

Ombudsman's Office holds First Annual Conference: "Government and Stakeholders – Finding Solutions Together"



On October 20, 2011, the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman's Office) hosted its First Annual Conference bringing together more than 300 participants with diverse backgrounds and interests, to discuss their common goal of improving the delivery of immigration and citizenship services. Participants included representatives from community and faith based organizations, national networks, business and industry associations, law schools, and individual immigration practices, as well as officials from multiple government agencies including the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement, and Customs and Border Protection, as well as the Department of Justice and Department of State.

In her welcoming remarks, Ombudsman January Conference shared a video of an applicant who, after recently being granted permanent residency by USCIS, very movingly described her positive experience with the immigration benefits process as a sign of how this country embraced her and her family. Ombudsman Contreras noted that there are millions of similar stories every year where a person's first impression of our nation is based on his or her interaction with USCIS. Ombudsman Contreras said: "As the Administration works with Congress on larger issues requiring legislation, we need to remember that we can continue to raise the bar every day on how we do our jobs. . . It doesn't take legislation to ensure a fair process or a professional interview. Regardless of whether an application is denied or approved, we need to keep working to ensure that every person has an experience like the one we heard today."

Ombudsman Contreras recognized her colleagues in the Ombudsman's Office for their passion and commitment to the mission of the Ombudsman's Office. In addition, she thanked USCIS Director Alejandro Mayorkas and USCIS employees for contributing to the conference, and for their work every day to increase engagement with the public and access to information and services.

Keynote remarks were delivered by Cecilia Muñoz, White House Director of Intergovernmental Affairs, who thanked all participants - both government and non-government immigration professionals - for coming together to speak with and learn from one another to continue strengthening transparency and collaboration in immigration services. She noted the significance of the dialogue that took place in a recent [White House Blog posting](#).

Highlights of issues covered during the conference include:

- Stakeholder perspectives on recent trends in the adjudication of employment-based immigration applications;
- AILA InfoNet Doc. No. 11102562. (Posted 10/25/11)**

- Current developments in particular social group definitions for asylum applicants;
- Challenges in the processing of waivers of inadmissibility filed both overseas and domestically;
- Efforts to improve docket efficiency in the Executive Office for Immigration Review's Immigration Courts through inter-agency coordination and communication;
- Impact of immigrant status verification services on access to public benefits, employment, driver's licenses, and social security with information on best practices;
- Insight into the making of the monthly Visa Bulletin and the collaborative efforts focused on efforts to address retrogression; and
- The role of bloggers in immigration services.

The Ombudsman's Office thanks each of the professionals who served as speakers and panelists, as well as the many practitioners who participated in the conference.

The Ombudsman's Office will provide additional information on its website, www.dhs.gov/cisombudsman, in the coming weeks summarizing the dialogue that took place during the conference.

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Office of the Citizenship and Immigration Services Ombudsman

Highlights from the First Annual Conference

October 20, 2011
National Archives and Records Administration Building
Washington, D.C.

Keynote Remarks

Remarks from Gary Stern, NARA General Counsel

Mr. Stern shared the vibrant history and work of the National Archives and Records Administration (NARA), and the important role NARA plays in preserving our national heritage. NARA controls over 10 billion records, including those of individuals arriving in the United States from foreign ports, U.S.-Mexican land border records, Great Lakes crew lists, naturalization records, and A-files. These records tell the story of our nation, and they help to tell the story of the work undertaken by immigration professionals, both inside and outside the Federal government.

Remarks from January Contreras, Citizenship and Immigration Services Ombudsman

Ombudsman Contreras welcomed attendees from community and faith-based organizations, national immigration services networks, employer and industry associations, law schools, and law firms, as well as officials from government agencies, including components within the U.S. Department of Homeland Security (DHS) – U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP) – as well as the Departments of Justice (DOJ) and State (DOS).

Ombudsman Contreras shared a video of an immigration benefits applicant who, after recently being granted permanent residency by USCIS, very movingly described her positive experience with the immigration benefits process as a sign of how this country embraced her and her family. Ombudsman Contreras noted that there are millions of similar stories every year, where a person's first impression of our nation is based on the interaction with USCIS. Ombudsman Contreras set the tone for the conference with these remarks:

As the Administration works with Congress on larger issues requiring legislation, we need to remember that we can continue to raise the bar every day on how we do our jobs. . . It doesn't take legislation to ensure a fair process or a professional interview. Regardless of whether an application is denied or approved, we need to keep working to ensure that every person has an experience like the one we heard today.

Remarks from Cecilia Munoz, White House Director of Intergovernmental Affairs

Ms. Munoz welcomed the opportunity to speak with conference attendees and shared that opportunities for dialogue between stakeholders, community partners, and others invested in immigration issues is an important part of good government. Ms. Munoz felt it was especially powerful to hold the conference at NARA, surrounded by history and connected to the identity of our country as nation of immigrants.



**Homeland
Security**

Ms. Munoz told her immigration story, including her first memory of interacting with the government. When she was young, Ms. Munoz accompanied her mother for fingerprinting prior to her mother's naturalization. Witnessing the naturalization process made a lasting impression on Ms. Munoz, and ultimately impacted her commitment to public service.

Ms. Munoz emphasized the importance of how the government provides services because, as a country, we will be ultimately be judged on the basis of those individual decisions, which are, in turn, guided by broader policy choices. Ms. Munoz applauded the efforts of DHS to improve its delivery of services to the public. She noted that the immigration process is the method by which people become U.S. citizens; Ms. Munoz concluded that as a nation of immigrants and a nation of laws, the government bears a responsibility to implement immigration laws in a fair, transparent, and service-oriented manner.

Remarks from Alejandro Mayorkas, USCIS Director

In his afternoon plenary remarks, Mr. Mayorkas emphasized how seriously USCIS values the opinion of the public. He shared the many ways in which USCIS has engaged with the immigration services community and has attempted to address issues raised. USCIS has held discussions and other stakeholder engagement activities on issues such as I-797, Notice of Action receipts, concerns regarding L-1 and EB-5 adjudications, and the recently announced Entrepreneurs in Residence (EIR) initiatives. Director Mayorkas said he hoped these initiatives would better accommodate the operational realities faced by the business community. In addition, he noted that USCIS looks forward to collaborating with the public at unprecedented levels in 2012 and will make changes that will affect both the structure of the agency and the way in which it engages in policymaking. He further stated that direct access to USCIS on cases should be a hallmark of all product lines. Finally, Director Mayorkas described how he is working to institutionalize community engagement initiatives so they have an enduring impact.

The Role of Bloggers in Immigration Services

Panelists: Angelo Paparelli, *Nation of Immigrants*
Greg Siskind, *Immigration Law and Policy*
Jason Dzubow, *The Asylumist*
Eleanor Pelta, *AILA Leadership Blog*

Blogs help inform the public, demystify immigration rhetoric, and advance policy changes. This panel brought together influential bloggers from the immigration services community to share their experiences blogging, and what they hope to accomplish in the immigration world through their blog posts.

Mr. Siskind, who authors a blog on www.ILW.com called "Immigration Law and Policy," has played a key role in the history of the internet and immigration. He began the first immigration law firm website in 1994 and has continually informed immigration practitioners and policy advocates on the challenges and successes of the U.S. immigration system. During the panel, he shared the story of various immigration law firm websites and bloggers with a look at where they are now.

Mr. Dzubow, whose blog is "The Asylumist," talked about the ethics of blogging. As a filter of information, Mr. Dzubow explained that bloggers often toe the line between journalism, information collectors, social commentators, and talk show personalities.

Mr. Paparelli, who authors pens the blog “Nation of Immigrators,” provided an example of how blogs also play a role informing the government. He showed data on the high number of hits from government website servers to his blog after he posted a story about USCIS. By making policy understandable, opening dialogue, and triggering external and internal discussions, bloggers play an increasing role in the immigration policy world.

Blogs often unite the immigration practitioner community on compelling issues of shared concern. Ms. Pelta, President of the American Immigration Lawyers Association (AILA) shared how the AILA Leadership blog provides a voice to numerous contributors both from a technical and a policy perspective.

Roundtable 1: The Importance of Adjudication Predictability: Impact on Employers, Individuals, and the Economy

Moderator: Frederick Troncone, *Ombudsman’s Office*
Panelists: Amy Nice, *U.S. Chamber of Commerce*
Linda Rahal, *Trow and Rahal, P.C.*
Lynn Shotwell, *American Council on International Personnel (ACIP)*

This roundtable shared differing perspectives on recent USCIS employment-based adjudications, focusing primarily on predictability and consistency.

Panelists focused on the need for USCIS to better understand current business practices. Employer relocation trends demonstrate how companies strive to fulfill business objectives and enhance career development with international assignments. Companies are now utilizing more employee transfers than ever. Ms. Shotwell explained that based upon increased issuance of Requests for Evidence (RFEs), there is a perception that the government may be struggling to keep up with current business practices. All panelists agreed that USCIS needs to better understand the business community, such as the use of “virtual offices,” and ensure better consistency. Ms. Nice stated that companies are increasingly under pressure and fast-paced. As companies must pivot to account for change, they may choose leave the United States and go elsewhere due to the complexity of the immigration process.

Panelists expressed concerns with the lack of predictability in USCIS employment-based processing. They reported that attorneys and their clients often receive varying results for similar petitions or applications. For example, H1-B specialty occupation petitions submitted for the same project have yielded different RFE’s. Ms. Rahal stated that USCIS appears to be more restrictive now than in years past. She explained that inconsistency gives the appearance of a “culture of no” surrounding USCIS employment-based adjudications. Ultimately, companies may turn elsewhere to conduct business, and the United States may lose out.

Panelists commented that accountability for business-related immigration is limited because the USCIS appeals process is not timely enough for companies. Ms. Rahal shared that employers will often re-file petitions, rather than submitting an appeal due to the lengthy processing times. Proposed solutions to restore adjudication predictability included implementing a new initiative to address specific subject matters such as entrepreneurs, EB-5, L-1B, etc. Another suggestion was for USCIS to hold a summit of experts followed by technical training that implements recommendations from the summit.

Panelists applauded the new Entrepreneurs in Residence Program, but were skeptical that it will have the needed impact.

The training of adjudicators was emphasized across the panel discussion. One key training area highlighted was the preponderance of the evidence standard. Panelists explained that even though the USCIS Adjudicator's Field Manual has remained the same, the adjudications standard appears to have changed. For instance, an Alabama logistics company wanted to bring in a manager but was denied because the manager was supervising contractors and not employees of the petitioning employer. This denial made it appear to the employer's attorney that USCIS does not consider supervising contractors as managerial, when another similar case was approved.

Conference attendees also had an opportunity to ask questions of the panelists, some of which are included below.

What are panelists' experiences with USCIS adjudicators reviewing proof of a beneficiary's qualifications?

Ms. Shotwell stated that there is a need for increased training for adjudicators. Recently, experts met with adjudicators to explain what goes on in research labs. It may be possible to replicate this process for other industries. Ms. Rahal explained that the adjudication process can be tough for applicants for employment-based first preference for individuals of extraordinary ability, and details must be explained thoroughly.

Mr. Troncone noted that increased specialization for adjudicators may be a solution, along with an emphasis on academic skills and following systemic trends of USCIS adjudications. Ms. Nice explained that specialization may be helpful and that she is hopeful USCIS will provide more training focused on specific categories.

An audience member shared that in the past, USCIS adjudicators responded well to training and good policy and noted that USCIS recently hired additional adjudicators who will receive this training. Another audience member commented that USCIS is working to ensure that their adjudicators receive the proper training to ultimately provide consistent decisions.

How can the Ombudsman's Office help USCIS better understand the present day business environment, as different from ten to twenty years ago?

The Ombudsman's Office continually liaises with USCIS regarding current business practices and developments. For example, the Ombudsman's Office recently hosted a listening session in Los Angeles, California and a public teleconference, both focused on small businesses concerns. The Ombudsman's Office will continue to provide a forum to improve communication with USCIS regarding these concerns.

Roundtable 2: Hot Topics in Asylum: An Examination of Particular Social Group and Other Serious Harm

Moderator: Rená Cutlip-Mason, Ombudsman's Office
Panelists: Chuck Adkins-Blanch, DOJ Executive Office for Immigration Review (EOIR) Immigration Appeals (BLA)
Pamela Goldberg, United Nations High Commissioner for Refugees (UNHCR)
Karen Musalo, Center for Gender and Refugee Studies

This roundtable covered developments in asylum law including changes in the definition of a “particular social group” (PSG), as well as an examination of “other serious harm” in claims for asylum. In *Matter of Acosta*, 19 I&N Dec. 211 at 233 (BIA 1985), the BIA held that a PSG is defined by an “immutable” or “fundamental” characteristic. These characteristics may include sexual identity, family, clan membership, and former occupation or status. The BIA has added requirements of “social visibility” along with “particularity” to the PSG analysis. Social visibility has come to mean that the PSG is perceived as a group within society. Particularity refers to the ability to distinguish the group as a distinct class of persons.

Ms. Musalo explained the origins of PSG as a ground for asylum and noted that case law serves as the sole means for definition of a PSG. Ms. Goldberg also noted that, in 1992, UNHCR published guidelines on gender-related persecution and membership of a PSG. In 2000, DOJ proposed regulations attempting to define PSG, but final regulations have not been issued.

Ms. Musalo explained that case law on gender as a PSG has been dynamic. Domestic violence as a basis for PSGs developed significantly with *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), *vacated*, 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded*, 24 I&N Dec. 629 (A.G. 2008). DHS provided supplemental briefs for *Matter of R-A-* that helped define social visibility and explained the methodology for showing membership in a PSG.

Ms. Lay noted PSG differs from other protected grounds because it is still being developed by new case law, which is difficult to reconcile with administering benefits. USCIS provides its Asylum Division with up-to-date training on PSG.

Ms. Lay noted that the way PSG is generally analyzed does not present a realistic version of the persecutor/persecuted dynamic. The primary questions are whether the persecutor perceives the trait common to the PSG and whether the persecutory action is then based on that perception. USCIS Asylum Officers use a three-part test to adjudicate claims involving PSG: 1) immutability/fundamentality of the characteristic (*Acosta*); 2) whether the PSG is socially distinct (*C-A-*); and 3) ensuring that a persecutory act or terrorist activity is not the basis of the trait. The analysis in *Acosta* is valuable in defining a trait as it discusses innate sex, color, or kinship ties, along with shared past experience as being characteristics upon which to form a PSG.

Ms. Lay said that while shared past experience may be an immutable trait, the experience may still not be socially distinct. For example, in the case of past service in the military or police, an individual being targeted for harm as revenge or because he or she frustrated a criminal activity would not be seen as socially distinct. However, in instances where former service in the military or police rises to level of social status, one may be able to show how this relates to a PSG. Ms. Goldberg explained that particularity was not construed as a legal test, and whether a social group is particular should be determined by the nature of the group itself.

Ms. Lay stated that voluntary assumption of risk is also “very fact-specific” and may itself be evidence of an immutable trait. USCIS understands that social visibility does not mean literal visibility but whether society distinguishes between the trait and societal protection from persecution because of that trait. Ms. Lay noted that an immutable trait is viewed through the perception of the persecutor. Abuse or harm in of itself

cannot be an immutable trait. Ms. Goldberg stated that while there is no hard and fast rule, analysis must take into consideration the identity of the persecutor. If a non-state actor is the persecutor, the focus must be placed on whether the state is unable or unwilling to protect the asylum-seeker.

Mr. Adkins-Blanch noted that there are seven new board members since PSG-related case was last considered by the BIA. He stated that cases on PSG since 2007 have been disposed of without consideration *en banc* by the BIA.

Mr. Adkins-Blanch turned the discussion to “other serious harm”, another path to asylum. Analysis of an asylum claim includes whether the asylum-seeker: 1) suffered severe past persecution under *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989); or 2) has a “reasonable possibility of suffering other serious harm.” 8 C.F.R. § 208.13(b)(iii)(B). While a finding of past persecution makes for a presumption of well-founded fear, the presumption may be rebutted. If the presumption is rebutted and the court determines the applicant no longer has a well-founded fear, the applicant may still be eligible for asylum if they can demonstrate “other serious harm” may be suffered in the home country. “Other serious harm” need not be based on a protected ground, nor related to the original persecution. Federal regulations in 2001 added “other serious harm” as the second prong of humanitarian grounds for asylum.

Mr. Adkins-Blanch stated that “other serious harm” should be “equal in severity” to persecution reviewed in the primary analysis. Federal Circuit Courts have been remanding this issue for analysis. Remands have been identified as coming from four areas: 1) economic deprivation; 2) civil strife; 3) emotional harm (e.g. family separation); and 4) mental/physical health (e.g. difficulty in obtaining housing). Conference attendees also had an opportunity to ask questions of the panelists, some of which are included below.

What is the current status of the proposed regulations relating to *Matter of R-A*- concerns?

Ms. Lay shared that USCIS cannot comment on set dates, but both DOJ and DHS are actively working on this issue. Ms. Goldberg suggested that the advocacy community should articulate what they want to see in the regulations.

Can the IJ apply a balancing test when the current existence of a well-founded fear is often debatable or unclear? Which precedent is applicable?

Mr. Adkins-Blanch suggested that if past persecution was shown and then rebutted, a claim of well-founded fear must still be considered. Other serious harm is a second prong considered when the presumption of well founded fear has been rebutted.

If a claim is based on two protected grounds i.e. PSG and Political Opinion, do asylum officers think about both arguments being made? Would a weak argument undermine the strength of another argument? Should both be made? Is it appropriate to argue other serious harm at the affirmative stage?

Ms. Musalo explained that it is appropriate to present all possible grounds. She suggested it is wrong to dismiss a possible theory because another is stronger. Ms. Lay explained that it is not USCIS policy to ignore any part of the claim. USCIS will resolve the case based on what is presented in a claim. “Other serious harm” is considered, and USCIS provides training for its Asylum Officers on this.

Could you address imputed social groups?

Ms. Lay shared that imputation requires a closer reading of nexus. It is about if the persecutor sees the trait. Ms. Lay referenced *INS v. Elias-Zacarias* as to whether persecution may occur because a persecutor perceives someone to have a trait that he or she actually does not.

What is the processing time for an appeal with the BIA?

Mr. Adkins-Blanch shared that there is a 90 day limit according to regulatory guidelines. This is a set time for staff and the Board to complete a case. If a Board member misses a deadline, the case goes to the Board Chairman and then to the Attorney General. The BIA has met all of its deadlines, and a case has not reached the Attorney General's desk.

It seems that when cases are referred to USCIS Headquarters for asylum quality assurance reviews that there is a long turnaround time. Are there any ways to expedite that review, for example with minors? Have any steps been taken to reduce the delay?

When queried after the conference, USCIS responded that during the last year or so, there have been two primary reasons for delays in the Headquarters quality assurance review process. First, some cases are unavoidably delayed because USCIS is awaiting guidance on certain issues, such as terrorism related inadmissibility grounds. USCIS works to clear these cases quickly whenever guidance allows these cases to be adjudicated. Second, staffing shortages have caused delays in review. For much of the last year, the quality assurance team has been functioning with half its staff. USCIS took actions to remedy this situation by bringing in short-term detailees and hiring new staff. USCIS expects to be fully staffed by January 2012. Once, fully staffed, USCIS will be able to more efficiently address the pending workload and remain current in its review.

Roundtable 3: I-601 Waivers of Inadmissibility: Does the Current Process Work? When is Hardship Extreme? Do Alternative Models Exist?

Moderator: Peggy Gleason, Ombudsman's Office
Panelists: Anna Gallagher, Maggio + Kattar
Michael D. Olszak, U.S. Customs and Border Protection Admissibility Review Office
Pilar Peralta Mihalko, USCIS Refugee Asylum and International Operations (RAIO) Directorate

This roundtable described current standards and processes for adjudication of Forms I-601, Application for Waiver of Grounds of Inadmissibility. Panelists discussed the legal requirements for I-601 waivers, recent changes in processing, and the challenges of the waiver process from government and stakeholder perspectives.

Ms. Mihalko described her office's work processing waivers. RAIO has jurisdiction for most overseas USCIS adjudications. It has three districts in Mexico City, Bangkok, and Rome which include the USCIS field offices that adjudicate I-601 applications for those who file overseas.

RAIO received 23,574 Form I-601 waiver applications in FY 2011, and completed over 21,000 cases. Over 9,000 cases remain pending at the end of FY 2011. The Ciudad Juarez Field Office (CDJ) receives approximately 75 percent of the annual case load. CDJ operates with three adjudicators and a field office director, Ms. Yolanda Miranda.

RAIO has been working towards a goal of completing adjudications of I-601 applications within six months from the receipt date. In FY 2011, there was an 82 percent reduction in the number of cases that remained pending over six months. However, a lag still exists between DOS receipt of waivers and the initiation of processing which varies by overseas post, USCIS.

Ms. Peralta Mihalko described the high volume waiver operation at CDJ, which receives assistance from the USCIS El Paso Field Office and the Nebraska Service Center in adjudicating cases. Ms. Mihalko's office, the International Adjudications Support Branch, located in Anaheim, CA, handled 13% of the waiver cases from CDJ. This office also assists with overseas adjudications by sending staff on rotations to USCIS field offices abroad. RAIO's I-601 approval rates for FY 2011 international offices were 54% in the Bangkok District, 50% in the Rome District, and 84% in the Mexico District.

Ms. Mihalko explained that USCIS filing procedures for waivers overseas changed in 2011. Beginning in April 2011, I-601s were accepted directly at all USCIS field offices overseas that were co-located with DOS. Applicants may not notice the difference since DOS and USCIS share the same window for case intake, however, the change saves USCIS money, as the agency was required to pay DOS for intake of applications. Where USCIS offices are not co-located with DOS, applications are still filed with DOS and transferred to a USCIS field office. There are [28 USCIS international offices that are co-located with DOS](#). There may be additional significant filing changes in FY 2012. USCIS is considering a transition to I-601 filing at a U.S.-based lockbox but will engage with stakeholders prior to making any such change.

Ms. Mihalko stated that the extreme hardship requirement for waivers is determined on a case-by-case basis. Adjudicators must consider the totality of circumstances and consider factors cumulatively. The most frequent issue is a failure to provide sufficient evidence. It is helpful if the packet pulls the evidence together succinctly and directly to help adjudicators get to the point. Packets should highlight how evidence in its totality adds up to hardship and should connect the hardship of other family members to the qualifying family member's hardship.

Ms. Gallagher discussed immigrant waivers from a practitioner's point of view. Ms. Gallagher shared that she generally advises clients to be prepared to be outside of the United States for two years when filing a waiver with consular processing. She also carefully assesses the equities in the case before advising a client to leave the country and file for a waiver. She advised people to always inquire how many times the applicant came to the United States and how long the individual stayed to ensure proper calculation for the permanent bar of inadmissibility at INA Section 212(a)(9)(c).

Waiver outcomes are uncertain and it is important to build equities before presenting a waiver. For example, if clients just married and have no children, Ms. Gallagher will not recommend attempting a waiver, but instead will advise the couple to build equity and file later. If a waiver is denied, the applicant may appeal to the USCIS Administrative Appeals Office, where processing times are 26 months.

Ms. Gallagher described how to document extreme hardship, referring to BIA case law and unpublished AAO decisions. When documenting country conditions, she advised that practitioners should summarize and highlight relevant portions of long documents. She recommended using experts for psychological evaluations. For medical hardship, she advised people to highlight lack of availability of treatment in the home country and to document lack of funds for medical care or insurance.

Mr. Olszak explained to the audience how his office adjudicates nonimmigrant waivers. In 2006, CBP launched the Admissibility Review Office, now located in Herndon, Virginia, as the centralized office to adjudicate nonimmigrant waivers. Through centralization, CBP sought to achieve consistency in adjudications. Approximately, 20,000 waivers were decided by ARO in FY 2011. The approval rate on the consular cases is high because consular officers examine the case first and make a recommendation to ARO.

Mr. Olszak reminded the audience that nonimmigrant waivers are temporary and are valid for five years (except for U, T and K visas), whereas immigrant waivers are permanent. The legal standards and process for each of these types of waivers is different. Temporary nonimmigrant waivers are available under INA 212 (d)(3)(A).

Mr. Olszak explained that under INA 212(d)(3)(A)(i) there is a nonimmigrant waiver that is part of a consular process. When a nonimmigrant applicant goes to the consular post abroad for an interview, the consular officer decides whether to recommend the applicant for a waiver or not. No separate application or fee is needed and the request is submitted electronically to ARO. Sometimes the ARO will find that the applicant is not inadmissible and notify DOS. No appeal is available for the decision DOS gives to the applicant, but the applicant may re-apply. When a post does not recommend a waiver, or one is denied, the applicant can request an advisory opinion. While it generally takes an average of 60 days to adjudicate a waiver, ARO can expedite cases.

INA 212(d)(3)(A)(ii) provides a paper-driven waiver process, using Form I-192, Application for Advance Permission to Enter as Nonimmigrant, which is used mostly by Canadians who do not require nonimmigrant visas. Mr. Olszak explained that when a person files Form I-192 at the port of entry with supporting documents and the \$585 fee, CBP at the port of entry mails the application to ARO. The average processing time is 90-120 days.

Roundtable 4: Improving Docket Efficiency through Better Communication and Coordination: Roles of USCIS, ICE, and EOIR

Moderator: Debra Rogers, Ombudsman's Office
Panelists: The Honorable Gary W. Smith, Executive Office for Immigration Review
Ellen Gallagher, USCIS Office of Chief Counsel
Michael Davis, U.S. Immigration and Customs Enforcement (ICE)

This roundtable covered issues relating to EOIR docket efficiency and attempts to resolve the challenges of high-volume caseloads through interagency partnerships with ICE and USCIS.

Judge Smith explained that the Docket Efficiency Working Group began in late July 2009 and met to identify ways to coordinate agency action in order to make court docket more efficient. The working group decided to focus on cases on the EOIR docket that have a petition or application pending with USCIS. The working group identified 18,000 pending cases that required continuances three and four times when the underlying petition was not adjudicated. This totaled around 72,000 hearings, requiring judges, government and private attorneys, as well as respondents to expend time and resources.

The working group, comprised of representatives from EOIR, ICE Office of the Principal Legal Advisor (OPLA), and USCIS, began to address these issues by January 2010. More than 25,000 cases before EOIR

had pending USCIS petitions, of which 17,000 cases had a pending Form I-130, Petition for Alien Relative as the basis for relief. The group discussed the possibility of administrative closure, termination without prejudice, and expedited processing for detained and non-detained cases. The working group also discussed logistical issues surrounding the transfer of A-files between DHS components.

On August 20, 2010, ICE published, “Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Application or Petitions,” and on February 4, 2011, USCIS published its companion policy “Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator’s Field Manual,” which called for expedited processing of selected cases within 30 calendar days for detained respondents and 45 calendar days for non-detained respondents.

Since June 2010, DHS and ICE have set clear priorities to ensure resource optimization. The ICE guidance has two key policy developments aimed at promoting docket efficiency: (1) a shared commitment with USCIS to expedite adjudication by USCIS of applications/petitions for aliens currently in removal proceedings; and (2) a policy supporting ICE attorneys in seeking dismissal without prejudice of certain removal proceedings. In terms of ICE motion to dismiss the removal proceedings of certain aliens, the August 2010 guidance policy memo provides three basic considerations. First, the individual must have an underlying application or petition with USCIS that would provide relief from removal. Second, the individual must appear eligible for the relief as a matter of law and discretion. Third, the favorable exercise of prosecutorial discretion must appear warranted to ICE (i.e. ICE will look to any adverse discretionary factors). Mr. Davis explained that ICE has focused on detained cases. ICE OPLA was instructed to process the longest pending cases and work backwards.

Ms. Gallagher explained how historical foundations of USCIS, EOIR, and ICE have contributed to these current issues; the breakup of INS into three DHS components had unintended consequences. The working group now focuses on how to identify cases, developing a method to notify and receive a decision from USCIS, and the smooth routing of A-files. Standard operating procedures (SOPs) have been developed in each USCIS district. Many SOPs call for dedicated channels of communication between USCIS and ICE. Ms. Gallagher noted that the USCIS memoranda’s 30 day and 45 day guidelines are still ambitious targets that USCIS strives to meet.

Tips for Practitioners from the Panelists:

- If your client is a respondent before the immigration court and has an application pending with USCIS, notify the judge early in the process, at the master calendar hearing or earlier. Provide proof of the filing, a copy of the receipt number, and, if applicable, proof of any waiver application.
- Present derogatory information. The government attorney may exercise prosecutorial discretion (PD) and it is better to identify an old conviction and subsequent rehabilitation at the front end of the process. PD requires balancing the pros and cons of each case. A marginal case could be balanced with an early and direct explanation addressing the negative factors. If ICE learns about problems later in the process or believes that derogatory information has been concealed, a favorable exercise of PD may be less likely and the practitioner’s credibility could be undermined.
- Compelling humanitarian facts may influence a decision. Inform ICE early in the process, and be detailed as you explain why your client merits a positive decision. Be direct and bring up any matter that could influence the decision. ICE officers want a full picture of the case and they may

not be privy to personal information that would be important to a full, considered application of PD.

- Do what is best for your client. Joinder of parties and administrative closure may not be advantageous for your individual client. If ICE terminates before the petition has been adjudicated by USCIS, how will this affect the processing of the case? There may be no need to expedite once the EOIR case has been terminated.
- PD is a case-by-case decision. Be sure to manage your client's expectations.

Conference attendees also had an opportunity to ask questions of the panelists, some of which are included below.

Can ICE adjudicate the family petition (I-130) so that the A-file would not have to be transferred to USCIS?

Panelists suggested that since Director Mayorkas invited suggestions from the private bar, the individual should submit this question; however, this adjudication authority currently falls within USCIS' purview.

How do we respond when the operations people convey an attitude of "no confidence" and secure communities has increased NTA issuance. How is the prioritization memo being put into operation?

Panelists shared that the working group allows the DHS components and EOIR to communicate. The group set in motion a new process, tackling the oldest cases first. The next project for this working group will be to continue to share ideas, implement Director Morton's Memo, and monitor implementation of the SOPs.

What does a practitioner do if they have a problem with a specific attorney?

Let the ICE Chief Counsel know you have a problem with an attorney. ICE meets periodically with AILA at the national level, ICE field leadership meet locally with advocates and practitioners, and there is always an opportunity to comment about your concerns.

With the ICE policy of promoting docket efficiency by prioritizing cases, how is USCIS deciding to issue an NTA?

USCIS released Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens, PM-602-0050, 11/17/2011. EOIR is currently studying the efficiencies.

Conference attendees also submitted questions which the panelists were unable to answer due to time constraints. However, the panelists have since answered these questions and they are included below.

When a case has an underlying approved I-130 petition and is dismissed to have the Form I-485, Application to Register Permanent Residence or Adjust Status adjudicated by USCIS, why is it taking so long for USCIS to schedule an interview, sometimes as long as 16 months?

USCIS explained that the adjudication of an I-485 under these conditions should not take that long. USCIS District Offices have all established SOPs related to cases dismissed by ICE/EOIR where relief applications are pending before USCIS. These procedures are designed to ensure timely, effective adjudications and communication between USCIS and ICE. If you have specific examples of cases pending beyond USCIS processing times, please forward them to the Ombudsman's Office at cisombudsman.publicaffairs@dhs.gov.

Can you tell us more about ICE efforts to monitor or streamline which cases will continue on to proceedings after a prosecutorial discretion review?

Please see the following recently issued guidance from USCIS and ICE:

[Revised Guidance for the Referral of Cases and Issuance of Notices to Appear \(NTAs\) in Cases Involving Inadmissible and Removable Aliens, PM-602-0050, 11/17/2011](#)

[Case-by-Case Review of Incoming and Certain Pending Cases, 11/17/2011](#)

When might the guidelines for the “new” prosecutorial guidelines be expected for field agents, supervisors, FODs and AFODs with ERO?

While OPLA is not certain as to what specific guidance may be issued in the field in the future, OPLA expects that any such guidance will build upon Director Morton’s memoranda, “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens” (June 30, 2010), and “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (June 17, 2011), both of which already apply to ICE attorneys, officers, and agents. Moreover, while written guidelines can serve as helpful tools for the exercise of discretion, such discretion has always been and will remain inherently a case-by-case consideration.

How does USCIS adjudicate an I-130 for a husband/wife when an interview is ordinarily needed and the beneficiary is detained?

Under Director Morton’s memorandum, “Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions” (Aug. 20, 2010), ICE is obliged to facilitate USCIS access to applicants or beneficiaries who are in ICE custody. Once ICE provides USCIS with access to the detained beneficiary and the A-file, USCIS should – absent unusual circumstances such as fraud/national security or other public safety concerns – process the I-130/485 according to established guidelines and within the expedited (30 day) timeframe set forth in the February 2011 memo. Again, specific cases pending beyond USCIS processing times should be emailed to the Ombudsman’s Office at oisombudsman.publicaffairs@dhs.gov.

When will A-files be digitized so cases are not delayed while paper is moved around the country from service centers to ICE offices to USCIS district offices, etc.?

USCIS explained that this is an ongoing process. It is noteworthy, however, that all USCIS attorneys in the Office of the Chief Counsel recently gained limited access to GEMS (ICE’s General Counsel Electronic Management System), which provides real-time information on cases being litigated in immigration court and the federal courts and includes materials relating to the litigation of a particular case.

Could an automated system be established to transfer detained clients to the non-detained docket (automatically) after they are bonded out?

ICE indicates that the docketing of released cases is generally a function of local immigration court arrangements and will depend on whether a particular judge has both a detained and non-detained docket or specializes only in one or the other. Also, if the release of the individual will result in his or her relocation to a different court jurisdiction, there may be legal requirements that need to be satisfied in terms of a formal change of venue, which would not be practical to automate. EOIR indicates that when a respondent in removal proceedings is released from detention on bond, the case remains before the court where the Notice to Appear was filed as that court has jurisdiction of the case, per 8 C.F.R. § 1003.14(a).

If the respondent wishes to have the case moved to a different court, the individual must file a Motion for Change of Venue and establish good cause under 8 C.F.R. § 1003.20, and follow the guidance in the Immigration Court Practice Manual, Chapter 5.10(c). There are a limited number of courts co-located in the same base city (a court at a detention location and another court with principally non-detained cases), where clerical transfer of cases may be done under 8 C.F.R. § 1003.11 (for example, El Paso Immigration Court and El Paso SPC; Buffalo Immigration Court and Batavia Immigration Court).

What is being done to speed up background checks for court? Is there a way to let attorneys and respondents know ahead of time when a background check will not be complete and a hearing will not go forward?

Immigration Judges address this when setting individual hearing dates and emphasize to respondents the need to obtain biometrics. Also, the biometrics form is provided to the respondent during a hearing. Both parties should be attentive to the need for biometrics to be current before an individual hearing.

How likely is ICE to join in a motion to reopen a case where, for example, a person granted withholding of removal wishes to pursue adjustment of status based on an approved I-130 petition? What is the procedure?

The exercise of prosecutorial discretion is inherently case-specific, but ICE will always consider requests to file joint motions. ICE has 26 Chief Counsels, each with established office-specific practices for the receipt and consideration of such requests, and ICE encourages individuals to touch base with counsel at the local level to learn more about those practices.

Have the August 20, 2010 ICE “*Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Application or Petitions*” and February 4, 2011, USCIS “*Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator’s Field Manual*” reduced the EOIR docket?

Yes. ICE explained that during the period September 1, 2010, to September 9, 2011, over 12,300 cases that had underlying petitions pending before USCIS were completed, either by termination without prejudice, administrative closure, relief granted, or other action.

Has the working group dealt specifically with efficiency of petitions involving unaccompanied children (Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, and Form I-589, Application for Asylum and Withholding of Removal under TVPRA)? Are these petitions also subject to the 30 day adjudication expediting process if the children are detained?

ICE responded that I-360s are petitions that go to USCIS for adjudication and were within the grouping of cases in removal proceedings that the working group addressed. Form I-589s, not granted by the Asylum Officer and in which charging documents are issued, are referred to the Immigration Court by the Asylum Offices (affirmative asylum applications) for removal proceedings under 8 C.F.R. § 208.14 and adjudication by the Immigration Judge, or are filed in immigration court (defensive asylum applications). Asylum applications are governed by Immigration and Nationality Act § 208 and timelines are provided in § 208(d)(5).

Roundtable 5: The SAVE Program: Verification, Immigrants, and Public Benefits

Moderator: Wendy Kamenshine, Ombudsman’s Office

Panelists: Patricia Hatch, Maryland Office of Refugee Affairs

John Roessler, USCIS Systematic Alien Verification for Entitlements (SAVE)
Stephen Leak, Indiana Bureau of Motor Vehicles
Ellen Battistelli, National Immigration Law Center

This roundtable discussed the most recent trends in the Systematic Alien Verification for Entitlements (SAVE) Program and how they impact customer agencies and benefits applicants.

Mr. Roessler explained that SAVE is an inter-governmental initiative designed to aid benefit-granting agencies in determining an applicant's immigration status, and thereby ensure that only entitled applicants receive Federal, state, or local public benefits and licenses. SAVE is an information service for benefit-issuing agencies, institutions, licensing bureaus, and other governmental entities. Mr. Roessler noted that SAVE does not make determinations on any applicant's eligibility for a specific benefit or license. He also emphasized that SAVE is working to improve its business process for customer agencies and benefit applicants, and welcomes suggestions and feedback from stakeholders directed to the Ombudsman's Office or through the USCIS Office of Public Engagement. He also shared that the SAVE Program is working on ways to provide more information to benefit applicants and their service providers in the community.

Ms. Battistelli expressed concern that SAVE lacks sufficient oversight and necessary funds, especially in light of recent state immigration-related legislation mandating the use of SAVE, expansion of the definition of "public benefit" in certain settings, as well as the increase in availability of public health benefits which require SAVE verification. She suggested the need for an outside evaluation to determine the efficacy, reliability, and impact of the SAVE program. Ms. Battistelli emphasized the importance of evaluating customer agencies to review their compliance with SAVE standards, and whether customer agencies understand how to properly work the SAVE program.

Ms. Hatch, an advocate for asylees and refugees who recently retired from the Maryland Office of Refugee Affairs, explained that SAVE works well for the mainstream populations, but there is a breakdown when verifying statuses such as withholding of removal and extensions for refugees/asylees and their derivatives, a particularly vulnerable population. This breakdown has a devastating effect on asylee and refugees accessing the time-restricted benefits to which they are entitled. Ms. Hatch also identified the challenges when dealing with multiple verification attempts after an initial verification, noting that the time required is burdensome because individuals often have to go through the same process again and again with each new agency, as SAVE does not record that an applicant has already gone through all three levels at one agency.

Ms. Hatch shared potential solutions including working with other DHS components to address the need for better database sharing capabilities or creating an interagency working group to tackle these asylee/refugee issues comprehensively.

As the Executive Director of the Indiana Department of Motor Vehicles, and a representative of the Driver Identification and Verification System (DIVS) Committee of the American Association of Motor Vehicle Administrators, Mr. Leak shared a unique perspective on the role of the customer agency that provides the public benefit. Mr. Leak explained that state DMVs often differ in the ways they use the SAVE program depending upon the business needs of that DMV. In January 2011, the DIVS committee issued a report that compiled the feedback and recommendations from over 17 DMVs from across the country, and continues to work with DHS and the SAVE Program to identify areas for improvement, implement those

recommendations, and make additional suggestions to simplify and streamline the SAVE Program for use by DMVs.

Conference attendees also had an opportunity to ask questions of the panelists, some of which are included below.

How does the SAVE Program respond when agencies do not comply with their Memorandums of Agreement?

Mr. Roessler explained that SAVE relies upon compliance through education. The SAVE Program provides training and instructions including best practices to better educate customer agencies on the proper techniques to verify benefit applicants. Mr. Roessler emphasized that 94 to 95 percent are completed at the first step of the three-step process.

If an individual goes through all three steps of the SAVE Program process and is ultimately verified, is there a way to update the SAVE Program to ensure they can be verified during the first step during the next application process?

Mr. Roessler noted that the SAVE program is not a separate database so there is no way to “update” the SAVE Program. SAVE verifies status information provided by a benefit applicant based on underlying records owned by other government agencies. SAVE has a good working relationship with the agencies that maintain these underlying databases including USCIS, CBP, and other DHS components, and works with them to correct records and update systems where possible. Mr. Roessler suggested that updating one’s records with these agencies is the best way to ensure a timely verification. SAVE will be working to ensure a better process in the years to come.

What is your experience correcting information after an agency reports not being able to verify an individual through SAVE?

Ms. Hatch explained that it is often difficult for individuals with little experience in the United States to navigate the necessary channels to correct information without support from an advocate. She suggested that there was a need for communication and education with the larger advocacy community to ensure they understand the complexities of the SAVE process and how best to direct their clients. Mr. Roessler shared that individuals should be sure their records are correct in order to be properly verified through SAVE.

Some DMVs refuse to issue licenses for individuals who have withholding of removal or deferred action even if SAVE verifies them. Why does this happen?

Mr. Leak shared that laws governing eligibility for licenses vary state by state. Some states, such as Indiana, may allow for licenses to be issued to individuals with these statuses when SAVE verifies them properly, but others may not. There is no national uniformity because state law governs.

How soon after a nonimmigrant arrives will information be verifiable through the SAVE Program?

Mr. Roessler answered that after entering the United States, the individual should wait ten days as the information from CBP takes time before uploading into the database which SAVE relies upon.

Roundtable 6: Demystifying the Visa Queues: An Interagency Discussion on Priority Dates, Retrogression, and Future Movement of the Visa Bulletin Cut-Off Dates

Moderator: Gary Merson, Ombudsman's Office
Panelists: Charlie Oppenheim, U.S. Department of State
Sophia Cox, USCIS Service Center Operations
Vinay Singla, USCIS Field Operations
Charles Wheeler, Catholic Legal Immigration Network, Inc.

This roundtable focused on interagency management of the family and employment-based visa queues, movement of the cut-off dates in the Department of State (DOS) Visa Bulletin, how priority dates are established, how they may be retained when categories change, and how they are revoked under certain circumstances. Panelists also discussed retrogression, or the backwards movement of cut-off dates, and its impacts on individuals and employers.

Mr. Wheeler explained automatic conversion of an individual's priority date and "opt-out" options for preference based petitions. Unmarried sons and daughters of Legal Permanent Residents (F2B) may "opt-out" of conversion to first preference (F1) when the petitioner naturalizes. For certain countries, the wait is longer for F1 category than for the F2B category. Recently, the BIA held that individuals qualifying as a child sponsored by a lawful permanent resident parent under the Child Status Protection Act may not "opt-out" of conversion to F1 when the petitioner naturalizes. *Zamora-Molina*, 25 I&N, Dec. 606 (BIA 2011).

Mr. Wheeler explained that if the same petitioner is filing for the same beneficiary in the same category and the first petition was approved, then the subsequent petition should retain the initial priority date. There is no retention of priority date if the petition is revoked or terminated. See 8 CFR § 205.1. For retention of priority date if the F2A ages out, file a second Form I-130, Petition for Alien Relative to retain the priority date.

Mr. Oppenheim discussed how DOS establishes cut-off dates in the Visa Bulletin. There are approximately 4.6 million people waiting for visas. Congress has allocated 226,000 family immigrant visas and 140,000 employment immigrant visas annually. Each country is subject to an annual allotment of seven percent, which equates to a limit of 15,820 family visas and 9,800 employment visas. Mr. Oppenheim noted that in determining cut-off dates, his office looks at the number of visas used in past years, and monitors usage during the current year.

Ms. Cox presented on USCIS processing of employment-based petitions and green card applications. Approximately 70 percent of employment-based immigration applications are processed through the USCIS Texas and Nebraska Service Centers. When one's visa number is available, applicants may concurrently file Forms I-140, Immigrant Petition for Alien Worker and I-485, Application to Register Permanent Residence or Adjust Status. If an immigrant visa number is not available, employers or individuals may file the I-140 petition to establish the priority date but must wait to file the I-485 application.

USCIS Service Center Operations (SCOPS) is now moving past the 2007 filing surge cases, and based on movement of the Visa Bulletin cut-off dates and an analysis of completed Form I-140s, USCIS anticipates 14,000 – 18,000 new employment-based adjustment of status filings in the coming months. Long pending applications and petitions are being reviewed on issues, such as: the job offer, changes in derivative beneficiaries, up-to-date biometrics, and needed additional evidence. SCOPS is working with the USCIS Lockboxes to ensure that they have the capacity to accept large numbers of filings, coordinating with

the Application Support Centers to ensure that they are ready for increased numbers of biometric appointments, and working with the service centers to ensure that ancillary applications for advance parole and employment authorization are adjudicated in a timely manner. SCOPS also will monitor the number of incoming receipts to better coordinate with DOS.

Mr. Singla offered insight on USCIS' processing of family-based cases, which are under the jurisdiction of field offices. A family-based case is prepped at the National Benefits Center (NBC) in Lee's Summit, Missouri and then forwarded to the local office. The field office requests the file from the NBC and schedules appointments. Mr. Singla explained that if the immigrant visa is available, the final adjudication takes place at the field office. If the immigrant visa is no longer available, due to retrogression in the DOS Visa Bulletin, the file is sent back to the NBC. He explained that centralizing petitions helps with inventory control.

Conference attendees also had an opportunity to ask questions of the panelists, some of which are included below:

How does USCIS Field Operations handle visa retrogression for family-based cases?

Retrogression does not stop interviews from being scheduled. Individuals may contact the National Customer Service Center toll-free number to initiate a case inquiry. Once the priority date is current, USCIS instructed individuals to wait at least one month before making an inquiry because when an inquiry is made, the file is pulled out of the queue for an officer to review and upon review, must be put back into the queue. If this process is not resulting in current cases being adjudicated, please contact the Ombudsman's Office.

How does one notify USCIS of a visa petition preference category upgrade?

USCIS automatically connects both Form I-140 filings, but if you are current for your new employment-based classification and you have not heard from the agency after 30 days, email: streamline.tsc@dhs.gov or ncscfollowup.nsc@dhs.gov.

For additional information about any of these panels including copies of PowerPoint presentations, please email cisombudsman.publicaffairs@dhs.gov.