



**AILA Policy Brief: Recommendations for How USCIS Can Dismantle the Invisible Wall Slowing Case Adjudication**

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In February 2020, AILA reviewed available USCIS case processing data from FY2014 to FY2019.<sup>1</sup> Our resulting analysis showed crisis level delays across various form types for immigrant and nonimmigrant applications and petitions. The overall average case processing time surged by 25 percent from the end of FY2017 through FY2019 despite a 10 percent decrease in overall case receipts, and by 101 percent from FY2014 to the end of FY2019.<sup>2</sup> Over the last fiscal year, the agency's overall processing times have continued to rise by close to 5 percent.<sup>3</sup> These delays result in lapsed work authorization, prolonged family separation, and extreme anxiety for USCIS's customers.

The worsening of processing time delays and the millions of backlogged cases are products of the agency's deleterious policies.<sup>4</sup> Over the last four years, the agency has implemented several policies and processes that have expanded its already excessive workload and served to slow down case processing rather than make it more efficient or provide better adjudications.<sup>5</sup> USCIS can very quickly overturn many of these policies and processes, as they were not instituted by regulation. For example:

- **USCIS should reinstitute the agency's 2004 "deference" policy.** In October 2017, USCIS rescinded guidance from 2004 that directed USCIS officers to give deference to prior determinations when adjudicating nonimmigrant employment-based extension petitions involving the same position and the same employer.<sup>6</sup> The new policy states that USCIS officers "should not feel constrained" in issuing RFEs. The prior guidance

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<sup>1</sup> See "AILA Policy Brief: Crisis Level USCIS Processing Delays and Inefficiencies Continue to Grow" (Feb. 26, 2020), AILA Doc. No. 20022502, available at: <https://www.aila.org/advo-media/aila-policy-briefs/crisis-level-uscis-processing-delays-grow>.

<sup>2</sup> *Id.*

<sup>3</sup> See "AILA Policy Brief: Walled Off: How USCIS Has Closed Its Doors on Customers and Strayed from Its Statutory Customer Service Mission" (Feb 12, 2021), AILA Doc. No. 21021236.

<sup>4</sup> See "AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration" (Jan. 30, 2019), AILA Doc. No. 19012834, available at: <https://www.aila.org/advo-media/aila-policy-briefs/aila-policy-brief-uscis-processing-delays>.

<sup>5</sup> See "AILA Report: Deconstructing the Invisible Wall" (April 24, 2018), AILA Doc. No. 18031933, available at: <https://www.aila.org/infonet/aila-report-deconstructing-the-invisible-wall>.

<sup>6</sup> See, "USCIS Will No Longer Provide Deference to Prior Adjudications for Nonimmigrant Petitions" (Oct. 23, 2017) AILA Doc. No. 17102461 available at <https://www.aila.org/infonet/uscis-will-no-longer-provide-deference-to-prior>.

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permitted officers to give weight to the fact that the same beneficiary or applicant had already received an approval by the government for the same position. Now, however, petitioners are required to submit more documentation proving that the beneficiary remains qualified for a position that he or she has been filling for as long as three years. As a result of this new policy, adjudicators will spend more time reviewing cases, more time issuing RFEs, and more time reviewing RFE responses, even though there has been no change in the employer or the position.

- Reinstating deference does not require regulatory action. USCIS can resume providing deference to prior determinations by rescinding the October 2017 memo and reinstating the 2004 guidance memo. Ultimately, USCIS may want to consider codifying deference to prior determinations by way of other regulatory actions that may be moving.
- **USCIS should eliminate mandatory in-person interview requirement for routine cases.** In October 2017, USCIS implemented universal, in-person interview requirements for employment-based immigration applications and I-730, Refugee/Asylee Relative Petitions at local USCIS offices.<sup>7</sup> Prior to this, USCIS would only require in-person interviews when there was a question of eligibility. This mandatory in-person interview requirement was further expanded interview requirements for most I-730 petitioners.<sup>8</sup> Imposing these requirements had a direct impact in longer processing times. Two year after the policy was implemented (the beginning of FY18 to the end of FY19), average processing times on these applications have risen 58 percent; 15 percent in FY19 alone. The same is shown by the jump in overall average processing time for the Form I-730, which has also risen 58 percent from the beginning of FY18, and 37 percent from the beginning of FY19. Figures 3 and 4 document the meteoric rise of processing times for these applications, a 184 percent and 167 percent jump respectively since the end of FY14.<sup>9</sup> While additional data is not available, these processing times have likely been exacerbated by the COVID-19 pandemic which has resulted in the closures or limited processing at USCIS Field Offices.
  - These mandatory interview requirements are not required by regulation. Therefore, USCIS could rescind these policy memos and restore deference to adjudicators to only require mandatory in-person interviews where it is necessary to determine eligibility on a case-by-case basis. This would be particularly helpful in light of limited processing at USCIS Field Offices.

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<sup>7</sup> See “USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants”, AILA Doc. No. 17082900, available at <https://www.aila.org/infonet/uscis-to-expand-in-person-interview-reqs-residency>.

<sup>8</sup> See “USCIS Issues Memo on Expanding Interviews to Refugee/Asylee Relative Petitions,” AILA Doc. No. 20113041 available at <https://www.aila.org/infonet/uscis-issues-memo-on-expanding-interviews>.

<sup>9</sup> See “AILA Policy Brief: Crisis Level USCIS Processing Delays and Inefficiencies Continue to Grow” (Feb. 26, 2020), AILA Doc. No. 20022502, available at: <https://www.aila.org/advo-media/aila-policy-briefs/crisis-level-uscis-processing-delays-grow>.

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- **USCIS should reuse biometrics and waive the biometrics requirement for certain groups.** Applicants are often asked to personally appear at an Application Support Center (ASC), by appointment, to provide biometrics (fingerprints and photograph) for various immigration benefits. This includes, but is not limited to, employment authorization documents (EAD), advance parole (AP), applications to adjust status, naturalization, and I-539 applications to change or extend nonimmigrant visa status. In a statement released by USCIS, the agency noted that 1.3 million applicants were waiting for biometrics appointments in mid-December 2020.<sup>10</sup> While much of this backlog can be attributed to the closures of ASCs due to the pandemic, the backlog is also exacerbated by USCIS's often duplicative requirement of biometrics capture and failure to exercise its discretion to limit when biometrics must be captured as part of the prior administration's extreme vetting policies. For example, in July 2017, USCIS began requiring biometrics be captured from every naturalization applicant, regardless of age.<sup>11</sup> Similarly, in March 2019, USCIS revised the Form I-539, Application to Extend/Change Nonimmigrant Status to mandate that all applicants, regardless of age, were required to pay a biometrics fee and have their biometrics captured for each application.<sup>12</sup> Previously, applicants under the age of 14 and over the age of 75 were not required to have their biometrics captured. Moreover, many of these applicants have had their biometrics previously captured by USCIS when filing other forms or by DOS when applying for their visa.
  - USCIS should exercise its discretion pursuant to 8 CFR 103.2(b)(9) to limit when biometrics need to be captured. In order to save personnel and processing costs, USCIS should reuse all biometrics that have been captured within the past five years for any form type and waive the biometrics requirement for individuals under the age of 14 or above the age of 65, as well as for applicants who have been previously vetted, such as Form I-539 and naturalization applicants. Such determinations can be made by Policy Manual Alerts or internal processing guidance.
- **USCIS should stop rejecting applications and petitions due to alleged incompleteness or blank spaces,** a policy which is inefficient and costly to the agency to mail back applications and petitions that are rejected on this basis. Although USCIS has agreed to stop rejecting petitions for asylum, T and U applications, other types of cases continue to be rejected for non-material reasons.
- **USCIS should issue RFEs and NOIDs more judiciously.** In recent years, USCIS has been issuing Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs) at an

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<sup>10</sup> See "USCIS Provides Updates on Application Support Centers" (Dec. 29, 2020), AILA Doc. No. 20122905 available at <https://www.aila.org/infonet/uscis-asc-updates>.

<sup>11</sup> See "USCIS Policy Alert on the Biometrics Requirement for Naturalization" (July 26, 2017) AILA Doc. No. 17072664, available at <https://www.aila.org/infonet/uscis-policy-alert-on-the-biometrics-requirement>.

<sup>12</sup> See "Practice Alert: USCIS Publishes Revised Form I-539 and New Form I-539A" (Mar. 8, 2019) AILA Doc. No. 19021234, available at <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-alert-uscis-announces-new-form-i-539>.

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unprecedented high rate, which wastes limited staff resources and increases the overall time it takes from USCIS to adjudicate applications and petitions. Frequently, RFEs and NOIDs are issued seeking evidence that has already been provided or that is unnecessary to establish eligibility. The agency should take steps to issue RFEs and NOIDs more judiciously to spare agency resources.

- **USCIS Should Retrain Adjudicators on the Appropriate Standards of Proof.** Immigration law and regulations typically require that eligibility for an immigration benefit must be demonstrated by a “preponderance of the evidence”. As such, adjudicators should be approving applications and petitions if the applicant or petitioner has demonstrated that it is “more likely than not” that they are eligible. However, in recent years, AILA members have received RFEs and denials based on much higher standards.
  - To ensure consistency in adjudications, USCIS should conduct trainings for adjudication officers on the proper standards of proof and institute supervisory review of cases that may be denied or are questionable. Moreover, USCIS should restore the 2013 Policy Memo 3, 2013 PM titled “Requests for Evidence and Notices of Intent to Deny”, which was rescinded in July 2018, which enabled adjudicators to seek more information before denying a case where there was question of eligibility.<sup>13</sup>
- **USCIS should minimize burdensome paperwork requirements.** USCIS forms have become significantly burdensome over the past years with added questions, which are often confusing or duplicative. Moreover, form instructions are extremely lengthy and hard to follow resulting in unnecessary rejections. Many of these forms must still be filed by paper, which makes it more susceptible to human error and detrimental to the environment. Finally, the time or resources to complete and adjudicate these forms are not sufficiently analyzed to provide an appropriate estimate of costs.
  - AILA recommends that USCIS take steps to streamline the questions asked in forms, develop ways to allow for submission of certain information (information about an employer eligibility that may be submitting more than one application only one time) and to bundle adjudications of related forms
  - While all of the forms need to be revised and streamlined, some of the most burdensome and problematic forms are:
    - [Form I-944, Declaration of Self-Sufficiency](#) (Used for Public Charge Determinations) – This form is extremely burdensome. It is 18 pages long, requiring submission of documents that far exceed what the agency needs

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<sup>13</sup> See “USCIS Policy Memorandum Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator’s Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)” (July 13 2018) available at [https://www.uscis.gov/sites/default/files/document/memos/AFM\\_10\\_Standards\\_for\\_RFEs\\_and\\_NOIDs\\_FINAL2.pdf](https://www.uscis.gov/sites/default/files/document/memos/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf)

to make a public charge determination (Such as 3 years of tax transcripts instead of tax returns or W-2 copies, 12 months of bank statements, educational information dating back to elementary school). The questions are frequently repetitive and confusing. DHS estimated that it would take applicants approximately 4 hours and 30 minutes to complete; however, our experience has shown that this was grossly underestimated. The time to review and adjudicate the Form I-944 also places an immense burden on the agency's limited resources and already crisis-level processing delays. In our [comment](#) opposing the Public Charge Public rule, AILA noted that a conservative estimate of USCIS adjudicators performing a public charge analysis of adjustment of status applicants would review all required documentation and scrutinize and weigh all factors in an average of 60 minutes—which seems impracticable given the volume of paperwork and considerations involved—USCIS would need the equivalent of approximately 214 full-time adjudicators—working 40 hours per week, 52 weeks per year—to complete DHS's estimated 382,264 public charge determinations on adjustment of status applications alone.

- [Form I-485, Application to Register Permanent Residency or Adjust Status](#) – Overly burdensome criminal questions, with more than 5 pages of yes or no questions related to possibly inadmissibility grounds, many of which will be discovered through criminal background check process. These types of questions seem more likely an attempt to trip up applicants and cause them to falsely state information. Moreover, much of the information captured on the I-485 is duplicative of information used for the underlying immigrant visa petition.
- [Form I-130/I-130A, Petition for Alien Relative](#) – When filed concurrently with the Form, I-485, much of the information is extremely repetitive regarding information with spouses, family members, addresses and employment. This could be resolved by reviving the Form G-325A, Biometric Information, form that was previously used to collect this information in one place.
- [Form I-912, Request for Fee Waiver](#) – This form is burdensome and difficult to complete. For example, means-tested benefits are difficult to calculate and its applicability is unclear. Moreover, the format of the questionnaire is not conducive to being completed by the likely population who will complete these forms, as there may be no available documentation to demonstrate an individual's income or appropriate way to show expenses.

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- [Form I-129, Petition for Nonimmigrant Worker](#) – This is a 42-page form that is used for more than 20 different nonimmigrant classifications. It is divided into a main form filled out by all petitioners and various supplements that are classification specific. This leads to significant confusion as not all questions are relevant or applicable to each classification and there is confusion over what supplements are required. As part of the 2019 USCIS Proposed Fee Rule, USCIS proposed dividing the Form I-129 up into multiple different forms, which, if finalized, would help alleviate some of the burden. Moreover, information related to public charge analysis (Part 6 page 5-7) is unduly burdensome on an employer to ask the beneficiary about this information and require the employer to sign under penalty of perjury that the employee has relayed truthful information.
- [Form I-360, Petition for Amerasian, Widow\(er\), or Special Immigrant](#) – This is a 19-page form that is used for about 15 different types of special immigrants, all with completely different types of requirements and information requested (e.g. Religious workers, Amerasians, Special Immigrant Juveniles and VAWA). It is difficult to ascertain which questions are relevant for which classifications and some may not be applicable to all classifications. This is particularly problematic when USCIS rejects petitions that leave space blank or do not use specific terminology to indicate that a space is not applicable.
- [Form I-918A, Petition for Qualifying Family Member of U-1 Recipient](#) – This form requires the derivative to sign the form if they are outside of the United States. Previously, USCIS waived the signature requirement for those not in the U.S. This can prove to be problematic because not every derivative has access to the technology needed to do scans and international mail can be too expensive for these clients.
- [Form I-290B, Notice of Appeal or Motion](#) – In December 2019, USCIS proposed significant changes to the Form I-290B, which were not merely discrete form changes, but rather constituted a structural overhaul of post-decision processes. The proposed revisions would fundamentally change how a record is built, how the I-290B appeal is reviewed at by USCIS adjudicators and the Administrative Appeals Office (“AAO”), and the very role of the AAO. Many of the changes proposed required notice and comment rulemaking. [AILA and partners urged DHS to withdraw](#) these changes. At this time, the proposed revisions remain under review.

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- [Form I-864, Affidavit of Support](#) – In October 2019, USCIS proposed revisions to this form that significantly expanded the certification requirements, required the form be notarized, and added a requirement that sponsors include sensitive bank information. These changes have not yet been finalized by USCIS and [AILA continues to urge](#) USCIS to rescind these burdensome requirements.