AMERICAN IMMIGRATION LAWYERS ASSOCIATION

May 19, 2021

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategies
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Submitted via https://beta.regulations.gov

Re: Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input (Docket ID No. USCIS-2021-0004; RIN: 1615-ZB87)

Dear Ms. Deshommes:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced request for comments on Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input.[1]

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

AILA appreciates the opportunity to provide input on how USCIS can reduce barriers across its administrative services, regulations and policies that impede its customers from being able to timely access immigration benefits and the services that the agency offers. AILA provides below a non-exhaustive list of recommendations concerning how the agency might reduce barriers to immigration services and benefits that AILA and our members have identified relating to USCIS customer engagement and access to services, adjudicative practices and timely processing of benefits, and regulations and policies that touch all areas of immigration law.

I. AILA Recommendations on How USCIS Can Reduce Barriers to Immigration Services and Benefits

a. Customer Engagement and Access to Services

In recent years, USCIS has consolidated nearly all of its customer engagement through the USCIS Customer Service Center including submitting service requests, accessing relevant case information, and scheduling local USCIS office appointments. During this time the agency has all but eliminated its tiered inquiry process, and significantly reduced stakeholder engagements. In February 2021, AILA issued a policy brief,

[1] 86 Fed. Reg. 20398 (Apr. 19, 2021).

titled, "Walled Off: How USCIS Has Closed Its Doors on Customers and Strayed from Its Statutory Customer Service Mission,"[2] detailing the following nine recommendations for USCIS to improve its customer service:

1. USCIS Must Reframe Its Mission Statement
2. The USCIS Customer Service Center Must Be Made More Accessible to Customers
3. USCIS Must Resolve Issues Plaguing the Scheduling of Appointments at Local USCIS Offices
4. USCIS Must Offer Walk-In Availability at Local USCIS Offices
5. USCIS Must Take Steps to Reduce Crisis-Level Processing Delays
6. USCIS Must Take Steps to Reduce Cost and Secure Funding Without Passing the Cost on to Customers
7. USCIS Must Reinstate Local and National Email Inquiry Boxes at Relevant Offices
8. USCIS Must Once Again Offer Robust National and Local Engagements with Customers
9. USCIS Must Reopen International USCIS Field and District Office

In addition to these recommendations, AILA encourages the agency to adopt the following suggestions to improve customer service and provide better access to services:

- **Reemphasize the Importance of Providing Customer Service.** The USCIS Contact Center should be restored to its prior name – the National Customer Service Center (NCSC) to elevate the importance of providing quality customer service and to reflect the statutory mission of USCIS.

- **Make the USCIS Customer Service Center More Accessible**. USCIS should provide prompt and helpful access to USCIS customer service by ensuring that applicants and their counsel have direct, meaningful, and helpful access to USCIS to obtain case assistance. The process of asking applicants and their attorneys to wait for a callback from an officer sometime in the next 12 hours should be eliminated. USCIS should provide sufficient customer service staffing to meet customer service needs and where possible leverage technology, for example, by expanding the e-Request system to allow for additional inquiries and requests to be made electronically.

    - **Ensure Access to USCIS Customer Service Center Services for International Customers.** It is currently very difficult for stakeholders, including immigration attorneys, to contact USCIS from outside of the United States. The feature requesting a call back from the customer contact line does not allow for an international number, and the online filing system contemplates only U.S. addresses. There are U.S. immigration attorneys with offices in foreign countries and they should be able to access USCIS resources the same as their counterparts in the United States. AILA urges USCIS to review its customer tools and resources and online filing system and ensure they are accessible to all its stakeholders, both domestically and internationally.

    - **Amend the Scheduling System for Local USCIS Office Appointments.** To provide greater efficiency and flexibility, AILA urges USCIS to consider the implementation of a self-scheduling appointment system. USCIS should also consider expanding the mechanisms by which a local USCIS appointment can be made, to allow customers to complete at least the first step in the scheduling process via an online form or chat function such as the USCIS virtual assistant Emma.

[2] *Walled Off: How USCIS Has Closed Its Doors on Customers and Strayed from Its Statutory Customer Service Mission,* AM. IMMIGRATION LAWYERS ASS'N (Feb. 12, 2021) https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-walled-off-how-uscis-has-closed.

- **Expand e-Requests**. The e-Request system should be expanded to better address some of the kinds of requests that usually require speaking with a Tier 2 officer, and these could be done more efficiently through the e-Request system. These could include requests on cases where the derivative case has not been adjudicated with the principal's case, where a derivative with his/her own application wants that case to become a derivative case (such as an adjustment of status application), where there is a priority date error or failure to preserve an earlier priority date, and cases where expedited processing is being requested.

- **Permit Self-scheduling of Biometrics**. USCIS should enable self-scheduling for biometrics appointments to allow maximum flexibility for applicants. This process would simplify the scheduling process and instructions and make the process more accessible for *pro se* applicants.

- **Amend the Current Online Filing System to Ensure Legal Representation.** AILA whole-heartedly supports USCIS' intention to move to online filing for more form types. However, we have serious concerns regarding the manner in which the agency intends to implement this change. The initial rollout has completely eliminated the attorney from the process (for example, the Form I-539 explicitly says you can only file online if you do not require counsel), and other form types require an "electronic handshake" that can be very cumbersome. While we appreciate the need for privacy, IRS tax filings by accountants do not require these additional steps. Moreover, the current online filing system seems to foreclose legal representation. If an application is filed by paper and it is eligible for online filing, the applicant receives a notice inviting him or her to create an account online to link to the application. However, there is no mechanism for the applicant's attorney to link the case. In addition, USCIS online systems often request information from attorneys that have already been provided by attorneys in forms like the Form G-28. Where possible it would be helpful to populate the system with information collected in uploaded forms like the G-28, and allow this information to be utilized in future applications. The agency should also ensure that applicants facing technological limitations continue to have adequate access to filing. AILA notes that most applications that can be e-filed (e.g., Forms I-9, N-400, and I-539) are often filed by one-time pro se applicants. Were USCIS to implement e-filing for additional form types such as Forms I-129 and I-140, it would allow customers to provide additional feedback to improve the initiative. USCIS should partner with its stakeholders, including AILA, in designing and rolling out its online filing system to more form types.

- **Ensure timely responses to U visa hotline emails.** Given the urgency and sensitivity of U visa petitions, the Nebraska and Vermont Service Centers must respond to hotline inquiries in a prompt manner. In addition, each service center should have an escalation process for inquires and requests that require urgent attention in a timely manner.

- **Provide an Email Option for Receipt Numbers for All Cases**. USCIS should provide stakeholders with the option of receiving an e-mailed receipt number for all cases, not just those filed via premium processing. Doing so would provide peace of mind to applicants and the ability to track their cases online more quickly, which likely will also reduce the number of calls that need to be fielded by the USCIS Contact Center.

- **Improve Premium Processing Customer Service**. AILA members reports diminished customer service at Premium Processing Units, in particular the Texas Service Center Premium Processing Unit (TSC PPU). Specifically, members report that the TSC PPU phone line is no longer in service and that the unit refuses to email or fax copies of Requests for Evidence (RFE). Where petitioners pay an additional $2,500 to USCIS for premium processing, they should be provided with a correspondingly

high level of customer service. Petitioners or their counsel should be able to communicate with adjudicating officers by phone or email and should be able to receive timely and meaningful assistance with case issues. This should include prompt e-mail responses, easy access to missing case documents, and scanned/faxed/emailed copies of approval notices, RFEs and NOIDs.

- **Ensure that Students Are Not Prejudiced by USCIS Processing Delays**. If a student's timely-filed application to change status is not adjudicated before the start date listed on the Form I-20, a Designated Student Official (DSO) was required to defer the program start date. Moreover, a student's application has often been denied because their underlying status expired before their deferred start date. AILA first raised this issue to USCIS in 2016, when processing times for Change of Status Applications were 5 months. Since that time, processing times have nearly tripled. Rather than improving its processing times to address this situation, USCIS is requiring the prospective student to file multiple "bridge" extension of stay applications – unnecessarily increasing costs for the applicant and clogging up the case backlog even further with unnecessary applications. USCIS should return to its policy of relying on the initial program start date noted on the Form I-20, rather than the deferred date, to determine an individual's eligibility for change of status. For more information, please see this AILA Memorandum to USCIS on Change of Status Applications to F-1 from 2016.[3]

b. Adjudicative Practices and Timely Processing of Benefits

USCIS is suffering 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.[4] Over the last fiscal year, the agency's overall processing times have continued to rise by close to 5 percent.[5] These delays result in lapsed work authorization, prolonged family separation, and extreme anxiety for USCIS's customers. Moreover, these delays amount to a denial of the very immigration benefits that Congress has authorized and far exceeds the "sense of Congress" that immigration benefit applications should be adjudicated within 180 days and that nonimmigrant petitions should be processed within 30 days of filing.[6]

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. USCIS can very quickly overturn many of these policies and processes, as they were not instituted by regulation. In AILA's "Policy Brief: How USCIS Can Dismantle the Invisible Wall Slowing Case Adjudication[7]," we recommended the following actions to improve case processing times administratively:

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[3] *See AILA Memorandum to USCIS on Change of Status Applications to F-1*, AM. IMMIGRATION LAWYERS ASS'N (Dec. 15, 2016), https://www.aila.org/infonet/aila-memorandum-uscis-change-of-status-application.

[4] *See AILA Policy Brief: Crisis Level USCIS Processing Delays and Inefficiencies Continue to Grow*, AM. IMMIGRATION LAWYERS ASS'N (Feb. 26, 2020), https://www.aila.org/advo-media/aila-policy-briefs/crisis-level-uscis-processing-delays-grow.

[5] *See AILA Policy Brief Walled Off: How USCIS Has Closed Its Doors on Customers and Strayed from its Statutory Customer Service Mission*, AM. IMMIGRATION LAWYERS ASS'N (Feb. 12. 2021), https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-walled-off-how-uscis-has-closed.

[6] 8 U.S.C. 1571(b).

[7] *Policy Brief: How USCIS Can Dismantle the Invisible Wall Slowing Case Adjudication*, AM. IMMIGRATION LAWYERS ASS'N (March 24, 2021), https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-recommendations-for-how-uscis.

- **USCIS should reinstitute the agency's 2004 "deference" policy.** AILA applauds recent steps already taken by USCIS under the Biden Administration, such as reinstating the 2004 deference guidance. As an important next step, we urge USCIS to work with U.S. Customs and Border Protection (CBP) and the Department of State (DOS) to urge these agencies to extend the deference policy to visa issuance and admissibility determinations made by these agencies. The fact that an immigration-related agency separate and distinct from USCIS has made the determination in no way lessens the extent to which that determination should be entitled to deference when an applicant later seeks an extension of a visa or seeks readmission to the United States where the same parties and the same facts as the initial petition are involved. Unless there is clear evidence of fraud or a clear adjudication error, prior approvals should be provided with discretion and should be upheld in future determinations involving the same parties and the same facts as the initial petition regardless of whether those are prior adjudications by USCIS, CBP, or DOS.

- **USCIS should eliminate the mandatory in-person interview requirement for routine cases, including adjustment of status and refugee/asylee relative applications**.[8] Although AILA members have observed that some employment-based adjustment of status interviews have been waived during COVID, an official announcement rescinding mandatory interviews for all form types and detailing when interviews will be necessary will provide transparency and certainty to stakeholders.

- **USCIS should reuse biometrics and waive the biometrics requirement for certain groups**. AILA appreciates the agency's recent announcement that that it will temporarily suspend the biometrics requirement for I-539 applicants requesting an extension of stay or change of status to H-4, L-2, E-1, E-2 and E-3 for a two-year period. AILA urges USCIS to permanently eliminate the biometrics requirement for all I-539 applicants, including applicants in the B, J and F visa categories, among others, as it is clear that the imposition of mandatory biometrics is unjustified and significantly delayed adjudications. Moreover, USCIS should work with other DHS agencies, Department of State, and Department of Justice to share biometrics information captured, rather than duplicating efforts.

- **USCIS should stop rejecting applications and petitions due to alleged incompleteness or blank spaces.** AILA recognizes that USCIS has announced that it has rescinded the "blank space rejection" policy for certain form types.[9] AILA continues to urge USCIS to ensure that cases are only rejected when mandatory evidence and information, as well as required fees, are not included.

- **USCIS should issue RFEs and NOIDs more judiciously.** In recent years, USCIS has been issuing RFEs and NOIDS at an unprecedented high rate, which wastes limited staff resources, increases the overall time it takes USCIS to adjudication applications and petitions, and unnecessarily burdens stakeholders. Frequently, RFEs and NOIDS are issued seeking evidence that has already been provided or that is unnecessary to establish eligibility. AILA urges USCIS to take steps to issue RFEs and NOIDS more judiciously to spare agency resources and to minimize burdens on stakeholders. USCIS should consider allowing additional time to respond to certain agency requests permanently to allow for applicants and petitioners to have sufficient time to gather necessary evidence.

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[8] *See USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants*, U.S. CITIZENSHIP & IMMIGRATION SERV. (Aug, 28. 2017), https://www.uscis.gov/archive/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants.

[9] *USCIS Confirms Elimination of "Blank Space" Criteria*, U.S. CITIZENSHIP & IMMIGRATION SERV. (April 1, 2021), https://www.uscis.gov/news/alerts/uscis-confirms-elimination-of-blank-space-criteria.

- **USCIS should retrain adjudicators on the appropriate standards of proof.** 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, training materials and adjudication manuals provided to adjudicators should be made public for transparency and accountability.

- **USCIS should minimize burdensome paperwork requirements.** AILA recommends that USCIS take steps to streamline the questions asked in forms, develop ways to allow high-volume filers to submit certain information only once (e.g., company financial information, etc.) and to bundle adjudications of related forms.

AILA offers these additional recommendations to improve processing times:

- **Devise a Method to Recalculate and Disseminate Processing Times**. It is very difficult to understand from the USCIS processing times website how long it is taking USCIS to process applications and petitions.[10] The ranges provided are so wide that there is no realistic way for stakeholders to understand how long a particular case might take. In addition, the processing page itself has contradictory information. For example, USCIS indicates that for Form I-485s processing at the Nebraska Service Center, for instance, the processing time range is 9 to 14 months. However, when you scroll down it indicates that employment-based adjustments are taking 12 to 29 months. Not only is this range so broad that it isn't helpful, it is also inconsistent with the first range given. . Lack of transparency in posted processing times gives the public no reliable information, no reasonable expectations and inability to file case status inquiries because even very long pending cases will be considered within "normal" processing times. AILA encourages USCIS to revise its current method for calculating its processing windows based on the revised definitions set forth in the Case Backlog and Transparency Act of 2020.[11]

- **End the Last-In First Out Policy to Address Asylum Backlogs.** Currently, in certain jurisdictions it could take up to 15 years to adjudicate the asylum applications in the pipeline. By that point, conditions in many countries will change, and claims may become moot. Applicants for asylum are often separated from family members who are often still in perilous situations, refugee camps, etc. Restrictions on the ability to work for asylum seekers have been heightened while the backlog grows and grows. Applicants have fewer opportunities to survive economically because of the lack of permanent status. The longer it takes to adjudicate cases, the longer an applicant builds their life in the U.S. waiting. USCIS should consider ending the last-in, first out policy and create a concrete set of criteria for allotting interview slots, especially those with valid/compelling expedite requests.

- **Reduce the I-730 Backlog.** The same must be said of the I-730 backlog. Not only have backlogs increased exponentially, but the entire adjudication process has also been turned on its head due to the closure of USCIS International Field Offices (IOs), the consolidation of processing into the Los Angeles Asylum Office, issues with the National Visa Center (NVC) and DOS, and recent policy changes like mandatory in-person interviews for all I-730 petitioners.[12] At a minimum, USCIS

[10] *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGRATION SERV. https://egov.uscis.gov/processing-times/.
[11] *See H.R. 5971: The Case Backlog and Transparency Act of 2020*, AM. IMMIGRATION LAWYERS ASS'N (Feb. 26, 2020), https://www.aila.org/infonet/hr-5971-the-case-backlog-transparency.
[12] *USCIS Expands Interviews for Refugees and Asylees Petitioning For Family Members*, U.S. CITIZENSHIP & IMMIGRATION SERV., https://www.uscis.gov/news/alerts/uscis-expands-interviews-for-refugees-and-asylees-petitioning-for-family-members (last updated Nov. 30, 2020).

should report out on what progress has been made since President Biden's Executive Orders directed review of this type of adjudication and processing.

- **Create a Backlog Reduction Unit.** Simply attempting to process cases more quickly will not be sufficient to solve the underlying issue with adjudications, which is the massive backlog of unprocessed cases currently sitting with the agency. Just as the Department of Labor (DOL) did before implementing the PERM regulations, USCIS should create a dedicated unit whose function is simply to process backlogged cases such that the agency can then handle new filings in a more prompt and efficient manner. Any case that has been waiting processing for more than 6 months should be included in the work of the backlog reduction unit, so that the core underlying problem causing case processing delays can ultimately be solved.

- **Implement a More Reasonable Approach to Expedite Requests.** In some instances, there are truly compelling circumstances justifying expedited processing of a case pending with USCIS. Unfortunately, in 2019 USCIS issued a Policy Manual update that narrowed the list of criteria for which officers should consider expediting an immigration benefit application from seven situations down to four and increased the bar for the remaining criteria.[13] For example, rather than simply showing "severe financial loss," applicants must now prove such loss would be to a company or person and that the need for urgent action is not a result of the applicant's own failure to file in a timely manner. USCIS should revamp its approach to expedite requests, and address these in a more reasonable and compassionate manner.

- **Expand Premium Processing as Directed by Congress**. The Continuing Appropriations Act, 2021 and Other Extensions Act, Pub. L. No. 116-159, signed into law on Oct. 1, 2020 not only increased the baseline premium processing fee to $2,500, but also mandated that USCIS expand premium processing to other adjudications including all immigrant petitions in the EB-1, EB-2, and EB-3 categories, applications to change or extend nonimmigrant status such as H-4, L-2, and B-1/B-2 applications, and applications for employment authorization. USCIS should follow the instructions of Congress and expand premium processing to include these additional kinds of petitions and adjudications as soon as possible.[14]

***AILA offers these recommendations to streamline filings and adjudications*:**

- **Permanently Accept Scanned Original Signatures and Begin Accepting Digital Signatures**. AILA appreciates USCIS for accepting copies of signatures during the COVID-19 global pandemic. AILA encourages USCIS to continue allowing scanned original signatures rather than original-signed "wet signatures" and that this courtesy be extended for humanitarian-based relief moving forward. This would significantly reduce burdens on applicants and petitioners during the filing process. AILA also encourages USCIS to consider the acceptance of digital signatures.

- **Limit the Supporting Documentation Required for Petitions for the Continuation of Existing Employment.** In order to limit the amount of paperwork that is submitted with a petition, AILA recommends that USCIS adopt the standard set forth in 8 CFR 214.2(o)(11) that supporting

[13] *See* USCIS POLICY MANUAL, VOLUME ONE: GENERAL POLICIES AND PROCEDURES, PART A, PUBLIC SERVICES, CHAPTER 5 – REQUESTS TO EXPEDITE APPLICATIONS OR PETITIONS, U.S. CITIZENSHIP & IMMIGRATION SERV., https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-5 (last updated May 19, 2021).

[14] *See AILA and Coalition Partners Send Letter to USCIS Urging Implementation of the Emergency Stopgap USCIS Stabilization Act*, AM. IMMIGRATION LAWYERS ASS'N (Mar. 1, 2021), https://www.aila.org/advo-media/aila-correspondence/2021/letter-to-uscis-urging-implementation-emergency.

documentation is not required unless requested by the Director for all petitions seeking continuation of existing employment.

- **Provide Clear and Advance Instructions Regarding USCIS Filing Addresses.** USCIS filing instructions can be very confusing and are also frequently changing. The changes are often buried in very confusing instructions or hidden on the USCIS website with little or no public notice. While we understand that USCIS needs to manage its caseload, it is doing so at a tremendous burden to the public, particularly to pro se filers. AILA urges USCIS to provide clear instructions of filing locations and to provide significant advance notice to the public before changing a filing location. USCIS should also provide a reasonable grace period where the agency will forward to the proper Service Center or Lockbox applications or petitions that are inadvertently submitted to the wrong location.

- **Eliminate Denials of Advance Parole Applications for Travel.** The language that a departure from the U.S. prior to the approval of an advance parole document will invalidate that application has long been part of the I-131 instructions. However, prior to 2017, departures from the U.S. while in H or L status did not trigger a denial. In 2017, these denials began to occur with no formal announcement; rather, applicants traveled abroad and then received a notice that their I-131 application had been denied. This policy of denying initial applications for advance parole because the applicant travels abroad provides no benefit, while increasing burdens on both applicants and USCIS. The applicant in most cases will simply file the application again, causing USCIS to expend more resources on adjudicating a subsequent application. The applicant is forced to expend resources on another filing, or suspend travel that may involve visiting a critically ill family member or engaging in critical business activities. This policy provides no value and should be eliminated.[15]

- **Issue all I-485-based EADs and Advance Paroles with a validity period of at least 2 years**. USCIS reports case processing times for Form I-485 of anywhere between 9 months to 65 months, with the vast majority of cases taking more than a year to adjudicate. Issuing EADs and advance parole documents in connection with these cases for only one year essentially mandates that applicants must go through the renewal process at least once, if not more, adding unnecessary work to the agency. By simply issuing EADs and advance parole documents for a validity of at least two years, USCIS could significantly reduce its workload and decrease costs for itself and its customers.

- **Adjudicate Related Cases Together**. In order to streamline adjudications, USCIS should adjudicate related cases together, so that eligibility criteria does not have to be reestablished for each application. For example, I-129, I-539 and I-765 applications could be adjudicated by the same officer, as once the determination is made for the principal's eligibility on the Form I-129, the dependent's relationship and eligibility for work authorization can be quickly made together.

- **Create a Trusted Filer Program.** Significant operational efficiencies could be realized by creating a program in which established users with verifiable compliance track records could pre-certify common elements of the process so that the preparation and adjudication of applications could be streamlined. This concept could be available to any user, regardless of size, that can meet established compliance criteria. AILA acknowledges the agency's "Known Employer Pilot

[15] *See AILA Submits Comments on Form I-131, Application for Travel Document*, AM. IMMIGRATION LAWYERS ASS'N (Oct. 15, 2018), https://www.aila.org/infonet/aila-form-i-131-application-travel-document.

Program"[16] which was launched in 2016, but notes that since its launch, it has permitted only 5 U.S. employers to participate. The program expired in December 2020.AILA encourages USCIS to revisit the concept of a trusted filer program as this would help with more efficient processing of immigration benefits, would help improve the quality of adjudications, and allow the agency to focus its limited resources on more complex eligibility issues.

- **Streamline the evidence that must be provided by publicly traded companies.** USCIS requires publicly traded companies to provide evidence of ability to pay the offered salary in I-140 petitions, even though the Annual Report and other tax filings of publicly traded companies are all easily available online. This creates an unnecessary paperwork burden for the petition and the agency. We recommend that filers simply be permitted to include a link to their Annual Report rather than printing and including the entire document.

- **Process I-526 Petitions Based on Visa Availability**. In January 2020, USCIS announced it would prioritize EB-5 (I-526) petitions based on visa availability, instead of on a first-in, first-out basis, in order to optimize immigrant visa usage.[17] It is not apparent from any available data that the visa availability approach has been put into action by USCIS. This processing protocol should be put in place immediately to optimize visa usage, particularly as precious visa numbers are poised to be wasted again in the EB-5 preference category due to COVID-related consular closures or delays.

- **Establish Priority Date Registration for Filing Adjustment of Status**. USCIS should explore using its H-1B cap registration technology to allow registration of an intent to file an adjustment of status (AOS) application during a window in time when the priority date is current for filing of the adjustment. In the fall of 2020, filing dates for certain employment-based petitions became current very suddenly and without a great deal of notice. This resulted in thousands of applicants filing for adjustment of status during a very limited window of time. Whether filing dates would remain the same in successive months did not become clear until the end of the month, thereby resulting in a rush to file applications in October, a deluge of filings at USCIS, a severe backlog in receipting the thousands of cases in at USCIS, and rejection of numerous cases for technical errors. To avoid this in the future, USCIS could institute a system similar to the H-1B electronic registration system for the lottery, whereby foreign nationals with current filing dates could, in the month that the filing date is current, register their intention to file their I-485, thereby preserving their priority date, and then have a period of a certain number of days from registration to prepare, perfect and file the AOS. This will result in a much more predictable process for both foreign nationals and USCIS. It will allow for full quality control of AOS applications prior to filing by foreign nationals and their counsel, fewer rejections for omissions and technical errors, and it will allow USCIS to predict the staffing that will be needed to accommodate a rush of filing.

- **Clarify Which Applications Require Passport Style Photos.** USCIS should withdraw passport photo requirements across all applications where digital photos are taken during biometrics appointments.

- **Eliminate KCC duplicate copy**. USCIS should coordinate with DOS to eliminate the requirement that stakeholders must submit a duplicate copy of an application or petition to USCIS for purposes

[16] *Known Employer Pilot*, U.S. CITIZENSHIP & IMMIGRATION SERV., https://www.uscis.gov/archive/known-employer-pilot (last updated Dec. 23, 2020).
[17] *USCIS Adjusts Process for Managing EB-5 Visa Petition Inventory*, U.S. CITIZENSHIP & IMMIGRATION SERV., https://www.uscis.gov/news/news-releases/uscis-adjusts-process-for-managing-eb-5-visa-petition-inventory (last updated Jan. 29, 2020).

of USCIS forwarding the application or petition to the Kentucky Consular Center (KCC) upon approval for scanning into PIMS. Instead, USCIS should electronically scan all relevant applications and petitions upon approval either directly into PIMS or into a system that the KCC can access digitally. This will provide for substantial cost savings by eliminating the need to ship the paper-based applications and petitions to KCC for scanning into PIMS. It will also create greater efficiencies, including allowing the approved application and petition to be uploaded more timely into PIMS.

- **Treat U and T derivatives the same as principals.** U and T visa petitioners are automatically issued employment authorization documents upon approval of their petitions. The same procedure should be implemented for U and T derivatives to ensure consistency.

- **Reserve collecting biometrics from U & T visa derivative applicants abroad until the consular processing stage**. For U & T visa derivative applicants residing abroad, USCIS prematurely requires biometrics at the application stage when this requirement can and should be reserved for the consular processing stage, particularly given that approvals are typically not occurring for more than 2 years for Form I-914 applicants and up to 5 years for Form I-918 applicants after the initial petition is submitted to USCIS. AILA recommends that USCIS work with DOS to shift biometrics processing to the consular processing stage. This will also help to reduce burdens on stakeholders as many derivatives reside in rural areas and accessing biometrics can be logistically challenging and costly.

AILA recommends the following actions to ensure consistency and fairness in adjudications:

- **Consistently and Fairly Adjudicate Fee Waiver Requests.** Practitioners are regularly seeing rejections for fee waivers where identical evidence was successfully presented on approved fee waivers for other applicants in the same household or similarly situated applicants. Eligibility instructions for these requests are also unclear as USCIS often insists on evidence that an applicant may not have such as tax filings and often seems to ignore instructions concerning requesting this secondary evidence. This is especially troubling as some applicants who have no financial means, income, or history of tax filings are having their requests rejected making it impossible for some to access USCIS benefits. Fee waivers should not be automatically denied just because an applicant does not have tax returns. Often, the applicant doesn't have taxes because they were not authorized to work and/or did not or could not work. This is especially relevant in the context of those seeking asylum work permits and renewals and victims of violence. The agency should immediately perform a review of the current instructions for adjudicating these requests and ensure that applicants have fair access to its benefits.

- **Review Process to Ensure Proper Handling for the Recording of Information from Form G-28.** Practitioners have noted increased instances of USCIS not properly processing or recording G-28s, creating additional burdens of representatives having to resubmit G-28s despite having already entered an initial appearance or substituted appearance. USCIS should review its intake processes relating to Form G-28 and ensure that the attorney's or accredited representative's information is timely and accurately recorded.

- **Ensure Access to Counsel**. In June 2020, USCIS announced a nationwide policy[18] would be permitted to appear telephonically at interviews conducted by the USCIS Field Offices. However, since that announcement, has received reports from attorneys across the U.S. that some USCIS officers have been unwilling to call the attorney of record during interviews. AILA has shared case examples of this problem with USCIS yet the problem persists, AILA urges USCIS to remind local field offices of its policy of allowing attorneys to appear telephonically to ensure that attorneys of record are properly and timely contacted for their clients' interviews. In the asylum context, there is a continual problem with officers conducting Credible Fear Interview (CFI) and Reasonable Fear interview (RFI) not contacting the attorney. The officer should be calling the attorney or whomever the applicant requests consistent with procedure, even if there hasn't been time to file a signed G-28. We suggest adding a form that the officer must fill out with the applicant as part of the CFI process, having the applicant list whether or not they would like the officer to call an attorney or other trusted person during the CFI.

- **Improve Consistency of Adjudications at the Immigrant Investor Program Office (IPO)**. Currently, there is no consistency in adjudications at the IPO. The AILA EB-5 Committee is aware of many reports of denials of I-526 petitions filed under the same or substantially similar facts as other I-526 petitions that have been approved. Relatedly, some officers, for example, request many documents from long ago to show lawful source of funds, while others do not. In addition, sometimes there are denials on currency exchange issues where there are approvals on cases using the exact same currency exchange service provider with the exact same evidence. There is also no consistent application of the preponderance of the evidence standard by adjudicators. This is likely a training issue. AILA urges USCIS to implement robust and ongoing training for its EB-5 officers. AILA also urges the IPO to resume engagement with AILA and other EB-5 stakeholders so that stakeholders can highlight problematic trends and provide specific examples that will help IPO address and improve its inconsistency of adjudications.

- **Determine H-1B Cap Exemption Eligibility on an Institutional Basis.** Currently, the California Service Center adjudicates all cap-exempt H-1B's and retains the discretion to question an institution's eligibility for the cap-exemption at any time in the context of adjudication of a single cap-exempt H-1B petition. At best, this leads to inconsistent decision-making by the agency and at worse, it means that an institution that has been deemed cap-exempt year after year could suddenly and unpredictably lose its cap exemption by virtue of a single adjudicator's decision on a single petition. This occurred during the previous four years and it was particularly difficult to overcome such a determination especially in light of the now-retracted no-deference memo. In order to instill a degree of predictability into the process of filing cap exempt cases, USCIS should make the cap exemption determination on an institutional basis and provide cap exempt employers with a letter confirming eligibility for the cap exemption for a certain period of time. This letter could then accompany each cap exempt petition until the end of the validity of the letter, at which point the employer would be required to submit documentation showing continued eligibility for the exemption. It would be incumbent on the employer to notify USCIS of any change in circumstances during the validity period of the letter that would impact the employer's eligibility for the cap exemption.

- **Mandate that Adjudicator Identification Numbers be Included on RFEs and Denial Notices.** Some USCIS Service Centers include an officer identification number on RFEs and denials, and

[18] *USCIS Response to COVID-19*, U.S. CITIZENSHIP & IMMIGRATION SERV., https://www.uscis.gov/about-us/uscis-response-to-covid-19 (last updated May 17, 2021) (noting that attorneys and/or authorized representatives may accompany applicants to the interview or participate telephonically).

this practice should be made mandatory for all adjudications. For its own quality control functions, stakeholders should have the opportunity to provide feedback to the agency if a particular officer is routinely issuing RFEs or denials that do not comport with the law or the evidence. When denials are "unsigned" and don't contain identifying information, it is more difficult for stakeholders to provide this kind of feedback.

- **Clarify that Signatures Are Not Required for U Visa Applicants Who Are Abroad.** There is a lack of clarity about whether signatures are required from derivative U visa applicants abroad. We strongly urge USCIS to clarify that such signatures are not required as they impose significant burdens in acquiring signatures in a timely manner.

- **Ensure timely and consistent issuance of U and T Visa Extension Notices.** AILA has observed inconsistency in issuing approval notices in a timely manner for U and T visa extension of stays issued upon the filing of an adjustment application, as well as I-360 VAWA approvals.

- **Rescind the July 2018 RFE/NOID Policy Memo.** USCIS should rescind its July 2018 Policy Memorandum which expanded USCIS officers' discretionary authority to deny applications based on evidentiary insufficiency without first issuing an RFE or NOID.[19] This Policy Memorandum has had a particularly adverse impact on *pro se* applicants who in some cases, such as those seeking humanitarian benefits, may not be able to afford a legal representative's help to prepare initial filings, which may lead to such applicants inadvertently failing to include certain supporting documents, despite preparing and filing their application in good faith. USCIS should revert to its prior June 3, 2013 guidance titled "Requests for Evidence and Notices of Intent to Deny."

c. Regulations and Policies

AILA offers the following recommendations regarding regulatory and policy measures that USCIS should adopt to ensure that USCIS operates more efficiently and effectively and is more transparent and accountable to its stakeholders:

- **Policy Manual Updates Should be Transparent, Provide Stakeholders with Sufficient Time for Comment and Not be Retroactive.** As the new Administration begins making changes to the USCIS Policy Manual, we urge that each update be accompanied with an explanation or specific annotations of what has been changed. In the past, USCIS provided a redlined version of updates to the Adjudicators Field Manual, but that practice ceased in recent years when changes were made to the USCIS Policy Manual. This makes it very difficult for USCIS stakeholders to easily identify the changes that were made and understand the potential impact of such changes. Moreover, substantive USCIS Policy Manual changes have often been labeled as "updates" and have been made effective retroactively without notice. Stakeholders are regularly only given between 10 - 14 days to review policy manual changes and submit comments to USCIS on the proposed changes. A comment period is meaningless unless there is sufficient time for stakeholders to review the policy changes, evaluate their impact, and formulate a comment that USCIS will take into consideration before implementing a policy change.

[19] ISSUANCE OF CERTAIN RFEs AND NOIDS; REVISIONS TO ADJUDICATOR'S FIELD MANUAL (AFM) CHAPTER 10.5(A), CHAPTER 10.5(B), PM-602-0163, U.S. CITIZENSHIP & IMMIGRATION SERV. (July 13, 2018), https://www.uscis.gov/sites/default/files/document/memos/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf.

- **Eliminate recent changes to the USCIS Policy Manual Regarding the Application of Discretion in Immigration Benefit Adjudications**. There have been a number of recent policy announcements making changes to the USCIS Policy Manual involving the applying of discretion in the adjudication of immigration benefits.[20] These changes indicate, among other things, that benefits that should be routinely granted are now a matter of discretion, such as the issuance of EADs and approval of clearly approvable adjustment of status applications. AILA is also concerned that USCIS's new policy for discretionary adjudications instructs officers to conduct a discretionary analysis even when denying a benefit on statutory or regulatory ineligibility grounds in order to avoid reversal upon review. AILA recommends that USCIS eliminate these policy manual changes and revert back to its prior policies regarding the application of discretion in immigration benefit adjudications.

- **USCIS Denials Based on Derogatory Information**. 8 CFR § 103.2(b)(16)(i) discusses when USCIS may use derogatory information to deny a benefit request. If the adverse decision is based on derogatory information considered by USCIS and of which the applicant or petitioner is unaware, USCIS must provide notice to the applicant that the derogatory information exists and affords the applicant an opportunity to rebut the information and present information on his or her own behalf. In practice, however, USCIS does not disclose or provide any information concerning the derogatory information, impeding the applicant's due process right to rebut or overcome such information. AILA urges USCIS to fully comply with 8 CFR § 103.2(b)(16)(i).

- **Exercise Greater Discretion for Form I-94 Records Shortened on Admission**. Either through CBP error, or because of a passport expiration, CBP often provides a shorter admission on the Form I-94 than that indicated on an individual's I-797 Approval Notice. In many cases the individual does not notice this discrepancy, and it is only after the I-94 expires that this comes to light. This causes an accrual of unlawful presence, in some cases so long that the 3 or 10 year re-entry bars would be triggered if the individual were to depart the United States. This problem will be exacerbated further as CBP plans to eliminate even stamping the passport, further confusing which document governs an individual's status in the U.S. USCIS should offer greater discretion in adjudicating applications and petitions when this scenario arises, particularly when an individual has a valid, unexpired I-797A Approval Notice, to ensure that a shortened I-94 will neither place the individual out of status nor result in the accrual of unlawful presence. Individuals should be able to rely on the I-797A as evidence of lawful status, and not be penalized by the confusing and cumbersome system of online I-94s and deferred inspection.

Policies and Regulations Impacting Employment-Based and Family-Based Applicants and Petitioners

- **Provide Administrative Relief to Individuals Who Are Stuck in the Immigrant Visa Backlog.** Individuals who are in the process of becoming permanent residents often have to wait years, if not decades, due to the unavailability of immigrant visa numbers. As they wait, their children may age

[20] *See e.g.*, APPLICATIONS FOR DISCRETIONARY EMPLOYMENT AUTHORIZATION INVOLVING CERTAIN ADJUSTMENT APPLICATIONS OR DEFERRED ACTION, PA-2021-01, U.S. CITIZENSHIP & IMMIGRATION SERV. (Jan. 14, 2021), https://www.aila.org/infonet/uscis-policy-guidance-discretionary-employment; USE OF DISCRETION FOR ADJUSTMENT OF STATUS, PA-2020-22, U.S. CITIZENSHIP & IMMIGRATION SERV. (Nov. 17, 2020), https://www.aila.org/infonet/uscis-updates-policy-guidance-use-of-discretion; REMOVING EXEMPTION FROM DISCRETION FOR ASYLUM APPLICANTS SEEKING EMPLOYMENT AUTHORIZATION UNDER 8 CFR 274A.12(C)(8), U.S. CITIZENSHIP & IMMIGRATION SERV. (Aug. 27, 2020), https://www.uscis.gov/policy-manual/updates; POLICY ALERT – APPLYING DISCRETION IN USCIS ADJUDICATIONS, PA-2020-10, U.S. CITIZENSHIP & IMMIGRATION SERV. (July 15, 2020), https://www.aila.org/infonet/uscis-issues-policy-alert-on-applying-discretion.

out of their opportunity to become permanent residents, their spouses may be left in limbo without work authorization, and they face economic and social uncertainty. AILA urges USCIS to take steps to provide relief to these individuals and families by:

- Amending 8 CFR 245.1(g) to redefine "immediately available" to allow for earlier filing of adjustment of status applications.
- Revising USCIS's policy on the Child Status Protect Act to allow children to preserve their eligibility to adjust status to permanent residence based on the earliest day they can file for adjustment of status.[21]
- Administratively recapturing the more than 200,000 immigrant visas that were unused between FY 1992 and FY 2019 to provide relief to individuals stuck in the backlog and to USCIS from adjudicating certain nonimmigrant extension petitions for beneficiaries that would otherwise be eligible for a green card.
- Exempting derivatives of principal immigrant visa applicants from the numerical limitations via regulations.

- **Reissue Regulations that Require USCIS to Issue EADs Within 90 days, or Issue Interim EADs, to prevent unnecessary loss of employment.** USCIS should reissue regulations that require the agency to issue EADs within 90 days, or issue interim EADs if the EAD is not adjudicated within 90 days to avoid significant delays in stakeholders obtaining initial work authorization and to prevent the unnecessary loss of employment.

- **Extend Automatic Extension of EADs to More Visa Categories**. Pursuant to 8 CFR § 274a.13(d), certain EADs are automatically extended for 180 days from the date the initial EAD expires if a I-765 extension application is properly and timely filed before the EAD's expiration date. This rule was promulgated in the same regulation that eliminated the requirement that USCIS process EADs within 90 days. While DHS stated that it "remains committed to current processing timeframes and expects to adjudicate Form I-765 within 90 days,"[22]this has not been the case. In reality, many stakeholders are waiting upwards of 8 months for an EAD, and even longer if that EAD is tied to an H-4 or L-2 extension. We urge USCIS to expand the regulation to include an automatic 180 day extension of EAD validity for all bona fide I-765 extension applications that are timely filed, such as H-4 and L-2 applicants, among others. The disparate treatment of certain categories of employment authorization extension results in tremendous interruption both to businesses and families. When a family member suddenly has to stop working this can cause substantial financial strain to the family unit and puts that individual's employer in a very difficult position where they no longer have the services of a valued employee.

- **Work Authorization Incident to Status**. USCIS should formally clarify that K-1 visa holders and spouses of E and L visa beneficiaries are work-authorized incident to status. Specifically, USCIS should provide clarification on its website that 8 CFR § 274.a directs that K-1 visa holders and spouses of E and L beneficiaries are work authorized incident to status and that the EAD serves only as an optional form of proof of the work authorization. USCIS should further formally clarify on its website that employment without an EAD in these visa categories does not constitute unauthorized employment.

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[21] *See AILA Submits Supplemental Comments on USCIS Policy Manual Revisions Concerning the Child Status Protection Act*, AM. IMMIGRATION LAWYERS ASS'N (Apr. 16, 2021) thttps://www.aila.org/infonet/supplemental-comments-on-uscis-policy-manual.

[22] 81 Fed. Reg. 82398 (Nov. 18, 2016).

- **Expand Dual Intent for Additional NIV Categories**. USCIS should revise its regulations to allow dual intent for additional nonimmigrant visa categories for purposes of filing Form I-485, such as the E and O visa categories. This would better account for the modern realities of global mobility and help facilitate the ability of the United States to attract and retain global talent from around the world.

- **Revoke the 2017 Restrictions on the TN category for Economists**. On November 20, 2017, USCIS restricted the TN category for Economist, directing that individuals in occupations related to the field of economics, such as financial analysts, marketing analysts, and market research analysts, no longer qualify.[23] This change severely and unnecessarily limited the TN Economist category and is contrary to the intent of Congress. This policy change should be revoked.

Policies and Regulations Impacting I-360 Beneficiaries

- **Allow Concurrent Filing of Form I-485 for all I-360 Beneficiaries**. USCIS currently only permits certain I-360 beneficiaries the ability to concurrently file Form I-360 and Form I-485.[24] AILA recommends that USCIS allow all I-360 beneficiaries the ability to file the Form I-360 concurrently with Form I-485. This will allow I-360 beneficiaries who are in the United States the ability to obtain interim benefits, such as work authorization and advance parole.

Policies and Regulations Impacting VAWA, T and U Applicants

- **I-751 Derivatives in Battery/Extreme Cruelty Cases**. USCIS unnecessarily limits I-751 derivative eligibility to those who immigrated to the U.S. within 90 days of the principal applicant. The application of this general regulation is particularly burdensome for derivatives in I-751 waiver cases based on battery/extreme cruelty grounds. There should be an exception for these waiver cases to allow for derivative consideration notwithstanding the time of admission. For example, an abusive I-130 petitioner may delay the immigration process for the derivative of an abused beneficiary as an abusive tactic, later placing the burden on the abused spouse and any derivatives to file more than one I-751 petition.

- **Expand Evidence to Support Claims of Extreme Cruelty**. For domestic violence survivors filing Battered Spouse Waivers, 8 CFR § 216.5(e)(3)(i) acknowledges that extreme cruelty may include non-physical violence, including psychological abuse. Yet 8 CFR § 216.5(e)(3) states that such claims "must be supported by the evaluation of a professional recognized by the Service as an expert in the field." This regulation ignores the possibility that other evidence may satisfy the "any credible evidence" standard and places undue burden on survivors who do not have the financial resources or access to obtain the required evaluation. USCIS should modify its regulation to allow for other forms of evidence to support such claims.

- **Comply with 8 CFR § 214.14(d)(2)**. USCIS has not implemented and does not comply with 8 CFR § 214.14(d)(2), which explicitly provides that USCIS "will grant" parole to a U visa applicant's qualifying family member while the U visa applicant is on the waitlist. Implementing this regulation and providing parole to U visa derivative family members abroad would help to

[23] TN NONIMMIGRANT ECONOMISTS ARE DEFINED BY QUALIFYING BUSINESS ACTIVITY, PA-602-0153, U.S. CITIZENSHIP & IMMIGRATION SERV., (Nov. 20, 2017), https://www.uscis.gov/sites/default/files/document/memos/2017-1120-PM-602-0153_-TN-Economists.pdf.
[24] *Concurrent Filing of Form I-485*, U.S. CITIZENSHIP & IMMIGRATION SERV., https://www.uscis.gov/green-card/green-card-processes-and-procedures/concurrent-filing-of-form-i-485 (last updated Nov. 10, 2020).

promote family unity, especially in light of lengthy wait times of about 5 years just to be placed a waitlist, followed by additional years on the waitlist before being in a position to consular process. AILA urges USCIS to fully comply with 8 CFR § 214.14(d)(2).

- **Comply With 8 CFR § 214.11(d)(7)**. USCIS has not implemented and does not comply with 8 CFR § 214.11(d)(7), which provides that the agency "will conduct an initial review" of a T visa application to determine if it is "bona fide." Where USCIS makes such a determination, the regulations state that DHS "will automatically grant an administrative stay of the final order of removal"[25]to which the T visa applicant is subject. USCIS's failure to regularly implement this regime results in the unlawful removal of human trafficking survivors. Notably, once a T visa applicant has been removed, that person is no longer physically present in the U.S. on account of his or her trafficking and no longer qualifies for a T visa. AILA urges USCIS to fully comply with 8 CFR § 214.11(d)(7).

- **Comply with INA § 214(p)(6)**. USCIS has not implemented and does not comply with INA § 214(p)(6), which allows USCIS to issue work authorization cards to individuals with "pending, bona fide" U visa applications. AILA urges USCIS to comply with INA § 214(p)(6).

- **EAD applications under the (a)(20) category**. U visa derivatives that include applications for (a)(20) EADs and not (c)(14) EADs are seeing their (a)(20) applications automatically converted to (c)(14) EAD issuance upon the U visa derivatives' grant of deferred action, later forcing them to submit a new (a)(20) EAD application and pay the corresponding filing fee. This is an added burden for these applicants. AILA recommends that USCIS not convert I-765 applications that clearly list the (a)(20) category into (c)(14) category EAD applications. If an applicant did not already separately submit a (c)(14)EAD application, the applicant may do so upon receipt of the waitlist letter, but this should not interfere with the applicant's (a)(20) application already on file if/when the U visa/derivative Us are ultimately approved.

- **Rescind Policy Memorandum 602-0133**. USCIS should remove *Matter of L-S-M-*, Adopted Decision 2016-03 (AAO Feb. 23, 2016) as an adopted decision and rescind Policy Memorandum 602-0133, as the AAO's decision in *Matter of L-S-M* places a disproportionate burden on U visa applicants.

- **Deferred Action to VAWA Self-Petitioners**. USCIS should end its practice of refusing to issue deferred action to VAWA self-petitioners in removal proceedings or with final removal orders. It is in contravention to Congressional intent for the U.S. Department of Homeland Security through its ICE enforcement arm to proceed toward removal of VAWA self-petitioners where that same Department's USCIS agency has determined that the individual warrants humanitarian protection in approving his/her VAWA self-petition.

- **Recapture unused U visa numbers.** The U nonimmigrant visa category has seen increasing backlogs, with current wait times of about 5 years just to be considered for a waitlist. Recapturing any unused U visa numbers from 2001 when the law was enacted through 2009 would greatly help to reduce the backlog of waitlisted petitioners and make current wait times for adjudication more tenable.

- **Provide Greater Clarity for Certifying Agencies**. The current U visa certifier/law enforcement manual should be rescinded and rewritten to provide greater clarity to certifying agencies.

[25] 8 CFR § 214.11(d)(1)(ii).

- **USCIS should urge the Attorney General (AG) to rescind former AG Session's decision in *Matter of Castro-Tum***. USCIS should urge the Attorney General to rescind former Attorney General Jeff Sessions' decision in *Matter of Castro-Tum*, which strips immigration judges of their authority to administratively close the removal proceedings of survivors with applications for relief (such as U-visa petitions) pending before USCIS. This has been particularly problematic for Respondents with bona fide U visa petitions pending who are facing wait times of at least five years for waitlist consideration, which is beyond their control and within the purview and exclusive jurisdiction of USCIS.

Policies and Regulations Impacting the Employment Verification Process

With respect to regulations and policies within the employer verification arena, AILA recommends that USCIS adopt and implement the following measures:

- **Modernize the Form I-9 Employment Eligibility Verification Process.** Current agency regulatory interpretations of the requirement that employers conduct in person inspection of identity and employment authorization documents for new hires (and reverifications) are outdated and do not take into account technological advances or the reality of today's business environments, including a post COVID-19 onboarding and work experience. AILA urges DHS to reconsider its interpretation of the regulatory requirement, found at 8 C.F.R. § 274a.2, that an employer "[p]hysically examine the documentation presented by the individual establishing identity and employment authorization" when completing Form I-9, Employer Eligibility Verification. Currently, the physical inspection requirement is interpreted by USCIS and ICE to mean that the employer must review the documentation *in person*. We believe this strict interpretation of regulations, formulated almost three and one-half decades ago, can and should be updated as part of a longer-term operational effort to maximize efficiencies and improve employee and employer experience (including improving the health and safety of those involved in the Form I-9 process). AILA believes that certain virtual review of documentation for Form I-9 purposes constitutes physical examination within the meaning of the existing regulations. Further, the temporary relaxation of the in-person verification requirement should, due to changes in technology and business realities, become – perhaps with some adjustments – a permanent change. More details about AILA's recommendations for modernizing the Form I-9 Employment Eligibility Verification Process are outlined in a recent letter that AILA sent to DHS.[26]

- **Simplify and Clarify the Form I-9**. The Form I-9 and the employment verification process overall should be simplified and clarified to allow employers desiring compliance to succeed. Employers in the U.S. are required to use the Form I-9 to verify the identity and employment authorization of new hires. This form should be simple, but the reality is that in order to comply with all of the form's requirements and agency guidance frequently requires that employers consult with attorneys who specialize in employment verification issues. AILA recommends that USCIS provide easily accessible training to employers, concise and easy-to-follow instructions for Form I-9 completion, detailed guidance on electronic Form I-9 software requirements (and/or an electronic I-9 vendor certification program), and clear guidance on acceptable identity and employment authorization documentation. This would greatly benefit employers and improve compliance rates.

[26] *AILA Sends Letter to DHS Urging Modernization of the Form I-9 Employment Eligibility Verification Process*, AM. IMMIGRATION LAWYERS ASS'N (Apr. 13, 2021), https://www.aila.org/advo-media/aila-correspondence/2021/letter-to-dhs-urging-modernization-of-the-form-i-9.

- **Update the 2012 Dinkins Memorandum**. USCIS should update the 2012 Dinkins Memorandum[27] to take into consideration new developments and issues surrounding electronic I-9 audit trails. Employers and electronic I-9 vendors consistently indicate that they would like clearer guidance on electronic I-9 issues. USCIS should solicit broad stakeholder input regarding aspects of the electronic I-9 process that are unclear and update the Dinkins Memorandum to help provide greater clarity regarding the process.

- **Update the Virtue Memorandum**. USCIS should update the 1997 Virtue Memorandum[28] to take into consideration new developments and issues regarding errors that may occur during the I-9 employment verification process. USCIS should solicit broad input from stakeholders regarding aspects of Form I-9 errors that are unclear and update the Virtue Memorandum to help provide greater clarity regarding the process.

- **Amend 8 CFR § 274a.2(b)(2)(ii) to allow for a 30 day notice and production period**. USCIS should amend 8 CFR § 274a.2(b)(2)(ii) to allow for a 30-day period for the notice of inspection (NOI)/audit production period instead of the current 3-day period. This will result in more organized productions, among other benefits.

- **I-9 documentation for F-1 OPT**. USCIS should update M-274 to allow an employer to use an endorsed Form I-20 with OPT recommendation as an I-9 document similar to a I-797 receipt notice.

Policies and Regulations Impacting the EB-5 Visa Program

- **Revise the Redeployment Policy Manual Update.** The redeployment policy manual change of July 2020[29] is full of due process flaws, wherein a new geographic limit to prior policy was made effective on pending investor petitions. Large scale commercial transactions typical of the EB-5 visa program cannot be unwound immediately and can almost never be unwound retroactively. Subjecting investor petitions to denial risk based on a retroactive new policy, particularly when all investors have been in the process for years due to USCIS processing delays and visa backlogs is fundamentally unfair and raises due process concerns. AILA recommends that USCIS adopt a policy of nonretroactivity and sufficient notice when adopting policy changes or modifications. It is insufficient to merely label them "updates" when substantive requirements are changed. To that end, AILA urges USCIS to rescind and revise its July 2020 policy "update" on redeployment following job creation to remove geographic restrictions, particularly in light of the significant harms retroactive application of this policy is having and will have on so many stakeholders who reasonably relied on years of USCIS statements and guidance, which gave no reason to believe there would be a geographic limitation on redeployment. Please refer to the August 23, 2020 letter to USCIS from AILA and IIUSA regarding the redeployment policy changes for further information on our concerns about this policy change.[30] The urgency to act on this issue has

[27] MEMORANDUM FROM JAMES DINKINS, EXEC. ASSOC. DIR., HSI, GUIDANCE ON THE COLLECTION AND AUDIT TRAIL REQUIREMENTS FOR ELECTRONICALLY GENERATED FORMS 1-9 (Aug. 22, 2012).
[28] MEMORANDUM FROM PAUL W. VIRTUE, INS ACTING EXEC. COMM'R OF PROGRAMS, INTERIM GUIDELINES: SECTION 274A(B)(6) OF THE IMMIGRATION & NATIONALITY ACT ADDED BY SECTION 411 OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996 (Mar. 6, 1997) (the Virtue Memorandum) *available at* 74 No. 16 Interpreter Releases 706 (Apr. 28, 1997).
[29] *USCIS Issues Policy Guidance on Deployment of Capital in the EB-5 Category*, AM. IMMIGRATION LAWYERS ASS'N (July 24, 2020), https://www.aila.org/infonet/uscis-policy-guidance-eb5.
[30] *AILA and IIUSA Submit Joint Comments Opposing Changes to USCIS Policy Manual Regarding Deployment of Capital in EB-5 Category,* AM. IMMIGRATION LAWYERS ASS'N (Aug. 24, 2020), https://www.aila.org/infonet/comments-opposing-changes-deployment-capital-eb5.

dramatically increased because in January 2021 the IPO began issuing RFEs on I-829 cases citing this policy update. We urge the IPO to: (1) rescind the July 2020 policy updates, (2) hold a special stakeholder engagement on the issue of redeployment, and (3) provide sufficient notice and opportunity for comment in advance of any revisions to the USCIS policy manual, including track changes of all changes made to the policy manual.

- **Court decisions should be incorporated into USCIS training materials, USCIS Policy Manual and in USCIS adjudications**. Stakeholders have brought and won lawsuits against IPO challenging certain unfair adjudication practices and policies that are contrary to the law. These federal court decisions are binding on IPO, yet some IPO examiners are not abiding by the court rulings and are issuing RFEs based on invalid rules. For example, in *Zhang v. USCIS*, No. 1:15-cv-00995 (DC Cir. 2020), the D. C. Circuit Court of Appeals held that USCIS policy requiring loans to be collateralized with the petitioner's property was invalid and not in accordance with the law. However, it appears that USCIS is still applying this invalid standard in recent RFEs. Moreover, the invalidated and erroneous statement of authority remains in the USCIS Policy Manual. . Court decisions are law and must be incorporated into training materials, the Policy Manual and adjudications in a timely manner.

- **Proof of Lawful Permanent Resident Status.** EB-5 investors with expiring 24 months of initial conditional lawful permanent resident status (CLPR) are required to file an I-829 Petition to remove conditions in the last 90 days of their CLPR status. The I-829 Receipt Notice issued by USCIS serves as evidence of the automatic extension of CLPR status for 18 months. However, with I-829 processing times reported at 59 months (or longer), investors are required to pursue evidence of an extension of CLPR status. Currently, the only option is to apply for an I-551 stamp at the local USCIS field office, with each stamp providing only a 12-month extension. This requires, therefore, three or more separate instances of scheduling an appointment and appearing in person to obtain an I-551 stamp. At present, it is generally not possible for investors to obtain timely I-551 stamp appointments. As such, they are often left without proof of ongoing status to travel internationally, confirm employment eligibility, or to obtain driver's license extensions – not to mention compliance with INA §264(e), which states that all permanent residents must have "at all times" official evidence of permanent resident status or face criminal charges and/or fine. Stakeholders are keenly aware that InfoPass appointments were exceptionally hard to secure even before the COVID pandemic. Now, it is even more challenging to have USCIS schedule an I-551 appointment for EB-5 investors. Of course, requiring multiple I-551 stamp appointments for EB-5 investors is inefficient and a waste of precious CIS field office resources. We understand from recent litigation that EB-5/I-551 stamps account for about 8% of all InfoPass appointments. Using updated receipt notices would result in CIS field offices "finding" at least 8% greater capacity. Even when successful in obtaining an InfoPass appointment, stakeholders are reporting that CIS field offices have been issuing stamps only to those family members that personally appear, requiring an entire family to appear for I-551 stamps, often to the detriment of their work or academic obligations. AILA recommends that USCIS explore alternatives to providing EB-5 investors with evidence of continued CLPR while the I-829 petition is pending, including the following options:
    - IPO could print and mail updated I-829 receipts to extend status every 12 months, or IPO could update I-829 receipt language to reflect a longer extension timeline that is more in line with current processing times (such as 36 months).
    - Better yet, USCIS could update language on the receipt notice to state that CLPR status is extended until and unless there is a final order of deportation from an immigration judge.
    - Form I-751 cases share this same I-551 stamping issue with the EB-5 program so a solution adopted for the EB-5 program should also be extended to Form I-751 applicants. This

would positively impact a significant stakeholder population.

II. Conclusion

AILA appreciates the opportunity to provide feedback to the agency concerning the barriers to the timely accessing of its benefits and services. The suggestions provided above encompass a great deal of the issues and recommendations that AILA and our membership would like to see the agency resolve and implement. AILA looks forward to working with USCIS moving forward and to continued engagement on these and any other issues that arise.

Please address any concerns or questions to AILA Director of Government Relations Sharvari Dalal-Dheini at SDalal-Dheini@aila.org.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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