

Citizenship and Immigration Services Ombudsman

Recommendation Regarding the Processing of Waivers of Inadmissibility

WAIVERS OF INADMISSIBILITY: ADDITIONAL IMPROVEMENTS NEEDED TO ENHANCE THE CURRENT FILING PROCESS AND MINIMIZE RELUCTANCE TO FILE

June 10, 2010

Congress created the Department of Homeland Security's Citizenship and Immigration Services Ombudsman, in part, to recommend ways to improve the administrative delivery of citizenship and immigration services. Today we do so with the goal of increasing transparency and uniformity in the Form I-601 Waiver of Inadmissibility adjudication process.

Since the early days of immigration law in this nation, the United States has provided a form of relief to otherwise ineligible individuals seeking to immigrate to the United States. Today, individuals seeking to overcome inadmissibilities may do so by filing Form I-601, Application for Waiver of Ground of Inadmissibility.

The Ombudsman learned that challenges in the current waiver process oftentimes discourage applicants, many *pro se*, from applying. As well, immigration practitioners are often reluctant to advise their clients to enter into the waiver process.

The Ombudsman recognizes that USCIS has made improvements to this process, including the implementation of the I-601 Waiver Adjudication Program at the Ciudad Juarez Field Office (CDJ) in March 2007, which significantly improved caseload management. In addition, USCIS recently implemented a CIS Ombudsman proposal to issue more specific Requests for Evidence. USCIS also revised Form I-601 and developed a quality assurance pilot and a new standard operating procedures checklist to promote standardization in adjudications. Those steps already taken coupled with the recommendations here represent an opportunity to further improve the I-601 adjudication process both for applicants and those who administer this waiver of inadmissibility.

I thank my staff for their work in researching and developing this review. We welcome feedback on these recommendations and suggestions for future areas of focus. We can be reached at CISOmbudsman@dhs.gov.

Thank you,



January Contreras
Citizenship and Immigration Services
Ombudsman



RECOMMENDATIONS

The Ombudsman recommends that USCIS:

1. Centralize the I-601 adjudication process;
2. Allow applicants to concurrently file Form I-601 and Form I-130, Petition for Alien Relative;
3. Prioritize the finalization of the USCIS overseas case management system (currently in development) in order to provide for accurate statistical reporting of Forms I-601, allowing for posted processing times, and enabling I-601 applications processed at CDJ to be tracked via the case status online feature on the USCIS website;
4. Publish clear filing instructions to guide customers in need of expedited Form I-601 processing;
5. Increase coordination between DOS consular officers and USCIS adjudicators at CDJ who work with Form I-601; and
6. Allow USCIS employees to request digitized Alien Files upon receipt of interview schedules, amending CDJ's current office policy.

REASONS FOR THE RECOMMENDATIONS

- Limited access to information for customers about processing times and case status frustrates applicants.
- There is no standard process for applicants in urgent situations who are seeking expedited processing.
- Discrepancies in interpretation of the extreme hardship standard lead to a lack of uniformity in decision-making.
- Predictability and transparency are critical to this process as many applicants perceive the waiver application process as high-risk because it involves departure from the United States, and waiver denial may result in a lengthy bar on re-entry.

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The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.

Introduction

The concept of providing a form of relief to otherwise inadmissible foreign nationals is a historic one that dates back to early U.S. immigration law. The Immigration Act of 1891, for example, provides for the exclusion of, among others, individuals likely to be a public charge, individuals carrying contagious diseases, and individuals convicted of a crime involving moral turpitude.¹ Relief for many violations involved payment of fines at ports-of-entry and/or evidence of recovery from disease. Although these policies addressed issues relevant to particular eras — labor shortages, spread of contagious diseases — they set the foundation for future adaptations both of grounds of inadmissibility and of forms of relief from them.

Executive Summary

The Citizenship and Immigration Services Ombudsman and staff (Ombudsman) examined the processing of waivers of inadmissibility, a form of relief available to certain foreign nationals ineligible to enter the United States or adjust their status to that of a lawful permanent resident (green card holder) while in the United States, if deemed to have violated section 212 of the Immigration and Nationality Act (INA).² The INA provides a list of inadmissibility grounds that includes, but is not limited to, criminal, health, immigration, and security violations. Individuals seeking to overcome inadmissibilities may do so by filing Form I-601 (Application for Waiver of Ground of Inadmissibility), with the United States Citizenship and Immigration Services (USCIS).³

The Ombudsman focused this assessment on the processing hub of today's waiver of inadmissibility system, the USCIS Ciudad Juarez Field Office (CDJ). Co-located with the largest U.S. consulate in the world, CDJ has processed the majority of I-601s received by USCIS over the past few years. At its peak in FY 2008, CDJ received approximately 22,000 waiver applications, 86 percent of the total number of I-601s filed with USCIS abroad.⁴ During this time, the agency also accumulated a backlog that at one point amounted to nearly 10,000 cases from CDJ,⁵ leading to filing, processing, and adjudicatory challenges.

Although this study does not thoroughly review Form I-212 (Application for Permission to Reapply for Admission into the United States after Deportation or Removal) or I-601s filed at locations other than CDJ, its findings warrant discussion

¹Act of March 3, 1891, Ch. 551, 26 Stat. 1084 (“An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor”).

² The term “adjustment of status” refers to the process whereby a foreign national present in the United States may apply for permanent residency rather than obtain an immigrant visa abroad. *See generally* INA § 245(a).

³ The terms “Form I-601,” “I-601,” “waiver of inadmissibility,” and “waiver” all refer, according to context, to the waiver application.

⁴ Information provided by USCIS to the Ombudsman (Sept. 10, 2009), (Jan. 28, 2010).

⁵ Information provided by USCIS to the Ombudsman (Aug. 13, 2009).

and recommendations affecting overall waiver processing. The Ombudsman will continue to closely monitor the processing of waivers at CDJ and USCIS efforts to improve the system.

Ombudsman Findings

The Ombudsman found that USCIS made significant improvements in caseload management through initiation of the I-601 Waiver Adjudication Program at CDJ in March 2007.⁶ This restructured program entails a triage-type process of all I-601s, leading to the approval of many *clearly approvable* applications within a matter of days, and referral for further review of those applications needing more research or investigation. Additionally, as discussed later, USCIS implemented agency-wide procedural innovations and quality assurance measures intended to improve adjudication rates, customer service, and overall efficiency.

Despite these advancements, the agency has not been able to overcome fully challenges affecting both USCIS and its customers in several operational and procedural areas, including:

- *Disparity of Processing Times between On-Site Adjudicated and Referred Cases out of CDJ.* Under the current structure, CDJ approves within a matter of days approximately 50 percent of waivers filed, while the other 50 percent are referred for additional review,⁷ which, at the time of writing this review, takes 10-12 months for full adjudication.⁸ Any given applicant under this system could, therefore, experience one of the fastest or slowest processing times of any USCIS application.
- *Limited Access to, and Standardization of, Information for Customers.* Customers filing at CDJ cannot access processing times or the online My Case Status feature for their pending I-601s. Nor is there a standard practice for requesting expedited processing.
- *Discrepancies in Interpretation of the “Extreme Hardship” Standard.* Many applicants must demonstrate that refusal of admission to the United States would result in *extreme hardship* to qualifying family members. Both USCIS and stakeholders agree that these determinations often lack uniformity due to the discretionary nature of the cases and lack of guidance criteria to standardize decisions.

Additionally, the Ombudsman identifies the following factors related to waiver processing that must be considered when seeking solutions to the challenges noted above:

- High numbers of *pro se* (unrepresented by counsel) applicants who, for various reasons, experience procedural challenges in the waiver process.
- Ongoing absence of a modern case management system, as the agency continues developing its Transformation Initiative.
- Constraints on USCIS’ ability to sufficiently staff overseas offices without raising filing fees to cover the comparatively high cost of overseas staff versus domestic staff, and ensure their approval and placement, which is determined by the Department of State (DOS).⁹
- Uncertain future applicant flows due to legislative amendments and changing economic trends.

⁶ Information provided by USCIS to the Ombudsman (Jan. 28, 2010). See also USCIS, “New Pilot I-601 Waiver Adjudication Program Ciudad Juarez, Mexico American Consulate;” <http://www.aila.org/content/default.aspx?bc=26298%7C22200> (accessed June 3, 2010).

⁷ Information provided by USCIS to the Ombudsman (Jan. 28, 2010).

⁸ Information provided by USCIS to the Ombudsman (May 24, 2010).

⁹ Funding of overseas employees is more costly than domestic employees, as it entails not only salary costs but also housing allowances, security costs, and other related living expenses. USCIS must also obtain approval from DOS for each overseas employee working in an embassy or consulate, and submit fees to external bodies that govern these overseas placements. Information provided by USCIS to the Ombudsman (Aug. 13, 2009). See also International Cooperative Administrative Support Services, <http://www.icass.gov/> (accessed June 3, 2010), and Presidential Directives and Executive Order, NSDD 38 “Staffing at Diplomatic Missions and Their Overseas Constituent Posts;” <http://www.fas.org/irp/offdocs/nsdd38.htm> (accessed June 3, 2010).

The combination of these challenges in the waiver process oftentimes discourages those who may choose to pursue it, and deters others from seeking a waiver at all. Individuals who file a waiver application may encounter information gaps and long wait times at various stages of the process. Conversely, many applicants aware of the steps involved in the waiver application process perceive it as a high risk undertaking and become reluctant to file. The risk is particularly high for those within the United States who voluntarily choose to file for a waiver in order to regularize their status. These foreign nationals, per regulations, are required to leave the United States to file for a waiver, a step that involves a choice between two alternatives that present distinct risks: either embarking upon a complex and often time-consuming legalization process outside of the United States that could lead to a denial, or alternatively remaining in the shadows to stay near family within the United States.¹⁰ In meeting with stakeholders, the Ombudsman noted reluctance among immigration practitioners to advise clients to enter into the waiver process due to the risks involved.

An important aspect of the Ombudsman's mission involves determining priority areas for service improvements, including uniformity and transparency, for all USCIS customers. The anonymity of those who seek waivers for grounds of inadmissibility may be one of the most pressing reasons to enhance the processing of I-601s. Specifically to be considered is the population of inadmissible foreign nationals who remain unidentified within the United States. For those choosing to file for a waiver, USCIS should provide the same efficient services it strives to offer all customers. Strengthening the processing of these waivers — with uniformity and transparency built into the system — could be a critical tool in providing confidence for more individuals to step forward.

Currently, I-601s are one of the few means of relief available to many individuals who wish to enter or remain in the United States but cannot due to one or more grounds of inadmissibility. Until legislation establishes new ways of regularizing status, waivers remain an avenue of last resort: despite their shortcomings, they are often utilized for lack of any alternative.

Ombudsman Recommendations

Taking into consideration the many structural constraints in place, the Ombudsman identifies several ways to improve the inadmissibility waiver process.

The Ombudsman recommends that USCIS:

- 1. Centralize processing of all Forms I-601 to deliver faster and more standardized adjudication;**
- 2. Provide for concurrent filing of Form I-601 and Form I-130 (Petition for Alien Relative);**
- 3. Prioritize the finalization of its overseas case management system (currently in development) to provide for accurate statistical reporting of Forms I-601, allowing for: (1) posted processing times, and (2) tracking via the My Case Status feature on the USCIS website;**
- 4. Publish clear filing instructions to guide customers in need of expedited Form I-601 processing;**
- 5. Improve coordination between DOS consular officers and USCIS adjudicators who work with Forms I-601 at CDJ; and**
- 6. Amend CDJ's office policy to allow USCIS employees to request digitized Alien Files (A-files) upon receipt of interview schedules.**

¹⁰ See generally INA § 245(a).

Background

Methodology

For this review, the Ombudsman visited government facilities that manage and oversee various aspects of inadmissibility waiver processing at the USCIS Ciudad Juarez Field Office (CDJ), primarily CDJ itself and the International Adjudications Support Branch in Anaheim, California.

Additionally, the Ombudsman met with national and community-based organizations that file a high volume of waivers of inadmissibility. In August 2009, the Ombudsman held a public teleconference, entitled “I-601 Inadmissibility Waivers – How Are They Working For You?” in conjunction with the Community Call-In Teleconference Series.¹¹ The Ombudsman also reviewed case problems and inquiries submitted by individuals.

Legal and Procedural Framework

Section 212 of the INA identifies the various grounds of inadmissibility, including those that may not be waived (See Table A).

Table A - General Categories of Grounds of Inadmissibility

**Not all listed here may be waived*

- Health (communicable disease, drug abuse, failure to obtain required vaccinations, physical / mental disorder, etc.)
- Criminal (convicted of, or admitting to, crimes involving moral turpitude, controlled substance, prostitution, trafficking, etc.)
- Immigration (misrepresentation of material facts in order to obtain an immigration benefit, reentry after deportation, student visa abuse, unlawful presence, etc.)
- Security (terrorist activity, membership in a totalitarian party, participation in persecution or torture, etc.)
- Miscellaneous (polygamy, likelihood of becoming a public charge, draft evasion, etc.)

If an individual seeks to remedy a ground for inadmissibility, the individual must request a waiver by filing Form I-601 (Application for Waiver of Ground of Inadmissibility), at a filing location dictated by their immigration status.¹²

¹¹ See http://www.dhs.gov/xabout/structure/gc_1171038701035.shtm (accessed June 3, 2010).

¹² Individuals who are approved VAWA self-petitioners or T nonimmigrants seeking adjustment of status must file at the Vermont Service Center; individuals in the United States concurrently submitting Form I-485 (Application to Register Permanent Residence or Adjust Status) must file at the location specified on the Form I-485 instructions; individuals with a pending Form I-485 must file with the appropriate USCIS Lockbox facility; individuals in removal proceedings must file with the appropriate Executive Office for Immigration Review office; and, Temporary Protected Status applicants must file at the location specified in the published Federal Register notice for the appropriate country’s Temporary Protected Status designation. See generally USCIS, “Instructions for I-601, Application for Waiver of Grounds of Inadmissibility;” www.uscis.gov (accessed June 3, 2010).

Two groups of foreign nationals are generally required to file outside the United States:¹³

- Individuals already outside the United States; and
- Individuals within the United States who do not qualify for adjustment of status (most commonly, foreign nationals who did not participate in an inspection and were not admitted or paroled into the United States).

Individuals that may file an I-601 include:¹⁴

- Applicants for immigrant visas;
- Applicants for adjustment of status; and
- Certain nonimmigrant classifications (K-1/K-2 visa applicants, K-3/K-4/V visa applicants, Temporary Protected Status applicants, Nicaraguan Adjustment and Central American Relief Act applicants, Haitian Refugee Immigrant Fairness Act applicants, Violence Against Women Act self-petitioners, and certain T visa status holders).

Applicants submitting an I-601 at CDJ are instructed to include supporting documentation that may include, but is not limited to:

- Evidence of *extreme hardship* to qualifying relatives (See Table E - Extreme Hardship Criteria);
- Medical records;
- Police, criminal, and/or court records from any country in which the applicant has resided; and
- Evidence of rehabilitation, if seeking a waiver for a ground of inadmissibility for substance abuse, or a related reason.

Certain individuals may be required to submit Form I-212 (Application for Permission to Reapply for Admission into the United States After Deportation or Removal), if they were previously excluded, deported, or removed from the United States.

¹³ Certain individuals who entered the country as a spouse or fiancé(e) of a U.S. citizen may not qualify for adjustment of status. INA § 245(d). See also 8 C.F.R. § 212.7 (b)(2)(i); INA § 245(a); USCIS, “Instructions for I-601, Application for Waiver of Grounds of Inadmissibility;” www.uscis.gov (accessed June 3, 2010).

¹⁴ See generally INA § 212. See also USCIS, “Instructions for I-601, Application for Waiver of Grounds of Inadmissibility;” www.uscis.gov (accessed June 3, 2010).

Volume of Inadmissibility Waiver Filings

Legislative changes and USCIS processing trends have caused fluctuations in waiver filing volume (See Tables B & C).

Table B - Major Legislative Factors that Affect Form I-601 Volume	
Lack of, or difficulty in obtaining, other forms of relief for foreign nationals in violation of INA § 212	<p>INA § 245(i) provided for certain individuals who unlawfully entered the United States, or failed to maintain lawful status while in the United States, to apply for adjustment of status upon payment of a \$1000 fine.</p> <p>Since the April 30, 2001 sunset date for this provision, each year the number of foreign nationals who qualify decreases,¹⁵ while the number of foreign nationals who must, instead, leave the United States to file a waiver of inadmissibility in order to obtain legal status increases.</p>
	<p>Suspension of deportation was a form of relief that allowed many individuals with grounds of inadmissibility to remain in the United States and obtain a green card.</p> <p>In 1996, it was replaced by cancellation of removal,¹⁶ which is more difficult to obtain for several reasons. Notably, it increased the length of physical presence in the United States required to apply and it restricted the impact of the <i>extreme or unusual hardship</i> standard to relatives (i.e., only the hardship the individual's exclusion would impose on family members is relevant, not the hardship experienced by the excluded person him/herself).¹⁷</p>
New grounds of inadmissibility and immigration bars added to INA § 212	<p>In 1996, Congress established more than ten new grounds of inadmissibility and introduced several immigration bars, many of which require a waiver if an individual seeks to enter the United States.¹⁸</p>
Possible New Legislation	<p>Immigration legislation could alter current method of curing grounds of inadmissibility.</p>

¹⁵ “As a result of this sunset provision [April 30, 2001], USCIS has seen a steady decline in these revenues over the last several years (\$66 million in FY 2001; \$37 million in FY 2003; and \$21 million in FY 2006) and projects that an insignificant amount of penalty fees will be collected by the time the proposed fee structure is in place given the finite and declining number of people affected by this legislation.” See “Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, Proposed Rule,” 72 Fed. Reg. 4888, 4897 (Feb. 1, 2007).

¹⁶ Former INA § 244.

¹⁷ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 (Sept. 20, 1996).

¹⁸ *Id.*

Table C - Major Trends and Procedural Factors that Affect Form I-601 Volume	
USCIS Adjudication Trends and Priorities	<p>USCIS adjudicates applications and petitions resulting in approval that allows many immigrants to file Form I-130 (Petition for Alien Relative) for family members. For example, USCIS projected that the agency’s prioritization of naturalization and adjustment of status applications would bring about an upswing of individuals who would be able to file I-130s for family members abroad.¹⁹ As I-130s are correlated to I-601s, increases in the number of I-130s filed may lead to increases in waiver filings.</p> <p>Historically, USCIS has adjudicated these different applications and petitions in waves, depending on circumstances, such as low receipting periods or surges.</p>
Department of State Visa Issuance	<p>The Department of State is responsible for issuing visas. Since many I-601s are submitted in conjunction with immigrant visas,²⁰ fluctuations in visa issuance can often lead to fluctuations in I-601 filings.</p>

USCIS asserts that the instability in many of these factors presents difficulties in accurately predicting filing volume trends, thereby creating challenges in forecasting and allocating appropriate resources.²¹

The USCIS Ciudad Juarez Field Office

In the past several years, CDJ has become a major processing site of inadmissibility waiver applications, receiving the majority of I-601s filed with USCIS (See Table D).²² This may be attributed to a combination of factors noted in Tables B and C (above) and to other characteristics specific to CDJ, including the I-601 Waiver Adjudication program, which allows many individuals to quickly enter the United States upon approval of a waiver and issuance of a visa, due to CDJ’s proximity to the border. Other characteristics specific to CDJ include its high rate of unlawful presence cases, which comprise the basis of roughly 90 percent of all waivers,²³ and its large population of *pro se* (unrepresented by counsel) applicants, who comprise approximately 81 percent of all waiver filers.²⁴

¹⁹ Information provided by USCIS to the Ombudsman (Aug. 13, 2009).

²⁰ Information provided by USCIS to the Ombudsman (Sept. 10, 2009).

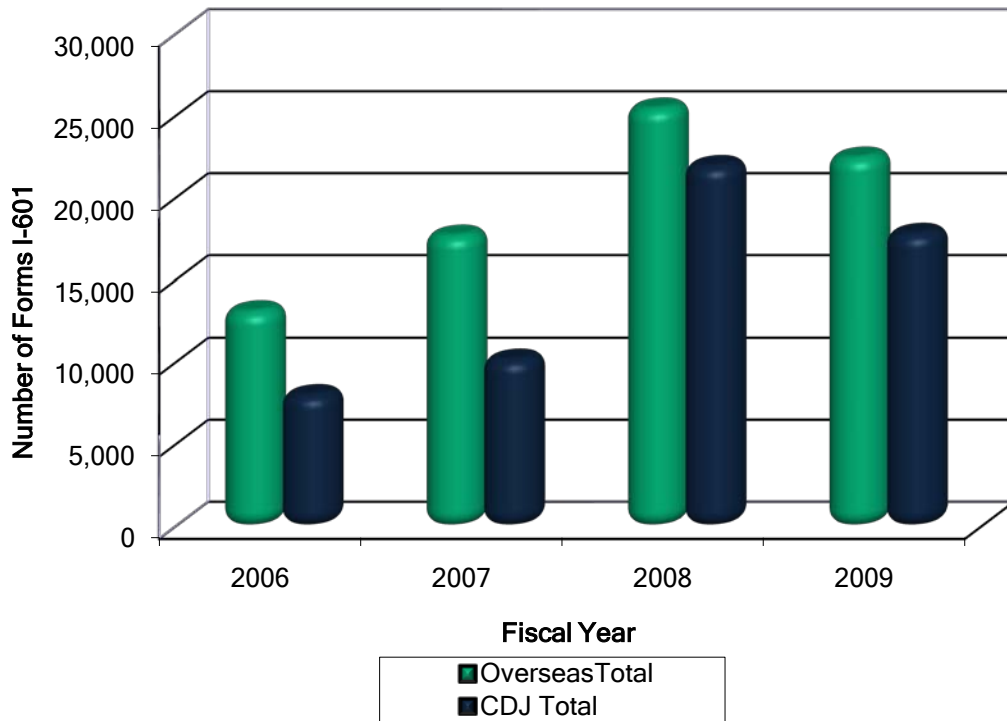
²¹ Information provided by USCIS to the Ombudsman (Mar. 5, 2010).

²² USCIS does not track domestic I-601s discretely; rather, it aggregates them with other forms into the categories of “non-criminal” and “criminal.” The non-criminal category includes Form I-191 (Application for Advance Permission to Return to Unrelinquished Domicile), certain types of Form I-192 (Application for Advance Permission to Enter as a Non-Immigrant), Form I-601 (Application for Waiver of Ground of Inadmissibility), Form I-602 (Application By Refugee For Waiver of Grounds of Excludability), and Form I-612 (Application for Waiver of the Foreign Residence Requirement (under Section 212(e) of the Immigration and Nationality Act, as Amended). The criminal category includes Form I-212 (Application for Permission to Reapply for Admission into the United States After Deportation or Removal), Form I-601 (Application for Waiver of Ground of Inadmissibility), and Form I-602 (Application by Refugee for Waiver of Grounds of Excludability). Information provided by USCIS to the Ombudsman (Sept. 10, 2009), (Jan. 28, 2010), (Mar. 5, 2010), (Mar. 10, 2010).

²³ Information provided by USCIS to the Ombudsman (Sept. 10, 2009).

²⁴ Information provided by USCIS to the Ombudsman (Jan. 28, 2010).

Table D - Form I-601 (Overseas) Receipt Volume FY 2006-2009



I-601 Waiver Adjudication Program

In March 2007, CDJ, in conjunction with DOS, initiated the I-601 Waiver Adjudication Program pilot to eliminate a backlog of approximately 8,000 cases by streamlining the adjudication of many I-601s.²⁵

This program is often referred to as the “same-day adjudication program.” While waivers are not typically processed the same day, cases are routinely reviewed the day after filing; thereafter, it may take between four days and two weeks for a foreign national to be notified of a decision.²⁶ Under this system, approximately 50 percent of all waivers processed at CDJ are approved within several days, while the other 50 percent are referred for further review, which are typically processed in 10-12 months.

The Waiver Adjudication Program relies on a close working relationship between DOS and USCIS, each of which plays an integral role in processing waiver applications.

²⁵ *Id.*

²⁶ Information provided by USCIS to the Ombudsman (May 24, 2010).

DOS Role

In order to issue a visa, DOS must first determine that a foreign national is admissible based on the visa application, internal security checks, and consular interview.²⁷ If found inadmissible pursuant to INA section 212, an applicant wishing to pursue a visa must make an appointment to return to the consulate, file Form I-601, and pay the corresponding \$545 fee with DOS, which then forwards the I-601 and any supporting documents to USCIS.

USCIS Role

After DOS finds a foreign national inadmissible, USCIS reviews the file to verify that the applicant is inadmissible and, if so, to determine whether there are additional grounds of inadmissibility beyond what DOS indicates. If there are additional grounds, USCIS then determines whether they may be waived.²⁸ At CDJ, an adjudicator may then *reject*, *approve*, or *refer* an application. Only under rare circumstances will CDJ *deny* an application; denials are primarily issued after referral.²⁹

- **Reject.** When reviewing a file, USCIS first determines whether the charged inadmissibility ground applies and identifies all inadmissibility grounds not previously identified by DOS. If additional inadmissibility grounds apply, the applicant is notified and afforded 45 days to submit a revised I-601 without additional cost.³⁰
- **Approve.** If there are no other grounds of inadmissibility, adjudicators make a determination whether to grant the waiver requested. If all requirements are met to establish eligibility for a waiver of the relevant ground(s) of inadmissibility, USCIS *approves* the I-601 and returns the file to DOS for visa issuance. After the visa is issued, the applicant may present himself or herself at a port-of-entry for admission to the United States.
- **Refer.** If an adjudicator finds that the application requires additional evidence and/or review, then it is *referred* to a different USCIS office for final adjudication. I-601s from CDJ may be referred to a number of USCIS facilities, including: the International Adjudication Support Branch (IASB) in Anaheim, California; another overseas office within the Mexico City District; the Los Angeles or Miami Asylum Offices; or, the El Paso Field Office. Currently, average processing times for referred cases are 10-12 months, during which the individual may not enter the United States.

At CDJ, approximately 100 cases are routinely adjudicated (rejected, approved, or referred, but generally not denied) each day by three, full-time adjudicators dedicated solely to processing I-601s, a system commonly referred to as “triage.”³¹ Each adjudicator processes 30-35 cases per day, which, recognizing that some cases take more time and other cases less time, translates to an average of 10-15 minutes on each case.³² When the I-601 Waiver Adjudication Program first began, officers each received approximately 65 cases a day, allowing for an average of eight minutes of review per case.³³

²⁷ INA § 221(g).

²⁸ See U.S. Department of State Foreign Affairs Manual (FAM), 9 FAM 40.21(A), “Procedural Notes.”

²⁹ USCIS claims that it is uncommon for an adjudicator to deny an application; rather, this only occurs under “extraordinary circumstances” or if adjudication of a referred waiver is specifically requested and a denial is issued. Information provided by USCIS to the Ombudsman (Jan. 28, 2010).

³⁰ “USCIS Immigrant Waivers – Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers,” (Apr. 28, 2009); http://www.uscis.gov/files/article/i601_immigrant_waivers_8jun09.pdf (accessed on June 3, 2010), p. 12.

³¹ Information provided by USCIS to the Ombudsman (Sept. 10, 2009).

³² *Id.*

³³ Information provided by USCIS to the Ombudsman (Aug. 13, 2009).

During the development of this assessment, the Ombudsman proposed to USCIS that upon referral, case-specific Requests for Evidence (RFE) be issued to customers. CDJ recently implemented this feature.

Upon referral of Form I-601 from CDJ, USCIS issues individuals a standard letter, which serves as both an RFE and notice of referral. Prior to the Ombudsman's proposal that RFEs be case-specific, the standard letter provided a checklist of three broad reasons for referral, one or all of which could be selected by an adjudicator, including:

- Lack of sufficient "extreme hardship" evidence.
- Additional databases and/or records to review before making a decision.
- Other: _____.

Unless an adjudicator specifically indicated in the "other" section what information was needed to make a final adjudication, customers were generally unsure of what supplemental evidence to submit. Therefore, customers often submitted supplemental evidence that was either duplicative or irrelevant.

Letters now provide customers with general information regarding *extreme hardship* criteria and more specific information regarding what materials to submit:

- You have not explained why your qualifying family member would experience any hardship.
- You submitted a letter stating that your qualifying family member would experience hardship, but you did not provide any documentary evidence to support the statements in your letter. Please see evidence as described above.
- You stated that your qualifying family member has a medical condition. Please provide medical records of that condition.
- Other: _____.

Letters now also have a section for criminal cases:

- Our records indicate that you have a criminal record. Please provide the following information with respect to that record:_____.

Referrals to the USCIS International Adjudications Support Branch

The USCIS IASB began receiving referred cases from CDJ in April 2008.³⁴ The IASB processes cases according to USCIS' first-in, first-out adjudication policy, in order of receipt. Actual adjudication times vary depending on the complexity of a case, though delays may occur due to the finding of additional grounds of inadmissibility, fingerprint check expiration, or, in rare cases, requests for additional interviews with DOS.³⁵

The IASB employs nine adjudicators and two support staff who process referred I-601s from CDJ.³⁶ IASB officials review and base their decisions on additional materials, including A-files and supplemental evidence provided by the applicant.³⁷ However, the IASB does not generally request specific evidence from the applicant.³⁸ As a quality assurance

³⁴ Information provided by USCIS to the Ombudsman (Jan. 28, 2010).

³⁵ *Id.*

³⁶ Information provided by USCIS to the Ombudsman (Aug. 18, 2009).

³⁷ An alien file or A-file is, "the record that contains copies of information regarding all transactions involving an individual as he/she passes through the U.S. immigration and inspection process." See USCIS, "System Notice for Alien File/Central Index System (A-file/CIS) DHS-USCIS 001;" <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=fca9c253d8f3f010VgnVCM1000000ecd190aRCRD&vgnnextchannel=c54f0ccc1793f010VgnVCM1000000ecd190aRCRD> (accessed June 3, 2010).

³⁸ Information provided by USCIS to the Ombudsman (Aug. 18, 2009).

measure, the Branch Chief reviews a sampling of adjudicated cases. The Branch Chief may also forward cases presenting difficult legal questions to the Quality Assurance Training and Communication Branch, which coordinates with the Office of Chief Counsel for specialized legal counsel and review.³⁹

Production Goals

In FY 2010, USCIS anticipates continued use of assistance from various asylum office detailees and the El Paso Field Office to adjudicate CDJ referrals. The agency may also use other domestic resources as the year progresses. It expects the additional resources to facilitate both elimination of the backlog of waivers pending at the IASB and reduction in processing times of referred cases to six months or less.⁴⁰

Other USCIS Efforts

USCIS has instituted several procedural changes and quality assurance reviews to improve process efficiency of all I-601s, including those filed at domestic offices and overseas offices other than CDJ.

Revised I-601. On October 21, 2009, USCIS published a revised I-601 to allow for easier readability and completion by applicants.⁴¹ The new form provides a checklist of inadmissibility grounds on the form rather than on the form instructions, and also includes a text box where applicants can provide additional information.

Quality Assurance Pilot. In July 2009, USCIS developed the I-601 Quality Assurance Pilot to assist in standardizing adjudication among overseas offices.⁴² Overseas districts (Bangkok, Mexico City, and Rome) randomly select I-601 cases from their field offices for review by district leadership. Districts provide a quality assurance report highlighting review findings, trends, and corrective actions. To further refine the review, USCIS is drafting standard operating procedures and developing a data collection tool, but has not set an implementation date.⁴³

USCIS Immigrant Waiver Standard Operating Procedures. On April 28, 2009, USCIS issued a resource entitled, “Immigrant Waivers – Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers,” to provide additional guidance for those who both process and file I-601s. This resource includes a worksheet that all overseas adjudicators are required to complete for each I-601 adjudicated. The aim is to enhance consistency, quality, and transparency by ensuring that all officers decide cases using a common analytic framework consistent with law and procedures, and to enable meaningful quality assurance review by supervisors. This worksheet is accessible on the USCIS website.⁴⁴

³⁹ The Quality Assurance Training and Communication Branch falls under the International Operations Division. Information provided by USCIS to the Ombudsman (Mar. 5, 2010).

⁴⁰ Although USCIS has no plans to hire additional adjudicators at CDJ, the agency is concerned about lengthy processing times for referred cases, and asserts that current production goals will reduce turnaround times. Information provided by USCIS to the Ombudsman (Jan. 28, 2010).

⁴¹ USCIS Update, “USCIS Revises Form I-601, Application for Waiver” (Oct. 21, 2009); <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=c9151dcf66874210VgnVCM10000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> (accessed June 3, 2010).

⁴² Information provided by USCIS to the Ombudsman (Aug. 13, 2010).

⁴³ Information provided by USCIS to the Ombudsman (Mar. 5, 2010), (May 24, 2010).

⁴⁴ “USCIS Immigrant Waivers – Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers,” (Apr. 28, 2009); http://www.uscis.gov/files/article/i601_immigrant_waivers_8jun09.pdf (accessed on June 3, 2010).

Areas of Concern

Stakeholders shared concerns about two areas that the Ombudsman reviewed but did not find evidence to support. For example, stakeholders shared concerns that consular officers periodically remove paperwork from customer files before forwarding to USCIS for Form I-601 adjudication. As a result, the USCIS adjudicators could be left lacking information needed to make a final decision. The Ombudsman raised this concern with both DOS and USCIS officials at CDJ, monitored the consular officers as they processed cases, and found that paperwork was not removed from customer files. DOS affirms that all materials given to consular officers are included in customer files before forwarding to USCIS, and that paperwork is not removed. In addition, stakeholders expressed concerns that cases are more likely to be referred at the end of the day or end of the week, due to fatigue on the part of adjudicators, who may find it easier to simply defer deciding a case, rather than issue a final decision. The Ombudsman reviewed a random sample of cases received in CDJ and found that there was no correlation among spikes in referrals and days of the week. CDJ does not record adjudication data according to time of day.

However, the Ombudsman has identified several areas of concern in the processing of I-601s filed at CDJ.

- **Disparity of Processing Times between On-Site Adjudicated and Referred Cases.** At CDJ, approximately 50 percent of I-601s are approved within a matter of days, while the other 50 percent, which are referred for further review, currently takes 10-12 months to be fully adjudicated.
- **Limited Access to, and Standardization of, Information for Customers.** While processing times are available for most forms via the “My Case Status” feature (formerly, “Case Status Service Online”) on its website, USCIS does not provide either case status or processing times for I-601s filed at CDJ, due to a lack of an integrated case management system. Customers must rely, instead, on estimated processing times posted in *ad hoc* locations and case status updates through inquiries sent to the CDJ email inquiry box.⁴⁵ Additionally, there is no standard process for applicants to request expedited processing. These factors create a lack of transparency and cause an information gap for customers who seek to monitor their case.

Complaint received by the Ombudsman in September 2009

In October 2008, a customer filed Form I-601 at CDJ. USCIS told her the case would be referred due to “lack of sufficient extreme hardship evidence,” and to expect a decision within ten months. After ten months without any updated information, her husband in the United States input his wife’s receipt number into USCIS’ Case Status Service Online; the number was listed as invalid. The husband contacted the USCIS National Customer Service Center toll-free line, where he was informed that the case could not be accessed. He was instructed to contact a USCIS adjudicator who suggested that he contact either the Department of State main number or email CDJ’s customer email box. He left a message on an automated answering machine with the Department of State; his call was never returned. He then emailed CDJ and received a response that the case was still pending and within the normal processing time of 13-15 months.

⁴⁵ For cases filed at CDJ, inquiries may be made by email to mexico.uscis@dhs.gov.

- **Discrepancies in Interpretation of the *Extreme Hardship* Standard.** For many grounds of inadmissibility, approval of an I-601 requires evidence that refusal of admission to the United States would result in *extreme hardship* to the applicant’s qualifying relative(s).⁴⁶ Qualifying relatives vary depending on the ground of inadmissibility.⁴⁷ Regulations do not define *extreme hardship* criteria; rather, adjudicators and filers must refer to other authorities, including precedent decisions and USCIS guidance (See Table E).⁴⁸

Table E ⁴⁹ - Extreme Hardship Criteria
<ul style="list-style-type: none"> • Extent of qualifying relative’s family ties outside of the United States • Conditions in the country or countries to which the qualifying relative would relocate • Financial impact of the foreign national’s absence • Health-related issues and, in such cases, access to appropriate medical care in the country or countries to which the qualifying relative would relocate • Relationship between the foreign national and spouse (duration of marriage, number of children together, etc.) • Age of the foreign national upon initial entry into the United States

The discretionary nature of these decisions presents challenges to both USCIS and customers. Adjudicators are tasked with interpreting *extreme hardship* standards for a range of scenarios. USCIS and stakeholders agree that the breadth of possible fact patterns causes consistency issues not only among different offices, but also among adjudicators in the same office.

The Ombudsman finds that this discretion is most challenging to decipher in cases that involve what have been referred to by USCIS as “gray areas.”⁵⁰ The challenges arise for cases involving hardship standards comprising serious issues that, arguably, are not extreme. These matters may include: severe, but not life-threatening, health-related issues; financial strains to the qualifying family members, but not such that the family is left destitute; levels of unrest in the country to which the qualifying family members would have to relocate; and many others.

One immigration practitioner told the Ombudsman that nearly identical cases may, therefore, have different outcomes. As a result, customers find it difficult to determine what materials best support their *extreme hardship* case.

As previously noted, USCIS recently initiated the I-601 Quality Assurance Pilot to improve the standardization of hardship determinations throughout all overseas offices. The Ombudsman will continue to monitor the results of this program and how those results are utilized to provide uniform guidance to both USCIS staff and applicants.

- **Forms I-601 Filed by *Pro Se* Applicants.** *Pro se* applicants comprise the majority of all waiver applicants filing at CDJ. USCIS estimates that these individuals file 81 percent of all waiver applications received at CDJ and nearly 82 percent of these *pro se* CDJ filings are referred.⁵¹ This population may be particularly susceptible to case mishandling and potential fraud by *notarios* or other document preparers who offer discounted rates for assisting in filing I-601s, but who often have limited knowledge of immigration law and are neither trained nor authorized to provide legal

⁴⁶ See generally INA § 212.

⁴⁷ Qualifying relatives may include United States citizen fiancé(es), or United States citizen or lawfully resident spouses, parents, or children. See generally INA § 212.

⁴⁸ See generally *Shoostary v. INS*, 39 F.3d 1049 (9th Cir. 1994); *Palmer v. INS*, 4 F.3d 482 (7th Cir. 1993); *Matter of Kao & Lin*, 23 I&N Dec. 45, 49, n. 3 (BIA 2001). See also “USCIS Immigrant Waivers – Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers,” (Apr. 28, 2009); http://www.uscis.gov/files/article/i601_immigrant_waivers_8jun09.pdf (accessed on June 3, 2010).

⁴⁹ Information provided by USCIS to the Ombudsman (Sept. 10, 2010). See also *Matter of Cervantes*, 22 I&N Dec. 560, 566 (BIA 1999).

⁵⁰ Information provided by USCIS to the Ombudsman (Aug. 13, 2009).

⁵¹ Information provided by USCIS to the Ombudsman (Jan. 28, 2010).

assistance.⁵² Additionally, anecdotal evidence suggests that this population may encounter difficulties in understanding general I-601 filing procedures and criteria reviewed during adjudication.

Recommendations

The Ombudsman makes the following recommendations to improve the efficiency, transparency, and uniformity of processing inadmissibility waivers:

Recommendation 1: Centralize processing of all Forms I-601 to deliver faster and more standardized adjudication.

Currently, waiver adjudications are performed at various overseas and domestic offices, enhancing standardization challenges. Both USCIS and stakeholders note that the discretionary nature of I-601 adjudication lends itself to difficulties with ensuring consistent decision-making within individual offices, let alone throughout the agency. Additionally, processing times vary among overseas offices, and CDJ is the only office that offers on-site, immediate adjudication.⁵³

Under a centralized system, both USCIS and its customers could benefit from resulting efficiencies in processing and standardization of adjudication. This structure would improve efficiency by enabling adjudicators to review cases, rather than spend time on file transfer and re-adjudication, as there would be no more case referrals. Consequently, processing times for all I-601s filed both overseas and domestically would diminish and be more consistent for all applicants, as there would be no site-to-site variances. USCIS also would be able to separate adjudications into categories, such as inadmissibility-type, allowing adjudicators to develop expertise in particular areas. Uniform training and processing in this scenario would promote standardization.

The Ombudsman recognizes that some stakeholders support dispersal of I-601 processing among all USCIS offices. While this approach might reduce processing times, this review suggests that increase in adjudication speed, if any, would be far outweighed by a likely decrease in adjudication consistency.

A model for how centralized processing might work is the U.S. Customs & Border Protection (CBP) Admissibility Review Office (ARO), which reviews nonimmigrant waivers to determine if individuals are eligible to travel to the United States.⁵⁴ CBP officials attest that proximity to other adjudicators familiar with waiver applications, ability to conduct office-wide meetings to discuss changes to waiver processing, and other factors involving collegiality foster efficiency and standardization of adjudication.⁵⁵

⁵² See generally USCIS, “Don’t Be a Victim of Immigration Fraud;” <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=915c9ddf801b3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=915c9ddf801b3210VgnVCM100000b92ca60aRCRD> (accessed May 11, 2010); see also ABA Commission on Immigration, “About Notario Fraud;” <http://new.abanet.org/Immigration/Pages/aboutnotariofraud.aspx> (accessed June 3, 2010); unlike a U.S. notary public, a “notario publico” in Spanish language countries has legal training and is authorized to perform certain functions reserved for lawyers in the United States.

⁵³ USCIS Agenda, “USCIS National Stakeholder Meeting” (Jan. 27, 2009), http://www.uscis.gov/files/nativedocuments/Jan_stakeholder_27Jan09.pdf (accessed June 3, 2010).

⁵⁴ The ARO processes and reviews nonimmigrant waivers pursuant to INA §§ 212(d)(3)(A)(i)-(ii).

⁵⁵ The Ombudsman gathered this information during a visit to the ARO (Mar. 10, 2010).

Recommendation 2: Provide for concurrent filing of Form I-601 and Form I-130 (Petition for Alien Relative).

Filing Form I-130 is the first step that a citizen or lawful permanent resident takes to help a relative immigrate to the United States. Under current regulations, foreign nationals are unable to concurrently file Form I-130 and Form I-601; rather, they must wait until the I-130 is adjudicated, and then file an I-601.⁵⁶ Allowing concurrent filing of these forms may substantially lessen waiting times for many individuals, thus minimizing the hardships they experience upon leaving the United States. While only those applicants already aware of their potential inadmissibility prior to the visa interview would benefit from this option, the opportunity for some enhanced efficiency validates this approach.⁵⁷

USCIS is evaluating concurrent I-130/I-601 filing for cases where applicants have advance awareness of inadmissibility.⁵⁸ If the agency implements concurrent filing, the Ombudsman believes that a centralized waiver processing structure, as discussed in the previous recommendation, would still foster consistency in adjudications and be a positive development. Under this structure, concurrently filed I-601s would be transferred to the centralized location after receipt. Concurrent filing would, thereby, yield processing benefits to USCIS, as well as to customers, as noted above.

Recommendation 3: Prioritize the finalization of its overseas case management system (currently in development) to provide for accurate statistical reporting of Forms I-601, allowing for: (1) posted processing times, and (2) tracking via the My Case Status feature on the USCIS website.

According to USCIS, the lack of a robust case management system for I-601s prevents processing times from being posted and case status from being accessed through the USCIS website. Customers must rely, instead, on estimated processing times posted on the DOS website, immigration blogs, and on case status updates obtained through inquiries to the CDJ email inquiry box. Many applicants who are navigating this process without legal assistance may know how to access the public USCIS forums, but be unaware of other lesser known resources.

USCIS currently uses in-house, case management systems for quantitative reporting of I-601s overseas. These systems cannot, without cumbersome manual work, produce accurate statistical data or case status information that would facilitate real-time information about processing times and case status on the USCIS website.

The USCIS Office of Information Technology currently is developing a new case management system for the International Operations Division. The new system's original deployment date of January 2010 has been delayed and rollout is now tentatively scheduled for summer 2010.⁵⁹ Thereafter, USCIS plans to begin generating updated reports and statistical data and, in subsequent releases, to post data on its website. The Ombudsman is concerned, based on program monitoring since inception, that permanent solutions contemplated by the USCIS Transformation Initiative may not be available for several years.

Recommendation 4: Publish clear filing instructions to guide customers in need of expedited I-601 processing.

Currently, USCIS considers requests for expedited processing of I-601s if, "...the waiver applicant can show that an extreme medical condition or medical emergency exists or if the applicant's military spouse is preparing or has already

⁵⁶ 8 C.F.R. § 212.7(a)(1)(i).

⁵⁷ Some beneficiaries may be unaware they can present a ground of inadmissibility, while even those who know they need to file a waiver request may not know of other grounds for inadmissibility until notified by a consular officer.

⁵⁸ USCIS Questions and Answers, "Refugee, Asylum, International Operations Directorate Quarterly Meeting with AILA" (May 6, 2009); <http://www.uscis.gov/files/nativedocuments/RAIO%20AILA%20questions%20-%2006MAY09.pdf> (accessed June 3, 2010).

⁵⁹ Information provided by USCIS to the Ombudsman (Mar. 5, 2010), (May 24, 2010).

deployed to an overseas post.”⁶⁰ Applicants may request expedited processing during their consular interview or by later mailing a written request to CDJ. However, USCIS does not provide instructions as to what should be submitted in support of the request.

To streamline this process and provide for standardized review of requests for expedited processing, USCIS should provide clearer filing instructions to customers. These instructions could include a checklist of materials and/or information to be provided, or a specific form for submitting the request and supporting materials. Implementation of this recommendation would allow USCIS to better meet its goals of providing for increased transparency and uniformity.

Recommendation 5: Improve coordination between DOS consular officers and USCIS adjudicators who work with Forms I-601 at CDJ.

CDJ should take advantage of its co-location with DOS and schedule periodic meetings between its adjudicators and DOS consular officers to ensure coordinated adjudication procedures. For example, DOS does not request abstracts of judgment or conviction records for crimes not involving moral turpitude;⁶¹ however, USCIS adjudicators often need these records to fully evaluate a case. Communication on such issues would result in all adjudicators having the materials needed to decide a case, thus eliminating many requests for information and potentially reducing the number of cases referred.

Recommendation 6: Amend CDJ’s office policy to allow USCIS employees to request digitized Alien Files (A-files) upon receipt of interview schedules.

Waiver applicants are required to submit their I-601 in-person at an appointment they schedule through the Teletch system.⁶² Once Teletch provides USCIS with a list of interviews scheduled, the agency conducts security checks on prospective interviewees. At this point, USCIS should also request the A-file or, if it is unavailable, request that the A-file be digitized and made accessible to CDJ adjudicators.

At CDJ, many referrals arise from the need to review materials found in an individual’s A-file. This review may be necessary to determine whether the identified inadmissibility is correct, whether there are other inadmissibility grounds, or whether an individual is eligible for the waiver sought. USCIS instructs adjudicators to request an A-file;⁶³ however, CDJ’s office policy is not to request an A-file.⁶⁴ Therefore, if a CDJ adjudicator needs to view an individual’s A-file, the case is likely to be referred.

By adopting a uniform policy of requesting, upon receipt of the daily appointment list, the A-file for every foreign national for whom an A-file exists (or, if unavailable, asking that it be digitized), CDJ could mitigate the number of cases referred due to the need for A-file review. This approach would ensure adjudicators have all information necessary to adjudicate more cases upon initial handling.

⁶⁰ Department of State, “Consulate General of the United States – Ciudad Juarez, Mexico;” <http://ciudadjuarez.usconsulate.gov> (accessed June 3, 2010).

⁶¹ For cases with crimes involving moral turpitude, consular officers are instructed to attach certified copies of the charges forming the basis of a conviction, provisions of law in full on which such charges were predicated, and judgments of the court. *See* 9 FAM 40.21(a), “Procedural Notes 2.3 – Executing Form I-601, Application for Waiver of Grounds of Inadmissibility.”

⁶² USCIS Update, “USCIS Field Office Adopts Teletch Call Appointment System for Filing Waiver of Inadmissibility Applications” (Jan. 3, 2009); <http://www.uscis.gov/files/pressrelease/CiudadJuarez010308.pdf> (accessed June 4, 2010).

⁶³ USCIS Overseas Officer’s Field Manual, “Chapter Six--Immigrant Waivers: Section I, Form I-601, Application for Waiver of Ground of Excludability.”

⁶⁴ Information provided by USCIS to the Ombudsman (Sept. 10, 2009).

USCIS asserts that CDJ's policy for not requesting an A-file arose because review of additional information would slow its processing of cases and counter its goal of only approving *clearly approvable* cases, as any adjudication requiring review of an A-file is likely not *clearly approvable*. However, the Ombudsman found that adjudicators often know, based on their familiarity with I-601 cases and case files, what information or document is required for review; presumably, if provided access to an A-file, they could locate the document and/or information quickly. The Ombudsman notes that the additional minutes needed to review an A-file for possible same day adjudication of the waiver application is far outweighed by the estimated additional 10-12 months it would take for the customer to receive a final decision on a referral.