
[236] USCIS Response to Recommendation 52 (Jun. 14, 2012); http://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/USCIS%20Formal%20Response%20to%20Recommendation%2052.pdf (accessed Apr. 7, 2014).

[237] *Supra* note 224.

[238] *Id.*

[239] *Id.*

FIGURE 18: TOP FOUR SERVICE REQUEST TYPES



Source: Information provided by USCIS (Apr. 28, 2014).

USCIS has expanded e-Request capabilities, and individuals and employers now can generate SRMT inquiries online for cases beyond posted processing times, typographical errors, nondelivery of USCIS notices, and requests for special accommodations at a USCIS office. A total of 67,978 e-Requests were made during this reporting period. This self-generating service request capacity has been promoted through webinars, email messages, focus groups, a brochure distributed by USCIS community relations officers and through USCIS's crowd-sourcing site, Idea Community.

Since the Ombudsman issued its 2012 recommendations, USCIS formed a customer service working group. This working group met weekly between March 2012 and March 2013, and focused on SRMT reports and templates. The group continues to review the SRMT process.

With respect to a follow-up mechanism in SRMT, USCIS continues in various instances to provide an interim response (e.g., the file has been requested) and then close the request with no follow-up. Where the interim response does not answer the inquiry or resolve the problem, the individual or employer is left to initiate another service request or seek redress through other avenues. USCIS is no longer providing estimated case completion times in many responses to SRMTs.

Approximately 70 percent of all requests for assistance filed with the Ombudsman were submitted by individuals and employers who reported that they first attempted to resolve their problems by submitting a service request through the NCSC.[240] Despite these efforts, individuals and employers did not receive responses they considered to be satisfactory and sought assistance from the Ombudsman.

Ongoing Concerns

Responses to customer inquiries are valuable only where they include pertinent information, such as a projected timeline for adjudication or an explanation of processing delays that prompted the service request. Although some USCIS regions and service centers perform quality assurance reviews for service request responses – monitoring a sampling of responses to identify the response time, accuracy in spelling and grammar, and accuracy of the response – USCIS has not yet implemented a national quality assurance review to identify the accuracy or completeness of those responses.

In addition, customers are often told to wait a specified period of time before submitting another service request. In one case assistance request submitted to the Ombudsman, the petitioner stated,

> [A]ll we have received from the USCIS is a generic message stating "your case is under review and you should receive a notice of action in 30 days." Well we have [waited] many such 30 day periods without any action of notice or any clear message from USCIS. USCIS's lack of transparency is frustrating and overwhelming at times. We need help understanding why our case has been pending for an extended duration. Our concern is that USCIS has misplaced our case/paperwork …

[240] Information collected by the Ombudsman on Form DHS-7001, *Case Assistance Form.*

Ongoing delays and uninformative responses increase customer frustration and create additional work for USCIS, due to repeated customer inquiries.

With SRMT, USCIS has an effective process for receiving, tracking and transferring requests for assistance to USCIS field offices and service centers. However, individuals and employers continue to report agency responses are often uninformative and not timely. Ensuring meaningful responses to service requests is critical to successful customer service, and doing so would reduce the overall number of customer service interactions, thereby freeing resources that could be focused on adjudications and other agency needs.

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 the Field Operations and Service Center Directorates

USCIS is not issuing notice to attorneys or accredited representatives when it rejects a deficient Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative.* The rejection of a notice of appearance, without any notification to the submitting attorney or accredited representative, raises concerns pertaining to the fundamental right to counsel. It also creates practical difficulties when the attorney or accredited representative is not notified of USCIS actions, and is, therefore, unable to inform the client of or advise on how to respond to agency actions, including interview notices, requests for evidence, and denials.

Background

Under the regulations, applicants or petitioners appearing before USCIS may be represented, at no cost to the government, by an attorney or an accredited representative of a recognized organization.[241] 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 on the attorney or accredited representative.[242] 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.[243]

Failure to list an applicant or petitioner's attorney or accredited representative, without due cause, would constitute unwarranted interference by USCIS in the attorney or accredited representative client relationship. Failure to provide an attorney of record or accredited representative with notices and documents would greatly impede, if not extinguish, the attorney's or accredited representative's ability to zealously represent the client before USCIS. As such, it is critical that USCIS honor its obligation to serve documents and notices on the attorney of record or accredited representative, as specified in the regulations.[244]

Ongoing Concerns

Stakeholders have raised issues regarding USCIS acceptance of G-28 forms, and USCIS has confirmed that it is not notifying attorneys or accredited representatives where the form has been rejected.[245] When USCIS receives a technically deficient Form G-28, it marks the form invalid and places it upside down at the bottom of the non-record side of the administrative file without notifying the attorney or accredited representative that the Form G-28 was not properly filed. The attorney or accredited representative only becomes aware that he or she is not listed when the client begins to receive notices from USCIS, but the attorney or accredited representative does not. Failure to notify the customer or the attorney or accredited representative of a deficient Form G-28 denies the attorney or accredited representative the opportunity to correct the mistake and denies the customer the right to be represented.

[241] 8 C.F.R. §§ 103.2(a)(3) and 292.5(b). *See* definition of "Accredited Representative" at 8 C.F.R. § 292.1(a)(4).

[242] 8 C.F.R. § 292.5(a). A "properly completed Form G-28" is a notice of appearance containing sufficient information to determine that: 1) an attorney appears to be duly licensed; 2) an attorney-client relationship exists between the submitting attorney and the applicant or petitioner; and 3) there is a valid address to which notices and documents can be sent. A Form G-28 submitted without the required information in Item Numbers 1.-1.b.1 or 2.-2.b. will be rejected." *See* Instructions for Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, OMB No. 1615-01015, Expires 02/29/2016, http://www.uscis.gov/sites/default/files/files/form/g-28instr.pdf (accessed May 14, 2014).

[243] 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); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2012/May/AFMs5-23-12.pdf (accessed Apr. 29, 2014).

[244] 8 C.F.R. § 292.5(a).

[245] *See* USCIS Meeting With the American Immigration Lawyers Association, Questions and Answers (Oct. 23, 2013). "When a G-28 is found to be defective (i.e., invalid) at the Lockbox, the standard procedure is not to recognize it and move the case on for processing. The Lockbox does not send any notice to the attorney when the G-28 is invalid. When a case is rejected and the G-28 is defective (i.e., invalid) only the applicant/petitioner will receive the rejected application/petition and notice, but we do not notify the applicant/petitioner that their G-28 is invalid."

Case Example

After filing Form I-589, *Application for Asylum and Withholding of Removal* on behalf of the client, the attorney did not receive any notices of action or other correspondence from USCIS. The client, however, did receive USCIS mailings. The Ombudsman submitted an inquiry to USCIS and was able to determine that the attorney had inadvertently submitted an outdated version of Form G-28. Due, in part, to the attorney not receiving notice, the applicant missed the asylum interview and was referred to Immigration Court. After the Ombudsman requested further review, USCIS decided that since the Form G-28 was originally filed (and subsequently refiled two weeks later) that it would seek to terminate proceedings and provide the applicant with an affirmative asylum interview.

To resolve issues with Form G-28 rejections, USCIS suggests that legal representatives contact the Lockbox support email (Lockboxsupport@uscis.dhs.gov). This is only helpful where the attorney or accredited representative is aware that the Form G-28 was rejected.[246]

USCIS policy and practice relating to rejected Form G-28s is problematic for a number of practical reasons. Many applicants and petitioners rely on their attorney or accredited representative to receive notices and other correspondence from USCIS because they do not have a secure place to receive mail, they have limited proficiency in English, or they lack knowledge of U.S. legal procedures and rely on their legal representative to ensure deadlines are met and applications are filed with the appropriate office.

USCIS has acknowledged problems with its current method for handling Form G-28 rejections. The agency indicated that it has formulated a number of solutions that are being reviewed by agency leadership. To date, USCIS has not stated when these changes may be implemented, nor has it proposed any interim solutions.

Fee Waiver Processing Issues

Responsible USCIS Offices:

Office of Intake and Document Production and the Field Operations and Service Center Directorates

Fee waivers are important to vulnerable segments of the immigrant community, including elderly, indigent, or disabled applicants. This year's Report provides an update of issues described in the Ombudsman's 2013 Annual Report,[247] including improvements made by USCIS, and summarizes stakeholder reports of continued problems that affect certain aspects of fee waiver processing.

Background

USCIS restructured and improved the fee waiver process in 2010, by publishing Form I-912, *Request for Fee Waiver.* When USCIS published the form, it stated:

> The proposed fee waiver form is the product of extensive collaboration with the public. In meetings with stakeholders, USCIS heard concerns that the absence of a standardized fee waiver form led to confusion about the criteria that had to be met as well as the adjudication standards … The new proposed fee waiver form is designed to verify that an applicant for an immigration benefit is unable to pay the fee for the benefit sought. The proposed form provides clear criteria and an efficient way to collect and process the information.[248]

USCIS also published guidance on fee waiver adjudication standards in a 2011 Policy Memorandum titled *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 AD11-2.*[249] This guidance supersedes and rescinds all prior memoranda regarding fee waivers.[250]

[246] American Immigration Lawyers Association, AILA FAQs: "Completing the New G-28 Form Answers Provided by USCIS Office of Intake and Document Production" (Oct. 11, 2013). *See also* Alan Lee, "G-28 Authorization of Representation Becomes a Trial for Attorneys/Other Representatives" ILW.com (Nov. 13, 2013); http://discuss.ilw.com/showthread.php?36220-Article-G-28-Authorization-Of-Representation-Becomes-A-Trial-For-Attorneys-Other-Representatives-by-Alan-Lee (accessed Jan. 17, 2014). Although USCIS has advised contacting the Lockbox Support e-mail for assistance with G-28 issues, the Lockbox filing tips clearly state, "If your client received a receipt notice, but you did not, it is likely that your G-28 was not properly filed. Do not send a follow-up Form G-28 to a Lockbox facility. Send follow-up Forms G-28 to the USCIS office where the case was assigned. Be sure to include the Receipt Number of the associated application/petition on Form G-28 in Part 3, Question 7." USCIS Webpage, "G-28 Notice of Entry of Appearance as Attorney or Accredited Representative: Tips for Lockbox Facility Filings" (Feb. 12, 2014); http://www.uscis.gov/forms/g-28-notice-entry-appearance-attorney-or-accredited-representative-tips-lockbox-facility-filings (accessed Jan. 17, 2014).

[247] Ombudsman Annual Report 2013 (Jun. 2013), pp. 47-49; http://www.dhs.gov/sites/default/files/publications/cisomb_2013_annual_report%20508%20final_1.pdf (accessed May 29, 2014).

[248] USCIS Webpage, "USCIS Published First-Ever Proposed Fee Waiver Form" (Nov. 22, 2010); Website link no longer available.

[249] 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. 29, 2014).

[250] *Id.*

USCIS revised Form I-912 and instructions in May 2013.[251] USCIS also published amended tips on fee waivers on its website.[252] The tips contain useful information and clarifications, including contact information for the receipting centers, referred to as Lockboxes (Lockboxsupport@uscis.dhs.gov), which can be used to inquire with USCIS about fee waiver denials.

Pursuant to established protocols, the Ombudsman does not accept fee waiver case assistance requests unless the applicant first attempts to resolve the problem through the Lockbox. The USCIS Lockbox support aims to respond to inquiries within five business days.

Ongoing Concerns

Calculating Household Size. The revised Form I-912 instructions changed the calculation of household size. The household total is critical, as it determines by reference to the Federal Poverty Guidelines whether the individual is income-eligible for a fee waiver.[253] It is unclear whether the applicant is included in counting the household size; some sections of Form I-912 and the instructions indicate the applicant should be counted, while others do not.[254]

In addition, the revised Form I-912 and instructions, for the first time, call for counting non-family members in household size, under certain circumstances. The 2011 Policy Memorandum does not call for non-family members to be counted in the household size calculation.[255] These inconsistencies cause confusion and can lead to unnecessary denials.

Fee Waiver Rejections. The Ombudsman's 2013 Annual Report recounted stakeholder concerns regarding multiple rejections of waiver applications by the USCIS Lockbox facilities, and inconsistent application of fee waiver standards. These concerns continued. The Ombudsman received reports that multiple, identical submissions were necessary before the request was favorably adjudicated, often based upon the same evidence included with the original submission. Stakeholders received rejections and denials even after submitting income documentation such as tax returns, or when USCIS disputes that a public benefit qualifies as a means-tested benefit, despite evidence presented to show that it is such a benefit. Stakeholders also recounted inconsistent decisions on fee waiver applications which, in all substantive respects, are identical. In a June 27, 2013 letter to USCIS, stakeholders stated:

> We are deeply concerned about the widespread pattern of denials of eligible applicants that our organizations and networks have been experiencing over the last few months … We are also concerned that USCIS's own systems for ensuring quality control have not identified this problem. While we appreciate USCIS's willingness to review individual case examples, we feel a case-by-case is not effective in this instance, and we are seeking a systemic resolution to what we see as a systemic problem.[256]

USCIS has rapidly sought to resolve individual cases brought to the agency's attention by the Ombudsman, but systemic issues remain and require a review of guidance and form instructions, as well as Lockbox intake procedures. The Ombudsman urges USCIS to host a public engagement on this program to hear stakeholder feedback.

USCIS Administrative Appeals Office: Ensuring Autonomy, Transparency, and Timeliness to Enhance the Integrity of Administrative Appeals

Responsible USCIS Office:
Administrative Appeals Office

In the 2013 Annual Report, the Ombudsman discussed issues pertaining to the Administrative Appeals Office (AAO), including a lack of transparency regarding AAO policies and procedures, and challenges for *pro se* individuals who seek information in plain English about the administrative appeals process. Over the past year, USCIS eliminated

[251] USCIS Webpage, "Forms Update". (May 2013); http://www.uscis.gov/forms-updates (accessed Apr. 29, 2014).

[252] 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. 21, 2014).

[253] *See* Form I-912P, *HHS Poverty Income Guidelines for Fee Waiver Request* states how much income is the limit per household size for fee waiver eligibility. *See* USCIS Webpage; http://www.uscis.gov/i-912p (accessed Apr. 14, 2014).

[254] Form I-912, *Request for Fee Waiver*, instructions at Section 5, line 9 asks, "other than you, how many others in your household depend on the stated income?" This directs that the applicant should not count himself. Section 5 does not have any other place to include the applicant. However, elsewhere on the Form I-912, at question 3 on page 4, it indicates that applicant should include him or herself in the household total. The Poverty Guidelines used for fee waivers are published as Form I-912P, *HHS Poverty Guidelines for Fee Waiver Request*; *see* USCIS Webpage, "I-912P, HHS Poverty Guidelines for Fee Waiver Request" (Jan. 28, 2014); http://www.uscis.gov/i-912p (accessed Apr. 14, 2014).

[255] *Supra* note 249.

[256] Letter from the Catholic Legal Immigration Network, Hebrew Immigrant Aid Society, and World Relief (Jun. 27, 2013).

lengthy processing times once cases reach the AAO and revised its website. However, stakeholders still report issues stemming from the manner in which the AAO receives, reviews, and decides appeals. Of particular concern is the need for an AAO practice manual; the absence of any up-to-date statutory or regulatory standard for AAO operations; the AAO's lack of direct authority to designate precedent decisions; and the length of time for cases to be transferred to the AAO from USCIS service centers and field offices for review, and vice versa for remand.

Background

With appellate jurisdiction over approximately 55 different immigration applications and petitions, the AAO is charged with reviewing certain decisions issued by USCIS service centers and district offices.[257] The authority to adjudicate appeals of these decisions is delegated to the AAO by the Secretary of Homeland Security, pursuant to the Homeland Security Act of 2002.[258]

In 2005, the Ombudsman published recommendations focusing on the transparency, quality and timeliness of the decisions issued by the AAO.[259] More than eight years later, USCIS has eliminated lengthy processing times for all case types once cases reach the AAO.[260] Additionally, the AAO has updated and revised its website content to provide AAO contact information and filing instructions. USCIS has also recently revised Form I-290B, *Notice of Appeal or Motion* and instructions; a new version was made available for use on February 12, 2014.[261]

Ongoing Concerns

Publication of an AAO Practice and Procedures Manual. Stakeholders regularly note that AAO procedures could be made more transparent through the publication of a practice manual providing procedural guidance.[262] The U.S. Department of Justice's (DOJ) Board of Immigration Appeals (BIA) and Executive Office for Immigration Review publish practice manuals as a public service to the parties who appear before them. These practice manuals are periodically updated and have been highly regarded by the public as being helpful guides and fostering greater uniformity in practice and decisions.[263] An AAO practice manual that provides substantive, procedural, and operational information in plain English and a user-friendly format would be similarly useful. Over the last year, the AAO has confirmed to the Ombudsman that it started drafting a practice manual similar in structure to that of the BIA; however, the AAO has not released a draft document or publicly stated a proposed publication date.[264]

Publication of Revised Regulations. Stakeholders have expressed concern regarding the AAO's autonomy, explaining that it is often thought of as an extension of USCIS service centers and field offices, and not an independent review panel.[265] Organizationally, the AAO is part of USCIS, but is independent of any specific USCIS district office or service center. Like other USCIS components, the AAO follows agency guidance and does not create new policy. The AAO consults with the USCIS Office of the Chief Counsel if an appeal involves novel or complex issues requiring legal interpretation and to develop uniform agency guidance. The AAO may also engage with USCIS adjudicating components on operational matters as well as on broad adjudication issues and trends.[266]

The lack of regulations governing the AAO's operations and role with respect to USCIS policies creates an impression among the public that the AAO merely "rubber-stamps" USCIS decisions. To avoid any appearance of bias, regulations could clearly articulate that the AAO is intended to function as an autonomous subcomponent of the agency, charged with providing appellants with a venue for administrative review of their immigration benefits claims.

[257] 8 CFR § 103.1(f)(3)(iii).

[258] Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective Mar. 1, 2003); *see also* 8 C.F.R. § 2.1 (2003).

[259] Ombudsman Recommendation 20 (Dec. 6, 2005); http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_12-07-05.pdf (accessed Apr. 29, 2014).

[260] USCIS Webpage, "AAO Processing Times" (May 12, 2014); http://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-processing-times (accessed Apr. 6, 2014). The AAO currently lists all case types as being "current," which the AAO defines as "[w]ithin six months or less from the time when [the AAO received] the appeal."

[261] USCIS Webpage, "Forms Update" (Jan. 2014); http://www.uscis.gov/forms-updates (accessed Apr. 29, 2014).

[262] Ombudsman Teleconference, "The USCIS Administrative Appeals Office (AAO)" (Dec. 19, 2012).

[263] *See* BIA Practice Manual; http://www.justice.gov/eoir/vll/qapracmanual/apptmtn4.htm, and Executive Office for Immigration Review's Immigration Court Practice Manual; http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (both accessed Apr. 6, 2014).

[264] Information provided by the AAO (Feb. 7, 2013 and Mar. 5, 2014).

[265] *Supra* note 262.

[266] Information provided by USCIS (Dec. 18, 2012).

Designating and Publishing Precedent Decisions. Pursuant to the regulations, AAO decisions may be designated as precedent by the Secretary of Homeland Security, with the Attorney General's approval.[267] The process for designating a precedent decision, described on the USCIS website, involves review by no fewer than seven entities within USCIS, as well as the Attorney General.[268] Due to this cumbersome process, precedent decisions are infrequently issued. The AAO did not issue a precedent decision in FY 2013; in FY 2012, the AAO published only one precedent decision;[269] no precedent decisions were issued in FY 2011;[270] and in FY 2010, the AAO published only two precedent decisions.[271]

More AAO precedent decisions would improve consistency in adjudications by offering USCIS adjudicators clearer paths to follow in assessing the legal and policy issues encountered in their assigned cases.[272] Since precedent decisions serve as binding legal authority for determining later cases involving similar facts or issues, the publication of more precedent decisions would also mean appellants and legal representatives would have additional information regarding legal and evidentiary requirements. While the AAO recognizes the need for precedent decisions, at the Ombudsman's 2013 Annual Conference, the AAO confirmed there is no current plan to allow it to independently make such designations.

Create a Searchable Index of Decisions. While AAO non-precedent decisions are generally made available on the USCIS website within weeks of issuance, they are not cataloged with a searchable index for quick review and retrieval. Creating a searchable index is not an AAO priority, given the availability of commercial legal research services. This, however, fails to take into account that *pro se* appellants and community-based organizations representing low-income immigrants may not be able to afford costly private research services. A searchable index of AAO decisions, similar to what other government agencies, such as the BIA, provide, would better serve USCIS customers.

Timely Forwarding of Appeals to the AAO. The AAO considers a case to be "current" as long as it is decided within six months from the date it is received by the AAO, and does not include the time the appeal was pending initially with the USCIS field office or service center of original jurisdiction. Appeals or motions are not filed directly with the AAO; instead they are filed with the USCIS field office, service center or Lockbox that made the decision.[273] Generally, upon submission of an appeal, the USCIS office that denied the application or petition is responsible for reviewing the appeal, and determining within 45 days of receipt whether to reverse the decision and reopen the case.[274] This is referred to as "initial field review." If the appeal is meritorious, the case will be reopened or reconsidered, whereas an unfavorable review results in the appeal being forwarded "promptly" to the AAO.[275] Stakeholders report that USCIS field offices and service centers are holding cases well beyond the 45-day period specified in regulations, prior to forwarding them to the AAO.[276] There are also delays in forwarding appeals remanded from the AAO back to USCIS field offices and service centers.

[267] 8 C.F.R. § 103.3(c).

[268] *See* USCIS webpage, "Administrative Appeals Office: Precedent Decisions;" http://www.uscis.gov/sites/default/files/USCIS/Laws/AAO/AAO%20DHS%20Precedent%20Decision%20Process%20Print%20Version.pdf (accessed Jan. 28, 2014).

[269] *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012); http://www.justice.gov/eoir/vll/intdec/vol25/3752.pdf (accessed Mar. 18, 2013).

[270] *Supra* note 266.

[271] *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010); http://www.justice.gov/eoir/vll/intdec/vol25/3699.pdf (accessed Mar. 18, 2013), and *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010); http://www.justice.gov/eoir/vll/intdec/vol25/3700.pdf (accessed Mar. 18, 2013).

[272] *Supra* note 262.

[273] *See* USCIS Webpage, "Direct Filing Address for Form I-290B, Notice of Appeal or Motion". (Apr. 3, 2014); http://www.uscis.gov/i-290b-addresses (accessed Apr. 10, 2014).

[274] 8 C.F.R. § 103.3(a)(2)(iii); *see also* USCIS webpage "The Administrative Appeals Office (AAO), Appeal Process" (Apr. 17, 2014); http://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/administrative-appeals-office-aao (accessed Apr. 29, 2014). Both indicate the appeal should be forwarded to the AAO within 45 days. However, the Adjudicator's Field Manual (AFM), Chapter 10.8(a)(1), "Preparing the Appellate Case Record: Administrative Appeals (AAO) Cases;" http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html (accessed Apr. 29, 2014) is silent on the number of days within which a decision must be made on the appeal and only states that if the arguments fail to overcome the basis for denial, "the appeal and related record must be promptly forwarded to the AAO."

[275] 8 C.F.R. § 103.3(a)(2)(iv); The Adjudicator's Field Manual (AFM), Chapter 10.8(a)(1), "Preparing the Appellate Case Record: Administrative Appeals (AAO) Cases;" http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html (accessed Apr. 29, 2014). The regulations and USCIS field guidance do not make clear what constitutes "promptly" for purposes of forwarding an appeal to the AAO.

[276] *Supra* note 262. Pursuant to 8 C.F.R. § 103.3(a)(2)(iii), "Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action. However, that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion under §103.5(a)(5)(i) of this part in order to make a new decision favorable to the affected party after 45 days of receipt of the appeal."

The AAO and other USCIS components are aware of this issue, which has become more apparent with the AAO eliminating its own processing delays. The AAO noted that because USCIS field offices do not necessarily use the same electronic case management system, the AAO cannot determine electronically when an appeal is received by a field office, how long the appeal remains pending, or when the appeal has actually been forwarded to the AAO for review.[277] The AAO did state that recent revisions to the Form I-290B and instructions, including a drop-down list to select the USCIS office that issued the denial decision,[278] should facilitate easier tracking of appeals. Additionally, USCIS informed the Ombudsman that the agency established a working group last year to improve tracking of appeals through the initial review process at USCIS field offices. As a result of this effort, USCIS stated that it will issue in the third quarter of FY 2014 standard operating procedures on reporting requirements for the disposition of Forms I-290B and conduct in FY 2014 a full inventory of this form type.

AAO Decisional Data. In the 2005 recommendations, the Ombudsman noted that statistics on AAO decision-making are not published by USCIS.[279] In its response to those recommendations, USCIS indicated that the AAO maintains detailed data on the number of appeals received, the number of adjudicator decisions that are sustained (approved) and dismissed (denied), and the total number of decisions issued each year.[280] At that time, USCIS stated that once technical issues were resolved, the data would be added to the USCIS website. While it has yet to be published on the agency website, below is AAO data, provided by USCIS, for select form types. ***See Figure 19:*** *AAO Select Receipts, Sustains, and Dismissals.* For initial benefit adjudication data, ***See Appendix 4:*** *Initial Benefit Adjudication Data for Commonly Appealed Form Types.*

USCIS noted that this data provides the disposition of appeals that have been transferred to the AAO, and does not include favorable dispositions during initial field review. Also, this data does not include other AAO dispositions (e.g., rejections, withdrawals, and remands).

The Ombudsman will further evaluate and discuss this data with USCIS in the coming year to better understand the disparities in the AAO sustain and dismissal rates among immigration benefit types. Publication of AAO decision statistics on a quarterly or annual basis would enhance transparency in administrative appeals.

FIGURE 19: AAO SELECT RECEIPTS, SUSTAINS, AND DISMISSALS

	2011			2012			2013		
	Receipts	Sustained	Dismissed	Receipts	Sustained	Dismissed	Receipts	Sustained	Dismissed
I-129 H-1B, Specialty Occupation	723	15	585	523	19	985	578	12	858
I-129 L-1, Intracompany Transferee	257	4	83	254	26	317	269	37	508
I-140 EB-1, Extraordinary Ability	206	11	184	203	14	282	179	8	193
I-140 EB-3, Professionals	533	24	651	392	77	1803	423	93	1619
I-212, Request for Admission After Deportation or Removal	179	9	193	115	40	161	86	36	88
I-360, Self-Petitioning Spouse of Abusive U.S. Citizen or Legal Permanent Resident	574	29	458	524	20	320	339	28	352
I-601, Waiver of Grounds of Inadmissibility	1347	435	1215	1167	490	1929	997	496	1737
I-918, U Nonimmigrant Status	216	12	190	221	4	183	166	0	119
N-600, Certificate for Citizenship	226	39	168	173	11	131	193	12	105

Source: Information provided by USCIS (Apr. 25, 2014).

[277] Information provided by USCIS (Feb. 7, 2013).

[278] *See* Form I-290B, *Notice of Appeal* or *Motion* and instructions on USCIS Webpage; http://www.uscis.gov/i-290b (accessed Apr. 10, 2014). Part 3, item 6 "USCIS Office Where Last Decision Issued" of Form I-290B asks the applicant to enter (if nonelectronic filing) or select from the drop-down (if electronic filing) the name of the office that denied or revoked the petition or application.

[279] *Supra* note 159.

[280] USCIS Response to Recommendation 20 (Dec. 19, 2005); http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_USCIS_Response-12-19-05.pdf (accessed Jan. 27, 2014).

Data Quality and its Impact on those Seeking Immigration and Other Benefits

Responsible USCIS Office:
Enterprise Services Directorate

Stakeholders reported issues with the USCIS Systematic Alien Verification for Entitlements (SAVE) program verifying a foreign national's eligibility with a benefit-granting agency, such as a state driver's license office or a local Social Security Administration (SSA) office. SAVE uses data from the U.S. Department of State, DHS, DOJ, and other agencies to verify an individual's immigration status, usually at the time the individual is applying for a state or local benefit, including drivers' licenses.[281] USCIS has taken steps to resolve certain quality issues but problems persist. In April 2013, the Ombudsman convened a working group, the Data Quality Forum, to focus on issues pertaining to DHS data sharing and integrity. While communication and new working relationships have developed as a result of this forum, data quality challenges remain and addressing them will require a renewed commitment on the part of participating offices.

Background

USCIS Verification Information Systems (VIS) is the technical infrastructure that enables USCIS to operate SAVE and E-Verify.[282] It is a nationally accessible database of selected immigration status information containing in excess of 100 million records. In 2013, VIS responded to approximately 25 million E-Verify queries, and approximately 11 million SAVE queries.[283] The E-Verify and SAVE programs rely on multiple data systems to verify an individual's immigration status.

On September 19, 2012, the DHS Office of the Inspector General (OIG) issued a report on the SAVE program. The OIG recommended implementation of a process to compile and trace SAVE benefit-applicant requests and referrals, and a process for SAVE database owners to report to the USCIS Verification Division whether changes to SAVE benefit-applicant records were made.[284] USCIS concurred with the first recommendation. USCIS responded to the second recommendation by stating that the SAVE program was not the owner of the records it uses to determine immigration status, and that the SAVE program does not have the authority to require database owners to report corrections to applicants' records.[285] The OIG directed and USCIS is working to develop internal procedures to report to the SAVE program whether USCIS records have been changed.[286] Since the SAVE program uses non-USCIS data, the Ombudsman offered to help coordinate with other DHS components and federal offices to develop a reporting system as the OIG suggested.

In response to the OIG report, USCIS and DHS partners have worked to improve the quality of data used to verify immigration status with the SAVE program. Specifically, the SAVE program has automated certain processing steps for select user agencies that eliminate the need for manual processing requests. The SAVE program now interfaces with USCIS Electronic Information System (ELIS) and CLAIMS 3, the central USCIS case management system, as well as DOJ systems.[287]

Starting in April 2013, the Ombudsman began hosting the Data Quality Forum to address data sharing challenges between USCIS and other federal agencies. Participants include DOJ, SSA, and DHS. Topics have ranged from U.S. Customs and Border Protection's (CBP) main data system, to the automation of the Form I-94, *Arrival/Departure Record*, to data stewardship policies and service level agreements.

The Ombudsman's 2013 Annual Conference included a roundtable discussion on USCIS data quality enhancements, user challenges, and access concerns with panelists from the USCIS Enterprise Services Directorate, the DHS Office of Civil Rights and Civil Liberties, and a state Refugee and Asylee services office.[288] They shared information on recent USCIS systems enhancements and user frustrations and challenges.

[281] USCIS Webpage, "SAVE," http://www.uscis.gov/save.

[282] DHS Privacy Impact Assessment, "Verification Information System Supporting Verification Programs" (Apr. 1, 2007); http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_vis.pdf (accessed Jun. 11, 2014).

[283] *Supra* note 224.

[284] U.S. Department of Homeland Security Office of Inspector General Report, "U.S. Citizenship and Immigration Services Systematic Alien Verification for Entitlements Program Issues" (Sept. 19, 2012); http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-125_Sep12.pdf.

[285] *Id.*, p.8.

[286] *Id.*

[287] *Supra* note 224.

[288] *See* DHS Blog Posting, "Ombudsman's Third Annual Conference: Working Together to Improve Immigration Services" (Oct. 24, 2013); http://www.dhs.gov/blog/2013/10/24/ombudsman%E2%80%99s-third-annual-conference-working-together-improve-immigration-services (accessed Mar. 14, 2014).

Recently, in anticipation of new immigration legislation, USCIS Verification began system testing high volume use of the E-Verify and SAVE programs.[289] The SAVE program enhanced its monitoring and compliance to ensure agency participants use the program to verify the immigration status information of benefit applicants in a fair, appropriate and lawful manner.

Ongoing Concerns

In the last year, USCIS improved its data sharing capabilities and quality. VIS quality assurance efforts are also ongoing, but issues remain:

Correcting Data Errors. USCIS interfaces with multiple IT systems to compile information into the Central Index System (CIS). This system is a repository of electronic data that provides its users access to biographical, and current and historical status information. CIS has 15 interfaces with eight other IT systems. This is one of the many systems E-Verify and the SAVE program use to verify immigration status for benefits-granting agencies. E-Verify and the SAVE program depend on the responsible agency to make the correction or addition to the feeder system, but cannot force compliance and at times cannot verify corrections. An enforceable policy for follow-up and verification of corrections resulting from a system's error report is needed.

Interagency Coordination. Government agencies and employers rely on information from USCIS systems in order to administer benefits and entitlement programs, and to make hiring and other significant decisions. Careful coordination is needed in exchanges between record owners and USCIS to ensure the accuracy of data. This requires a commitment to invest time and resources to improve systems. To date, USCIS has taken steps toward improving data quality by, for example, developing internal working groups and sponsoring research projects to assess data quality. However, USCIS does not control all data it relies on to verify immigration status. Active measures are needed to ensure data quality practices remain effective and keep pace with the rapid development of new information systems technologies.

USCIS relies on accurate data to strengthen and effectively administer the immigration system. When data quality falls short, customers experience delays in benefits and inaccurate decisions. The Ombudsman values USCIS's contribution to the Data Quality Forum, and looks forward to continuing to host meetings to improve interagency coordination and data quality.

Problems with Payment of the Immigrant Visa Fee via ELIS

Responsible USCIS Office:
Office of Transformation Coordination

In May 2013, USCIS began requiring that immigrant visa recipients pay, via USCIS's ELIS system, the $165 fee to cover the cost of producing their Permanent Resident Cards.[290] Electronic payment of this fee is problematic for a variety of reasons: 1) computer access is required in order to make the payment, and USCIS has not specified any alternative method for payment; 2) the visa recipient must create an ELIS account in order to make the payment, with no provision for payment by an attorney or other authorized representative; 3) the need for a credit card or a bank account makes payment impossible for some visa applicants; and 4) the account registration process, which requires the user to answer a series of questions, is available only in English.

Background

During the 2014 reporting period, USCIS continued its "Transformation" efforts, the fundamental reengineering of USCIS's business processes from paper-based adjudications to an electronic case review and management environment.[291] On May 22, 2012, USCIS launched the foundational release of the new system, ELIS, which integrates with other DHS systems such as U.S. Immigration and Customs Enforcement's Student and Exchange Visitor Information System and CBP's Arrival-Departure Information system.[292] This release included online account-based filing of Forms I-526, *Immigrant Petition by Alien Entrepreneur,* and I-539, *Application to Extend/Change Nonimmigrant Status.*[293]

[289] *Supra* note 220.

[290] USCIS Webpage "USCIS Immigrant Fee" (Aug. 21, 2013); http://www.uscis.gov/forms/uscis-immigrant-fee (accessed Apr. 29, 2014). USCIS offered its email for feedback at usics-elis-feedback@uscis.dhs.gov.

[291] *See generally* USCIS Webpage, "USCIS ELIS" (Apr. 16, 2014); http://www.uscis.gov/uscis-elis (accessed Apr. 28, 2014).

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

[293] *See* USCIS Webpage, "USCIS ELIS, Forms and Fees Available in USCIS ELIS" (Apr. 16, 2014); http://www.uscis.gov/uscis-elis (accessed Apr. 29, 2014). *See* section of this Report on "Problems with Payment of the Immigrant Visa Fee via ELIS."

In anticipation of its second release, USCIS held public engagements on the immigrant fee payment process via ELIS in May and August 2013.[294] Callers expressed concerns that some visa applicants have no computer access; and others, who can access a computer, do not have the computer-familiarity necessary to make an online payment. Callers also raised concerns about frequent error messages from ELIS; a non-intuitive registration process for the accounts; the barriers presented to certain visa applicants by the English-only interface; and the lack of technical support available to users. One attorney on the call described the new process as an "outrageous problem."

Since the USCIS immigrant fee payment process was added to ELIS, almost 500,000 ELIS accounts have been established by new immigrants.[295] According to USCIS, approximately 15 percent of new immigrants using ELIS pay after they enter the United States.[296]

The ELIS Customer Contact Center responded to 18,007 email inquiries from 42 countries since October 2013. Links are available on the ELIS landing page where customers create and log into accounts, and on the ELIS Help and Customer Support page.[297] The USCIS call center has 14 ELIS technical support agents to address technical inquiries. Despite not accepting overseas calls, many customers abroad are able to contact the ELIS technical support agents with the use of online communications for voice calling. Call center technical support agents have answered 65,871 telephonic inquiries since August 2013.[298]

Ongoing Concerns

Since June 2013, the Ombudsman has been receiving stakeholder reports that immigrant visa recipients are having difficulty using the new ELIS fee payment process. Of greatest concern are reports from organizations that represent low-income immigrant visa applicants who are not technologically proficient and do not typically have computer access. In addition to lacking access and know-how, these immigrants may not have bank accounts or credit/debit cards. Since ELIS does not permit attorneys or other representatives to pay the immigrant fee on behalf of their clients, these visa recipients face significant barriers to completing the immigration process. Stakeholders reported that individuals with valid immigrant visa packets were remaining overseas after consular interviews because they do not know how to use the ELIS system and feared coming to the United States without payment of the fee.

In August 2013, USCIS issued new instructions, *F4 Customer Guide – General Information: How Do I Pay the USCIS Immigrant Fee*, indicating if an individual is unable to pay the fee while abroad, the individual may travel to the United States, without penalty, and make the payment following admission.[299] However, these instructions are embedded in a three-page brochure, and they provide little information on how that payment should be made, and no information specifying what a customer should do if the customer does not receive a Request for Payment from USCIS. The customer guide is available in Chinese (Mandarin), French, Hindi, Korean, Portuguese, Spanish, Tagalog, Urdu and Vietnamese, as well as English. USCIS acknowledged that the translations contain inaccurate language stating that the fee must be paid abroad, and there is no plan to revise this literature, which is distributed after the consular appointment.

[294] *See* USCIS Webpage, "USCIS Immigrant Fee Transition to USCIS ELIS (Electronic Immigration System)" (May 10, 2013); http://www.uscis.gov/outreach/notes-previous-engagements/uscis-immigrant-fee-transition-uscis-elis-electronic-immigration-system (accessed Apr. 28, 2014); USCIS Customer Service and Public Engagement Directorate, "Webinar on Paying the USCIS Immigrant Fee" (Aug. 16, 2013); http://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/Upcoming%20National%20Engagement%20Pages/2013%20Events/August%202013/USCISImmigrantFee-webinar-invite.pdf (accessed May 14, 2014).

[295] *Supra* note 136.

[296] Information provided by USCIS (May 12, 2014). Approximately 50,000 accounts have been created for individuals filing Form I-539.

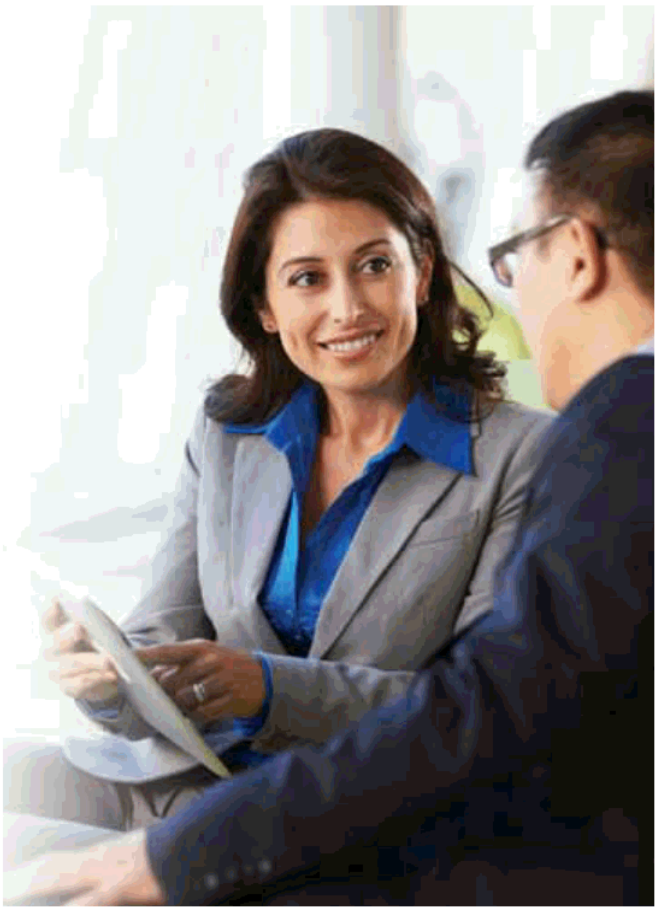
[297] USCIS Webpage, "USCIS Electronic Immigration System (USCIS ELIS) Log In;" https://elis.uscis.dhs.gov/cislogin/CISControllerAction.do?TAM_OP=login&ERROR_CODE=0x00000000&URL=%2F&AUTHNLEVEL=&OLDSESSION (accessed May 9, 2014); "USCIS ELIS Help and Customer Support" (Jan. 27, 2014); http://www.uscis.gov/uscis-elis/uscis-elis-help-and-customer-support (accessed May 9, 2014).

[298] Information provided by USCIS (May 7, 2014).

[299] USCIS Webpage, "F4 Customer Guide – General Information: How Do I Pay the USCIS Immigrant Fee" M-1113 (Aug. 2013); http://www.uscis.gov/sites/default/files/USCIS/Resources/How%20Do%20I%20Guides/F4en.pdf (accessed Apr. 28, 2014).

The Ombudsman suggested that USCIS take the following ameliorative actions:

- Change ELIS to allow an attorney or accredited representative with a Form G-28, on file to make the fee payment on the client's behalf. In a meeting with USCIS in April 2014, Transformation leaders stated USCIS is consulting with counsel and privacy authorities to develop a payment option for representatives of the visa recipient. USCIS likely will schedule a public engagement session when such changes are unveiled.
- Revise the foreign language instructions indicating that it is compulsory to pay the fee from abroad, and revise the instructions in English on the USCIS website to simply and clearly state that the applicant has the option of paying from overseas or in the United States, wherever the individual can access ELIS.
- Translate ELIS questions into Spanish and other languages.



Conclusion

USCIS continues to conduct robust public engagement. However, there are ongoing concerns with the AAO's authority and independence, the fee waiver process, and the methodology used to calculate processing times. The Ombudsman will continue to monitor USCIS's customer service efforts and looks forward to future developments.

Recommendations Updates

Employment Eligibility for Derivatives of Conrad State 30 Program Physicians

Responsible USCIS Offices:
Service Center Operations Directorate, Office of Policy and Strategy, and Office of the Chief Counsel

On March 24, 2014, the Ombudsman published recommendations titled *Employment Eligibility for Derivatives of Conrad State 30 Program Physicians.*[300]

Background

USCIS interprets relevant statutory and regulatory provisions as permitting J-2 nonimmigrant dependents of a J-1 (Exchange Visitor) medical doctor accepted into the Conrad State 30 program,[301] which provides a waiver of the two-year home-country physical presence requirement, to change only to H-4 nonimmigrant status. USCIS will not allow change of status to another, employment-authorized nonimmigrant status, even where the dependent independently qualifies for such status.[302] This policy appears to be at odds with the legislative intent, may have a chilling effect on Conrad State 30 applications, and may place an undue financial burden on international medical graduates and their families.

Recommendations

Accordingly, the Ombudsman recommended that USCIS:

1) Publish new regulations that permit independently eligible J-2 dependents of J-1 physicians approved for Conrad State 30 program waivers to change to other employment-authorized nonimmigrant classifications; or
2) Issue new policy guidance clearly explaining that J-2 visa holders, who are derivative beneficiaries of a Conrad State 30 program waiver, may change to any nonimmigrant status for which they are otherwise qualified and eligible.

Improving the Quality and Consistency of Notices to Appear

Responsible USCIS Offices:
Field Operations and Service Center Operations Directorates, Office of Policy and Strategy, and Office of the Chief Counsel

On June 11, 2014, the Ombudsman published recommendations titled *Improving the Quality and Consistency of Notices to Appear.*[303]

Background

Under the Immigration and Nationality Act, three agencies within DHS may initiate a removal proceeding by preparing and serving Form I-862, *Notice to Appear* (NTA) on a respondent and the Immigration Court.[304] These agencies include USCIS, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection.[305] While statutory and regulatory provisions outline the initiation, nature, and potential outcome of removal proceedings, agency policy memoranda makes clear enforcement priorities, procedures for drafting and reviewing NTAs, and

[300] Ombudsman Recommendation, "Employment Eligibility for Derivatives of Conrad State 30 Program Physicians" (Mar. 24, 2014); http://www.dhs.gov/publication/cisomb-recommendation-work-authorization-j2-physician-dependents (accessed Jun.17, 2014).

[301] Immigration and Nationality Act (INA) § 214(l). On September 28, 2012, through enactment of Pub. L. No. 112-176, the Conrad State 30 program was extended until September 30, 2015.

[302] Information provided by USCIS (Sept. 17, 2013). Prior to 2011, USCIS regularly approved requests for change of status for J-2s to employment-authorized nonimmigrant classifications, such as H-1B Specialty Occupation Worker, after the principal J-1 obtained a Conrad State 30 waiver. According to USCIS, subsequent to a revision of Form I-129, *Petition for a Nonimmigrant Worker*, in 2010, the agency began collecting information pertaining to J-2s in order to determine whether the principal was subject to the two-year home-residency requirement. It then began denying change of status applications filed by these dependents to change to classifications other than H-4. USCIS maintains that its policy has not changed in this area. Rather, the agency claims that denial of these applications for change of status is due to the collection of new information by USCIS via the revised Form I-129 (i.e., USCIS is now able to easily identify dependents who are subject to the two-year home-residency requirement).

[303] Ombudsman Recommendation, "Improving the Quality and Consistency in Notices to Appear (NTAs)" (Jun. 11, 2014); http://www.dhs.gov/publication/cisomb-nta-recommendation (accessed Jun.17, 2014).

[304] INA § 239(a); 8 U.S.C. § 1229(a) (2006); and 8 C.F.R. § 1003.14(a).

[305] This recommendation does not address the issuance of Notices to Appear (NTAs) by U.S. Customs and Border Protection (CBP) agents. It does discuss U.S. Immigration and Customs Enforcement's (ICE) priorities and legal review related to NTAs.

the proper exercise of prosecutorial discretion. In November 2011, USCIS released revised guidance on issuance of NTAs and referral of certain cases to ICE.[306] The guidance focused on DHS-established enforcement priorities and is an essential mechanism to streamline the NTA issuance process to promote efficiency while enhancing national security and public safety. Effective communication and collaboration to actualize DHS's priorities is a challenging but critical goal for NTA issuance.

In USCIS, a wide range of officials in asylum, field and service center locations may draft and issue NTAs.[307] There is no requirement that these NTAs be reviewed and approved by attorneys in the USCIS Office of the Chief Counsel (OCC) or in any other DHS legal program. OCC attorneys are not typically involved in designing or delivering training on NTA issuance.[308] Instead, USCIS offices and directorates have developed their own protocols and instructional materials, some of which have not been updated in years.[309] Stakeholder and case assistance feedback brought to the attention of the Ombudsman indicates the lack of attorney involvement in USCIS-generated NTAs has contributed 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 – increased efficiency and coordination.

USCIS does not track the number of NTAs that are returned as undeliverable, rejected by ICE, or terminated by the Executive Office for Immigration Review (EOIR), making it difficult to evaluate the agency's overall performance in this area.[310] However, the Ombudsman has identified a need for greater transparency and coordination within USCIS, and between USCIS, ICE and EOIR. The recommendations below seek to ensure that those placed into removal receive a full and fair hearing, including proper notice of all charges and a meaningful opportunity to respond.

Recommendations

To improve the quality and consistency of NTAs, and to ensure they are in compliance with DHS and USCIS policies, the Ombudsman recommends that USCIS:

1) Provide additional guidance for NTA issuance with input from ICE and 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.

[306] USCIS Policy Memorandum, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens" (Nov. 7, 2011); http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf (accessed Apr. 29, 2014).

[307] Information provided by USCIS (Mar. 22, 2013).

[308] *Id.*

[309] *Id.* USCIS Office of the Chief Council does not have any separate guidance related to legal sufficiency review of NTAs by its headquarters or field attorneys.

[310] *Id.* USCIS informed the Ombudsman that the agency does not generally maintain a system to track the number of NTAs returned to USCIS by ICE, CBP or the Executive Office for Immigration Review due to erroneous information or faulty drafting. The agency also does not track how many of these returned NTAs were mailed again or delivered in person to the same respondent. According to USCIS, the agency "does not track the number of NTAs returned as undeliverable on a national level." Information provided by USCIS (Oct. 1, 2013).

Appendix 1: 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 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;

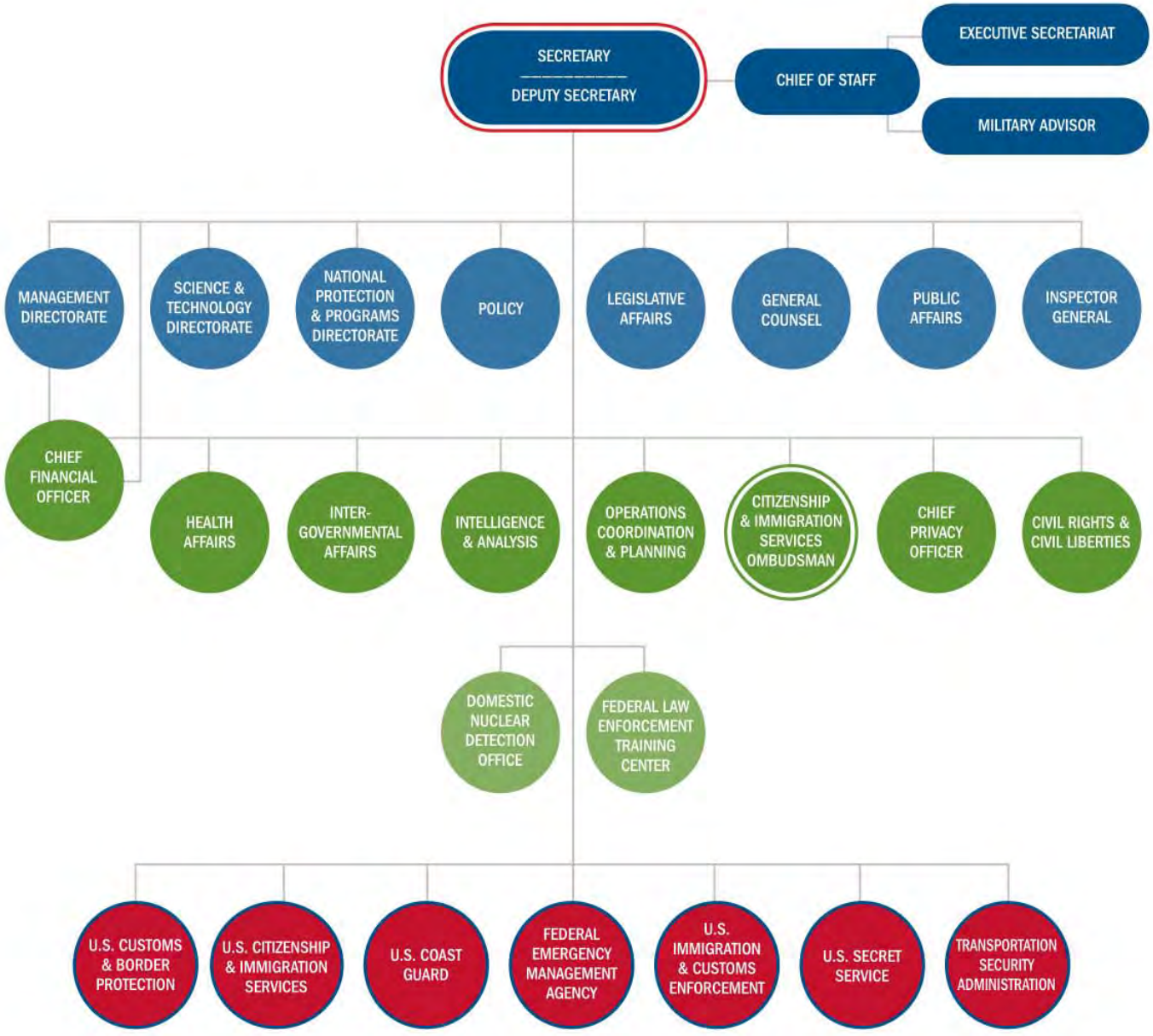
(B) may consult with the appropriate supervisory personnel of the Bureau of Citizenship and Immigration Services regarding the daily operation of the local office of such ombudsman;

(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.

Appendix 2: U.S. Department of Homeland Security Organizational Chart



Appendix 3: Ombudsman Scope of Case Assistance

Office of the Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security

Homeland Security

Requests for Case Assistance: Scope of Assistance Provided to Individuals

June 2013

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's 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's 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.)

Appendix 4: Initial Benefit Adjudication Data for Commonly Appealed Form Types

	2011			2012			2013		
	Receipts	Approvals	Denials	Receipts	Approvals	Denials	Receipts	Approvals	Denials
I-129 H-1B, Specialty Occupation	267,950	220,779	55,333	307,774	234,167	60,354	299,272	274,261	62,760
I-129 L-1, Intracompany Transferee	41,973	32,370	7,886	41,488	34,625	8,856	42,244	32,390	9,680
I-140 EB-1, Extraordinary Ability	5,012	2,930	1,560	4,940	3,789	1,892	5,689	4,377	1,482
I-140 EB-3, Professionals	18,501	18,740	3,064	10,428	12,217	2,650	4,094	6,862	1,518
I-212, Request for Admission After Deportation or Removal	587	220	181	1,083	368	244	2,992	925	373
I-360, Self-Petitioning Spouse of Abusive U.S. Citizen or Legal Permanent Resident	8,682	4,015	1,479	9,007	3,110	1,421	6,816	9,665	2,660
I-601, Waiver of Grounds of Inadmissibility	3,739	1,999	690	5,787	2,653	630	4,586	3,176	785
I-918, U Nonimmigrant Status	26,801	17,690	4,574	39,894	17,543	4,331	43,695	18,228	3,269
N-600, Certificate for Citizenship	57,606	56,746	4,792	62,862	48,914	4,013	63,599	60,038	5,329

Source: Information provided by USCIS (May 16, 2014).

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Homeland Security

Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security

Mail Stop 0180
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http://www.dhs.gov/cisombudsman

Send your comments to: **cisombudsman@hq.dhs.gov**

U.S. Department of Homeland Security's Responses to
Representative Gosar's June 13, 2014 Letter

1. ***First and foremost,* what statutory authority, Presidential executive order, or memo from the Office of the Secretary is used as a basis for these transfers and the processes involved?**

The transfer of U.S. Immigration and Customs Enforcement (ICE) detainees from one ICE area of responsibility to another is part of the routine detention and removal process. The *Immigration and Nationality Act* (INA) and *Homeland Security Act of 2002* (HSA) vest the Department of Homeland Security (DHS) with the authority to transfer aliens to another state and release those individuals in that state as opposed to other locations. Specifically, INA § 241(g), 8 U.S.C. § 1231(g), states that the Secretary of DHS "shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." This statute has been interpreted as providing DHS the authority "to transfer aliens from one detention center to another." *Gandarillas-Zambrana v. Bd. of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995). With the implementation of the HSA, the care of unaccompanied children (UAC) was transferred from legacy Immigration and Naturalization Service (INS) to the Director of the Office for Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS). *See Homeland Security Act of 2002*, Pub. L. 107-296, § 462(a), 116 Stat. 2135, 2202 (codified at 6 U.S.C. § 279(a)). Further, the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA) requires any department or agency of the federal government that has an unaccompanied alien child in its custody to transfer the child to HHS within 72 hours of determining that such child is unaccompanied. *Trafficking Victims Protection Reauthorization Act*, ch. 235(b)(3) (2008), 122 Stat 5044 (2008) (codified at 8 U.S.C. § 1232(b)(3)) (TVPRA). Accordingly, ICE is required by law to transfer UAC to ORR facilities that are located throughout the United States. After ICE initially transfers the UAC to ORR, it no longer has responsibility for their care or custody, or subsequent placement or relocation decisions made by ORR HHS.

In addition, ICE transports UAC in accordance with the terms of the agency's appropriations acts. *See Consolidated Appropriations Act*, 2014, Pub. L. No. 113-76, 128 Stat. 5, 250.

   a. **Further, what appropriations are used to facilitate these actions (meaning, from which specific accounts within DHS)?**

Congress appropriates funds to ICE under the heading "Salaries and Expenses" to pay "for necessary expenses for enforcement of immigration and customs laws, [and] detention and removals," among other things. *See, e.g.*, *Consolidated Appropriations Act*, 2014, Pub. L. No. 113-76, 128 Stat. 5, 250; *Consolidated and Further Continuing Appropriations Act*, 2013, Pub. L. No. 113-6, 127 Stat. 198, 346-47. Amounts appropriated under the Salaries and Expenses heading are to be used, among other things, for "transportation of unaccompanied minor aliens." 128 Stat. 251; 127 Stat. 347.

2. Might it be possible that the Department, through CBP and ICE, is breaking federal laws regarding "alien smuggling" by acting in this way and transferring these individuals within the United States?

No. DHS is not violating 8 U.S.C. § 1324, *Bringing in and harboring certain aliens*, or other similar laws by processing and transferring the UAC to HHS. To the contrary, DHS is enforcing the laws that Congress has passed.

Through the HSA, Congress specifically transferred the responsibility for the care of UAC from INS to ORR. *See* 6 U.S.C. § 279(a). The HSA also makes ORR responsible for implementing placement determinations for UAC. 6 U.S.C. § 279(b)(1).

Within DHS, UAC are ordinarily apprehended and placed into removal proceedings by U.S. Customs and Border Protection (CBP). ICE assists with transportation of UAC to ORR custody. ICE's appropriations explicitly authorize ICE to pay for the transportation of UAC. *See Consolidated and Further Continuing Appropriations Act of 2013*, Pub. L. No. 113-6, 127 Stat. 198, 346-47 (appropriating ICE $5,394,402,000 for fiscal year (FY) 2013 and further providing "[t]hat of the total amount provided, not less than $2,753,610,000 is for detention and removal operations, including transportation of unaccompanied minor aliens ..."); *Consolidated Appropriations Act*, 2014, Pub. L. No. 113-76, 128 Stat. 5, 250 (appropriating ICE $5,229,461,000 for FY 2014 and further providing, "[t]hat of the total amount provided, not less than $2,785,096,000 is for detention and removal operations, including transportation of unaccompanied minor aliens ....")

ICE does not make placement determinations for unaccompanied minors as referenced in your letter or in the opinion you cite by Judge Andrew Hanen in *United States v. Nava-Martinez*, No. 1:13-cr-441, (S.D. Tex. Dec. 13, 2013). Instead, placements such as those are made by ORR.

a. Please see Section 1324 of Title 8, U.S.C. and explain to me how this statute does not apply to the Department.

Please see the answer to Question 2.

b. If the Department believes it is justified, please provide such justification.

Please see the answer to Question 2.

c. If the Department believes it is not justified after review of the U.S. Code, does it plan to cease these practices posthaste?

Please see the answer to Question 2.

3. **Please provide an explanation as to the evolution of this policy/process, including:**

    a. **Any earlier versions of the policy/process;**
    b. **When the policy/process was instituted in its current form;**
    c. **How and when the policy/process was distributed to personnel as instruction, in addition to providing the exact document outlining such instructions, in unredacted form;**
    d. **Any updates to the policy/process since the June 4 staff briefing; and**
    e. **Any and all potential updates to the policy/process that DHS is currently considering.**

    The specific policy raised by this question is not clearly identified in your letter, which discussed several policies and practices. However, to the extent you are referring to ICE's general authority to transfer detainees from one facility to another, please refer to the response provided to question one, explaining that such transfers are consistent with ICE's statutory authority and relevant case law. To the extent that you are referring to the policies involving the transfer of unaccompanied minors, please note that ORR is responsible for the placement of such children as explained in response to questions one and two.

4. **When asked by staff at the June 4 briefing how much money was being spent to transport these illegal immigrants to other areas, ICE answered that it cost about $53,000 per flight, if it was a full flight. ICE then went on to describe how its hands are tied because they do not have enough detention beds, or enough money to contract with other facilities to detain these individuals.**

    a. **Does the Department not see the hypocrisy of this explanation?**
    b. **Might the Department rather wish to work with the Administration and Congress to outline this serious issue of a lack of infrastructure, provide a workable budget justification, and request that Congress appropriate the funds needed to raise the necessary infrastructure rather than spend $53,000 per flight to help get these individuals to their final destination?**

    The Administration is eager to work with Congress to ensure that sufficient resources and authorities exist to continue our efforts. To that end, and to effectively address this urgent situation, the President has requested an emergency supplemental appropriation of $3.7 billion, including $1.5 billion for DHS to support additional detention and removal facilities and enhanced processes, as well as increased activities to disrupt and dismantle the human smuggling organizations that lure these individuals into the dangerous journey from Central America. More specifically, the request focuses on:

    - deterrence, including increased detention and removal of adults with children and increased immigration court capacity to adjudicate these cases as quickly as possible;
    - enforcement, including enhanced interdiction and prosecution of criminal networks, increased surveillance, and expanded collaborative law enforcement task force efforts;

- foreign cooperation, including improved repatriation and reintegration, intensified public information campaigns, and efforts to address the root causes of migration; and
- increased capacity for the care and transportation of UAC.

DHS looks forward to working with Congress to obtain the important funding.

5. **At the briefing, ICE explained that in the less than 2 weeks prior to June 4 that these policies/practices had been in place to transfer these individuals to Arizona, it had made 7 flights from Texas to various parts of Arizona.**

   a. **How many flights have occurred since then and/or to-date?**

There have not been any additional ICE flights like those from the CBP's Border Patrol's Rio Grande Valley Sector to Tucson Sector.

6. **What exact instructions are given to these detained individuals after they are processed and before they are released on what the Department has deemed a "parole" status?**

   a. **I am aware of the 15-day reporting requirement, but what exactly is said to them or given to them?**
   b. **Is any paperwork signed?**
   c. **Please provide a copy of any and all related documents.**

After ICE took custody of these individuals, pursuant to its standard operating procedures, the ICE Enforcement and Removal Operations (ERO) Phoenix Field Office personnel reviewed each case and took appropriate enforcement action based on governing law and the agency's national security and public safety enforcement priorities. Individuals who did not remain in custody were given a list of available services, notified of the ICE ERO office nearest to the address given as their final destination, and received instructions to report to that ICE ERO office within 15 days. ICE ERO also informed these individuals that their immigration cases—including an assessment of any appropriate conditions of release—would be managed by the receiving field office. The receiving offices were notified of these transfers through internal docket control and management systems used by all ICE ERO offices.

7. **As a percentage, what is the success rate to-date in terms of these individuals self-reporting to the regional ICE facility (as instructed by ICE prior to release) near their final destination for additional processing and adjudication?**

After CBP's Border Patrol processed the 940 adults with children (i.e., family unit members), due to lack of appropriate detention space, ICE paroled them into the United States. As you know, ICE has established family residential standards, developed in response to federal court litigation, generally providing for case management, health, education, and counseling services in family facilities. As a result, family detention bed space is generally more than double the cost of adult detention space; ICE has traditionally only maintained about 100 family detention beds. Since no family detention beds were available for these adults with

children, they were transported to bus stations after indicating to ICE their final destinations across the Nation. Approximately 60 percent of these adults reported timely to the appropriate ICE field offices at the final destinations they indicated. Individuals who do not appear for immigration removal proceedings as required are likely to be ordered removed in absentia. ICE ERO will take appropriate enforcement action with respect to these individuals based on its national security, public safety, and border security priorities, including those related to recent arrivals and fugitive aliens.

Since this time, ICE has added additional detention capacity for adults who cross the border illegally in the Rio Grande Valley with their children. For this purpose, DHS has established a temporary facility for adults with children on the Federal Law Enforcement Training Center's campus at Artesia, New Mexico. And, on August 1, 2014, ICE transitioned the Karnes County Civil Detention Center from an immigration detention facility housing adults to a residential facility to house adults with children. The establishment of these facilities will help ICE to increase its capacity to house and expedite the removal of adults with children in a manner that complies with federal law. DHS will continue working to increase our capacity to hold and expedite the removal of the influx of adults with children illegally crossing the southwest border.

8. **Do the transfers take place from Texas to states other than Arizona for any detainees which are not UAC or are not part of a family unit? I have heard reports about New York and Maryland in particular.**

The transfer of ICE detainees, including adults not part of a family unit, from one ICE area of responsibility to another is part of the routine detention and removal process, based on operational needs.

9. **Please describe in detail the ways in which the Yuma Sector has been incorporated thus far.**

    a. **Further, please describe the plans the Department is hoping to implement to further involve Yuma Sector in this process.**

In support of the Rio Grande Valley Sector effort to accommodate the processing and transfer of UAC, Yuma Sector provided both personnel and equipment to Rio Grande Valley Sector and the Nogales Processing Center in Tucson Sector (TCA). Since the onset of the UAC situation, Yuma Sector deployed 105 Border Patrol agents (including supervisors) and 11 vehicles to Rio Grande Valley Sector and 38 to the Nogales Processing Center. Within the last four months, Yuma Sector deployed an average of 35 agents per month, which represents approximately 4 percent of the Yuma Sector workforce.

At this time, there are no further plans for Yuma Sector in this process. Steady-state operations will be maintained by rotating agents in and out of these temporary assignments in 28-day iterations through the end of the fiscal year. The situation continues to be monitored and adjustments could be made as operational needs require.

10. In what specific ways does DHS plan to involve DOD in this process?

a. What about other departments of the government?

At the direction of President Obama and Secretary Johnson, the Federal Emergency Management Agency (FEMA) is leading the Unified Coordination Group responsible for addressing the influx of UAC that is creating a humanitarian situation along the southern border. This group includes DHS and its Components; HHS, the Department of Defense (DoD), the Department of Justice (DOJ), the Department of State (DOS); and the General Services Administration (GSA). The safety and well-being of the children are a top priority of the Federal Government. As the lead coordinating agency, FEMA is leveraging the capabilities of the Federal Government to support CBP, ICE, and HHS. These agencies have the lead roles in addressing the immediate needs of UAC.

Other U.S. Government agencies involved in issues related to the UAC migration surge include DoD, which provided temporary shelter space for HHS at its facilities in San Antonio, Texas; Ventura, California; and Fort Sill, Oklahoma. While HHS has scaled back its use of these shelter spaces, these facilities remain ready to assist in our efforts as necessary should apprehensions increase. DOS, working with DHS, is coordinating diplomatic outreach, public diplomacy, and messaging with domestic and international partners, and is committed to working with Central American governments of the UAC migration to address the complex root causes of migration. They are working closely with U.S. missions and partner governments in the region, as well as their embassies in the United States, to actively stress the dangers of irregular immigration through media engagements, public events, and outreach in at-risk communities. DOJ and the Corporation for National Community Service announced "justice AmeriCorps," a strategic partnership to increase national service opportunities, while enhancing the effective and efficient adjudication of immigration proceedings involving certain children who have crossed the U.S. border without a parent or legal guardian.

DHS and DOJ are continuing to work together to investigate, prosecute, and dismantle the smuggling organizations that are facilitating border crossings into the Rio Grande Valley. As of August 18, 2014, 363 smugglers and their associates had already been arrested on criminal charges, and more than 900 undocumented immigrants had been taken into custody. As of August 17, $713,300 in illicit profits had been seized from 438 bank accounts held by human smuggling and drug trafficking organizations. To date, HSI has seized over $839,000 in illicit proceeds, including derivative cash seizures.

DOJ is reassigning immigration judges as necessary to handle the cases arising from those crossing the border. Leveraging video teleconferencing technology, DOJ will help adjudicate these new cases as quickly as possible, and all cases will continue to be heard consistent with fairness and due process and all existing legal and procedural standards, including those for asylum applicants. Overall, DOJ's increased capacity and resources will allow for the acceleration of case processing, allowing ICE to return unlawful migrants from Central America to their home countries more quickly.

11. Please describe in detail the ways in which the detainees' consulates facilitate any part of this process once the detainees are state-side.

Each country has discretion in deciding what level of consular services it will provide. Consular officers may do a variety of things to assist a foreign national; the most common is speaking with the detained individual or arranging a visit. Consular officers may also assist in arranging legal representation and monitoring the progress of a case, but they have no concrete role in facilitating the outcome of individual cases. All foreign nationals who come into CBP custody are afforded the opportunity to contact a consular official of their native country. Additionally, appropriate consular officials are notified when an individual from a mandatory notification country is arrested. While a subject is in custody, consular officers have access to their citizens and will occasionally visit CBP facilities to collaborate with CBP officials and meet with citizens of their country.

12. Reports also indicate that DHS believes Arizona has seen a decline in illegal border crossings.

- **a. While many Members of Congress dispute that assessment based on the fact that DHS has no real metrics for accounting for crossings and periodically changes standards and definitions of "detained," "deported," and "turnaround," let us assume for the purposes of these questions that DHS' statements are true.**
- **b. If true, why aren't Yuma Sector and Tucson Sector sending personnel assets to Texas for border and interior enforcement?**

The metrics that are in place indicate a 26 percent decrease in apprehensions compared to the same period in FY 2013. Yuma Sector and Tucson Sector have both deployed assets to Texas to assist with the current situation as more particularly described in response to Question 9 above.

13. What law enforcement policies are in place to address illegal activity performed by these individuals after they are state-side?

- **a. When my staff posed this question at the June 4 briefing, the answer seemed to be that there was no policy whatsoever in place.**

When state and local law enforcement officers arrest and fingerprint an individual for a criminal violation of state or local law, those fingerprints are sent to DHS to check against its immigration databases. If these checks reveal that an individual is unlawfully present in the United States or otherwise removable due to a criminal conviction, ICE takes enforcement action—prioritizing the removal of individuals who present the most significant threats to public safety, as determined by the severity of their crime, their criminal history, and other factors—as well as those who have repeatedly violated immigration laws.

14. Why did the Department decline to inform Congress and/or state and local officials about these transfers?

a. Is it true that ICE was coordinating, at least sporadically, with the Greyhound Company to arrange for the drop-off of these detainees?
b. Could no one at any level call anyone in Congress or at the state or local level to inform them of these transfers?

While the Department did not notify Congress and/or state and local government officials before enforcement actions were taken, such briefings began after the initial releases. Regarding coordination with transportation providers, pursuant to standard operating procedures, ICE ERO coordinates with commercial carriers as well as non-governmental and faith-based organizations to determine the number of individuals that transportation providers may accommodate based on their transportation schedule, resources, and capabilities to ensure detainees are processed quickly, safely, and humanely. .

15. Does DHS/ICE have any intentions of repaying the public and private services afforded to these individuals based on this reckless policy/practice of dropping off hundreds of illegal immigrants at bus stations all over the State of Arizona?

a. It is my understanding that at the June 4 briefing when my staff posed this question, the Department replied that no reimbursements had been made, and that there was no such plan in place to do so.
b. Has a plan been formulated since the June 4 briefing when this question was posed?
c. Was a remedy to this injustice to local communities ever even considered by anyone at the Department?

One source of border security funding available to Arizona is Operation Stonegarden, a grant program administered by FEMA that supports enhanced cooperation and coordination among federal, state, local, tribal, and territorial law enforcement agencies in a joint mission to secure the borders of the United States. Among its goals, Operation Stonegarden is intended to support border states by increasing the capability to prevent, protect against, and respond to border security issues and encourage local operational objectives. Secretary Johnson announced the FY 2014 Operation Stonegarden funding allocations on July 25, which included more than $12.4 million in funding for Arizona—an 8-percent increase over the FY 2013 funding level. Overall, the southwest border received more than 86 percent of the total grant monies available under this program. This increased funding will further enhance the ability of law enforcement agencies within the state to support CBP missions along the southwest border and augment security efforts in the region. Since FY 2009, Arizona has received approximately $80 million in Operation Stonegarden funding, including more than $21.5 million in combined FY 2012 and FY 2013 funding that Arizona grant recipients are currently expending.

16. Please reaffirm in writing the statements from the June 4 briefing which indicated DHS/ICE/CBP made no transfers of these individuals without giving them proper amounts food, water, hygiene items, clothing, or shelter.

a. Please elaborate on everything the Department gives these individuals before dropping them at their next transfer stations.

As stated during the June 4 briefing to Congressional staff members and in subsequent correspondence with members of Congress, as well as state and local officials, before their release, ICE ERO Phoenix offered individuals access to phones to arrange for transportation to their destination and/or to contact their consulate. They were given a bag lunch and bottled water; families with infants were provided diapers and baby food. All property in the individuals' possession at the time they were transferred to ICE from CBP was returned to them.

17. Please provide figures outlining the total amount of money spent by the Department on these transfers (to any state) to-date.

a. The Department may also provide this figure without consideration of salaries.

The total cost to ICE to transfer unprocessed adults with children via air transport from the Rio Grande Valley area (during the time period of May 24, 2014 to June 15, 2014), was approximately $630,000. Please note that this figure reflects the total cost of the ICE missions flown, which include additional legs of these flights that were used to transport other detainees for different purposes.

18. Please provide the figures totaling the number of individuals ICE processed in each calendar year since 2004.

ICE Initial Book-ins, Calendar Years 2004 through 2014 Year-to-Date[1]

Calendar Year	Book-ins
2004	208,890
2005	217,637
2006	247,575
2007	297,335
2008	396,369
2009	372,703
2010	370,699
2011	443,922
2012	479,522
2013	433,022
2014 YTD	228,918

[1] FY 2014 year-to-date is as of June 30, 2014. Data provided represents initial book-ins to ICE custody. Aliens may have been booked in more than once.

19. Please provide the figures totaling the number of contract and non-contract beds ICE had available in each calendar year since 2004.

Number of Funded Beds, FYs 2004 through 2014

FY	Number of Funded Beds
2004	19,444
2005	18,500
2006	20,800
2007	27,500
2008	32,000
2009	33,400
2010	33,400
2011	33,400
2012	34,000
2013	34,000
2014	34,000

20. Please provide the average cost, on a state-by-state basis, of a detention bed fee for one night from each calendar year since 2004.

Average Cost of Detention Bed Fee, FYs 2009 through 2014

ICE ERO Area of Responsibility	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Atlanta	$ 92.52	$ 96.03	$ 91.95	$ 95.71	$ 99.44
Baltimore	$ 110.74	$ 100.55	$ 96.28	$ 100.21	$ 99.66
Boston	$ 119.59	$ 114.73	$ 109.85	$ 114.34	$ 111.66
Buffalo	$ 147.96	$ 173.63	$ 166.25	$ 173.04	$ 226.08
Chicago	$ 88.26	$ 85.20	$ 81.58	$ 84.91	$ 71.57
Dallas	$ 86.37	$ 81.24	$ 77.78	$ 80.96	$ 87.32
Denver	$ 122.39	$ 121.24	$ 116.08	$ 120.83	$ 146.91
Detroit	$ 96.28	$ 84.91	$ 81.30	$ 84.63	$ 92.53
El Paso	$ 120.66	$ 129.32	$ 123.83	$ 128.89	$ 136.62
Houston	$ 105.52	$ 92.09	$ 88.17	$ 91.78	$ 100.16
Los Angeles	$ 121.82	$ 123.97	$ 118.70	$ 123.55	$ 133.22
Miami	$ 141.19	$ 139.41	$ 133.48	$ 138.94	$ 173.77
Newark	$ 150.29	$ 215.59	$ 206.42	$ 214.86	$ 158.23
New Orleans	$ 71.49	$ 69.99	$ 67.01	$ 69.75	$ 79.05
New York	$ 224.36	$ 113.99	$ 109.15	$ 113.61	$ 113.37
Philadelphia	$ 107.98	$ 108.03	$ 103.43	$ 107.66	$ 128.91
Phoenix	$ 105.43	$ 116.05	$ 111.12	$ 115.66	$ 122.85
Seattle	$ 124.83	$ 134.72	$ 128.99	$ 134.26	$ 131.67
San Francisco	$ 91.06	$ 83.47	$ 79.92	$ 83.19	$ 97.83
Salt Lake City	$ 95.87	$ 101.24	$ 96.93	$ 100.89	$ 110.10
San Antonio	$ 127.37	$ 135.58	$ 129.81	$ 135.12	$ 103.46
San Diego	$ 170.53	$ 194.84	$ 186.56	$ 194.19	$ 247.89
St Paul	$ 98.52	$ 98.70	$ 94.51	$ 98.37	$ 96.94
Washington	$ 98.21	$ 90.19	$ 86.35	$ 89.88	$ 102.52
ICE Total[2]	**$ 115.32**	**$ 116.88**	**$ 112.83**	**$ 118.14**	**$ 118.88**

[2] Please note that total ICE bed rate is not a straight average of Area of Responsibility rates but is the weighted average daily population.

WASHINGTON
LEGISLATIVE OFFICE

April 4, 2014

The Honorable Jeh Johnson
Secretary
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Re: Recommendations to DHS Relating to Immigration Enforcement and Border Safety

Dear Secretary Johnson and Deputy Secretary Mayorkas:

On behalf of the American Civil Liberties Union (ACLU), I write to congratulate you on your confirmations to lead the U.S. Department of Homeland Security. Under your leadership, the Department will have the opportunity to institute policy reforms that ensure due process, preserve family unity, and protect communities.

We urge you to proceed quickly with the review of the Department's immigration enforcement practices, as families and communities daily struggle and suffer under the threat of deportation. We respectfully submit the following recommendations relating to immigration enforcement and border safety. While these steps would not fully address the pervasive problems in the current system, they would mark significant improvements. All can be pursued wholly within existing executive authority, and should be pursued irrespective of legislative immigration reform and affirmative relief considerations.

I. Curb Record-Level Deportations

The Obama Administration has hit a dubious milestone, having deported two million individuals over the course of five years. Many of the individuals deported are among those who would be eligible for relief under the Senate-passed comprehensive immigration reform bill (S. 744) or proposals currently being considered in the House of Representatives. In FY 2013, over 260,000 people were deported through expedited removals or reinstatement, their cases never heard by an immigration judge – a full 70 percent of the total number of people deported that year. Over 65 percent of FY13 removals were people with no criminal history or who had been convicted only of minor misdemeanors such as driving without a license. These sad and shocking statistics are inconsistent with our history as a nation of immigrants, inconsistent with the Department's promise to focus its resources on national security and public safety, inconsistent with due process and fundamental fairness, and inconsistent with the President's commitment to a humane enforcement system.

To help mitigate the destructive impact of mass deportations on communities, family unity, and civil liberties, DHS should take the following steps, which are described in greater detail in the ACLU's "Recommendations to DHS to Address Record-Level Deportations"[1]:

- Replace ICE's overbroad 2011 civil enforcement priorities memo[2] with DHS-wide guidance that significantly limits the priority categories, including by a) eliminating level 2 and 3 offenders from Priority 1; b) narrowing the overbroad level 1 Priority 1, which should not include anyone who has served less than one year's imprisonment completed within the past five years or who has demonstrated substantial evidence of rehabilitation; c) narrowing the vaguely defined Priority 2 ("recent illegal entrants"); and d) eliminating Priority 3 ("fugitives" and immigration violators). The guidance should clarify that cases falling into the categories must still be assessed individually for equities, including the factors listed in ICE's 2011 prosecutorial discretion memo,[3] before they are pursued for removal by DHS agents, officers, or attorneys.
- Reform detainer policy to include, among other changes: strictly limiting the issuance of detainers, clarifying that "reason to believe" an individual is removable means "probable cause," and providing for review of detainer decisions at DHS headquarters to reduce the number of erroneous detainers issued, enhance oversight, and increase national uniformity. As part of the process of revising its detainer policy and practices, DHS should provide an opportunity for affected communities and groups to comment on detainer problems currently experienced across the country.
- End the use of deportations without hearings for individuals who are prima facie eligible for relief from removal or for prosecutorial discretion, and for all unrepresented individuals who agree to a stipulated removal; limit the use of expedited removal to individuals apprehended at a port of entry or while attempting to enter, consistent with DHS policy prior to 2004; and provide an administrative appeal process for immigrants to challenge an expedited or stipulated removal order, visa waiver removal order, voluntary departure, or other administrative order.
- Implement reforms to ensure that ICE's 2011 prosecutorial discretion memo is significantly strengthened and applied uniformly nationwide and extended to CBP, including by issuing a DHS-wide policy requiring all Notices to Appear to be consistent with the civil enforcement priorities and ICE's 2011 prosecutorial discretion memo, developing an objective assessment tool to score prosecutorial discretion factors, and establishing review processes at DHS Headquarters.

II. End Programs and Practices Violating Civil Liberties, Civil Rights, and Human Rights

287(g) and Secure Communities

ICE's partnerships with state and local law enforcement agencies for the enforcement of immigration law, via 287(g) agreements and Secure Communities, incentivize profiling based on race or ethnicity by local law enforcement, undermine community policing, and threaten public safety. The Administration has taken a positive step in eliminating the use of 287(g) "task force" models, but the 287(g) jail model still presents significant concerns. It is particularly problematic that ICE has not terminated agreements with jurisdictions where the ACLU and other organizations have documented enforcement practices that thwart ICE's civil enforcement priorities or where

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[1] *See* "Recommendations to DHS to Address Record-Level Deportations," American Civil Liberties Union (Jan. 22, 2014), *available at* https://www.aclu.org/sites/default/files/assets/14_1_22_aclu_recommendations_to_dhs_to_address_record-level_deportations_final2.pdf.

[2] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All ICE Employees (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[3] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

there is evidence of biased and discriminatory policing.[4] Of the 37 active 287(g) agreements, over one-third are operating in states that passed "show me your papers" laws in recent years (Arizona, Alabama, Georgia, South Carolina, Utah). Other 287(g) agreements are operating in locations with demonstrated records of hostility to immigrants, including Prince William County (VA), Wake County (North Carolina), Frederick County (Maryland), and others.

DHS should:

- Terminate all 287(g) agreements, including jail models, and not enter into any new 287(g) agreements;
- Short of terminating all agreements, terminate agreements with all jurisdictions where there is reason to believe (based on community complaints or otherwise) that enforcement practices are inconsistent with ICE's civil enforcement priorities and/or where there is biased and discriminatory policing. Such termination should not require a formal DOJ investigation; indeed, recurring budget language requires that "no funds . . . may be used to continue a delegation of law enforcement authority authorized under section 287(g) of the Immigration and Nationality Act (8 U.S.C. 1357(g)) if the Department of Homeland Security Inspector General determines that the terms of the agreement governing the delegation of authority have been violated"[5];
- Reform the use of ICE detainers as described above and further detailed in the ACLU's "Administrative Recommendations on ICE Immigration Detainers"[6];
- Decline to issue ICE detainers on individuals in jurisdictions where racial profiling or other discriminatory local enforcement practices occur, including but not limited to jurisdictions under consent decree with DOJ (indeed, such non-issuance should not require a formal DOJ investigation); and
- Publicly release, in a timely manner, the long-promised quarterly statistical analyses of Secure Communities, along with information reflecting outcomes of DHS/ICE investigation of jurisdictions that are statistical outliers or "anomalies." The quarterly analyses should include data on detainers issued for victims, witnesses, plaintiffs, and individuals engaged in a protected right.[7]

Operation Streamline

Operation Streamline is a partnership between DHS and DOJ to prosecute migrants in the federal criminal justice system for illegal entry (under 8 U.S.C. §1325) and illegal re-entry (under 8 U.S.C. §1326). DHS's role includes the apprehension and referral of migrants who could otherwise be channeled into the civil immigration enforcement system to DOJ for criminal prosecution. CBP also details its agents at the southwest border as Special Assistant U.S. Attorneys to assist DOJ and U.S.

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[4] *See* ACLU FOUNDATION OF GEORGIA, TERROR AND ISOLATION IN COBB: HOW UNCHECKED POLICE POWER UNDER 287(G) HAS TORN FAMILIES APART AND THREATENED PUBLIC SAFETY (Oct. 2009), *available at* http://www.acluga.org/download_file/view_inline/1505/392/ (reporting on Cobb County); ACLU FOUNDATION OF GEORGIA, THE PERSISTENCE OF RACIAL PROFILING IN GWINNETT TIME FOR ACCOUNTABILITY, TRANSPARENCY, AND AN END TO 287(G) (Mar. 2010), *available at* http://www.acluga.org/download_file/view_inline/1504/392/ (reporting on Gwinnet County). ACLU of North Carolina submitted 57 complaints to CRCL on behalf of immigrants held in Wake County Jail in 2010. *See* Stacy Davis, *Letter Reveals Complaints About Treatment at Wake Jail*, WRAL.COM (July 7, 2011), *available at* http://www.wral.com/news/state/story/9829279/. *See* Sirene Shebaya, *Frederick County Officials Shouldn't Be Enforcing Immigration Law*, BALTIMORE SUN (Dec. 10, 2012) *available at* http://articles.baltimoresun.com/2012-12-10/news/bs-ed-immigration-enforcement-20121210_1_immigration-status-immigration-law-law-enforcement.

[5] Consolidated Appropriations Act, 2014, H.R. 3547, 113th Cong. (2014) (enacted).

[6] *See* "Administrative Recommendations on ICE Immigration Detainers," American Civil Liberties Union (Jan. 22, 2014) *available at* https://www.aclu.org/sites/default/files/assets/14_1_22_aclu_administrative_recommendations_on_ice_detainers_final.pdf

[7] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel (June 17, 2011), *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf.

Marshals.[8] DHS's policy goal is to deter illegal migration, but it is virtually impossible to measure the multiple factors that inform a migrant's decision to cross, and the desire to reunite with family or find a job often outweighs any fear of prosecution.[9] It is also unclear that DHS can even collect the data necessary to assess deterrent effect with any accuracy. Meanwhile, the Attorney General has directed U.S. Attorneys to prioritize cases that deal with national security, violent crime, and financial fraud and cases that protect our most vulnerable communities.[10]

Prosecutions for illegal entry and illegal re-entry serve neither DHS nor DOJ goals. Yet illegal entry and illegal re-entry are now the most prosecuted federal crimes in the United States.[11] According to the Pew Research Center, the increase in §1326 convictions over the past two decades accounts for 48 percent of the growth in total convictions in federal courts over the period.[12] Incarceration costs alone for people with illegal entry and re-entry convictions have been estimated at $1 billion annually.[13] Streamline-related trials also present significant due process concerns.[14]

Operation Streamline, as a zero-tolerance program, should be eliminated as wasteful and counter to fundamental notions of prosecutorial discretion and fitting the punishment to the crime. But short of elimination, CBP should at a minimum significantly downscale its role in channeling unlawful migrants into the federal criminal justice system by:

- Deprioritizing §1325 and §1326 referrals for vulnerable individuals (for example, domestic violence survivors and the elderly), for individuals with significant U.S. ties (specifically, individuals with U.S. citizen minor children or spouses, veterans and members of the U.S. armed forces, and long-time former lawful permanent residents), and for individuals who have not, within the previous five years, completed sentences for serious, violent felonies; and
- Ending the practice of appointing Border Patrol attorneys or other DHS employees to act as Special Assistant U.S. Attorneys, or in any prosecutorial capacity, in §1325 and §1326 cases, to avoid inherent conflicts of interest.

CBP Use of Force

CBP's reform plans regarding use of force, outlined in September 2013, do not address mechanisms of reporting and oversight relating to all uses of force, individual accountability for unreasonable use of force, and transparency and communication regarding deaths that occur as a result of a CBP encounter, among other gaps.[15] Reform in these areas is essential to ending the culture of impunity that external stakeholders perceive at CBP. Since January 2010, at least 27 people have died following encounters with CBP officials in which force was used. That number includes seven

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[8] LISA SEGHETTI, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 8 (Cong. Research Serv., CRS Report for Congress R42138, Jan. 16, 2014).

[9] HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF U.S. BORDER PROSECUTIONS 24 n.40 (May 2013), *available at* http://www.hrw.org/sites/default/files/reports /us0513_ForUpload_2.pdf .

[10] U.S. DEPT. OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (Aug. 2013), *available at* http://www.justice.gov/ag/smart-on-crime.pdf. According to BJS statistics, in 2010 only 20 percent of defendants charged with illegal reentry had prior felony convictions for violent offenses. *See* HUMAN RIGHTS WATCH, *supra* note 9.

[11] In FY 2013, for example, U.S. Attorneys' offices filed criminal charges against almost 100,000 immigrants for illegal entry or illegal re-entry. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, AT NEARLY 100,000, IMMIGRATION PROSECUTIONS REACH ALL-TIME HIGH IN FY 2013 (Nov. 25, 2013) http://trac.syr.edu/immigration/reports/336/.

[12] Michael T. Light, et. al., Pew Research Hispanic Trends Project, *The Rise of Federal Immigration Crimes* (Mar. 18, 2014), *available at* http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/.

[13] ALISTAIR GRAHAM ROBERTSON, ET. AL., GRASSROOTS LEADERSHIP, OPERATION STREAMLINE: COSTS AND CONSEQUENCES (Sept. 2012), *available at* http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf.

[14] *See, e.g.,* HUMAN RIGHTS WATCH, *supra* note 9, at 76-80; JOANNA LYDGATE, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 12-15 (Jan. 2010), *available at* http://www.law.berkeley.edu/files /Operation_Streamline_Policy_Brief.pdf.

[15] *See* "U.S. Customs and Border Protection Use of Force Recommendations, Reviews and Next Steps," U.S. Customs and Border Protection (Sept. 25, 2013) *available at* http://www.cbp.gov/xp/cgov/border_security/bs/force_reviews.xml.

minors under 21, nine U.S. citizens, eight individuals alleged to be throwing rocks, and six individuals killed while on the Mexican side of the border.[16] To date, it is unknown whether CBP has conducted a thorough investigation of each of these incidents to determine whether the force used was justified and whether it could have been avoided through different tactics or training, better supervision, different tools, adherence to policy, or changes in policy. Moreover, the ACLU has documented a pattern of abusive use of force at ports of entry.[17]

DHS has taken a long-overdue first step by releasing CBP's 2010 Use of Force Policy Handbook, albeit redacted. But the agency continues to refuse to release the Police Executive Research Forum (PERF) review of CBP use of force. The DHS Office of Inspector General's September 2013 report on CBP use of force was limited in scope and heavily redacted.

To bring CBP into line with leading law enforcement standards relating to use of force, and to improve transparency and accountability to the public, DHS should:

- Request an independent review of all use-of-force fatalities in the last five years;
- Publicly release the PERF review, unredacted and in full;
- Implement all PERF recommendations; and
- Implement additional changes to CBP use of force policy and practice, including body-worn and dashboard cameras with strong privacy protections, as detailed by the ACLU[18] and other organizations.

Racial Profiling

The inappropriate use of race or ethnicity by CBP agents and officers has been well documented, most recently in a series of complaints filed by the ACLU of Arizona.[19] The Maricopa County Sheriff's Office, in fact, has said it was instructed by ICE to use race as a factor in immigration enforcement – contrary to controlling Ninth Circuit case law.[20] To help ensure that its enforcement activities do not inadvertently facilitate racial profiling or otherwise discriminatory policing, DHS should:

- Conduct a comprehensive review of DHS policies and practices relating to roving patrol stops and checkpoints to determine whether the agency is complying with the U.S. Constitution, applicable non-discrimination laws, and agency guidelines. This review should include

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[16] For a detailed list, *see* "ACLU Recommendations Regarding Use of Force by U.S. Customs and Border Protection Officers," note 1, *available at* https://www.aclu.org/sites/default/files/assets/14_02_24_aclu_use_of_force_recommendations_final.pdf.

[17] *See* Press Release, American Civil Liberties Union, ACLU Demands Federal Investigation Into Charges of Abuse by Border Agents (May 10, 2012), *available at* https://www.aclu.org/immigrants-rights/aclu-demands-federal-investigation-charges-abuse-border-agents; Complaint and request for investigation of abuse of power, excessive force, coercion, and unlawful confiscation of property by Customs and Border Protection at ports of entry along the U.S.-Mexico border, American Civil Liberties Union and ACLU Southern Border Affiliates (May 9, 2012), *available at* http://www.aclu.org/immigrants-rights/customs-and-border-protection-complaint

[18] *See* Press Release, American Civil Liberties Union, ACLU Calls New CBP Commitments Limited, Issues Detailed Recommendations on Use of Force (Sept. 25, 2013,) *available at* https://www.aclu.org/immigrants-rights/aclu-calls-new-cbp-commitments-limited-issues-detailed-recommendations-use-force.

[19] Complaint and request for investigation of unlawful roving patrol stops by U.S. Border Patrol in southern Arizona including unlawful search and seizure, racial profiling, trespassing, excessive force, and destruction of personal property, ACLU of Arizona and ACLU Border Litigation Project (Oct. 9, 2013), *available at* http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf; Complaint and request for investigation of abuses at U.S. Border Patrol interior checkpoints in southern Arizona, including unlawful search and seizure, excessive force, and racial profiling, ACLU of Arizona and ACLU Border Litigation Project (Jan. 15, 2014), *available at* http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2001%2015.pdf.

[20] Letter from Joseph Arpaio, Sheriff of Maricopa County, to Eric Holder, Attorney General and ICE Office of General Counsel (Jan. 6, 2014), *available at* http://www.mcso.org/MultiMedia/PressRelease/Arpaio%20Letter%20to%20Holder.pdf.

recommendations to reduce CBP's "100-mile zone" for investigative detentions and warrantless searches of vehicles to 25 miles, and for permissible incursions on private property to 10 miles;
- Expand the settlement in the case of *Jose Sanchez et al. v. U.S. Border Patrol et al.* nationwide, in particular the terms relating to 4th Amendment training and data collection[21];
- Issue clear guidance to all DHS officers (including local officers deputized under 287(g)) that race, ethnicity, and national origin may not be considered to any extent in determining removability or conducting any enforcement activity, except that officers may rely on race, ethnicity, and national origin in a specific individual description; and
- Urge DOJ to issue revised guidance on the use of racial profiling by federal law enforcement that closes the border integrity and national security loopholes and prohibits profiling based on actual or perceived religion, national origin, sexual orientation, or gender (including gender identity and expression).

An end to all 287(g) agreements and an end to or reform of the Department's reliance on Secure Communities, which incentivize the use of race and ethnicity by state and local law enforcement – as recommended above – will also help ensure that DHS enforcement activities do not inadvertently facilitate racial profiling or otherwise discriminatory policing.

Sensitive Locations Enforcement

DHS has recognized that immigration and border enforcement actions should not take place at, near, or focused on certain "sensitive locations," including schools, hospitals, institutions of worships, and sites of religious ceremonies. In recognition of the importance of strong guidance on the issue, Section 3721 of S. 744 forbade enforcement of immigration law in sensitive locations by ICE and CBP officers and agents except in exigent circumstances and with prior supervisory approval. Notwithstanding the ICE and CBP memoranda regarding sensitive locations enforcement, [22] the ACLU and other organizations have documented cases of immigration enforcement taking place at county courthouses, resulting in the apprehension of individuals who are in court to pay traffic tickets, to appear for hearings or mediation, and even to get married.[23] DHS enforcement at county courthouses deters people from accessing the courts for critical protections including domestic violence restraining orders, child custody, child support, child guardianship, and wage and hour and other labor protections.

DHS should issue new sensitive locations enforcement guidance that:

- Applies to all DHS components to ensure consistency, particularly on the issues of sensitive locations sites, exigent circumstances, exemption from restrictions, and prior approval requirements;
- Specifies that all courts (other than immigration courts) and their premises are "sensitive locations";
- Instructs all DHS personnel to cease using courts and other sensitive locations as a records source for immigration enforcement actions, unless the individual has been convicted of a crime (other than a state or local conviction that relates to a non-citizen's immigration status) for

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[21] Settlement agreement, *Sanchez v. U.S. Border Patrol,* CV12-5378-RJB (U.S.D.C. W.D. Wash. Sept. 20, 2013), *available at* https://aclu-wa.org/sites/default/files/attachments/2013-09-23--Fully%20Executed%20Settlement%20Agreement.pdf.

[22] *See* U.S. Immigration and Customs Enforcement, "Enforcement Actions at or Focused on Sensitive Locations" (Oct. 24, 2011), *available at* http://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf; U.S. Customs and Border Protection, "U.S. Customs and Border Protection Enforcement Actions at or Near Certain Community Locations," (Jan. 18, 2013) *available at* http://foiarr.cbp.gov/streamingWord.asp?i=1251.

[23] *See, e.g.,* Press Release, American Civil Liberties Union of Southern California, ACLU condemns ICE for 'bait and switch' courthouse policy (Feb. 10, 2014) http://www.aclusocal.org/press-release-aclu-condemns-ice-bait-switch-courthouse-policy/; Michael Kauffman, "Arrested for following the law," American Civil Liberties Union of Southern California (Oct. 17, 2013) http://www.aclusocal.org/arrested-following-law/.

which he or she served more than one year's imprisonment completed within the past five years, and which has not been expunged, set aside, or the equivalent;
- Instructs DHS personnel not to undertake enforcement actions based on requests from employees or others at sensitive locations sites and courts, absent exigent circumstances;
- Collects and publicizes data on enforcement actions at or near sensitive locations;
- Restricts enforcement at sites where court-ordered activities take place (such as mediation or supervised visitation); and
- Includes special protections for juveniles.

III. Strengthen Due Process and Human Rights Protections in Detention

Prolonged Detention Without Bond Hearings

ICE spends $2 billion annually on immigration detention to hold approximately 400,000 immigrants in a sprawling network of county jails, contract prisons, and ICE-run facilities across the country – simply to ensure they appear at hearings and comply with an immigration judge's final order when relevant. Many ICE detainees are incarcerated for months or even years while their cases are pending with the immigration courts and federal courts. A significant proportion of these individuals never receive the most basic element of due process: an immigration bond hearing to determine if their detention is even necessary. They are subjected to prolonged detention even though they ultimately may become permanent residents or qualify for other immigration relief.[24] Many detained immigrants pose no danger to public safety or flight risk that cannot be mitigated by alternatives. Federal courts have increasingly concluded that prolonged detention without constitutionally adequate review raises serious due process concerns, and that six months is the presumptive point in time after which a bond hearing is required.[25]

Unnecessary – and indefinite – detention causes severe psychological harm, particularly for individuals who have fled persecution or domestic violence, and traumatizes families both emotionally and economically. It also imposes a significant financial burden on U.S. taxpayers, even though effective and far less costly alternatives to detention are available, and routinely and successfully used in the criminal justice system.[26]

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[24] DHS subjects three main categories of individuals to prolonged detention without bond hearings: 1) individuals, often lawful permanent residents (LPRs), whom the government claims are subject to "mandatory detention" under 8 U.S.C. § 1226(c) because they are allegedly removable on certain criminal grounds; 2) individuals who are detained upon arrival in the United States, including asylum seekers who have established a "credible fear" of persecution, and LPRs with longstanding ties to the United States who are returning from brief trips abroad (See 8 C.F.R. § 1003.19(h)(2)(i)(B) (providing that immigration judges lack jurisdiction to conduct bond hearings for "arriving aliens")); and 3) individuals detained pending judicial review of their removal orders – their detention can span months and years while they wait for courts of appeals to decide their cases.

[25] *Rodriguez, et. al. v. Robbins, et. al.*, No. 12-56734 (9th Cir. 2013); *Reid v. Donelan*, NO. 13-cv-30125-MAP (D. Mass 2014).

[26] NATIONAL IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION (Aug. 2013), *available at* http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf. Julie Myers Wood and Steve J. Martin, "Smart alternatives to immigrant detention," *Washington Times* (Mar. 28, 2013), *available at* http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/. Alternatives to detention are recommended as cost-savers by the American Jail Association, American Probation and Parole Association, American Bar Association, Association of Prosecuting Attorneys, Heritage Foundation, International Association of Chiefs of Police, National Conference of Chief Justices, National Sheriffs' Association, Pretrial Justice Institute, Texas Public Policy Foundation (home to Right on Crime), and the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy. *See* American Jail Association, Resolution on Pretrial Justice (Oct. 24, 2010), *available at* http://www.pretrial.org/download/policy-statements/AJA%20Resolution%20on%20Pretrial%20Justice%202011.pdf; American Probation and Parole Association, APPA Supports Pretrial Supervision Services (June 15, 2010), *available at* http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IE_NewsRelease&wps_key=4ce5b0cc-e5d6-4407-bcab-096640386f02; American Bar Association, ABA Criminal Justice Standards on Pretrial Release – Third Edition (Oct. 28, 2002), *available at* http://www.pretrial.org/wpfb-file/aba-standards-on-pretrial-release-2002-pdf/; Association of Prosecuting Attorneys, Policy Statement on Pretrial Justice, *available at* http://www.pretrial.org/wp-

DHS should work with DOJ to ameliorate the impact of current detention practices by:

- Requiring a bond hearing before an immigration judge for all individuals detained more than six months, where the government must justify continued detention;
- Interpreting "custody" in the mandatory detention statute (8 U.S.C. § 1226(c)) to permit the use of forms of custody short of detention, such as electronic monitoring or house arrest;
- Construing 8 U.S.C. § 1226(c) to apply only to individuals who are taken into ICE custody at or near the time of their release from criminal custody, as the statute provides on its face; and
- Not applying 8 U.S.C. § 1226(c) to individuals with substantial challenge to removal, including claims for relief from removal.

Access to Counsel

Immigrants in removal proceedings must navigate an extraordinarily complex body of law, regulations, and procedures in order to mount effective defenses against deportation. The American Bar Association has observed: "Fundamental principles of fairness and due process demand that vulnerable individuals who aren't able to secure paid or pro bono counsel should have counsel appointed by the government."[27] DOJ's Executive Office for Immigration Review has noted the challenges created by non-represented cases for court efficiency, and the National Association of Immigration Judges wrote to members of Congress that "when noncitizens are represented by attorneys, Immigration Judges are able to conduct proceedings more expeditiously and resolve cases more quickly."[28] Recent studies have documented the considerable impact of legal representation on the outcomes of removal cases.[29] In recognition of the dire need, Section 3502 of S. 744 contains a provision requiring appointed counsel for unaccompanied children, people with severe mental disabilities, and other particularly vulnerable immigrants in removal proceedings.

The ACLU has urged DHS, DOJ, and HHS to take immediate steps to ensure that two classes of indigent unrepresented individuals in removal proceedings be afforded legal representation, either pro bono or at government expense: 1) all children and 2) all individuals with serious mental disabilities that render them unable to represent themselves (whether or not such individuals are in

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content/uploads/2013/02/APA-Pretrial-Policy-Statement.pdf; Matt Mayer, The Heritage Foundation, Heritage Web Memo 3455: Administrative Reforms Insufficient to Address Flawed White House Immigration and Border Security Policies (Jan. 10, 2012), *available at* http://www.heritage.org/research/reports/2012/01/administrative-reforms-in-immigration-and-border-security-policies; International Association of Chiefs of Police, "Law Enforcement's Leadership Role in the Pretrial Release and Detention Process (Feb. 2011), *available at* http://www.pretrial.org/wp-content/uploads/2013/02/IACP-LE-Leadership-Role-in-Pretrial-20111.pdf; National Conference of Chief Justices, Resolution 3, Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release (Jan. 13, 2013), *available at* http://www.pretrial.org/wp-content/uploads/2013/02/CCJ-Resolution-on-Pretrial-1.pdfhttp://www.pretrial.org/wp-content/uploads/2013/02/CCJ-Resolution-on-Pretrial-1.pdf; National Sheriffs' Association, National Sheriffs' Association Supports and Recognizes the Contribution of Pretrial Services Agencies to Enhance Public Safety (June 18, 2012), *available at* http://www.pretrial.org/wp-content/uploads/filebase/policy-statements/NSA%20Pretrial%20Resolution.pdf; Pretrial Justice Institute, The Solution, *available at* http://www.pretrial.org/solutions/; Marc Levin, Texas Public Policy Foundation, "Public Safety and Cost Control Solutions for Texas County Jails (Mar. 6, 2012), *available at* http://www.texaspolicy.com/center/effective-justice/reports/public-safety-and-cost-control-solutions-texas-county-jails; and Council on Foreign Relations' Independent Task Force, Task Force Report: U.S. Immigration Policy (July 2009), *available at* http://www.cfr.org/immigration/us-immigration-policy/p20030.

[27] James Silkenat, President-Elect, American Bar Association, Remarks at Human Rights First Dialogue on Detention, Washington, DC (April 2013), *available at* http://www.humanrightsfirst.org/wp-content/uploads/ABA-Silkenat-HRF-Dialogues-Detention.pdf.

[28] Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, p. 8, *in* U.S. COMM'N. ON INTERNATIONAL RELIGIOUS FREEDOM, ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf; Letter from Dana Marks, Nat'l. Association of Immigration Judges, to Members of Congress, March 22, 2013 (on file with the ACLU).

[29] *See* Steering Committee of the New York Immigration Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO LAW REVIEW 357, 357-416 (2011), *available at* http://cardozolawreview.com/Joomla1.5/content/33-2/NYIRS%20Report.33-2.pdf; Jaya Ramji-Nogales, Andrew I. Schoenholtz, Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

ICE detention at the time of their immigration proceedings). Federal statutory and constitutional laws require that these two groups of individuals receive legal representation, whether paid or pro bono, and no statute prohibits the government from providing such representation where individuals facing deportation are indigent. On April 22, 2013, ICE and EOIR made public commitments to ensure that unrepresented detained individuals with serious mental disorders can access legal counsel.[30] To fulfill these commitments and its additional legal obligations, ICE should:

- Continue to work closely with DOJ to implement April 22, 2013, commitments relating to detained individuals with serious mental disabilities;
- Cooperate with DOJ and HHS to develop and implement plans in a timely manner to expand access to counsel to all indigent unrepresented children in immigration proceedings; and
- Cooperate with DOJ to develop and implement plans in a timely manner for all individuals with serious mental disabilities who are unable to represent themselves and are not detained at the time of their immigration proceedings.

CBP Short-Term Detention Conditions

CBP's short-term detention system – including holding cells at Border Patrol stations, checkpoints, and ports of entry, and secondary inspection areas – is a black box. The scale of the system is unknown, the standards governing conditions not public, and oversight authority within the agency unclear. Complaints of CBP misconduct include verbal and physical abuse, denial of medical care, inadequate food and water, due process violations, exposure to extreme temperatures, extended use of bright lights and inadequate provision of space or bedding making sleep impossible, extreme overcrowding, and permanent confiscation of personal items (including legal documents, medication and personal identification). A major University of Arizona study for which 1,113 recent deportees were interviewed in 2010, 2011, and 2012 found that 45 percent of respondents reported not receiving sufficient food while in U.S. custody, 37 percent reported denial of medical attention, and 39 percent reported confiscation of personal property, including money and identity documents.[31] In the past three years, many media and NGO reports have documented cases that are consistent with these findings.[32]

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[30] *See* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to Thomas D. Homan, Acting Executive Associate Director, Enforcement and Removal Operations, Peter S. Vincent, Principal Legal Advisor, and Kevin Landy, Assistant Director, Office of Detention Policy and Planning, "Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees with Serious Mental Disorders or Conditions" (Apr. 22, 2013), *available at* http://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainess_mental_disorders.pdf; Memorandum from Brian M. O'Leary, Chief Immigration Judge, Executive Office for Immigration Review, to All Immigration Judges, "Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions" (Apr. 22, 2103), *available at* http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf.

[31] *See* JEREMY SLACK ET. AL., UNIV. OF ARIZONA, IN THE SHADOW OF THE WALL: FAMILY SEPARATION, IMMIGRATION ENFORCEMENT AND SECURITY 24, 26 (Mar. 15, 2013), *available at* http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013web.pdf.

[32] *See* Cindy Carcamo and Richard Simon, *Immigrant groups complain of 'icebox' detention cells*, LOS ANGELES TIMES (Dec. 5, 2013), *available at* http://www.latimes.com/nation/la-na-ff-detention-centers-20131206,0,2076586,full.story#axzz2mgEXgFJa; Rachael Bale, *Detained border crossers may find themselves sent to 'the freezers'*, CENTER FOR INVESTIGATIVE REPORTING (Nov. 18, 2013), *available at* http://cironline.org/reports/detained-border-crossers-may-find-themselves-sent-to-freezers-5574; Eric Lipton and Julia Preston, *As U.S. Plugs Border in Arizona, Crossings Shift to South Texas*, NEW YORK TIMES (June 16, 2013), *available at* http://www.nytimes.com/2013/06/17/us/as-us-plugs-border-in-arizona-crossings-shift-to-south-texas.html?_r=0&pagewanted=all; NO MORE DEATHS, CROSSING THE LINE: HUMAN RIGHTS ABUSES OF MIGRANTS IN SHORT TERM CUSTODY ON THE ARIZONA SONORA BORDER (Sept. 2008), *available at* http://www.nomoredeaths.org/Abuse-Report-Crossing-the-Line/View-category.html; BINATIONAL DEFENSE AND ADVOCACY PROGRAM, NORTHERN BORDER INITIATIVE, HUMAN RIGHTS VIOLATIONS OF MEXICAN MIGRANTS DETAINED IN THE UNITED STATES, MAY 2010-2011 (Jan. 2012), *available at* http://www.lawg.org/storage/documents/Mexico/informe-violaciones-derechos-humanos-pdib-27marzo12.pdf; KINO BORDER INITIATIVE, DOCUMENTED FAILURES: THE CONSEQUENCES OF IMMIGRATION POLICY AT THE U.S.-MEXICO BORDER (Feb. 13, 2013), *available at* http://www.jesuit.org/jesuits/wp-content/uploads/Kino_FULL-REPORT_web.pdf (One in four migrants surveyed alleged abuse at the hands of the Border Patrol, more than double the

DHS should take steps to reform CBP's detention practices, including by:

- Creating an office responsible for CBP detention operations, planning, and oversight;
- Publicly releasing comprehensive information on the location and capacity of CBP short-term detention facilities, including average daily populations in each location;
- Requiring CBP to comply with policies that provide NGOs and media access. These policies should be modeled after the directive issued by ICE, "Stakeholder Procedures for Requesting a Detention Facility Tour and/or Visitation," and ICE's Performance-Based National Detention Standard (2011) 7.2 "Interviews and Tours";
- Creating an online detainee locator for individuals in CBP custody, analogous to the system in place for individuals in ICE detention;
- Creating enforceable standards applicable to all CBP short-term custody facilities and hold rooms that address the provision of adequate nutrition, appropriate climate, and medical care; dissemination of legal information in commonly-spoken languages; access to lawyers, consular officials, family members, and non-governmental organizations; and policies for identifying asylum seekers and victims of violence and referring their cases to USCIS.

Solitary Confinement

The ACLU welcomed ICE's September 2013 directive on the use of solitary confinement in ICE detention, in particular its strong reporting and review requirements.[3] Compliance system-wide, however, is a significant challenge, as the policy relies on staff and officials in county jails and contract facilities across the country, as well as ICE officials, to submit to a new set of limitations and requirements relating to their facility operations. To ensure that the directive's intent is fully realized, ICE should:

- Rigorously oversee compliance with the new directive and hold accountable any facilities – including jails and contract facilities – that do not comply with the directive's requirements; and
- Regularly release data to Congress and the public related to the use of solitary confinement in ICE facilities.

PREA Implementation

The ACLU welcomed the March 2014 release of the DHS Prison Rape Elimination Act regulations to set standards to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities. These long-overdue standards must be implemented system-wide – not only in DHS-run facilities. DHS should:

- Move swiftly to implement the PREA rule in all ICE-run facilities and in all CBP facilities and hold rooms; and
- End the use of any jail or contract facility that does not comply with either the DOJ PREA rule or the DHS PREA rule within 180 days of the effective date of the DHS rule.

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rate of reported abuse by Mexican police, criminal gangs, or any other source.); NO MORE DEATHS, A CULTURE OF CRUELTY: ABUSE AND IMPUNITY IN SHORT-TERM U.S. BORDER PATROL CUSTODY (2011), *available at* http://nomoredeaths.org/cultureofcruelty.html (No More Deaths conducted interviews with 12,895 individuals released from Border Patrol custody. Of those, 10 percent reported physical abuse by CBP agents, including sexual assault, use of chokeholds, and hitting and kicking of detainees, while 13 percent reported verbal abuse, including the use of racial slurs. Only 20 percent of people in custody for more than two days reported receiving food, while the vast majority of those in need of emergency medical care or medications reported being denied treatment. Children reported denial of water at a higher rate than adults.); AMNESTY INTERNATIONAL, IN HOSTILE TERRAIN: HUMAN RIGHTS VIOLATIONS IN IMMIGRATION ENFORCEMENT IN THE US SOUTHWEST (2012), *available at* http://www.amnestyusa.org/sites/default/files/ai_inhostileterrain_final031412.pdf; WASHINGTON OFFICE ON LATIN AMERICA, BEYOND THE BORDER BUILDUP: SECURITY AND MIGRANTS ALONG THE U.S.-MEXICO BORDER (Apr. 2012), *available at* http://www.seguridadcondemocracia.org/administrador_de_carpetas/biblioteca_virtual/pdf/beyondborderbuildup_wola.pdf.

IV. Improve Efficiency and Accountability Department-wide

Uniform Complaint Process

Consistent documented deficiencies within DHS complaint systems have inhibited the Department's ability to identify civil rights, civil liberties, and other concerns, to resolve complaints appropriately, and to reform policies or training when systemic problems are identified. Despite significant advances in technology, the DHS complaint systems are outdated. For example, the DHS OIG has found that CBP's case management system to track use of force incidents and complaints is entirely inadequate, and that the agency has failed to appropriately integrate complaint data analysis into decision-making.[33] In addition, the current complaint practices lack transparency and are inconsistent with the Administration's Open Government Initiatives, sending individuals who file complaints – U.S. citizens and noncitizens who interact with officers at one of DHS's many component agencies – into a black hole. Complainants routinely wait years, only to receive form letters in response to serious complaints alleging misconduct and mismanagement. The numerous overlapping complaint filing avenues within DHS create confusion as to where complaints should even be filed. Given its complex structure and its officers' daily interactions with thousands of people, DHS should:

- Create a single multilingual on-line portal and telephone number through which individuals can file immigration- and border-related complaints; and
- Implement uniform complaint processing that provides complainants with the status and outcomes of their complaints; requires all complaints to be investigated by a neutral decision-maker; and makes complaints and their resolutions accessible on-line, while preserving the privacy and identity of complainants.

Proactive Disclosure of A-Files

Under 8 U.S.C.A. § 1229, aliens in removal proceedings are entitled to "have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States."[34] Currently, DHS relies entirely on the Freedom of Information Act (FOIA) to satisfy this statutory obligation. This policy not only wastes significant Departmental resources on processing A-file FOIA requests (which account for over 90 percent of USCIS FOIAs); it also means that the vast majority of individuals in removal proceedings are unable to access the documents necessary to ensure a fair hearing. The Ninth Circuit has held that the current FOIA process is inadequate to effectuate the government's statutory obligations under 8 U.S.C.A. §1229.[35] In order to fulfill its statutory obligations, reduce the resources needed to process FOIA requests, and increase fairness in immigration proceedings, DHS should:

- Adopt a policy of proactively providing a copy of their A-file to all individuals in immigration proceedings.

V. Conclusion

DHS should move quickly in implementing these administrative enforcement reforms to strengthen due process, civil liberties, and civil rights, and to protect families and communities. We urge you,

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[33] DHS OFFICE OF INSPECTOR GENERAL, CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS (Sept. 2013), *available at* http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf.
[34] 8 U.S.C.A. § 1229(a)
[35] *Dent v. Holder*, 627 F.3d 365, 374-75 (9th Cir. 2011).

as the newest leaders of the U.S. Department of Homeland Security, to prioritize these recommendations so that citizens and non-citizens alike enjoy the full protections of the U.S. Constitution.

Please contact Ruthie Epstein (repstein@aclu.org or 202-675-2316) or Chris Rickerd (crickerd@aclu.org or 202-675-2339) with any questions.

Sincerely,

Laura W. Murphy
Director
Washington Legislative Office

Cc: Esther Olavarria, Senior Counselor to the Secretary, U.S. Department of Homeland Security
Stevan E. Bunnell, General Counsel, U.S. Department of Homeland Security
Thomas Winkowski, Acting Director, U.S. Immigration and Customs Enforcement
Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection
Cecilia Munoz, Director, Domestic Policy Council, Executive Office of the President
Felicia Escobar, Senior Policy Director for Immigration, Domestic Policy Council, Executive Office of the President

BRIEFING PAPER ON EXPEDITED REMOVAL AND CREDIBLE FEAR PROCESS

I. OVERVIEW OF EXPEDITED REMOVAL PROCESS

The expedited removal provisions of the Immigration and Nationality Act (INA) became effective April 1, 1997. Under the expedited removal provisions, where an immigration officer (usually CBP) determines that an alien arriving at a port of entry is inadmissible because the alien engaged in fraud or misrepresentation (section 212(a)(6)(C) of the INA) or lacks proper documents (section 212(a)(7) of the INA), the individual is ordered removed from the U.S. without a hearing before an immigration judge. However, if an individual expresses a fear of persecution or torture or an intention to apply for asylum, the case is referred to a USCIS asylum officer for a credible fear protection screening. In 2004, pursuant to notice published in the Federal Register, expedited removal was expanded beyond ports of entry to include those individuals apprehended within 100 air miles of the border and within 14 days of illegal entry.

II. CREDIBLE FEAR PROCESS

Any individual who asserts a fear of persecution or torture or an intention to seek asylum during the course of the expedited removal process is referred to an asylum officer for an interview to determine if the individual has a credible fear of persecution or torture. A credible fear of persecution or torture is established when there is a significant possibility, taking into account the credibility of the statements made by the individual in support of his or her claim and such other facts as are known to the officer, that the individual could establish eligibility for asylum under Section 208 of the INA or withholding of removal or deferral of removal under the Convention Against Torture. (8 C.F.R. § 208.30(e)(2) & (3)). The "significant possibility" standard used in credible fear cases is intended to be a low threshold screening process in order to capture all potential refugees. The purpose of the credible fear screenings is to identify all individuals who may have viable claims in order to prevent the removal of a refugee or someone who would be tortured without a full hearing on the claim; asylum officers do not adjudicate actual asylum applications during this preliminary screening process.

If the asylum officer finds that an individual has established a credible fear of persecution or torture, the individual is placed into removal proceedings (under Section 240 of the INA) where he or she is afforded the opportunity to apply for asylum before the Immigration Court. If the asylum officer finds that the individual has not established a credible fear of persecution or torture, the individual may ask an Immigration Judge to review the asylum officer's determination. If the individual does not ask for review, or if the Immigration Judge does not overturn the asylum officer's decision,[1] then the individual is removed from the U.S. under the expedited removal order.

The majority of individuals in the credible fear process are subject to mandatory detention while their cases are pending. (8 C.F.R. § 235.3(b)(4)(ii)). Individuals found to have a credible fear are subject to continued detention, but ICE may use its discretion to

parole them from custody on a case-by-case basis. For those individuals apprehended between ports of entry, the individual may ask an Immigration Judge to review their custody determination. On January 4, 2010, ICE changed its parole policy for arriving aliens found to have a credible fear by requiring each case to be considered for parole without requiring a specific request.2 The Asylum Division coordinated and assisted ICE in the implementation of those changes, including the development of a notice to such aliens to gather and provide information helpful to a parole determination.

The Asylum Division's goals are to complete 85% of all credible fear screenings within 14 days of referral to an asylum officer. Since establishing these completion goals, the Asylum Division has routinely met the 85% goal and usually exceeds it by completing more than 90% of cases within 14 days.

In July 2013, USCIS accelerated the processing goal from 85 % of all credible fear screenings within 14 days, to an 8-day average target. At the end of the FY13, the Asylum Division was processing credible fear cases at an overall 8-day average.

III. STATISTICS

Table A: Consistently, a very small percentage of individuals subject to expedited removal have been referred for a credible fear interview.

Year	Subject to Expedited Removal	Referred for a Credible Fear Interview	Percentage
2006	104,440	5,338	5%
2007	100,992	5,252	5%
2008	117,624	4,995	4%
2009	111,589	5,369	5%
2010	119,876	8,959	7%
2011	137,134	11,217	8%
2012	188,187	13,880	7%
2013	Unavailable	36,035	Unavailable

Note: The "Subject to Expedited Removal" data in 2006 and 2007 include apprehensions performed by Border Patrol and aliens determined inadmissible at Ports of Entry. The "Subject to Expedited Removal" data from 2008 to 2013 include apprehensions performed by Border Patrol, ICE Enforcement and Removal Operations, and aliens determined inadmissible at ports of entry.

Source: U.S. Department of Homeland Security.

Table B: A high percentage of those referred for a credible fear interview meet the credible fear standard.

Credible Fear Cases	FY-08	FY-09	FY-10	FY-11	FY-12	FY-13	FY -14 (through Q3)
Referrals from CBP or ICE	**4,995**	**5,369**	**8,959**	**11,217**	**13,880**	**36,035**	**36,334**
Completed	4,828	5,222	8,777	11,529	13,579	36,174	34,426
CF Found	3,097	3,411	6,293	9,423	10,838	30,393	26,728
CF Not Found	816	1,004	1,404	1,054	1,187	2,587	4,819
Closed	915	807	1,080	1,052	1,554	3,194	2,879
Of all referred cases completed by USCIS, % where CF was found	64%	65%	72%	82%	80%	84%	78%

Source: USCIS Asylum Pre-Screening System (APSS) Database

Table C: Top Five Nationalities Referred for a Credible Fear Interview

FY2014, Q3	**Referrals**
El Salvador	13,330
Honduras	5,939
Guatemala	4,738
Mexico	3,102
Ecuador	2,572

FY2013	**Referrals**
El Salvador	10,935
Honduras	6,871
Guatemala	5,573
India	2,974
Mexico	2,612

FY2011	Referrals
El Salvador	2,040
India	1,940
Mexico	1,205
Guatemala	1,164
Honduras	984

FY2012	Referrals
El Salvador	4,087
Honduras	2,405
Guatemala	2,015
Mexico	1,299
Ecuador	863

FY2010	Referrals
El Salvador	1,951
China	870
Honduras	844
India	735
Mexico	653

FY2009	Referrals
China	962
El Salvador	945
Honduras	591
Guatemala	458
Mexico	338

Source: APSS Database

[1] If an individual neither requests nor declines review of the determination, the individual is still referred to the Immigration Judge for review of the credible fear determination.

[2] The revised parole policy does not apply to individuals placed into ER upon apprehension between ports of entry.

3

Updated by DHS/US Citizenship and Immigration Services/Asylum Division: 11 July 2014

Department of Homeland Security
United States Citizenship and Immigration Services
Asylum Division

Updated by DHS/US Citizenship and Immigration Services/Asylum Division: 11 July 2014

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Ongoing Attorney Access and Due Process Issues at Artesia (as of August 20, 2014)

Facilitating Access to Counsel/Logistics:

- **The initial intake process should include a question as to whether residents either (1) have an attorney; or (2) would like to speak to an attorney**. The intake process does not currently include questions regarding right to counsel. A list of individuals who do not have an attorney but would like to speak to one should be provided to the LOP service provider (DMRS) so that they can be matched with a pro bono attorney.

  This is not happening as of yet, but the need for it has been greatly reduced as the volunteer attorneys (and detainees) have found work around systems to communicate their interest in speaking with a pro bono attorney. This includes boxes that have been put in the dorm rooms, word of mouth, access to attorneys while waiting for court proceedings due to the space issues, and the LOP. However, it would still be helpful if ICE gave DMRS the full list of detainees entering Artesia, particularly since ICE has told the volunteer attorneys that they may not distribute flyers to detainees with instructions on how to seek pro bono assistance.

- **Need clear instructions for the admission of interpreters and paralegals to Artesia**. There has been no clear instruction from the facility as to whether interpreters and paralegals can accompany an attorney to facilitate communication and case preparation. Note: We understand and appreciate that at least one individual was admitted this morning (July 28, 2014) to assist an attorney, but clear guidelines must be issued.

  This has been resolved by our attorneys on the ground working with ICE staff. As of now, the volunteer attorneys have been able to bring in support staff including interpreters and paralegals.

- **The process for attorney/LOP admission to Artesia must be streamlined and consistent**. The amount of time it takes for an attorney to gain admission to the facility varies wildly. It can take anywhere from 15 minutes to an hour or more (sometimes much more) for individuals to be admitted once they have arrived at the facility. As a result, LOP meetings are being cut drastically short and attorneys are missing interviews and hearings, even though they arrive 30 minutes or more prior to the scheduled event. This morning, a group of attorneys arrived at 6:45 am to accompany clients to 7:30 am credible fear interviews. The attorneys were advised that they would not be admitted until 8:00 am. After AILA called the facility, the attorneys were admitted, albeit late for the interviews.

  While this has greatly improved, it is by no means perfect. The attorneys still often wait long periods of time to either enter the facility and/or to have clients delivered to the law library. We have been assured by ICE that they are working on a separate entrance for the facility, but understand that as of today, that is not operational.

- **The facility must provide at least two hours for each LOP presentation**. We have been informed that LOP presenters were delayed for approximately one hour at the Artesia gate and as a result, the normal two-hour LOP presentation was cut-off by facility staff after 20 minutes. If delays at the gate, a head count, or other facility scheduling issue conflicts with a prescheduled LOP presentation, two hours must still be provided.

  Following up with LOP provider, not sure if this is still an issue.

- **Additional confidential spaces must be established for attorney meetings with detainees**. At present, we understand that 2-3 attorneys can be accommodated in the current visitation space, but this is not sufficient to meet the demand for legal services and the current space is partitioned with dividers that do not protect the confidentiality of attorney-client communications. Furthermore, residents and staff regularly come and go through these areas to access an adjoining room. Additional spaces must be established and such spaces must be sufficiently private so that confidentiality and the attorney-client privilege are not compromised. Attorneys must also have reasonable access to phones, fax, computers, Internet and a copy machine/scanner.

  ICE has been very accommodating in the use of electronics by our attorneys in the facility, which we greatly appreciate. However, the lack of adequate space to meet the demand for legal services continues to be an issue. Although ICE has provided additional tables and chairs, the physical space of the law library has not changed. This means that an ever growing number of attorney-client meetings are happening in a cramped, sometimes chaotic, and decidedly non-confidential environment. That being said, the attorneys have made the space work as best as they can.

- **Attorneys must be able to interview clients without their children (or parent) present if needed.** The attorney frequently will need to elicit information from a parent that she does not wish the child to hear. Similarly, a child may have an independent basis for relief and needs to be able to speak candidly to the attorney.

  The last update that AILA received was that managed child care would be forthcoming, but was not yet available. We are checking with our attorneys on the ground for updates.

- **Need clear instructions permitting attorneys to bring cell phones, laptops, and wifi hotspots into the facility**. Some attorneys have been told that they cannot bring their cell phones into the facility. This means, among other things, that attorneys are unable to call their offices or ICE or EOIR officers on the site if needed, and that pro bono attorneys who are not experts in the specific immigration issues that arise are unable to consult with volunteer mentors. Moreover, phones can be damaged from the extreme heat because they must be locked in enclosed automobiles. Attorneys must also have Internet access, either through their own wifi hotspots or through wifi at the facility. There needs to be improved access to technology at Artesia and clear guidelines must be provided.

  After initial problems and resistance by ICE, this was successfully negotiated at the local level.

- **Attorneys must have a quick and reliable method for contacting their clients by telephone**. At present, attorneys who need to get in touch with their clients are instructed to call the main Artesia phone line and ask an ERO officer to give a message to their client and have the client call them back. If the attorney does not receive a call back, they are instructed to contact the Artesia ICE Office of Chief Counsel. That number often just rings and rings, with no answer. Given the difficulties accessing telephones, a better system must be created to allow attorneys to contact their clients by telephone.

  Access to clients by telephone, or vice versa, is still highly problematic. Because the AILA volunteer attorneys are in the facility, everyday workarounds have been developed. However, as

cases continue to merits hearings and more attorneys who are not physically present in Artesia continue with cases, this will be an ongoing issue.

- **The ability to conduct video interviews should be established so that Artesia residents can meet remotely with pro bono lawyers**. This could be done through Skype or other technology and would greatly increase the pool of pro bono lawyers.

  This has not been discussed at the local level yet with ICE.

- **Residents must have better access to telephones and the ability to make calls in private rooms**. At present, residents have access to cell phones which are carried by ICE officers. Though we are told access is unrestricted, residents report that they have been told they are allowed only one call per day, or they do not seem to understand that they may use the phone at any time. Moreover, residents may easily be intimidated by the prospect of asking for a cell phone from a law enforcement officer. Residents should have unrestricted access to telephones that are not in the personal possession of ICE officers and should be informed that they may use the phones at any time (including to call an attorney).

  We have been told that a phone system is in the process of being installed, and that detainees will be able to use these phones confidentiality. We were advised that it would take 2-3 weeks for the system to be in place but understand that it is not yet functioning.

- **An Artesia-specific EOIR list of free legal services providers must be created and widely distributed**. At present, the only EOIR list of free legal services providers that is being circulated at Artesia is the El Paso list. The El Paso list consists of only three providers, one of which does not accept refugee or asylum cases. A revised list of Artesia-specific free legal services providers must be created and widely distributed. The list must be provided to Artesia residents prior to the credible fear interview and at the time a negative credible fear finding is communicated to the resident. The list should also be posted in common areas and in the individual dormitories. The list should include the following language in both Spanish and English: "Free legal services may be available."

  We have not heard of any movement to expand the free legal service provider list offered to Artesia detainees.

- **The law library should have printed pro se legal information and preparation materials in Spanish**. The Florence Project and other nonprofit legal service organizations have developed these materials already. Access to Lexis/Nexis alone is insufficient.

- *This has not happened.*

Necessary Steps to Ensure Adequate Due Process Protections

- **Artesia residents must have meaningful opportunities to obtain counsel**. Nobody should be removed unless and until they are afforded an opportunity to attend an LOP presentation and have an individualized consultation with the LOP provider or other legal service provider, where the right to claim fear (and the process for doing so) is explained and facilitated, if needed. The KYR video that residents view during the intake process, by itself, is inadequate. Moreover, per the *Orantes* injuction, Artesia residents from El Salvador should be advised in writing and orally of their right to apply for asylum, to be represented by counsel, and to request a deportation hearing.

It is still unclear if all detainees have access to LOP.

- **Proceedings before the Asylum Officer or IJ should not take place without the presence of the attorney if the individual is represented**. If an attorney has filed a G-28 or EOIR-28, no credible fear interview or IJ proceeding may take place without the attorney's presence or knowledge, unless the represented party knowingly and intentionally waives representation. We have been informed of instances where scheduled proceedings for represented individuals were moved without ever notifying the attorney, even in at least once instance where the attorney was actually onsite at the Artesia facility.

  This process has been greatly improved, and asylum officers do what they can to inform attorneys of interviews as soon as possible; however, the rushed nature of the proceedings still makes it very difficult for attorneys to meet with clients before they go into interviews or proceedings.

- **A fair and reasonable process for quickly filing stays of removal and optional fee waivers with ICE must be established**. At present attorneys are instructed that stays of removal (Form I-246) must be filed in-person with the $155 filing fee at the Midland, Texas ICE office or, though reports conflict, possibly at the El Paso ICE office or other remote offices. We also have been informed that fee waivers are not being granted. Midland, Texas is the closest ICE office and that is an approximate 3 hour drive from Artesia. Attorneys must have a clear, straightforward method for filing a stay request with ICE either on-site at the Artesia facility or via facsimile to another office, including the ability to file a stay request without the signature of the detained client. Given the vulnerability of this population and the fact that many of them have no access to funds, ICE must give due consideration to fee waiver requests or create a method whereby fees can be accepted remotely. Attorneys must also have a means of receiving proof of filing, such as a date stamp.

  We are checking on filing procedures and issues.

Credible Fear Interviews

- **Attorneys and residents must be provided sufficient notice of credible fear interviews**. Attorneys and residents must be provided sufficient written notice (at least 3 days) of a credible fear interview that has been scheduled. Residents must receive such notice in their native language and the notice must include language regarding the right to counsel. Given the speed with which proceedings are taking place, regular mail is not an adequate means of providing notice to attorneys.

  The asylum officers are providing detainees and attorneys (where there is a G-28 on file) on average, 48 hours' notice before interviews take place.

- **Residents must be afforded adequate time to obtain counsel if they request it**. We have been informed that at present, individuals who express the desire to consult with an attorney prior to the commencement of the credible fear interview are given 48 hours to obtain counsel. An individual who states that he or she would like to speak to an attorney prior to a credible fear interview should be permitted adequate time to locate and consult with an attorney without the imposition of artificial and unrealistic time limits.

  Detainees are still generally only given 48 hours to find counsel.

- **Accommodations must be made to conduct credible fear interviews in private, without the presence of children or parents, if that is the interviewee's wish**. Currently, Asylum

Officers are conducting credible fear interviews of mothers with their children present. Accommodations must be made to conduct credible fear interviews in private. Providing distractions or headphones while the child remains in the room is not sufficient. Interviewers must always ask a parent if they would like to speak privately; it should not be left up to the individual to affirmatively request a private interview. In addition, children must also be asked if they would like to speak to an interviewer without their parent.

We are grateful for the efforts the asylum officers have made to provide child care during the credible fear interview when necessary. However, we note that we were recently informed that the Asylum Office granted a motion filed by an attorney requesting re-interview of a detainee who was issued a negative credible fear finding when she was unable to explain that people were threatening to kill her children while her children were sitting in the room with her. Though it is unclear how long ago the initial interview took place, it is possible that problems persist in this area.

- **Children, in appropriate circumstances, must also be interviewed for credible fear**. We understand that currently, Asylum Officers are only interviewing the mother for credible fear and are not interviewing any children unless the officer is unable to make a determination and the child is 14 or older. When a parent expresses fear, all children who are capable of understanding should also be asked if they are afraid and if they want to be interviewed separately from their parents. Even children under 14 may have very serious and valid fears that they do not wish to discuss in front of their mother. If current training practice does not provide the expertise to interview young children, suitable experts must be provided. Any child who divulges trauma in the interview should be provided with appropriate mental health services and a child advocate and attorney.

  This issue has been resolved.

- **Attorneys must be afforded meaningful opportunities to represent the client in the credible fear interview process**. We understand that some attorneys are being informed that they are not permitted to speak during the credible fear interview and that their role is as a mere "observer." While understanding that attorneys are not permitted to answer questions for their client or otherwise disrupt the interview, attorneys must be permitted to provide meaningful representation during the credible fear interview. Under no circumstances should an attorney be barred from speaking at the interview.

  This issue has been resolved.

- **Asylum officers must understand the comprehension level of the individuals they are interviewing**. We have received reports of mothers being asked questions like "to what particular social group do you belong?" These are not the kinds of questions that the average migrant will understand. Interviewers should be able to ask questions in terms that the interviewee will understand, and/or allow the attorney in represented cases to clarify the question for the client.

  We are following-up with the volunteers at Artesia on this issue.

IJ Proceedings

- **Attorneys and residents must be provided sufficient notice of IJ proceedings.** Attorneys and residents must be provided sufficient written notice (at least 5 days) of IJ proceedings to review a negative credible fear determination, master calendar hearing, or bond

redetermination hearing. Residents must receive such notice in their native language and the notice must include language regarding the right to counsel. Given the speed with which proceedings are taking place, and the fact that the court, attorney, and client may be in up to three different locations around the country, regular mail is not an adequate means of providing notice to attorneys. Electronic notice should be considered.

We are following-up with the volunteers at Artesia on this issue, however it does not appear that attorneys are receiving notice of hearings electronically.

- **ICE and EOIR must give due consideration to reasonable requests for release on bond following a positive credible fear determination.** We have heard from attorneys on the ground at Artesia that ICE and/or IJs are not granting bond to Artesia detainees, even in cases where a positive credible fear determination has been made. Artesia detainees who will be presenting a full claim for asylum in proceedings, who have demonstrated that they are not a flight risk or a danger to the community, must be considered for and granted release on bond while they pursue their claims.

  This continues to be a high priority issue. ICE is still not setting bond for individuals who have demonstrated a credible fear of persecution. . Bond has been set by immigration judges in some cases, but the amount of the bond varies wildly, and has been as high as $36,000. Two of the IJs hearing cases have not approved any bonds. It appears only one judge at Artesia is setting bond amounts that are comparable to the national average. In order for these families to make effective asylum cases they must be able to access resources not available to them while in detention.

From:	Wamsley, Cammilla
SentVia:	Wamsley, Cammilla </o=DHS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cammilla.wamsley.(b)(6)
To:	"Desta, Fana </o=DHS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fana.desta>"
Subject:	FW: artesia
Date:	2014/07/01 12:25:00
Priority:	Normal
Type:	Note

This is what I have for Family units

Thanks!

Cam Wamsley

(b)(6)

From: Olavarria, Esther
Sent: Friday, June 27, 2014 11:49 AM
To: Wamsley, Cammilla
Cc: Desta, Fana; Zengotitabengoa, Colleen
Subject: RE: artesia

Use this:

TALKING POINTS:

- The establishment of this facility will allow U.S. Immigration and Customs Enforcement (ICE) to increase its capacity to house and process individuals in a humane manner.
- This facility is also one of several that DHS is considering, to increase our capacity to hold and expedite the removal of the increasing number of adults

with children illegally crossing the southwest border.Doing so will help ensure more timely and effective removals, and deter others from taking the dangerous journey and illegally crossing into the United States.

- The FLETC Artesia, N.M., campus was selected as a temporary facility because it offers a more appropriate environment for the care and custody of adults with children and is cost-effective.

- This facility will add approximately 700 additional beds for adults with children.

- This temporary facility will allow U.S. Immigration and Customs Enforcement (ICE) to increase its capacity to house and process these apprehended individuals.

- The use of this temporary facility at FLETC Artesia is estimated to have minimal or no impact to the ongoing law enforcement training.

- ICE is committed to providing safe, secure and humane care to individuals in detention, including adults with children, who are pending completion of their immigration cases. ICE will do everything possible to ensure that the facility meets the applicable legal standards.

- The addition of this facility and the government's response to this urgent humanitarian situation will in no way diminish the existing rights of individuals in removal proceedings under the Immigration and Nationality Act, including access to asylum and other immigration protections.

- Individuals, including adults with children, illegally entering the United States are subject to removal and are not eligible for Deferred Action for Childhood Arrivals (DACA) or the earned citizenship provisions in the immigration reform bill pending before the Congress. Adults with children should not risk the dangerous journey to illegally enter the United States at the Southwest Border or elsewhere. Too often individuals have tragically perished attempting to cross the border illegally at the hands of criminal smugglers who have no regard for human life.

- If asked: Most family units with children encountered illegally crossing into the United States are from Central America and Mexico.

IF ASKED Q&A:

Why was this center established, and, why is it located on the Federal Law Enforcement Training Centers' campus in Artesia, New Mexico?

Given the fluid nature of this situation, and the whole of government approach, the Artesia, N.M., facility was identified as the most appropriate site given that it requires minimal modifications to quickly get it up and running. It is also centrally located near the southwest border, and availability of space that meets the requirements set forth by ICE.

Why does ICE detain adults with children who have recently illegally entered the U.S.?

Detention helps ensure compliance with appearances in immigration court and increases our capacity to hold and expedite the removal of the increasing number of adults with children illegally entering the U.S.

What special arrangements need to be made for families that are not required for adults without children?

ICE ensures that family detention facilities operate in a family-friendly open environment, which includes play rooms, social workers, computer access, regularly re-stocked refrigerators, classrooms with state-certified teachers, and bilingual teachers.

What laws or policies exist to oversee the detention of families?

ICE formulated its Residential Standards in December 2007 by analyzing operations at family detention facilities and governing State statutes. Medical, psychological, and educational subject-matter experts were contracted for guidance in developing these standards. Various entities, such as the DHS Office of Civil Rights and Civil Liberties (CRCL) and non-governmental organizations (NGOs) provided comment to ICE.

These Residential Standards are written in a manner that affords each resident admission and continuous housing to a family residential facility in a dignified and respectful manner.

ICE used to have a family detention facility in Texas called Hutto; why not just use that facility to house the families who have most recently illegally entered the U.S.?

The Hutto facility was converted years ago to an all-women's detention facility. Restoring the facility to a family detention facility, and moving all its current residents would not be cost effective.

What is the capacity of the Artesia facility?

The temporary family detention facility in Artesia, N.M., has a capacity for 720 beds.

When will you move families in?

The adults with children will be transferred to Artesia in a phased-in approach. We initially expect approximately 100 individuals.

Will adult males be housed?

No, only adult mothers will be housed with their children under 17.

Are you screening individuals for criminal histories?

Everyone encountered by ICE is interviewed to determine criminal histories. If someone is identified as having a criminal history, they will not be eligible for housing in Artesia.

How long will these families stay in this temporary facility?

This is a fluid situation requiring adjustments as we move along. All cases are handled individually. The time frame of detention depends on the outcome of an individual's immigration case.

How long will the facility remain open?

This is intended as a temporary facility. Given the fluid nature of the situation, we cannot speculate further on timing for use of facility.

Are other such facilities planned? If so, how many, where will they be located, and what are their individual capacities?

Other detention facilities are being considered, but will not be announced until when, and if, they are confirmed.

What agency is in charge of the facility?

U.S. Immigration and Customs Enforcement (ICE) is responsible for the facility housing the adults with children.

What is the process for detaining and removing family units?

ICE's Enforcement and Removal Operations (ERO) is responsible for housing adults with children at the new temporary facility in Artesia, N.M. In addition to coordinating all accommodations for the individuals, ERO will also ensure that everyone appears at their immigration court hearings. When, and if, a federal immigration judge orders an individual removed, ERO effects the removal.

Why has it taken so long for such a facility to be established when the need for one has been clear for more than a month?

ICE acted immediately to identify available resources for additional detention space for adults with children.

How many family units in custody are slated for deportation?

Federal immigration judges determine which individuals are eligible for immigration relief based on their merits of their individual cases. The immigration courts and federal immigration judges are overseen by the Executive Office for Immigration Review (EOIR).

How will it impact the operations of other U.S. government agencies housed at FLETC?

The new temporary family detention facility in Artesia, N.M., will have little or no impact on the other agencies that currently operate in this FLETC facility.

Will the cost of the operation be fully paid by the federal government?

Yes, all housing costs associated with Artesia will be funded by the federal government.

What kind of assurances can the federal government make that no additional costs (such as medical, law enforcement, etc.) will be have to be picked up by local or state agencies?

Again, all costs associated with the housing of adults with children, are being paid by ICE.

What family detention facilities does ICE have?

Since 2001, ICE has contracted with Berks County, Pennsylvania, to operate Berks Family Residential Center (BFRC) in Leesport, about 65 miles northwest of Philadelphia. The facility has a capacity for 96 beds and allows families to remain together until their immigration cases are fully adjudicated. The Berks facility is set up in a dormitory style, with sleeping quarters separated by sex and age. Juveniles age 11 and under are housed with a parent; juveniles age 12 and above are housed with other juveniles of the same sex and age range. Family units are normally housed on the same wing in order to promote family unity. Parents are expected to be responsible for their children and are encouraged to take an active role in their development. Only non-criminals are accepted for placement in this facility.

###

From: Wamsley, Cammilla
Sent: Friday, June 27, 2014 11:46 AM
To: Olavarria, Esther
Cc: Desta, Fana; Zengotitabengoa, Colleen
Subject: artesia

Hi Esther,

I am speaking for Molly on this afternoon's IGA call with state officials on the additional space at Artesia. Do you have any new points/information that should be highlighted?

Thank you,

Cammilla Hayes Wamsley

Senior Policy Analyst

Office of Immigration and Border Security

DHS Policy

(b)(6)

Sender:	Wamsley, Cammilla; Wamsley, Cammilla </o=DHS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cammilla.wamsley.(b)(6)
Recipient:	"Desta, Fana </o=DHS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fana.desta>"
Sent Date:	2014/07/01 12:25:14
Delivered Date:	2014/07/01 12:25:00

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From:	Wamsley, Cammilla
SentVia:	Wamsley, Cammilla </o=DHS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cammilla.wamsley(b)(6)
To:	"Antkowiak, Stephen (Stephen.Antkowiak@ice.dhs.gov)"
Subject:	FW: language
Date:	2014/07/24 16:37:00
Priority:	Normal
Type:	Note

Thanks!

Cam Wamsley

(b)(6)

From: Wamsley, Cammilla
Sent: Thursday, July 24, 2014 2:15 PM
To: Cissna, Tiffany (CTR)
Subject: language

16. *Upon ICE intake of adults traveling with children, pursuant to standard operating procedures, Enforcement and Removal Operations (ERO) personnel conduct a full review of each case and, consistent with law and policy, take appropriate enforcement action depending on the information provided/determined at that time. Those individuals who are released are notified which ICE ERO office is nearest to the address given as their final destination and are instructed to report there within 15 days. These individuals are also informed that their immigration cases—including an assessment of any appropriate conditions of their release—would be managed by that field office in accordance with current ICE enforcement priorities. The receiving offices have been notified of these transfers through internal docket control and management systems used by all ERO offices.*

17. As outlined above, ICE conducts a review to determine appropriate detention and/or parole. At this time, ICE is unable to provide a statistical analysis of those individuals who have not reported [DHS Plcy1] ***to onward ICE offices.***

Thank you,

Cammilla Hayes Wamsley

Senior Policy Analyst

Office of Immigration and Border Security

DHS Policy

(b)(6)

In the absence of ICE response, Language adapted from AZ AG Tom Horne letter.

Sender:	Wamsley, Cammilla; Wamsley, Cammilla </o=DHS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cammilla.wamsley (b)(6)
Recipient:	"Antkowiak, Stephen (Stephen.Antkowiak@ice.dhs.gov)"
Sent Date:	2014/07/24 16:37:51
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U.S. Department of Homeland Security's Responses to Chairman Goodlatte's June 19, 2014 Letter

EXCERPTs FROM JUNE 19 LETTER:

1. **The number of Special Immigrant Juvenile visa petitions filed in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

2. **The number of Special Immigrant Juvenile visa petitions filed in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry;**

3. **The number of Special Immigrant Juvenile visa petitions approved in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

4. **The number of Special Immigrant Juvenile visa petitions approved in fiscal years 2010, 2011. 2012, 2013 and for each month in fiscal year 2014 (to date) for unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry;**

5. **The number of Special Immigrant Juvenile visa petitions denied in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

6. **The number of Special Immigrant Juvenile visa petitions approved in fiscal years 2010, 2011. 2012, 2013 and for each month in fiscal year 2014 (to date) for unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry;**

RESPONSE TO REQUESTS 1-6:

The following chart shows the receipts and approvals of those with a classification of "Special Immigrant Juvenile" for Fiscal Years 2010 to 2014 (through May). Please note that U.S. Citizenship and Immigration Services (USCIS) does not track how many Special Immigrant Juvenile petitions are filed by unaccompanied children, or how many are filed by alien minors who are accompanied by adults. USCIS also does not keep statistics on the citizenship of Special Immigrant Juvenile petitioners or their manner of arrival.

U.S. Citizenship and Immigration Services Petition for Amerasian, Widow(er), or Special Immigrant (I-360) Receipts with a Classification of Special Immigrant Juvenile (C) for Approvals and Receipt for Fiscal Years 2005 to 2014 (May)		
FY	Approval	Receipts
2010	1,590	1,646
2011	1,869	2,226
2012	2,726	2,968
2013	3,432	3,994
2014	2,909	3,439
Grand Total	**12,526**	**14,273**

7. **The number of applications for asylum and withholding of removal filed by or on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry that were denied in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

8. **The number of applications for asylum and withholding of removal filed by or on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry that were granted in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

9. **The number of applications for asylum and withholding of removal filed by or on behalf of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who sought to enter the U.S. illegally along our borders between ports of entry or at ports of entry that were denied in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

RESPONSE TO REQUESTS 7-9:
The following tables provide the number of asylum applications filed with USCIS by unaccompanied alien children (UAC) from contiguous and non-contiguous countries. As defined at 6 U.S.C. § 279(g)(2), an unaccompanied alien child is a child who: has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States or no parent or legal guardian in the United States is available to provide care and physical custody. (Alien minors who are accompanied by adults who are not their parents or legal guardians may still be UAC under this statutory definition.) Pursuant to the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA), with the exception of certain UAC from contiguous countries whom DHS may permit to withdraw their applications for admission and return to their home country, UAC apprehended at the border are placed in removal proceedings under section

240 of the *Immigration and Nationality Act*. Although these UAC are in removal proceedings before the Executive Office of Immigration Review (EOIR), the TVPRA gives USCIS initial jurisdiction over asylum applications filed by UAC. When USCIS does not grant asylum to such applicants, their cases are returned to immigration court, where the asylum claim is considered by an immigration judge during the course of removal proceedings.

Unlike asylum applications filed by UAC, USCIS does not have jurisdiction over asylum applications filed by alien minors in removal proceedings who are accompanied by a parent or legal guardian. Therefore, USCIS does not have information regarding asylum application filings by such individuals.

Mexican* UACs in Removal Proceedings Filing Pursuant to TVPRA

	FY 2011	FY 2012	FY 2013	FY 2014	Oct	Nov	Dec	Jan	Feb	Mar	April	May	June
Filed	26	31	23	23	3	1	2	3	2	3	3	5	1
Granted	6	8	8	2	1	-	-	-	-	-	-	1	-
Not granted and returned to removal proceedings	7	3	6	2	1	-	-	-	-	-	-	1	-

Non-Mexican UACs in Removal Proceedings Filing Pursuant to TVPRA

	FY 2011	FY 2012	FY 2013	FY 2014	Oct	Nov	Dec	Jan	Feb	Mar	April	May	June
Filed	562	388	705	1,414	104	125	124	127	152	197	204	221	160
Granted	123	120	51	101	1	6	4	8	16	12	14	16	24
Not granted and returned to removal proceedings	151	153	96	59	5	8	10	13	6	2	3	7	5

Source: USCIS Asylum Division, Refugees, Asylum and Parole System (RAPS) reports RACL1433-1434, June 25, 2014.

NOTES: Cases granted or returned to removal proceedings may have been filed in a previous fiscal year. Individuals may have entered the US in previous fiscal years. Does not include uninterviewed returned or administratively closed cases.

*No Canadian UACs in removal proceedings have filed for asylum with USCIS pursuant to the TVPRA.

Report Key	
Filed	The total number of new asylum cases received and reopened.
Granted	The number of cases USCIS approved for asylum status.
Not granted and returned to removal proceedings	The number of cases USCIS interviewed, did not approve and returned to the Immigration Judge.

10. **The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

11. **The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally between ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

RESPONSE TO REQUESTS 10-11:
Customs and Border Protection (CBP) is responsible for immigration enforcement at and between ports of entry. CBP's Office of Field Operations (OFO) operates at the ports of entry and CBP Border Patrol operates between the ports of entry.

The following tables provide the number of UAC from contiguous and non-contiguous countries apprehended at and between ports entry. When CBP determines a child meets the definition of an unaccompanied alien child, CBP must process the child in accordance with the TVPRA.

Unaccompanied Alien Children Apprehended at a Port of Entry

	FY 2011	FY 2012	FY 2013	FY 14 to date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun
Contiguous	1199	1693	1484	1086	123	97	125	113	113	170	123	113	109
Non-Contiguous	127	315	932	2256	99	175	172	126	177	247	321	466	473
Total	1326	2008	2416	3342	222	272	297	239	290	417	444	579	582

Note: CBP OFO transitioned to a new processing system in July 2011; hence the data in Fiscal Year 2011 is reflective, but not complete. FY 2010 data is unavailable

Unaccompanied Alien Children Apprehended Between the Ports of Entry

	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 to date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	13615	11713	13943	17219	10112	1550	1363	1057	1209	1359	1820	1754	1438
Non-Contiguous	4796	4236	10460	21540	35387	2636	2987	3274	2504	3495	5367	5958	9166
Total	18411	15949	24403	38759	45499	4186	4350	4331	3713	4854	7187	7712	10604

12. **The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

CBP's OFO data systems lack the capability to query in the above manner. Therefore, these numbers were extrapolated by excluding unaccompanied children from total encounters of children at ports of entry. These encounters may include children who were later identified as not being accompanied by a legal guardian.

Adults Traveling with Children Apprehended at the Ports of Entry												
	FY 2011	FY 2012	FY 2013	FY 14 to Date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	2,027	3,685	4,589	4823	475	654	723	664	464	640	680	523
Non-Contiguous	1,584	2,999	4,415	4380	394	423	566	442	439	616	684	816
Total	3,611	6,684	9,004	9,203	869	1,077	1,289	1,106	903	1,256	1,364	1,339

13. **The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally between ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date);**

Adults Traveling with Children Apprehended between Ports of Entry													
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 to Date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	11,531	6,190	5,035	3,997	2208	319	271	263	220	219	276	300	340
Non-Contiguous	818	712	1,401	4,482	19861	1035	1286	1590	1053	1620	2935	3380	6,962
Total	12,349	6,902	6,436	8,479	22,069	1,354	1,557	1,853	1,273	1,839	3,211	3,680	7,302

14. **The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were granted humanitarian parole;**

The TVPRA requires that all UAC, with the exclusion of those who are eligible to withdraw their application for admission under the contiguous country exception under the TVPRA, whom DHS seeks to remove must be placed in removal proceedings under section 240 of the *Immigration and Nationality Act*. Thus, those UAC are not granted parole, but are placed in removal proceedings and transferred to the Department of Health and Human Services (HHS).

15. **The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were not placed in removal proceedings;**

As described above, the TVPRA specifies that if DHS is seeking removal of an unaccompanied alien child, then the child must generally be processed under the *Immigration and Nationality Act* §240. The UAC who meet the requirements detailed in section 235 of the TVPRA are not processed for removal proceedings, but are allowed to withdraw their application for admission and return to their home country.

CBP has two separate systems of record for tracking UAC. CBP data is sometimes combined as requested. CBP's OFO transitioned to a new system of record in 2011; therefore, data for fiscal year 2010 represents CBP Border Patrol information only.

Unaccompanied Children Apprehended at and between the Ports of Entry processed as other than 240 Removal Proceedings													
	FY 2010*	FY 2011	FY 2012	FY 2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	13034	12,071	14,664	17,598	11857	1603	1387	1107	1238	1400	1895	1782	1445
Non-Contiguous	1	6	7	4	4	0	0	0	0	0	0	2	2
Total	13035	12077	14671	17602	11861	1603	1387	1107	1238	1400	1895	1784	1447

*Note: Border Patrol Data Only

16. **The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our**

borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were granted humanitarian parole;

In answering this question, DHS assumes that you are inquiring about minor children who are traveling with an adult who is their parent or legal guardian. CBP's OFO data systems lack the capability to query in the above manner. Therefore, these numbers were extrapolated by excluding unaccompanied children from total encounters of children at ports of entry at initial apprehension. At this time, CBP systems tracks information for all paroles, which can include advance paroles (e.g., individuals adjusting status, Cuban parole, and other categories).

Adults traveling with children apprehended between the ports of entry are not granted humanitarian parole by CBP.

Adults Traveling with Children Apprehended at Ports of Entry and Granted Humanitarian Parole												
	2011	2012	2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	186	388	591	452	50	52	56	75	51	64	70	34
Non-Contiguous	120	425	1,176	1,533	183	211	234	195	164	177	197	172
Total	306	813	1,767	1,985	233	263	290	270	215	241	267	206

Note: Data reflective of port of entry apprehensions only.

17. **The number and percentage of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were granted humanitarian parole and who have not appeared at U.S. Immigration and Customs Enforcement Offices for processing as ordered or have not appeared at scheduled immigration court dates;**

UAC are not paroled into the United States by CBP. ICE conducts a review to determine appropriate detention and/or parole. At this time, ICE is unable to provide a statistical analysis of those individuals who have not reported to onward ICE offices.

DHS defers to U.S. Department of Justice's (DOJ's) Executive Office for Immigration Review (EOIR) for information related to individuals who have not appeared at scheduled immigration court dates.

18. **The number and percentage of unaccompanied alien minors from contiguous and separately from non-contiguous countries and alien minors accompanied by adults from contiguous and separately from non-contiguous countries who were apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were placed in removal proceedings and who have not appeared at scheduled immigration court dates;**

DHS defers to the DOJ's EOIR for this information.

19. **The number of alien minors accompanied by adults from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date) who were not ordered removed through the expedited removal process or otherwise placed in removal proceedings;**

When CBP apprehends and processes adults traveling with children who are determined to be a family unit (i.e., parent/legal guardian with at least one foreign born child), generally the disposition of the adult guides the outcome of the case. Therefore, the processing for adults traveling with children apprehended may be reflected in the data system in a variety of ways (e.g., crew member detained, deferred inspection, voluntary return).

Adults Traveling with Children Apprehended at and between Ports of Entry Processed as other than Removal or Expedited Removal													
	FY 2010*	FY 2011	FY 2012	FY 2013	FY 14 to date	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	11,414	9,069	7,925	3,683	4,401	519	509	592	652	483	519	621	506
Non-Contiguous	1	1,132	1,990	251	2,247	250	270	339	299	244	278	295	272
Total	11,415	10,201	9,915	3,934	6,648	769	779	931	951	727	797	916	778

*Note: Border Patrol Data Only

20. **The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry who were removed in in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date), and;**

As described above, the TVPRA specifies that if DHS is seeking removal of an unaccompanied alien child, then the child must generally be processed under *Immigration and Nationality Act* §240, with limited exceptions for those who are citizens or habitual residents of a contiguous country. Therefore, CBP does not remove UAC from the United States. Rather, those UAC who meet the requirements detailed in section 235 of the TVPRA are allowed to withdraw their application for admission and return to their home country.

Unaccompanied Children Apprehended between Ports of Entry and Returned by CBP Border Patrol													
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	13,080	11,113	13,538	16816	11225	1527	1330	1024	1173	1326	1774	1706	1365
Non-Contiguous	31	34	71	65	86	8	6	8	4	13	9	15	23
Total	13,111	11,147	13,609	16,881	11,311	1,535	1,336	1,032	1,177	1,339	1,783	1,721	1,388

Unaccompanied Children Apprehended at Ports of Entry and Returned by CBP Office of Field Operations													
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	196	1,094	1,608	1324	1043	108	90	128	124	106	158	126	100
Non-Contiguous	126	279	512	1123	2382	110	179	180	158	187	271	325	490
Total	322	1,373	2,120	2,447	3,425	218	269	308	282	293	429	451	590

ICE ERO is generally responsible for the removal of UAC if so ordered by an immigration judge. The following table represents removals of individuals who were UAC when initially transferred to ICE.

Unaccompanied Children Removals														
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 to date	FY 2013 lag*	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	692	699	576	548	284	12	40	38	27	32	37	36	30	32
Non-Contiguous	998	996	1,233	1320	951	21	113	109	117	112	109	159	97	114
Total	1,690	1,695	1,809	1,868	1,235	33	153	147	144	144	146	195	127	146

Please note that beginning in fiscal year 2009, ICE began to "lock" removal statistics on October 5th as the end of a fiscal year and counted only the individuals whose removal or return was already confirmed. Individuals removed or returned in that fiscal year but not confirmed until after October 5th were excluded from the locked data and thus from ICE statistics. To ensure an accurate and complete representation of all removals and returns, ICE includes the removals and returns confirmed after October 5th into the next fiscal year.

21. **The number alien minors accompanied by adults from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry who were removed in in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date), and**

Adults Traveling with Children Apprehended between Ports of Entry and Removed by CBP Border Patrol													
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 (Total)	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	11,402	6,060	4,879	3,856	2,044	295	258	254	196	205	248	280	308
Non-Contiguous	7	14	172	1,218	4,709	275	323	470	357	356	755	1,054	1,119
Total	11,409	6,074	5,051	5,074	6,753	570	581	724	553	561	1,003	1,334	1,427

CBP OFO data systems lack the capability to query in the above manner.

Adults Traveling with Children Apprehended at or between Ports of Entry and Removed by ICE														
	FY 2010	FY 2011	FY 2012	FY 2013	FY 14 to date	FY 2013	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Contiguous	219	188	172	150	66	2	8	11	7	7	4	7	14	6
Non-Contiguous	123	106	92	95	60	2	5	6	7	8	4	11	9	8
Total	342	294	264	245	126	4	13	17	14	15	8	18	23	14

22. **The authorities by which unaccompanied alien minors and alien minors accompanied by adults apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry are being transferred to varying facilities within the interior of the United States. Are localities being notified ahead of the transfer? If not, why not?**

The transfer of DHS detainees from one area of responsibility to another is part of the routine detention and removal process. The *Immigration and Nationality Act* and *Homeland Security*

Act of 2002 vest the Department of Homeland Security (DHS) with the authority to transfer aliens to another State and release those individuals in that State, as opposed to other locations. Specifically, the *Immigration and Nationality Act* § 241(g) (8 U.S.C. § 1231(g)), states that the Secretary of Homeland Security "…shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." This statute has been interpreted as providing DHS the authority "to transfer aliens from one detention center to another." [*Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995).] The Federal Government has broad discretion to determine how to implement the immigration laws, including the appropriate location for processing aliens, where to transfer them, and whether to release such aliens under an order of supervision.

In addition, with the implementation of the *Homeland Security Act*, the care of unaccompanied children was transferred from the former Immigration and Naturalization Service to the Director of the Office of Refugee Resettlement (ORR) of HHS. [*See* 6 U.S.C. § 279(a).] Additionally, the TVPRA requires any department or agency of the Federal Government that has an unaccompanied alien child in custody to transfer the child to HHS within 72 hours of determining that such child is an unaccompanied alien child. [8 U.S.C. § 1232(b)(3).] Accordingly, DHS is required to transfer UAC to ORR facilities that are located throughout the United States. After ICE transfers custody of an unaccompanied child to ORR, it has no further role with respect to subsequent placement or relocation decisions made by ORR.

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CERD Q&A – DHS Responses

B. Racial Profiling

1. Immigration enforcement, including 287(g) and Secure Communities

B-1(1). QUESTION – DHS 287(g) PROGRAM**:** How does the U.S. government justify continuing and expanding the 287(g) program after the U.S. Department of Justice (DOJ) provided evidence of its failure to fulfill its goals and the prevalence of racial profiling? Given the ample documentation of human rights violations and the widespread criticism from both government and civil society sources, why haven't DHS 287(g) agreements been eliminated completely? How will DHS track potential violations related to racial profiling considering the failure of the recent statistical monitoring project? How is the DOJ investigating the FBI's racial mapping initiatives and those undertaken by state and local law enforcement agencies?

RESPONSE:

- **Racial profiling is the invidious use of race or ethnicity as a criterion in conducting stops, searches, and other law enforcement, investigation, or screening activities. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.**

- **DHS takes allegations of racial profiling by its employees or affiliates very seriously. In April 2013 – which was too recent to make it into our periodic report -- the Department issued a revised policy statement on nondiscrimination in law enforcement and screening activities, which continues the prohibition on unlawful racial or ethnic profiling while for the first time providing Department-wide policy with respect to the use of nationality in law enforcement and screening.**

- **The 287(g) program has been reconfigured to include only Jail Enforcement Model agreements that provide immigration enforcement resources for aliens who have already been arrested by state or local law enforcement for state-law crimes. The Task Force Model, where 287(g)-deputized officers participated in arrests, has been discontinued. There are currently thirty-seven (37) 287(g) Memoranda of Agreement, all of which only operate in a jail setting.**

- The 287(g) Delegation of Authority Program remains a robust national program with 37 Memoranda of Agreement (MOA) with partner law enforcement agencies (LEAs) in 18 states. These LEAs, working exclusively through the Jail Enforcement Model, have repeatedly proven to be highly effective in enforcing immigration laws consistent with ICE's priorities. In fiscal year 2013, 287(g)

Designated Immigration Officers (DIOs) recorded 37,228 encounters, and ICE removed 11,767 individuals that were identified through the 287(g) program, of which 10,424 (89 percent) were aliens convicted of a criminal offense.

- The government has multiple safeguards to prevent racial profiling in the 287(g) program, including through training, inspections, and investigations of complaints. E.g.,:
    - The ICE Office of Professional Responsibility (OPR) conducts a comprehensive inspection of the 287(g) program at least every two years, considers 287(g) programs' compliance with civil rights and civil liberties during inspections, and researches programs before inspections to determine whether there have been complaints against officers or about the program itself. All complaints against any officers or programs themselves are reviewed at the time of the complaint.
    - The DHS Office for Civil Rights and Civil Liberties (CRCL) investigates complaints related to the implementation of 287(g) programs, as they arise, and has participated in some of the program inspections.
    - The MOA between DHS and the LEA further outlines the purpose of the 287(g) program, the complaint process, and the clear prohibition against racial profiling.

IF PRESSED:

- The 287(g) Program cross-designates non-federal law enforcement officers as immigration officers to perform specific functions under the Immigration and Nationality Act (INA or Act), but only under U.S. Immigration and Customs Enforcement (ICE) supervision. The 287(g) Program is a voluntary program which now exclusively utilizes the Jail Enforcement Model to accomplish its mission. The 287(g) Jail Enforcement Model is designed to identify and process criminal and other priority aliens after their arrest for a criminal violation of state or local law, including those identified through ICE Secure Communities' use of IDENT/IAFIS interoperability.
- Even as we are starting to *discontinue* some of the 287(g) agreements in light of the nationwide activation of the Secure Communities program and reduction of 287(g) funding, the U.S. Immigration and Customs Enforcement (ICE) still considers the 287(g) Jail Enforcement Model program an important tool for enhancing community safety in some jurisdictions.
- The government has multiple safeguards to prevent racial profiling in the program. For example:

- Immigration enforcement authority is delegated only with DHS/ICE approval and only after the delegates' completion of extensive ICE-led training, including training on the U.S. Department of Justice "Guidance Regarding The Use Of Race By Federal Law Enforcement Agencies" dated June 2003 and Title VI of the Civil Rights Act of 1964, as amended, 42. U.S.C. 2000 et seq., which prohibits discrimination based upon race, color, or national origin (including limited English proficiency) in any program or activity receiving Federal financial assistance.
- The 287(g) Memoranda of Agreement are assessed regularly to determine whether they should be renewed.
- All delegated officers perform immigration enforcement functions under ICE supervision.
- The ICE Office of Professional Responsibility (OPR) conducts a comprehensive inspection of the 287(g) program at least every two years, considers 287(g) programs' compliance with civil rights and civil liberties during inspections, and researches programs before inspections to determine whether there have been complaints against officers or about the program itself. All complaints against any officers or programs themselves are reviewed at the time of the complaint.
- The DHS Office for Civil Rights and Civil Liberties (CRCL) investigates complaints related to the implementation of 287(g) programs, as they arise, and has participated in some of the program inspections.
- The MOA between DHS and the LEA further outlines the purpose of the 287(g) program, the complaint process, and the clear prohibition against racial profiling.

SOURCES: This question is based on a question from the Rights Working Group, Rights Working Group. For prior U.S. treatment of this issue, see generally, paragraphs 11-16 of the July 3 written responses, http://www.state.gov/j/drl/rls/212393.htm. See also 4th Report, ¶¶ 107, 293-294, 482-484, 593-604 (racial profiling), http://www.state.gov/j/drl/rls/179781.htm; and ¶¶ 83-85 of CERD Report, http://www.state.gov/j/drl/rls/cerd_report/210605.htm.

BACKGROUND (DHS 287g Program):

In September 1996, Congress authorized the Executive Branch to delegate immigration enforcement authorities to state and local government agencies. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 amended the INA by adding section 287(g). Under this section, the Secretary of Homeland Security is authorized to enter into MOAs with state and local LEAs to delegate immigration

enforcement functions to designated law enforcement officers. The law requires that the MOAs describe the terms and conditions under which participating LEA personnel will function when enforcing immigration law.

Each 287(g) program undergoes a comprehensive inspection by the ICE Office of Professional Responsibility (OPR) at least every two years; OPR provides reports on these inspections to ICE and ICE Enforcement and Removal Operations (ERO) Headquarters for appropriate action. Included as part of the inspections process, OPR considers the 287(g) programs' compliance with civil rights and civil liberties protections, and researches the programs before inspection to determine whether complaints have been lodged against officers or the program itself. Such complaints or allegations assist OPR in focusing its inspections.

On December 21, 2012, ICE announced its decision not to renew 287(g) agreements under the Task Force Model Program with state and local law enforcement agencies. As a result, all 287(g) Task Force Programs expired and all impacted law enforcement agencies were notified that their Memorandum of Agreement would conclude on December 31, 2012. The decision impacted seventeen (17) stand-alone Task Force Programs and seven (7) Joint Model Programs in twelve (12) states. On January 4, 2013, Letters of Revocation were sent to all 115 affected Task Force Officers, also known as Designated Immigration Officers, revoking their authority to perform immigration law enforcement functions.

The DHS Office for Civil Rights and Civil Liberties (CRCL) investigates complaints related to the implementation of 287(g) programs, and CRCL has also participated in some OPR inspections of 287(g) programs and has made recommendations which, if implemented, could help enforce the protection of civil rights in 287(g) Jail Enforcement Models. ICE and CRCL are currently discussing these recommendations.

B-1(2). QUESTION – DHS SECURE COMMUNITIES PROGRAM: Given the plethora of information and data that supports Secure Communities as a mechanism for racial profiling, when will the U.S. Government abandon the policy and reexamine its detention and deportation methods? We understand that DHS has limited the Secure Communities Program in some jurisdictions found by the DOJ to have engaged in a pattern or practice of discriminatory profiling. We also understand that the program in these jurisdictions limits only the information shared with the state/local law enforcement program in a problematic jurisdiction creates an additional incentive to racially profile—because local law enforcement is aware that immigration status checks will be conducted and possible immigration actions taken. Why doesn't DHS fully terminate the Secure Communities Program in these jurisdictions?

RESPONSE:

- **Profiling in law enforcement operations is premised on the erroneous assumption that any particular individual possessing one or more irrelevant personal characteristics is more likely to engage in misconduct than another individual who does not possess those characteristics.**

- **DHS takes allegations of racial profiling by its employees or affiliates very seriously, and has taken a number of proactive steps to ensure that Secure Communities would not serve as a conduit for racial profiling.**

- Nonetheless, ICE recognizes that restricting local law enforcement's access to Secure Communities may be appropriate in jurisdictions found to have engaged in discriminatory enforcement practices.

    - DHS has taken several steps to ensure Secure Communities is not a conduit for racial profiling or otherwise abused:

        - In collaboration with the DHS Office for Civil Rights and Civil Liberties (CRCL), ICE updated its website, including the release of a Secure Communities complaint process, through which CRCL will be notified of any complaints filed with ICE regarding the program.

        - To prevent and address possible abuses of Secure Communities, ICE and CRCL developed briefing materials for state and local law enforcement personnel regarding civil rights and civil liberties issues.

        - ICE and CRCL have collaborated on monitoring techniques to ensure that Secure Communities does not provide a conduit for profiling or other improper law enforcement practices.

- ICE has revised the detainer form ICE submits to local jurisdictions to emphasize the longstanding guidance that state and local authorities are not to detain an individual for more than 48 hours. The form also requests local law enforcement to provide arrestees with a copy, which has a number to call if they believe their civil rights have been violated.

- In addition, former ICE Director Morton issued the June 17, 2011, memorandum entitled *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*. This memorandum provides policy guidance to ICE officers, special agents, and attorneys to exercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice.

- ICE will continue to work with the Department of Justice, including its Civil Rights Division to enhance measures that will minimize abuse of Secure Communities.

SOURCES: This question is based on questions from the Junta for Progressive Action, the Right Working Group, and the ACLU. See Junta for Progressive Action and Federal Anti-Immigrant Policy and Its Correlation to Racial Profiling within Law Enforcement in Context of the International Covenant on Civil and Political Rights; Rights Working Group; ACLU National Submission, pp. 6-10, Suggested List of Issues to Country Report Task Force on the United States. See also Amnesty International, Submission to the UN Human Rights Committee.

BACKGROUND:

Secure Communities satisfies a congressional mandate for ICE to improve and modernize its efforts to identify and remove criminal aliens from the United States, including prioritizing the removal of criminal aliens convicted of violent crimes.

Secure Communities utilizes an existing federal biometric information-sharing partnership between ICE and the Federal Bureau of Investigation (FBI)), mandated by Congress, to identify criminal aliens arrested or booked into custody and fingerprinted by a law enforcement agency. The FBI automatically sends these fingerprints to DHS to check against its databases. If these checks reveal that an individual is unlawfully present in the United States or otherwise removable due to a criminal conviction, ICE takes enforcement action in accordance with its civil enforcement priorities.

Secure Communities enables ICE to identify criminal aliens who may be subject to removal early in the criminal justice process, and initiate appropriate immigration enforcement action, including removal proceedings, while they are still serving their sentences.

Secure Communities imposes no new or additional requirements on state and local law enforcement, nor does it authorize state and local law enforcement officers to enforce federal immigration law. Only federal officers (or duly authorized officers delegated under the 287(g) program) make immigration enforcement decisions and only after state and local law

enforcement officers have made an independent decision, based on probable cause, to arrest an individual for a criminal violation of state or local law, separate and apart from any violations of immigration law.

Since its inception in 2008 with 14 jurisdictions, Secure Communities has expanded to all 3,181 jurisdictions within 50 states, the District of Columbia, and five (5) U.S. Territories. Full implementation was completed on January 22, 2013.

Secure Communities does not provide immigration enforcement authority to state and local law enforcement officers. They are not deputized to enforce federal immigration laws and are not tasked with any additional responsibilities. They are asked to enforce their state and local laws in the same manner they did prior to activation of information sharing procedures in their jurisdictions.

When state and local law enforcement agencies arrest or book someone into custody for a criminal offense, they generally fingerprint the person and send the fingerprints to the FBI's biometric system to see whether the subject has a criminal record. Under Secure Communities, the FBI automatically sends these fingerprints to DHS' biometric system to check against its immigration and enforcement records so that ICE can determine whether that person is also removable.

B-1(3). QUESTION – PROFILING IN DHS IMMIGRATION ENFORCEMENT**:** In June 2011, ICE director John Morton issued two memoranda to ICE personnel on the use of discretion in immigration enforcement (the "Morton memoranda"). They direct ICE attorneys and employees to refrain from pursuing individuals with strong ties to the United States, and those "involved in non-frivolous efforts related to the protection of their civil rights and liberties." Instead, ICE officials are to focus their efforts on persons who pose a serious threat to national security and public safety, and individuals with an "egregious record of immigration violations." Please provide an update on the effect of these memoranda on U.S. immigration enforcement policy. How does the U.S. ensure uniform compliance with these directives by personnel in ICE's regional and local offices? What kinds of training and oversight mechanisms are in place to ensure that ICE personnel properly exercise discretion under the Morton memoranda? What channels of redress are available when they do not?

RESPONSE:

- **ICE is focused on smart, effective immigration enforcement that prioritizes the agency's resources to promote border security and to identify and remove criminal aliens who pose a threat to public safety and national security.**

- **U.S. immigration enforcement policy allows certain ICE personnel prosecutorial discretion in making enforcement decisions. This policy is carried out through training, periodic supplemental guidance, and ongoing oversight by supervisors and senior officials.**

- **Prosecutorial discretion can take a number of forms and can be exercised at multiple points in the enforcement process, from a determination whether to charge an alien with a Notice to Appear through the ultimate determination whether to remove an alien with a final order.**

- **In addition to a case-by-case review beginning in 2011, each month, ICE attorneys review thousands of cases added to the immigration courts' dockets for appropriate potential exercises of prosecutorial discretion.**

- ICE ERO has issued field guidance on how to properly document the exercise of prosecutorial discretion in ERO's case management system. These methods allow ERO officials and other DHS stakeholders to identify cases in which prosecutorial discretion has been favorably exercised.

- **DHS and ICE take allegations of invidious racial profiling and civil rights and civil liberties violations very seriously.** Formal allegations lodged with ICE may be referred to ICE the DHS Office for Civil Rights and Civil Liberties (CRCL), which is responsible for guarding against civil rights violations in DHS programs, or to the joint intake center, for allegations involving employee misconduct.

SOURCES: This question is based on a question from the New Orleans Workers' Center for Racial Justice and Coalition, see Migrant Workers in the South Expose How U.S. Immigration Enforcement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights.

BACKGROUND (Profiling in DHS Immigration Practice):

In addition, ICE maintains a Community and Detainee Hotline, a toll-free service that provides a direct channel for agency stakeholders to communicate directly with ERO to answer questions and resolve concerns, including those of racial profiling. *See* http://www.ice.gov/about/offices/enforcement-removal-operations/ero-outreach/cmnty-helpline.htm.

The CRCL complaints investigation process is explained in greater detail online at http://www.dhs.gov/file-civil-rights-complaint. The CRCL complaint form is available in English, Spanish, and seven other languages.

"Islamophobic" language in appropriations bills

B-1(4). QUESTION—APPROPRIATIONS BILL LANGUAGE. Why does the Homeland Security Act and related appropriations bills use Islamophobic language, such as "counter homegrown violent Islamist Extremism" or "Islamist Terrorism"? When will this be removed?

RESPONSE:

- **The United States traces its deep commitment to religious freedom and protection of religious practice to the origin of the nation. We do not use religious exercise or religious affiliation to profile.**
- **The government acts to counter any violent extremist threat, regardless of motivation or claimed ideology.**
- The shadow report cited *unenacted* language from *proposed* legislation. The government does have any statutory mandate to, and does not, single out violent extremists by their religious affiliation.

BACKGROUND:
The shadow report noted language from two unenacted DHS reauthorization bills from the 112th Congress, S.1546 and H.R.3116.

SOURCE: Meikeljohn Civil Liberties Institute shadow report, June 30, 2014, raised this issue.

2. NSEERS

B-2. QUESTION – NSEERS: "The Committee notes with concern that despite the measures adopted at the federal and state levels to combat racial profiling, including the elaboration by the Civil Rights Division of the U.S. Department of Justice of the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, such practice continues to be widespread. In particular, the Committee is deeply concerned about the increase in racial profiling against Arabs, Muslims and South Asians in the wake of the 11 September 2001 attack, as well as about the development of the National Entry and Exit Registration System (NEERS) for nationals of 25 countries, all located in the Middle East, South Asia or North Africa (arts. 2 and 5 (b)). What is the U.S. government doing to ensure that non-citizens are not being discriminated against and that the NSEERS program will not continue to discriminate against Arabs, Muslims, and South Asians?

RESPONSE:

- **On April 27, 2011, the Department of Homeland Security (DHS) announced the end of the National Security Entry-Exit Registration System (NSEERS) registration process—a critical step forward in the Department's ongoing efforts to eliminate redundancies; streamline the collection of data for individuals entering or exiting the United States, regardless of nationality; and enhance the capabilities of our security personnel.** NSEERS itself was eliminated because the information the program sought to collect was available by other means.

- The public was apprised of the discontinuation of NSEERS through general and targeted outreach that all individuals previously required to register under NSEERS were no longer covered.

- **DHS takes allegations of racial profiling by its employees or in its programs very seriously. In April 2013, the Department issued a revised policy statement on nondiscrimination in law enforcement and screening activities, which continues the prohibition on unlawful racial or ethnic profiling while also presenting the Department's policy with respect to the limited permissible use of nationality in law enforcement and screening.**

- In 2012, DHS prepared further internal policy regarding aliens previously subject to registration. On April 16, 2012, DHS issued guidance to the effect that an alien's violation of the previous requirement to register for NSEERS would not have binding immigration consequences unless it could be determined, by the totality of the evidence, that an alien's NSEERS violation was willful. The

Department continues to work through the small number of cases where failures to register under NSEERS while it was in place arise.

IF PRESSED

- The NSEERS regulation continues to be in place should the program need to be revived in the future.

- In 2012, the Department prepared further internal policy regarding aliens previously subject to registration.

SOURCES:

This was also addressed in the CERD Committee's 2008 Concluding Observations and Recommendations, paragraph 14:

"The Committee notes with concern that despite the measures adopted at the federal and state levels to combat racial profiling, including the elaboration by the Civil Rights Division of the U.S. Department of Justice of the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,– such practice continues to be widespread. In particular, the Committee is deeply concerned about the increase in racial profiling against Arabs, Muslims and South Asians in the wake of the 11 September 2001 attack, as well as about the development of the National Entry and Exit Registration System (NEERS) for nationals of 25 countries, all located in the Middle East, South Asia or North Africa (arts. 2 and 5 (b)).

Bearing in mind its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party strengthen its efforts to combat racial profiling at the federal and state levels, inter alia, by moving expeditiously towards the adoption of the End Racial Profiling Act, or similar federal legislation. The Committee also draws the attention of the State party to its general recommendation No. 30 (2004) on discrimination against non-citizens, according to which measures taken in the fight against terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin, and urges the State party, in accordance with article 2, paragraph 1 (c), of the Convention, to put an end to the National Entry and Exit Registration System (NEERS) and to eliminate other forms of racial profiling against Arabs, Muslims and South Asians."

Background

NSEERS was implemented pursuant to DHS' authority to register aliens under INA sections 262(a) and 263(a), 8 U.S.C. §§ 1302(a) and 1303(a). NSEERS was intended to provide the Federal Government with records of the arrival to, presence in, and departure from the United States of certain nonimmigrant aliens. Aliens required to register included those non-immigrants: (i) who, in accordance with the requirements outlined in 8 C.F.R. § 264.1(£), were designated by Federal Register notice, and (ii) whose presence in the United States required monitoring in the national security or law enforcement interests of the United States. Aliens subject to NSEERS were required to be registered, photographed, and fingerprinted, provide specific information at regular intervals to ensure compliance with visa and admission requirements, and verify their departure from the United States through designated ports of entry. However, on April28, 2011, DHS announced in a Federal Register notice its removal of the list of countries whose nationals have been subject to NSEERS registration and reporting requirements. Following this notice, DHS suspended **all** special registration and reporting requirements associated with the NSEERS program and the suspension applies to all aliens previously subject to NSEERS requirements, whether or not the alien was a national of one of the previously designated countries and regardless of the underlying basis for the alien's inclusion in the NSEERS program.

3. Complaints to DHS on Profiling on Religious Grounds

B-3 . QUESTION – COMPLAINTS TO DHS ON PROFILING ON RELIGIOUS GROUNDS**:** Does the DHS Office for Civil Rights and Civil Liberties (CRCL) entertain complaints alleging profiling and other forms of discrimination based on religion or religious appearance, as well as on race, ethnicity, and national origin? Can you provide any statistics on the number of profiling complaints received and their disposition?

RESPONSE:

- **DHS takes allegations of racial profiling by its employees or affiliates very seriously. We learn of these and other concerns through our public complaints process, as well as ongoing, proactive community engagement, to solicit community concerns from community leaders, grass-roots organizations, national nongovernmental organizations, and other elements of our country's robust civil society.**

- The DHS Office for Civil Rights and Civil Liberties (CRCL) investigates complaints alleging profiling and/or discrimination based on religion, race, ethnicity, sexual orientation, heath status, and national origin. This includes complaints alleging discrimination based on religion and/or religious appearance as mentioned in the question. Between August 1, 2003, and January 30, 2014, CRCL received 362 complaints alleging profiling and/or discrimination. Of these, 332 have been closed and 30 remain open. While exact numbers are not available, the allegations were unfounded in a substantial majority of the closed complaints.

- The Office for Civil Rights and Civil Liberties opened 10 discrimination/profiling complaints in FY 2011, eight complaints in FY 2012, and 18 in FY 2013. It closed 60 discrimination/profiling complaints in FY 2011, six in FY 2012, and 15 in FY 2013.

- As of the close of FY 2013, the Office had made policy recommendations in 37 discrimination and/or profiling complaints. Of these, three dealt with discrimination based on religion.

SOURCES: For prior treatment of this issue, see July 3 written responses, paragraph 14, http://www.state.gov/j/drl/rls/212393.htm.

4. Disposition of DHS Racial Profiling Investigations

B-4. QUESTION – DISPOSITION OF DHS RACIAL PROFILING INVESTIGATIONS: What criteria does CRCL employ in deciding which racial profiling complaints warrant investigation? Of the two racial profiling investigations since October 2011 that CRCL completed with recommendations to the component or office involved, please elaborate on the remedial measures taken and whether any resulted in disciplinary or criminal action against DHS personnel? Why are 40 of the 42 complaints received still pending or closed without recommendations? Of these, how many remain pending today and what is the nature of the allegations?

RESPONSE:

- **DHS takes allegations of racial profiling by its employees or affiliates very seriously. In April 2013, the Department issued a revised policy statement on nondiscrimination in law enforcement and screening, which continues the prohibition on unlawful racial or ethnic profiling while also presenting the Department's policy with respect to the limited permissible use of nationality in law enforcement and screening.**

- **The DHS Office for Civil Rights and Civil Liberties reviews and processes complaints of civil rights, civil liberties, or human rights violations related to a DHS program or activity, including discrimination, violation of rights in immigration detention or enforcement, discriminatory or inappropriate questioning, and violations of due process.**

- Upon receipt of a complaint, the Office of Civil Rights and Civil Liberties carefully reviews the individual facts and circumstances surrounding each allegation. Among the factors considered are the severity of the alleged violation, the alleged violation's connection to the Department, and the impact of any potential recommendations on Department policy and procedure. However, there is no *one* factor by which all complaints are measured.

- When reviewing a complaint, the Office determines whether the allegation describes an action that relies on, or is influenced by, the race, ethnicity, or national origin of the individual rather than his or her behavior. If discrimination or profiling may have occurred, further investigation is generally conducted.

- Of the 42 complaints CRCL received between October 2011 and May 2013 that alleged profiling, only one has been closed with recommendations, *not two as previously reported*. That complaint alleged racial profiling in the Secure Communities program. After determining that the allegations were unfounded, CRCL recommended to ICE that it facilitate CRCL's ongoing access to local law enforcement to ensure that it can properly investigate claims of discrimination and

racial profiling. ICE and CRCL agreed (informally) to work together to secure access to local law enforcement on a case-by-case basis going forward, but no case has since arisen where that cooperation has been needed. The second complaint that CRCL referenced earlier has been placed on hold pending ongoing litigation on the matter. Once the litigation is resolved, CRCL will reassess its recommendations in light of the court's decision.

- **Disposition of the 42 cases:**

  - Thirty-six of the 42 complaints have been closed as of June 10, 2014. One was closed with recommendations to the component, and six are under active investigation.
  - Six of the 42 complaints are still open. In these six complaints, four allege discrimination based on ethnicity, one alleges discrimination based on race, and one alleges discrimination based on gender.

BACKGROUND (Disposition of DHS Racial Profiling Investigations):

CRCL begins its investigative process by referring the complaint to the DHS Office of the Inspector General (OIG). The OIG then determines whether or not it will investigate the complaint. If OIG declines to investigate, the complaint is returned to CRCL for appropriate action, at which point CRCL determines whether the complaint should be retained for CRCL's own investigation or referred to the relevant DHS component(s) or office(s) for fact-finding investigation. In all complaint investigations, CRCL also notifies the complainant or their representative of the results. If a complaint is referred to a component, CRCL provides the relevant component with guidance on questions and issues to address during their factual investigation, and the component issues a Report of Investigation (ROI) to CRCL at the completion of factual investigation. CRCL then reviews the ROI for sufficiency and may perform follow-up investigation if needed.

If a complaint is retained, CRCL conducts its own fact-finding. Retained complaints may also be opened as "short form" complaints. "Short-form" complaint processing procedures facilitate swift action on urgent complaints and expeditious resolution of allegations that are narrowly focused and require limited investigation. The short-form process makes it easier to open and close complaints; cases that prove to require additional work are often converted to retained investigations. When the investigation is complete, if issues are found, CRCL issues its conclusions to senior leadership of the relevant component(s) alongside any appropriate recommendations, including recommendations for improving policy, practice, or training. If recommendations are made, CRCL asks the relevant DHS components to formally concur or non-concur with the

recommendations, and to provide action plans for implementing accepted recommendations, or the basis for non-concurrence if a recommendation is not accepted. CRCL does not have the authority to levy disciplinary action or criminal charges against DHS personnel.

When logging in complaints, every issue within CRCL's jurisdiction is typically entered, at minimum, into the CRCL Compliance database's information layer. Thus, should a matter not rise to the level of a complaint, but may be helpful for later trend analysis, it can be entered into the "info layer" to ensure it is used as a data point for future reviews. This "info layer" is routinely reviewed for patterns, statistical information, and issues that may be ripe for later investigation depending on future information.

5. Bias in Screening Airline Passengers

B-5. QUESTION – BIAS IN SCREENING AIRLINE PASSENGERS**:** There have been allegations of profiling by Transportation Security Administration (TSA) officials at airports in the United States. What is DHS doing to mitigate this practice in screening passengers?

RESPONSE:

- **DHS does not tolerate unlawful profiling. This commitment was renewed in April 2013 with the issuance of a revised departmental policy statement, The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities, strengthening and superseding prior policy.**

- **TSA's behavioral detection programs utilize observable behavior, not nationality, race, color, ethnicity, or religious affiliation, to identify potential security concerns.**

- The TSA Screening of Passengers by Observation Techniques program relies on behavior, document review, and statement analysis to determine risk. Behavior Detection Officers are trained to screen passengers for involuntary physical and physiological reactions exhibited in response to a fear of discovery. Allegations of deviations from the program's Standard Operating Procedures are investigated, and appropriate action is taken whenever necessary.

- In response to allegations of unlawful profiling, in 2012 TSA worked with the Office for Civil Rights and Civil Liberties to develop expanded initial and refresher anti-profiling training for TSA Behavior Detection Officers, reflecting the Department's latest policy.

SOURCES: This question is based on NGO concerns frequently expressed to CRCL.

BACKGROUND (Bias in Screening Airline Passengers):

The DHS Office for Civil Rights and Civil Liberties (CRCL) conducted a Civil Liberties Impact Assessment (CLIA) on the SPOT program in 2009, and found that TSA management directives, standard operating procedures, and Employee Responsibilities and Conduct Directive provide sufficient guidance and direction to avoid the abuse of official discretion, particularly personal bias in the conduct of official duties. The CLIA also found that TSA embeds constitutional law, civil rights, and civil liberties training in the Transportation Security Officer (TSO) basic training and the advanced SPOT training.

Zero Tolerance for Unlawful Profiling

Racial profiling is not part of the TSA's BDA program and is not tolerated by TSA. Not only is racial profiling generally prohibited by Federal law and under Department and agency policy, but it is also an ineffective security tactic. TSA has zero tolerance for this kind of behavior and has taken several steps to reinforce the agency's nondiscrimination and anti-profiling policies with our workforce.

The Standard Operating Procedures (SOPs) and training for TSA's BDA program, in coordination with the DHS Office of Civil Rights and Liberties (CRCL), provide clear instructions to ensure that referrals for additional screening are made based on specific observed behavioral criteria without regard to nationality, race, color, ethnicity, or religious affiliation. BDOs are required to complete a report documenting specific behaviors observed for each passenger identified for additional action. BDA program analysts audit these reports regularly to ensure that BDOs are employing techniques properly, including protecting any privacy information that results from a law enforcement referral.

Additionally, BDOs are trained specifically in preventing race, ethnicity, or religious profiling, and in 2012, TSA reviewed and revised all training documents to underscore that unlawful profiling violates agency policy and anti-discrimination laws. BDOs are instructed to immediately notify management if they believe profiling has occurred. That instruction is reinforced during recurring training, shift briefs, employee counseling sessions, and other avenues. All BDOs and BDO training managers are required to take a pledge against unlawful profiling, and all TSA employees are required to take biannual DHS Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 (No FEAR Act) training that provides information to employees regarding rights and protections available under Federal antidiscrimination, whistleblower protection and retaliation laws.

TSA expects every member of the workforce, including BDOs, to report allegations of profiling to local management or directly to the TSA Office of Civil Rights and Liberties, Ombudsman and Traveler Engagement (CRL/OTE) or Office of Inspection (OOI) without fear of retaliation. TSA also modified its complaint reporting procedures to make it easier for travelers to report allegations of racial profiling through TSA's website or mobile phone app. If allegations do arise, TSA takes immediate steps to investigate the issue.

E. Violence (against women, police brutality, guns)

1. **Allegations of excessive use of force at border**

E-1. QUESTION – BORDERS – EXCESSIVE USE OF FORCE**:** What training and protocols are in place to govern the use of force at the border? What is being done to ensure accountability and remedies for the families of victims?

RESPONSE:

- **DHS enforces strict standards of conduct that apply to all of its employees, whether they are on- or off-duty, investigates deaths resulting from use of force, and follows up on civil rights and civil liberties-related complaints.**

- **Customs and Border Protection (CBP) continues to review, evaluate, and update its existing use of force policies after three comprehensive reviews of its use of force policies and practices. On May 30, 2014, CBP released its completely updated use of force handbook and an earlier Police Executive Research Forum (PERF) report on use of force in CBP, on its public website.**

  These policies and directives, following coordination between U.S. Customs and Border Protection and the DHS Office for Civil Rights and Civil Liberties on use of force issues, are consistent with many of the views expressed in the PERF report and other reviews noted in the civil society reports.

- Changes in the revised Handbook include, among other things, requiring additional training in the use of safe tactics, instituting the requirement to carry less-lethal devices and enhanced guidance on responding to thrown or launched projectiles (such as rocks).

  Further, CBP has also created the CBP Use of Force Reporting (UFRS) which electronically tracks all less-lethal and lethal uses of force by agents and officers. CBP supervisors are required to review the involved officer's/agent's report and submit/approve the report in the system. For uses of less-lethal force, local CBP management is required to conduct a monthly review of all incidents involving less-lethal force from the preceding month to determine:

  i. whether there is any indication of criminal misconduct by any CBP employee;

  ii. whether the actions of each CBP employee involved in the incident were appropriate and in accordance with CBP policies (e.g. whether each application of force was both reasonable and necessary);

iii. whether there are any factors that should be referred to IA and/or the CBP Office of Chief Counsel concerning potential litigation; and,

iv. whether corrective action is required.

Additionally, the CBP Use of Force Center for Excellence (UFCE) Incident Review Committee reviews all uses of deadly force by a CBP employee against a person and has authority to review any incident in which use of force is employed. The primary role of the Committee is to allow qualified experts an opportunity to perform an internal analysis of these incidents from a perspective of training, tactics, policy and equipment. This Committee will submit quarterly reports outlining findings and recommendations, as appropriate, to the CBP Commissioner.

- Taken together, these policies and directives make clear that under existing policy agents should, whenever possible, avoid placing themselves in circumstances where deadly force will be required, and to avoid discharging firearms as a result of thrown rocks unless the projectiles pose an imminent danger of death or serious injury.

- The DHS Office for Civil Rights and Civil Liberties (CRCL) receives notification of all non-employee deaths that occur in CBP custody as well as deaths involving use of force by law enforcement officials. Upon notification of a death, the Office for Civil Rights and Civil Liberties requests relevant records and information from the component agency, which is then reviewed to determine whether a more detailed investigation is warranted. If so, an investigation is conducted. As with all complaint investigations, if issues of concern are found, recommendations are made directly to CBP leadership.

- Accountability and remedies are addressed through the DHS Office of Inspector General (OIG), which receives information about all allegations of misconduct, including excessive use of force, involving DHS employees, contractors, and programs. Inspector General investigations may result in criminal prosecutions, fines, civil monetary penalties, administrative sanctions, and personnel actions. The Inspector General also maintains a 24-hour complaint hotline for this purpose.

IF ASKED:

- If the OIG declines to investigate, the ICE Office of Professional Responsibility, CBP's Office of Internal Affairs (CBPIA), or CBPIA special agents, fact-finders, or management may investigate.

IF ASKED ABOUT CIVIL LIABILITY FOR CROSS-BORDER USES OF FORCE:

- We are aware of the U.S. Court of Appeals for the Fifth Circuit's June 30, 2014 decision in *Hernandez v. United States*. The Federal Government is reviewing the decision. Because the matter is subject to ongoing litigation, however, we cannot comment further.

SOURCES: This question is based on submissions from the ACLU and the Rights Working Group. See ACLU National Submission, pp. 10-14 (re: killings on the U.S..-Mexico border).

This was also addressed in the CERD Committee's 2008 Concluding Observations and Recommendations, paragraph 25:

"While recognizing the efforts made by the State party to combat the pervasive phenomenon of police brutality, the Committee remains concerned about allegations of brutality and use of excessive or deadly force by law enforcement officials against persons belonging to racial, ethnic or national minorities, in particular Latino and African American persons and undocumented migrants crossing the U.S.-Mexico border. The Committee also notes with concern that despite the efforts made by the State party to prosecute law enforcement officials for criminal misconduct, impunity of police officers responsible for abuses allegedly remains a widespread problem (arts. 5 (b) and 6).

The Committee recommends that the State party increase significantly its efforts to eliminate police brutality and excessive use of force against persons belonging to racial, ethnic or national minorities, as well as undocumented migrants crossing the U.S.-Mexico border, inter alia, by establishing adequate systems for monitoring police abuses and developing further training opportunities for law enforcement officials. The Committee further requests the State party to ensure that reports of police brutality and excessive use of force are independently, promptly and thoroughly investigated and that perpetrators are prosecuted and appropriately punished."

BACKGROUND (Borders – Excessive Use of Force):

ACLU Report: Of particular concern to ACLU in its 2012 report is the lack of transparent investigations and prosecutions in most Border Patrol killings along the U.S.-Mexico border, citing the Sergio Hernandez-Guereca's case as the only case in which a federal investigation has been concluded. It also refers to difficulty for families of victims to seek redress or a sense of justice, referring to the need for the family of Carlos

LaMadrid to get "a court order to force the federal government to reveal the name of the agent who shot him so they could serve him with legal papers."

ACLU refers to apparent recognition in pending immigration reform legislation and of the need to review and reform CBP training protocol in consultation with the Department of Justice's Civil Rights Division, with an additional emphasis to improve reporting and review use-of-force incidents.

It also refers positively to two administrative investigations and reviews, including the DHS Office of Inspector General's pending review of CBP's Use of Force and an additional review initiated by CBP with the help of an "independent outside research center."

Through the Committee's examination, the ACLU states that it hopes the U.S. government, particularly DHS, "sees an opportunity for increased transparency with civil society both to address broadly steps the agency is taking to improve use-of-force policy and practice within the ranks of CBP, and more narrowly to address steps taken in the handling of individual investigations to provide effective remedy to victims and family members as mandated by US ICCPR obligations."

The **new directive**: http://www.cbp.gov/linkhandler/cgov/border_security/bs/uof14.ctt/uof14.pdf

Press release on use of force policies: http://www.dhs.gov/news/2014/03/07/dhs-cbp-ice-release-use-force-policies

FURTHER INFORMATION ON SPECIFIC CBP PROJECTS:

- *Border Patrol Agent Basic Training.* In January 2014, basic training for Border Patrol Agents was extended by six days to include an enhanced use of force scenario-based training experience, emphasizing de-escalation techniques, while maintaining border security and agent safety. Border Fence training venues have been constructed and incorporated into the basic training.

- *Comprehensive Use of Force Law & Policy Training.* CBP has developed comprehensive Use of Force Law & Policy Training to provide officers, agents, and managers further understanding of legal requirements and CBP policy on use of force. All CBP agents and officers will complete the training by June 30, 2014.

- *Establishment of the CBP Center for Use of Force.* On March 9, 2014, CBP stood up the CBP Center for Use of Force at the CBP Advanced Training Center in Harpers Ferry, WV. This center will provide a comprehensive and fully operational Use of Force program that conducts training standardization audits, incident reviews, data analysis, policy development, instructional delivery, and weapon accountability and procurement.
  Testing of New Less Lethal Devices. In January 2014, CBP began testing and evaluation of the 40MM Less Lethal Specialty Impact/Chemical Munition device and the NightHawk Controlled Tire Deflation Device. These systems will allow agents to engage subjects from

greater distances; reducing the likelihood of a lethal force encounter during some enforcement situations. Test results will inform decisions regarding further expansion of these devices.

- *Virtual Training Simulators*. CBP has tested, purchased, and installed a virtual UoF training simulator system. This system provides officers and agents a realistic and familiar environment for honing and demonstrating necessary judgment, tactics, and skillsets involved in everyday operations.

F. Housing

1. Addressing shortcomings of Katrina response, including housing

F-1. QUESTION: The Committee, while noting the efforts undertaken by the State party and civil society organizations to assist the persons displaced by Hurricane Katrina of 2005, remains concerned about the disparate impact that this natural disaster continues to have on low-income African American residents, many of whom continue to be displaced after more than two years after the hurricane (art. 5 (e) (iii)). What has the U.S. government done to ensure that there is adequate housing for everyone, including low-income residents, after natural disasters such as Hurricane Katrina?

Response:

- The Federal Emergency Management Agency (FEMA) within the Department of Homeland Security is tasked with the job of coordinating the federal government's role in preparing for, preventing, mitigating the effects of, responding to, and recovering from all domestic disasters, whether natural or man-made, including acts of terror.

- FEMA is one part of a large team that is working together to support the state in meeting the housing needs of disaster survivors. This joint effort is comprised of housing and technical experts from the state, Housing and Urban Development (HUD), FEMA, the U.S. Army Corps of Engineers (USACE), Small Business Administration (SBA), and voluntary agencies.

- In the aftermath of Hurricane Katrina 9 years ago, Congress enacted the *Post-Katrina Reform Act*, which directed FEMA to develop an overall strategy for disaster housing. This law also created a National Advisory Council to advise FEMA on all aspects of emergency management. This law also further FEMA to fund case management services for disaster survivors and also gave FEMA's Individuals and Households Program more flexibility to meet housing needs. FEMA now also has the authority to create a pilot rental repair program to explore ways to provide timely and cost-effective repairs to rental units.

- FEMA has made strides in a number of areas since hurricanes Katrina and Rita struck the Golf Coast. In the aftermath of Hurricane Sandy in October 2012, FEMA provided a Housing Portal through which eligible individuals and families who have been displaced by hurricanes can search for available rental units in their area that were provided by Federal agencies, such as HUD, the U.S. Department of Agriculture, U.S. Veterans Administration, IRS, as well as by private organizations and individuals. Shortly after the disaster, FEMA also approved $700 million in

housing assistance for individuals and families. The assistance could include money for rental assistance, essential home repairs, personal property losses and other serious disaster-related needs not covered by insurance. A year after Sandy, more than $1.4 billion in Individual Assistance had been provided to more than 182,000 survivors and an additional $2.4 billion in low-interest disaster loans had been approved by the U.S. Small Business Administration. FEMA also approved more than $3.2 billion to fund emergency work, debris removal, and repair and replacement of infrastructure.

- FEMA increased the amount of rental assistance that it provided to eligible disaster survivors in New York and New Jersey. The rental amount was based on existing HUD Fair Market Rates for fiscal year 2013. These FMR rates were low enough so that as many units as possible could be rented and provided to low-income families.

- FEMA's response to Hurricane Ike in 2008 was well organized and effective and FEMA and its federal and state partners implemented their incident objectives aggressively. By the end of October 2008, only 7 weeks after landfall, FEMA had registered more than 715,000 hurricane victims, completed 359,000 housing inspections, installed manufactured housing for 339 families, and disbursed $326 million for housing and other needs. FEMA also assisted more than 100,000 disaster victims at its Disaster Recovery Centers. FEMA's response to Hurricane Ike demonstrates that it is far better prepared for the next housing disaster.

- When requested by FEMA, the Department of Housing and Urban Development (HUD) may administer a Disaster Housing Assistance Program to provide housing vouchers to disaster displacees.

Source: COR 2008, 31

"The Committee, while noting the efforts undertaken by the State party and civil society organizations to assist the persons displaced by Hurricane Katrina of 2005, remains concerned about the disparate impact that this natural disaster continues to have on low-income African American residents, many of whom continue to be displaced after more than two years after the hurricane (art. 5 (e) (iii)).

The Committee recommends that the State party increase its efforts in order to facilitate the return of persons displaced by Hurricane Katrina to their homes, if feasible, or to guarantee access to adequate and affordable housing, where possible in their place of habitual residence. In particular, the Committee calls upon the State party to ensure that every effort is made to ensure genuine consultation and participation of persons displaced by Hurricane Katrina in the design and implementation of all decisions affecting them."

J. Indigenous Issues

1. Border Wall and its impact on tribes, including the non-recognized Lipan Apache (Ndé)

J-1. QUESTION: The construction of a Border Wall along the Texas-Mexico border restricts access to the Lipan Apache's traditional indigenous lands, resources, and sacred places and the tribe (which is not federally-recognized) was not consulted with prior to the construction of the wall and members of the Lipan Apache Band of Texas did not receive compensation for the value of sacred lands seized by the U.S. government. What is the U.S. government doing to ensure that the construction of a border wall is not encroaching on the rights of indigenous tribes, including the non-recognized Lipan Apache (Ndé)?

Response:

- **The United States recognizes the unique issues presented for tribes and other groups whose communities span the border. We have a strong record of finding appropriate solutions to these concerns that accommodate the interests of border communities while providing appropriate consideration for security and lawful commerce across the border.**

- The Department of Homeland Security established an internal working group to direct and coordinate the DHS response to the President's November 5, 2009 Memorandum on Tribal Consultation. The Office of Intergovernmental Affairs (IGA) and the Office of General Counsel led this effort.

- As required by both E.O. 13175 and the November 5th Presidential Memorandum, this plan was drafted in consultation with tribal governments. It is a living document that DHS will continue to refine and perfect through collaboration with its tribal partners over the coming months. In addition, DHS is working to ensure effective communication regarding these efforts across the Department with, and for, tribal nations. In drafting this plan, DHS solicited input and feedback from tribal governments.

- Advisory councils that were established in the founding and subsequent language of the Department have proven valuable in soliciting and understanding the views and opinions of our partners in the homeland. These bodies enable the Secretary and other Departmental leadership to routinely hear first-hand from those on the front line of state, local, and tribal government, as well as the private sector, for implementing DHS policies and regulations.

Source: See the February 2014 shadow report to the 2014 CERD session from the University of Texas Human Rights Law Clinic regarding the Lipan Apache tribe in Texas; Report available at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_16962_E.pdf.

DOJ L-5. QUESTION – STATE IMMIGRATION LAWS AND THE REAL ID ACT – DISCRIMINATORY USE AGAINST IMMIGRANTS: What steps is the U.S. Government taking to ensure that state laws denying driver's licenses are not being used in a manner that discriminates against immigrant communities? What positive measures is the U.S. Government taking to ensure that laws denying driver's licenses do not create barriers to obtaining necessary medical care and other services at the federal and state level?

[based on ICCPR B-2(5) with no substantive edits]

RESPONSE:

- **The United States is committed to ensuring that all persons in the United States receive the protections to which they are entitled under our Constitution and laws.**

- **We continue to monitor the implementation of state laws and their impact on the constitutional rights and well-being of immigrant communities.**

- The REAL ID Act of 2005 sets forth minimum requirements for the issuance and production of state-issued driver's licenses and identification cards in order for Federal agencies to accept those documents for certain official purposes. The Act and its implementing regulations describe these official purposes as accessing federal facilities, entering nuclear power plants, and boarding federally-regulated commercial aircraft.

- Enforcement of REAL ID would not restrict federal agencies from accepting state-issued licenses and identification cards for other purposes such as applying for federal benefits or obtaining health services.

- In addition, Federal agencies may accept driver's licenses or identification cards issued by noncompliant states for the purpose of accessing a Federal facility if such access is needed to apply for or receive Federal benefits, health, or life preserving services.

SOURCE:

BACKGROUND:

Drafted by: DOJ – CRT

Cleared by: OASG

ODAG

# # #

L. Immigration

1. Due process in immigration decisions and proceedings; deportations without access to immigration court system

L-1. QUESTION - DUE PROCESS IN IMMIGRATION DECISIONS AND PROCEEDINGS: How does the United States afford due process of law in the enforcement of immigration laws? What guarantees are available to challenge detention, deportation and asylum decisions and what are the rights of appeal?

RESPONSE:

- **All aliens in the United States are entitled to and afforded due process consistent with the U.S. Constitution, federal laws, and applicable international obligations.**

- Individuals placed in deportation or removal proceedings, including those who subsequently seek asylum or other forms of relief or protection before the DOJ Executive Office for Immigration Review (EOIR), have the right to a hearing before an immigration judge and may file an administrative appeal to the Board of Immigration Appeals, with the ability to seek further review before the federal courts.

- In the detention context, aliens subject to non-mandatory detention can challenge the Department of Homeland Security's decision to detain them before an immigration judge, with the right to appeal this decision administratively to the Board of Immigration Appeals and to seek further review of the legal basis of the alien's detention, and whether the statue is being lawfully applied, before the federal courts.

- While some aliens are subject to mandatory detention provisions during the pendency of the removal process, such aliens have the right to administratively challenge their inclusion in a category of aliens subject to mandatory detention in a hearing before an immigration judge, to file an administrative appeal, and to eventually seek further review of the legal basis of the alien's detention and whether the detention statute is being lawfully applied before the federal courts. The mandatory detention procedure is being tested through ongoing litigation in federal court. Aliens subject to mandatory detention may be eligible for bond hearings before certain federal courts.

- Regardless of lawful presence, an alien detained in the United States has the same right as any citizen to challenge in court, through a petition for writ of habeas corpus or other available means, the legal basis for detention.

- In terms of legal process, aliens in removal proceedings before immigration judges are accorded the opportunity to review the evidence against them, present evidence on their behalf, and cross-examine the Government's witnesses.

Legal Representation

- Aliens in removal proceedings before immigration judges have the privilege of being represented by counsel of their choosing at no expense to the Government. The Executive Office for Immigration Review (EOIR) has taken several steps to encourage *pro bono* legal representation of aliens in removal proceedings, including representation for unaccompanied children (see below).

- For example, the EOIR Office of Legal Access Programs offers the Legal Orientation Program, working with nonprofit organizations to explain immigration court procedures and basic legal information to detained individuals. These providers facilitate *pro bono* representation in removal proceedings and administrative appeals before the Board of Immigration Appeals. EOIR allows accredited representatives (individuals from recognized non-profit religious, charitable, social service, or similar organizations) to represent aliens in immigration proceedings for a nominal fee and maintains a Free Legal Service Provider List of organizations and private attorneys who have agreed to represent aliens in immigration hearings *pro bono*.

- Furthermore, immigration judges are instructed to assist *pro se* individuals to the greatest extent possible in immigration proceedings, including ensuring that such respondents are informed of potential forms of relief from deportation or removal and are provided with the requisite application forms and submission requirements.

Individuals with Mental Disorders

- DOJ, including EOIR, and DHS have taken steps to ensure that detained individuals with mental disorders receive additional protections in immigration proceedings. In April 2013, DOJ and DHS issued a policy providing new procedural protections for unrepresented immigration detainees with serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings ("Policy"). These protections include conducting screening for serious mental disorders or conditions, the availability of competency hearings and independent psychiatric or psychological examinations, and making available qualified representatives to mentally incompetent detainees in immigration proceedings. Currently, detained unrepresented individuals with serious mental disorders or conditions who are found to be incompetent while in immigration proceedings in Arizona, California, and Washington State are being provided qualified representatives. Pursuant to the Policy, this program is gradually being expanded nationwide.

Unaccompanied Alien Children

- The DOJ Executive Office for Immigration Review (EOIR) has taken several steps to encourage pro bono legal representation of respondents in removal proceedings, including detained unaccompanied children. These steps include: establishing juvenile dockets in all 59 Immigration Courts across the country to facilitate access to legal

services, of which 19 Immigration Court juvenile dockets serve detained unaccompanied children; issuing guidance to immigration judges regarding facilitating pro bono representation; and guidance on how to handle cases involving unaccompanied children. Further, EOIR established the Assistant Chief Immigration Judge for Vulnerable Populations to act as a resource to the immigration judges handling cases involving unaccompanied children.

- The Executive Office for Immigration Review (EOIR) conducts legal proceedings to determine whether minors/children may lawfully remain in the United States. For over a decade, EOIR, with the help of experts from other federal agencies and non-governmental organizations, has trained judges on issues related to children in immigration court proceedings. In addition, the agency has issued guidance about how to create a child-friendly environment in immigration court. This guidance addresses, among other things, special juvenile dockets, for children, child-friendly courtroom modifications, pre-hearing orientations, and child-sensitive questioning.

- Since 2010, EOIR's Legal Orientation Program for Custodians of Unaccompanied Alien Children has provided legal information to the adult caregivers of unaccompanied alien children in immigration court proceedings. The purpose of this program is to inform custodians of their responsibilities in ensuring that children under their care appear at all immigration court proceedings, as well as protecting them from mistreatment, exploitation, and trafficking. Finally, EOIR has worked closely with the Department of Health and Human Services, Office of Refugee Resettlement (ORR) and non-governmental organizations to identify children in need of legal assistance and facilitate pro bono legal services.

- On June 6, 2014, DOJ, EOIR, and the Corporation for National and Community Service (CNCS) announced their joint sponsorship for a program using the AmeriCorps service model creating a "justiceAmeriCorps" to improve the efficient and effective adjudication of immigration court proceedings involving unaccompanied children.

SOURCES: See the September 13 shadow report submitted by The Advocates for Human Rights: Violations of the Rights of Refugees, Asylum Seekers and Other Non-citizens and the John Marshall Law School Human Rights Project: Joint Submission to the U.N. Human Rights Committee Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America
ICE Policy No. 11063.1: *Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees with Serious Mental Disorders or Conditions* (Apr. 22, 2013).
Executive Office for Immigration Review Memorandum, *Nationwide Policy to Provide*

Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions (Apr. 22, 2013).

The BIA has also issued precedent decisions clarifying the procedural protections afforded mentally incompetent aliens in removal proceedings. See Matter of M-A-M-, 25 I&N Dec. 474 (BIA 2011); Matter of E-S-I-, 26 I&N Dec. 136 (BIA 2013).

This was also discussed in the April 2014 UPR consultation at the American University law school, where a number of civil society groups discussed access to counsel issues at length.

BACKGROUND – Due Process in Immigration Matters and Proceedings):

NGO Concerns:

The John Marshall Law School Human Rights Project shadow report in September 2013 notes the following concerns:

- U.S. immigration detention centers deny immigrant detainees' right to judicial protection and guarantees by denying them available and affordable legal services. This prevents detainees from asserting their right to due process under ICCPR Art. 2(3)(b).

Key concerns expressed by Amnesty International in its September 2013 Submission to the Human Rights Committee are that immigrants that are found guilty of crimes, including minor non-violent crimes, are subjected to mandatory detention that is practically unreviewable by the courts. Although deportation has a devastating effect on the lives of many undocumented immigrants, immigrants that are designated for deportation are not given individualized determination hearings—a single court appointed lawyer may represent as many as 70–80 people at a time.

Further Background Provided by DOJ

Under the Immigration and Nationality Act, Congress has afforded immigrants a variety of due process rights in the detention, deportation, and asylum contexts. In the detention context, aliens subject to non-mandatory detention can challenge the Department of Homeland Security's decision to detain them before an immigration judge, and that decision can be appealed to the Board of Immigration Appeals (BIA). *See* 8 C.F.R. §§ 236.1(d)(1) & (d)(3); and 1236.1(d) and (d)(3). Aliens subject to mandatory detention may challenge the basis for their mandatory detention in a hearing before an immigration judge. *See Matter of Joseph*, 22 I&N Dec. 660 (BIA 1999).

Regarding removable aliens, the Department of Homeland Security will initiate removal proceedings by issuing a charging document called a Notice to Appear and filing it with an Immigration Court, laying out the bases for removability. *See* 8 U.S.C. § 1229(a)(1); 8 C.F.R. §§ 239.1, 1239.1. The alien will then appear before an immigration judge where he or

she may be represented by counsel. *See* 8 U.S.C. § 1229a(b); 8 C.F.R. § 1240.3. If the immigration judge orders an alien removed or deported, the alien may challenge that order before the BIA and then to the circuit court of appeals. *See* 8 C.F.R. § 1240.53; 8 U.S.C. § 1252(a)(5); 8 C.F.R. § 1240.53.

An asylum seeker who is not in removal proceedings or is an unaccompanied child may file an affirmative application before U.S. Citizenship and Immigration Services (USCIS) in a non-adversarial hearing before a trained asylum officer. If that agency denies the asylum application, the alien is placed in removal proceedings and can renew his or her asylum application before an immigration judge. This renewed asylum application is subject to *de novo* review of the immigration judge. An alien in removal proceedings can raise an asylum claim as a defense to removal even if they did not do so affirmatively before USCIS. If the immigration judge denies the asylum application, the alien may appeal that order to the BIA and then to the circuit court. *See* 8 U.S.C. § 1252(a); 8 C.F.R. pt. 1003.

Since 2003, EOIR's Office of Legal Access Programs (OLAP) has offered the Legal Orientation Program (LOP), wherein EOIR works with nonprofit organizations to provide comprehensive presentations and Self-Help workshops to explain immigration court procedures, along with other basic legal information, to detained individuals in removal proceedings. LOP providers facilitate pro bono legal services for these detained individuals. The EOIR OLAP also supports the BIA Pro Bono Project that facilitates pro bono representation for individuals pursuing administrative appeals before the Board of Immigration Appeals. Since 2010, EOIR's Legal Orientation Program for Custodians of Unaccompanied Alien Children has provided legal information to the adult caregivers of unaccompanied alien children in immigration court proceedings. As part of this program, EOIR has worked closely with ORR and non-governmental organizations to identify children in need of legal assistance and facilitate pro bono legal services. Additionally, EOIR maintains the Recognition and Accreditation Program, which allows accredited representatives (individuals from recognized non-profit religious, charitable, social service, or similar organizations) to represent aliens in immigration proceedings for a nominal fee. *See* 8 C.F.R. § 1292.1. To further assist individuals in finding legal representation, EOIR maintains a Free Legal Service Provider List, which contains the names and contact information of organizations and private attorneys who have agreed to represent aliens in immigration hearings *pro bono*. These lists are maintained by the Office of the Chief Immigration Judge. *See* 8 C.F.R. § 1003.61(a).

On June 6, 2014, DOJ and the Corporation for National and Community Service (CNCS) announced their joint sponsorship for a program using the AmeriCorps service model creating a "justiceAmeriCorps" to improve the efficient and effective adjudication of immigration court proceedings involving unaccompanied children. Under this initiative CNCS issued a Notice of Federal Funding Opportunity that will allow grantees to enroll lawyers and paralegals to serve as AmeriCorps members providing legal services to this

vulnerable population. Specifically, the program is intended to provide legal services to children under the age of 16 who: (1) are not in the custody of the Office of Refugee Resettlement (ORR) or the Department of Homeland Security; (2) have received a Notice to Appear in removal proceedings before EOIR; and, (3) have not had their cases consolidated with removal proceedings against a parent or legal guardian (hereinafter "Unaccompanied Children" or "Unaccompanied Child"). The legal representation shall be limited to immigration or custody proceedings before EOIR Immigration Courts; appellate proceedings before the Board of Immigration Appeals; proceedings before United States Citizenship and Immigration Services (USCIS), including applications for asylum, Special Immigrant Juvenile (SIJ) status, and/or T or U nonimmigrant status; and state court proceedings seeking orders necessary to support applications for SIJ status (Immigration Proceedings). Immigration Proceedings shall not include any claims, litigation, or other proceedings before federal district courts, courts of appeals, or the Supreme Court.

Proposed programs shall provide legal services to Unaccompanied Children in Immigration Proceedings to increase the effective and efficient adjudication of immigration court cases involving those children. In addition, programs should facilitate the identification of Unaccompanied Children who have been victims of human trafficking or abuse and decrease the risk that those children may be trafficked upon return to their country of nationality or last habitual residence; screen Unaccompanied Children for abuse, trafficking, and trauma; refer suspected cases of abuse, trafficking, and trauma to appropriate law enforcement authorities and/or appropriate support services; build pro bono capacity to support the populations of unaccompanied children in the immigration court location(s) in which members will serve; and strengthen national service so that participants engaged in CNCS-supported programs consistently find satisfaction, meaning and opportunity.

2. Affordable legal services for migrants, court language initiative

L-2. QUESTION – AFFORDABLE LEGAL SERVICES FOR MIGRANTS: Migrants have the need for affordable legal services to assert their right to due process under ICCPR Art. 2(3)(b), whether in detention, deportation or other immigration process. What is the U.S. doing to ensure that such services are available?[1]

RESPONSE

- **All persons in the United States, regardless of immigration status, are entitled to and afforded due process, consistent with the U.S. Constitution, federal laws, and applicable international obligations.**

- **The Administration supports comprehensive immigration reform legislation that would expand the government's ability to fund immigration counsel for some non-citizens. Since 1952, the Immigration and Nationality Act (INA) has guaranteed individuals in immigration proceedings the "privilege" of representation by counsel, but only "at no expense to the Government."**

- **DHS notifies each individual in removal proceedings before an immigration judge that he or she may be represented by counsel, provides a list of pro bono counsel, and allows each alien at least ten days to obtain counsel at his or her own expense.** The government, through both the Department of Homeland Security and the immigration court system within the Department of Justice, endeavor to provide legal orientation and contact information for pro bono immigration counsel to aliens seeking representation.

- Immigration detention standards provide that detainees have access to confidential communications with counsel (in person, by phone, and through correspondence), access to courts, and access to legal materials in a properly equipped law library.

- With respect to juveniles, both CBP and ICE provide *all* juveniles at the time of apprehension with a document entitled Form I-770 (Notice of Rights and Requests for Disposition for Minors), which informs them of their rights to use the telephone, to be represented by a lawyer, to have a hearing before an immigration judge, along with a list of free legal services. Upon apprehension, CBP and ICE also provides every juvenile with the opportunity to speak directly with their consulate and a family member; juveniles apprehended by CBP are shown a video (for Spanish-speaking minors, in Spanish) providing a basic legal orientation.

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[1] DHS notes this relates to issue relates to ICCPR, likely not CERD. Article 5 of the CERD enumerates various rights, but as DOJ OLC observed, the "obligation [under Art. 5] is not primarily to protect the rights included as such 'but rather to assure equality and nondiscrimination in the enjoyment of those rights.' Letter of Submittal to the President from Warren Christopher, sent to Senate with Ex. C, 95th Cong., 2d Sess. at VII." Cuban Obligation to Accept Returning Nationals, 4B U.S. Op. Off. Legal Counsel 677, 1980 WL 20968, at *2 (1980).

- To further facilitate due process in immigration proceedings before the DOJ, Executive Office for Immigration Review (EOIR) Immigration Courts and the Board of Immigration Appeals, EOIR has taken additional steps within its statutory authority to encourage and facilitate *pro bono* legal representation for all respondents who appear in removal proceedings, including detained unaccompanied children. Since 2003, EOIR's Office of Legal Access Programs (OLAP) has offered the Legal Orientation Program (LOP), wherein EOIR works with nonprofit organizations to provide comprehensive presentations and Self-Help workshops to explain immigration court procedures, along with other basic legal information, to detained individuals in removal proceedings. LOP providers also facilitate *pro bono* legal services for these detained individuals.

- Additionally, EOIR maintains the Recognition and Accreditation Program, which allows accredited representatives, who are individuals from recognized non-profit religious, charitable, social service, or similar organizations, to represent aliens in immigration proceedings for a nominal fee. See 8 C.F.R. § 1292.1. To further assist individuals in finding legal representation, EOIR maintains a Free Legal Service Provider List, which contains the names and contact information of organizations and private attorneys who have agreed to represent aliens in immigration hearings pro bono. These lists are maintained by the Office of the Chief Immigration Judge for each Immigration Court location. See Section 208(d)(4)(B) of the INA; 8 C.F.R. §§ 1003.61(a) and 1240.10(a)(2).

- In the fall of 2010, EOIR launched the Legal Orientation Program for Custodians of Unaccompanied Alien Children, which provides legal orientation to the adult custodians of any such children in removal proceedings. The program aims to inform these custodians of their responsibilities to ensure the children's appearance at all immigration proceedings, and to protect them from mistreatment, exploitation, and trafficking. Through this Program, EOIR has worked with the HHS Office of Refugee Resettlement and non-governmental agencies to implement this program nationwide.

- The Administration also supports common sense Comprehensive Immigration Reform, specifically a bipartisan bill that the Senate passed earlier this year, which contains provisions to provide government funded attorneys for vulnerable populations, namely unaccompanied children and individuals with mental disabilities. It would also remove restrictions on providing legal representation in other proceedings for some noncitizens.

SOURCES: See September 2013 shadow reports from Amnesty International: Submission to the Human Rights Committee ; John Marshall Law School Human Rights Project: Joint Submission to the U.N. Human Rights Committee Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America and New Orleans Workers' Center for Racial Justice: Migrant Workers in the South Expose How U.S. Immigration

Enforcement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights

- This was also addressed in the CERD Committee's 2008 Concluding Observations and Recommendations, paragraph 22:

- "While welcoming the recent initiatives undertaken by the State party to improve the quality of criminal defence programmes for indigent persons, the Committee is concerned about the disproportionate impact that persistent systemic inadequacies in these programmes have on indigent defendants belonging to racial, ethnic and national minorities. The Committee also notes with concern the disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities (art. 5 (a)).

- "The Committee recommends that the State party adopt all necessary measures to eliminate the disproportionate impact that persistent systemic inadequacies in criminal defence programmes for indigent persons have on defendants belonging to racial, ethnic and national minorities, inter alia, by increasing its efforts to improve the quality of legal representation provided to indigent defendants and ensuring that public legal aid systems are adequately funded and supervised. The Committee further recommends that the State party allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs, such as housing, health care, or child custody, are at stake."

BACKGROUND (Affordable Legal Services for Migrants):

NGO Concerns:

The John Marshall Law School Human Rights Project shadow report in September 2013 states the following concerns:

- U.S. immigration detention centers deny immigrant detainees' right to judicial protection and guarantees by denying them available and affordable legal services. This prevents detainees from asserting their right to due process under ICCPR Art. 2(3)(b).

- Amnesty International states that immigrants who are found guilty of crimes, including minor non-violent crimes, are subjected to mandatory detention that is practically unreviewable by the courts. It adds that although deportation has a devastating effect on the lives of many undocumented immigrants, immigrants that

are designated for deportation are not given individualized determination hearings—a single court appointed lawyer may represent as many as 70–80 people at a time.

- New Orleans Workers Center for Racial Justice state that people in immigration detention report a vacuum of information about their deportation cases and minimal to no access to family or lawyers.

HHS Background

HHS's Office of Refugee Resettlement (ORR) Survivors of Torture (SoT) program funds grantees that provide legal services to immigrants in ICE detention. The following are the programs that we know of who are working with this population:

- Survivors of Torture International
- Bellevue/NYU Program for Survivors of Torture
- LIRS
- HealthRight International
- Center for Survivors of Torture (Texas)
- ASTT
- Heartland Alliance/Kovler Center
- University of California Santa Rosa (though not an SoT, they work with detained survivors through HHS)

The aggregate services the programs provide are: Forensic/medical evaluations, legal representation, psychological evaluations, letter writing to the detainees, social services, legal referrals, counseling, eligibility screening, and pre-release case management.

DHS Background

- Since 1952, section 292 of the Immigration and Nationality Act (INA) has guaranteed individuals in immigration proceedings before an immigration judge the "privilege" of representation by counsel, but only "at no expense to the Government." Pub. L. No. 82-414, 66 Stat. 163 (1952). In this regard, DHS ensures that the individual is notified that he or she may be represented by counsel, and will provide a list of counsel and a period of at least ten days to obtain counsel at his or her own expense. INA § 239(a)(1). In addition, DHS provides this list in a number of other circumstances including by USCIS to asylum applicants (INA § 208(d)(4)) and by ICE to aliens subject to administrative removal (8 CFR 238.1(b)(2)(iv)) and certain detained juveniles (8 CFR 236.3(g)).

- The Executive Office for Immigration Review (EOIR), within DOJ, maintains a Free Legal Service Provider List, which contains the names and contact information of organizations and private attorneys who have agreed to represent aliens in immigration hearings *pro bono*.

- Specifically with respect to juveniles, ICE policy requires all officers to provide *all* juveniles at the time of apprehension with the Form I-770 (Notice of Rights and Requests for Disposition for Minors), which informs the juvenile of his or her rights to use the telephone, to be represented by a lawyer, to have a hearing before an immigration judge, and requires that the juvenile be given a list of free legal services. Upon apprehension, ICE also provides every juvenile with the opportunity to speak directly with their consulate and a family member.

- In the fall of 2010, EOIR launched the Legal Orientation Program for Custodians (LPOC) of Unaccompanied Alien Children (UACs), which provides legal orientation presentations to the adult custodians of UACs in removal proceedings before EOIR. The program aims to inform these custodians of their responsibilities to ensure the UAC's appearance at all immigration proceedings, and to protect UACs from mistreatment, exploitation, and trafficking. *See* section 235(d)(4) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. No. 110-457, 122 Stat. 5044 (8 U.S.C. § 1232(c)(4)). Through the LOPC, EOIR has worked with ORR and non-governmental agencies to implement this program nationwide.

- The detention standards mandate that detainees receive assistance where needed (e.g., orientation to written or electronic media and materials and assistance in accessing related programs, forms, and materials). In addition, detainees who are illiterate, limited-English proficient or disabled receive appropriate special assistance.

- The Executive Office for Immigration Review, within DOJ, maintains a Free Legal Service Provider List, which contains the names and contact information of organizations and private attorneys who have agreed to represent aliens in immigration hearings *pro bono*. DHS provides a related list to aliens subject to administrative removal and to certain detained juveniles. HHS also funds grantees that provide legal services to immigrants in ICE detention

- Additionally, OLAP, in conjunction with the Board of Immigration Appeals (BIA) Clerk's Office, implements the BIA Pro Bono Project (Project) to increase pro bono representation for detained individuals, including detained unaccompanied children, with immigration cases on appeal before the BIA. Through the Project, EOIR collaborates with various nonprofit organizations to identify and secure representation for this vulnerable group.

- In some cases, detained unaccompanied children may benefit from a child advocate in their proceedings. Section 235(c)(6) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 authorizes the Secretary of Health and Human Services (HHS) to appoint independent child advocates to advocate for the best interests of child trafficking

victims and other vulnerable unaccompanied alien children. See 8 U.S.C. § 1232(c)(6). The child advocate's role is separate and distinct from the role of the legal representative in removal proceedings in that the legal representative focuses on the express wishes of the child. Currently, child advocates are available in the Chicago and Harlingen Immigration Courts, and other immigration courts on an occasional basis.

- Further, the Secretary of HHS is required to make reasonable efforts to secure counsel for unaccompanied alien children in its custody, a function that it performs through its Division of Children's Services (DCS). See 8 U.S.C. § 1232(c)(5).

- On June 6, 2014, DOJ and the Corporation for National and Community Service (CNCS) announced their joint sponsorship for a program using the AmeriCorps service model creating a "justiceAmeriCorps" to improve the efficient and effective adjudication of immigration court proceedings involving unaccompanied children. Under this initiative CNCS issued a Notice of Federal Funding Opportunity that will allow grantees to enroll lawyers and paralegals to serve as AmeriCorps members providing legal services to this vulnerable population. Specifically, the program is intended to provide legal services to children under the age of 16 who: (1) are not in the custody of the Office of Refugee Resettlement (ORR) or the Department of Homeland Security; (2) have received a Notice to Appear in removal proceedings before EOIR; and, (3) have not had their cases consolidated with removal proceedings against a parent or legal guardian (Unaccompanied Children or Unaccompanied Child). The legal representation shall be limited to immigration or custody proceedings before EOIR Immigration Courts; appellate proceedings before the Board of Immigration Appeals; proceedings before United States Citizenship and Immigration Services (USCIS), including applications for asylum, Special Immigrant Juvenile (SIJ) status, and/or T or U nonimmigrant status; and state court proceedings seeking orders necessary to support applications for SIJ status (Immigration Proceedings). Immigration Proceedings shall not include any claims, litigation, or other proceedings before federal district courts, courts of appeals, or the Supreme Court.

- Proposed programs shall provide legal services to Unaccompanied Children in Immigration Proceedings to increase the effective and efficient adjudication of immigration court cases involving those children. In addition, programs should facilitate the identification of Unaccompanied Children who have been victims of human trafficking or abuse and decrease the risk that those children may be trafficked upon return to their country of nationality or last habitual residence; screen Unaccompanied Children for abuse, trafficking, and trauma; refer suspected cases of abuse, trafficking, and trauma to appropriate law enforcement authorities and/or appropriate support services; build pro bono capacity to support the populations of unaccompanied children in the immigration court location(s) in which members will serve; and strengthen national service so that participants engaged in CNCS-supported programs consistently find satisfaction, meaning and opportunity.

- Additionally, DOJ, EOIR and DHS have taken steps to ensure that detained individuals with mental disorders receive additional protections. In April 2013, DOJ and DHS issued a policy providing new procedural protections for unrepresented immigration detainees with serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings ("Policy"). These protections include conducting screening for serious mental disorders or conditions and making available qualified representatives to mentally incompetent detainees in immigration proceedings. Currently, detained unrepresented individuals with serious mental disorders or conditions who are found to be incompetent while in immigration proceedings in Arizona, California, and Washington State are being provided qualified representatives. Pursuant to the Policy, this program is gradually being expanded nationwide.

Administration Actions:

- As for increasing access to counsel in immigration removal proceedings before an immigration judge and lifting restrictions for legal aid offices to represent noncitizens, the closest the Administration has come to addressing this, apart from the unaccompanied children efforts discussed above, is through support of the Senate bill on comprehensive immigration reform, which includes provisions to provide government funded attorneys (at the discretion of the Attorney General) for unaccompanied alien children, individuals with mental disabilities, and vulnerable populations. (Section 3502) The bill also removes the restrictions on providing legal representation in other proceedings for some noncitizens. http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saps744s_20130611.pdf

3. Due Process and Asylum Protection

L-3. QUESTION – OPERATION STREAMLINE, DUE PROCESS AND ASYLUM PROTECTION**:** What are DOJ and DHS doing to address concerns related to violations of due process rights in the course of rushed Operation Streamline prosecutions? What measures has the U.S. taken to ensure that asylum seekers detained pursuant to the Expedited Removal process have the opportunity to pursue their claims of asylum and other forms of relief? Is any consideration being taken to halting or modifying Operation Streamline, or other programs contributing to the increase of non-citizens in the federal prison system?

RESPONSE:

- Operation Streamline is a DHS partnership with the Department of Justice with a geographic focus aimed at deterring the dramatic increase in illegal crossings on the southwest border by criminally prosecuting aliens who cross the border unlawfully.

- **Aliens subject to Operation Streamline are entitled to and afforded due process consistent with the U.S. Constitution, federal laws, and any applicable international obligations, including both the rights provided to criminal defendants and to aliens in removal proceedings.**

- **Each Streamline prosecution is conducted openly in federal court, with the benefit of legal representation, a thorough and transcribed plea dialogue and rights discussion, right to demand a trial to make the Government prove each element of each allegation beyond a reasonable doubt, and access to the U.S. Courts of Appeals and beyond for higher-level review.**

IF PRESSED - Expedited Removal and Protection Claims

- Under INA § 235(b)(1)(A)(i), certain aliens are subject to "expedited removal" which means that if an immigration officer determines that the alien is inadmissible under section 212(a)(6)(c) or 212(a)(7), the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum or a fear of persecution .

- To ensure the United States complies with its international treaty obligations relating to non-refoulement, CBP officials also inquire whether an individual subject to expedited removal has any fear of persecution or torture or a fear of return to his/her home country.

- If the individual expresses such fear or intent to apply for asylum, the individual is detained by U.S. Immigration and Customs Enforcement (ICE) and referred to a U.S. Citizenship and Immigration Services asylum officer for a credible fear

interview – a detailed screening for potential eligibility for asylum or withholding of removal. USCIS asylum officers are a professional cadre, dedicated to the adjudication or screening of protection claims.

An individual determined by a USCIS asylum officer to have established a credible fear of persecution or torture is issued a Notice to Appear, and is placed in removal proceedings before a Department of Justice immigration judge, at which point, the individual can seek asylum or other forms of relief or protection from removal. The immigration judge ultimately determines whether the individual is eligible for asylum or any other requested form of relief or protection.

- An individual determined by a USCIS asylum officer not to have a credible fear is subject to immediate removal by ICE, unless the individual requests a limited review of the asylum officer's determination by an immigration judge. An immigration judge can overrule the asylum officer's decision and find the individual does have a credible fear, in which case the individual would be placed in immigration proceedings in the Immigration Court. If the immigration judge upholds the asylum officer's determination, the individual is subject to immediate removal by DHS.

- Similar to credible fear screenings, reasonable fear screenings ensure compliance with U.S. treaty obligations not to return a person to a country where the person would be tortured or the person's life or freedom would be threatened on account of a protected characteristic in the refugee definition. Asylum officers may make reasonable fear determinations in two types of cases in which an applicant has expressed a fear of return: 1) A prior order has been reinstated pursuant to section 241 (a)(5) of the INA; or 2) DHS has ordered an individual removed pursuant to section 238(b) of the INA based on a prior aggravated felony conviction.

- Individuals who are found to have a reasonable fear of persecution or torture are placed in "withholding only" proceedings before an immigration judge. In "withholding only" proceedings the immigration judge determines whether the individual is eligible for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act or withholding or deferral of removal consistent with non-refoulement obligations under the Convention Against Torture. If an individual is determined not to have a reasonable fear, he or she may request a limited review by an immigration judge of the asylum officer's negative determination. An immigration judge can overrule the initial negative determination, with a finding that the individual has a reasonable fear, thus placing the individual in withholding only proceedings.

SOURCES: This question is based on requests for information submitted by The Advocates for Human Rights to the Committee in September 2013: Violations of the Rights of Refugees, Asylum Seekers and Other Non-citizens. See also the December 2012 shadow

report from Human Rights Watch: Submission to the Human Rights Committee During its Consideration of the Fourth Periodic Report of the United States.

BACKGROUND: Operation Streamline, Due Process and Asylum Protection

NGO Concerns

The Advocates for Human Rights is concerned that the U.S. mandatorily deports people without considering their unique circumstances, which may include family ties to the U.S. It maintains that rules that streamline the deportation process deny due process rights of immigrants and that aggressive use of automatic prosecutorial programs undermines the use of prosecutorial discretion that would otherwise involve the consideration of the value of prosecuting certain violations and strip judges of discretion in immigration cases.

It suggested that the Committee also ask the following questions:

- Will the U.S. halt its detrimental "streamlining" of the immigration system?

DOJ/EOIR:

As a neutral arbiter, the DOJ Executive Office for Immigration Review (EOIR) strives to provide fair, impartial, and timely adjudication of immigration proceedings. The Immigration and Nationality Act (INA or Act) and the regulations interpreting this Act specify the due process protections afforded to individuals in immigration proceedings. *See* section 240 of the INA and 8 C.F.R. pt. 1240. Additionally, sections 208, 235 and 241(b)(3) of the INA and the regulations at 8 C.F.R. pts. 208, 235, 1003, 1208, and 1235 are the statutory and regulatory provisions applicable to individuals placed in the Expedited Removal process seeking protection from removal after expressing a fear of returning to their countries of origin, or, if in immigration proceedings, filing applications for asylum, withholding of removal under section 241(b)(3) of the INA, or withholding of removal under the Convention against Torture or who are asserting a status claim.

Individuals in the Expedited Removal process who articulate any fear of return to their countries of origin or last habitual residence at any stage during their initial encounter with DHS are referred to DHS USCIS, whose asylum officers conduct either credible fear or reasonable fear interviews depending on the circumstances of these individuals. Individuals in the credible fear or reasonable fear determination process may consult with a person or persons of their choice, without expense to the government, prior to the interview and these individuals may be present during the interview. These consultants may, in the discretion of the asylum officer, present a statement at the end of the credible fear or reasonable fear interview. These interviews are conducted with the assistance of language interpreters.

Individuals who are subject to expedited removal but who assert a claim for U.S. citizenship, lawful permanent residence, asylee or refugee status under oath are ordered removed and referred to an immigration judge for a review of the expedited removal order.

Individuals found to have either a credible fear or reasonable fear of persecution or harm upon return their country are placed in either section 240 or withholding-only immigration proceedings before an EOIR immigration judge. Upon placement in immigration or withholding-only proceedings, if detained and depending on their individual circumstances, these individuals **may seek a bond redetermination hearing** before the immigration judge. If a USCIS Asylum Officer determines that the individual does not have a credible or reasonable fear, the individual may seek review of this negative determination by an EOIR immigration judge.

If an immigration judge overturns the negative determination, the individual is placed in section 240 or withholding-only proceedings before EOIR, where they can file an application for asylum, withholding of removal under section 214(b)(3) of the INA, and withholding of removal under the Convention against Torture. Individuals in section 240 immigration proceedings may also seek additional forms of relief from removal for which they may be eligible. Individuals in withholding-only proceedings may only seek protection from removal by filing an application for withholding of removal under section 241(b)(3) of the INA and for withholding of removal under the Convention against Torture.

If the immigration judge upholds the negative fear determination, the expedited removal order is upheld. Further review by the federal courts may be possible; however, there is no statutory or regulatory authority to file an administrative appeal with the EOIR Board of Immigration Appeals. Credible and reasonable fear reviews and immigration proceedings before EOIR immigration judges are interpreted into the individual's native language as needed on a case-by-case basis. Individuals seeking review of the negative USCIS credible fear or reasonable fear determination before an EOIR may have a consultant of their choice present during this review at no expense to the government. In a hearing to review an expedited removal order of an alien who asserts a claim for lawful permanent residence, asylee or refugee status, if an immigration judge determines that the individual was admitted as a lawful permanent resident or as a refugee, or was granted asylum, the expedited removal order is vacated. If the alien appears inadmissible, DHS may initiate removal proceedings; however, these individuals will be placed in section 240 immigration proceedings. If the immigration judge determines that the individual is a U.S. citizen, the expedited removal order is vacated and immigration proceedings may not be initiated. Once an immigration judge determines that the individual does not have the claimed status, the expedited removal order is affirmed; this determination is not subject to appeal.

Once an individual is placed into section 240 immigration or withholding-only proceedings, they are entitled to representation at no expense to the government and interpretation of proceedings into their native language as needed on a case-by-case

basis. They may also file an administrative appeal or seek further review before the federal courts. See Sections 235 and 240 of the INA and 8 C.F.R. §§ 235, 208.30, 208.31, 1003.42, 1208.30, 1208.31, 1235, and 1240. For further details regarding due process protections while in immigration proceedings, please see the DOJ EOIR response at E-6(6).

4. Due Process of Human Rights complaints

L-4. QUESTION – DUE PROCESS FOR HUMAN RIGHTS COMPLAINTS**:** How does the United States ensure that immigrants receive due process of law on claims of civil, constitutional and human rights violations made to DHS-CRCL and other DHS components without fear of deportation? What steps does DHS take to ensure they are not detained and/or deported while their claims are being investigated?

RESPONSE:

- **The United States provides many avenues to pursue claims of rights violations in the immigration system, including in the federal courts, through immigration proceedings, and before administrative oversight bodies including the DHS Office for Civil Rights and Civil Liberties and the DHS Inspector General, and ICE Office of Professional Responsibility.**

- The DHS Office for Civil Rights and Civil Liberties investigates complaints from the public alleging violations of civil rights or civil liberties by DHS personnel, programs, or activities. Where CRCL investigations identify areas of concern, CRCL recommends improvements to enhance DHS's protection of civil rights and civil liberties while supporting DHS's mission. These usually take the form of recommendations for improved policy, procedures, training, or reporting. OIG and OPR investigate issues of related employee misconduct, including allegations of criminal misconduct.

- The Office for Civil Rights and Civil Liberties has the authority to ask the relevant DHS component to stay removal of a complainant until the Office has had the opportunity to gather all necessary information to proceed with its investigation.

SOURCES: This question is based on questions from the New Orleans Workers' Center for Racial Justice and Coalition in its September 2013 shadow report: Migrant Workers in the South Expose How U.S. Immigration Enforcement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights.

5. Retaliation and intimidation against complainants

L-5. QUESTION – RETALIATION AND INTIMIDATION AGAINST COMPLAINTS**:** How does the United States ensure that documented and undocumented immigrants can report civil, constitutional, and human rights violations, particularly against government officials, without experiencing retaliation? What redress is available for persons who experience retaliatory action by DHS or its sub-agencies as a result of reporting a rights violation?

RESPONSE:

- **The United States provides many avenues to pursue claims of rights violations in the immigration system, including in the federal courts, immigration proceedings, and before administrative oversight bodies including the DHS Office for Civil Rights and Civil Liberties, the DHS Inspector General, and ICE Office of Professional Responsibility.**

- **All employee misconduct allegations are subject to independent review and assessment by the Office of the Inspector General; cases the Inspector General does not retain for investigation are then referred back to the appropriate component for appropriate action.**

- The Department of Homeland Security takes allegations of employee misconduct very seriously.

- Allegations of employee misconduct, including allegations of retaliatory action as a result of reporting a rights violation, may be made to the DHS Office of Inspector General or directly to a component agency.

- All allegations of employee misconduct, including allegations of retaliatory action as a result of reporting a rights violation, are referred to the DHS Office of Inspector General for independent review and assessment.

IF ASKED:

- Some cases are retained by the DHS Office of Inspector General for investigation while others are referred back to the appropriate component for further action.

    - For example, allegations referred back to U.S. Customs and Border Protection (CBP) from the Inspector General's Office or the Office for Civil Rights and Civil Liberties are fully investigated by CBP's Office of Office of Internal Affairs. If misconduct is found, appropriate corrective action or discipline is taken.

- To avoid deterring individuals from reporting crimes and from pursuing actions to protect their civil rights, ICE officers, special agents, and attorneys are reminded to exercise all appropriate discretion when making detention and enforcement decisions in the cases of victims and witnesses of crime and individuals pursuing non-frivolous civil rights complaints. This includes individuals involved in complaints against ICE officials.

- Upon declination by OIG, OPR reserves the right to accept all criminal allegations (ICE, CBP, or USCIS employees) or administrative allegations (ICE employees). Upon declination of an administrative case by OIG or a criminal case by OIG and OPR, CBPIA reserves the right to accept all allegations concerning CBP employees. USCIS Office of Special Investigations (USCIS OSI) accepts administrative allegations concerning USCIS employees.

SOURCES: This question is based on questions submitted by the New Orleans Workers' Center for Racial Justice and Coalition. For the most recent submission from this organization, see Migrant Workers in the South Expose How U.S. Immigration Enforcement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights. See also September 2013 shadow report of the John Marshall Law School Human Rights Project: Joint Submission to the U.N. Human Rights Committee Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America (removed)
See also ICE Policy Directive, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, June 17, 2011. http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf

BACKGROUND (Retaliation and Intimidation against Complaints):

NGO Concerns:

The New Orleans Workers' Center for Racial Justice has raised detailed concerns and proposed the following additional questions on the question of retaliation (arranged by topic):

- ***Question Re Prosecutorial discretion and the "Morton Memo:*** Please provide an update on the effect of these memoranda on U.S. immigration enforcement policy. Have ICE regional offices exercised their discretion to refrain from prosecuting civil rights advocates caught in the immigration enforcement system. How does the United States ensure uniform compliance with the Morton Memo by personnel in ICE's regional and local offices? - What kinds of training and oversight mechanisms are in place to ensure that ICE personnel properly exercise discretion under the Morton Memo? What channels of redress are available when they do not?

Key concerns: The "Morton memo," a memorandum from ICE Director John Morton, directing immigration prosecutors to exercise "all appropriate discretion" in cases involving individuals "pursuing legitimate civil rights complaints" including "individuals engaging in a protected activity related to civil or other rights" in order to prevent people from being deterred from pursuing actions to protect their civil rights, has not been effective. ICE regional offices have not exercised their discretion to refrain from prosecuting civil rights advocates caught in the immigration enforcement system.

- ***Questions Re Deportations in retaliation against migrant human rights activities*:** What provisions of U.S. immigration law and policy ensure protections for vulnerable migrant workers and other individuals acting to defend the rights enumerated in the ICCPR so that the U.S. does not deport the evidence of serious human rights violations?

  Key Concerns: The immigration system is regularly used as a mechanism of retaliation against workers who organize against private and government abuses.

  - In TN, ICE agents conducted immigration sweep the date after a public hearing against racial profiling.
  - In AL, ICE agents covertly surveilled immigrant workers as they visited a civil rights museum.
  - In TX, ICE agents and local police detained and attempted to deport workers who organized a strike to challenge discrimination and wage theft by their employer.

- ***Questions Re Confidentiality and Protective measures pending investigation of complaint:***
  - How is information gathered through investigations shared within DHS and its subagencies?
  - What protections exist to ensure confidentiality for participants in the process?
  - What steps does DHS take to ensure that participants in the complaint process are not detained and/or deported while their claims are being investigated?
  - Please update the Committee as to the kind of complaints most commonly received by the CRCL and their resolution. What enforcement mechanisms does the CRCL have to end ongoing violations?

- ***Question Re Retaliations as deterrence to complaints:***
  - How does the United States ensure that documented and undocumented immigrants can report civil, constitutional, and human rights violations, particularly against government officials, without experiencing retaliation?

- ***Questions Re Redress for retaliation*:**
  - What redress is available for persons who experience retaliatory action by DHS or its subagencies as a result of reporting a rights violation?

– ***Questions Re* Protective measures pending investigation of complaint**. What steps does DHS take to ensure they are not detained and/or deported while their claims are being investigated?

The John Marshall Law School Human Rights Project also expressed concern that ICE guards intimate immigrant detainees to prevent them from filing complaints.

DHS Actions

Within DHS, employees – including CBP officers and Border Patrol agents and ICE special agents – are subject to strict rules and to investigation, where warranted, regarding any incidents of harassment, threats, or retaliation. State and local law enforcement agency personnel who exercise limited authority to enforce U.S. immigration laws under programs such as the DHS/ICE 287(g) program are also bound by federal civil rights laws, regulations, and guidance relating to non-discrimination, and their compliance is closely monitored by ICE, including through investigations by the ICE Office of Professional Responsibility. All law enforcement officers authorized to perform 287(g) program functions must also pass a four-week training course at the ICE Academy, which includes coursework on the ICE Use of Force Policy, multi-cultural communication, and avoiding racial profiling, among other topics. DHS/CRCL is currently reviewing open complaints alleging racial or ethnic profiling, violations of Title VI civil rights requirements related to language access, and other issues in the ICE 287(g) program.

The CRCL complaints process is explained on CRCL's website at http://www.dhs.gov/file-civil-rights-complaint. The CRCL complaint form is available in English, Spanish, and seven other languages

6. Use of segregated housing in immigration detention

L-6. QUESTION: What is being done to ensure that the rights of individuals who are being segregated and put into solitary confinement while in immigration detention are being upheld? What standards and methods of oversight are in place that ICE has to comply with when placing detainees into segregation?

Response:

- **U.S. law prohibits the use of solitary confinement, or other segregated housing, in a manner that constitutes cruel and unusual punishment, or without due process of law. The United States remains committed to preventing abuses with regard to detention conditions, protecting detainees from such abuses, and bringing to justice those who commit them.**

- **The Department of Homeland Security meets its constitutional and statutory mandates by confining migrants in detention facilities that are safe, humane, and appropriately secure, and implementing strict rules for all its law enforcement personnel, regularly training detention personnel, monitoring performance and investigating alleged misconduct whenever warranted.**

- **ICE has created a robust system for supervising the use of segregated housing and ensuring that detention facilities housing ICE detainees use segregation only in accordance with ICE's detention standards.** ICE is committed to ensuring that detainees who may be particularly vulnerable, including those with mental illness or other disabilities, are housed appropriately, and are not involuntarily assigned to segregated housing solely on the basis of the vulnerability.

- ICE recently reviewed its use of segregation policies, and in September 2013, issued the directive "Review of the Use of Segregation for ICE Detainees." This directive established enhanced ICE policy and procedures for the review and oversight of decisions to place ICE detainees in segregated housing for more than 14 days, or placements in segregation for any length of time in the case of detainees for whom heightened concerns exist based on factors related to the detainee's health or other special vulnerabilities. This directive enhances reporting requirements and requires ICE field offices and headquarters to evaluate the appropriateness of continued placement and to determine the viability of any potential housing or custodial alternatives.

IF ASKED:

- The Directive requires the ICE Field Offices to report all detainees held continuously in segregated housing for more than 14 days or for 14 days out of any 21 day period. If the segregation placement is related to disability, medical or mental illness, suicide risk, hunger strike, status as a victim of sexual assault, or other special vulnerability, or if the detainee placed in segregation for any reason has a mental illness or a serious medical illness or serious physical disability, the ERO Field Office Director is required to take steps to ensure that he or she is notified in writing as soon as possibility by the facility administrator, but no later than 72 hours after the initial placement into segregation.

- The Directive states that "placement of detainees in segregated housing is a serious step that requires careful consideration of alternatives. Placement in segregation should occur only when necessary and in compliance with applicable detention standards. In particular, placement in administrative segregation due to a special vulnerability should be used only as a last resort and when no other viable housing options exist."

- ICE detention standards carefully circumscribe the use of segregation to ensure that it is used only as necessary and appropriate to preserve the safety and security of detainees, staff, or the facility. ICE has recently issued the directive "Review of the Use of Segregation for ICE Detainees," which complements requirements in detention standards for facilities to regularly review the ongoing appropriateness of continued segregation placement by strengthening processes for agency monitoring and oversight of facility segregation determinations.

- To facilitate the enhanced review processes established by this directive, ICE has deployed an automated Segregation Review Management System, which permits notification to ICE of segregation placements in real time and coordinated review of all segregation cases at both ICE field office and headquarters levels. Additionally, the DHS Office for Civil Rights and Civil Liberties is involved in reviewing and providing guidance on the Segregation Reports.

- The enhanced oversight mechanisms established by the directive have improved ICE's supervision of segregated ICE detainees and bolstered coordination among agency entities in evaluating the appropriateness of ongoing segregation placements. Where review has resulted in a determination that continued segregation may not be warranted or that other housing options may be available and appropriate, ICE headquarters and field offices have coordinated to effectuate less restrictive housing or custodial options.

- ICE's utilization of segregation is significantly lower than that of criminal detention facilities. Approximately 1 percent of all detainees in ICE custody are typically held in segregation at any given time. This compares favorably to what might be predicted based on the use of segregation in the prison context: Of the detainees housed in segregation in ICE custody, approximately 85 percent have been convicted of a crime. Data collected by the U.S. Bureau of Justice Statistics in 2005 reveals that 3.3 percent of state prisoners in minimum- or low-security facilities were in segregation and 5 percent of those at medium-security prisons.

Source: This is a complaint that a number of NGOs have periodically raised.

7. Immigrants – abuse at hands of US officials

L-7. QUESTION – BORDERS – ALLEGATIONS OF EXCESSIVE USE OF FORCE**:** What training and protocols are in place to govern the use of force, particularly at the border? What is being done to ensure accountability and remedies for the families of victims? (Issue 13(a))

RESPONSE:

SEE ANSWER E-1.

8. Asylum/refugee policies and treatment/detention

L-8. QUESTION - What U.S. legislation is applicable to refugees and asylum-seekers? When might immigrants, particularly undocumented migrant workers, victims of trafficking, and asylum-seekers and refugees, be subject to mandatory and prolonged detention? Does expedited removal result in mandatory and prolonged detention of asylum seekers?

RESPONSE:

- **Since World War II, more refugees have found permanent homes in the United States than in any other country – more than 3 million in the last 40 years. Welcoming refugees is central to our nation's identity, and providing a home for refugees is a central part of our international humanitarian programs.**

- **U.S. immigration law implements U.S. obligations under the 1967 Protocol Relating to the Status of Refugees, to which the United States is a party.**

- Immigration laws generally require certain categories of noncitizens to be detained pending removal proceedings. Among those categories are noncitizens who are subject to expedited removal proceedings after having been found inadmissible upon arrival at a port of entry (including noncitizens subject to expedited removal proceedings after having been found inadmissible for having engaged in fraud or willful misrepresentation or for lack of proper entry documents), those who have committed certain serious criminal offenses, and those subject to terrorism-related grounds of inadmissibility.

- **For most aliens, DHS has discretion to authorize release while such proceedings are pending, and, with some exceptions, detained aliens in removal proceedings have a right to a custody redetermination hearing before an immigration judge**.

- Once an individual's order of removal becomes administratively final, DHS may detain the individual for a period reasonably necessary to bring about his or her removal.

Credible fear screenings for certain aliens

- An immigration officer may order the **expedited removal** of an alien who is inadmissible because the alien either lacks a valid entry document (8 U.S.C. 1182(a)(7)) or engaged in fraud or misrepresentation (8 U.S.C. 1182(a)(6)(C)). INA § 235(b) (8 U.S.C. 1225(b). Three classes of aliens fall under the expedited removal provisions, and their corresponding regulations: (1) arriving aliens at a port-of-entry; (2) alien at a port-of-entry who are present without having been admitted or paroled who have not been established to the satisfaction of the immigration officer that the alien was continuously physically present in the United States for the two-year period immediately prior to a determination of inadmissibility; and (3) outside of a port-of-entry, aliens who were (a)

encountered within 100 miles of the border and within 14 days of their unlawful entry, or (b) arrived by sea. Generally, these classes of aliens are removed without a hearing before an immigration judge. *See* 8 U.S.C. 1225(b).

- However, if an individual expresses a fear of persecution or torture, an intention to apply for asylum, or a fear of return to his or her country, the case is referred to a USCIS asylum officer for credible fear protection screening.

- Individuals in the expedited removal process who are referred to USCIS for a credible fear interview are generally subject to mandatory detention pending a determination by an asylum officer and any review of that determination by an immigration judge. See 8 U.S.C. 1225(b)(1)(B)(iii)(IV); 8 C.F.R. §§ 235.3(b)(4)(ii) and 1235.3(b)(4)(ii).

- Individuals at a port of entry found to have a credible fear are automatically considered for parole under the 2010 policy and procedures described below, and a majority of these individuals are released on parole.

- On January 4, 2010, ICE changed its parole policy for arriving aliens at a port of entry found to have a credible fear. Under the new policy, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," **aliens at a port of entry who were subject to expedited removal but were found to have a credible fear of persecution or torture are automatically considered by ICE for parole** from custody pending removal proceedings before an immigration judge, rather than having affirmatively to request parole in writing. See http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf**Error! Hyperlink reference not valid.**. The new policy also adds heightened quality assurance safeguards, and defines when paroling aliens is in the public interest.

Reasonable fear screenings for certain aliens

- Similar to credible fear screenings, reasonable fear screenings ensure compliance with U.S. treaty obligations not to return a person to a country where the person would be tortured or the person's life or freedom would be threatened on account of a protected characteristic in the refugee definition. Asylum officers may make reasonable fear determinations in two types of cases in which an applicant has expressed a fear of return: 1) A prior order has been reinstated pursuant to section 241(a)(5) of the INA; or 2) DHS has ordered an individual removed pursuant to section 238(b) of the INA based on a prior aggravated felony conviction.

- Individuals who are found to have a reasonable fear of persecution or torture are placed in "withholding only" proceedings before an immigration judge. In "withholding only" proceedings the immigration judge determines whether the individual is eligible for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act or withholding or deferral of removal consistent with non-refoulement obligations under the Convention Against Torture. If an individual is determined not to have a reasonable fear, he or she may request a limited review by an immigration judge of the asylum officer's negative determination. An immigration judge can overrule the initial negative

determination, with a finding that the individual has a reasonable fear, thus placing the individual in withholding only proceedings.

- The USCIS Asylum Division, which conducts credible fear and reasonable fear screenings for detained aliens, has assisted ICE in implementing the policy changes, including by developing a notice to such aliens that parole from custody may be available.

SOURCE:

This was also addressed in the CERD Committee's 2008 Concluding Observations and Recommendations, paragraph 37:

"The Committee requests the State party to provide, in its next periodic report, detailed information on the legislation applicable to refugees and asylum-seekers, and on the alleged mandatory and prolonged detention of a large number of non-citizens, including undocumented migrant workers, victims of trafficking, asylum-seekers and refugees, as well as members of their families (arts. 5 (b), 5 (e) (iv) and 6)."

9. Credible fear and reasonable fear processes

L-9. QUESTION—DELAYS IN CREDIBLE AND REASONABLE FEAR INTERVIEWS: How does the U.S. government justify its failure to process and complete credible and reasonable fear cases in compliance with immigration law and regulations? Numerous reports and press accounts indicate that the U.S. government through responsible administrative agencies rarely if ever initiates and completes reasonable fear interviews within the 10 days prescribed by regulation (8 C.F.R. 208.31(b)), or ensures through issuance of the Form I-863, *Notice of Referral to Immigration Judge,* review within 7 days of credible fear cases (8 C.F.R. 1003.42(e)). This has resulted in class action litigation highlighting prolonged detention and delayed referrals to the immigration court. Would you agree that the U.S. government has a non-discretionary obligation to provide reasonable fear interviews and determinations, and credible fear referrals for review by an immigration judge in a timely manner; what do you consider timely given your existing resources and demand, and what, if any, plans do you have to improve credible/reasonable fear processing times?

RESPONSE:

- **The U.S. has a long history of providing humanitarian relief to refugees and other individuals seeking protection from harm. As a party to the both 1967 Protocol relating to the Status of Refugees and the Convention Against Torture (CAT), we are committed to fulfilling our non-refoulement obligations. To reduce delays and backlogs, we are in the process of hiring 400 new asylum officers, with an emphasis on the cities with the greatest demand.**

- **Credible fear determinations are governed by longstanding statute. A USCIS officer must find that a "significant possibility" exists that the individual may be found eligible for asylum or withholding of removal.**

    - If the credible fear threshold is met, the individual is placed into removal proceedings before an Immigration Judge. As is longstanding policy, U.S. Immigration and Customs Enforcement (ICE) makes custody determinations on a case-by-case basis following a thorough review of criminal and national security databases. If an individual claiming asylum at the border is deemed to be a threat to public safety or national security, ICE has the authority to keep the individual in detention until their case is heard by an immigration judge.
    - Only a judge can determine asylum eligibility for an individual in expedited removal.

- During the credible fear process, USCIS initiates a background check using immigration, national security and criminal databases.

- To ensure that the U.S. maintains compliance with its international treaty obligations relating to non-refoulement, individuals subject to expedited removal who indicate a fear of persecution or torture or who indicate an intent to apply for asylum are referred to a specially trained U.S. Citizenship and Immigration Services (USCIS) asylum officer who conducts a detailed screening of eligibility for asylum and other forms of protection.

- Individuals attempting to enter the U.S. without valid travel documents encountered at or near a port of entry who express a fear of returning to their home country are given "credible fear interviews" while those who are subject to having prior orders of removal reinstated or to expedited removal as non-lawful permanent resident aggravated felons, may request a "reasonable fear interview" in order to seek protection in this country. In either set of circumstances, USCIS AOs are instructed to ask questions enabling individuals to describe any past, present or future experiences and/or fears of persecution, torture or other harm in any country, including the United States.

- **Since June 2013, the credible fear process has taken an average of 8 days to complete following notification. The average number of days between when an individual in the expedited removal process was detained before being referred to an asylum officer was 19 days.**

- In Fiscal Year (FY) 2013, approximately 15% of all individuals placed into expedited removal required a credible fear screening. This translated into 36,000 new cases, of which 65% involved nationals of El Salvador, Honduras or Guatemala, and just over 7% involved nationals of Mexico. This unprecedented demand far exceeds earlier figures (FY 2010 to FY 2012, the annual percentage ranged from 7-9%) and is more than double the number (13,391) from FY 2012.

- Reasonable fear cases have also increased dramatically with over 7,000 in FY 2013 compared to a few hundred in previous years.

- USCIS Asylum Offices are on track to receive a record number of credible and reasonable fear cases through FY 2014, with the former expected to exceed 45,000.

- The U.S. government is working extremely hard to address demand related to credible/reasonable fear cases. We are in the process of hiring and training almost 400 new asylum officers, with expansion focused on USCIS offices in Los Angeles, Houston, New York and Newark. We will continue to maximize the use of all available resources and personnel and facilitate effective inter-agency

communication and the provision of humanitarian protection to refugees and other vulnerable individuals.

SOURCES: This question is based on recent articles and reports, including *Mexican and Central American Asylum and Credible Fear Claims*, a Special Report by the American Immigration Council (May 2014), and a class action lawsuit filed on April 17, 2014, by the ACLU Foundation of Southern California against the DHS challenging its failure to process and complete reasonable fear interviews and make reasonable fear determinations in compliance with applicable immigration regulations. The proposed response is drawn largely from the December 12, 2013, written testimony of USCIS Deputy Director Lori Scialabba, ICE Deputy Director Daniel Ragsdale, and CBP Office of Border Patrol Chief Michael Fisher for a House Committee on the Judiciary hearing titled "Asylum Abuse: Is it Overwhelming our Borders?" *See,* http://www.dhs.gov/news/2013/12/12/written-testimony-uscis-ice-and-cbp-house-committee-judiciary-hearing-titled-%E2%80%9Casylum.

BACKGROUND (Credible/Reasonable Fear Cases):

The number of credible/reasonable fear cases has increased dramatically since FY 2012. The vast majority of the cases involve Salvadorans, Hondurans and Guatemalans, and have been attributed to reports of increased drug trafficking, violence and overall rising crime in those countries. The Department of Homeland Security, through CBP, ICE and USCIS, is struggling to address and minimize the demand for such interviews and to provide safe, adequate detention space. Inter-agency coordination is essential to this effort and is ongoing.

10. Immigration detention

L-10(1). QUESTION – DURATIONAL LIMITS ON DETENTION OF UNDOCUMENTED MIGRANTS**:** Are there any restrictions or limitations on the duration of detention of undocumented migrants pending the initiation or completion of removal or deportation proceedings? What requirements exist to assure prompt proceedings before a court, whenever an alien is detained? Can the State Party provide statistics on numbers of aliens detained and the length of detention in such cases, as well as the time delay in the initiation of administrative or judicial proceedings?

RESPONSE:

- **Federal and state laws establish standards of care to which all migrants detained in the United States are entitled, including those held by DHS.**

- **The United States works hard to ensure that undocumented migrants are treated humanely in a manner consistent with the U.S. laws and applicable international obligations.**

- Detention of aliens under the Immigration and Nationality Act is not indefinite, but is undertaken for the purpose of obtaining and executing a removal order. Courts have recognized that indefinite detention raises constitutional concerns. *See Zadvydas v. Davis*, 533 U.S. 697 (2001).

- U.S. law does provide for the mandatory detention of certain aliens pending completion of removal proceedings and then removal from the United States. There is ongoing litigation regarding the scope of application of these laws. *See, e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1227 (9th Cir. 2013).

- Generally, a decision to pursue removal proceedings against a detained alien must be made within 48 hours of the arrest, except for emergencies or other extraordinary circumstances.

- Once the government has initiated removal proceedings, immigration judges are to adjudicate the case in an expeditious manner. Aliens eligible for release on bond may seek a bond hearing orally or in writing. Aliens may also challenge a determination of whether they are bond eligible.

- An adverse bond decision by an immigration judge may be appealed to the Board of Immigration Appeals prior to the entry of a final order of removal. The federal district courts also have jurisdiction to consider challenges to civil immigration detention in the context of a petition for writ of habeas corpus.

- In FY 2013, ICE had 440,557 book-ins into ICE detention. In year-to-date FY 2014 (as of 5/31/2014), ICE had 287,041 book-ins into ICE detention.

- In FY 2013, the average length of stay in ICE detention was 28.7 days. The average length of stay in ICE detention for those cases requiring a hearing was 47.3 days in FY 2013.

- In year-to-date FY 2014 (as of 5/31/2014), the average length of stay in ICE detention is 29.0 days. The average length of stay in ICE detention for those cases requiring a hearing was 44.9 days in year-to-date FY 2014 (as of 5/31/2014).

SOURCES: See generally NGO submissions on immigration detention, see generally Human Rights Watch, pp. 21-23; Midwest Coalition for Human Rights. See also, generally, John Marshall Law School Human Rights Project submission to the Committee in September 2013, Joint Submission to the U.N. Human Rights Committee Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America (removed).

BACKGROUND (Durational Limits on Detention of Undocumented Migrants):

Pending the initiation of removal proceedings, the Department of Homeland Security (DHS) must generally determine within 48 hours whether a detained alien will continue in custody or be released on bond. (*See* 8 C.F.R. § 287.3(d)) Generally, within 48 hours, DHS must also determine whether the alien will be charged with removability by filing a charging document known as a Notice to Appear (NTA). *Id*

Regarding detention pending the completion of removal or deportation proceedings, the statutes and regulations do not explicitly limit the length of detention pending a final order of removal. Congress has mandated that certain aliens be detained without the opportunity for a bond hearing pending a final order of removal, namely certain criminals and terrorists. *See* 8 U.S.C. § 1226(c). In *Demore v. Kim*, the Supreme Court held that mandatory detention during deportation proceedings is constitutionally valid. 538 U.S. 510, 523 (2003). But some courts have noted that lengthy, pre-removal order custody without an individualized hearing may be problematic. **The Ninth Circuit Court of Appeals has held that any alien who has been detained for six months is entitled to a bond hearing. *See Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013).** The Third and Sixth Circuits have determined that lengthy mandatory detention is subject to a rule of reason, but did not delineate a particular period of time. *Diop v. ICE*, 656 F.3d 221 (3d Cir.2011); *Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir.2003). What these courts have focused on is the length of detention without a bond hearing, not the length of detention.

Several requirements exist to assure prompt proceedings for a detained alien before the Immigration Courts. As discussed above, when an alien is detained, DHS must determine whether it will file an NTA within 48 hours. *See* 8 C.F.R. § 287.3(d). Throughout the immigration court process, including appeals, detained aliens receive significantly accelerated hearing dates and decisions, and the Administration has made expediting detained cases a high priority. *See* Executive Office of the President, *High Priority Performance Goals*, at 12, *available at*

http://www.whitehouse.gov/sites/default/files/omb/performance/high-priority-performance-goals.pdf (last visited Aug. 20, 2013). The Administration's goal is to complete 85 percent of detained cases within 60 days. *Id.*

L-10(2). QUESTION –JAIL-LIKE CONDITIONS FOR MIGRANTS IN DHS DETENTION**:** Immigrant detainees are not criminals and should not be treated as such. What steps is DHS taking to ensure that migrants are not held in jail-like detention facilities while under its authorities?

RESPONSE:

- **Federal and state laws establish standards of care to which all migrants detained in the United States are entitled, including those held by DHS.**

- **The United States works hard to ensure that undocumented migrants are treated humanely in a manner consistent with the U.S. Constitution and laws and applicable international obligations.**

- **U.S. Immigration and Customs Enforcement (ICE) employs a rigorous and multi-layered system of monitoring and oversight to ensure compliance by detention facilities with its national detention standards.**

- The detention standards ensure that detainees have adequate access to medical care, legal resources, visitation, recreation, grievance processes, and other programs and privileges consistent with civil detention principles. These standards are designed to ensure humane conditions tailored to the needs of the ICE detainee population and consistent with the civil rather than penal purpose of immigration detention.

- In 2007, ICE issued the Family Residential Standards (FRS), which guide the care and custody of non-violent, non-criminal alien families housed in ICE Residential Centers pending the outcome of their immigration proceedings. The standards were developed with input from medical, psychological, and educational subject matter experts and various organizations such as the DHS Office of Civil Rights and Civil Liberties (CRCL) and many non-governmental organizations (NGOs). These standards were also crafted to resolve key pieces of the Hutto Settlement Agreement to bolster best practices in family detention. The standards address issues specifically related to housing these vulnerable populations, ensure best practices in relation to educational and recreational access and opportunities for children and demand stringent behavior management standards which take into consideration the specific developmental and behavioral nature of children.

- Until recently, ICE maintained only one facility, the Berks County Residential Center, equipped to house family groups and operating under the Family Residential Standards. Berks has a maximum capacity of 96 beds and is located in Leesport, PA. The facility holds a Pennsylvania State child residential facility license. Berks only accepts non-criminal, non-violent aliens for placement, as the family members groups reside and interact together in a non-secure, residential-style environment. The Center layout includes an on-site

state licensed educational program, resident internet bank, fitness, movie, arts and crafts and activity rooms, social and law library, and toddler playroom. Residents may access a host of age appropriate educational and recreational items, activities, and events both on and off site. Residents at the Center wear their own clothing, adults have no mandatory scheduling requirements (other than personal housekeeping) and adults retain parental supervision responsibilities while at the Center. Adult residents may freely move around the Center and outdoor campus between 0800 and 2000 each day, and may allow their older children to participate in the same free movement. Additionally, the sleeping accommodations provided at Berks are unique to ICE detention and further foster family unity. Upon admission, parents with children under twelve years old are assigned a bedroom together, while children twelve years and older are assigned bedrooms with other children of like gender and age.

In July 2014, DHS began housing limited numbers of adults with children at its newest detention facility in Artesia, New Mexico, and continues to explore other locations that may be suitable for housing this population in accordance with the requirements of the relevant detention standards.

- Development of Risk Classification Assessment: In January 2013, ICE completed nationwide deployment of the new automated Risk Classification Assessment to improve transparency and uniformity in detention and custody classification decisions, aid in identifying vulnerable populations, and promote the prioritization of detention resources. The Risk Classification Assessment contains objective criteria, incorporating factors reflecting the agency's civil enforcement priorities and any special vulnerabilities that may affect custody and classification determinations, to guide the decision-making of ICE officers and their supervisors regarding whether an alien should be detained or released, and, if detained, the appropriate custody classification level.

SOURCES: This concern was raised in September 2013 shadow reports to the Committee from the John Marshall Law School Human Rights Project: Joint Submission to the U.N. Human Rights Committee Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America and from Amnesty International: Submission to the Human Rights Committee

BACKGROUND (Jail-like Conditions for Migrants in DHS Detention):

NGO Concerns

The John Marshall Law School Human Rights Project renews concern that ICE relies on correctional incarceration standards that impose unnecessary and disproportionate

restrictions on immigrant detainees and that the conditions that result violate the fundamental right to liberty under ICCPR Art. 9(1). "Immigrant detainees are not criminals and should not be treated as such."

Amnesty International recommends that the Committee also asks whether the U.S. will pass[support] legislation that creates a presumption against the detention of immigrants and asylum-seekers, and that ensures that detention be used as a measure of last resort?

L-10(3). QUESTION –DHS PREVENTION OF MISTREATMENT OF DETAINEES IN ICE FACILITIES**:** What does DHS do to prevent mistreatment of detainees in its detention facilities?

RESPONSE:

- **Federal and state laws establish standards of care to which all migrants detained in the United States are entitled, including those held by the Department of Homeland Security's U.S. Immigration and Customs Enforcement (ICE).**

- **The Department of Homeland Security meets its legal mandates by confining migrants in detention facilities that are safe, humane, and appropriately secure, and implementing strict rules for all its law enforcement personnel, regularly training detention personnel, monitoring performance, and investigating alleged misconduct wherever warranted.**

- The ICE Office of Enforcement and Removal Operations employs more than 41 on-site federal Detention Service Managers at 54 ICE detention facilities covering approximately 85.6 % of ICE's detained population. These officers monitor and inspect facility operations on a daily basis to ensure safe, secure, and humane conditions of confinement and to provide "on the spot" resolutions for operational issues or concerns. A quality assurance team further reviews these facilities to ensure that the monitoring is effective. Since December 2010, the quality assurance team has performed 39 reviews across the country.

- ICE conducts regular inspections of its facilities. All ICE facilities with an average daily population of 50 or more detainees are inspected on an annual basis. These inspections test compliance with applicable ICE detention standards, the most recent version of which are the 2011 Performance-Based National Detention Standards.

- The ICE Office of Detention Oversight also conducts periodic compliance inspections at selected facilities where detainees are housed for periods in excess of 72 hours, including facilities where allegations of detainee mistreatment have been reported.

- ICE Enforcement and Removal Operations has since September 2012 operated a Detention Reporting and Information Line (DRIL), which is available in all over-72 hour detention facilities, and serves as an additional oversight mechanism for the agency. DRIL is available to ICE detainees, toll free, and is a direct line to trained operators prepared to record and respond to detainee questions, concerns, and/or complaints. Call center representative will answer calls and assist with resolution on subjects such as reporting incidents of sexual or physical assault or abuse; serious or unresolved problems in detention; victims of human trafficking and other crimes; reports on individuals with serious mental disorders or conditions; separation of minor child or other dependent and other parental related issues; inquiries from the general public, law enforcement officials and others; requests for basic case

information; and other detention related issues. DRIL employs a case management system that allows for timely coordination between HQ and appropriate field office leadership to follow up, as necessary, on detainee allegations. The DRIL is available to detainees Monday through Friday, 8am – 8pm.

- Additional layers of oversight are undertaken through site visits, investigations, and audits from the U.S. Government Accountability Office, the DHS Inspector General, and the DHS Office for Civil Rights and Civil Liberties.

IF ASKED:

- Issuance of Sexual Assault Policy: In May 2012, ICE issued a directive on sexual abuse and assault prevention and intervention, establishing agency-wide policy and procedures for responding to incidents or allegations of sexual abuse or assault of individuals in ICE custody. The "Sexual Abuse and Assault Prevention and Intervention" (SAAPI) policy delineates duties of agency employees for timely reporting, coordinated response and investigation, and effective monitoring of all incidents of sexual abuse or assault of individuals in ICE custody in order to ensure an integrated and comprehensive system of responding to such incidents, and it complements sexual assault safeguards applicable to detention facilities contained in the 2011 Performance-Based National Detention Standards. In March 2014, the Department of Homeland Security (DHS) promulgated regulations implementing the Prison Rape Elimination Act (PREA); the regulations further strengthen sexual assault safeguards at ICE detention and holding facilities.

- As part of implementing the standards set forth in the DHS PREA regulation, ICE updated the SAAPI policy and on May 22, 2014, ICE reissued enhanced guidance for preparing for and responding to incidents of sexual assault in detention.

- Enhanced Review of Segregation Placements: In September 2013, ICE issued the directive "Review of the Use of Segregation for ICE Detainees," which established ICE policy and procedures for the review and oversight of decisions to place ICE detainees in segregated housing for more than 14 days, or placements in segregation for any length of time in the case of detainees for whom heightened concerns exist based on factors related to the detainee's health or other special vulnerabilities. This directive enhances reporting requirements for facilities concerning such cases, and requires ICE field offices and headquarters to evaluate the appropriateness of continued placement and to determine the viability of any potential housing or custodial alternatives.

- Development of Risk Classification Assessment: In January 2013, ICE completed nationwide deployment of the new automated Risk Classification Assessment to improve transparency and uniformity in detention and custody classification decisions, aid in identifying vulnerable populations, and promote the prioritization of detention resources. The Risk Classification Assessment contains objective criteria, incorporating factors reflecting the agency's civil enforcement priorities and any special vulnerabilities that may affect custody and classification determinations, to guide the decision-making of ICE

officers and their supervisors regarding whether an alien should be detained or released, and, if detained, the appropriate custody classification level.

SOURCES: See generally September 2013 shadow reports to the Committee from the John Marshall Law School Human Rights Project: Joint Submission to the U.N. Human Rights Committee Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America and from Amnesty International: Submission to the Human Rights Committee; See ¶¶ 13, 14, and 62 of the July 3 written responses, http://www.state.gov/j/drl/rls/212393.htm.

BACKGROUND (DHS Prevention of Mistreatment of Detainees in ICE Facilities):

DHS Actions

DHS OIG and ICE OPR have conducted criminal investigations leading to indictments, arrests, and convictions for various civil rights violations. Allegations in these cases have included the sexual assault of an unaccompanied minor being held in an ICE detention facility; an unwarranted physical assault of an ICE detainee by a supervisory detention facility staff member who then ordered other officers to cover the crime by submitting false reports; the sexual assault of a woman in the custody of a border officer in the presence of her two minor children; and the physical assault of a restrained immigration detainee by an ICE detention official at an ICE facility for special needs detainees.

NGO Concerns

The John Marshall Law School Human Rights Project renews concern that ICE relies on correctional incarceration standards that impose unnecessary and disproportionate restrictions on immigrant detainees and that the conditions that result violate the fundamental right to liberty under ICCPR Art. 9(1).

L-10 (4). QUESTION – DHS OVERSIGHT OF PRIVATE IMMIGRATION DETENTION FACILITIES**:** What measures is DHS taking to oversee the treatment of immigration detainees in private detention facilities and to ensure that they are held to international standards regarding the treatment of detainees by States?

RESPONSE:

- **Federal and state laws establish standards of care to which all migrants detained in the United States are entitled, including those held by DHS Immigration and Customs Enforcement (ICE). Publicly and privately owned or operated detention facilities are all held to the detention standards.**

- **The Department of Homeland Security meets its legal mandate by confining migrants in detention facilities that are safe, humane, and appropriately secure.**

- The Custody Management Division of ICE ensures that all ICE detention facilities – including contract facilities run by private companies – comply with ICE national detention standards. These standards were revised most recently in 2011 to improve medical and mental health services, increase access to legal services and religious opportunities, ensure meaningful access for detainees with no or limited English proficiency, and to make other changes consistent with good practice.

- ICE has also established an on-Site Detention Monitoring Unit with 41 federal Detention Service Managers who work at 54 facilities across the country to inspect and monitor compliance with ICE detention standards, respond to and report problems, and implement solutions.

- The ICE Custody Management Division runs a Community and Detainee Hotline so detainees can easily report facility concerns, mistreatment, and/or staff misconduct.

- Other layers of oversight are provided by ICE's Office of Detention Oversight, which conducts periodic inspections of detention facilities for compliance with national detention standards, as well as the DHS Office of the Inspector General and the DHS Office for Civil Rights and Civil Liberties.

SOURCES: This question is based on questions raised by Human Rights Advocates and the University of San Francisco Center for Law and Global Justice Criminal Sentencing Project, during the Civil Society Consultation in May 2013 and their joint submission to the Committee in September 2013: Report on the United States' Compliance with the International Covenant on Civil and Political Rights.

BACKGROUND:

As of June 9, 2014, the 54 facilities under the purview of the Detention Monitoring unit house 85.6% of ICE's average daily detainee population. In many cases, problems are remedied on the spot. In other instances, the ICE Custody Management Division implements and monitors remedial plans.

NGO Concerns:

Human Rights Advocates and the University of San Francisco Center for Law and Global Justice Criminal Sentencing Project identifies as key concerns that;

- Private contractors, because they profit from detention, have a conflict of interest in the treatment of detainees.
- Their facilities cut costs in order to foster greater profits at the expense of those held in detention.
- Some have no trauma recovery programs, no job training programs, no programs addressing mental illness, no disease management or health programs, and no programs addressing sex offender issues.
- They often utilize undertrained and undisciplined staff to cope with complicated problems.
- These employees have little incentive to do their job well because they are underpaid and are given little to no health benefits and experience high staff turnover rates.

L-10(5). QUESTION – DHS OVER-RELIANCE ON PRIVATE DETENTION FACILITIES**:** In view of the significant concerns regarding conditions in private detention facilities, is DHS willing to stop contracting with private companies to run immigration detention facilities?

RESPONSE:

- **Federal and state laws establish standards of care to which all migrants detained in the United States are entitled, including those held by DHS Immigration and Customs Enforcement (ICE).**

- **The Department of Homeland Security meets its legal mandate by confining migrants in detention facilities that are safe, humane, and appropriately secure.**

- Privately operated facilities; facilities operated by state and local governments; and other arrangements are all governed by ICE's detention standards and oversight procedures. That is, **federal detention standards are in effect in all facilities ICE employs, whether public or private**.

SOURCES: Question posed by Human Rights Advocates and the University of San Francisco Center for Law and Global Justice Criminal Sentencing Project in their joint submission to the Committee in September 2013: Report on the United States' Compliance with the International Covenant on Civil and Political Rights.

BACKGROUND (DHS Over-reliance on Private Detention Facilities)**:**

L-10(6). QUESTION – DOMESTIC DETENTION OVERSIGHT**:** Previously, the United States reported the creation of the ICE OPR Office of Detention Oversight (ODO), which is charged with independently verifying the inspection of detention facilities, according to national detention standards. Please update the Committee as to the success of these oversight mechanisms in improving detention conditions, particularly in private facilities. Do these Offices also play a role in redressing individual reports of problematic detention conditions? How does the United States ensure protections from retaliation for detainees who file complaints while in custody?

RESPONSE:

- **The United States works hard to ensure that migrants are treated humanely in a manner consistent with the U.S. laws and applicable international obligations. These laws and obligations are incorporated into concrete detention standards to which all facilities that hold civil immigration detainees are held accountable**

- The DHS Immigration and Customs Enforcement Office of Detention Oversight conducts periodic compliance inspections at selected detention facilities where detainees are housed for periods in excess of 72 hours, including facilities where allegations of detainee mistreatment have been reported.

- The work of the Office of Detention Oversight's adds to and complements the functions of the DHS Office for Civil Rights and Civil Liberties, which investigates complaints from the public, including allegations of retaliation, and makes recommendations to correct deficiencies.

- ICE's Custody Management Division follows up on all deficiencies identified by the Office of Detention Oversight and requires detention facilities to develop corrective action plans to remedy all negative findings. At select detention facilities where ICE maintains on-site Detention Services Managers, corrective action plans are closely monitored to ensure issues are appropriately addressed. It is through the agency's robust inspection program and implementation of a thorough corrective action process that ICE is assured that conditions remain appropriate at detention facilities.

- ICE Enforcement and Removal Operations has since September 2012 operated a Detention Reporting and Information Line (DRIL), which is available in all over-72 hour detention facilities, and serves as an additional oversight mechanism for the agency. DRIL is available to ICE detainees, toll free, and is a direct line to trained operators prepared to record and respond to detainee questions, concerns, and/or complaints. Call center representative will answer calls and assist with resolution on subjects such as reporting incidents of sexual or physical assault or abuse; serious or unresolved problems in detention; victims of human trafficking

and other crimes; reports on individuals with serious mental disorders or conditions; separation of minor child or other dependent and other parental related issues; inquiries from the general public, law enforcement officials and others; requests for basic case information; and other detention related issues. DRIL employs a case management system that allows for timely coordination between HQ and appropriate field office leadership to follow up, as necessary, on detainee allegations. The DRIL is available to detainees Monday through Friday, 8am – 8pm. The DRIL allows for near real-time resolution of issues and concerns in detention. Aggregate DRIL data is used to assess potential systemic issues in detention.

- ICE maintains at the headquarters level an oversight mechanism for managing effective implementation of humane policies in detention. The Detention Monitoring Council (DMC) is comprised of senior ICE leadership and meets on a quarterly basis to discuss issues related to detention and recommends policy changes for mitigating risk nationally, including reports of sexual assault or abuse, employee misconduct, and use of segregation. It also meets on an ad-hoc basis to review any deaths of aliens in ICE custody. A sub-committee of the DMC meets on a monthly basis to review more timely issues.

SOURCES: This question is based on questions submitted by the New Orleans Workers' Center for Racial Justice. For the general concerns of this NGO, see its September 2013 submission: Migrant Workers in the South Expose How U.S. Immigration Enforcement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights.

L-10(7). QUESTION – ADDRESSING CIVIL SOCIETY CONCERNS ABOUT CONDITIONS OF DETENTION**:** Civil society groups continue to report immigration detention conditions that are dangerous to the health and safety of detained migrants; over-reliance on detention of individuals including women, children, and asylum seekers; and punitive actions against detainees including the use of solitary confinement. How is the United States responding to these continuing concerns from civil society?

RESPONSE:

- **Federal and state laws establish standards of care to which all migrants detained in the United States are entitled, including those held by DHS Immigration and Customs Enforcement (ICE).**

- **The United States works hard to ensure that undocumented migrants are treated humanely in a manner consistent with the U.S. laws and applicable international obligations.**

- ICE national detention standards (most recently the 2011 Performance Based National Detention Standards) establish minimum conditions of detention (and, optionally for particular facilities, enhanced conditions) for immigration detainees with respect to medical care, access to legal resources, visitation, recreation, correspondence, religious services, grievance processes, and a number of other issues.

- ICE employs rigorous and multi-layered forms of oversight to ensure compliance by detention facilities with the agency's standards; other DHS offices provide further layers of oversight.

- ICE civil immigration enforcement priorities direct that enforcement resources be focused on criminal aliens, individuals who pose a threat to public safety and national security, repeat immigration law violators, and other individuals prioritized for removal.

- Absent extraordinary circumstances or the requirements of mandatory detention, ICE policy dictates that individuals should not be detained if they are known to be suffering from serious physical or mental illness, or if they are disabled, elderly, infirm, pregnant or nursing, or demonstrate that they are primary caretakers of children, or if their detention is otherwise not in the public interest.

- ICE prosecutorial discretion policies further require that positive consideration be given to whether an individual is a minor, or is likely to be granted temporary or permanent status or relief as an asylum seeker or victim of domestic violence, human trafficking, or other crime.

- In addition, ICE's parole policy mandates that all asylum seekers found to have a credible fear of persecution be granted parole so long as they establish their identities,

pose neither a flight risk nor a danger to the community, and have no additional factors weighing against their release.

- ICE detention standards prohibit the imposition of any punitive sanction against a detainee absent a finding by an institutional disciplinary panel that the detainee has committed a facility infraction. Detainees are entitled at such disciplinary hearings to present statements and evidence, call witnesses, and draw upon the assistance of a staff representative to prepare a defense.

- The use of segregation as a potential sanction is authorized only for confirmed serious disciplinary infractions.

SOURCES: Question recommended by New Orleans Workers' Center for Racial Justice in its September 2013 shadow report: Migrant Workers in the South Expose How U.S. Immigration Enforc ement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights*

BACKGROUND (Addressing Civil Society Concerns about Conditions of Detention):

NGO Concerns:

The New Orleans Workers' Center for Racial Justice expressed concern that the number of people held in immigration detention has grown greatly in the last decade. Private contractors are relied upon to run detention facilities. People in immigration detention report lack of access to medical care, shortages of basic toiletries, a vacuum of information about their deportation cases, and minimal to no access to family or lawyers. They further assert that detainees who report conditions are regularly ignored or retaliated against.

Continued Detention of Thousands of Noncitizens who Pose no Flight Risk or Threat to Public Safety

L-10(8). QUESTION – CONTINUED DETENTION OF THOUSANDS OF NONCITIZENS WHO POSE NO FLIGHT RISK OR THREAT TO PUBLIC SAFETY – In the absence of comprehensive immigration reform legislation, the U.S. has continued to aggressively enforce immigration laws, often to the detriment of families and communities across the country. At any given time, DHS detains thousands of noncitizens who pose no flight risk or threat to public safety while they are awaiting deportation proceedings. Detention costs the American taxpayer an estimate $159 per person per day, but alternatives to detention (such as release on recognizance, community-based support services or bond) do not carry an expense, and other alternatives cost from pennies to around $18 per person per day. What steps is the U.S. government taking to move toward alternatives to detention to ensure that it ensures compliance with immigration laws in a more humane way?

- **RESPONSE:**
  - **The United States is committed to safe, humane, and efficient immigration enforcement, including substantial use of alternatives to detention programs.**
  - Institutional immigration detention and Alternatives to Detention (ATD) programs, however, are only part of the process. The Departments of Homeland Security and Justice are working to increase immigration court efficiencies to ensure removal hearings are completed efficiently, reducing the time period in which individuals may be subject to detention or supervision.
  - One ATD option includes release on recognizance or bond and comes at little or no cost. Other forms of alternatives to detention include forms of supervision and monitoring, such as enrollment in an Alternatives to Detention program including the Intensive Supervision Appearance Program (ISAP), Enhanced Supervision/Reporting (ESR), and Electronic Monitoring (EM). The ISAP program allows ICE to monitor participants through telephonic reporting, radio frequency, GPS, and unannounced home visits. ESR uses the same monitoring methods as ISAP. Individuals in ATD programs are also required to show up to mandatory hearings.
  - The President's budget for FY 2014 funds 30,539 detention beds, instead of the 34,000 beds mandated by Congress in prior years. This avoids approximately $185 million in detention and removal costs while allowing U.S. Immigration and Customs Enforcement (ICE) to detain priority aliens. This level of beds allows ICE to ensure the most cost-effective use of federal dollars, focusing the more-costly detention capabilities on priority and mandatory detainees, while placing low-risk, non-mandatory detainees in lower cost Alternatives to Detention Programs (ATD), where the President's 2014 budget proposed a $2 million increase.

- To continue meeting and exceeding enforcement expectations, ICE continues to implement efficiencies that assist with identifying, detaining, and removing those individuals who are enforcement priorities, such as those who pose a danger to the community or are a flight risk, while exercising discretion appropriately. Examples of this include implementing nationwide the risk classification assessment (RCA), a pilot program in which ICE works with the Executive Office for Immigration Review to expedite priority cases that are not subject to detention; and further expansion of the Alternatives to Detention program.

- **SOURCE:** This question came from comments made in a Shadow Report titled "Falling Further Behind: Combating Racial Discrimination America." The authors of this report are the Leadership Conference Education Fund and the Leadership Conference on Civil and Human Rights with the Lawyers' Committee for Civil Rights Under Law and the National Association for the Advancement of Colored People (NAACP).

L-10(9) QUESTION: HEALTH CARE FOR DETAINED MIGRANTS, INCLUDING WOMEN: Please inform the Committee of steps taken to address the reports of inconsistent and inadequate medical care for immigrant women held by United States Immigration and Customs Enforcement detention system.

[based on ICCPR B-2(9) with no substantive edits]

RESPONSE:

- **The United States is committed to ensuring that all persons in the United States receive the treatment and protections to which they are entitled under our Constitution and laws, including any applicable international obligations; it recognizes fully its responsibilities with respect to any migrant deprived of liberty, whether by federal, state, or local authorities.**

- **As part of its ongoing immigration detention reform programs, DHS has significantly improved health services for all persons in its custody, including women. The ICE Health Services Corps (IHSC) provides direct health care to approximately 15,000 detainees, including women, in ICE custody. IHSC also oversees medical care provided to all ICE detainees at non-IHSC staffed state and local facilities and ensures the care provided accords with applicable standards.**

- **ICE's most recent set of national detention standards (the 2011 Performance Based National Detention Standards) incorporate a new standard focused exclusively on the medical care provided to female detainees. This standard establishes uniform minimum requirements for the adequate provision of women's health care, including gynecological and obstetrical care. Among other things, female detainees are entitled under this standard to routine age-appropriate medical assessments, preventive services (including baseline mammograms, pelvic examinations, pap smears, and STD screenings), birth control, and pregnancy services (including pregnancy testing, routine or specialized prenatal care, and postpartum follow-up.**

- The Office for Civil Rights and Civil Liberties (CRCL) at DHS investigates complaints alleging inadequate medical care. Where allegations are substantiated, CRCL has and will continue to provide policy, practice, and training recommendations to leadership of the involved DHS component agency

- The Federal Bureau of Prisons (BOP) houses female immigrants who are serving criminal sentences imposed by a Federal court. All offenders housed in BOP custody have access to on-site medical care in their respective facilities, and the availability of care in the community, if needed. The BOP also operates medical facilities for offenders who may need greater levels of health care. The medical center for female offenders is located in Carswell, Texas.

- (If raised) Immigrant women held in state, local, tribal and territorial governmental custody are not monitored by the BOP; BOP would only have jurisdiction over female immigrants who committed federal crimes, and were sentenced to BOP custody.

- (If needed) Any ineligibility for Medicaid or other subsidized benefits available under the ACA or other laws applicable to segments of the public at large, would in no way adversely affect migrants in the custody of federal, state or local government authorities, because those authorities are responsible for providing fully for the migrants' welfare needs (including medical care) for the duration of that custody.

11. Sexual violence in immigration detention / PREA implementation

L-11(1). QUESTION – PREVENTING SEXUAL VIOLENCE IN DETENTION: What is the United States doing to design and implement appropriate measures to prevent sexual violence in all its detention facilities? In this respect, please elaborate on the measures taken to implement the Prison Rape Elimination Act and on the standards developed by the National Prison Rape Elimination Commission in 2009 to detect, prevent, reduce, and punish prison rape, as well as on the implementation thereof.

RESPONSE:

- **The United States is taking extensive action at all levels of government to prevent sexual violence and other sexual victimization in its detention centers.**

- The United States is actively working to address recommendations of the bipartisan National Prison Rape Elimination Commission (NPREC) established by the 2003 Prison Rape Elimination Act.

    - DOJ issued regulations implementing the Prison Rape Elimination (PREA) Act in 2012 which addressed and strengthened many of the Commission's regulations. These regulations apply to the Federal Bureau of Prisons and all DOJ components.

    - On March 7, 2014, DHS finalized PREA regulations to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities, which include immigration detention facilities and holding facilities. .

- Pursuant to the DOJ regulation, states must also certify that all facilities under the operational control of the state's executive branch fully comply with the regulations, including facilities operated by private entities on behalf of the state's executive branch. A state that is not in full compliance will lose certain DOJ funding unless it pledges to devote such funding to coming into compliance.

- The final DOJ regulation includes greater protections for juvenile offenders in adult facilities; establishes new restrictions on cross-gender viewing and searches; sets minimum staffing ratios in juvenile facilities; expands medical and mental health care, including reproductive health care, for victims of prison rape; provides greater protections for lesbian, gay, bisexual, transgender, intersex, and gender non-conforming inmates; and requires independent audits of all covered facilities.

- DHS continues to administer and implement other measures to prevent sexual violence in its detention facilities.

- On May 22, 2014, ICE issued a revised directive on sexual abuse and assault prevention and intervention, which strengthens pre-existing agency-wide policy and procedures for responding to incidents or allegations of sexual abuse or assault of individuals in ICE custody.
- DHS, including its components ICE and CBP, has a zero tolerance policy for all forms of sexual abuse and assault in all of its facilities.
- It is DHS policy to provide effective safeguards against sexual abuse and assault of individuals in ICE and CBP custody, including through screening, staff training, detainee education, response and intervention, medical and mental health care, reporting, investigation, monitoring, and oversight, and provide agency-wide procedures for timely notification of sexual abuse and assault allegations, prompt response, and effective monitoring of sexual abuse and assault incidents

- DoD issued a Directive-type Memorandum in February 2013 establishing policy for DoD correctional facilities that DoD is "committed to work diligently to prevent, detect, and respond to prison rape." Among other things, it directs that that the secretaries of the military branches are responsible for maintaining a zero-tolerance standard for rape and all other types of violence, and upholding universally high standards to prevent, detect and respond to sexual abuse in prisons.

SOURCES: Material above is from the draft USG CAT report, edited somewhat. Material submitted for ICCPR questions is in the background section. See generally ¶¶ 74 – 85 of the July 3 written responses, http://www.state.gov/j/drl/rls/212393.htm. See also 4th Report, ¶¶ 184, 224, 246-247, 672 (CRIPA issues), http://www.state.gov/j/drl/rls/179781.htm.

BACKGROUND:

Fiscal Year 2014 is the first year that states and territories may have certain federal grant funds withheld unless they demonstrate an intention to comply with the law. Of the 56 jurisdictions that are subject to PREA – the 50 states, the 5 territories and the District of Columbia – 48 are in compliance or have submitted assurances to the department committing to spending five percent of certain federal grant funds to come into compliance. The eight states or territories that are unwilling to commit the five percent of federal grant funds to implementation of the PREA Standards are subject to the loss of five percent of certain department grant funds that they would otherwise receive. http://www.justice.gov/opa/pr/2014/May/14-dag-570.html

As noted in the July 3 written responses, the Violence Against Women Act Reauthorization of 2013 clarified that the Prison Rape Elimination Act (PREA) applies to DHS detention facilities, and also required the issuance of regulations

adopting national standards for the detection, prevention, reduction, and punishment of sexual abuse and assault in immigration detention.

Several DHS component agencies and offices – including ICE, CBP, CRCL, and the DHS Office of the General Counsel – participated in a working group to draft the DHS PREA final rule, which was published in March 2014.

DHS has a zero tolerance policy against sexual abuse. Both ICE and CBP have zero tolerance policies as well. The ICE policies and standards on sexual abuse and assault prevention and intervention clearly articulate the agency's zero-tolerance policy for incidents of sexual abuse or assault. These include *Admission and Release*; *Custody Classification System*; *Facility Security and Control*; *Searches of Detainees*; *Special Management Units* (for protective custody, administrative segregation, and disciplinary segregation); *Medical Care*; *Grievances*; *Sexual Abuse and Assault Prevention and Intervention*; *Disciplinary System*; and *Staff-Detainee Communication.*

More specifically, ICE standards and policies ensure that, among other things: staff receive training on working with vulnerable populations and addressing their potential special housing needs; detainees are screened to identify those individuals who are likely to be sexual aggressors or victims; all allegations of sexual abuse or assault are immediately and effectively reported to ICE, whose staff will refer the allegation for investigation.

L-11(2). QUESTION – INVESTIGATION OF SEXUAL VIOLENCE IN DETENTION FACILITIES**:** Please indicate steps taken to ensure that all allegations of violence in detention facilities are investigated promptly and independently, as well as that perpetrators are prosecuted and appropriately sentenced. (Good question for state and local officials.)

RESPONSE:

- **The United States is taking extensive action at all levels of government to prevent sexual violence and other sexual victimization in its detention centers.**

- DOJ's and DHS's Prison Rape Elimination Act regulations contain extensive requirements that all allegations of sexual abuse in facilities are to be thoroughly investigated and referred to the proper authorities, where appropriate, and that agencies follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence. The regulations require that there be multiple internal and external mechanisms to report sexual abuse, and staff are required to report any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment in a DHS facility.

- DOJ collects data on sexual victimization based on official records in the relatively small number of cases in which an inmate reports a violation to authorities. In substantiated cases of sexual victimization by prison staff (consisting of sexual misconduct or sexual harassment), staff members were arrested and referred for prosecution, or received other sanctions (e.g., reprimand and demotion). Substantiated incidents of inmate-on-inmate sexual victimization resulted in disciplinary sanctions, legal action, placement in higher custody within the same facility, loss of privileges, or transfer to another facility.

IF ASKED:

- ICE detainees may report a sexual abuse or assault incident to multiple entities, including the DHS Office of Inspector General, the ICE Office of Professional Responsibility Joint Intake Center, the ICE Detention Reporting and Information Line, the DHS Office for Civil Rights and Civil Liberties, the local ICE Field Office, and facility staff , and a dedicated email address to ICE headquarters. ICE policy requires that each such allegation be promptly, thoroughly, and objectively investigated by qualified investigators, whether from ICE itself, detention facility staff, or local law enforcement. ICE detention standards also require that confirmed perpetrators be disciplined accordingly.

- In addition, ICE is undertaking measures to improve reporting mechanisms, including coordination with DHS/OIG to expedite the sharing of incident reports, and improving communications between ICE headquarters and field offices. DHS/CRCL also investigates allegations of sexual abuse and assault as part of its efforts to review compliance with detention standards and recommend policy improvements to protect detainees from abuse in detention.

SOURCES: Response is based on the USG CAT report, http://www.state.gov/j/drl/rls/213055.htm

L-11(3). QUESTION – MEASURES TO REDUCE SEXUAL VIOLENCE IN DETENTION CENTERS**:** Please provide information on the impact and effectiveness of the measures employed in reducing cases of sexual violence in detention facilities.

RESPONSE:

- **The United States is taking extensive action at all levels of government to prevent sexual violence and other sexual victimization in its detention centers.**

- Although recent information is not yet available, a 2009 DOJ Office of Inspector General report on staff sexual abuse of federal prisoners found significant increases in cases accepted for prosecution and the percentage of convictions since 2006, when new laws changed sexual abuse crimes from misdemeanors to felony crimes.

- It is hoped that the enactment of the PREA implementing regulations, along with increased training and policy directives, will yield significant reductions of the terrible toll exacted by sexual abuse and violence in detention.

- DHS continues to implement and improve its policies as part of its broader detention reform efforts. Although it is working toward this goal, DHS is not yet able to quantify the impact of these measures. In May 2012, U.S. Immigration and Customs Enforcement (ICE) issued a Sexual Abuse and Assault Prevention and Intervention Directive. As part of this policy the new ICE Prevention of Sexual Assault (PSA) Coordinator will prepare an annual report for the ICE Director identifying problem areas and recommending corrective actions for the agency as well as for ICE detention facilities, and assessing the agency's progress in addressing sexual abuse and assault by comparing the current year's data with those from prior years.

SOURCES: Response is based on the U.S. CAT report, http://www.state.gov/j/drl/rls/213055.htm.

12. Unaccompanied immigrant children – counsel, best interests of child

L-12(1). QUESTION – FAMILY UNITY IN IMMIGRATION ENFORCEMENT: What steps is the USG taking to protect family unity, parental rights, and the right to family life—including, but not limited to, parental participation in education, extracurricular activities, securing medical care, and religious life—in its implementation of immigration policies and practices? What weight is given to family circumstance on a case-by-case basis before detaining or deporting an immigrant?

RESPONSE:

- **U.S. law and policy seeks to protect family unity and parental involvement wherever possible.**

- **While Border Patrol apprehensions of Mexicans in FY 2014 have increased slightly from FY2013, apprehensions of individuals from countries other than Mexico, predominately individuals from Central America, increased by well over 50 percent. Significant border-wide investments in additional enforcement resources and enhanced operational tactics and strategy have enabled CBP to address the changing composition of attempted border crossers, but the rising flow of unaccompanied children and adults with children into the Rio Grande Valley present unique operational and resource challenges for CBP and the Department of Health and Human Services (HHS) as well.**

- **U.S. Customs and Border Protection (CBP) is assisting with processing immigrants apprehended in South Texas, many of whom are adults with children. Upon completion of CBP processing, CBP is transferring certain individuals to U.S. Immigration and Customs Enforcement's (ICE) Enforcement and Removal Operations (ERO), where appropriate custody determinations will be made on a case-by-case basis, prioritizing national security and public safety.** In addition to the facility in Berks, Pennsylvania, some families are now held in ICE's temporary facility, in Artesia, New Mexico, in both locations under ICE detention standards specifically designed for families held in custody.

- DHS is ensuring that after apprehension, families are housed in facilities that adequately provide for their safety, security, and medical needs. Meanwhile, we will continue to expand use of the Alternatives to Detention program to ensure compliance with notices to appear before immigration judges for removal proceedings

- After our 2013 CERD report was submitted, on August 23, 2013, ICE issued a directive on "Facilitating Parental Interests in the Course of Immigration

Enforcement Activities," which unifies policy and procedures to ensure that immigration enforcement efforts do not unnecessarily impede parental rights of alien parents or legal guardians of minor children present in the United States.

- The Directive complements existing ICE guidance which discourages the use of detention resources on detainees who can demonstrate that they are primary caretakers of children, absent extraordinary circumstances or a requirement for mandatory detention.
- The Directive states that if an alien's child, children, or family or child welfare proceedings are within the area of responsibility (AOR) of initial apprehension, ICE shall refrain from making an initial placement or from subsequently transferring the alien outside of the AOR unless deemed necessary pursuant to the ICE Detainee Transfer Directive. Furthermore, subject to detention space availability, ICE will place the detained alien parent as close as practicable to the alien's child(ren) and/or to the location of the alien's family court or child welfare proceedings (if any).

- Additional guidance promotes exercise of sound judgment by ICE officers and agents with regard to avoiding enforcement actions at or focused on sensitive locations, such as schools, religious buildings, or hospitals.

IF ASKED: CBP LATEST NUMBERS

- Number of adults crossing illegally with their children fell from 16,330 in June to 7,410 in July,

SOURCES: This question is based on a submission from the Media Mobilizing Project & Coalition. See also September 2013 shadow reports from Amnesty International: Submission to the Human Rights Committee and Junta for Progressive Action: Federal Anti-Immigrant Policy and Its Correlation to Racial Profiling within Law Enforcement in Context of the International Covenant on Civil and Political Rights

BACKGROUND (Family Unity in Immigration Enforcement):

NGO Concerns

In its September 2013 report, Amnesty raised concern that, as a result of detention, it is often impossible for parents to make arrangements for their children's care. As a consequence, children are taken into care temporarily or permanently by the state. People in immigration detention also have no way to obtain permission to attend court hearings regarding their children. Amnesty recommends that the Committee ask:

- Will the U.S. give consideration to family circumstances on a case-by-case basis before detaining or deporting an immigrant?

In its September 2013 report, the Junta for Progressive Action similarly expressed concern that the separation of families under policies such as S-Comm and CAP undermine the value of the family unit and place children of undocumented parents within foster care systems. It proposed that the Committee ask:

- How does this benefit economic and social growth of the country?

DHS actions

- On August 23, 2013, ICE issued a directive on "Facilitating Parental Interests in the Course of Immigration Enforcement Activities," which establishes policy and procedures to balance the agency's immigration enforcement efforts with the parental rights of alien parents or legal guardians of minor children present in the United States. Among other things, the Directive designates a specific point of contact within each field office for parental-interests matters; establishes processes for field offices to regularly identify and review cases involving parents, legal guardians, and primary caretakers, and to determine the appropriateness of detention; facilitates participation of detainees in family court proceedings; promotes parent-child visitation; and accommodates care and travel arrangements for the children of detainees facing removal.

- Further, ICE guidance on "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens" issued in March 2011 prohibits the use of immigration enforcement resources on detainees who can demonstrate that they are primary caretakers of children, absent extraordinary circumstances or the requirements of mandatory detention. Guidance issued in June 2011 on "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" similarly requires that ICE officers consider whether an individual is the primary caretaker of a minor when exercising prosecutorial discretion authority.

- ICE's Risk Classification Assessment (RCA), which contains objective criteria to guide decisions about whether to detain an apprehended individual, accordingly directs ICE officers to inquire whether an individual may be the primary caretaker of a child, and recommends against detention in these cases unless legally mandatory. The policy on "Enforcement Actions at or Focused on Sensitive Locations," issued in October 2011, also promotes exercise of sound judgment by ICE officers and agents with regard to avoiding enforcement actions at or focused on sensitive locations, such as schools, religious buildings, or hospitals

- The ICE Detainee Transfer Directive, issued in January 2012, prohibits the long-distance transfer of detainees with family members in the original area of detention unless absolutely necessary.

- ICE national detention standards formalize the agency's commitment to facilitate participation by detainee parents in dependency and family court hearings, and ICE continues to explore alternative arrangements that would allow meaningful participation, including through the use of phone and televideo conferencing.

L-12(2). QUESTION – BEST INTERESTS OF UNACCOMPANIED ALIEN CHILDREN. We are aware of reports of large numbers of children being held along the U.S. border, separated from traveling companions, and transported to a shelter system where they are held for long period before being returned to family members. How does the United States ensure humane treatment and recognition of the best interest of each child when it encounters children at the border?

- **The United States is committed to the safety and welfare of all persons in its custody, with special recognition of the vulnerabilities - children traveling without a parent, legal guardian may experience. Unaccompanied children may be especially vulnerable to human trafficking, exploitation, and other forms of abuse.**

- **The situation in the Rio Grande Valley has, since early May of this year, presented an urgent humanitarian situation. Our strategy to respond to the situation has been (1) to process the increased number of unaccompanied children through the border patrol system and into the custody of the Department of Health and Human Service's shelter system for children as quickly and safely as possible; (2) to stem the tide of people crossing the border unlawfully; and (3) to do all this consistently with our laws and values, including applicable international obligations.**

- **DHS and HHS are conducting public health screening for all those who come into our facilities for any symptoms of contagious diseases or other possible public health concerns. Both DHS and HHS are ensuring that the children's nutritional and hygienic needs are met while in our custody; that children are provided regular meals and access to drinks and snacks throughout the day; that they receive constant supervision; and that children who exhibit signs of illness or disease are given proper medical care. We have also made clear that all individuals will be treated with dignity and respect, and any instances of mistreatment reported to us will be investigated.**

- The U.S. Government has coordinated across a large number of affected agencies to coordinate the response to this humanitarian crisis. We have worked closely with the governments of Guatemala, El Salvador, Honduras, and Mexico to address our shared border security interest and the underlying conditions in Central America promoting the mass migration. Vice President Biden has announced a range of new assistance to the region, including funding to improve security in those countries and to empower the governments to receive and reintegrate their repatriated citizens.

- We have also intensified public affairs campaigns, in Spanish, to communicate to parents and others the dangers of sending unaccompanied children from Central America to the United States, and the dangers of putting children into the hands of criminal smuggling organizations.

IF ASKED – CBP TRANSFERS TO HHS/ORR

- Through statutory frameworks including the Trafficking Victims Protection Reauthorization Act of 2008 and a litigation settlement, children are generally transferred from border security authorities to the Office of Refugee Resettlement within 72 hours of being identified as an unaccompanied minor.

    - While the Department of Homeland Security's enforcement agencies make every effort to make a timely transfer, this 72-hour interval may be exceeded during periods of exceptional circumstances, as we encountered during the recent humanitarian crisis.

    - To process the increased numbers of children encountered in Texas, DHS relocated some children in its custody to centralized processing centers, first in Nogales, Arizona and now in McAllen, Texas, where appropriate and clean housing, food service, and recreation for the children are made available while awaiting transfer to HHS custody.

- The HHS Office of Refugee Resettlement (ORR) makes placement determinations in the best interests of the Unaccompanied Alien Children (UAC) based on all available information. ORR designates the least restrictive placement option appropriate to the UAC's needs that is available within the ORR network.

IF ASKED: DEFINITION OF UNACCOMPANIED ALIEN CHILD

- An unaccompanied child is defined as a child who: "(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom —(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." HSA 2002§ 462(g)(2) (codified at 6 U.S.C. § 279(g)(2)). Thus, a minor traveling with any other relative would be deemed unaccompanied. Once deemed unaccompanied, a minor is required to be transferred into HHS' custody, per the TVPRA, regardless of existence of any adult traveling companions.

IF ASKED: INTAKE, PROCESSING, SCREENING

- Subsequent to apprehension, the government informs all children through Form I-770 (Notice of Rights and Request for Disposition for Minors) about certain rights, including access to a telephone to contact a trusted adult; to communicate with a consulate or other diplomatic officer; and to be represented by an attorney, albeit at no cost to the government.

- The Department of Homeland Security screens all children encountered at the land border or ports of entry, to determine if they have been victims of trafficking or are at risk of being trafficked upon return, or if they have a fear of persecution if returned to their home countries, and that the child is able to make an independent decision.

- By law, unaccompanied alien children from contiguous countries (Mexico or Canada) may be allowed to voluntarily return to their country following a determination they are not trafficking victims, have no fear of persecution, and are able to make an independent decision to withdraw their application for admission.

IF ASKED: IMMIGRATION COURT PROCEEDINGS FOR UAC

- The Executive Office for Immigration Review (EOIR) conducts legal proceedings to determine whether minors/children may lawfully remain in the United States. For over a decade, EOIR, with the help of experts from other federal agencies and non-governmental organizations, has trained judges on issues related to children in immigration court proceedings. EOIR has also issued guidance about how to create a child-friendly environment in immigration court. This guidance addresses, among other things, special juvenile dockets, child-friendly courtroom modifications, pre-hearing orientations, and child-sensitive questioning. Since 2010, EOIR's Legal Orientation Program for Custodians of Unaccompanied Alien Children has provided legal information to the adult caregivers of unaccompanied alien children in immigration court proceedings. The purpose of this program is to inform custodians of their responsibilities in ensuring that children under their care appear at all immigration court proceedings, as well as protecting them from mistreatment, exploitation, and trafficking. Finally, EOIR has worked closely with ORR and non-governmental organizations to identify children in need of legal assistance and facilitate pro bono legal services.

IF ASKED: ASYLUM APPLICATIONS BY UAC

- Only a small percentage of unaccompanied children apprehended at the border apply for asylum: From FY 2013 through June 30, 2014, only 2% of unaccompanied children apprehended by CBP have applied for asylum. Unaccompanied children represent about 4% of all asylum applications received in FY2014 through June 30.

IF ASKED: DEMOGRAPHICS OF UACS

- The percentage of girls has increased in recent years. In FY2014 as of July 29, 33% of the unaccompanied children apprehended in the South Texas (Rio Grande Valley) sector were female.

- The substantial majority of unaccompanied children are boys aged 11 or older. However, we have encountered hundreds of children under age 5, and boys and girls of all ages.

- The substantial majority are from Mexico, Guatemala, El Salvador, and Honduras, but in FY2014, in the Rio Grande Valley sector alone, CBP has encountered children from 19 countries.

BACKGROUND:

- The TVPRA 2008 requires the trafficking screening of unaccompanied minors from Mexico or Canada encountered at the land or ports of entry; extension of the screening to all encountered unaccompanied alien children is a matter of DHS policy.

Unaccompanied children – differential treatment based on country of origin

L-12(3). QUESTION – UNACOMMPANIED ALIEN CHILDREN AND DIFFERENTIAL TREATMENT BASED ON COUNTRY OF ORIGIN: There have been reports that unaccompanied alien children are treated differently depending on their country of origin. For example, under the Trafficking Victims Protection Reauthorization Act (TVPRA), which is meant to combat human trafficking, children from noncontiguous (non-bordering) countries are screened and treated differently from children from Mexico. This is arguably a form of national origin discrimination. Under what rationale is the U.S. government engaging in this sort of preferential treatment?

RESPONSE:

- **The United States is committed to an appropriate response to the humanitarian crisis posed by the influx of unaccompanied children and families along our border in 2014, consistent with the Constitution, federal laws, and applicable international obligations.**

- As a matter of policy the United States screens all unaccompanied children for human trafficking. By law, the United States is required to screen unaccompanied children from contiguous countries (Mexico and Canada) found at land border or port of entry

- Unaccompanied children from contiguous countries may be permitted to withdraw their application for admission and return to the contiguous country following screening for trafficking, credible fear, and capacity to make the decision to withdraw the application. Other unaccompanied children may also be permitted to depart the United States voluntarily, but not to withdraw their application for admission in this particular way.

IF PRESSED WITH ASSERTIONS THAT THIS PRACTICE VIOLATES THE CONVENTION:

- Not every difference in treatment constitutes unjustifiable discrimination for purposes of the Convention. The immigration laws of very many State Parties draw rational distinctions among nationalities in extending certain preferences or benefits, including the Visa Waiver Program, though which the United States allows nationals of certain countries to enter without a visa for stays of up to 90 days, or the preferences with respect to immigration and expulsion members of the European Union extend to one another's nationals.

Background:

- From a legal perspective it is questionable that the CERD, by its terms, prohibits States Parties from advantaging nationals of one country of those of another with respect to whether a UAC may first be permitted to withdraw his or her application for admission (after screening for trafficking, credible fear, and capacity to withdraw) before being placed in § 240 proceedings (vs. being immediately placed in § 240 proceedings and then

permitted to voluntarily depart). Although the Committee "recommends" that States Parties "[e]nsure that laws concerning deportation or other form of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies," General Recommendation No. 30 (2004), the text of the Convention is ambiguous with respect to expulsion. Unlike in the ICCPR (Art. 13), there is no mention of expulsion in Art. 5 of the CERD. Even were we to incorporate Art. 13 of the ICCPR into Art. 5 as a civil right, such that national origin discrimination is generally prohibited in expulsion proceedings, *that right is limited to noncitizens who are lawfully within the territory of a State Party*.

- As the CERD Committee has acknowledged in its General Recommendations, not every difference in treatment constitutes unjustifiable discrimination for purposes of the Convention. For example, General Recommendation No. 30 (2004) recognized that differential treatment between citizens and non-citizens should be "judged in light of the objectives and purposes of the Convention" and is not impermissible if "applied pursuant to a legitimate aim, and . . . proportional to the achievement of this aim"). Further, General Recommendation No. 14 (1993) observed that "a differentiation in treatment will not constitute discrimination if the criteria for such discrimination, judged against the objectives and purposes of the Convention, are legitimate" and that "[i]n considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes."

- Under Supreme Court jurisprudence, Congress need only have a rational basis (meaning a legitimate aim) to draw nationality-based distinctions in the immigration laws. The immigration laws of the U.S. are replete with examples of giving preferential treatment of nationals of certain countries over those of other countries. Some examples include the Nicaraguan Adjustment and Central American Relief Act (NACARA), which involves types of relief from deportation (or removal) and applies to certain individuals from Guatemala, El Salvador, and the former Soviet bloc countries; the Visa Waiver Program, which allows citizens of participating countries to travel to the United States without a visa for stays of 90 days or less when they meet certain requirements; the Cuban Adjustment Act, which is specifically applicable and gives special treatment to any native or citizen of Cuba who has been inspected and admitted or paroled into the U.S. after January 1, 1959, and has been physically present for at least one year, and is admissible to the United States as a permanent resident; and the North American Free Trade Agreement, which is a preferential trade agreement between the United States, Mexico, and Canada.

- Internationally, the European Union also gives preferential treatment to nationals of EU Member States with respect to immigration and expulsion.

SOURCES: This question is based on an anticipated potential angle that the CERD Committee might focus regarding Unaccompanied Alien Children. The CERD Committee may argue that the differential treatment of UACs from Mexico vs those from noncontiguous countries may constitute national origin discrimination.

Removals to Haiti

L-13. QUESTION - U.S. DEPORTATIONS AND REMOVALS OF HAITIAN MIGRANTS AFTER THE JANUARY 2010 EARQUAKE: The United States has a long history of targeting Haitian migrants in its immigration policy and practice, in a wide range of issues including detention and removal procedures, legislation concerning status adjustment and naturalization for various groups of immigrants, and the disparate application of temporary protections for refugees. The racial discrimination against Haitian refugees occurs through implementation of policies specifically targeting Haitians, neutral policies that leave too much discretion to immigration officials and allow the possibility of racially-based decisions, and preferential treatment for other nationality groups. Almost exactly one year after the devastating January 2010 earthquake in Haiti, the U.S. resumed deportations of Haitian men and women with criminal convictions, tearing them away from their families and forcing them to return to Haiti, despite the continuing humanitarian crisis and dire conditions in Haiti. How does the U.S. government justify the resumption of deportations of Haitians, in light of the humanitarian crisis and alarming human rights concerns? What balancing test does ICE use to determine whether a person should be deported to Haiti?

RESPONSE:

- **Following the tragic January 2010 earthquake in Haiti, which displaced over a million persons, the U.S. government immediately provided $1.3 billion in humanitarian relief assistance. As of September 30, 2013, the United States has committed $3.7 billion for Haiti's humanitarian relief and reconstruction, of which $2.9 billion has been provided as of February 2014.** Additional funds for long-term recovery and reconstruction efforts are being provided incrementally over several years. The United States provides broad-based assistance to Haiti for earthquake relief and recovery and long-term sustainable development. The overarching goal of U.S. assistance is to increase stability and prosperity in Haiti.

- With respect to Haitian nationals in the United States, immediately following the earthquake, the Department of Homeland Security (DHS) halted all removals to Haiti of Haitian nationals with final orders of removal. DHS also designated Haiti for temporary protected status, which protects from removal eligible Haitians who were present in the United States at that time, and has subsequently extended TPS to those who were in the United States on or before January 23, 2012. These protections continue, and approximately 58,000 Haitians have received TPS benefits under this designation which was last extended for 18 months by Secretary of Homeland Security Johnson from July 23, 2014 through January 22, 2016.

- With respect to Haitian nationals repatriated from the United States, the U.S. Government works with the Haitian Government to ensure that repatriations are conducted in the most humane manner possible, and has supported a socio-economic reintegration program for returnees. Returnees have been provided support --- if desired --- upon arrival in-

country; transportation to their home community or temporary accommodation; basic medical care and psycho-social counseling; basic language and skills training; employment referrals; and other support to facilitate reintegration.

IF ASKED:

- As a result of halting all removals to Haiti in the immediate aftermath of the earthquake, DHS's Immigration and Customs Enforcement (ICE) released certain detained Haitian nationals with criminal histories, as United States law general restricts its authority to hold aliens in custody more than 180 days after a final order of removal. Some of the Haitians detained had been convicted of serious crimes, and their release posed significant risks to public safety. As a result, on January 20, 2011, DHS ended its moratorium on removals and began removing a limited number of Haitians who were convicted of serious crimes.

- When prioritizing aliens for removal, ICE will conducts an individualized review prioritizing removals which balances adverse factors, such as the severity of an individual's offenses, the number of his or her convictions, and dates of his or her convictions, and against any equities of the Haitian national, such as his or her duration of residence in the United States, family ties, or significant medical issues. In certain cases, where there are compelling medical, humanitarian, or other relevant factors, supervised release or other alternatives to detention programs may be appropriate. ICE minimizes transferring Haitian nationals to remote facilities to the greatest degree possible, and, where possible, detains individuals in facilities close to family and representation, except to facilitate the actual removal process.

- In the course of an administrative removal proceeding before an immigration judge, each individual has the opportunity to contest removal from the United States, apply for asylum, and seek non-refoulement protection in accordance with Article 3 of the Convention Against Torture. If the immigration judge finds the individual removable and denies the relief sought, the alien may pursue reconsideration or appeal to the Board of Immigration Appeals. In either case, if unsatisfied with the final administrative outcome, the returnee may petition for review by the appropriate federal circuit court of appeals.

Source: This question is derived from a Shadow Report titled "Deportations from the United States to Haiti: A Violation of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)." This Shadow Report was authored by the University of Miami School of Law Human Rights Clinic, University of Miami School of Law Immigration Clinic, FANM/Haitian Women of Miami, Alternative Chance, and Americans for Immigrant Justice (formerly FIAC).

M. Terrorism

1. Non-citizens – possible CIDT through rendition, transfer, non-refoulement

M-1. QUESTION – NON-REFOULEMENT OBLIGATIONS**:** Please describe the U.S. government position on its *non-refoulement* obligations in the context of rendition, proxy detention, or other cases in which the U.S. extra-judicially facilitates a transfer or is involved in the interrogation of an individual held in the custody of a foreign government. (Issue 12)

RESPONSE:

- **The U.S. Government's is committed to its non-refoulement obligations with respect to torture as set out in Article 3 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.**

- Above and beyond our obligations under the CAT, as a matter of fundamental policy and practice, the United States does not transfer any individual in U.S. custody – regardless of whether in the U.S. or abroad – to a foreign country if it is more likely than not that the person would be tortured. This principle is woven thoroughly into U.S. policy and practice in multiple ways, such as in section 1242 of the Foreign Affairs Reform and Restructuring Act, and in Executive Order 13491, which required the formation of a special United States Government task force to study and evaluate the practices of transferring individuals to other nations in order to ensure consistency with all applicable laws and United States policies pertaining to treatment.

- If the United States determines, after taking into account all available information, that it is more likely than not that a person would be tortured if transferred to a foreign country, the United States would not approve the transfer of the person to that country.

- The United States considers the totality of relevant factors relating to the individual to be transferred and the government in question. Such factors include, but are not limited to, the individual's allegations of prior or potential mistreatment by the receiving government, the country's human rights record, whether post-transfer detention is contemplated, the specific factors suggesting that the individual in question is at risk of being tortured by officials in that country, and whether similarly situated individuals have been tortured by the country under consideration.

- The Special Task Force established in Executive Order 13491 issued a set of recommendations to ensure that U.S. transfer practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to face torture. The President accepted those recommendations and a public summary of them was provided.

IF NEEDED:

- The United States has implemented a number of the Task Force recommendations, such as ensuring State Department involvement in evaluating assurances in all cases. The implementation of several of the recommendations – such as the creation of the High Value Interrogation Group (HIG) – was announced publicly, and others have been or are in the process of being integrated into our practice.

- **If Pressed:** While I won't get into specifics about every recommendation, we are fully committed to the implementation of the Task Force recommendations.

SOURCES:

This was also addressed in the CERD Committee's 2008 Concluding Observations and Recommendations, paragraph 24:

> "The Committee notes with concern that the State party exposes non-citizens under its jurisdiction to the risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment by means of transfer, rendition, or refoulement to third countries where there are substantial reasons to believe that they will be subjected to such treatment (arts. 5 (a), 5 (b) and 6)."

From:	Wamsley, Cammilla
SentVia:	Wamsley, Cammilla </o=DHS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cammilla.wamsley(b)(6)
To:	"MCINERNEY, MICHAEL J. </o=DHS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=MICHAEL.J.MCINERNEY>"; "HUTTON, JAMES R </o=DHS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=JAMES.R.HUTTON>"
CC:	"/o=DHS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=PPAE"
Subject:	RE: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.
Date:	2014/07/24 17:11:00
Priority:	Normal
Type:	Note

Mike,

Thanks for getting back to me but, I am still unclear. Does the data include NTAs? Or is it only WDs and VRs?

The email attached gives a little more background.

For ease of reading:

20. The number of unaccompanied alien minors from contiguous and separately from non-contiguous countries apprehended trying to enter the U.S. illegally along our borders between ports of entry or at ports of entry who were removed in in fiscal years 2010, 2011, 2012, 2013 and for each month in fiscal year 2014 (to date), and;

As described above, the TVPRA specifies that if DHS is seeking removal of a UAC, then the UAC must generally be processed under INA §240, with limited exceptions for those who are citizens or habitual residents of a contiguous country. Therefore, CBP does not remove UAC from the U.S. Rather, those UAC who meet the requirements detailed in section 235 of the TVPRA are allowed to withdraw their application for admission and returned to their home country[DHS Plcy1] [SJG2] .

Thanks!

Cam Wamsley

(b)(6)

From: MCINERNEY, MICHAEL J.
Sent: Thursday, July 24, 2014 4:54 PM
To: Wamsley, Cammilla; HUTTON, JAMES R
Cc: PPAE
Subject: RE: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.

Cam and James,

We coordinated with Paul Minton and Rafael Henry and this represents what they told us to pull for #20. So if their direction was correct, the data represents #20.

Not trying to be a pain but PPAE wants to make sure that we provide what the SMEs in APP EPD say answers the question. I think the SMEs were very clear and it is an easy pull based on the direction so it should be correct and representative of the question asked.

V/R

Mac

From: Wamsley, Cammilla
Sent: Thursday, July 24, 2014 4:34 PM
To: HUTTON, JAMES R; MCINERNEY, MICHAEL J.
Cc: PPAE
Subject: RE: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.

So, does the spreadsheet answer question 20 or not?

Thanks!

Cam Wamsley

(b)(6)

From: HUTTON, JAMES R
Sent: Thursday, July 24, 2014 4:30 PM
To: MCINERNEY, MICHAEL J.
Cc: PPAE; Wamsley, Cammilla
Subject: Re: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.

Mac
I got the same from DHS that si trying to confirm that the Excel spreadsheet is meant to answer #20 for OFO as it was not labelled.

From: MCINERNEY, MICHAEL J.
Sent: Thursday, July 24, 2014 04:01 PM
To: HUTTON, JAMES R
Cc: PPAE
Subject: RE: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.

Please see attached…I replied to all, but they did not send to you originally.

V/R

Mac

From: HUTTON, JAMES R
Sent: Thursday, July 24, 2014 1:14 PM
To: MCINERNEY, MICHAEL J.
Subject: FW: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.
Importance: High

Mac

Can you please verify that the attached Excel relates to Question #20 as pertains to OFO.

J. Ryan Hutton

Director of Enforcement Programs

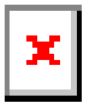
Admissibility and Passenger Programs

RRB #2.5B-36

Washington, DC

(b)(6)

✉:James.Hutton (b)(6)



From: Wamsley, Cammilla
Sent: Thursday, July 24, 2014 1:11 PM
To: HUTTON, JAMES R

Subject: FW: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.
Importance: High

Thanks!

Cam Wamsley

(b)(6)

From: Plcy Exec Sec
Sent: Wednesday, July 23, 2014 2:41 PM
To: PII Tasking; OIBS
Cc: Plcy Exec Sec; Johnson, Brandon (CTR); Dudley, Gwendolyn
Subject: FW: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.
Importance: High

PII/OIP- What is the status of this reconciliation? Main ES and PLCY FO is pinging to get these completed and out of PLCY's hands.

Thank you

V/r

Ericka Nixon

Correspondence Analyst/Management & Program Analyst

PLCY Executive Secretariat, Office of Policy

(b)(6)

From: Baynocky, Karee **On Behalf Of** Plcy Exec Sec
Sent: Monday, July 21, 2014 4:53 PM
To: PII Tasking
Cc: Plcy Exec Sec; Matthes, Justin; Dudley, Gwendolyn; Johnson, Brandon (CTR)
Subject: FW: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.
Importance: High

Please see CBP response below.

Thanks

Karee

Karee Baynocky

PLCY Executive Secretariat

Office of Policy

U.S. Department of Homeland Security

(b)(6)

From: STEWART, JOSEPH G. **On Behalf Of** CBPTASKING
Sent: Monday, July 21, 2014 10:07 AM
To: Plcy Exec Sec
Cc: CBPTASKING
Subject: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.
Importance: High

Please see CBP's response attached.

Joseph G. Stewart

Office of the Executive Secretariat

U.S. Customs and Border Protection

(b)(6)

From: Plcy Exec Sec
Sent: Thursday, July 17, 2014 3:43 PM
To: CBPTASKING
Cc: Plcy Exec Sec
Subject: FW: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.
Importance: High

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v/r

Mitch Hoskins

Correspondence Analyst

Office of Policy, Executive Secretariat

Department of Homeland Security

(b)(6)

From: Plcy Exec Sec
Sent: Friday, June 20, 2014 2:01 PM
To: USCIS Exec Sec; CBPTASKING; ICE Exec Sec
Cc: Plcy Exec Sec; PII Tasking; Dudley, Gwendolyn; Johnson, Brandon (CTR)
Subject: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.

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USCIS: 1-9

CBP: 10-19

ICE: 15-22

Mitch Hoskins

Correspondence Analyst

Office of Policy, Executive Secretariat

Department of Homeland Security

(b)(6)

[DHS Plcy1]CBP OFO please provide statistics on the number of UAC processed as WD or VR in the format below.

[SJG2]Please see attached chart

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Recipient:	"MCINERNEY, MICHAEL J. </o=DHS/ou=Exchange Administrative Group

	(FYDIBOHF23SPDLT)/cn=Recipients/cn=MICHAEL.J.MCINERNEY>"; "HUTTON, JAMES R </o=DHS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=JAMES.R.HUTTON>"; "/o=DHS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=PPAE"
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To:	"Wamsley, Cammilla </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Cammilla.wamsley.hq.dhs.gov4eb>"; "Desta, Fana </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Fana.desta>"
CC:	"/O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=PII Taskingc18"
Subject:	FW: WF 1023683 Sen. Robert Goodlatte (R-VA) Requests information regarding immigration visa petitions and unaccompanied alien minors entering the United States.
Date:	2014/07/22 13:12:12
Importance:	High
Priority:	Urgent
Type:	Note

Please see CBP response below

Brandon S. Johnson

Executive Assistant

Office for State and Local Law Enforcement

Office of Policy

Department of Homeland Security-Headquarters

NAC17 3-313-6

(b)(6)

Email: Brandon.johnson(b)(6)

From: Baynocky, Karee **On Behalf Of** Plcy Exec Sec
Sent: Monday, July 21, 2014 4:53 PM
To: PII Tasking

Cc: Plcy Exec Sec; Matthes, Justin; Dudley, Gwendolyn; Johnson, Brandon (CTR)
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Office of Policy

U.S. Department of Homeland Security

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Office of the Executive Secretariat

U.S. Customs and Border Protection

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CERD Q&A – DHS Responses

B. Racial Profiling

1. Immigration enforcement, including 287(g) and Secure Communities

B-1(1). QUESTION – DHS 287(g) PROGRAM**:** How does the U.S. government justify continuing and expanding the 287(g) program after the U.S. Department of Justice (DOJ) provided evidence of its failure to fulfill its goals and the prevalence of racial profiling? Given the ample documentation of human rights violations and the widespread criticism from both government and civil society sources, why haven't DHS 287(g) agreements been eliminated completely? How will DHS track potential violations related to racial profiling considering the failure of the recent statistical monitoring project? How is the DOJ investigating the FBI's racial mapping initiatives and those undertaken by state and local law enforcement agencies?

RESPONSE:

- **Racial profiling is the invidious use of race or ethnicity as a criterion in conducting stops, searches, and other law enforcement, investigation, or screening activities. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.**

- **DHS takes allegations of racial profiling by its employees or affiliates very seriously. In April 2013 – which was too recent to make it into our periodic report -- the Department issued a revised policy statement on nondiscrimination in law enforcement and screening activities, which continues the prohibition on unlawful racial or ethnic profiling while for the first time providing Department-wide policy with respect to the use of nationality in law enforcement and screening.**

- **The 287(g) program has been reconfigured to include only Jail Enforcement Model agreements that provide immigration enforcement resources for aliens who have already been arrested by state or local law enforcement for state-law crimes. The Task Force Model, where 287(g)-deputized officers participated in arrests, has been discontinued. There are currently thirty-seven (37) 287(g) Memoranda of Agreement, all of which only operate in a jail setting.**

- The 287(g) Delegation of Authority Program remains a robust national program with 37 Memoranda of Agreement (MOA) with partner law enforcement agencies (LEAs) in 18 states. These LEAs, working exclusively through the Jail Enforcement Model, have repeatedly proven to be highly effective in enforcing immigration laws consistent with ICE's priorities. In fiscal year 2013, 287(g)

Designated Immigration Officers (DIOs) recorded 37,228 encounters, and ICE removed 11,767 individuals that were identified through the 287(g) program, of which 10,424 (89 percent) were aliens convicted of a criminal offense.

- The government has multiple safeguards to prevent racial profiling in the 287(g) program, including through training, inspections, and investigations of complaints. E.g.,:
    - The ICE Office of Professional Responsibility (OPR) conducts a comprehensive inspection of the 287(g) program at least every two years, considers 287(g) programs' compliance with civil rights and civil liberties during inspections, and researches programs before inspections to determine whether there have been complaints against officers or about the program itself. All complaints against any officers or programs themselves are reviewed at the time of the complaint.
    - The DHS Office for Civil Rights and Civil Liberties (CRCL) investigates complaints related to the implementation of 287(g) programs, as they arise, and has participated in some of the program inspections.
    - The MOA between DHS and the LEA further outlines the purpose of the 287(g) program, the complaint process, and the clear prohibition against racial profiling.

IF PRESSED:

- The 287(g) Program cross-designates non-federal law enforcement officers as immigration officers to perform specific functions under the Immigration and Nationality Act (INA or Act), but only under U.S. Immigration and Customs Enforcement (ICE) supervision. The 287(g) Program is a voluntary program which now exclusively utilizes the Jail Enforcement Model to accomplish its mission. The 287(g) Jail Enforcement Model is designed to identify and process criminal and other priority aliens after their arrest for a criminal violation of state or local law, including those identified through ICE Secure Communities' use of IDENT/IAFIS interoperability.
- Even as we are starting to *discontinue* some of the 287(g) agreements in light of the nationwide activation of the Secure Communities program and reduction of 287(g) funding, the U.S. Immigration and Customs Enforcement (ICE) still considers the 287(g) Jail Enforcement Model program an important tool for enhancing community safety in some jurisdictions.
- The government has multiple safeguards to prevent racial profiling in the program. For example:

- Immigration enforcement authority is delegated only with DHS/ICE approval and only after the delegates' completion of extensive ICE-led training, including training on the U.S. Department of Justice "Guidance Regarding The Use Of Race By Federal Law Enforcement Agencies" dated June 2003 and Title VI of the Civil Rights Act of 1964, as amended, 42. U.S.C. 2000 et seq., which prohibits discrimination based upon race, color, or national origin (including limited English proficiency) in any program or activity receiving Federal financial assistance.
- The 287(g) Memoranda of Agreement are assessed regularly to determine whether they should be renewed.
- All delegated officers perform immigration enforcement functions under ICE supervision.
- The ICE Office of Professional Responsibility (OPR) conducts a comprehensive inspection of the 287(g) program at least every two years, considers 287(g) programs' compliance with civil rights and civil liberties during inspections, and researches programs before inspections to determine whether there have been complaints against officers or about the program itself. All complaints against any officers or programs themselves are reviewed at the time of the complaint.
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- The MOA between DHS and the LEA further outlines the purpose of the 287(g) program, the complaint process, and the clear prohibition against racial profiling.

SOURCES: This question is based on a question from the Rights Working Group, Rights Working Group. For prior U.S. treatment of this issue, see generally, paragraphs 11-16 of the July 3 written responses, http://www.state.gov/j/drl/rls/212393.htm. See also 4th Report, ¶¶ 107, 293-294, 482-484, 593-604 (racial profiling), http://www.state.gov/j/drl/rls/179781.htm; and ¶¶ 83-85 of CERD Report, http://www.state.gov/j/drl/rls/cerd_report/210605.htm.

BACKGROUND (DHS 287g Program):

In September 1996, Congress authorized the Executive Branch to delegate immigration enforcement authorities to state and local government agencies. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 amended the INA by adding section 287(g). Under this section, the Secretary of Homeland Security is authorized to enter into MOAs with state and local LEAs to delegate immigration

enforcement functions to designated law enforcement officers. The law requires that the MOAs describe the terms and conditions under which participating LEA personnel will function when enforcing immigration law.

Each 287(g) program undergoes a comprehensive inspection by the ICE Office of Professional Responsibility (OPR) at least every two years; OPR provides reports on these inspections to ICE and ICE Enforcement and Removal Operations (ERO) Headquarters for appropriate action. Included as part of the inspections process, OPR considers the 287(g) programs' compliance with civil rights and civil liberties protections, and researches the programs before inspection to determine whether complaints have been lodged against officers or the program itself. Such complaints or allegations assist OPR in focusing its inspections.

On December 21, 2012, ICE announced its decision not to renew 287(g) agreements under the Task Force Model Program with state and local law enforcement agencies. As a result, all 287(g) Task Force Programs expired and all impacted law enforcement agencies were notified that their Memorandum of Agreement would conclude on December 31, 2012. The decision impacted seventeen (17) stand-alone Task Force Programs and seven (7) Joint Model Programs in twelve (12) states. On January 4, 2013, Letters of Revocation were sent to all 115 affected Task Force Officers, also known as Designated Immigration Officers, revoking their authority to perform immigration law enforcement functions.

The DHS Office for Civil Rights and Civil Liberties (CRCL) investigates complaints related to the implementation of 287(g) programs, and CRCL has also participated in some OPR inspections of 287(g) programs and has made recommendations which, if implemented, could help enforce the protection of civil rights in 287(g) Jail Enforcement Models. ICE and CRCL are currently discussing these recommendations.

B-1(2). QUESTION – DHS SECURE COMMUNITIES PROGRAM: Given the plethora of information and data that supports Secure Communities as a mechanism for racial profiling, when will the U.S. Government abandon the policy and reexamine its detention and deportation methods? We understand that DHS has limited the Secure Communities Program in some jurisdictions found by the DOJ to have engaged in a pattern or practice of discriminatory profiling. We also understand that the program in these jurisdictions limits only the information shared with the state/local law enforcement program in a problematic jurisdiction creates an additional incentive to racially profile—because local law enforcement is aware that immigration status checks will be conducted and possible immigration actions taken. Why doesn't DHS fully terminate the Secure Communities Program in these jurisdictions?

RESPONSE:

- **Profiling in law enforcement operations is premised on the erroneous assumption that any particular individual possessing one or more irrelevant personal characteristics is more likely to engage in misconduct than another individual who does not possess those characteristics.**

- **DHS takes allegations of racial profiling by its employees or affiliates very seriously, and has taken a number of proactive steps to ensure that Secure Communities would not serve as a conduit for racial profiling.**

- Nonetheless, ICE recognizes that restricting local law enforcement's access to Secure Communities may be appropriate in jurisdictions found to have engaged in discriminatory enforcement practices.

    - DHS has taken several steps to ensure Secure Communities is not a conduit for racial profiling or otherwise abused:

        - In collaboration with the DHS Office for Civil Rights and Civil Liberties (CRCL), ICE updated its website, including the release of a Secure Communities complaint process, through which CRCL will be notified of any complaints filed with ICE regarding the program.

        - To prevent and address possible abuses of Secure Communities, ICE and CRCL developed briefing materials for state and local law enforcement personnel regarding civil rights and civil liberties issues.

        - ICE and CRCL have collaborated on monitoring techniques to ensure that Secure Communities does not provide a conduit for profiling or other improper law enforcement practices.

- ICE has revised the detainer form ICE submits to local jurisdictions to emphasize the longstanding guidance that state and local authorities are not to detain an individual for more than 48 hours. The form also requests local law enforcement to provide arrestees with a copy, which has a number to call if they believe their civil rights have been violated.

- In addition, former ICE Director Morton issued the June 17, 2011, memorandum entitled *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*. This memorandum provides policy guidance to ICE officers, special agents, and attorneys to exercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice.

- ICE will continue to work with the Department of Justice, including its Civil Rights Division to enhance measures that will minimize abuse of Secure Communities.

SOURCES: This question is based on questions from the Junta for Progressive Action, the Right Working Group, and the ACLU. See Junta for Progressive Action and Federal Anti-Immigrant Policy and Its Correlation to Racial Profiling within Law Enforcement in Context of the International Covenant on Civil and Political Rights; Rights Working Group; ACLU National Submission, pp. 6-10, Suggested List of Issues to Country Report Task Force on the United States. See also Amnesty International, Submission to the UN Human Rights Committee.

BACKGROUND:

Secure Communities satisfies a congressional mandate for ICE to improve and modernize its efforts to identify and remove criminal aliens from the United States, including prioritizing the removal of criminal aliens convicted of violent crimes.

Secure Communities utilizes an existing federal biometric information-sharing partnership between ICE and the Federal Bureau of Investigation (FBI)), mandated by Congress, to identify criminal aliens arrested or booked into custody and fingerprinted by a law enforcement agency. The FBI automatically sends these fingerprints to DHS to check against its databases. If these checks reveal that an individual is unlawfully present in the United States or otherwise removable due to a criminal conviction, ICE takes enforcement action in accordance with its civil enforcement priorities.

Secure Communities enables ICE to identify criminal aliens who may be subject to removal early in the criminal justice process, and initiate appropriate immigration enforcement action, including removal proceedings, while they are still serving their sentences.

Secure Communities imposes no new or additional requirements on state and local law enforcement, nor does it authorize state and local law enforcement officers to enforce federal immigration law. Only federal officers (or duly authorized officers delegated under the 287(g) program) make immigration enforcement decisions and only after state and local law

enforcement officers have made an independent decision, based on probable cause, to arrest an individual for a criminal violation of state or local law, separate and apart from any violations of immigration law.

Since its inception in 2008 with 14 jurisdictions, Secure Communities has expanded to all 3,181 jurisdictions within 50 states, the District of Columbia, and five (5) U.S. Territories. Full implementation was completed on January 22, 2013.

Secure Communities does not provide immigration enforcement authority to state and local law enforcement officers. They are not deputized to enforce federal immigration laws and are not tasked with any additional responsibilities. They are asked to enforce their state and local laws in the same manner they did prior to activation of information sharing procedures in their jurisdictions.

When state and local law enforcement agencies arrest or book someone into custody for a criminal offense, they generally fingerprint the person and send the fingerprints to the FBI's biometric system to see whether the subject has a criminal record. Under Secure Communities, the FBI automatically sends these fingerprints to DHS' biometric system to check against its immigration and enforcement records so that ICE can determine whether that person is also removable.

B-1(3). QUESTION – PROFILING IN DHS IMMIGRATION ENFORCEMENT**:** In June 2011, ICE director John Morton issued two memoranda to ICE personnel on the use of discretion in immigration enforcement (the "Morton memoranda"). They direct ICE attorneys and employees to refrain from pursuing individuals with strong ties to the United States, and those "involved in non-frivolous efforts related to the protection of their civil rights and liberties." Instead, ICE officials are to focus their efforts on persons who pose a serious threat to national security and public safety, and individuals with an "egregious record of immigration violations." Please provide an update on the effect of these memoranda on U.S. immigration enforcement policy. How does the U.S. ensure uniform compliance with these directives by personnel in ICE's regional and local offices? What kinds of training and oversight mechanisms are in place to ensure that ICE personnel properly exercise discretion under the Morton memoranda? What channels of redress are available when they do not?

RESPONSE:

- **ICE is focused on smart, effective immigration enforcement that prioritizes the agency's resources to promote border security and to identify and remove criminal aliens who pose a threat to public safety and national security.**

- **U.S. immigration enforcement policy allows certain ICE personnel prosecutorial discretion in making enforcement decisions. This policy is carried out through training, periodic supplemental guidance, and ongoing oversight by supervisors and senior officials.**

- **Prosecutorial discretion can take a number of forms and can be exercised at multiple points in the enforcement process, from a determination whether to charge an alien with a Notice to Appear through the ultimate determination whether to remove an alien with a final order.**

- **In addition to a case-by-case review beginning in 2011, each month, ICE attorneys review thousands of cases added to the immigration courts' dockets for appropriate potential exercises of prosecutorial discretion.**

- ICE ERO has issued field guidance on how to properly document the exercise of prosecutorial discretion in ERO's case management system. These methods allow ERO officials and other DHS stakeholders to identify cases in which prosecutorial discretion has been favorably exercised.

- **DHS and ICE take allegations of invidious racial profiling and civil rights and civil liberties violations very seriously.** Formal allegations lodged with ICE may be referred to ICE the DHS Office for Civil Rights and Civil Liberties (CRCL), which is responsible for guarding against civil rights violations in DHS programs, or to the joint intake center, for allegations involving employee misconduct.

SOURCES: This question is based on a question from the New Orleans Workers' Center for Racial Justice and Coalition, see Migrant Workers in the South Expose How U.S. Immigration Enforcement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights.

BACKGROUND (Profiling in DHS Immigration Practice):

In addition, ICE maintains a Community and Detainee Hotline, a toll-free service that provides a direct channel for agency stakeholders to communicate directly with ERO to answer questions and resolve concerns, including those of racial profiling. *See* http://www.ice.gov/about/offices/enforcement-removal-operations/ero-outreach/cmnty-helpline.htm.

The CRCL complaints investigation process is explained in greater detail online at http://www.dhs.gov/file-civil-rights-complaint. The CRCL complaint form is available in English, Spanish, and seven other languages.

"Islamophobic" language in appropriations bills

B-1(4). QUESTION—APPROPRIATIONS BILL LANGUAGE. Why does the Homeland Security Act and related appropriations bills use Islamophobic language, such as "counter homegrown violent Islamist Extremism" or "Islamist Terrorism"? When will this be removed?

RESPONSE:

- **The United States traces its deep commitment to religious freedom and protection of religious practice to the origin of the nation. We do not use religious exercise or religious affiliation to profile.**
- **The government acts to counter any violent extremist threat, regardless of motivation or claimed ideology.**
- The shadow report cited *unenacted* language from *proposed* legislation. The government does have any statutory mandate to, and does not, single out violent extremists by their religious affiliation.

BACKGROUND:
The shadow report noted language from two unenacted DHS reauthorization bills from the 112th Congress, S.1546 and H.R.3116.

SOURCE: Meikeljohn Civil Liberties Institute shadow report, June 30, 2014, raised this issue.

2. NSEERS

B-2. QUESTION – NSEERS: "The Committee notes with concern that despite the measures adopted at the federal and state levels to combat racial profiling, including the elaboration by the Civil Rights Division of the U.S. Department of Justice of the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, such practice continues to be widespread. In particular, the Committee is deeply concerned about the increase in racial profiling against Arabs, Muslims and South Asians in the wake of the 11 September 2001 attack, as well as about the development of the National Entry and Exit Registration System (NEERS) for nationals of 25 countries, all located in the Middle East, South Asia or North Africa (arts. 2 and 5 (b)). What is the U.S. government doing to ensure that non-citizens are not being discriminated against and that the NSEERS program will not continue to discriminate against Arabs, Muslims, and South Asians?

RESPONSE:

- **On April 27, 2011, the Department of Homeland Security (DHS) announced the end of the National Security Entry-Exit Registration System (NSEERS) registration process—a critical step forward in the Department's ongoing efforts to eliminate redundancies; streamline the collection of data for individuals entering or exiting the United States, regardless of nationality; and enhance the capabilities of our security personnel.** NSEERS itself was eliminated because the information the program sought to collect was available by other means.

- The public was apprised of the discontinuation of NSEERS through general and targeted outreach that all individuals previously required to register under NSEERS were no longer covered.

- **DHS takes allegations of racial profiling by its employees or in its programs very seriously. In April 2013, the Department issued a revised policy statement on nondiscrimination in law enforcement and screening activities, which continues the prohibition on unlawful racial or ethnic profiling while also presenting the Department's policy with respect to the limited permissible use of nationality in law enforcement and screening.**

- In 2012, DHS prepared further internal policy regarding aliens previously subject to registration. On April 16, 2012, DHS issued guidance to the effect that an alien's violation of the previous requirement to register for NSEERS would not have binding immigration consequences unless it could be determined, by the totality of the evidence, that an alien's NSEERS violation was willful. The

Department continues to work through the small number of cases where failures to register under NSEERS while it was in place arise.

IF PRESSED

- The NSEERS regulation continues to be in place should the program need to be revived in the future.

- In 2012, the Department prepared further internal policy regarding aliens previously subject to registration.

SOURCES:

This was also addressed in the CERD Committee's 2008 Concluding Observations and Recommendations, paragraph 14:

"The Committee notes with concern that despite the measures adopted at the federal and state levels to combat racial profiling, including the elaboration by the Civil Rights Division of the U.S. Department of Justice of the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,– such practice continues to be widespread. In particular, the Committee is deeply concerned about the increase in racial profiling against Arabs, Muslims and South Asians in the wake of the 11 September 2001 attack, as well as about the development of the National Entry and Exit Registration System (NEERS) for nationals of 25 countries, all located in the Middle East, South Asia or North Africa (arts. 2 and 5 (b)).

Bearing in mind its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party strengthen its efforts to combat racial profiling at the federal and state levels, inter alia, by moving expeditiously towards the adoption of the End Racial Profiling Act, or similar federal legislation. The Committee also draws the attention of the State party to its general recommendation No. 30 (2004) on discrimination against non-citizens, according to which measures taken in the fight against terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin, and urges the State party, in accordance with article 2, paragraph 1 (c), of the Convention, to put an end to the National Entry and Exit Registration System (NEERS) and to eliminate other forms of racial profiling against Arabs, Muslims and South Asians."

Background

NSEERS was implemented pursuant to DHS' authority to register aliens under INA sections 262(a) and 263(a), 8 U.S.C. §§ 1302(a) and 1303(a). NSEERS was intended to provide the Federal Government with records of the arrival to, presence in, and departure from the United States of certain nonimmigrant aliens. Aliens required to register included those non-immigrants: (i) who, in accordance with the requirements outlined in 8 C.F.R. § 264.1(£), were designated by Federal Register notice, and (ii) whose presence in the United States required monitoring in the national security or law enforcement interests of the United States. Aliens subject to NSEERS were required to be registered, photographed, and fingerprinted, provide specific information at regular intervals to ensure compliance with visa and admission requirements, and verify their departure from the United States through designated ports of entry. However, on April28, 2011, DHS announced in a Federal Register notice its removal of the list of countries whose nationals have been subject to NSEERS registration and reporting requirements. Following this notice, DHS suspended **all** special registration and reporting requirements associated with the NSEERS program and the suspension applies to all aliens previously subject to NSEERS requirements, whether or not the alien was a national of one of the previously designated countries and regardless of the underlying basis for the alien's inclusion in the NSEERS program.

3. Complaints to DHS on Profiling on Religious Grounds

B-3 . QUESTION – COMPLAINTS TO DHS ON PROFILING ON RELIGIOUS GROUNDS**:** Does the DHS Office for Civil Rights and Civil Liberties (CRCL) entertain complaints alleging profiling and other forms of discrimination based on religion or religious appearance, as well as on race, ethnicity, and national origin? Can you provide any statistics on the number of profiling complaints received and their disposition?

RESPONSE:

- **DHS takes allegations of racial profiling by its employees or affiliates very seriously. We learn of these and other concerns through our public complaints process, as well as ongoing, proactive community engagement, to solicit community concerns from community leaders, grass-roots organizations, national nongovernmental organizations, and other elements of our country's robust civil society.**

- The DHS Office for Civil Rights and Civil Liberties (CRCL) investigates complaints alleging profiling and/or discrimination based on religion, race, ethnicity, sexual orientation, heath status, and national origin. This includes complaints alleging discrimination based on religion and/or religious appearance as mentioned in the question. Between August 1, 2003, and January 30, 2014, CRCL received 362 complaints alleging profiling and/or discrimination. Of these, 332 have been closed and 30 remain open. While exact numbers are not available, the allegations were unfounded in a substantial majority of the closed complaints.

- The Office for Civil Rights and Civil Liberties opened 10 discrimination/profiling complaints in FY 2011, eight complaints in FY 2012, and 18 in FY 2013. It closed 60 discrimination/profiling complaints in FY 2011, six in FY 2012, and 15 in FY 2013.

- As of the close of FY 2013, the Office had made policy recommendations in 37 discrimination and/or profiling complaints. Of these, three dealt with discrimination based on religion.

SOURCES: For prior treatment of this issue, see July 3 written responses, paragraph 14, http://www.state.gov/j/drl/rls/212393.htm.

4. Disposition of DHS Racial Profiling Investigations

B-4. QUESTION – DISPOSITION OF DHS RACIAL PROFILING INVESTIGATIONS**:** What criteria does CRCL employ in deciding which racial profiling complaints warrant investigation? Of the two racial profiling investigations since October 2011 that CRCL completed with recommendations to the component or office involved, please elaborate on the remedial measures taken and whether any resulted in disciplinary or criminal action against DHS personnel? Why are 40 of the 42 complaints received still pending or closed without recommendations? Of these, how many remain pending today and what is the nature of the allegations?

RESPONSE:

- **DHS takes allegations of racial profiling by its employees or affiliates very seriously. In April 2013, the Department issued a revised policy statement on nondiscrimination in law enforcement and screening, which continues the prohibition on unlawful racial or ethnic profiling while also presenting the Department's policy with respect to the limited permissible use of nationality in law enforcement and screening.**

- **The DHS Office for Civil Rights and Civil Liberties reviews and processes complaints of civil rights, civil liberties, or human rights violations related to a DHS program or activity, including discrimination, violation of rights in immigration detention or enforcement, discriminatory or inappropriate questioning, and violations of due process.**

- Upon receipt of a complaint, the Office of Civil Rights and Civil Liberties carefully reviews the individual facts and circumstances surrounding each allegation. Among the factors considered are the severity of the alleged violation, the alleged violation's connection to the Department, and the impact of any potential recommendations on Department policy and procedure. However, there is no *one* factor by which all complaints are measured.

- When reviewing a complaint, the Office determines whether the allegation describes an action that relies on, or is influenced by, the race, ethnicity, or national origin of the individual rather than his or her behavior. If discrimination or profiling may have occurred, further investigation is generally conducted.

- Of the 42 complaints CRCL received between October 2011 and May 2013 that alleged profiling, only one has been closed with recommendations, *not two as previously reported*. That complaint alleged racial profiling in the Secure Communities program. After determining that the allegations were unfounded, CRCL recommended to ICE that it facilitate CRCL's ongoing access to local law enforcement to ensure that it can properly investigate claims of discrimination and

racial profiling. ICE and CRCL agreed (informally) to work together to secure access to local law enforcement on a case-by-case basis going forward, but no case has since arisen where that cooperation has been needed. The second complaint that CRCL referenced earlier has been placed on hold pending ongoing litigation on the matter. Once the litigation is resolved, CRCL will reassess its recommendations in light of the court's decision.

- **Disposition of the 42 cases:**

  - Thirty-six of the 42 complaints have been closed as of June 10, 2014. One was closed with recommendations to the component, and six are under active investigation.
  - Six of the 42 complaints are still open. In these six complaints, four allege discrimination based on ethnicity, one alleges discrimination based on race, and one alleges discrimination based on gender.

BACKGROUND (Disposition of DHS Racial Profiling Investigations):

CRCL begins its investigative process by referring the complaint to the DHS Office of the Inspector General (OIG). The OIG then determines whether or not it will investigate the complaint. If OIG declines to investigate, the complaint is returned to CRCL for appropriate action, at which point CRCL determines whether the complaint should be retained for CRCL's own investigation or referred to the relevant DHS component(s) or office(s) for fact-finding investigation. In all complaint investigations, CRCL also notifies the complainant or their representative of the results. If a complaint is referred to a component, CRCL provides the relevant component with guidance on questions and issues to address during their factual investigation, and the component issues a Report of Investigation (ROI) to CRCL at the completion of factual investigation. CRCL then reviews the ROI for sufficiency and may perform follow-up investigation if needed.

If a complaint is retained, CRCL conducts its own fact-finding. Retained complaints may also be opened as "short form" complaints. "Short-form" complaint processing procedures facilitate swift action on urgent complaints and expeditious resolution of allegations that are narrowly focused and require limited investigation. The short-form process makes it easier to open and close complaints; cases that prove to require additional work are often converted to retained investigations. When the investigation is complete, if issues are found, CRCL issues its conclusions to senior leadership of the relevant component(s) alongside any appropriate recommendations, including recommendations for improving policy, practice, or training. If recommendations are made, CRCL asks the relevant DHS components to formally concur or non-concur with the

recommendations, and to provide action plans for implementing accepted recommendations, or the basis for non-concurrence if a recommendation is not accepted. CRCL does not have the authority to levy disciplinary action or criminal charges against DHS personnel.

When logging in complaints, every issue within CRCL's jurisdiction is typically entered, at minimum, into the CRCL Compliance database's information layer. Thus, should a matter not rise to the level of a complaint, but may be helpful for later trend analysis, it can be entered into the "info layer" to ensure it is used as a data point for future reviews. This "info layer" is routinely reviewed for patterns, statistical information, and issues that may be ripe for later investigation depending on future information.

5. Bias in Screening Airline Passengers

B-5. QUESTION – BIAS IN SCREENING AIRLINE PASSENGERS**:** There have been allegations of profiling by Transportation Security Administration (TSA) officials at airports in the United States. What is DHS doing to mitigate this practice in screening passengers?

RESPONSE:

- **DHS does not tolerate unlawful profiling. This commitment was renewed in April 2013 with the issuance of a revised departmental policy statement, The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities, strengthening and superseding prior policy.**

- **TSA's behavioral detection programs utilize observable behavior, not nationality, race, color, ethnicity, or religious affiliation, to identify potential security concerns.**

- The TSA Screening of Passengers by Observation Techniques program relies on behavior, document review, and statement analysis to determine risk. Behavior Detection Officers are trained to screen passengers for involuntary physical and physiological reactions exhibited in response to a fear of discovery. Allegations of deviations from the program's Standard Operating Procedures are investigated, and appropriate action is taken whenever necessary.

- In response to allegations of unlawful profiling, in 2012 TSA worked with the Office for Civil Rights and Civil Liberties to develop expanded initial and refresher anti-profiling training for TSA Behavior Detection Officers, reflecting the Department's latest policy.

SOURCES: This question is based on NGO concerns frequently expressed to CRCL.

BACKGROUND (Bias in Screening Airline Passengers):

The DHS Office for Civil Rights and Civil Liberties (CRCL) conducted a Civil Liberties Impact Assessment (CLIA) on the SPOT program in 2009, and found that TSA management directives, standard operating procedures, and Employee Responsibilities and Conduct Directive provide sufficient guidance and direction to avoid the abuse of official discretion, particularly personal bias in the conduct of official duties. The CLIA also found that TSA embeds constitutional law, civil rights, and civil liberties training in the Transportation Security Officer (TSO) basic training and the advanced SPOT training.

Zero Tolerance for Unlawful Profiling

Racial profiling is not part of the TSA's BDA program and is not tolerated by TSA. Not only is racial profiling generally prohibited by Federal law and under Department and agency policy, but it is also an ineffective security tactic. TSA has zero tolerance for this kind of behavior and has taken several steps to reinforce the agency's nondiscrimination and anti-profiling policies with our workforce.

The Standard Operating Procedures (SOPs) and training for TSA's BDA program, in coordination with the DHS Office of Civil Rights and Liberties (CRCL), provide clear instructions to ensure that referrals for additional screening are made based on specific observed behavioral criteria without regard to nationality, race, color, ethnicity, or religious affiliation. BDOs are required to complete a report documenting specific behaviors observed for each passenger identified for additional action. BDA program analysts audit these reports regularly to ensure that BDOs are employing techniques properly, including protecting any privacy information that results from a law enforcement referral.

Additionally, BDOs are trained specifically in preventing race, ethnicity, or religious profiling, and in 2012, TSA reviewed and revised all training documents to underscore that unlawful profiling violates agency policy and anti-discrimination laws. BDOs are instructed to immediately notify management if they believe profiling has occurred. That instruction is reinforced during recurring training, shift briefs, employee counseling sessions, and other avenues. All BDOs and BDO training managers are required to take a pledge against unlawful profiling, and all TSA employees are required to take biannual DHS Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 (No FEAR Act) training that provides information to employees regarding rights and protections available under Federal antidiscrimination, whistleblower protection and retaliation laws.

TSA expects every member of the workforce, including BDOs, to report allegations of profiling to local management or directly to the TSA Office of Civil Rights and Liberties, Ombudsman and Traveler Engagement (CRL/OTE) or Office of Inspection (OOI) without fear of retaliation. TSA also modified its complaint reporting procedures to make it easier for travelers to report allegations of racial profiling through TSA's website or mobile phone app. If allegations do arise, TSA takes immediate steps to investigate the issue.

E. Violence (against women, police brutality, guns)

1. **Allegations of excessive use of force at border**

E-1. QUESTION – BORDERS – EXCESSIVE USE OF FORCE**:** What training and protocols are in place to govern the use of force at the border? What is being done to ensure accountability and remedies for the families of victims?

RESPONSE:

- **DHS enforces strict standards of conduct that apply to all of its employees, whether they are on- or off-duty, investigates deaths resulting from use of force, and follows up on civil rights and civil liberties-related complaints.**

- **Customs and Border Protection (CBP) continues to review, evaluate, and update its existing use of force policies after three comprehensive reviews of its use of force policies and practices. On May 30, 2014, CBP released its completely updated use of force handbook and an earlier Police Executive Research Forum (PERF) report on use of force in CBP, on its public website.**

  These policies and directives, following coordination between U.S. Customs and Border Protection and the DHS Office for Civil Rights and Civil Liberties on use of force issues, are consistent with many of the views expressed in the PERF report and other reviews noted in the civil society reports.

- Changes in the revised Handbook include, among other things, requiring additional training in the use of safe tactics, instituting the requirement to carry less-lethal devices and enhanced guidance on responding to thrown or launched projectiles (such as rocks).

  Further, CBP has also created the CBP Use of Force Reporting (UFRS) which electronically tracks all less-lethal and lethal uses of force by agents and officers. CBP supervisors are required to review the involved officer's/agent's report and submit/approve the report in the system. For uses of less-lethal force, local CBP management is required to conduct a monthly review of all incidents involving less-lethal force from the preceding month to determine:

  i. whether there is any indication of criminal misconduct by any CBP employee;

  ii. whether the actions of each CBP employee involved in the incident were appropriate and in accordance with CBP policies (e.g. whether each application of force was both reasonable and necessary);

iii. whether there are any factors that should be referred to IA and/or the CBP Office of Chief Counsel concerning potential litigation; and,

iv. whether corrective action is required.

Additionally, the CBP Use of Force Center for Excellence (UFCE) Incident Review Committee reviews all uses of deadly force by a CBP employee against a person and has authority to review any incident in which use of force is employed. The primary role of the Committee is to allow qualified experts an opportunity to perform an internal analysis of these incidents from a perspective of training, tactics, policy and equipment. This Committee will submit quarterly reports outlining findings and recommendations, as appropriate, to the CBP Commissioner.

- Taken together, these policies and directives make clear that under existing policy agents should, whenever possible, avoid placing themselves in circumstances where deadly force will be required, and to avoid discharging firearms as a result of thrown rocks unless the projectiles pose an imminent danger of death or serious injury.

- The DHS Office for Civil Rights and Civil Liberties (CRCL) receives notification of all non-employee deaths that occur in CBP custody as well as deaths involving use of force by law enforcement officials. Upon notification of a death, the Office for Civil Rights and Civil Liberties requests relevant records and information from the component agency, which is then reviewed to determine whether a more detailed investigation is warranted. If so, an investigation is conducted. As with all complaint investigations, if issues of concern are found, recommendations are made directly to CBP leadership.

- Accountability and remedies are addressed through the DHS Office of Inspector General (OIG), which receives information about all allegations of misconduct, including excessive use of force, involving DHS employees, contractors, and programs. Inspector General investigations may result in criminal prosecutions, fines, civil monetary penalties, administrative sanctions, and personnel actions. The Inspector General also maintains a 24-hour complaint hotline for this purpose.

IF ASKED:

- If the OIG declines to investigate, the ICE Office of Professional Responsibility, CBP's Office of Internal Affairs (CBPIA), or CBPIA special agents, fact-finders, or management may investigate.

IF ASKED ABOUT CIVIL LIABILITY FOR CROSS-BORDER USES OF FORCE:

- We are aware of the U.S. Court of Appeals for the Fifth Circuit's June 30, 2014 decision in *Hernandez v. United States*. The Federal Government is reviewing the decision. Because the matter is subject to ongoing litigation, however, we cannot comment further.

SOURCES: This question is based on submissions from the ACLU and the Rights Working Group. See ACLU National Submission, pp. 10-14 (re: killings on the U.S..-Mexico border).

This was also addressed in the CERD Committee's 2008 Concluding Observations and Recommendations, paragraph 25:

"While recognizing the efforts made by the State party to combat the pervasive phenomenon of police brutality, the Committee remains concerned about allegations of brutality and use of excessive or deadly force by law enforcement officials against persons belonging to racial, ethnic or national minorities, in particular Latino and African American persons and undocumented migrants crossing the U.S.-Mexico border. The Committee also notes with concern that despite the efforts made by the State party to prosecute law enforcement officials for criminal misconduct, impunity of police officers responsible for abuses allegedly remains a widespread problem (arts. 5 (b) and 6).

The Committee recommends that the State party increase significantly its efforts to eliminate police brutality and excessive use of force against persons belonging to racial, ethnic or national minorities, as well as undocumented migrants crossing the U.S.-Mexico border, inter alia, by establishing adequate systems for monitoring police abuses and developing further training opportunities for law enforcement officials. The Committee further requests the State party to ensure that reports of police brutality and excessive use of force are independently, promptly and thoroughly investigated and that perpetrators are prosecuted and appropriately punished."

BACKGROUND (Borders – Excessive Use of Force):

ACLU Report: Of particular concern to ACLU in its 2012 report is the lack of transparent investigations and prosecutions in most Border Patrol killings along the U.S.-Mexico border, citing the Sergio Hernandez-Guereca's case as the only case in which a federal investigation has been concluded. It also refers to difficulty for families of victims to seek redress or a sense of justice, referring to the need for the family of Carlos

LaMadrid to get "a court order to force the federal government to reveal the name of the agent who shot him so they could serve him with legal papers."

ACLU refers to apparent recognition in pending immigration reform legislation and of the need to review and reform CBP training protocol in consultation with the Department of Justice's Civil Rights Division, with an additional emphasis to improve reporting and review use-of-force incidents.

It also refers positively to two administrative investigations and reviews, including the DHS Office of Inspector General's pending review of CBP's Use of Force and an additional review initiated by CBP with the help of an "independent outside research center."

Through the Committee's examination, the ACLU states that it hopes the U.S. government, particularly DHS, "sees an opportunity for increased transparency with civil society both to address broadly steps the agency is taking to improve use-of-force policy and practice within the ranks of CBP, and more narrowly to address steps taken in the handling of individual investigations to provide effective remedy to victims and family members as mandated by US ICCPR obligations."

The **new directive**: http://www.cbp.gov/linkhandler/cgov/border_security/bs/uof14.ctt/uof14.pdf

Press release on use of force policies: http://www.dhs.gov/news/2014/03/07/dhs-cbp-ice-release-use-force-policies

FURTHER INFORMATION ON SPECIFIC CBP PROJECTS:

- *Border Patrol Agent Basic Training.* In January 2014, basic training for Border Patrol Agents was extended by six days to include an enhanced use of force scenario-based training experience, emphasizing de-escalation techniques, while maintaining border security and agent safety. Border Fence training venues have been constructed and incorporated into the basic training.

- *Comprehensive Use of Force Law & Policy Training.* CBP has developed comprehensive Use of Force Law & Policy Training to provide officers, agents, and managers further understanding of legal requirements and CBP policy on use of force. All CBP agents and officers will complete the training by June 30, 2014.

- *Establishment of the CBP Center for Use of Force.* On March 9, 2014, CBP stood up the CBP Center for Use of Force at the CBP Advanced Training Center in Harpers Ferry, WV. This center will provide a comprehensive and fully operational Use of Force program that conducts training standardization audits, incident reviews, data analysis, policy development, instructional delivery, and weapon accountability and procurement.
  Testing of New Less Lethal Devices. In January 2014, CBP began testing and evaluation of the 40MM Less Lethal Specialty Impact/Chemical Munition device and the NightHawk Controlled Tire Deflation Device. These systems will allow agents to engage subjects from

greater distances; reducing the likelihood of a lethal force encounter during some enforcement situations. Test results will inform decisions regarding further expansion of these devices.

- *Virtual Training Simulators*. CBP has tested, purchased, and installed a virtual UoF training simulator system. This system provides officers and agents a realistic and familiar environment for honing and demonstrating necessary judgment, tactics, and skillsets involved in everyday operations.

F. Housing

1. Addressing shortcomings of Katrina response, including housing

F-1. QUESTION: The Committee, while noting the efforts undertaken by the State party and civil society organizations to assist the persons displaced by Hurricane Katrina of 2005, remains concerned about the disparate impact that this natural disaster continues to have on low-income African American residents, many of whom continue to be displaced after more than two years after the hurricane (art. 5 (e) (iii)). What has the U.S. government done to ensure that there is adequate housing for everyone, including low-income residents, after natural disasters such as Hurricane Katrina?

Response:

- The Federal Emergency Management Agency (FEMA) within the Department of Homeland Security is tasked with the job of coordinating the federal government's role in preparing for, preventing, mitigating the effects of, responding to, and recovering from all domestic disasters, whether natural or man-made, including acts of terror.

- FEMA is one part of a large team that is working together to support the state in meeting the housing needs of disaster survivors. This joint effort is comprised of housing and technical experts from the state, Housing and Urban Development (HUD), FEMA, the U.S. Army Corps of Engineers (USACE), Small Business Administration (SBA), and voluntary agencies.

- In the aftermath of Hurricane Katrina 9 years ago, Congress enacted the *Post-Katrina Reform Act*, which directed FEMA to develop an overall strategy for disaster housing. This law also created a National Advisory Council to advise FEMA on all aspects of emergency management. This law also further FEMA to fund case management services for disaster survivors and also gave FEMA's Individuals and Households Program more flexibility to meet housing needs. FEMA now also has the authority to create a pilot rental repair program to explore ways to provide timely and cost-effective repairs to rental units.

- FEMA has made strides in a number of areas since hurricanes Katrina and Rita struck the Golf Coast. In the aftermath of Hurricane Sandy in October 2012, FEMA provided a Housing Portal through which eligible individuals and families who have been displaced by hurricanes can search for available rental units in their area that were provided by Federal agencies, such as HUD, the U.S. Department of Agriculture, U.S. Veterans Administration, IRS, as well as by private organizations and individuals. Shortly after the disaster, FEMA also approved $700 million in

housing assistance for individuals and families. The assistance could include money for rental assistance, essential home repairs, personal property losses and other serious disaster-related needs not covered by insurance. A year after Sandy, more than $1.4 billion in Individual Assistance had been provided to more than 182,000 survivors and an additional $2.4 billion in low-interest disaster loans had been approved by the U.S. Small Business Administration. FEMA also approved more than $3.2 billion to fund emergency work, debris removal, and repair and replacement of infrastructure.

- FEMA increased the amount of rental assistance that it provided to eligible disaster survivors in New York and New Jersey. The rental amount was based on existing HUD Fair Market Rates for fiscal year 2013. These FMR rates were low enough so that as many units as possible could be rented and provided to low-income families.

- FEMA's response to Hurricane Ike in 2008 was well organized and effective and FEMA and its federal and state partners implemented their incident objectives aggressively. By the end of October 2008, only 7 weeks after landfall, FEMA had registered more than 715,000 hurricane victims, completed 359,000 housing inspections, installed manufactured housing for 339 families, and disbursed $326 million for housing and other needs. FEMA also assisted more than 100,000 disaster victims at its Disaster Recovery Centers. FEMA's response to Hurricane Ike demonstrates that it is far better prepared for the next housing disaster.

- When requested by FEMA, the Department of Housing and Urban Development (HUD) may administer a Disaster Housing Assistance Program to provide housing vouchers to disaster displacees.

Source: COR 2008, 31

"The Committee, while noting the efforts undertaken by the State party and civil society organizations to assist the persons displaced by Hurricane Katrina of 2005, remains concerned about the disparate impact that this natural disaster continues to have on low-income African American residents, many of whom continue to be displaced after more than two years after the hurricane (art. 5 (e) (iii)).

The Committee recommends that the State party increase its efforts in order to facilitate the return of persons displaced by Hurricane Katrina to their homes, if feasible, or to guarantee access to adequate and affordable housing, where possible in their place of habitual residence. In particular, the Committee calls upon the State party to ensure that every effort is made to ensure genuine consultation and participation of persons displaced by Hurricane Katrina in the design and implementation of all decisions affecting them."

J. Indigenous Issues

1. Border Wall and its impact on tribes, including the non-recognized Lipan Apache (Ndé)

J-1. QUESTION: The construction of a Border Wall along the Texas-Mexico border restricts access to the Lipan Apache's traditional indigenous lands, resources, and sacred places and the tribe (which is not federally-recognized) was not consulted with prior to the construction of the wall and members of the Lipan Apache Band of Texas did not receive compensation for the value of sacred lands seized by the U.S. government. What is the U.S. government doing to ensure that the construction of a border wall is not encroaching on the rights of indigenous tribes, including the non-recognized Lipan Apache (Ndé)?

Response:

- **The United States recognizes the unique issues presented for tribes and other groups whose communities span the border. We have a strong record of finding appropriate solutions to these concerns that accommodate the interests of border communities while providing appropriate consideration for security and lawful commerce across the border.**

- The Department of Homeland Security established an internal working group to direct and coordinate the DHS response to the President's November 5, 2009 Memorandum on Tribal Consultation. The Office of Intergovernmental Affairs (IGA) and the Office of General Counsel led this effort.

- As required by both E.O. 13175 and the November 5th Presidential Memorandum, this plan was drafted in consultation with tribal governments. It is a living document that DHS will continue to refine and perfect through collaboration with its tribal partners over the coming months. In addition, DHS is working to ensure effective communication regarding these efforts across the Department with, and for, tribal nations. In drafting this plan, DHS solicited input and feedback from tribal governments.

- Advisory councils that were established in the founding and subsequent language of the Department have proven valuable in soliciting and understanding the views and opinions of our partners in the homeland. These bodies enable the Secretary and other Departmental leadership to routinely hear first-hand from those on the front line of state, local, and tribal government, as well as the private sector, for implementing DHS policies and regulations.

Source: See the February 2014 shadow report to the 2014 CERD session from the University of Texas Human Rights Law Clinic regarding the Lipan Apache tribe in Texas; Report available at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_16962_E.pdf.

L. Immigration

1. Due process in immigration decisions and proceedings; deportations without access to immigration court system

L-1. QUESTION - DUE PROCESS IN IMMIGRATION DECISIONS AND PROCEEDINGS: How does the United States afford due process of law in the enforcement of immigration laws? What guarantees are available to challenge detention, deportation and asylum decisions and what are the rights of appeal?

RESPONSE:

- **All aliens in the United States are entitled to and afforded due process consistent with the U.S. Constitution, federal laws, and applicable international obligations.**

- Individuals placed in deportation or removal proceedings, including those who subsequently seek asylum or other forms of relief or protection before the DOJ Executive Office for Immigration Review (EOIR), have the right to a hearing before an immigration judge and may file an administrative appeal to the Board of Immigration Appeals, with the ability to seek further review before the federal courts.

- In the detention context, aliens subject to non-mandatory detention can challenge the Department of Homeland Security's decision to detain them before an immigration judge, with the right to appeal this decision administratively to the Board of Immigration Appeals and to seek further review of the legal basis of the alien's detention, and whether the statue is being lawfully applied, before the federal courts.

- While some aliens are subject to mandatory detention provisions during the pendency of the removal process, such aliens have the right to administratively challenge their inclusion in a category of aliens subject to mandatory detention in a hearing before an immigration judge, to file an administrative appeal, and to eventually seek further review of the legal basis of the alien's detention and whether the detention statute is being lawfully applied before the federal courts. The mandatory detention procedure is being tested through ongoing litigation in federal court. Aliens subject to mandatory detention may be eligible for bond hearings before certain federal courts.

- Regardless of lawful presence, an alien detained in the United States has the same right as any citizen to challenge in court, through a petition for writ of habeas corpus or other available means, the legal basis for detention.

- In terms of legal process, aliens in removal proceedings before immigration judges are accorded the opportunity to review the evidence against them, present evidence on their behalf, and cross-examine the Government's witnesses.

Legal Representation

- Aliens in removal proceedings before immigration judges have the privilege of being represented by counsel of their choosing at no expense to the Government. The Executive Office for Immigration Review (EOIR) has taken several steps to encourage *pro bono* legal representation of aliens in removal proceedings, including representation for unaccompanied children (see below).

- For example, the EOIR Office of Legal Access Programs offers the Legal Orientation Program, working with nonprofit organizations to explain immigration court procedures and basic legal information to detained individuals. These providers facilitate *pro bono* representation in removal proceedings and administrative appeals before the Board of Immigration Appeals. EOIR allows accredited representatives (individuals from recognized non-profit religious, charitable, social service, or similar organizations) to represent aliens in immigration proceedings for a nominal fee and maintains a Free Legal Service Provider List of organizations and private attorneys who have agreed to represent aliens in immigration hearings *pro bono*.

- Furthermore, immigration judges are instructed to assist *pro se* individuals to the greatest extent possible in immigration proceedings, including ensuring that such respondents are informed of potential forms of relief from deportation or removal and are provided with the requisite application forms and submission requirements.

Individuals with Mental Disorders

- DOJ, including EOIR, and DHS have taken steps to ensure that detained individuals with mental disorders receive additional protections in immigration proceedings. In April 2013, DOJ and DHS issued a policy providing new procedural protections for unrepresented immigration detainees with serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings ("Policy"). These protections include conducting screening for serious mental disorders or conditions, the availability of competency hearings and independent psychiatric or psychological examinations, and making available qualified representatives to mentally incompetent detainees in immigration proceedings. Currently, detained unrepresented individuals with serious mental disorders or conditions who are found to be incompetent while in immigration proceedings in Arizona, California, and Washington State are being provided qualified representatives. Pursuant to the Policy, this program is gradually being expanded nationwide.

Unaccompanied Alien Children

- The DOJ Executive Office for Immigration Review (EOIR) has taken several steps to encourage pro bono legal representation of respondents in removal proceedings, including detained unaccompanied children. These steps include: establishing juvenile dockets in all 59 Immigration Courts across the country to facilitate access to legal

services, of which 19 Immigration Court juvenile dockets serve detained unaccompanied children; issuing guidance to immigration judges regarding facilitating pro bono representation; and guidance on how to handle cases involving unaccompanied children. Further, EOIR established the Assistant Chief Immigration Judge for Vulnerable Populations to act as a resource to the immigration judges handling cases involving unaccompanied children.

- The Executive Office for Immigration Review (EOIR) conducts legal proceedings to determine whether minors/children may lawfully remain in the United States. For over a decade, EOIR, with the help of experts from other federal agencies and non-governmental organizations, has trained judges on issues related to children in immigration court proceedings. In addition, the agency has issued guidance about how to create a child-friendly environment in immigration court. This guidance addresses, among other things, special juvenile dockets, for children, child-friendly courtroom modifications, pre-hearing orientations, and child-sensitive questioning.

- Since 2010, EOIR's Legal Orientation Program for Custodians of Unaccompanied Alien Children has provided legal information to the adult caregivers of unaccompanied alien children in immigration court proceedings. The purpose of this program is to inform custodians of their responsibilities in ensuring that children under their care appear at all immigration court proceedings, as well as protecting them from mistreatment, exploitation, and trafficking. Finally, EOIR has worked closely with the Department of Health and Human Services, Office of Refugee Resettlement (ORR) and non-governmental organizations to identify children in need of legal assistance and facilitate pro bono legal services.

- On June 6, 2014, DOJ, EOIR, and the Corporation for National and Community Service (CNCS) announced their joint sponsorship for a program using the AmeriCorps service model creating a "justiceAmeriCorps" to improve the efficient and effective adjudication of immigration court proceedings involving unaccompanied children.

SOURCES: See the September 13 shadow report submitted by The Advocates for Human Rights: Violations of the Rights of Refugees, Asylum Seekers and Other Non-citizens and the John Marshall Law School Human Rights Project: Joint Submission to the U.N. Human Rights Committee Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America
ICE Policy No. 11063.1: *Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees with Serious Mental Disorders or Conditions* (Apr. 22, 2013).
Executive Office for Immigration Review Memorandum, *Nationwide Policy to Provide*

Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions (Apr. 22, 2013).

The BIA has also issued precedent decisions clarifying the procedural protections afforded mentally incompetent aliens in removal proceedings. See Matter of M-A-M-, 25 I&N Dec. 474 (BIA 2011); Matter of E-S-I-, 26 I&N Dec. 136 (BIA 2013).

This was also discussed in the April 2014 UPR consultation at the American University law school, where a number of civil society groups discussed access to counsel issues at length.

BACKGROUND – Due Process in Immigration Matters and Proceedings):

NGO Concerns:

The John Marshall Law School Human Rights Project shadow report in September 2013 notes the following concerns:

- U.S. immigration detention centers deny immigrant detainees' right to judicial protection and guarantees by denying them available and affordable legal services. This prevents detainees from asserting their right to due process under ICCPR Art. 2(3)(b).

Key concerns expressed by Amnesty International in its September 2013 Submission to the Human Rights Committee are that immigrants that are found guilty of crimes, including minor non-violent crimes, are subjected to mandatory detention that is practically unreviewable by the courts. Although deportation has a devastating effect on the lives of many undocumented immigrants, immigrants that are designated for deportation are not given individualized determination hearings—a single court appointed lawyer may represent as many as 70–80 people at a time.

Further Background Provided by DOJ

Under the Immigration and Nationality Act, Congress has afforded immigrants a variety of due process rights in the detention, deportation, and asylum contexts. In the detention context, aliens subject to non-mandatory detention can challenge the Department of Homeland Security's decision to detain them before an immigration judge, and that decision can be appealed to the Board of Immigration Appeals (BIA). *See* 8 C.F.R. §§ 236.1(d)(1) & (d)(3); and 1236.1(d) and (d)(3). Aliens subject to mandatory detention may challenge the basis for their mandatory detention in a hearing before an immigration judge. *See Matter of Joseph*, 22 I&N Dec. 660 (BIA 1999).

Regarding removable aliens, the Department of Homeland Security will initiate removal proceedings by issuing a charging document called a Notice to Appear and filing it with an Immigration Court, laying out the bases for removability. *See* 8 U.S.C. § 1229(a)(1); 8 C.F.R. §§ 239.1, 1239.1. The alien will then appear before an immigration judge where he or

she may be represented by counsel. *See* 8 U.S.C. § 1229a(b); 8 C.F.R. § 1240.3. If the immigration judge orders an alien removed or deported, the alien may challenge that order before the BIA and then to the circuit court of appeals. *See* 8 C.F.R. § 1240.53; 8 U.S.C. § 1252(a)(5); 8 C.F.R. § 1240.53.

An asylum seeker who is not in removal proceedings or is an unaccompanied child may file an affirmative application before U.S. Citizenship and Immigration Services (USCIS) in a non-adversarial hearing before a trained asylum officer. If that agency denies the asylum application, the alien is placed in removal proceedings and can renew his or her asylum application before an immigration judge. This renewed asylum application is subject to *de novo* review of the immigration judge. An alien in removal proceedings can raise an asylum claim as a defense to removal even if they did not do so affirmatively before USCIS. If the immigration judge denies the asylum application, the alien may appeal that order to the BIA and then to the circuit court. *See* 8 U.S.C. § 1252(a); 8 C.F.R. pt. 1003.

Since 2003, EOIR's Office of Legal Access Programs (OLAP) has offered the Legal Orientation Program (LOP), wherein EOIR works with nonprofit organizations to provide comprehensive presentations and Self-Help workshops to explain immigration court procedures, along with other basic legal information, to detained individuals in removal proceedings. LOP providers facilitate pro bono legal services for these detained individuals. The EOIR OLAP also supports the BIA Pro Bono Project that facilitates pro bono representation for individuals pursuing administrative appeals before the Board of Immigration Appeals. Since 2010, EOIR's Legal Orientation Program for Custodians of Unaccompanied Alien Children has provided legal information to the adult caregivers of unaccompanied alien children in immigration court proceedings. As part of this program, EOIR has worked closely with ORR and non-governmental organizations to identify children in need of legal assistance and facilitate pro bono legal services. Additionally, EOIR maintains the Recognition and Accreditation Program, which allows accredited representatives (individuals from recognized non-profit religious, charitable, social service, or similar organizations) to represent aliens in immigration proceedings for a nominal fee. *See* 8 C.F.R. § 1292.1. To further assist individuals in finding legal representation, EOIR maintains a Free Legal Service Provider List, which contains the names and contact information of organizations and private attorneys who have agreed to represent aliens in immigration hearings *pro bono*. These lists are maintained by the Office of the Chief Immigration Judge. *See* 8 C.F.R. § 1003.61(a).

On June 6, 2014, DOJ and the Corporation for National and Community Service (CNCS) announced their joint sponsorship for a program using the AmeriCorps service model creating a "justiceAmeriCorps" to improve the efficient and effective adjudication of immigration court proceedings involving unaccompanied children. Under this initiative CNCS issued a Notice of Federal Funding Opportunity that will allow grantees to enroll lawyers and paralegals to serve as AmeriCorps members providing legal services to this

vulnerable population. Specifically, the program is intended to provide legal services to children under the age of 16 who: (1) are not in the custody of the Office of Refugee Resettlement (ORR) or the Department of Homeland Security; (2) have received a Notice to Appear in removal proceedings before EOIR; and, (3) have not had their cases consolidated with removal proceedings against a parent or legal guardian (hereinafter "Unaccompanied Children" or "Unaccompanied Child"). The legal representation shall be limited to immigration or custody proceedings before EOIR Immigration Courts; appellate proceedings before the Board of Immigration Appeals; proceedings before United States Citizenship and Immigration Services (USCIS), including applications for asylum, Special Immigrant Juvenile (SIJ) status, and/or T or U nonimmigrant status; and state court proceedings seeking orders necessary to support applications for SIJ status (Immigration Proceedings). Immigration Proceedings shall not include any claims, litigation, or other proceedings before federal district courts, courts of appeals, or the Supreme Court.

Proposed programs shall provide legal services to Unaccompanied Children in Immigration Proceedings to increase the effective and efficient adjudication of immigration court cases involving those children. In addition, programs should facilitate the identification of Unaccompanied Children who have been victims of human trafficking or abuse and decrease the risk that those children may be trafficked upon return to their country of nationality or last habitual residence; screen Unaccompanied Children for abuse, trafficking, and trauma; refer suspected cases of abuse, trafficking, and trauma to appropriate law enforcement authorities and/or appropriate support services; build pro bono capacity to support the populations of unaccompanied children in the immigration court location(s) in which members will serve; and strengthen national service so that participants engaged in CNCS-supported programs consistently find satisfaction, meaning and opportunity.

2. Affordable legal services for migrants, court language initiative

L-2. QUESTION – AFFORDABLE LEGAL SERVICES FOR MIGRANTS: Migrants have the need for affordable legal services to assert their right to due process under ICCPR Art. 2(3)(b), whether in detention, deportation or other immigration process. What is the U.S. doing to ensure that such services are available?[1]

RESPONSE

- **All persons in the United States, regardless of immigration status, are entitled to and afforded due process, consistent with the U.S. Constitution, federal laws, and applicable international obligations.**

- **The Administration supports comprehensive immigration reform legislation that would expand the government's ability to fund immigration counsel for some non-citizens. Since 1952, the Immigration and Nationality Act (INA) has guaranteed individuals in immigration proceedings the "privilege" of representation by counsel, but only "at no expense to the Government."**

- **DHS notifies each individual in removal proceedings before an immigration judge that he or she may be represented by counsel, provides a list of pro bono counsel, and allows each alien at least ten days to obtain counsel at his or her own expense.** The government, through both the Department of Homeland Security and the immigration court system within the Department of Justice, endeavor to provide legal orientation and contact information for pro bono immigration counsel to aliens seeking representation.

- Immigration detention standards provide that detainees have access to confidential communications with counsel (in person, by phone, and through correspondence), access to courts, and access to legal materials in a properly equipped law library.

- With respect to juveniles, both CBP and ICE provide *all* juveniles at the time of apprehension with a document entitled Form I-770 (Notice of Rights and Requests for Disposition for Minors), which informs them of their rights to use the telephone, to be represented by a lawyer, to have a hearing before an immigration judge, along with a list of free legal services. Upon apprehension, CBP and ICE also provides every juvenile with the opportunity to speak directly with their consulate and a family member; juveniles apprehended by CBP are shown a video (for Spanish-speaking minors, in Spanish) providing a basic legal orientation.

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[1] DHS notes this relates to issue relates to ICCPR, likely not CERD. Article 5 of the CERD enumerates various rights, but as DOJ OLC observed, the "obligation [under Art. 5] is not primarily to protect the rights included as such 'but rather to assure equality and nondiscrimination in the enjoyment of those rights.' Letter of Submittal to the President from Warren Christopher, sent to Senate with Ex. C, 95th Cong., 2d Sess. at VII." Cuban Obligation to Accept Returning Nationals, 4B U.S. Op. Off. Legal Counsel 677, 1980 WL 20968, at *2 (1980).

- To further facilitate due process in immigration proceedings before the DOJ, Executive Office for Immigration Review (EOIR) Immigration Courts and the Board of Immigration Appeals, EOIR has taken additional steps within its statutory authority to encourage and facilitate *pro bono* legal representation for all respondents who appear in removal proceedings, including detained unaccompanied children. Since 2003, EOIR's Office of Legal Access Programs (OLAP) has offered the Legal Orientation Program (LOP), wherein EOIR works with nonprofit organizations to provide comprehensive presentations and Self-Help workshops to explain immigration court procedures, along with other basic legal information, to detained individuals in removal proceedings. LOP providers also facilitate *pro bono* legal services for these detained individuals.

- Additionally, EOIR maintains the Recognition and Accreditation Program, which allows accredited representatives, who are individuals from recognized non-profit religious, charitable, social service, or similar organizations, to represent aliens in immigration proceedings for a nominal fee. See 8 C.F.R. § 1292.1. To further assist individuals in finding legal representation, EOIR maintains a Free Legal Service Provider List, which contains the names and contact information of organizations and private attorneys who have agreed to represent aliens in immigration hearings pro bono. These lists are maintained by the Office of the Chief Immigration Judge for each Immigration Court location. See Section 208(d)(4)(B) of the INA; 8 C.F.R. §§ 1003.61(a) and 1240.10(a)(2).

- In the fall of 2010, EOIR launched the Legal Orientation Program for Custodians of Unaccompanied Alien Children, which provides legal orientation to the adult custodians of any such children in removal proceedings. The program aims to inform these custodians of their responsibilities to ensure the children's appearance at all immigration proceedings, and to protect them from mistreatment, exploitation, and trafficking. Through this Program, EOIR has worked with the HHS Office of Refugee Resettlement and non-governmental agencies to implement this program nationwide.

- The Administration also supports common sense Comprehensive Immigration Reform, specifically a bipartisan bill that the Senate passed earlier this year, which contains provisions to provide government funded attorneys for vulnerable populations, namely unaccompanied children and individuals with mental disabilities. It would also remove restrictions on providing legal representation in other proceedings for some noncitizens.

SOURCES: See September 2013 shadow reports from Amnesty International: Submission to the Human Rights Committee ; John Marshall Law School Human Rights Project: Joint Submission to the U.N. Human Rights Committee Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America and New Orleans Workers' Center for Racial Justice: Migrant Workers in the South Expose How U.S. Immigration

Enforcement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights

- This was also addressed in the CERD Committee's 2008 Concluding Observations and Recommendations, paragraph 22:

- "While welcoming the recent initiatives undertaken by the State party to improve the quality of criminal defence programmes for indigent persons, the Committee is concerned about the disproportionate impact that persistent systemic inadequacies in these programmes have on indigent defendants belonging to racial, ethnic and national minorities. The Committee also notes with concern the disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities (art. 5 (a)).

- "The Committee recommends that the State party adopt all necessary measures to eliminate the disproportionate impact that persistent systemic inadequacies in criminal defence programmes for indigent persons have on defendants belonging to racial, ethnic and national minorities, inter alia, by increasing its efforts to improve the quality of legal representation provided to indigent defendants and ensuring that public legal aid systems are adequately funded and supervised. The Committee further recommends that the State party allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs, such as housing, health care, or child custody, are at stake."

BACKGROUND (Affordable Legal Services for Migrants):

NGO Concerns:

The John Marshall Law School Human Rights Project shadow report in September 2013 states the following concerns:

- U.S. immigration detention centers deny immigrant detainees' right to judicial protection and guarantees by denying them available and affordable legal services. This prevents detainees from asserting their right to due process under ICCPR Art. 2(3)(b).

- Amnesty International states that immigrants who are found guilty of crimes, including minor non-violent crimes, are subjected to mandatory detention that is practically unreviewable by the courts. It adds that although deportation has a devastating effect on the lives of many undocumented immigrants, immigrants that

are designated for deportation are not given individualized determination hearings—a single court appointed lawyer may represent as many as 70–80 people at a time.

- New Orleans Workers Center for Racial Justice state that people in immigration detention report a vacuum of information about their deportation cases and minimal to no access to family or lawyers.

HHS Background

HHS's Office of Refugee Resettlement (ORR) Survivors of Torture (SoT) program funds grantees that provide legal services to immigrants in ICE detention. The following are the programs that we know of who are working with this population:

- Survivors of Torture International
- Bellevue/NYU Program for Survivors of Torture
- LIRS
- HealthRight International
- Center for Survivors of Torture (Texas)
- ASTT
- Heartland Alliance/Kovler Center
- University of California Santa Rosa (though not an SoT, they work with detained survivors through HHS)

The aggregate services the programs provide are: Forensic/medical evaluations, legal representation, psychological evaluations, letter writing to the detainees, social services, legal referrals, counseling, eligibility screening, and pre-release case management.

DHS Background

- Since 1952, section 292 of the Immigration and Nationality Act (INA) has guaranteed individuals in immigration proceedings before an immigration judge the "privilege" of representation by counsel, but only "at no expense to the Government." Pub. L. No. 82-414, 66 Stat. 163 (1952). In this regard, DHS ensures that the individual is notified that he or she may be represented by counsel, and will provide a list of counsel and a period of at least ten days to obtain counsel at his or her own expense. INA § 239(a)(1). In addition, DHS provides this list in a number of other circumstances including by USCIS to asylum applicants (INA § 208(d)(4)) and by ICE to aliens subject to administrative removal (8 CFR 238.1(b)(2)(iv)) and certain detained juveniles (8 CFR 236.3(g)).

- The Executive Office for Immigration Review (EOIR), within DOJ, maintains a Free Legal Service Provider List, which contains the names and contact information of organizations and private attorneys who have agreed to represent aliens in immigration hearings *pro bono*.

- Specifically with respect to juveniles, ICE policy requires all officers to provide *all* juveniles at the time of apprehension with the Form I-770 (Notice of Rights and Requests for Disposition for Minors), which informs the juvenile of his or her rights to use the telephone, to be represented by a lawyer, to have a hearing before an immigration judge, and requires that the juvenile be given a list of free legal services. Upon apprehension, ICE also provides every juvenile with the opportunity to speak directly with their consulate and a family member.

- In the fall of 2010, EOIR launched the Legal Orientation Program for Custodians (LPOC) of Unaccompanied Alien Children (UACs), which provides legal orientation presentations to the adult custodians of UACs in removal proceedings before EOIR. The program aims to inform these custodians of their responsibilities to ensure the UAC's appearance at all immigration proceedings, and to protect UACs from mistreatment, exploitation, and trafficking. *See* section 235(d)(4) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. No. 110-457, 122 Stat. 5044 (8 U.S.C. § 1232(c)(4)). Through the LOPC, EOIR has worked with ORR and non-governmental agencies to implement this program nationwide.

- The detention standards mandate that detainees receive assistance where needed (e.g., orientation to written or electronic media and materials and assistance in accessing related programs, forms, and materials). In addition, detainees who are illiterate, limited-English proficient or disabled receive appropriate special assistance.

- The Executive Office for Immigration Review, within DOJ, maintains a Free Legal Service Provider List, which contains the names and contact information of organizations and private attorneys who have agreed to represent aliens in immigration hearings *pro bono*. DHS provides a related list to aliens subject to administrative removal and to certain detained juveniles. HHS also funds grantees that provide legal services to immigrants in ICE detention

- Additionally, OLAP, in conjunction with the Board of Immigration Appeals (BIA) Clerk's Office, implements the BIA Pro Bono Project (Project) to increase pro bono representation for detained individuals, including detained unaccompanied children, with immigration cases on appeal before the BIA. Through the Project, EOIR collaborates with various nonprofit organizations to identify and secure representation for this vulnerable group.

- In some cases, detained unaccompanied children may benefit from a child advocate in their proceedings. Section 235(c)(6) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 authorizes the Secretary of Health and Human Services (HHS) to appoint independent child advocates to advocate for the best interests of child trafficking

victims and other vulnerable unaccompanied alien children. See 8 U.S.C. § 1232(c)(6). The child advocate's role is separate and distinct from the role of the legal representative in removal proceedings in that the legal representative focuses on the express wishes of the child. Currently, child advocates are available in the Chicago and Harlingen Immigration Courts, and other immigration courts on an occasional basis.

- Further, the Secretary of HHS is required to make reasonable efforts to secure counsel for unaccompanied alien children in its custody, a function that it performs through its Division of Children's Services (DCS). See 8 U.S.C. § 1232(c)(5).

- On June 6, 2014, DOJ and the Corporation for National and Community Service (CNCS) announced their joint sponsorship for a program using the AmeriCorps service model creating a "justiceAmeriCorps" to improve the efficient and effective adjudication of immigration court proceedings involving unaccompanied children. Under this initiative CNCS issued a Notice of Federal Funding Opportunity that will allow grantees to enroll lawyers and paralegals to serve as AmeriCorps members providing legal services to this vulnerable population. Specifically, the program is intended to provide legal services to children under the age of 16 who: (1) are not in the custody of the Office of Refugee Resettlement (ORR) or the Department of Homeland Security; (2) have received a Notice to Appear in removal proceedings before EOIR; and, (3) have not had their cases consolidated with removal proceedings against a parent or legal guardian (Unaccompanied Children or Unaccompanied Child). The legal representation shall be limited to immigration or custody proceedings before EOIR Immigration Courts; appellate proceedings before the Board of Immigration Appeals; proceedings before United States Citizenship and Immigration Services (USCIS), including applications for asylum, Special Immigrant Juvenile (SIJ) status, and/or T or U nonimmigrant status; and state court proceedings seeking orders necessary to support applications for SIJ status (Immigration Proceedings). Immigration Proceedings shall not include any claims, litigation, or other proceedings before federal district courts, courts of appeals, or the Supreme Court.

- Proposed programs shall provide legal services to Unaccompanied Children in Immigration Proceedings to increase the effective and efficient adjudication of immigration court cases involving those children. In addition, programs should facilitate the identification of Unaccompanied Children who have been victims of human trafficking or abuse and decrease the risk that those children may be trafficked upon return to their country of nationality or last habitual residence; screen Unaccompanied Children for abuse, trafficking, and trauma; refer suspected cases of abuse, trafficking, and trauma to appropriate law enforcement authorities and/or appropriate support services; build pro bono capacity to support the populations of unaccompanied children in the immigration court location(s) in which members will serve; and strengthen national service so that participants engaged in CNCS-supported programs consistently find satisfaction, meaning and opportunity.

- Additionally, DOJ, EOIR and DHS have taken steps to ensure that detained individuals with mental disorders receive additional protections. In April 2013, DOJ and DHS issued a policy providing new procedural protections for unrepresented immigration detainees with serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings ("Policy"). These protections include conducting screening for serious mental disorders or conditions and making available qualified representatives to mentally incompetent detainees in immigration proceedings. Currently, detained unrepresented individuals with serious mental disorders or conditions who are found to be incompetent while in immigration proceedings in Arizona, California, and Washington State are being provided qualified representatives. Pursuant to the Policy, this program is gradually being expanded nationwide.

Administration Actions:

- As for increasing access to counsel in immigration removal proceedings before an immigration judge and lifting restrictions for legal aid offices to represent noncitizens, the closest the Administration has come to addressing this, apart from the unaccompanied children efforts discussed above, is through support of the Senate bill on comprehensive immigration reform, which includes provisions to provide government funded attorneys (at the discretion of the Attorney General) for unaccompanied alien children, individuals with mental disabilities, and vulnerable populations. (Section 3502) The bill also removes the restrictions on providing legal representation in other proceedings for some noncitizens. http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saps744s_20130611.pdf

3. Due Process and Asylum Protection

L-3. QUESTION – OPERATION STREAMLINE, DUE PROCESS AND ASYLUM PROTECTION**:** What are DOJ and DHS doing to address concerns related to violations of due process rights in the course of rushed Operation Streamline prosecutions? What measures has the U.S. taken to ensure that asylum seekers detained pursuant to the Expedited Removal process have the opportunity to pursue their claims of asylum and other forms of relief? Is any consideration being taken to halting or modifying Operation Streamline, or other programs contributing to the increase of non-citizens in the federal prison system?

RESPONSE:

- Operation Streamline is a DHS partnership with the Department of Justice with a geographic focus aimed at deterring the dramatic increase in illegal crossings on the southwest border by criminally prosecuting aliens who cross the border unlawfully.

- **Aliens subject to Operation Streamline are entitled to and afforded due process consistent with the U.S. Constitution, federal laws, and any applicable international obligations, including both the rights provided to criminal defendants and to aliens in removal proceedings.**

- **Each Streamline prosecution is conducted openly in federal court, with the benefit of legal representation, a thorough and transcribed plea dialogue and rights discussion, right to demand a trial to make the Government prove each element of each allegation beyond a reasonable doubt, and access to the U.S. Courts of Appeals and beyond for higher-level review.**

IF PRESSED - Expedited Removal and Protection Claims

- Under INA § 235(b)(1)(A)(i), certain aliens are subject to "expedited removal" which means that if an immigration officer determines that the alien is inadmissible under section 212(a)(6)(c) or 212(a)(7), the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum or a fear of persecution .

- To ensure the United States complies with its international treaty obligations relating to non-refoulement, CBP officials also inquire whether an individual subject to expedited removal has any fear of persecution or torture or a fear of return to his/her home country.

- If the individual expresses such fear or intent to apply for asylum, the individual is detained by U.S. Immigration and Customs Enforcement (ICE) and referred to a U.S. Citizenship and Immigration Services asylum officer for a credible fear

interview – a detailed screening for potential eligibility for asylum or withholding of removal. USCIS asylum officers are a professional cadre, dedicated to the adjudication or screening of protection claims.

An individual determined by a USCIS asylum officer to have established a credible fear of persecution or torture is issued a Notice to Appear, and is placed in removal proceedings before a Department of Justice immigration judge, at which point, the individual can seek asylum or other forms of relief or protection from removal. The immigration judge ultimately determines whether the individual is eligible for asylum or any other requested form of relief or protection.

- An individual determined by a USCIS asylum officer not to have a credible fear is subject to immediate removal by ICE, unless the individual requests a limited review of the asylum officer's determination by an immigration judge. An immigration judge can overrule the asylum officer's decision and find the individual does have a credible fear, in which case the individual would be placed in immigration proceedings in the Immigration Court. If the immigration judge upholds the asylum officer's determination, the individual is subject to immediate removal by DHS.

- Similar to credible fear screenings, reasonable fear screenings ensure compliance with U.S. treaty obligations not to return a person to a country where the person would be tortured or the person's life or freedom would be threatened on account of a protected characteristic in the refugee definition. Asylum officers may make reasonable fear determinations in two types of cases in which an applicant has expressed a fear of return: 1) A prior order has been reinstated pursuant to section 241 (a)(5) of the INA; or 2) DHS has ordered an individual removed pursuant to section 238(b) of the INA based on a prior aggravated felony conviction.

- Individuals who are found to have a reasonable fear of persecution or torture are placed in "withholding only" proceedings before an immigration judge. In "withholding only" proceedings the immigration judge determines whether the individual is eligible for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act or withholding or deferral of removal consistent with non-refoulement obligations under the Convention Against Torture. If an individual is determined not to have a reasonable fear, he or she may request a limited review by an immigration judge of the asylum officer's negative determination. An immigration judge can overrule the initial negative determination, with a finding that the individual has a reasonable fear, thus placing the individual in withholding only proceedings.

SOURCES: This question is based on requests for information submitted by The Advocates for Human Rights to the Committee in September 2013: Violations of the Rights of Refugees, Asylum Seekers and Other Non-citizens. See also the December 2012 shadow

report from Human Rights Watch: Submission to the Human Rights Committee During its Consideration of the Fourth Periodic Report of the United States.

BACKGROUND: Operation Streamline, Due Process and Asylum Protection

NGO Concerns

The Advocates for Human Rights is concerned that the U.S. mandatorily deports people without considering their unique circumstances, which may include family ties to the U.S. It maintains that rules that streamline the deportation process deny due process rights of immigrants and that aggressive use of automatic prosecutorial programs undermines the use of prosecutorial discretion that would otherwise involve the consideration of the value of prosecuting certain violations and strip judges of discretion in immigration cases.

It suggested that the Committee also ask the following questions:

- Will the U.S. halt its detrimental "streamlining" of the immigration system?

DOJ/EOIR:

As a neutral arbiter, the DOJ Executive Office for Immigration Review (EOIR) strives to provide fair, impartial, and timely adjudication of immigration proceedings. The Immigration and Nationality Act (INA or Act) and the regulations interpreting this Act specify the due process protections afforded to individuals in immigration proceedings. *See* section 240 of the INA and 8 C.F.R. pt. 1240. Additionally, sections 208, 235 and 241(b)(3) of the INA and the regulations at 8 C.F.R. pts. 208, 235, 1003, 1208, and 1235 are the statutory and regulatory provisions applicable to individuals placed in the Expedited Removal process seeking protection from removal after expressing a fear of returning to their countries of origin, or, if in immigration proceedings, filing applications for asylum, withholding of removal under section 241(b)(3) of the INA, or withholding of removal under the Convention against Torture or who are asserting a status claim.

Individuals in the Expedited Removal process who articulate any fear of return to their countries of origin or last habitual residence at any stage during their initial encounter with DHS are referred to DHS USCIS, whose asylum officers conduct either credible fear or reasonable fear interviews depending on the circumstances of these individuals. Individuals in the credible fear or reasonable fear determination process may consult with a person or persons of their choice, without expense to the government, prior to the interview and these individuals may be present during the interview. These consultants may, in the discretion of the asylum officer, present a statement at the end of the credible fear or reasonable fear interview. These interviews are conducted with the assistance of language interpreters.

Individuals who are subject to expedited removal but who assert a claim for U.S. citizenship, lawful permanent residence, asylee or refugee status under oath are ordered removed and referred to an immigration judge for a review of the expedited removal order.

Individuals found to have either a credible fear or reasonable fear of persecution or harm upon return their country are placed in either section 240 or withholding-only immigration proceedings before an EOIR immigration judge. Upon placement in immigration or withholding-only proceedings, if detained and depending on their individual circumstances, these individuals **may seek a bond redetermination hearing** before the immigration judge. If a USCIS Asylum Officer determines that the individual does not have a credible or reasonable fear, the individual may seek review of this negative determination by an EOIR immigration judge.

If an immigration judge overturns the negative determination, the individual is placed in section 240 or withholding-only proceedings before EOIR, where they can file an application for asylum, withholding of removal under section 214(b)(3) of the INA, and withholding of removal under the Convention against Torture. Individuals in section 240 immigration proceedings may also seek additional forms of relief from removal for which they may be eligible. Individuals in withholding-only proceedings may only seek protection from removal by filing an application for withholding of removal under section 241(b)(3) of the INA and for withholding of removal under the Convention against Torture.

If the immigration judge upholds the negative fear determination, the expedited removal order is upheld. Further review by the federal courts may be possible; however, there is no statutory or regulatory authority to file an administrative appeal with the EOIR Board of Immigration Appeals. Credible and reasonable fear reviews and immigration proceedings before EOIR immigration judges are interpreted into the individual's native language as needed on a case-by-case basis. Individuals seeking review of the negative USCIS credible fear or reasonable fear determination before an EOIR may have a consultant of their choice present during this review at no expense to the government. In a hearing to review an expedited removal order of an alien who asserts a claim for lawful permanent residence, asylee or refugee status, if an immigration judge determines that the individual was admitted as a lawful permanent resident or as a refugee, or was granted asylum, the expedited removal order is vacated. If the alien appears inadmissible, DHS may initiate removal proceedings; however, these individuals will be placed in section 240 immigration proceedings. If the immigration judge determines that the individual is a U.S. citizen, the expedited removal order is vacated and immigration proceedings may not be initiated. Once an immigration judge determines that the individual does not have the claimed status, the expedited removal order is affirmed; this determination is not subject to appeal.

Once an individual is placed into section 240 immigration or withholding-only proceedings, they are entitled to representation at no expense to the government and interpretation of proceedings into their native language as needed on a case-by-case

basis. They may also file an administrative appeal or seek further review before the federal courts. See Sections 235 and 240 of the INA and 8 C.F.R. §§ 235, 208.30, 208.31, 1003.42, 1208.30, 1208.31, 1235, and 1240. For further details regarding due process protections while in immigration proceedings, please see the DOJ EOIR response at E-6(6).

4. Due Process of Human Rights complaints

L-4. QUESTION – DUE PROCESS FOR HUMAN RIGHTS COMPLAINTS**:** How does the United States ensure that immigrants receive due process of law on claims of civil, constitutional and human rights violations made to DHS-CRCL and other DHS components without fear of deportation? What steps does DHS take to ensure they are not detained and/or deported while their claims are being investigated?

RESPONSE:

- **The United States provides many avenues to pursue claims of rights violations in the immigration system, including in the federal courts, through immigration proceedings, and before administrative oversight bodies including the DHS Office for Civil Rights and Civil Liberties and the DHS Inspector General, and ICE Office of Professional Responsibility.**

- The DHS Office for Civil Rights and Civil Liberties investigates complaints from the public alleging violations of civil rights or civil liberties by DHS personnel, programs, or activities. Where CRCL investigations identify areas of concern, CRCL recommends improvements to enhance DHS's protection of civil rights and civil liberties while supporting DHS's mission. These usually take the form of recommendations for improved policy, procedures, training, or reporting. OIG and OPR investigate issues of related employee misconduct, including allegations of criminal misconduct.

- The Office for Civil Rights and Civil Liberties has the authority to ask the relevant DHS component to stay removal of a complainant until the Office has had the opportunity to gather all necessary information to proceed with its investigation.

SOURCES: This question is based on questions from the New Orleans Workers' Center for Racial Justice and Coalition in its September 2013 shadow report: Migrant Workers in the South Expose How U.S. Immigration Enforcement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights.

5. Retaliation and intimidation against complainants

QUESTION – RETALIATION AND INTIMIDATION AGAINST COMPLAINTS: How does the United States ensure that documented and undocumented immigrants can report civil, constitutional, and human rights violations, particularly against government officials, without experiencing retaliation? What redress is available for persons who experience retaliatory action by DHS or its sub-agencies as a result of reporting a rights violation?

RESPONSE:

- **The United States provides many avenues to pursue claims of rights violations in the immigration system, including in the federal courts, immigration proceedings, and before administrative oversight bodies including the DHS Office for Civil Rights and Civil Liberties, the DHS Inspector General, and ICE Office of Professional Responsibility.**

- **All employee misconduct allegations are subject to independent review and assessment by the Office of the Inspector General; cases the Inspector General does not retain for investigation are then referred back to the appropriate component for appropriate action.**

- The Department of Homeland Security takes allegations of employee misconduct very seriously.

- Allegations of employee misconduct, including allegations of retaliatory action as a result of reporting a rights violation, may be made to the DHS Office of Inspector General or directly to a component agency.

- All allegations of employee misconduct, including allegations of retaliatory action as a result of reporting a rights violation, are referred to the DHS Office of Inspector General for independent review and assessment.

IF ASKED:

- Some cases are retained by the DHS Office of Inspector General for investigation while others are referred back to the appropriate component for further action.

    - For example, allegations referred back to U.S. Customs and Border Protection (CBP) from the Inspector General's Office or the Office for Civil Rights and Civil Liberties are fully investigated by CBP's Office of Office of Internal Affairs. If misconduct is found, appropriate corrective action or discipline is taken.

- To avoid deterring individuals from reporting crimes and from pursuing actions to protect their civil rights, ICE officers, special agents, and attorneys are reminded to exercise all appropriate discretion when making detention and enforcement decisions in the cases of victims and witnesses of crime and individuals pursuing non-frivolous civil rights complaints. This includes individuals involved in complaints against ICE officials.

- Upon declination by OIG, OPR reserves the right to accept all criminal allegations (ICE, CBP, or USCIS employees) or administrative allegations (ICE employees). Upon declination of an administrative case by OIG or a criminal case by OIG and OPR, CBPIA reserves the right to accept all allegations concerning CBP employees. USCIS Office of Special Investigations (USCIS OSI) accepts administrative allegations concerning USCIS employees.

SOURCES: This question is based on questions submitted by the New Orleans Workers' Center for Racial Justice and Coalition. For the most recent submission from this organization, see Migrant Workers in the South Expose How U.S. Immigration Enforcement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights. See also September 2013 shadow report of the John Marshall Law School Human Rights Project: Joint Submission to the U.N. Human Rights Committee Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America (removed)
See also ICE Policy Directive, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, June 17, 2011. http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf

BACKGROUND (Retaliation and Intimidation against Complaints):

NGO Concerns:

The New Orleans Workers' Center for Racial Justice has raised detailed concerns and proposed the following additional questions on the question of retaliation (arranged by topic):

- ***Question Re Prosecutorial discretion and the "Morton Memo:*** Please provide an update on the effect of these memoranda on U.S. immigration enforcement policy. Have ICE regional offices exercised their discretion to refrain from prosecuting civil rights advocates caught in the immigration enforcement system. How does the United States ensure uniform compliance with the Morton Memo by personnel in ICE's regional and local offices? - What kinds of training and oversight mechanisms are in place to ensure that ICE personnel properly exercise discretion under the Morton Memo? What channels of redress are available when they do not?

Key concerns: The "Morton memo," a memorandum from ICE Director John Morton, directing immigration prosecutors to exercise "all appropriate discretion" in cases involving individuals "pursuing legitimate civil rights complaints" including "individuals engaging in a protected activity related to civil or other rights" in order to prevent people from being deterred from pursuing actions to protect their civil rights, has not been effective. ICE regional offices have not exercised their discretion to refrain from prosecuting civil rights advocates caught in the immigration enforcement system.

- ***Questions Re Deportations in retaliation against migrant human rights activities*:** What provisions of U.S. immigration law and policy ensure protections for vulnerable migrant workers and other individuals acting to defend the rights enumerated in the ICCPR so that the U.S. does not deport the evidence of serious human rights violations?

  Key Concerns: The immigration system is regularly used as a mechanism of retaliation against workers who organize against private and government abuses.

  - In TN, ICE agents conducted immigration sweep the date after a public hearing against racial profiling.
  - In AL, ICE agents covertly surveilled immigrant workers as they visited a civil rights museum.
  - In TX, ICE agents and local police detained and attempted to deport workers who organized a strike to challenge discrimination and wage theft by their employer.

- ***Questions Re Confidentiality and Protective measures pending investigation of complaint:***
  - How is information gathered through investigations shared within DHS and its subagencies?
  - What protections exist to ensure confidentiality for participants in the process?
  - What steps does DHS take to ensure that participants in the complaint process are not detained and/or deported while their claims are being investigated?
  - Please update the Committee as to the kind of complaints most commonly received by the CRCL and their resolution. What enforcement mechanisms does the CRCL have to end ongoing violations?

- ***Question Re Retaliations as deterrence to complaints:***
  - How does the United States ensure that documented and undocumented immigrants can report civil, constitutional, and human rights violations, particularly against government officials, without experiencing retaliation?

- ***Questions Re Redress for retaliation*:**
  - What redress is available for persons who experience retaliatory action by DHS or its subagencies as a result of reporting a rights violation?

- ***Questions Re* Protective measures pending investigation of complaint**. What steps does DHS take to ensure they are not detained and/or deported while their claims are being investigated?

The John Marshall Law School Human Rights Project also expressed concern that ICE guards intimate immigrant detainees to prevent them from filing complaints.

DHS Actions

Within DHS, employees – including CBP officers and Border Patrol agents and ICE special agents – are subject to strict rules and to investigation, where warranted, regarding any incidents of harassment, threats, or retaliation. State and local law enforcement agency personnel who exercise limited authority to enforce U.S. immigration laws under programs such as the DHS/ICE 287(g) program are also bound by federal civil rights laws, regulations, and guidance relating to non-discrimination, and their compliance is closely monitored by ICE, including through investigations by the ICE Office of Professional Responsibility. All law enforcement officers authorized to perform 287(g) program functions must also pass a four-week training course at the ICE Academy, which includes coursework on the ICE Use of Force Policy, multi-cultural communication, and avoiding racial profiling, among other topics. DHS/CRCL is currently reviewing open complaints alleging racial or ethnic profiling, violations of Title VI civil rights requirements related to language access, and other issues in the ICE 287(g) program.

The CRCL complaints process is explained on CRCL's website at http://www.dhs.gov/file-civil-rights-complaint. The CRCL complaint form is available in English, Spanish, and seven other languages

6. Use of segregated housing in immigration detention

L-6. QUESTION: What is being done to ensure that the rights of individuals who are being segregated and put into solitary confinement while in immigration detention are being upheld? What standards and methods of oversight are in place that ICE has to comply with when placing detainees into segregation?

Response:

- **U.S. law prohibits the use of solitary confinement, or other segregated housing, in a manner that constitutes cruel and unusual punishment, or without due process of law. The United States remains committed to preventing abuses with regard to detention conditions, protecting detainees from such abuses, and bringing to justice those who commit them.**

- **The Department of Homeland Security meets its constitutional and statutory mandates by confining migrants in detention facilities that are safe, humane, and appropriately secure, and implementing strict rules for all its law enforcement personnel, regularly training detention personnel, monitoring performance and investigating alleged misconduct whenever warranted.**

- **ICE has created a robust system for supervising the use of segregated housing and ensuring that detention facilities housing ICE detainees use segregation only in accordance with ICE's detention standards.** ICE is committed to ensuring that detainees who may be particularly vulnerable, including those with mental illness or other disabilities, are housed appropriately, and are not involuntarily assigned to segregated housing solely on the basis of the vulnerability.

- ICE recently reviewed its use of segregation policies, and in September 2013, issued the directive "Review of the Use of Segregation for ICE Detainees." This directive established enhanced ICE policy and procedures for the review and oversight of decisions to place ICE detainees in segregated housing for more than 14 days, or placements in segregation for any length of time in the case of detainees for whom heightened concerns exist based on factors related to the detainee's health or other special vulnerabilities. This directive enhances reporting requirements and requires ICE field offices and headquarters to evaluate the appropriateness of continued placement and to determine the viability of any potential housing or custodial alternatives.

IF ASKED:

- The Directive requires the ICE Field Offices to report all detainees held continuously in segregated housing for more than 14 days or for 14 days out of any 21 day period. If the segregation placement is related to disability, medical or mental illness, suicide risk, hunger strike, status as a victim of sexual assault, or other special vulnerability, or if the detainee placed in segregation for any reason has a mental illness or a serious medical illness or serious physical disability, the ERO Field Office Director is required to take steps to ensure that he or she is notified in writing as soon as possibility by the facility administrator, but no later than 72 hours after the initial placement into segregation.

- The Directive states that "placement of detainees in segregated housing is a serious step that requires careful consideration of alternatives. Placement in segregation should occur only when necessary and in compliance with applicable detention standards. In particular, placement in administrative segregation due to a special vulnerability should be used only as a last resort and when no other viable housing options exist."

- ICE detention standards carefully circumscribe the use of segregation to ensure that it is used only as necessary and appropriate to preserve the safety and security of detainees, staff, or the facility. ICE has recently issued the directive "Review of the Use of Segregation for ICE Detainees," which complements requirements in detention standards for facilities to regularly review the ongoing appropriateness of continued segregation placement by strengthening processes for agency monitoring and oversight of facility segregation determinations.

- To facilitate the enhanced review processes established by this directive, ICE has deployed an automated Segregation Review Management System, which permits notification to ICE of segregation placements in real time and coordinated review of all segregation cases at both ICE field office and headquarters levels. Additionally, the DHS Office for Civil Rights and Civil Liberties is involved in reviewing and providing guidance on the Segregation Reports.

- The enhanced oversight mechanisms established by the directive have improved ICE's supervision of segregated ICE detainees and bolstered coordination among agency entities in evaluating the appropriateness of ongoing segregation placements. Where review has resulted in a determination that continued segregation may not be warranted or that other housing options may be available and appropriate, ICE headquarters and field offices have coordinated to effectuate less restrictive housing or custodial options.

- ICE's utilization of segregation is significantly lower than that of criminal detention facilities. Approximately 1 percent of all detainees in ICE custody are typically held in segregation at any given time. This compares favorably to what might be predicted based on the use of segregation in the prison context: Of the detainees housed in segregation in ICE custody, approximately 85 percent have been convicted of a crime. Data collected by the U.S. Bureau of Justice Statistics in 2005 reveals that 3.3 percent of state prisoners in minimum- or low-security facilities were in segregation and 5 percent of those at medium-security prisons.

Source: This is a complaint that a number of NGOs have periodically raised.

7. Immigrants – abuse at hands of US officials

L-7. QUESTION – BORDERS – ALLEGATIONS OF EXCESSIVE USE OF FORCE**:** What training and protocols are in place to govern the use of force, particularly at the border? What is being done to ensure accountability and remedies for the families of victims? (Issue 13(a))

RESPONSE:

SEE ANSWER E-1.

8. Asylum/refugee policies and treatment/detention

L-8. QUESTION - What U.S. legislation is applicable to refugees and asylum-seekers? When might immigrants, particularly undocumented migrant workers, victims of trafficking, and asylum-seekers and refugees, be subject to mandatory and prolonged detention? Does expedited removal result in mandatory and prolonged detention of asylum seekers?

RESPONSE:

- **Since World War II, more refugees have found permanent homes in the United States than in any other country – more than 3 million in the last 40 years. Welcoming refugees is central to our nation's identity, and providing a home for refugees is a central part of our international humanitarian programs.**

- **U.S. immigration law implements U.S. obligations under the 1967 Protocol Relating to the Status of Refugees, to which the United States is a party.**

- Immigration laws generally require certain categories of noncitizens to be detained pending removal proceedings. Among those categories are noncitizens who are subject to expedited removal proceedings after having been found inadmissible upon arrival at a port of entry (including noncitizens subject to expedited removal proceedings after having been found inadmissible for having engaged in fraud or willful misrepresentation or for lack of proper entry documents), those who have committed certain serious criminal offenses, and those subject to terrorism-related grounds of inadmissibility.

- **For most aliens, DHS has discretion to authorize release while such proceedings are pending, and, with some exceptions, detained aliens in removal proceedings have a right to a custody redetermination hearing before an immigration judge**.

- Once an individual's order of removal becomes administratively final, DHS may detain the individual for a period reasonably necessary to bring about his or her removal.

Credible fear screenings for certain aliens

- An immigration officer may order the **expedited removal** of an alien who is inadmissible because the alien either lacks a valid entry document (8 U.S.C. 1182(a)(7)) or engaged in fraud or misrepresentation (8 U.S.C. 1182(a)(6)(C)). INA § 235(b) (8 U.S.C. 1225(b). Three classes of aliens fall under the expedited removal provisions, and their corresponding regulations: (1) arriving aliens at a port-of-entry; (2) alien at a port-of-entry who are present without having been admitted or paroled who have not been established to the satisfaction of the immigration officer that the alien was continuously physically present in the United States for the two-year period immediately prior to a determination of inadmissibility; and (3) outside of a port-of-entry, aliens who were (a)

encountered within 100 miles of the border and within 14 days of their unlawful entry, or (b) arrived by sea. Generally, these classes of aliens are removed without a hearing before an immigration judge. *See* 8 U.S.C. 1225(b).

- However, if an individual expresses a fear of persecution or torture, an intention to apply for asylum, or a fear of return to his or her country, the case is referred to a USCIS asylum officer for credible fear protection screening.

- Individuals in the expedited removal process who are referred to USCIS for a credible fear interview are generally subject to mandatory detention pending a determination by an asylum officer and any review of that determination by an immigration judge. See 8 U.S.C. 1225(b)(1)(B)(iii)(IV); 8 C.F.R. §§ 235.3(b)(4)(ii) and 1235.3(b)(4)(ii).

- Individuals at a port of entry found to have a credible fear are automatically considered for parole under the 2010 policy and procedures described below, and a majority of these individuals are released on parole.

- On January 4, 2010, ICE changed its parole policy for arriving aliens at a port of entry found to have a credible fear. Under the new policy, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," **aliens at a port of entry who were subject to expedited removal but were found to have a credible fear of persecution or torture are automatically considered by ICE for parole** from custody pending removal proceedings before an immigration judge, rather than having affirmatively to request parole in writing. See http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf**Error! Hyperlink reference not valid.**. The new policy also adds heightened quality assurance safeguards, and defines when paroling aliens is in the public interest.

Reasonable fear screenings for certain aliens

- Similar to credible fear screenings, reasonable fear screenings ensure compliance with U.S. treaty obligations not to return a person to a country where the person would be tortured or the person's life or freedom would be threatened on account of a protected characteristic in the refugee definition. Asylum officers may make reasonable fear determinations in two types of cases in which an applicant has expressed a fear of return: 1) A prior order has been reinstated pursuant to section 241(a)(5) of the INA; or 2) DHS has ordered an individual removed pursuant to section 238(b) of the INA based on a prior aggravated felony conviction.

- Individuals who are found to have a reasonable fear of persecution or torture are placed in "withholding only" proceedings before an immigration judge. In "withholding only" proceedings the immigration judge determines whether the individual is eligible for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act or withholding or deferral of removal consistent with non-refoulement obligations under the Convention Against Torture. If an individual is determined not to have a reasonable fear, he or she may request a limited review by an immigration judge of the asylum officer's negative determination. An immigration judge can overrule the initial negative

determination, with a finding that the individual has a reasonable fear, thus placing the individual in withholding only proceedings.

- The USCIS Asylum Division, which conducts credible fear and reasonable fear screenings for detained aliens, has assisted ICE in implementing the policy changes, including by developing a notice to such aliens that parole from custody may be available.

SOURCE:

This was also addressed in the CERD Committee's 2008 Concluding Observations and Recommendations, paragraph 37:

"The Committee requests the State party to provide, in its next periodic report, detailed information on the legislation applicable to refugees and asylum-seekers, and on the alleged mandatory and prolonged detention of a large number of non-citizens, including undocumented migrant workers, victims of trafficking, asylum-seekers and refugees, as well as members of their families (arts. 5 (b), 5 (e) (iv) and 6)."

9. Credible fear and reasonable fear processes

L-9. QUESTION—DELAYS IN CREDIBLE AND REASONABLE FEAR INTERVIEWS: How does the U.S. government justify its failure to process and complete credible and reasonable fear cases in compliance with immigration law and regulations? Numerous reports and press accounts indicate that the U.S. government through responsible administrative agencies rarely if ever initiates and completes reasonable fear interviews within the 10 days prescribed by regulation (8 C.F.R. 208.31(b)), or ensures through issuance of the Form I-863, *Notice of Referral to Immigration Judge,* review within 7 days of credible fear cases (8 C.F.R. 1003.42(e)). This has resulted in class action litigation highlighting prolonged detention and delayed referrals to the immigration court. Would you agree that the U.S. government has a non-discretionary obligation to provide reasonable fear interviews and determinations, and credible fear referrals for review by an immigration judge in a timely manner; what do you consider timely given your existing resources and demand, and what, if any, plans do you have to improve credible/reasonable fear processing times?

RESPONSE:

- **The U.S. has a long history of providing humanitarian relief to refugees and other individuals seeking protection from harm. As a party to the both 1967 Protocol relating to the Status of Refugees and the Convention Against Torture (CAT), we are committed to fulfilling our non-refoulement obligations. To reduce delays and backlogs, we are in the process of hiring 400 new asylum officers, with an emphasis on the cities with the greatest demand.**

- **Credible fear determinations are governed by longstanding statute. A USCIS officer must find that a "significant possibility" exists that the individual may be found eligible for asylum or withholding of removal.**

    - If the credible fear threshold is met, the individual is placed into removal proceedings before an Immigration Judge. As is longstanding policy, U.S. Immigration and Customs Enforcement (ICE) makes custody determinations on a case-by-case basis following a thorough review of criminal and national security databases. If an individual claiming asylum at the border is deemed to be a threat to public safety or national security, ICE has the authority to keep the individual in detention until their case is heard by an immigration judge.
    - Only a judge can determine asylum eligibility for an individual in expedited removal.

- During the credible fear process, USCIS initiates a background check using immigration, national security and criminal databases.

- To ensure that the U.S. maintains compliance with its international treaty obligations relating to non-refoulement, individuals subject to expedited removal who indicate a fear of persecution or torture or who indicate an intent to apply for asylum are referred to a specially trained U.S. Citizenship and Immigration Services (USCIS) asylum officer who conducts a detailed screening of eligibility for asylum and other forms of protection.

- Individuals attempting to enter the U.S. without valid travel documents encountered at or near a port of entry who express a fear of returning to their home country are given "credible fear interviews" while those who are subject to having prior orders of removal reinstated or to expedited removal as non-lawful permanent resident aggravated felons, may request a "reasonable fear interview" in order to seek protection in this country. In either set of circumstances, USCIS AOs are instructed to ask questions enabling individuals to describe any past, present or future experiences and/or fears of persecution, torture or other harm in any country, including the United States.

- **Since June 2013, the credible fear process has taken an average of 8 days to complete following notification. The average number of days between when an individual in the expedited removal process was detained before being referred to an asylum officer was 19 days.**

- In Fiscal Year (FY) 2013, approximately 15% of all individuals placed into expedited removal required a credible fear screening. This translated into 36,000 new cases, of which 65% involved nationals of El Salvador, Honduras or Guatemala, and just over 7% involved nationals of Mexico. This unprecedented demand far exceeds earlier figures (FY 2010 to FY 2012, the annual percentage ranged from 7-9%) and is more than double the number (13,391) from FY 2012.

- Reasonable fear cases have also increased dramatically with over 7,000 in FY 2013 compared to a few hundred in previous years.

- USCIS Asylum Offices are on track to receive a record number of credible and reasonable fear cases through FY 2014, with the former expected to exceed 45,000.

- The U.S. government is working extremely hard to address demand related to credible/reasonable fear cases. We are in the process of hiring and training almost 400 new asylum officers, with expansion focused on USCIS offices in Los Angeles, Houston, New York and Newark. We will continue to maximize the use of all available resources and personnel and facilitate effective inter-agency

communication and the provision of humanitarian protection to refugees and other vulnerable individuals.

SOURCES: This question is based on recent articles and reports, including *Mexican and Central American Asylum and Credible Fear Claims*, a Special Report by the American Immigration Council (May 2014), and a class action lawsuit filed on April 17, 2014, by the ACLU Foundation of Southern California against the DHS challenging its failure to process and complete reasonable fear interviews and make reasonable fear determinations in compliance with applicable immigration regulations. The proposed response is drawn largely from the December 12, 2013, written testimony of USCIS Deputy Director Lori Scialabba, ICE Deputy Director Daniel Ragsdale, and CBP Office of Border Patrol Chief Michael Fisher for a House Committee on the Judiciary hearing titled "Asylum Abuse: Is it Overwhelming our Borders?" *See,* http://www.dhs.gov/news/2013/12/12/written-testimony-uscis-ice-and-cbp-house-committee-judiciary-hearing-titled-%E2%80%9Casylum.

BACKGROUND (Credible/Reasonable Fear Cases):

The number of credible/reasonable fear cases has increased dramatically since FY 2012. The vast majority of the cases involve Salvadorans, Hondurans and Guatemalans, and have been attributed to reports of increased drug trafficking, violence and overall rising crime in those countries. The Department of Homeland Security, through CBP, ICE and USCIS, is struggling to address and minimize the demand for such interviews and to provide safe, adequate detention space. Inter-agency coordination is essential to this effort and is ongoing.

10. Immigration detention

L-10(1). QUESTION – DURATIONAL LIMITS ON DETENTION OF UNDOCUMENTED MIGRANTS**:** Are there any restrictions or limitations on the duration of detention of undocumented migrants pending the initiation or completion of removal or deportation proceedings? What requirements exist to assure prompt proceedings before a court, whenever an alien is detained? Can the State Party provide statistics on numbers of aliens detained and the length of detention in such cases, as well as the time delay in the initiation of administrative or judicial proceedings?

RESPONSE:

- **Federal and state laws establish standards of care to which all migrants detained in the United States are entitled, including those held by DHS.**

- **The United States works hard to ensure that undocumented migrants are treated humanely in a manner consistent with the U.S. laws and applicable international obligations.**

- Detention of aliens under the Immigration and Nationality Act is not indefinite, but is undertaken for the purpose of obtaining and executing a removal order. Courts have recognized that indefinite detention raises constitutional concerns. *See Zadvydas v. Davis*, 533 U.S. 697 (2001).

- U.S. law does provide for the mandatory detention of certain aliens pending completion of removal proceedings and then removal from the United States. There is ongoing litigation regarding the scope of application of these laws. *See, e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1227 (9th Cir. 2013).

- Generally, a decision to pursue removal proceedings against a detained alien must be made within 48 hours of the arrest, except for emergencies or other extraordinary circumstances.

- Once the government has initiated removal proceedings, immigration judges are to adjudicate the case in an expeditious manner. Aliens eligible for release on bond may seek a bond hearing orally or in writing. Aliens may also challenge a determination of whether they are bond eligible.

- An adverse bond decision by an immigration judge may be appealed to the Board of Immigration Appeals prior to the entry of a final order of removal. The federal district courts also have jurisdiction to consider challenges to civil immigration detention in the context of a petition for writ of habeas corpus.

- In FY 2013, ICE had 440,557 book-ins into ICE detention. In year-to-date FY 2014 (as of 5/31/2014), ICE had 287,041 book-ins into ICE detention.

- In FY 2013, the average length of stay in ICE detention was 28.7 days. The average length of stay in ICE detention for those cases requiring a hearing was 47.3 days in FY 2013.

- In year-to-date FY 2014 (as of 5/31/2014), the average length of stay in ICE detention is 29.0 days. The average length of stay in ICE detention for those cases requiring a hearing was 44.9 days in year-to-date FY 2014 (as of 5/31/2014).

SOURCES: See generally NGO submissions on immigration detention, see generally Human Rights Watch, pp. 21-23; Midwest Coalition for Human Rights. See also, generally, John Marshall Law School Human Rights Project submission to the Committee in September 2013, Joint Submission to the U.N. Human Rights Committee Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America (removed).

BACKGROUND (Durational Limits on Detention of Undocumented Migrants):

Pending the initiation of removal proceedings, the Department of Homeland Security (DHS) must generally determine within 48 hours whether a detained alien will continue in custody or be released on bond. (*See* 8 C.F.R. § 287.3(d)) Generally, within 48 hours, DHS must also determine whether the alien will be charged with removability by filing a charging document known as a Notice to Appear (NTA). *Id*

Regarding detention pending the completion of removal or deportation proceedings, the statutes and regulations do not explicitly limit the length of detention pending a final order of removal. Congress has mandated that certain aliens be detained without the opportunity for a bond hearing pending a final order of removal, namely certain criminals and terrorists. *See* 8 U.S.C. § 1226(c). In *Demore v. Kim*, the Supreme Court held that mandatory detention during deportation proceedings is constitutionally valid. 538 U.S. 510, 523 (2003). But some courts have noted that lengthy, pre-removal order custody without an individualized hearing may be problematic. **The Ninth Circuit Court of Appeals has held that any alien who has been detained for six months is entitled to a bond hearing. *See Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013).** The Third and Sixth Circuits have determined that lengthy mandatory detention is subject to a rule of reason, but did not delineate a particular period of time. *Diop v. ICE*, 656 F.3d 221 (3d Cir.2011); *Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir.2003). What these courts have focused on is the length of detention without a bond hearing, not the length of detention.

Several requirements exist to assure prompt proceedings for a detained alien before the Immigration Courts. As discussed above, when an alien is detained, DHS must determine whether it will file an NTA within 48 hours. *See* 8 C.F.R. § 287.3(d). Throughout the immigration court process, including appeals, detained aliens receive significantly accelerated hearing dates and decisions, and the Administration has made expediting detained cases a high priority. *See* Executive Office of the President, *High Priority Performance Goals*, at 12, *available at*

http://www.whitehouse.gov/sites/default/files/omb/performance/high-priority-performance-goals.pdf (last visited Aug. 20, 2013). The Administration's goal is to complete 85 percent of detained cases within 60 days. *Id.*

L-10(2). QUESTION –JAIL-LIKE CONDITIONS FOR MIGRANTS IN DHS DETENTION**:** Immigrant detainees are not criminals and should not be treated as such. What steps is DHS taking to ensure that migrants are not held in jail-like detention facilities while under its authorities?

RESPONSE:

- **Federal and state laws establish standards of care to which all migrants detained in the United States are entitled, including those held by DHS.**

- **The United States works hard to ensure that undocumented migrants are treated humanely in a manner consistent with the U.S. Constitution and laws and applicable international obligations.**

- **U.S. Immigration and Customs Enforcement (ICE) employs a rigorous and multi-layered system of monitoring and oversight to ensure compliance by detention facilities with its national detention standards.**

- The detention standards ensure that detainees have adequate access to medical care, legal resources, visitation, recreation, grievance processes, and other programs and privileges consistent with civil detention principles. These standards are designed to ensure humane conditions tailored to the needs of the ICE detainee population and consistent with the civil rather than penal purpose of immigration detention.

- In 2007, ICE issued the Family Residential Standards (FRS), which guide the care and custody of non-violent, non-criminal alien families housed in ICE Residential Centers pending the outcome of their immigration proceedings. The standards were developed with input from medical, psychological, and educational subject matter experts and various organizations such as the DHS Office of Civil Rights and Civil Liberties (CRCL) and many non-governmental organizations (NGOs). These standards were also crafted to resolve key pieces of the Hutto Settlement Agreement to bolster best practices in family detention. The standards address issues specifically related to housing these vulnerable populations, ensure best practices in relation to educational and recreational access and opportunities for children and demand stringent behavior management standards which take into consideration the specific developmental and behavioral nature of children.

- Until recently, ICE maintained only one facility, the Berks County Residential Center, equipped to house family groups and operating under the Family Residential Standards. Berks has a maximum capacity of 96 beds and is located in Leesport, PA. The facility holds a Pennsylvania State child residential facility license. Berks only accepts non-criminal, non-violent aliens for placement, as the family members groups reside and interact together in a non-secure, residential-style environment. The Center layout includes an on-site

state licensed educational program, resident internet bank, fitness, movie, arts and crafts and activity rooms, social and law library, and toddler playroom. Residents may access a host of age appropriate educational and recreational items, activities, and events both on and off site. Residents at the Center wear their own clothing, adults have no mandatory scheduling requirements (other than personal housekeeping) and adults retain parental supervision responsibilities while at the Center. Adult residents may freely move around the Center and outdoor campus between 0800 and 2000 each day, and may allow their older children to participate in the same free movement. Additionally, the sleeping accommodations provided at Berks are unique to ICE detention and further foster family unity. Upon admission, parents with children under twelve years old are assigned a bedroom together, while children twelve years and older are assigned bedrooms with other children of like gender and age.

In July 2014, DHS began housing limited numbers of adults with children at its newest detention facility in Artesia, New Mexico, and continues to explore other locations that may be suitable for housing this population in accordance with the requirements of the relevant detention standards.

- Development of Risk Classification Assessment: In January 2013, ICE completed nationwide deployment of the new automated Risk Classification Assessment to improve transparency and uniformity in detention and custody classification decisions, aid in identifying vulnerable populations, and promote the prioritization of detention resources. The Risk Classification Assessment contains objective criteria, incorporating factors reflecting the agency's civil enforcement priorities and any special vulnerabilities that may affect custody and classification determinations, to guide the decision-making of ICE officers and their supervisors regarding whether an alien should be detained or released, and, if detained, the appropriate custody classification level.

SOURCES: This concern was raised in September 2013 shadow reports to the Committee from the John Marshall Law School Human Rights Project: Joint Submission to the U.N. Human Rights Committee Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America and from Amnesty International: Submission to the Human Rights Committee

BACKGROUND (Jail-like Conditions for Migrants in DHS Detention):

NGO Concerns

The John Marshall Law School Human Rights Project renews concern that ICE relies on correctional incarceration standards that impose unnecessary and disproportionate

restrictions on immigrant detainees and that the conditions that result violate the fundamental right to liberty under ICCPR Art. 9(1). "Immigrant detainees are not criminals and should not be treated as such."

Amnesty International recommends that the Committee also asks whether the U.S. will pass[support] legislation that creates a presumption against the detention of immigrants and asylum-seekers, and that ensures that detention be used as a measure of last resort?

L-10(3). QUESTION –DHS PREVENTION OF MISTREATMENT OF DETAINEES IN ICE FACILITIES**:** What does DHS do to prevent mistreatment of detainees in its detention facilities?

RESPONSE:

- **Federal and state laws establish standards of care to which all migrants detained in the United States are entitled, including those held by the Department of Homeland Security's U.S. Immigration and Customs Enforcement (ICE).**

- **The Department of Homeland Security meets its legal mandates by confining migrants in detention facilities that are safe, humane, and appropriately secure, and implementing strict rules for all its law enforcement personnel, regularly training detention personnel, monitoring performance, and investigating alleged misconduct wherever warranted.**

- The ICE Office of Enforcement and Removal Operations employs more than 41 on-site federal Detention Service Managers at 54 ICE detention facilities covering approximately 85.6 % of ICE's detained population. These officers monitor and inspect facility operations on a daily basis to ensure safe, secure, and humane conditions of confinement and to provide "on the spot" resolutions for operational issues or concerns. A quality assurance team further reviews these facilities to ensure that the monitoring is effective. Since December 2010, the quality assurance team has performed 39 reviews across the country.

- ICE conducts regular inspections of its facilities. All ICE facilities with an average daily population of 50 or more detainees are inspected on an annual basis. These inspections test compliance with applicable ICE detention standards, the most recent version of which are the 2011 Performance-Based National Detention Standards.

- The ICE Office of Detention Oversight also conducts periodic compliance inspections at selected facilities where detainees are housed for periods in excess of 72 hours, including facilities where allegations of detainee mistreatment have been reported.

- ICE Enforcement and Removal Operations has since September 2012 operated a Detention Reporting and Information Line (DRIL), which is available in all over-72 hour detention facilities, and serves as an additional oversight mechanism for the agency. DRIL is available to ICE detainees, toll free, and is a direct line to trained operators prepared to record and respond to detainee questions, concerns, and/or complaints. Call center representative will answer calls and assist with resolution on subjects such as reporting incidents of sexual or physical assault or abuse; serious or unresolved problems in detention; victims of human trafficking and other crimes; reports on individuals with serious mental disorders or conditions; separation of minor child or other dependent and other parental related issues; inquiries from the general public, law enforcement officials and others; requests for basic case

information; and other detention related issues. DRIL employs a case management system that allows for timely coordination between HQ and appropriate field office leadership to follow up, as necessary, on detainee allegations. The DRIL is available to detainees Monday through Friday, 8am – 8pm.

- Additional layers of oversight are undertaken through site visits, investigations, and audits from the U.S. Government Accountability Office, the DHS Inspector General, and the DHS Office for Civil Rights and Civil Liberties.

IF ASKED:

- Issuance of Sexual Assault Policy: In May 2012, ICE issued a directive on sexual abuse and assault prevention and intervention, establishing agency-wide policy and procedures for responding to incidents or allegations of sexual abuse or assault of individuals in ICE custody. The "Sexual Abuse and Assault Prevention and Intervention" (SAAPI) policy delineates duties of agency employees for timely reporting, coordinated response and investigation, and effective monitoring of all incidents of sexual abuse or assault of individuals in ICE custody in order to ensure an integrated and comprehensive system of responding to such incidents, and it complements sexual assault safeguards applicable to detention facilities contained in the 2011 Performance-Based National Detention Standards. In March 2014, the Department of Homeland Security (DHS) promulgated regulations implementing the Prison Rape Elimination Act (PREA); the regulations further strengthen sexual assault safeguards at ICE detention and holding facilities.

- As part of implementing the standards set forth in the DHS PREA regulation, ICE updated the SAAPI policy and on May 22, 2014, ICE reissued enhanced guidance for preparing for and responding to incidents of sexual assault in detention.

- Enhanced Review of Segregation Placements: In September 2013, ICE issued the directive "Review of the Use of Segregation for ICE Detainees," which established ICE policy and procedures for the review and oversight of decisions to place ICE detainees in segregated housing for more than 14 days, or placements in segregation for any length of time in the case of detainees for whom heightened concerns exist based on factors related to the detainee's health or other special vulnerabilities. This directive enhances reporting requirements for facilities concerning such cases, and requires ICE field offices and headquarters to evaluate the appropriateness of continued placement and to determine the viability of any potential housing or custodial alternatives.

- Development of Risk Classification Assessment: In January 2013, ICE completed nationwide deployment of the new automated Risk Classification Assessment to improve transparency and uniformity in detention and custody classification decisions, aid in identifying vulnerable populations, and promote the prioritization of detention resources. The Risk Classification Assessment contains objective criteria, incorporating factors reflecting the agency's civil enforcement priorities and any special vulnerabilities that may affect custody and classification determinations, to guide the decision-making of ICE

officers and their supervisors regarding whether an alien should be detained or released, and, if detained, the appropriate custody classification level.

SOURCES: See generally September 2013 shadow reports to the Committee from the John Marshall Law School Human Rights Project: Joint Submission to the U.N. Human Rights Committee Concerning the Use of Solitary Confinement in Immigrant Detention Facilities in the United States of America and from Amnesty International: Submission to the Human Rights Committee; See ¶¶ 13, 14, and 62 of the July 3 written responses, http://www.state.gov/j/drl/rls/212393.htm.

BACKGROUND (DHS Prevention of Mistreatment of Detainees in ICE Facilities):

DHS Actions

DHS OIG and ICE OPR have conducted criminal investigations leading to indictments, arrests, and convictions for various civil rights violations. Allegations in these cases have included the sexual assault of an unaccompanied minor being held in an ICE detention facility; an unwarranted physical assault of an ICE detainee by a supervisory detention facility staff member who then ordered other officers to cover the crime by submitting false reports; the sexual assault of a woman in the custody of a border officer in the presence of her two minor children; and the physical assault of a restrained immigration detainee by an ICE detention official at an ICE facility for special needs detainees.

NGO Concerns

The John Marshall Law School Human Rights Project renews concern that ICE relies on correctional incarceration standards that impose unnecessary and disproportionate restrictions on immigrant detainees and that the conditions that result violate the fundamental right to liberty under ICCPR Art. 9(1).

L-10 (4). QUESTION – DHS OVERSIGHT OF PRIVATE IMMIGRATION DETENTION FACILITIES**:** What measures is DHS taking to oversee the treatment of immigration detainees in private detention facilities and to ensure that they are held to international standards regarding the treatment of detainees by States?

RESPONSE:

- **Federal and state laws establish standards of care to which all migrants detained in the United States are entitled, including those held by DHS Immigration and Customs Enforcement (ICE). Publicly and privately owned or operated detention facilities are all held to the detention standards.**

- **The Department of Homeland Security meets its legal mandate by confining migrants in detention facilities that are safe, humane, and appropriately secure.**

- The Custody Management Division of ICE ensures that all ICE detention facilities – including contract facilities run by private companies – comply with ICE national detention standards. These standards were revised most recently in 2011 to improve medical and mental health services, increase access to legal services and religious opportunities, ensure meaningful access for detainees with no or limited English proficiency, and to make other changes consistent with good practice.

- ICE has also established an on-Site Detention Monitoring Unit with 41 federal Detention Service Managers who work at 54 facilities across the country to inspect and monitor compliance with ICE detention standards, respond to and report problems, and implement solutions.

- The ICE Custody Management Division runs a Community and Detainee Hotline so detainees can easily report facility concerns, mistreatment, and/or staff misconduct.

- Other layers of oversight are provided by ICE's Office of Detention Oversight, which conducts periodic inspections of detention facilities for compliance with national detention standards, as well as the DHS Office of the Inspector General and the DHS Office for Civil Rights and Civil Liberties.

SOURCES: This question is based on questions raised by Human Rights Advocates and the University of San Francisco Center for Law and Global Justice Criminal Sentencing Project, during the Civil Society Consultation in May 2013 and their joint submission to the Committee in September 2013: Report on the United States' Compliance with the International Covenant on Civil and Political Rights.

BACKGROUND:

As of June 9, 2014, the 54 facilities under the purview of the Detention Monitoring unit house 85.6% of ICE's average daily detainee population. In many cases, problems are remedied on the spot. In other instances, the ICE Custody Management Division implements and monitors remedial plans.

NGO Concerns:

Human Rights Advocates and the University of San Francisco Center for Law and Global Justice Criminal Sentencing Project identifies as key concerns that;

- Private contractors, because they profit from detention, have a conflict of interest in the treatment of detainees.
- Their facilities cut costs in order to foster greater profits at the expense of those held in detention.
- Some have no trauma recovery programs, no job training programs, no programs addressing mental illness, no disease management or health programs, and no programs addressing sex offender issues.
- They often utilize undertrained and undisciplined staff to cope with complicated problems.
- These employees have little incentive to do their job well because they are underpaid and are given little to no health benefits and experience high staff turnover rates.

L-10(5). QUESTION – DHS OVER-RELIANCE ON PRIVATE DETENTION FACILITIES**:** In view of the significant concerns regarding conditions in private detention facilities, is DHS willing to stop contracting with private companies to run immigration detention facilities?

RESPONSE:

- **Federal and state laws establish standards of care to which all migrants detained in the United States are entitled, including those held by DHS Immigration and Customs Enforcement (ICE).**

- **The Department of Homeland Security meets its legal mandate by confining migrants in detention facilities that are safe, humane, and appropriately secure.**

- Privately operated facilities; facilities operated by state and local governments; and other arrangements are all governed by ICE's detention standards and oversight procedures. That is, **federal detention standards are in effect in all facilities ICE employs, whether public or private**.

SOURCES: Question posed by Human Rights Advocates and the University of San Francisco Center for Law and Global Justice Criminal Sentencing Project in their joint submission to the Committee in September 2013: Report on the United States' Compliance with the International Covenant on Civil and Political Rights.

BACKGROUND (DHS Over-reliance on Private Detention Facilities)**:**

L-10(6). QUESTION – DOMESTIC DETENTION OVERSIGHT**:** Previously, the United States reported the creation of the ICE OPR Office of Detention Oversight (ODO), which is charged with independently verifying the inspection of detention facilities, according to national detention standards. Please update the Committee as to the success of these oversight mechanisms in improving detention conditions, particularly in private facilities. Do these Offices also play a role in redressing individual reports of problematic detention conditions? How does the United States ensure protections from retaliation for detainees who file complaints while in custody?

RESPONSE:

- **The United States works hard to ensure that migrants are treated humanely in a manner consistent with the U.S. laws and applicable international obligations. These laws and obligations are incorporated into concrete detention standards to which all facilities that hold civil immigration detainees are held accountable**

- The DHS Immigration and Customs Enforcement Office of Detention Oversight conducts periodic compliance inspections at selected detention facilities where detainees are housed for periods in excess of 72 hours, including facilities where allegations of detainee mistreatment have been reported.

- The work of the Office of Detention Oversight's adds to and complements the functions of the DHS Office for Civil Rights and Civil Liberties, which investigates complaints from the public, including allegations of retaliation, and makes recommendations to correct deficiencies.

- ICE's Custody Management Division follows up on all deficiencies identified by the Office of Detention Oversight and requires detention facilities to develop corrective action plans to remedy all negative findings. At select detention facilities where ICE maintains on-site Detention Services Managers, corrective action plans are closely monitored to ensure issues are appropriately addressed. It is through the agency's robust inspection program and implementation of a thorough corrective action process that ICE is assured that conditions remain appropriate at detention facilities.

- ICE Enforcement and Removal Operations has since September 2012 operated a Detention Reporting and Information Line (DRIL), which is available in all over-72 hour detention facilities, and serves as an additional oversight mechanism for the agency. DRIL is available to ICE detainees, toll free, and is a direct line to trained operators prepared to record and respond to detainee questions, concerns, and/or complaints. Call center representative will answer calls and assist with resolution on subjects such as reporting incidents of sexual or physical assault or abuse; serious or unresolved problems in detention; victims of human trafficking

and other crimes; reports on individuals with serious mental disorders or conditions; separation of minor child or other dependent and other parental related issues; inquiries from the general public, law enforcement officials and others; requests for basic case information; and other detention related issues. DRIL employs a case management system that allows for timely coordination between HQ and appropriate field office leadership to follow up, as necessary, on detainee allegations. The DRIL is available to detainees Monday through Friday, 8am – 8pm. The DRIL allows for near real-time resolution of issues and concerns in detention. Aggregate DRIL data is used to assess potential systemic issues in detention.

- ICE maintains at the headquarters level an oversight mechanism for managing effective implementation of humane policies in detention. The Detention Monitoring Council (DMC) is comprised of senior ICE leadership and meets on a quarterly basis to discuss issues related to detention and recommends policy changes for mitigating risk nationally, including reports of sexual assault or abuse, employee misconduct, and use of segregation. It also meets on an ad-hoc basis to review any deaths of aliens in ICE custody. A sub-committee of the DMC meets on a monthly basis to review more timely issues.

SOURCES: This question is based on questions submitted by the New Orleans Workers' Center for Racial Justice. For the general concerns of this NGO, see its September 2013 submission: Migrant Workers in the South Expose How U.S. Immigration Enforcement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights.

L-10(7). QUESTION – ADDRESSING CIVIL SOCIETY CONCERNS ABOUT CONDITIONS OF DETENTION**:** Civil society groups continue to report immigration detention conditions that are dangerous to the health and safety of detained migrants; over-reliance on detention of individuals including women, children, and asylum seekers; and punitive actions against detainees including the use of solitary confinement. How is the United States responding to these continuing concerns from civil society?

RESPONSE:

- **Federal and state laws establish standards of care to which all migrants detained in the United States are entitled, including those held by DHS Immigration and Customs Enforcement (ICE).**

- **The United States works hard to ensure that undocumented migrants are treated humanely in a manner consistent with the U.S. laws and applicable international obligations.**

- ICE national detention standards (most recently the 2011 Performance Based National Detention Standards) establish minimum conditions of detention (and, optionally for particular facilities, enhanced conditions) for immigration detainees with respect to medical care, access to legal resources, visitation, recreation, correspondence, religious services, grievance processes, and a number of other issues.

- ICE employs rigorous and multi-layered forms of oversight to ensure compliance by detention facilities with the agency's standards; other DHS offices provide further layers of oversight.

- ICE civil immigration enforcement priorities direct that enforcement resources be focused on criminal aliens, individuals who pose a threat to public safety and national security, repeat immigration law violators, and other individuals prioritized for removal.

- Absent extraordinary circumstances or the requirements of mandatory detention, ICE policy dictates that individuals should not be detained if they are known to be suffering from serious physical or mental illness, or if they are disabled, elderly, infirm, pregnant or nursing, or demonstrate that they are primary caretakers of children, or if their detention is otherwise not in the public interest.

- ICE prosecutorial discretion policies further require that positive consideration be given to whether an individual is a minor, or is likely to be granted temporary or permanent status or relief as an asylum seeker or victim of domestic violence, human trafficking, or other crime.

- In addition, ICE's parole policy mandates that all asylum seekers found to have a credible fear of persecution be granted parole so long as they establish their identities,

pose neither a flight risk nor a danger to the community, and have no additional factors weighing against their release.

- ICE detention standards prohibit the imposition of any punitive sanction against a detainee absent a finding by an institutional disciplinary panel that the detainee has committed a facility infraction. Detainees are entitled at such disciplinary hearings to present statements and evidence, call witnesses, and draw upon the assistance of a staff representative to prepare a defense.

- The use of segregation as a potential sanction is authorized only for confirmed serious disciplinary infractions.

SOURCES: Question recommended by New Orleans Workers' Center for Racial Justice in its September 2013 shadow report: Migrant Workers in the South Expose How U.S. Immigration Enforc ement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights*

BACKGROUND (Addressing Civil Society Concerns about Conditions of Detention):

NGO Concerns:

The New Orleans Workers' Center for Racial Justice expressed concern that the number of people held in immigration detention has grown greatly in the last decade. Private contractors are relied upon to run detention facilities. People in immigration detention report lack of access to medical care, shortages of basic toiletries, a vacuum of information about their deportation cases, and minimal to no access to family or lawyers. They further assert that detainees who report conditions are regularly ignored or retaliated against.

Continued Detention of Thousands of Noncitizens who Pose no Flight Risk or Threat to Public Safety

L-10(8). QUESTION – CONTINUED DETENTION OF THOUSANDS OF NONCITIZENS WHO POSE NO FLIGHT RISK OR THREAT TO PUBLIC SAFETY – In the absence of comprehensive immigration reform legislation, the U.S. has continued to aggressively enforce immigration laws, often to the detriment of families and communities across the country. At any given time, DHS detains thousands of noncitizens who pose no flight risk or threat to public safety while they are awaiting deportation proceedings. Detention costs the American taxpayer an estimate $159 per person per day, but alternatives to detention (such as release on recognizance, community-based support services or bond) do not carry an expense, and other alternatives cost from pennies to around $18 per person per day. What steps is the U.S. government taking to move toward alternatives to detention to ensure that it ensures compliance with immigration laws in a more humane way?

- **RESPONSE:**
  - **The United States is committed to safe, humane, and efficient immigration enforcement, including substantial use of alternatives to detention programs.**
  - Institutional immigration detention and Alternatives to Detention (ATD) programs, however, are only part of the process. The Departments of Homeland Security and Justice are working to increase immigration court efficiencies to ensure removal hearings are completed efficiently, reducing the time period in which individuals may be subject to detention or supervision.
  - One ATD option includes release on recognizance or bond and comes at little or no cost. Other forms of alternatives to detention include forms of supervision and monitoring, such as enrollment in an Alternatives to Detention program including the Intensive Supervision Appearance Program (ISAP), Enhanced Supervision/Reporting (ESR), and Electronic Monitoring (EM). The ISAP program allows ICE to monitor participants through telephonic reporting, radio frequency, GPS, and unannounced home visits. ESR uses the same monitoring methods as ISAP. Individuals in ATD programs are also required to show up to mandatory hearings.
  - The President's budget for FY 2014 funds 30,539 detention beds, instead of the 34,000 beds mandated by Congress in prior years. This avoids approximately $185 million in detention and removal costs while allowing U.S. Immigration and Customs Enforcement (ICE) to detain priority aliens. This level of beds allows ICE to ensure the most cost-effective use of federal dollars, focusing the more-costly detention capabilities on priority and mandatory detainees, while placing low-risk, non-mandatory detainees in lower cost Alternatives to Detention Programs (ATD), where the President's 2014 budget proposed a $2 million increase.

- To continue meeting and exceeding enforcement expectations, ICE continues to implement efficiencies that assist with identifying, detaining, and removing those individuals who are enforcement priorities, such as those who pose a danger to the community or are a flight risk, while exercising discretion appropriately. Examples of this include implementing nationwide the risk classification assessment (RCA), a pilot program in which ICE works with the Executive Office for Immigration Review to expedite priority cases that are not subject to detention; and further expansion of the Alternatives to Detention program.

- **SOURCE:** This question came from comments made in a Shadow Report titled "Falling Further Behind: Combating Racial Discrimination America." The authors of this report are the Leadership Conference Education Fund and the Leadership Conference on Civil and Human Rights with the Lawyers' Committee for Civil Rights Under Law and the National Association for the Advancement of Colored People (NAACP).

L-10(9) QUESTION: HEALTH CARE FOR DETAINED MIGRANTS, INCLUDING WOMEN: Please inform the Committee of steps taken to address the reports of inconsistent and inadequate medical care for immigrant women held by United States Immigration and Customs Enforcement detention system.

[based on ICCPR B-2(9) with no substantive edits]

RESPONSE:

- **The United States is committed to ensuring that all persons in the United States receive the treatment and protections to which they are entitled under our Constitution and laws, including any applicable international obligations; it recognizes fully its responsibilities with respect to any migrant deprived of liberty, whether by federal, state, or local authorities.**

- **As part of its ongoing immigration detention reform programs, DHS has significantly improved health services for all persons in its custody, including women. The ICE Health Services Corps (IHSC) provides direct health care to approximately 15,000 detainees, including women, in ICE custody. IHSC also oversees medical care provided to all ICE detainees at non-IHSC staffed state and local facilities and ensures the care provided accords with applicable standards.**

- **ICE's most recent set of national detention standards (the 2011 Performance Based National Detention Standards) incorporate a new standard focused exclusively on the medical care provided to female detainees. This standard establishes uniform minimum requirements for the adequate provision of women's health care, including gynecological and obstetrical care. Among other things, female detainees are entitled under this standard to routine age-appropriate medical assessments, preventive services (including baseline mammograms, pelvic examinations, pap smears, and STD screenings), birth control, and pregnancy services (including pregnancy testing, routine or specialized prenatal care, and postpartum follow-up.**

- The Office for Civil Rights and Civil Liberties (CRCL) at DHS investigates complaints alleging inadequate medical care. Where allegations are substantiated, CRCL has and will continue to provide policy, practice, and training recommendations to leadership of the involved DHS component agency

- The Federal Bureau of Prisons (BOP) houses female immigrants who are serving criminal sentences imposed by a Federal court. All offenders housed in BOP custody have access to on-site medical care in their respective facilities, and the availability of care in the community, if needed. The BOP also operates medical facilities for offenders who may need greater levels of health care. The medical center for female offenders is located in Carswell, Texas.

- (If raised) Immigrant women held in state, local, tribal and territorial governmental custody are not monitored by the BOP; BOP would only have jurisdiction over female immigrants who committed federal crimes, and were sentenced to BOP custody.

- (If needed) Any ineligibility for Medicaid or other subsidized benefits available under the ACA or other laws applicable to segments of the public at large, would in no way adversely affect migrants in the custody of federal, state or local government authorities, because those authorities are responsible for providing fully for the migrants' welfare needs (including medical care) for the duration of that custody.

11. Sexual violence in immigration detention / PREA implementation

L-11(1). QUESTION – PREVENTING SEXUAL VIOLENCE IN DETENTION: What is the United States doing to design and implement appropriate measures to prevent sexual violence in all its detention facilities? In this respect, please elaborate on the measures taken to implement the Prison Rape Elimination Act and on the standards developed by the National Prison Rape Elimination Commission in 2009 to detect, prevent, reduce, and punish prison rape, as well as on the implementation thereof.

RESPONSE:

- **The United States is taking extensive action at all levels of government to prevent sexual violence and other sexual victimization in its detention centers.**

- The United States is actively working to address recommendations of the bipartisan National Prison Rape Elimination Commission (NPREC) established by the 2003 Prison Rape Elimination Act.

    - DOJ issued regulations implementing the Prison Rape Elimination (PREA) Act in 2012 which addressed and strengthened many of the Commission's regulations. These regulations apply to the Federal Bureau of Prisons and all DOJ components.

    - On March 7, 2014, DHS finalized PREA regulations to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities, which include immigration detention facilities and holding facilities. .

- Pursuant to the DOJ regulation, states must also certify that all facilities under the operational control of the state's executive branch fully comply with the regulations, including facilities operated by private entities on behalf of the state's executive branch. A state that is not in full compliance will lose certain DOJ funding unless it pledges to devote such funding to coming into compliance.

- The final DOJ regulation includes greater protections for juvenile offenders in adult facilities; establishes new restrictions on cross-gender viewing and searches; sets minimum staffing ratios in juvenile facilities; expands medical and mental health care, including reproductive health care, for victims of prison rape; provides greater protections for lesbian, gay, bisexual, transgender, intersex, and gender non-conforming inmates; and requires independent audits of all covered facilities.

- DHS continues to administer and implement other measures to prevent sexual violence in its detention facilities.

- On May 22, 2014, ICE issued a revised directive on sexual abuse and assault prevention and intervention, which strengthens pre-existing agency-wide policy and procedures for responding to incidents or allegations of sexual abuse or assault of individuals in ICE custody.
- DHS, including its components ICE and CBP, has a zero tolerance policy for all forms of sexual abuse and assault in all of its facilities.
- It is DHS policy to provide effective safeguards against sexual abuse and assault of individuals in ICE and CBP custody, including through screening, staff training, detainee education, response and intervention, medical and mental health care, reporting, investigation, monitoring, and oversight, and provide agency-wide procedures for timely notification of sexual abuse and assault allegations, prompt response, and effective monitoring of sexual abuse and assault incidents

- DoD issued a Directive-type Memorandum in February 2013 establishing policy for DoD correctional facilities that DoD is "committed to work diligently to prevent, detect, and respond to prison rape." Among other things, it directs that that the secretaries of the military branches are responsible for maintaining a zero-tolerance standard for rape and all other types of violence, and upholding universally high standards to prevent, detect and respond to sexual abuse in prisons.

SOURCES: Material above is from the draft USG CAT report, edited somewhat. Material submitted for ICCPR questions is in the background section. See generally ¶¶ 74 – 85 of the July 3 written responses, http://www.state.gov/j/drl/rls/212393.htm. See also 4th Report, ¶¶ 184, 224, 246-247, 672 (CRIPA issues), http://www.state.gov/j/drl/rls/179781.htm.

BACKGROUND:

Fiscal Year 2014 is the first year that states and territories may have certain federal grant funds withheld unless they demonstrate an intention to comply with the law. Of the 56 jurisdictions that are subject to PREA – the 50 states, the 5 territories and the District of Columbia – 48 are in compliance or have submitted assurances to the department committing to spending five percent of certain federal grant funds to come into compliance. The eight states or territories that are unwilling to commit the five percent of federal grant funds to implementation of the PREA Standards are subject to the loss of five percent of certain department grant funds that they would otherwise receive. http://www.justice.gov/opa/pr/2014/May/14-dag-570.html

As noted in the July 3 written responses, the Violence Against Women Act Reauthorization of 2013 clarified that the Prison Rape Elimination Act (PREA) applies to DHS detention facilities, and also required the issuance of regulations

adopting national standards for the detection, prevention, reduction, and punishment of sexual abuse and assault in immigration detention.

Several DHS component agencies and offices – including ICE, CBP, CRCL, and the DHS Office of the General Counsel – participated in a working group to draft the DHS PREA final rule, which was published in March 2014.

DHS has a zero tolerance policy against sexual abuse. Both ICE and CBP have zero tolerance policies as well. The ICE policies and standards on sexual abuse and assault prevention and intervention clearly articulate the agency's zero-tolerance policy for incidents of sexual abuse or assault. These include *Admission and Release*; *Custody Classification System*; *Facility Security and Control*; *Searches of Detainees*; *Special Management Units* (for protective custody, administrative segregation, and disciplinary segregation); *Medical Care*; *Grievances*; *Sexual Abuse and Assault Prevention and Intervention*; *Disciplinary System*; and *Staff-Detainee Communication.*

More specifically, ICE standards and policies ensure that, among other things: staff receive training on working with vulnerable populations and addressing their potential special housing needs; detainees are screened to identify those individuals who are likely to be sexual aggressors or victims; all allegations of sexual abuse or assault are immediately and effectively reported to ICE, whose staff will refer the allegation for investigation.

L-11(2). QUESTION – INVESTIGATION OF SEXUAL VIOLENCE IN DETENTION FACILITIES**:** Please indicate steps taken to ensure that all allegations of violence in detention facilities are investigated promptly and independently, as well as that perpetrators are prosecuted and appropriately sentenced. (Good question for state and local officials.)

RESPONSE:

- **The United States is taking extensive action at all levels of government to prevent sexual violence and other sexual victimization in its detention centers.**

- DOJ's and DHS's Prison Rape Elimination Act regulations contain extensive requirements that all allegations of sexual abuse in facilities are to be thoroughly investigated and referred to the proper authorities, where appropriate, and that agencies follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence. The regulations require that there be multiple internal and external mechanisms to report sexual abuse, and staff are required to report any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment in a DHS facility.

- DOJ collects data on sexual victimization based on official records in the relatively small number of cases in which an inmate reports a violation to authorities. In substantiated cases of sexual victimization by prison staff (consisting of sexual misconduct or sexual harassment), staff members were arrested and referred for prosecution, or received other sanctions (e.g., reprimand and demotion). Substantiated incidents of inmate-on-inmate sexual victimization resulted in disciplinary sanctions, legal action, placement in higher custody within the same facility, loss of privileges, or transfer to another facility.

IF ASKED:

- ICE detainees may report a sexual abuse or assault incident to multiple entities, including the DHS Office of Inspector General, the ICE Office of Professional Responsibility Joint Intake Center, the ICE Detention Reporting and Information Line, the DHS Office for Civil Rights and Civil Liberties, the local ICE Field Office, and facility staff , and a dedicated email address to ICE headquarters. ICE policy requires that each such allegation be promptly, thoroughly, and objectively investigated by qualified investigators, whether from ICE itself, detention facility staff, or local law enforcement. ICE detention standards also require that confirmed perpetrators be disciplined accordingly.

- In addition, ICE is undertaking measures to improve reporting mechanisms, including coordination with DHS/OIG to expedite the sharing of incident reports, and improving communications between ICE headquarters and field offices. DHS/CRCL also investigates allegations of sexual abuse and assault as part of its efforts to review compliance with detention standards and recommend policy improvements to protect detainees from abuse in detention.

SOURCES: Response is based on the USG CAT report, http://www.state.gov/j/drl/rls/213055.htm

L-11(3). QUESTION – MEASURES TO REDUCE SEXUAL VIOLENCE IN DETENTION CENTERS**:** Please provide information on the impact and effectiveness of the measures employed in reducing cases of sexual violence in detention facilities.

RESPONSE:

- **The United States is taking extensive action at all levels of government to prevent sexual violence and other sexual victimization in its detention centers.**

- Although recent information is not yet available, a 2009 DOJ Office of Inspector General report on staff sexual abuse of federal prisoners found significant increases in cases accepted for prosecution and the percentage of convictions since 2006, when new laws changed sexual abuse crimes from misdemeanors to felony crimes.

- It is hoped that the enactment of the PREA implementing regulations, along with increased training and policy directives, will yield significant reductions of the terrible toll exacted by sexual abuse and violence in detention.

- DHS continues to implement and improve its policies as part of its broader detention reform efforts. Although it is working toward this goal, DHS is not yet able to quantify the impact of these measures. In May 2012, U.S. Immigration and Customs Enforcement (ICE) issued a Sexual Abuse and Assault Prevention and Intervention Directive. As part of this policy the new ICE Prevention of Sexual Assault (PSA) Coordinator will prepare an annual report for the ICE Director identifying problem areas and recommending corrective actions for the agency as well as for ICE detention facilities, and assessing the agency's progress in addressing sexual abuse and assault by comparing the current year's data with those from prior years.

SOURCES: Response is based on the U.S. CAT report, http://www.state.gov/j/drl/rls/213055.htm.

12. Unaccompanied immigrant children – counsel, best interests of child

L-12(1). QUESTION – FAMILY UNITY IN IMMIGRATION ENFORCEMENT: What steps is the USG taking to protect family unity, parental rights, and the right to family life—including, but not limited to, parental participation in education, extracurricular activities, securing medical care, and religious life—in its implementation of immigration policies and practices? What weight is given to family circumstance on a case-by-case basis before detaining or deporting an immigrant?

RESPONSE:

- **U.S. law and policy seeks to protect family unity and parental involvement wherever possible.**

- **While Border Patrol apprehensions of Mexicans in FY 2014 have increased slightly from FY2013, apprehensions of individuals from countries other than Mexico, predominately individuals from Central America, increased by well over 50 percent. Significant border-wide investments in additional enforcement resources and enhanced operational tactics and strategy have enabled CBP to address the changing composition of attempted border crossers, but the rising flow of unaccompanied children and adults with children into the Rio Grande Valley present unique operational and resource challenges for CBP and the Department of Health and Human Services (HHS) as well.**

- **U.S. Customs and Border Protection (CBP) is assisting with processing immigrants apprehended in South Texas, many of whom are adults with children. Upon completion of CBP processing, CBP is transferring certain individuals to U.S. Immigration and Customs Enforcement's (ICE) Enforcement and Removal Operations (ERO), where appropriate custody determinations will be made on a case-by-case basis, prioritizing national security and public safety.** In addition to the facility in Berks, Pennsylvania, some families are now held in ICE's temporary facility, in Artesia, New Mexico, in both locations under ICE detention standards specifically designed for families held in custody.

- DHS is ensuring that after apprehension, families are housed in facilities that adequately provide for their safety, security, and medical needs. Meanwhile, we will continue to expand use of the Alternatives to Detention program to ensure compliance with notices to appear before immigration judges for removal proceedings

- After our 2013 CERD report was submitted, on August 23, 2013, ICE issued a directive on "Facilitating Parental Interests in the Course of Immigration

Enforcement Activities," which unifies policy and procedures to ensure that immigration enforcement efforts do not unnecessarily impede parental rights of alien parents or legal guardians of minor children present in the United States.

- The Directive complements existing ICE guidance which discourages the use of detention resources on detainees who can demonstrate that they are primary caretakers of children, absent extraordinary circumstances or a requirement for mandatory detention.
- The Directive states that if an alien's child, children, or family or child welfare proceedings are within the area of responsibility (AOR) of initial apprehension, ICE shall refrain from making an initial placement or from subsequently transferring the alien outside of the AOR unless deemed necessary pursuant to the ICE Detainee Transfer Directive. Furthermore, subject to detention space availability, ICE will place the detained alien parent as close as practicable to the alien's child(ren) and/or to the location of the alien's family court or child welfare proceedings (if any).

- Additional guidance promotes exercise of sound judgment by ICE officers and agents with regard to avoiding enforcement actions at or focused on sensitive locations, such as schools, religious buildings, or hospitals.

IF ASKED: CBP LATEST NUMBERS

- Number of adults crossing illegally with their children fell from 16,330 in June to 7,410 in July,

SOURCES: This question is based on a submission from the Media Mobilizing Project & Coalition. See also September 2013 shadow reports from Amnesty International: Submission to the Human Rights Committee and Junta for Progressive Action: Federal Anti-Immigrant Policy and Its Correlation to Racial Profiling within Law Enforcement in Context of the International Covenant on Civil and Political Rights

BACKGROUND (Family Unity in Immigration Enforcement):

NGO Concerns

In its September 2013 report, Amnesty raised concern that, as a result of detention, it is often impossible for parents to make arrangements for their children's care. As a consequence, children are taken into care temporarily or permanently by the state. People in immigration detention also have no way to obtain permission to attend court hearings regarding their children. Amnesty recommends that the Committee ask:

- Will the U.S. give consideration to family circumstances on a case-by-case basis before detaining or deporting an immigrant?

In its September 2013 report, the Junta for Progressive Action similarly expressed concern that the separation of families under policies such as S-Comm and CAP undermine the value of the family unit and place children of undocumented parents within foster care systems. It proposed that the Committee ask:

- How does this benefit economic and social growth of the country?

DHS actions

- On August 23, 2013, ICE issued a directive on "Facilitating Parental Interests in the Course of Immigration Enforcement Activities," which establishes policy and procedures to balance the agency's immigration enforcement efforts with the parental rights of alien parents or legal guardians of minor children present in the United States. Among other things, the Directive designates a specific point of contact within each field office for parental-interests matters; establishes processes for field offices to regularly identify and review cases involving parents, legal guardians, and primary caretakers, and to determine the appropriateness of detention; facilitates participation of detainees in family court proceedings; promotes parent-child visitation; and accommodates care and travel arrangements for the children of detainees facing removal.

- Further, ICE guidance on "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens" issued in March 2011 prohibits the use of immigration enforcement resources on detainees who can demonstrate that they are primary caretakers of children, absent extraordinary circumstances or the requirements of mandatory detention. Guidance issued in June 2011 on "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" similarly requires that ICE officers consider whether an individual is the primary caretaker of a minor when exercising prosecutorial discretion authority.

- ICE's Risk Classification Assessment (RCA), which contains objective criteria to guide decisions about whether to detain an apprehended individual, accordingly directs ICE officers to inquire whether an individual may be the primary caretaker of a child, and recommends against detention in these cases unless legally mandatory. The policy on "Enforcement Actions at or Focused on Sensitive Locations," issued in October 2011, also promotes exercise of sound judgment by ICE officers and agents with regard to avoiding enforcement actions at or focused on sensitive locations, such as schools, religious buildings, or hospitals

- The ICE Detainee Transfer Directive, issued in January 2012, prohibits the long-distance transfer of detainees with family members in the original area of detention unless absolutely necessary.

- ICE national detention standards formalize the agency's commitment to facilitate participation by detainee parents in dependency and family court hearings, and ICE continues to explore alternative arrangements that would allow meaningful participation, including through the use of phone and televideo conferencing.

L-12(2). QUESTION – BEST INTERESTS OF UNACCOMPANIED ALIEN CHILDREN. We are aware of reports of large numbers of children being held along the U.S. border, separated from traveling companions, and transported to a shelter system where they are held for long period before being returned to family members. How does the United States ensure humane treatment and recognition of the best interest of each child when it encounters children at the border?

- **The United States is committed to the safety and welfare of all persons in its custody, with special recognition of the vulnerabilities - children traveling without a parent, legal guardian may experience. Unaccompanied children may be especially vulnerable to human trafficking, exploitation, and other forms of abuse.**

- **The situation in the Rio Grande Valley has, since early May of this year, presented an urgent humanitarian situation. Our strategy to respond to the situation has been (1) to process the increased number of unaccompanied children through the border patrol system and into the custody of the Department of Health and Human Service's shelter system for children as quickly and safely as possible; (2) to stem the tide of people crossing the border unlawfully; and (3) to do all this consistently with our laws and values, including applicable international obligations.**

- The U.S. Government has coordinated across a large number of affected agencies to coordinate the response to this humanitarian crisis. We have worked closely with the governments of Guatemala, El Salvador, Honduras, and Mexico to address our shared border security interest and the underlying conditions in Central America promoting the mass migration. Vice President Biden has announced a range of new assistance to the region, including funding to improve security in those countries and to empower the governments to receive and reintegrate their repatriated citizens.

- We have also intensified public affairs campaigns, in Spanish, to communicate to parents and others the dangers of sending unaccompanied children from Central America to the United States, and the dangers of putting children into the hands of criminal smuggling organizations.

IF ASKED – CBP TRANSFERS TO HHS/ORR

- Through statutory frameworks including the Trafficking Victims Protection Reauthorization Act of 2008 and a litigation settlement, children are generally transferred from border security authorities to the Office of Refugee Resettlement within 72 hours of being identified as an unaccompanied minor.

    - While the Department of Homeland Security's enforcement agencies make every effort to make a timely transfer, this 72-hour interval may be exceeded during periods of exceptional circumstances, as we encountered during the recent humanitarian crisis.

- To process the increased numbers of children encountered in Texas, DHS relocated some children in its custody to centralized processing centers, first in Nogales, Arizona and now in McAllen, Texas, where appropriate and clean housing, food service, and recreation for the children are made available while awaiting transfer to HHS custody.

- The HHS Office of Refugee Resettlement (ORR) makes placement determinations in the best interests of the Unaccompanied Alien Children (UAC) based on all available information. ORR designates the least restrictive placement option appropriate to the UAC's needs that is available within the ORR network.

IF ASKED: DEFINITION OF UNACCOMPANIED ALIEN CHILD

- An unaccompanied child is defined as a child who: "(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom —(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." HSA 2002§ 462(g)(2) (codified at 6 U.S.C. § 279(g)(2)). Thus, a minor traveling with any other relative would be deemed unaccompanied. Once deemed unaccompanied, a minor is required to be transferred into HHS' custody, per the TVPRA, regardless of existence of any adult traveling companions.

IF ASKED: INTAKE, PROCESSING, SCREENING

- Subsequent to apprehension, the government informs all children through Form I-770 (Notice of Rights and Request for Disposition for Minors) about certain rights, including access to a telephone to contact a trusted adult; to communicate with a consulate or other diplomatic officer; and to be represented by an attorney, albeit at no cost to the government.

- The Department of Homeland Security screens all children encountered at the land border or ports of entry, to determine if they have been victims of trafficking or are at risk of being trafficked upon return, or if they have a fear of persecution if returned to their home countries, and that the child is able to make an independent decision.

- By law, unaccompanied alien children from contiguous countries (Mexico or Canada) may be allowed to voluntarily return to their country following a determination they are not trafficking victims, have no fear of persecution, and are able to make an independent decision to withdraw their application for admission.

IF ASKED: IMMIGRATION COURT PROCEEDINGS FOR UAC

- The Executive Office for Immigration Review (EOIR) conducts legal proceedings to determine whether minors/children may lawfully remain in the United States. For over a decade, EOIR, with the help of experts from other federal agencies and non-governmental organizations, has trained judges on issues related to children in immigration court proceedings. EOIR has also issued guidance about how to create a child-friendly environment in immigration court. This guidance addresses, among other things, special juvenile dockets, child-friendly courtroom modifications, pre-hearing orientations, and child-sensitive questioning. Since 2010, EOIR's Legal Orientation Program for Custodians of Unaccompanied Alien Children has provided legal information to the adult caregivers of unaccompanied alien children in immigration court proceedings. The purpose of this program is to inform custodians of their responsibilities in ensuring that children under their care appear at all immigration court proceedings, as well as protecting them from mistreatment, exploitation, and trafficking. Finally, EOIR has worked closely with ORR and non-governmental organizations to identify children in need of legal assistance and facilitate pro bono legal services.

IF ASKED: ASYLUM APPLICATIONS BY UAC

- Only a small percentage of unaccompanied children apprehended at the border apply for asylum: From FY 2013 through June 30, 2014, only 2% of unaccompanied children apprehended by CBP have applied for asylum. Unaccompanied children represent about 4% of all asylum applications received in FY2014 through June 30.

IF ASKED: DEMOGRAPHICS OF UACS

- The percentage of girls has increased in recent years. In FY2014 as of July 29, 33% of the unaccompanied children apprehended in the South Texas (Rio Grande Valley) sector were female.

- The substantial majority of unaccompanied children are boys aged 11 or older. However, we have encountered hundreds of children under age 5, and boys and girls of all ages.

- The substantial majority are from Mexico, Guatemala, El Salvador, and Honduras, but in FY2014, in the Rio Grande Valley sector alone, CBP has encountered children from 19 countries.

BACKGROUND:

- The TVPRA 2008 requires the trafficking screening of unaccompanied minors from Mexico or Canada encountered at the land or ports of entry; extension of the screening to all encountered unaccompanied alien children is a matter of DHS policy.

Unaccompanied children – differential treatment based on country of origin

L-12(3). QUESTION – UNACOMMPANIED ALIEN CHILDREN AND DIFFERENTIAL TREATMENT BASED ON COUNTRY OF ORIGIN: There have been reports that unaccompanied alien children are treated differently depending on their country of origin. For example, under the Trafficking Victims Protection Reauthorization Act (TVPRA), which is meant to combat human trafficking, children from noncontiguous (non-bordering) countries are screened and treated differently from children from Mexico. This is arguably a form of national origin discrimination. Under what rationale is the U.S. government engaging in this sort of preferential treatment?

RESPONSE:

- **The United States is committed to an appropriate response to the humanitarian crisis posed by the influx of unaccompanied children and families along our border in 2014, consistent with the Constitution, federal laws, and applicable international obligations.**

- As a matter of policy the United States screens all unaccompanied children for human trafficking. By law, the United States is required to screen unaccompanied children from contiguous countries (Mexico and Canada) found at land border or port of entry

- Unaccompanied children from contiguous countries may be permitted to withdraw their application for admission and return to the contiguous country following screening for trafficking, credible fear, and capacity to make the decision to withdraw the application. Other unaccompanied children may also be permitted to depart the United States voluntarily, but not to withdraw their application for admission in this particular way.

IF PRESSED WITH ASSERTIONS THAT THIS PRACTICE VIOLATES THE CONVENTION:

- Not every difference in treatment constitutes unjustifiable discrimination for purposes of the Convention. The immigration laws of very many State Parties draw rational distinctions among nationalities in extending certain preferences or benefits, including the Visa Waiver Program, though which the United States allows nationals of certain countries to enter without a visa for stays of up to 90 days, or the preferences with respect to immigration and expulsion members of the European Union extend to one another's nationals.

Background:

- From a legal perspective it is questionable that the CERD, by its terms, prohibits States Parties from advantaging nationals of one country of those of another with respect to whether a UAC may first be permitted to withdraw his or her application for admission (after screening for trafficking, credible fear, and capacity to withdraw) before being placed in § 240 proceedings (vs. being immediately placed in § 240 proceedings and then

permitted to voluntarily depart). Although the Committee "recommends" that States Parties "[e]nsure that laws concerning deportation or other form of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies," General Recommendation No. 30 (2004), the text of the Convention is ambiguous with respect to expulsion. Unlike in the ICCPR (Art. 13), there is no mention of expulsion in Art. 5 of the CERD. Even were we to incorporate Art. 13 of the ICCPR into Art. 5 as a civil right, such that national origin discrimination is generally prohibited in expulsion proceedings, *that right is limited to noncitizens who are lawfully within the territory of a State Party*.

- As the CERD Committee has acknowledged in its General Recommendations, not every difference in treatment constitutes unjustifiable discrimination for purposes of the Convention. For example, General Recommendation No. 30 (2004) recognized that differential treatment between citizens and non-citizens should be "judged in light of the objectives and purposes of the Convention" and is not impermissible if "applied pursuant to a legitimate aim, and . . . proportional to the achievement of this aim"). Further, General Recommendation No. 14 (1993) observed that "a differentiation in treatment will not constitute discrimination if the criteria for such discrimination, judged against the objectives and purposes of the Convention, are legitimate" and that "[i]n considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes."

- Under Supreme Court jurisprudence, Congress need only have a rational basis (meaning a legitimate aim) to draw nationality-based distinctions in the immigration laws. The immigration laws of the U.S. are replete with examples of giving preferential treatment of nationals of certain countries over those of other countries. Some examples include the Nicaraguan Adjustment and Central American Relief Act (NACARA), which involves types of relief from deportation (or removal) and applies to certain individuals from Guatemala, El Salvador, and the former Soviet bloc countries; the Visa Waiver Program, which allows citizens of participating countries to travel to the United States without a visa for stays of 90 days or less when they meet certain requirements; the Cuban Adjustment Act, which is specifically applicable and gives special treatment to any native or citizen of Cuba who has been inspected and admitted or paroled into the U.S. after January 1, 1959, and has been physically present for at least one year, and is admissible to the United States as a permanent resident; and the North American Free Trade Agreement, which is a preferential trade agreement between the United States, Mexico, and Canada.

- Internationally, the European Union also gives preferential treatment to nationals of EU Member States with respect to immigration and expulsion.

SOURCES: This question is based on an anticipated potential angle that the CERD Committee might focus regarding Unaccompanied Alien Children. The CERD Committee may argue that the differential treatment of UACs from Mexico vs those from noncontiguous countries may constitute national origin discrimination.

Removals to Haiti

L-13. QUESTION - U.S. DEPORTATIONS AND REMOVALS OF HAITIAN MIGRANTS AFTER THE JANUARY 2010 EARQUAKE: The United States has a long history of targeting Haitian migrants in its immigration policy and practice, in a wide range of issues including detention and removal procedures, legislation concerning status adjustment and naturalization for various groups of immigrants, and the disparate application of temporary protections for refugees. The racial discrimination against Haitian refugees occurs through implementation of policies specifically targeting Haitians, neutral policies that leave too much discretion to immigration officials and allow the possibility of racially-based decisions, and preferential treatment for other nationality groups. Almost exactly one year after the devastating January 2010 earthquake in Haiti, the U.S. resumed deportations of Haitian men and women with criminal convictions, tearing them away from their families and forcing them to return to Haiti, despite the continuing humanitarian crisis and dire conditions in Haiti. How does the U.S. government justify the resumption of deportations of Haitians, in light of the humanitarian crisis and alarming human rights concerns? What balancing test does ICE use to determine whether a person should be deported to Haiti?

RESPONSE:

- **Following the tragic January 2010 earthquake in Haiti, which displaced over a million persons, the U.S. government immediately provided $1.3 billion in humanitarian relief assistance. As of September 30, 2013, the United States has committed $3.7 billion for Haiti's humanitarian relief and reconstruction, of which $2.9 billion has been provided as of February 2014.** Additional funds for long-term recovery and reconstruction efforts are being provided incrementally over several years. The United States provides broad-based assistance to Haiti for earthquake relief and recovery and long-term sustainable development. The overarching goal of U.S. assistance is to increase stability and prosperity in Haiti.

- With respect to Haitian nationals in the United States, immediately following the earthquake, the Department of Homeland Security (DHS) halted all removals to Haiti of Haitian nationals with final orders of removal. DHS also designated Haiti for temporary protected status, which protects from removal eligible Haitians who were present in the United States at that time, and has subsequently extended TPS to those who were in the United States on or before January 23, 2012. These protections continue, and approximately 58,000 Haitians have received TPS benefits under this designation which was last extended for 18 months by Secretary of Homeland Security Johnson from July 23, 2014 through January 22, 2016.

- With respect to Haitian nationals repatriated from the United States, the U.S. Government works with the Haitian Government to ensure that repatriations are conducted in the most humane manner possible, and has supported a socio-economic reintegration program for returnees. Returnees have been provided support --- if desired --- upon arrival in-

country; transportation to their home community or temporary accommodation; basic medical care and psycho-social counseling; basic language and skills training; employment referrals; and other support to facilitate reintegration.

IF ASKED:

- As a result of halting all removals to Haiti in the immediate aftermath of the earthquake, DHS's Immigration and Customs Enforcement (ICE) released certain detained Haitian nationals with criminal histories, as United States law general restricts its authority to hold aliens in custody more than 180 days after a final order of removal. Some of the Haitians detained had been convicted of serious crimes, and their release posed significant risks to public safety. As a result, on January 20, 2011, DHS ended its moratorium on removals and began removing a limited number of Haitians who were convicted of serious crimes.

- When prioritizing aliens for removal, ICE will conducts an individualized review prioritizing removals which balances adverse factors, such as the severity of an individual's offenses, the number of his or her convictions, and dates of his or her convictions, and against any equities of the Haitian national, such as his or her duration of residence in the United States, family ties, or significant medical issues. In certain cases, where there are compelling medical, humanitarian, or other relevant factors, supervised release or other alternatives to detention programs may be appropriate. ICE minimizes transferring Haitian nationals to remote facilities to the greatest degree possible, and, where possible, detains individuals in facilities close to family and representation, except to facilitate the actual removal process.

- In the course of an administrative removal proceeding before an immigration judge, each individual has the opportunity to contest removal from the United States, apply for asylum, and seek non-refoulement protection in accordance with Article 3 of the Convention Against Torture. If the immigration judge finds the individual removable and denies the relief sought, the alien may pursue reconsideration or appeal to the Board of Immigration Appeals. In either case, if unsatisfied with the final administrative outcome, the returnee may petition for review by the appropriate federal circuit court of appeals.

Source: This question is derived from a Shadow Report titled "Deportations from the United States to Haiti: A Violation of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)." This Shadow Report was authored by the University of Miami School of Law Human Rights Clinic, University of Miami School of Law Immigration Clinic, FANM/Haitian Women of Miami, Alternative Chance, and Americans for Immigrant Justice (formerly FIAC).

M. Terrorism

1. Non-citizens – possible CIDT through rendition, transfer, non-refoulement

M-1. QUESTION – NON-REFOULEMENT OBLIGATIONS**:** Please describe the U.S. government position on its *non-refoulement* obligations in the context of rendition, proxy detention, or other cases in which the U.S. extra-judicially facilitates a transfer or is involved in the interrogation of an individual held in the custody of a foreign government. (Issue 12)

RESPONSE:

- **The U.S. Government's is committed to its non-refoulement obligations with respect to torture as set out in Article 3 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.**

- Above and beyond our obligations under the CAT, as a matter of fundamental policy and practice, the United States does not transfer any individual in U.S. custody – regardless of whether in the U.S. or abroad – to a foreign country if it is more likely than not that the person would be tortured. This principle is woven thoroughly into U.S. policy and practice in multiple ways, such as in section 1242 of the Foreign Affairs Reform and Restructuring Act, and in Executive Order 13491, which required the formation of a special United States Government task force to study and evaluate the practices of transferring individuals to other nations in order to ensure consistency with all applicable laws and United States policies pertaining to treatment.

- If the United States determines, after taking into account all available information, that it is more likely than not that a person would be tortured if transferred to a foreign country, the United States would not approve the transfer of the person to that country.

- The United States considers the totality of relevant factors relating to the individual to be transferred and the government in question. Such factors include, but are not limited to, the individual's allegations of prior or potential mistreatment by the receiving government, the country's human rights record, whether post-transfer detention is contemplated, the specific factors suggesting that the individual in question is at risk of being tortured by officials in that country, and whether similarly situated individuals have been tortured by the country under consideration.

- The Special Task Force established in Executive Order 13491 issued a set of recommendations to ensure that U.S. transfer practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to face torture. The President accepted those recommendations and a public summary of them was provided.

IF NEEDED:

- The United States has implemented a number of the Task Force recommendations, such as ensuring State Department involvement in evaluating assurances in all cases. The implementation of several of the recommendations – such as the creation of the High Value Interrogation Group (HIG) – was announced publicly, and others have been or are in the process of being integrated into our practice.

- **If Pressed:** While I won't get into specifics about every recommendation, we are fully committed to the implementation of the Task Force recommendations.

SOURCES:

This was also addressed in the CERD Committee's 2008 Concluding Observations and Recommendations, paragraph 24:

> "The Committee notes with concern that the State party exposes non-citizens under its jurisdiction to the risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment by means of transfer, rendition, or refoulement to third countries where there are substantial reasons to believe that they will be subjected to such treatment (arts. 5 (a), 5 (b) and 6)."

TED CRUZ

United States Senate

June 19, 2014

The Honorable Jeh Johnson
Secretary of Homeland Security
Washington, D.C. 20528

Dear Secretary Johnson:

Each day, hundreds of unaccompanied children enter the United States after being handed to dangerous human smugglers. Along the way, those children are sometimes abused, sometimes sold into prostitution, sometimes recruited by drug cartels, and sometimes even killed. Those who make it are now being housed in United States military installations in Texas, California, and Oklahoma.

While we are obligated to keep those children safe, we are also obligated to stop more children from risking their own safety and being forced into such a terrible situation.

Without a doubt, the growing humanitarian crisis at our border is a direct consequence of the Obama Administration's refusal to secure the border. Children are pushed into the hands of criminals because the Obama Administration has made it clear to the world that any child who arrives, regardless of whether they are granted formal legal status, will be permitted to stay in the United States.

The Obama Administration's outright refusal to enforce the law is causing chaos for those of us who live and work in border states that must deal with the surge of immigrants who are illegally arriving each day. When last we spoke at the Senate Judiciary Committee in June, I was disappointed that you were unwilling to acknowledge how the Administration's policies have contributed to the crisis.

For decades now, Congress has mandated that the federal government secure the border, and yet the number of persons arriving illegally in the United States has grown from around 8.5 million in 2000 to around 11.5 million today.

Increasingly alarming statistics demonstrate how our porous borders are leaving Americans vulnerable to crime and even terrorism.

As the Department of Homeland Security is aware, 1,918 individuals from special interest countries were apprehended on the southwest border between FY2006 and FY2011, and

according to the Texas Department of Public Safety, six of the eight major Mexican drug cartels have command and control networks operating in the state.

We have seen the rise of drug cartels that make between $19 billion and $29 billion annually from U.S. drug sales, and one study has estimated that some 10,000 women from southern and central Mexico are trafficked to the northern border region annually to be sexually exploited.

Last year Border Patrol rescued 2,346 people in danger, encountered 461 assaults, and sifted the rubble of 445 senseless deaths.

I am writing to urge your full consideration of Texas Attorney General Greg Abbott's letter of June 12, 2014, in which he proposed the State of Texas be empowered to take decisive action to secure the southwest border during the present crisis brought on by the arrival of roughly 50,000 unaccompanied minor children.

Preventing people from illegally immigrating to the United States should be the primary purpose of Customs and Border Protection. And, although this critical task is primarily a federal responsibility, Texas is prepared to take action to gain control of our borders.

Should it be determined that implementation of this proposal would require action by Congress, I stand ready and willing to do my part to protect our citizens and prevent any more children from falling into the hands of notorious human smugglers who often kidnap, rape, abuse, and murder them.

To that end, I request a prompt response detailing your thoughts on Attorney General Abbott's proposal.

All the best,

Ted Cruz
United States Senator

From:	Groom, Molly </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MOLLY.GROOM(b)(6)
To:	"Kessler, Tamara </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Tamara.Kessler>"; "Shuchart, Scott </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Scott.Shuchart>"; "Cucinella, Amy </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Amy.cucinella>"; "Desta, Fana </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Fana.desta>"
Subject:	Fw: Artesia issues
Date:	2014/07/31 00:48:28
Type:	Note

Fyi--what front office is raising with ice

From: Hoy, Serena
Sent: Wednesday, July 30, 2014 10:03 PM
To: Ragsdale, Daniel H
Cc: Rosen, Paul; Olavarria, Esther; Shahoulian, David; Groom, Molly
Subject: Artesia issues

Dan – I think I mentioned to you I'd have a more complete list of Artesia-related issues coming. Attached is a list of issues from AILA, and at the bottom of this message is a list from another advocate. I believe the recommendations are drawn both from the advocates' visit to Artesia last week and the experiences of a group of AILA-organized attorneys volunteering there.

The advocates have asked if an LOP /attorney coordinator at Artesia could be appointed. If that were possible, I think that might help address a lot of the issues raised, a few of which I'll highlight here:

- Childcare during credible fear interviews and attorney visits (and, to a lesser extent, LOP), so parents can speak freely without concern about traumatizing their kids. The simple answer may be for you all to let other parents watch kids. As I think I emailed you earlier this week, this may be what happens at Berks. Alternatively, as I think we discussed, perhaps you could look into contracting out for child care.
- Attorney meeting space – I know you are working on this one, but any additional space or more privacy would be helpful (advocates say people are frequently walking through the space they're using now to access an adjoining room).
- Improved access for lawyers to technology, including cell phones and other electronic devices. There is a note in the email below as well as the attached about this.

- Phones – thank you for working on this one. It sounds like it will get much better soon. When the new phones arrive, if there were a system for using them that didn't involve residents having to ask for them from ICE officers who are carrying them around, it would be preferable.

- The attorneys list is problematic. There are three attorneys from El Paso on it, and I've heard reports that either none of them take Artesia cases, or their phones are always busy, or one of them doesn't take asylum cases. In any event, advocates are asking for a broader list from the area that includes a note that assistance free of charge may be available. Also, I'm not sure how they're getting notice into folks at the facility, but there are currently groups of AILA-organized volunteer attorneys working at the facility, as noted above – not sure if it would make sense to include a contact for these folks on the list as well.

- Better space and more time for LOPs. Because of space issues, LOPs are being time limited, and advocates are asking that they be allowed 2 hours, because of high demand.

- Better access for attorney/LOP admission to Artesia – as you saw the other day, attorneys are sometimes waiting a very long time to get into the facility and occasionally missing hearings/interviews.

I will also forward this list to USCIS and EOIR, because some of these issues are for them. Thank you, Dan, for anything your folks are able to do to address some of these concerns.

Serena

From: Crystal Williams [mailto:CWilliams (b)(6)
Sent: Wednesday, July 30, 2014 10:46 AM
To: Hoy, Serena; Betsy Lawrence; Robert Deasy
Subject: It's the little things....

Serena,

As mentioned when we met, it's the little things that are killing us. Can we make a priority of the first bullet on the second page of the attached? **Need clear instructions permitting attorneys to bring cell phones, laptops, and wifi hotspots into the facility**.

In particular, the issue about cell phones. Attorneys need to be able to bring them in. So many circumstances arise that could be resolved easily if the attorney could just call someone. But to do so involves an ordeal of at least an hour, because they have to leave the facility, make the call, then come back. And, if they have to leave a message, the attorney has the option of waiting outside for the return call or going back in and missing it. The biggest issue is when they need to contact the ICE OPLA representative to resolve matters on the ground.

Any chance we can get a clear OK for attorneys to bring in their phones?

LOP

- LOPs - At least a few planeloads were deported before LOP even arrived at Artesia. The current LOP provider has to drive almost 4 hours to do presentations and does not have the resources to come often enough. They also do not have funding to provide any actual legal services, which is also a problem. EOIR or DHS has to do something about providing support for more LOP at Artesia. All residents (even those not scheduled for CFIs) should get an LOP upon arrival and before any court appearances or CFIs - specifically - no one should be removed or deported until they have had an LOP presentation.

- LOPs are currently conducted in the cafeteria. Demand is high so the groups are very large and chaotic. This emphasizes the need for more LOP support but also they need a better space and need more time. Because of space issues they are being cut off at around 45 minutes. Given the complexities and number of people interested they need at least 2 hours. They also need more privacy. The other room used besides the cafeteria is a waiting room for court and also the same room in which attorney interviews take place, and where detainees meet with their consulates over v-tel.

- Consular v-tel seems inappropriately public as well. Consulates meet with their citizens in a large public room, as a group, over v-tel. There is no privacy and no reasonable opportunity to tell a consulate about any personal issues.

- more and better attorney/client interviewer space. There are currently two cubicles- IF you can even call them that, in a common area that afford no privacy at all. Also, the same issue regarding speaking in the presence of children exists here. parents must be allowed to leave their children with a friend or someplace while they speak to their attorney privately.

Telephone access and attorney communication:

- Detainees are having a very difficult time contacting attorneys. The attorneys list provided is insufficient. It is the El Paso list. It should include a broader list from the area and should include in big print at the top information that assistance free of charge may be available. People are very confused about this. there are also not enough phones available - or at least detainees are not able to make the calls they need.

- Telephone access is being limited or denied as a disciplinary measure - in direct violation of the standards. Even worse, this punitive measure is being implemented broadly. we heard from numerous detainees, that if one child misbehaves, or if the bathrooms are not cleaned adequately - the whole dorm loses phone access. This is unacceptable and must stop immediately

- Due to the extreme remoteness of this facility, and difficulty in attorney access, attorneys must be provided with a way to contact their clients by phone without have to come in person, or wait for their client to find a way to call them.

- Attorneys must be given notice of all activity, court dates, interviews, etc in their clients cases, and must be given sufficient notice and time to appear with their client. Despite claims by ICE and CIS that hearings and appointment are always rescheduled to accommodate attorney presence, several attorneys told us otherwise and gave accounts of interviews and hearings that proceeded without them. I can personally attest to how difficult it is to get to this facility. many attorneys representing families have done so from far away - like Colorado, California, and even Virginia. Flights are not easy to get, and it is a long drive from all practical airports.

CFIs

- everyone must be asked about credible fear. This is currently done only at arrival at the border by CBP and never again while at Artesia. Given the chaotic conditions at the border, and the pressure all officers are under to deter, detain, and deport, this amounts to a shout test and is not sufficient. CIS told us that anyone can express fear anytime, and will automatically be referred for a CFI. However, on this visit we were all bombarded by women and even children, expressing fear, who had not been referred. Better screening is required. (lop for everyone might help here)

- asylum interviews are problematic. Children are always in the room during the interview. This has to stop. It is apparently done this way because the facility has no child care license. However, I know there were ways around this after we pointed the problem out at both Hutto and Berks. At both those facilities parents can have another mother, or a friend watch her children for a couple of hours. I am not sure why this is strictly forbidden during the CFI. It was clear form walking around the facility that this was happening in the common areas as children walked around freely in groups without adults. (this is a good thing)

- Parents must be given the opportunity to speak to an asylum officer during a CFIi in private, without their children present. Earphones and toys in the corner are not sufficient. Parents must also specifically be asked about whether they fear harm to their children if deported. Children over 14 (and even under that age) should be provided the opportunity to speak privately without a parents present. Finally there is currently no interviewing of children under 12. This is problematic because many of these children could have claims. They should be given the opportunity to be interviewed by asylum officers trained to interview young children.

Sender:	Groom, Molly </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MOLLY.GROOM(b)(6)
Recipient:	"Kessler, Tamara </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Tamara.Kessler>"; "Shuchart, Scott </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Scott.Shuchart>"; "Cucinella, Amy </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Amy.cucinella>"; "Desta, Fana </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Fana.desta>"
Sent Date:	2014/07/31 00:48:27
Delivered Date:	2014/07/31 00:48:28

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From:	Groom, Molly </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MOLLY.GROOM(b)(6)
To:	"Kessler, Tamara </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Tamara.Kessler>"; "Shuchart, Scott </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Scott.Shuchart>"; "Desta, Fana </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Fana.desta>"; "Cucinella, Amy </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Amy.cucinella>"
Subject:	Fw: It's the little things....
Date:	2014/07/30 12:37:52
Type:	Note

CRCL--

Please see the below from AILA. If you all could work with ICE on these things and the ACUS issues to see what improvements can be made to current situation, I think that would be great. We should probably work from this on the issues that we believe should be addressed, but not forward this email. Let me know if I can be helpful in pushing this with ICE as well. Thanks, Molly

---

From: Hoy, Serena
Sent: Wednesday, July 30, 2014 12:14 PM
To: Groom, Molly
Subject: FW: It's the little things....

From: Crystal Williams [mailto:CWilliams(b)(6)
Sent: Wednesday, July 30, 2014 10:46 AM
To: Hoy, Serena; Betsy Lawrence; Robert Deasy
Subject: It's the little things....

Serena,

As mentioned when we met, it's the little things that are killing us. Can we make a priority of the first bullet on the second page of the attached? **Need clear instructions permitting attorneys to bring cell phones, laptops, and wifi hotspots into the facility**.

In particular, the issue about cell phones. Attorneys need to be able to bring them in. So many circumstances arise that could be resolved easily if the attorney could just call

someone. But to do so involves an ordeal of at least an hour, because they have to leave the facility, make the call, then come back. And, if they have to leave a message, the attorney has the option of waiting outside for the return call or going back in and missing it. The biggest issue is when they need to contact the ICE OPLA representative to resolve matters on the ground.

Any chance we can get a clear OK for attorneys to bring in their phones?

Thanks,

Crystal

Crystal Williams

Executive Director

(b)(6) I Email: cwilliams (b)(6)

American Immigration Lawyers Association

Main: 202.507.7600 I Fax: 202.783.7853 I www.aila.org

1331 G Street NW, Suite 300, Washington, DC 20005

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From: Crystal Williams
Sent: Monday, July 28, 2014 5:55 PM
To: 'Hoy, Serena'; Greg Chen; Betsy Lawrence
Subject: RE: Karnes

Attached is the list of issues. It's a moving target, so we'll likely have updates.

Re the pro bono efforts in Artesia, here's what I can tell you at this moment:

We are planning to coordinate attorney groups to Artesia each week for the foreseeable future.

8 AILA attorneys are currently on the ground there, many from Colorado and Nevada, including one who is acting as a pro bono coordinator.

The coordinator will need to leave on Wednesday, and we are currently recruiting another to take her place for a couple of weeks.

Another group of 5 attorneys from our Oregon chapter are poised to go next week.

Two attorneys from the law firm Jones Day are on site now and assisting in our pro bono efforts.

We are currently recruiting other volunteers, both from our membership and from large law firms.

We have set up an office for the volunteers at the Chamber of Commerce office for two weeks, and then will move to a local church.

We are partnering with a number of other NGOs in trying to coordinate the activities of non-profits and pro bono attorneys.

Crystal Williams

Executive Director

(b)(6) Email: cwilliams (b)(6)

American Immigration Lawyers Association

Main: 202.507.7600 I Fax: 202.783.7853 I www.aila.org

1331 G Street NW, Suite 300, Washington, DC 20005

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From: Hoy, Serena [mailto:serena.hoy(b)(6)
Sent: Monday, July 28, 2014 9:20 AM
To: Crystal Williams; Greg Chen; Betsy Lawrence
Subject: Karnes

Thanks for your very helpful thoughts last week on Artesia. I know you all are working on a list for us of issues with Artesia, and I look forward to receiving it. Also, if there's anything you can share about the plan you've put in place with respect to the attorneys that are out there (i.e., how many, are they already there, etc.), I would find that useful.

In case you missed it, I wanted to flag for you that Karnes will be up and running soon (see the statement below we put out earlier this month), so that you all could bear that in mind for your attorney recruitment efforts. Thank you - Serena

"On July 11, 2014, ICE modified its contract with Karnes County, Texas, in order to transition the Karnes County Civil Detention Center (Karnes) from an existing immigration detention facility housing adults to a residential facility to house adults with children. This was done in order to expand the agency's capacity to house Central American adults with children who have been apprehended at the border and placed into expedited removal proceedings. It is anticipated that Karnes will begin receiving Central American female adults with children within the next several weeks."

Serena Hoy

Senior Counselor

Office of the Deputy Secretary

U.S. Department of Homeland Security

(202)447-4365

Sender:	Groom, Molly </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MOLLY.GROOM(b)(6)
Recipient:	"Kessler, Tamara </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Tamara.Kessler>"; "Shuchart, Scott </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Scott.Shuchart>"; "Desta, Fana </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Fana.desta>"; "Cucinella, Amy </O=DHS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Amy.cucinella>"
Sent Date:	2014/07/30 12:37:50
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Ongoing Attorney Access and Due Process Issues at Artesia
(as of July 28, 2014)

Facilitating Access to Counsel/Logistics:

- **The initial intake process should include a question as to whether residents either (1) have an attorney; or (2) would like to speak to an attorney**. The intake process does not currently include questions regarding right to counsel. A list of individuals who do not have an attorney but would like to speak to one should be provided to the LOP service provider (DMRS) so that they can be matched with a pro bono attorney.
- **Need clear instructions for the admission of interpreters and paralegals to Artesia**. There has been no clear instruction from the facility as to whether interpreters and paralegals can accompany an attorney to facilitate communication and case preparation. Note: We understand and appreciate that at least one individual was admitted this morning (July 28, 2014) to assist an attorney, but clear guidelines must be issued.
- **The process for attorney/LOP admission to Artesia must be streamlined and consistent**. The amount of time it takes for an attorney to gain admission to the facility varies wildly. It can take anywhere from 15 minutes to an hour or more (sometimes much more) for individuals to be admitted once they have arrived at the facility. As a result, LOP meetings are being cut drastically short and attorneys are missing interviews and hearings, even though they arrive 30 minutes or more prior to the scheduled event. This morning, a group of attorneys arrived at 6:45 am to accompany clients to 7:30 am credible fear interviews. The attorneys were advised that they would not be admitted until 8:00 am. After AILA called the facility, the attorneys were admitted, albeit late for the interviews.
- **The facility must provide at least two hours for each LOP presentation**. We have been informed that LOP presenters were delayed for approximately one hour at the Artesia gate and as a result, the normal two-hour LOP presentation was cut-off by facility staff after 20 minutes. If delays at the gate, a head count, or other facility scheduling issue conflicts with a prescheduled LOP presentation, two hours must still be provided.
- **Additional confidential spaces must be established for attorney meetings with detainees**. At present, we understand that 2-3 attorneys can be accommodated in the current visitation space, but this is not sufficient to meet the demand for legal services and the current space is partitioned with dividers that do not protect the confidentiality of attorney-client communications. Furthermore, residents and staff regularly come and go through these areas to access an adjoining room. Additional spaces must be established and such spaces must be sufficiently private so that confidentiality and the attorney-client privilege are not compromised. Attorneys must also have reasonable access to phones, fax, computers, Internet and a copy machine/scanner.
- **Attorneys must be able to interview clients without their children (or parent) present if needed.** The attorney frequently will need to elicit information from a parent that she does not wish the child to hear. Similarly, a child may have an independent basis for relief and needs to be able to speak candidly to the attorney.

- **Need clear instructions permitting attorneys to bring cell phones, laptops, and wifi hotspots into the facility**. Some attorneys have been told that they cannot bring their cell phones into the facility. This means, among other things, that attorneys are unable to call their offices or ICE or EOIR officers on the site if needed, and that pro bono attorneys who are not experts in the specific immigration issues that arise are unable to consult with volunteer mentors. Moreover, phones can be damaged from the extreme heat because they must be locked in enclosed automobiles. Attorneys must also have Internet access, either through their own wifi hotspots or through wifi at the facility. There needs to be improved access to technology at Artesia and clear guidelines must be provided.

- **Attorneys must have a quick and reliable method for contacting their clients by telephone**. At present, attorneys who need to get in touch with their clients are instructed to call the main Artesia phone line and ask an ERO officer to give a message to their client and have the client call them back. If the attorney does not receive a call back, they are instructed to contact the Artesia ICE Office of Chief Counsel. That number often just rings and rings, with no answer. Given the difficulties accessing telephones, a better system must be created to allow attorneys to contact their clients by telephone.

- **The ability to conduct video interviews should be established so that Artesia residents can meet remotely with pro bono lawyers**. This could be done through Skype or other technology and would greatly increase the pool of pro bono lawyers.

- **Residents must have better access to telephones and the ability to make calls in private rooms**. At present, residents have access to cell phones which are carried by ICE officers. Though we are told access is unrestricted, residents report that they have been told they are allowed only one call per day, or they do not seem to understand that they may use the phone at any time. Moreover, residents may easily be intimidated by the prospect of asking for a cell phone from a law enforcement officer. Residents should have unrestricted access to telephones that are not in the personal possession of ICE officers and should be informed that they may use the phones at any time (including to call an attorney).

- **An Artesia-specific EOIR list of free legal services providers must be created and widely distributed**. At present, the only EOIR list of free legal services providers that is being circulated at Artesia is the El Paso list. The El Paso list consists of only three providers, one of which does not accept refugee or asylum cases. A revised list of Artesia-specific free legal services providers must be created and widely distributed. The list must be provided to Artesia residents prior to the credible fear interview and at the time a negative credible fear finding is communicated to the resident. The list should also be posted in common areas and in the individual dormitories. The list should include the following language in both Spanish and English: "Free legal services may be available."

- **The law library should have printed pro se legal information and preparation materials in Spanish**. The Florence Project and other nonprofit legal service organizations have developed these materials already. Access to Lexis/Nexis alone is insufficient.

Necessary Steps to Ensure Adequate Due Process Protections

- **Artesia residents must have meaningful opportunities to obtain counsel**. Nobody should be removed unless and until they are afforded an opportunity to attend an LOP presentation and have an individualized consultation with the LOP provider or other legal service provider, where

the right to claim fear (and the process for doing so) is explained and facilitated, if needed. The KYR video that residents view during the intake process, by itself, is inadequate. Moreover, per the *Orantes* injuction, Artesia residents from El Salvador, should be advised in writing and orally of their right to apply for asylum, to be represented by counsel, and to request a deportation hearing.

- **Proceedings before the Asylum Officer or IJ should not take place without the presence of the attorney if the individual is represented**. If an attorney has filed a G-28 or EOIR-28, no credible fear interview or IJ proceeding may take place without the attorney's presence or knowledge, unless the represented party knowingly and intentionally waives representation. We have been informed of instances where scheduled proceedings for represented individuals were moved without ever notifying the attorney, even in at least once instance where the attorney was actually onsite at the Artesia facility.
- **A fair and reasonable process for quickly filing stays of removal and optional fee waivers with ICE must be established**. At present attorneys are instructed that stays of removal (Form I-246) must be filed in-person with the $155 filing fee at the Midland, Texas ICE office or, though reports conflict, possibly at the El Paso ICE office or other remote offices. We also have been informed that fee waivers are not being granted. Midland, Texas is the closest ICE office and that is an approximate 3 hour drive from Artesia. Attorneys must have a clear, straightforward method for filing a stay request with ICE either on-site at the Artesia facility or via facsimile to another office, including the ability to file a stay request without the signature of the detained client. Given the vulnerability of this population and the fact that many of them have no access to funds, ICE must give due consideration to fee waiver requests or create a method whereby fees can be accepted remotely. Attorneys must also have a means of receiving proof of filing, such as a date stamp.

Credible Fear Interviews

- **Attorneys and residents must be provided sufficient notice of credible fear interviews**. Attorneys and residents must be provided sufficient written notice (at least 3 days) of a credible fear interview that has been scheduled. Residents must receive such notice in their native language and the notice must include language regarding the right to counsel. Given the speed with which proceedings are taking place, regular mail is not an adequate means of providing notice to attorneys.
- **Residents must be afforded adequate time to obtain counsel if they request it**. We have been informed that at present, individuals who express the desire to consult with an attorney prior to the commencement of the credible fear interview are given 48 hours to obtain counsel. An individual who states that he or she would like to speak to an attorney prior to a credible fear interview should be permitted adequate time to locate and consult with an attorney without the imposition of artificial and unrealistic time limits.
- **Accommodations must be made to conduct credible fear interviews in private, without the presence of children or parents, if that is the interviewee's wish**. Currently, Asylum Officers are conducting credible fear interviews of mothers with their children present. Accommodations must be made to conduct credible fear interviews in private. Providing distractions or headphones while the child remains in the room is not sufficient. Interviewers must always ask a parent if they would like to speak privately; it should not be left up to the individual to affirmatively request a private interview. In addition, children must also be asked if they would like to speak to an interviewer without their parent.

- **Children, in appropriate circumstances, must also be interviewed for credible fear**. We understand that currently, Asylum Officers are only interviewing the mother for credible fear and are not interviewing any children unless the officer is unable to make a determination and the child is 14 or older. When a parent expresses fear, all children who are capable of understanding should also be asked if they are afraid and if they want to be interviewed separately from their parents. Even children under 14 may have very serious and valid fears that they do not wish to discuss in front of their mother. If current training practice does not provide the expertise to interview young children, suitable experts must be provided. Any child who divulges trauma in the interview should be provided with appropriate mental health services and a child advocate and attorney.
- **Attorneys must be afforded meaningful opportunities to represent the client in the credible fear interview process**. We understand that some attorneys are being informed that they are not permitted to speak during the credible fear interview and that their role is as a mere "observer." While understanding that attorneys are not permitted to answer questions for their client or otherwise disrupt the interview, attorneys must be permitted to provide meaningful representation during the credible fear interview. Under no circumstances should an attorney be barred from speaking at the interview.
- **Asylum officers must understand the comprehension level of the individuals they are interviewing**. We have received reports of mothers being asked questions like "to what particular social group do you belong?" These are not the kinds of questions that the average migrant will understand. Interviewers should be able to ask questions in terms that the interviewee will understand, and/or allow the attorney in represented cases to clarify the question for the client.

IJ Proceedings

- **Attorneys and residents must be provided sufficient notice of IJ proceedings.** Attorneys and residents must be provided sufficient written notice (at least 5 days) of IJ proceedings to review a negative credible fear determination, master calendar hearing, or bond redetermination hearing. Residents must receive such notice in their native language and the notice must include language regarding the right to counsel. Given the speed with which proceedings are taking place, and the fact that the court, attorney, and client may be in up to three different locations around the country, regular mail is not an adequate means of providing notice to attorneys. Electronic notice should be considered.
- **ICE and EOIR must give due consideration to reasonable requests for release on bond following a positive credible fear determination.** We have heard from attorneys on the ground at Artesia that ICE and/or IJs are not granting bond to Artesia detainees, even in cases where a positive credible fear determination has been made. Artesia detainees who will be presenting a full claim for asylum in proceedings, who have demonstrated that they are not a flight risk or a danger to the community, must be considered for and granted release on bond while they pursue their claims.

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ACUS Pilot Project on Remote Representation for Detained Immigration Court Respondents

"Proof of Concept" (Phase II) for Remote Video Representation

Summary

Believing that remote video representation of unrepresented detained persons facing deportation is in the interest of the nation generally and the Department of Homeland Security's Immigration and Customs Enforcement (ICE) in particular, the Administrative Conference of the United States (ACUS) plans to engage in a six-month to one-year experiment to test the utility of remote pro bono representation.

Background

For the past several years, the Administrative Conference has worked with DHS, EOIR, and others to study the procedures for immigration courts in order to recommend improvements and potential efficiencies. In 2012, ACUS conducted an in-depth research project on immigration removal adjudication. The Assembly of the Administrative Conference subsequently adopted Recommendation 2012-3, a set of recommendations designed to improve the adjudication process in immigration courts.[1]

As a follow-up to Recommendation 2012-3, over the course of the past year, ACUS has been assessing—with ICE's assistance—the feasibility of using video teleconferencing to facilitate communication between legal counsel and persons detained in ICE facilities as a means of increasing the efficiency, effectiveness, and fairness of these proceedings. It is beyond dispute that legal representation yields concrete benefits for all sides in the removal adjudication process. Legal representation is essential to the fairness of adjudicatory proceedings. Moreover, from an institutional perspective, pro se cases tap scarce resources disproportionally by increasing the length of time needed to resolve removal proceedings, requiring a greater investment of judicial resources, and precluding ICE trial attorneys from handling higher case volumes or from focusing on complex or difficult cases.[2] As a former ICE Assistant Secretary noted: "Immigrants representing themselves … can mean confusion and delay …. Aliens having representation … could be the most positive thing for immigration courts that we [can] really

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[1] Additional information on Recommendation 2012-3 and the Immigration Removal Adjudication Project generally may be found on the project's webpage, http://www.acus.gov/research-projects/immigration-removal-adjudication.

[2] *See* Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Adjudication* 56-57 & App. 3 (June 2012) (report by ACUS consultants) [hereinafter Benson & Wheeler, *Enhancing Immigration Adjudication*]; PETER L. MARKOWITZ, BARRIERS TO REPRESENTATION FOR DETAINED IMMIGRANTS FACING DEPORTATION: VARICK STREET DETENTION FACILITY, A CAST STUDY, 78 FORDHAM L. REV. 541, 544-46 (2009); Nina Siulc et al., Vera Inst. of Justice, *Improving Efficiency and Promoting Justice in the Immigration System* 1-4 (May 2008); ANDREW I. SCHOENHOLTZ & HAMUTAL BERNSTEIN, IMPROVING ADJUDICATIONS THROUGH COMPETENT COUNSEL, 21 GEO. J. LEGAL ETHICS 55, 56-58 (2008); *see also* Dept. of Justice, *The BIA Pro Bono Project Is Successful* 11-16 (Oct. 2004) (describing how BIA's pro bono project benefited the adjudicatory process).

see."[3] Indeed, from an economic perspective, pro bono programs save detention costs. According to EOIR's recent assessment of the BIA Legal Orientation Program (which is federally-funded "know your rights" program for detainees), detainees participating in the LOP program spent, on average, six fewer days in detention, which resulted in $17.8 million in net savings to the government.[4]

Yet, despite these advantages, the overwhelming majority of detainees appear pro se in immigration court. According to EOIR data, only about 22% of detained persons are represented in immigration court proceedings.[5] Since detainees in removal proceedings are not entitled to publicly-funded legal representation, and most detainees lack the financial resources to secure private counsel, they must generally rely on pro bono legal counsel, who may come from the private bar, legal service organizations, or law school clinics. Several factors impede higher pro bono representation rates, including limited nonprofit defense resources that are dwarfed by the demand for such services, and the remote location of many ICE detention facilities which often makes pro bono representation logistically impossible.

ACUS strongly believes that the inability of thousands of indigent detainees facing removal to secure legal representation presents both a challenge and an opportunity. This pilot project aims to narrow the detainee representation gap by connecting detained clients and pro bono counsel through video teleconferencing. Phase I of the project, which has already been completed, demonstrated that such remote connections were technically possible. With the help of officials at several ICE detention facilities (including the ICE detention facility in Farmville, Virginia) in the mid-Atlantic region, EOIR, and staff at the William & Mary Law School's Center for Legal and Court Technology (CLCT), ACUS has verified that it is possible for legal counsel to communicate remotely with persons detained at ICE facilities via laptops or tablet-based video conferencing.

However, additional technical, logistical, and administrative questions exist as to the feasibility and desirability of remote representation. Accordingly, ACUS—with the cooperation of ICE— plans to embark on Phase II of the pilot project: a six-month to one-year "real-world" remote representation experiment to determine the feasibility and desirability of remote pro bono representation using videoconferencing equipment to allow pro bono counsel to communicate with individuals detained at ICE facilities.

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[3] *Immigration Crackdown Overwhelms Judges* (NPR radio broadcast Feb. 9, 2009), available at http://www.npr.org/templates/transcript/transcript.php?storyId=100420476 (statement of Julie Myers-Wood).

[4] Dept. of Justice, *Cost Savings Analysis – The EOIR Legal Orientation Program* 4 (April 2012), http://www.justice.gov/eoir/reports/LOP_Cost_Savings_Analysis_4-04-12.pdf.

[5] *See* Benson & Wheeler, *Enhancing Immigration Adjudication*, *supra* n. 3, at 56-57 & App. 3. While the cited figure represents the national average for FY 2011, representation rates exhibited significant variation across immigration courts from a low of 1% (Tucson) to a high of 78% (New York City). *Id.*

Pilot Project – Phase II

Summary of Remote Video Representation Experiment

With the assistance of ICE and CLCT, ACUS proposes to test the utility of remote pro bono representation. To conduct this experiment, ICE would select three detention facilities of varying nature and location (but including the Farmville, VA detention facility as a control) that have adequate videoconferencing capability. ACUS would recruit lawyers, legal services organizations, and law school clinics, to provide remote pro bono representation to indigent detainees in the selected facilities. Representation would be voluntary; the availability of counsel would be made known to unrepresented persons at the facilities, upon their request.

Pro bono counsel would communicate with their clients via videoconferencing. Counsel would use their own laptop computers or tablets; detained persons would use the ICE facility's videoconferencing equipment when available. Should the case come to trial, EOIR would connect remote counsel to the immigration court hearing along with the respondent or the pro bono counsel would appear in court in person.

Evaluation

Following conclusion of the six-month to one-year Phase II experiment, CLCT, working in cooperation with ACUS, will evaluate the advantages and disadvantages of remote video representation based on the results of the pilot program. This should include:

- Effect on the court process of remote representation
- Assessment of the participation experiences of both clients and lawyers.
- Process efficiency effects
- Collateral effects including impact on detention facility staff and equipment
- Perception of justice and fairness
- Cost, including cost savings

ACUS will publish a report evaluating Phase II. This report will incorporate input from ICE, EOIR, CLCT and pro bono counsel. After publication of the report, ACUS plans to host an event/workshop to bring together relevant stakeholders to discuss the remote video representation pilot project. If supported by the findings from the Phase II final report, ACUS envisions expanding remote representation efforts and is committed to supporting such expansion beyond the pilot project.

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Diplomatic Efforts to Address Influx of Central American Migrants in the Rio Grande Valley

- The Obama Administration has created a five-part plan designed to stem the flow of migrants, screen them properly for international protection concerns, and then begin timely repatriation.

- The plan consists of establishing a common understanding with our partners in the region of the current situation, government response and root causes of migration; creating a common public messaging campaign to deter migration; improving the ability of Mexico and Guatemala to interdict migrants before they cross into Mexico; enhancing the capacity of Guatemala, Honduras, and El Salvador to receive and reintegrate repatriated migrants; and addressing the underlying causes of migration of unaccompanied children by focusing additional resources on economic and social development, and enhancing our citizen security programs to reduce violence, attack criminal gang structures, and reach out to at-risk youth.

- In addition to our work in Mexico through the Merida Initiative, and in Central America through the Central American Regional Security Initiative (CARSI), the Obama Administration is taking an integrated and comprehensive approach to the economic and security challenges that lie behind the current migration crisis – developing a strategy that emphasizes and balances prosperity, governance, and security objectives.

Partnering with Central America and Mexico to Address Root Causes of Migration: On June 20, the Vice President met with regional leaders in Guatemala to discuss our work together to address the underlying security and economic issues that cause migration. During his visit, he announced that the U.S. Government will provide $9.6 million in additional support for Central American governments to receive and reintegrate their repatriated citizens. To improve citizen security in the region, we are launching a new $40 million USAID program over 5 years in Guatemala and a new $25 million Crime and Violence Prevention USAID program over 5 years in El Salvador. In Honduras under CARSI, we will provide $18.5 million to support community policing and law enforcement efforts to confront gangs and other sources of crime.

Additionally, the Administration's $3.7 billion request to Congress for an emergency supplemental appropriation includes $300 million to help governments repatriate and reintegrate migrants, as well as to help create the economic, social, governance and citizen security conditions to address factors contributing to increases in migration.

Public Information Campaigns: The Departments of State and Homeland Security launched new public information campaigns warning about the dangers of illegal immigration and delivering the message that unaccompanied children are not given a permit to stay in the U.S., and highlight a shared community responsibility for the welfare of unaccompanied. The Department of State has mobilized its social media networks and is working closely with English-and Spanish-speaking television and radio stations in the three Central American countries, Mexico, and the U.S. to amplify that message.

Diplomatic Engagement and Action from the Mexican Government:
We are working closely with the Government of Mexico to address the influx of Central American children and families across the border:

- June 19 - President Obama called President Peña Nieto of Mexico to discuss a regional strategy to address the influx of Central American migrants through Mexico. Mexico's Secretary of Government joined Vice President Biden in Guatemala for a meeting with the governments of Guatemala, Honduras, and El Salvador on ways to address the increased flow of migrants.
- July 3 - Counselor Thomas Shannon and Assistant Secretary Roberta Jacobson met with Central American foreign ministers and the Mexican Deputy Chief of Mission.
- July 7 - Mexican President Peña Nieto announced its Southern Border Strategy, a welcome step towards improving Mexico's ability to exercise greater control along its border with Guatemala. On July 15, President Peña Nieto designated Humberto Mayans Canabal as coordinator of its Southern Border Strategy.
- July 15 - Counselor Tom Shannon visited Tapachula, Mexico to see a major transit point for Central American migrants and the home of one of Mexico's key migrant detention centers.
- Mexico, as it has in the past, continues to remove travelers without legal status in Mexico, including to Guatemala, Honduras, and El Salvador.
- Mexico has also amplified the message on the "dangers of the journey" and is helping to clarify that undocumented migrants will not be eligible for legal status in the United States, nor for deferred action under current or proposed law or regulations. The government of Mexico will roll out an advertising campaign aimed at youth in the coming weeks.

Diplomatic Engagement with Honduras and Action by the Honduran Government:

- U.S. diplomatic engagement with Honduras resulted in the first group of 38 individuals, 16 adults and 22 children, returning in a DHS flight to San Pedro Sula.
- President Hernandez' administration has been forward-leaning in their work to receive and reintegrate the migrants
- June 20 - Vice President Biden called Honduran President Hernandez.
- June 20 - The Honduran government began a nationwide media campaign using CBP-provided materials highlighting the dangers of land-based migration, which is being shown on gas station screens and broadcast on 80 TV outlets and 120 radio stations.
- June 24-25 - Under Secretary Sewall traveled to Honduras
- July 1- Secretary Kerry met with Honduran Foreign Minister Mireya Aguero while in Panama.
- July 9 - The Vice President called the Presidents of Guatemala, Honduras and El Salvador to review join efforts to address the surge of Central American migrants including awareness campaigns and the President's request to Congress for emergency supplement funding.
- July 8-9 – Secretary Johnson and USSOUTHCOM Commander General Kelly traveled to Guatemala to participate in bilateral meetings to discuss issues of mutual concern, including the influx of unaccompanied children in the Rio Grande Valley.
- July 9 – The Vice President called the presidents of El Salvador, Guatemala, and Honduras
- July 9 - President Hernandez declared a humanitarian emergency and announced the creation of a revolving fund to coordinate the repatriation and reintegration of children and the prioritization of unaccompanied children in the delivery of consular services.

- Honduran special operations police, with training and funding assistance from INL and CBP, stood up Operation "Rescue Angels" along the Honduran-Guatemalan border. The operation is designed to increase apprehensions of migrants attempting to illegally emigrate to the United States, often via smuggling organizations. The unit has rescued at least 90 children attempting to cross the border with smuggling organizations since the operation began on June 20 and turned them over to the appropriate Honduran authorities.
- Adult migrants are repatriated on an ongoing basis

Diplomatic Engagement with Guatemala and Action by the Guatemala Government:

- June 20 - The Vice President traveled to Guatemala to announce U.S. assistance for repatriation programs in Guatemala, Honduras, and El Salvador.
- Guatemala's First Lady launched the "Quédate!" campaign discouraging illegal immigration to the United States. Through public statements she is noting the dangers of the journey and urged parents not to send their children illegally to the United States.
- June 26 - Guatemala media *Prensa Libre.El Quetzalteco*, and *Guatevisión* launched an independent campaign on June 26 to raise awareness of the unaccompanied minors issue
- July 1- Secretary Kerry met with his Guatemalan counterpart while in Panama
- July 9 - The Vice President called the Presidents of Guatemala, Honduras and El Salvador to review join efforts to address the surge of Central American migrants including awareness campaigns and the President's request to Congress for emergency supplement funding.
- In coordination with U.S. officials, the Guatemalan government is investigating six human smuggling/trafficking rings with potential connections to smuggling of migrants.
- Adult migrants are repatriated on an ongoing basis

Diplomatic Engagement with El Salvador and Action by El Salvador Government:

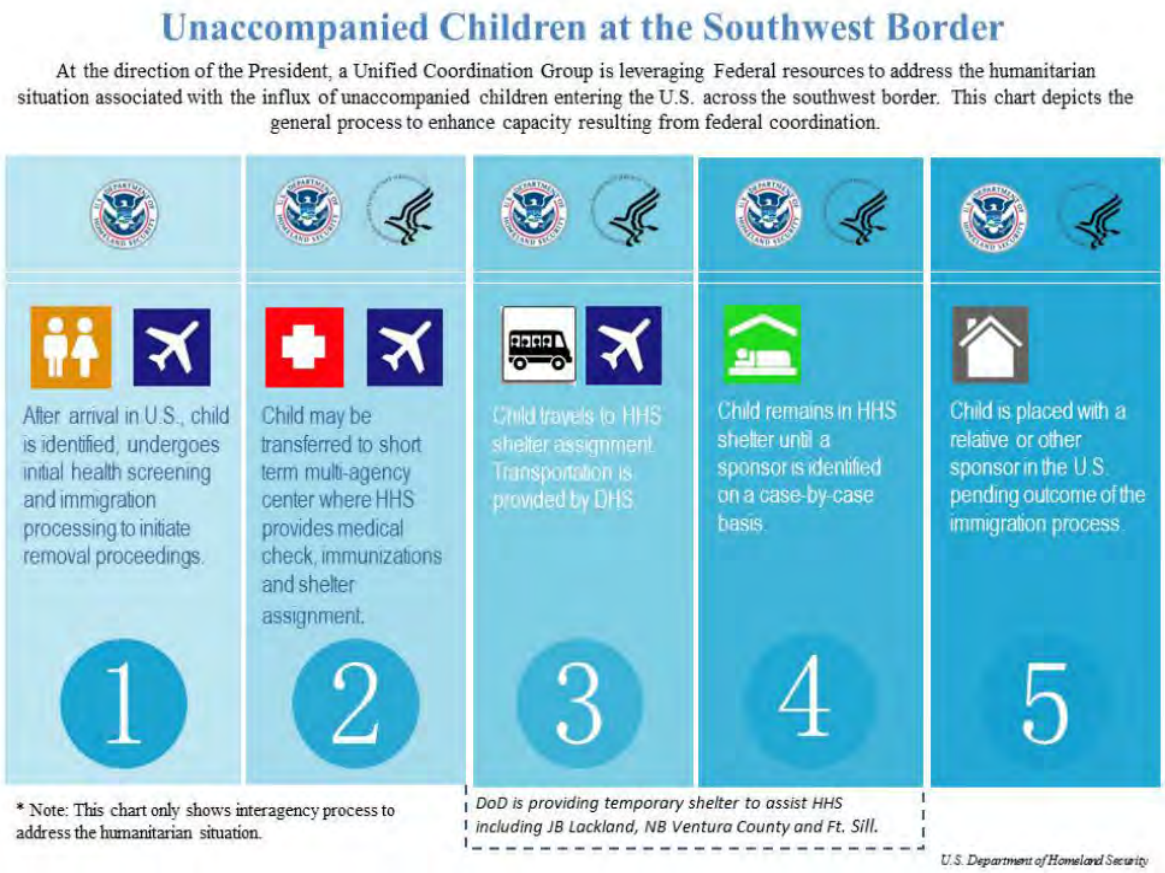
- US Ambassador Aponte and Deputy Chief of Mission Michael Barkin robust media engagement on dangers of journey and clarifying US immigration policy.
- July 1 – Secretary Kerry met with his El Salvador counterpart while in Panama
- July 9 - The Vice President called the Presidents of Guatemala, Honduras and El Salvador to review join efforts to address the surge of Central American migrants including awareness campaigns and the President's request to Congress for emergency supplement funding.
- July 14 - The Government of El Salvador announced the launch of a six-month, $1.2 million media campaign on the dangers of migration by children and families. Phase one will focus on the dangers of the trip, while phase two will highlight government efforts to reduce migration push factors.
- July 10 - The Mayor's Office of San Salvador, the Municipal Institute for Youth and the NGO Vision Democrática launched a unaccompanied minor campaign called "Sueño vs. Pesadilla" (Dream vs. Nightmare). The campaign, conducted in partnership with ten universities and 2,000 youth volunteers, includes earned media, social media and direct volunteer outreach to key communities in San Salvador.
- Adult migrants are repatriated on an ongoing basis

Immigration Processing of Unaccompanied Minors and Adults with Children

The Administration is focused on addressing the immediate and pressing challenges associated with the situation in the Rio Grande Valley.

Recent border crossers – whether it is unaccompanied children, adults with children, or single adults – are subject to removal proceedings that are consistent with our laws and our values; this includes caring for migrant children in our custody. We will carefully screen individuals for humanitarian claims and work with our Central American partners to ensure they have the capacity to accept returned migrants and appropriately process and support their reintegration.

For adults traveling with children, we are utilizing additional space to detain these groups and and surge immigration judges to processes their cases. For unaccompanied children, we are working to greatly reduce the time it takes to fairly process these cases, consistent with our values and laws.



Unaccompanied Minors

Minors from contiguous countries (Mexico/Canada)

- CBP screens the child for protection issues (i.e., whether the child has a fear of persecution or is susceptible to human trafficking). If there are no protection concerns, and if the child is deemed to have the capacity to withdraw his or her application for admission and does so, the child is voluntarily returned to Mexico or Canada.
- If protection concerns are found, or if the child does not to have the capacity to make immigration decisions or does not agree to withdraw, CBP processes the child for removal proceedings and transfers custody of the child to HHS.

Minors from non-contiguous countries

- CBP screens the child for protection issues, processes the child for removal proceedings, and transfers custody of the child to HHS. Children remain in HHS custody until they are either placed with a sponsor (often a parent or family member), repatriated, age out, or placed in another appropriate setting.
- While in HHS custody, children are cared for and provided services such as health and education services. In addition, while in care HHS endeavors to give all children Know Your Rights presentations, screening for legal relief, and access to pro bono representation.
- HHS attempts to secure counsel for children who stay in HHS custody to assist them with their removal proceedings in the immigration court closest to the HHS facility.
- When a child is released to a sponsor, HHS notifies ICE about the release and ICE initiates removal proceedings in the immigration court closest to the sponsor's address. This makes the removal process more efficient because it avoids needless court delays. ICE continues to monitor the cases of these children through the removal proceedings.
- HHS provides a small subpopulation of children identified as particularly vulnerable with post-release follow-up services, including home visits and referral to community based services.

Adults Traveling With Children

- Adults with children apprehended by CBP are processed for removal. Where detention space is available and appropriate, these adults with children are placed in expedited removal.
- When detention space is not available or appropriate, CBP processes these individuals for removal proceedings and transfers them to ICE for consideration of enrollment in the alternatives to detention program.
- Once adults with children arrive in their location, they are told to report to a local ICE office within 15 days. When an individual reports, they are told about their court date and other information. If they do not show up for court proceedings, ICE considers the individuals to be fugitives and based on enforcement priorities, including public safety and national security concerns, ICE Fugitive Operations identifies which fugitives to target for apprehension.

- At the direction of President Obama, the Administration announced a surge of government resources to increase our capacity to detain individuals and adults with children and to handle immigration court hearings. The surge included a temporary facility in Artesia, New Mexico to process adults with children more quickly.
- After CBP does its initial processing, subject to space constraints, some adults with children may be detained for the length of their proceedings, even if they are found to have credible fear and have an asylum hearing before an immigration judge.
- Despite the "expedited" nature of these removal proceedings, adults with children maintain important due process rights, including the ability to seek asylum, appeal to an immigration judge the denial of a credible fear finding, and the ability to seek legal representation. DOJ will soon operate the Legal Orientation Program (LOP) at the Artesia facility. Since 2003, LOP has improved judicial efficiency and assisted detained individuals in removal proceedings.
- Both asylum officers and immigration judges are available to conduct credible fear screenings, appeals of denials of credible fear, and asylum hearings. DHS and DOJ have surged judges and asylum officers to this facility, so that these claims can be heard quickly thereby minimizing the detention of families.

Safe Repatriation

- The Administration is working with our Central American partners to ensure that countries where migrants are returned have appropriate mechanisms in place to safely and securely repatriate and reintegrate children.
- The U.S. Government will be providing $9.6 million in additional support for Central American governments to receive and reintegrate their repatriated citizens. This funding will enable El Salvador, Guatemala, and Honduras to make substantial investments in their existing repatriation centers, provide training to immigration officials on migrant care, and increase the capacity of these governments and non-governmental organizations to provide expanded services to returned migrants
- Included in the President's supplemental request is funding for Central American governments to expand capacity to receive and reintegrate repatriated migrants. Beyond initial assistance, continued funding for repatriation and reintegration activities will be contingent on sustained progress and cooperation by the Central American countries.

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