The demand for timely and predictable service is demonstrated by customer willingness to pay premium filing fees.[26] The success of premium processing and public satisfaction with the reliably speedy service raises questions of why the premium processing methodology is not the norm and why 15 days is not the goal for backlog reduction efforts. If USCIS can produce a better, faster, and more secure product for one line of applications, it should be able to produce the same level of service to all applications in that product line and for all other products.

BEST PRACTICE

The Boston District Office created a "continued case" team that handles cases continued for any reason. This team sits separately from the rest of the adjudications section. It is staffed by specially trained immigration officers who are taught to examine only those items that prevented case approval. With this team, the Boston District Office is better able to complete continued cases after a quick review of requested documents without time lost on re-adjudication.

B. Untimely Processing and Systemic Problems with Employment-Based Green Card Applications

Although addressed in last year's Annual Report (at pp. 9-11), significant issues with the timely processing of employment-based immigrant petitions and applications for green card status remain.[27]

The Immigration and Nationality Act (INA) establishes formulas and numerical limits for regulating immigration to the United States. Employment-based immigration is set at 140,000 visas per year.[28] Employers in the United States who have permanent positions available may petition to bring immigrants to fill these positions. Such petitions are made using Form I-140 (Immigrant Petition for Alien Worker). In most cases, these petitions are supported by a Labor Certification Application approved by the Department of Labor (DOL). Upon submission, the proper filing of Labor Certification Applications or an I-140 (if labor certification is not necessary) sets a "priority date." Priority dates determine a beneficiary's "place in line" relative to other visa petitions in the same category for visa allocation. For instance, a priority date of January 31, 2000 would give a beneficiary priority over a beneficiary with a priority date of June 30, 2001.

Once individuals establish a basis for immigration, they may apply for green cards (immigrant status) in one of two ways. The traditional method is to apply for an immigrant visa at a U.S. consular office abroad. The second option, for those who are already in the United

[26] Premium processing was authorized by statute for employment-based petitions. *See* 8 U.S.C. § 1356(u). USCIS is currently offering premium processing for certain nonimmigrant worker petitions (Form I-129). On May 23, 2006, USCIS published a notice providing for the expansion of premium processing. *See* 71 Fed. Reg. 29662.

[27] *See generally* GAO Report "Immigration Benefits: Improvements Needed to Address Backlogs and Ensure Quality of Adjudications," GAO-06-20 (Nov. 2005), at 42-44; http://www.gao.gov/new.items/d0620.pdf.

[28] *See* 8 U.S.C. § 1151(d)(1)(A). This figure may be increased if family-based visas are unused or through congressional action.

States, is to apply for adjustment of status[29] with USCIS provided: the individuals have established a legal basis for immigration (in this case, an approved I-140 visa petition); are eligible to immigrate; and visas are immediately available to them.

The Department of State (DOS) regulates allocation of visas and the relevant statutory provision provides formulas and limits for the employment-based visa category.[30] DOS applies these complex formulas monthly to estimate how many immigrant visas will be available and publishes the results in a monthly "Visa Bulletin."[31] If visa availability in a category exceeds demand, the Visa Bulletin will reflect that the category is "current." If there are no visas available in a category, it is listed as "unavailable." When visas are available, but expected demand exceeds the available supply, the DOS publishes a cutoff date at which time the issuance of visas is restricted to applicants whose priority dates predate the cutoff date. In general, if an application is based on a labor certification application or visa petition with a priority date that is earlier than the cutoff date, a visa is available for that application and the applicant—if otherwise eligible—can obtain a green card.

Visa Bulletin cutoff dates also are used by USCIS to regulate receipts of green card applications. In general, if an applicant seeks to file an application for a green card, the priority date on the supporting visa petition must predate the Visa Bulletin cutoff date. For example, an applicant who is the beneficiary of an I-140 visa petition that has a priority date of January 31, 2000 may apply for a green card if the Visa Bulletin lists a cutoff date of February 1, 2000 or later.

Between FY 01 and FY 04, USCIS employment-based green card application production shortfalls created an artificially low demand for third preference employment-based visas.[32] In not completing enough green card applications, USCIS precluded allocation of visa numbers at levels that would have triggered a cutoff date. Thus, DOS continued to list the categories as "current" and USCIS continued to accept new applications. The result of high demand for visas at a time when demand artificially appeared to be low created a situation wherein USCIS accepted many more applications than it completed—or could have completed—within the same fiscal year.[33]

In a January 2005 email to the President's Council of Economic Advisors (CEA), USCIS reported that it had 270,533 *pending* employment-based applications for green cards and 191,221 of these applications were backlogged. In addition, USCIS reported to the CEA that there were 66,832 employment-based immigrant petitions (Form I-140) pending and 28,111 of these applications were backlogged.[34] For over two years, the Ombudsman has attempted to obtain

[29] *See* 8 U.S.C. § 1255.

[30] *See* 8 U.S.C. § 1153(b).

[31] *See* DOS' Visa Travel Bulletins at http://travel.state.gov/visa/frvi/bulletin/bulletin_1770.html.

[32] Third preference visas include "skilled, professionals, and other workers." 8 U.S.C. § 1153(b)(3).

[33] While USCIS is unable to provide exact data, it has indicated that USCIS service centers *received* 187,583 employment-based green card applications in FY 01; 221,223 in FY 02; 225,897 in FY 03; 159,873 in FY 04; and 140,006 in FY 05.

[34] *See infra* section II.H.

this specific information, yet USCIS has repeatedly stated that this type of specific data cannot be obtained due to USCIS' lack of reporting capability.

In April 2006, USCIS estimated the number of pending employment-based applications for green cards to be between 170,975 and 229,291.[35] USCIS further estimated that it will complete 136,254 employment-based applications in FY 06. Based on its lower estimate, USCIS has 22 percent (30,975) more applications than it can possibly approve in a year. From its higher estimate, USCIS has 64 percent (89,291) more applications than it can approve. Thus, it remains the case that USCIS—based on its own estimates—cannot end a fiscal year without cases pending visa allocation. This, in effect, creates a perpetual backlog of green card cases.

Moreover, once an applicant has filed for a green card, he or she is eligible to file for interim benefits (EADs and advance parole). The applicant may continue to apply for and receive these benefits for as long as the application is pending. Current USCIS data indicate that approximately 20 percent of pending employment-based green card applications will be denied. Based on USCIS estimates of pending cases, between 34,000 and 46,000 currently pending applicants are holding EAD cards despite their ineligibility for a green card. USCIS issues EADs valid for one year. When USCIS is unable to make a decision on a green card application within one year of the applicant receiving an EAD, that applicant must apply for a second card to continue employment.

In August, 2005, the Ombudsman began hosting a series of meetings between USCIS and DOS. Since September 2005, the DOL also has participated. The meetings were to develop useful communication among these entities regarding visa availability and expected demand. Based on these meetings, DOS was able to better determine visa availability at the beginning of FY 06 to reflect actual and expected demand.

The DOL labor certification application backlog also represents a potential problem. If DOL approves large numbers of these labor certification applications—some of which date back to early 2001—in a relatively short period of time, the number of employment-based visa petitions and applications for green cards would surge. The result would be a tremendous and immediate demand for employment-based visas. Without an effective way to regulate this expected workload surge, thousands of applicants will find themselves waiting for visas, and USCIS will be unable to reduce its processing times or application backlog. Thus, it is imperative that an efficient process be developed to systematically move applications into and through USCIS.

[35] In a March 17, 2006 email to the Ombudsman, USCIS indicated that between 16,957 and 45,477 employment-based green card applications were pending at district offices and between 154,018 and 183,814 such applications were pending with service centers.

RECOMMENDATION AR 2006 -- 02

The Ombudsman recommends reform of employment-based green card application processes to limit annual applications to a number that will not exceed visa availability, while also reducing abuse of the process by those who seek interim benefits through fraud or misrepresentation. The following recommendations emphasize real-time accountability and effective communication between USCIS and DOS:

1) Track data relating to employment-based green card applications at the time of filing with USCIS, including immigrant visa classifications, priority dates, and countries of chargeability.

Currently, USCIS does not collect these vital data on employment-based green card applications upon acceptance for processing. These data are noted by contractors as part of the intake process, but not systematically captured. This leaves USCIS unable to provide DOS with accurate data regarding these applications. Therefore, DOS must set cutoff dates without a clear understanding of pending applications. Data that are currently captured by contract staff should be forwarded to DOS for use in more accurately determining how many visas will be used.

2) Assign visa numbers to employment-based green card applications as they are filed with USCIS.

By assigning visa numbers to these applications upon receipt, USCIS will ensure that it will not accept more applications than it can legally process. When USCIS denies such applications, it must notify DOS immediately so that the visa can be reallocated.

C. Lack of Standardization Across USCIS Business Processes

Lack of standardization in USCIS adjudications among service centers, among field offices, and between officers within the same office remains a pervasive and serious problem. The Ombudsman's 2005 Annual Report (at pp. 15-18) identified this problem and the Ombudsman has observed little, if any, improvement.

As previously reported, service centers and field offices continue to operate with considerable autonomy. Although Headquarters establishes production goals, substantial differences in management approaches exist at the local levels. USCIS faces growing production goals and public expectations, but it has little opportunity to affect fundamental organizational change. As a result: (1) immigration officers inconsistently apply statutory discretion; (2) there is reliance on superseded regulations, policy memoranda, and procedures; and (3) wide variations exist in processing times for the same application types at different USICS offices.