CompeteAmerica

The Alliance for a Competitive Workforce

STATEMENT FOR THE RECORD

On: Policy Changes and Processing Delays at U.S. Citizenship and Immigration Services

At: House Committee on the Judiciary, Subcommittee on Immigration and Citizenship

Date: July 16, 2019

The Compete America coalition advocates for ensuring that the United States has the capacity to educate domestic sources of talent, and to obtain and retain the talent necessary for American employers to continue to innovate and create jobs in the United States. Our **coalition members** include higher education associations, industry groups, some of the nation's largest business associations, and employers. Coalition members collaborate to reflect the common interests of universities and colleges, research institutions, and businesses with regard to high-skilled employment-based immigration. For more than 20 years, Compete America has worked with successive administrations and Congress on issues critical to the employment-based immigration system and the global mobility of talent.

Over the last two years, U.S. Citizenship and Immigration Services (hereafter USCIS) has relied on a remarkable increase in the issuance of policy memoranda and guidance announcements to profoundly affect the nation's high-skilled immigration system. When making significant policy changes through sub-regulatory actions, USCIS has been able over the last two years to promptly proceed with the policy prescriptions it at least initially believes it prefers. But this use of sub-regulatory policy memos means that policy changes do not reflect valuable insights that are dispersed among intra-agency and inter-agency experts in government and widely distributed within the regulated community, including employers engaged in academia, research, a wide cross-section of industry, and non-profit activities that regularly hire highly skilled American as well as foreign-born professionals. The memos are also unnecessarily overbroad, and thus engender, by definition, unintended consequences.

Moreover, with regard at least to the H-1B classification, the agency has chosen to use case-by-case adjudications to formulate new standards for eligibility, without changes in regulatory (or statutory) text. Thus, while the GAO has reported that about 59,000 different employers[1] have petitions approved annually for H-1B status, none of these organizations had input or visibility regarding changes in policy that directly impact their ability to hire and retain H-1B professionals.

Most fundamentally for the regulated community focused on the high-skilled immigration system, the policy changes over the last two years feature a lack of clarity regarding the problem the agency is trying to solve and the implementation specifics for the agency's suggested solution, bringing about rampant inconsistency and dramatic increases in backlogs and processing delays. Good government requires more.

[1] See GAO, H-1B Visa Program (GAO 11-26, January 2011) at Figure 5, page 15.

INCREASING DELAYS IN HIGH-SKILLED IMMIGRATION PROCESSING AT USCIS

USCIS is experiencing backlogs in its adjudication services. This is true across all of the agency's areas of adjudication, to include naturalization; petitions for fiancées, spouses of U.S. citizens, and other family members; asylum; requests for travel documents, employment authorization documents, or permanent resident cards including production of such documents the applicant is entitled by law incident to status; and applications and petitions for employment-based immigration benefits. These backlogs have been documented in a **Policy Brief on USCIS Processing Delays from the American Immigration Lawyers Association** and elsewhere, including multiple, bipartisan letters from the House and the Senate in the 116th Congress.[2]

The Society for Human Resource Management (SHRM) recently conducted a survey of its membership regarding a variety of workplace issues and **SHRM's 2019 State of the Workplace** report reveals that the top challenge organizations face when hiring foreign talent are lengthy processing times and unpredictability of the visa process.[3] While we welcome the Service's reinstatement of premium processing for cap-subject H-1B petitions, reliance on a costly add-on service such as premium processing is not an adequate solution when the adjudication process is fundamentally broken.

The lengthening of the timelines for adjudications has certainly been felt by employers in the employment-based immigration system. For example, one employer noted the following concerning striking changes regarding adjudication timelines for cap-subject H-1B petitions:

Timeliness of cap-subject H-1B adjudications			
		Adjudication completed within 60 days of filing petition (by 6/1)	Adjudication completed after start of FY (after 10/1), more than 6 months after filing
FY16	Percentage of cap-subject petitions filed April 2015, selected in lottery and adjudicated by 6/1 or after 10/1	84%	5%
FY19	Percentage of cap-subject petitions filed April 2018, selected in lottery and adjudicated by 6/1 or after 10/1	53%	29%

Another employer reported that with regard to FY19 cap-subject H-1B petitions (those petitions filed the first week of April 2018), not only were cases not being completed during the 6 months preceding the start of the fiscal year but decisions were still being received the week of July 8, 2019 (the last quarter of the fiscal year and 15 months after filing).

USCIS failure to complete H-1B adjudications by the start of the fiscal year is particularly problematic for companies engaging in robust on-campus recruiting efforts across the nation's universities, leading to the hiring of American graduates beginning their careers as well as foreign-born young professionals earning degrees in the United States. That's because F-1 nonimmigrants graduating from U.S. colleges and universities often have gap in their status and work authorization when H-1B numerical caps mandate a delayed start date for their change of status to H-1B. This so-called "cap-gap"

---

[2] For example, USCIS backlogs have been the subject of a **May 2019 bipartisan letter on USCIS delays from 38 Senators**, a **March 2019 letter from a bipartisan group of House Members from the Texas delegation**, a **May 2019 letter to GAO from 82 Members of the House** asking for an independent investigation of USCIS processing delays, and a **February 2019 letter from 86 House Members to USCIS** asking for information about the agency's backlogs.

[3] See p. 11 of SHRM's 2019 report. When asked to identify the top three challenges when hiring foreign-born talent, 66% of organizations identified lengthy delays as one of the top three challenges, 60% identified complex application paperwork, and 55% identified unpredictability.

occurs in any year when the H-1B numerical cap is met so early in a fiscal year that the employer cannot file for a change of status effective until the start of the next fiscal year or October 1. The cap-gap regulation extends the status and work authorization of an F-1 nonimmigrant caught in a cap-gap between the end of his or her practical training and the October 1 start date on his or her H-1B petition. 8 CFR 214.2(f)(5)(vi)(A). Whenever USCIS does not complete adjudication of an H-1B petition by October 1 for an F-1 nonimmigrant with cap-gap protection, the individual's employment authorization ends and the individual must stop working until adjudication is completed.

In promulgating the cap-gap relief regulation, DHS anticipated that H-1B petitions would be adjudicated by October 1. Specifically, in describing its cap-gap relief regulation DHS explained that "in light of the importance that DHS places on international students, USCIS prioritizes petitions seeking a change of status from F–1 to H–1B. This prioritization normally results in the timely adjudication of these requests, so the vast majority of F–1 students changing status to H–1B do not experience any gap in status."[4] DHS also reiterated that the "cap-gap provision is based in part on the premise that students who seek to benefit from the provision actually qualify for H–1B status."[5] Lastly, in finalizing the cap-regulation DHS made a commitment to "make every effort to complete adjudications on all petitions seeking H–1B status for Cap-Gap beneficiaries prior to October 1, including by timely issuing RFEs in cases requiring further documentation."[6]

Since the 2016 re-promulgation of the cap-gap regulation, USCIS has seemingly abdicated its commitment to timely adjudication, and not only with respect to change of status requests from F-1 to H-1B. For example, employers report that employment-based applicants for Adjustment of Status are facing extensive delays in getting work authorization (an employment authorization document) and travel authorization (so-called "advance parole"). For many years, these benefits were processed within 3-4 months by the Nebraska Service Center and Texas Service Center of USCIS. In the last year, the National Benefits Center has begun processing these benefits, taking 10-11 months in many cases. In some cases, the Adjustment of Status interview was scheduled prior to the interim benefits being issued. Employers also report that it does not appear USCIS is following a "first in, first out" policy with regard to either advance parole or employment authorization documents. One employer, that has a very high volume of such cases it files and monitors, explained that its internal data showed that USCIS was processing advance parole and employment authorization document requests from the 4th quarter of 2018 before the volume that had been received June to August 2018.

The failure to provide timely adjudications is presently universal in employment-based immigration. One employer explained the following about nonimmigrant visa petition extension adjudications:

Timeliness of nonimmigrant visa (NIV) extension petition adjudications			
		Adjudication completed within 240 days of expiration, before end of work authorization under 8 CFR 274a.12(b)(2)	Adjudication completed within 180 days of filing extension
FY16	NIV extension petition filed prior to expiration of status	100%	90%
FY19	NIV extension petition filed 180* days prior to expiration of status	90%	60%
*Extension petitions cannot be filed more than 6 months before the expiration of status. Employers have moved to filing extensions as early as possible with the timing delays currently plaguing the system. Combining the 180 days before expiration with the 240 days of regulatory work authorization is not always enough with present agency backlogs.			

And, there has been a dramatic outcome shift as well. One employer reported that with regard to all nonimmigrant visa petition categories, its petition denials have increased by 30% comparing FY16 and

[4] 81 Fed. Reg. 13040 at 13101 (March 11, 2016).
[5] Id.
[6] Id.

FY19 adjudications. Another employer explained that across all nonimmigrant visa petition categories its denials were virtually 0% in FY16 and earlier (just a handful each year) but in FY19 are 10%. Reasonably, denials on extension petitions for existing employees filling the same position for which prior approval was granted are unexpected and particularly unmanageable. The positions being filled by nonimmigrants for whom the employer is seeking an extension are not jobs for which the employer is recruiting – they are not unfilled positions, and instead are jobs with ongoing responsibilities being filled by an existing high-performing professional. Yet such denials are a common occurrence in FY19. Employers reported rejection of H-1B visa petition extensions for individuals who had graduated from American universities, worked in the United States for a decade, including 7 years or longer with the same employer, and were the beneficiaries of approved I-140 Immigrant Visa Petitions with that same employer based on a Labor Certification that the U.S. Department of Labor had approved as requiring the individual's degree as a valid minimum requirement for the job. It is mysterious in such cases how the degree and job qualified the individual for an approved Labor Certification and I-140 Immigrant Visa Petition but was insufficient for H-1B extension approval.

Another outcome shift is with the agency's use of Requests for Evidence (RFEs), which has exponentially increased. One employer reported that with regard to all nonimmigrant visa petition categories, its RFEs have increased by 40% comparing adjudications before and the October 2017 policy memo eliminating agency to deference, while a second employer noted a 33% increase. Another employer stated that RFEs increased four-fold between FY16 and currently, when looking at both initial and continuation petitions in all nonimmigrant visa categories. In comparing calendar year 2016 and 2017 with calendar year 2018 and 2019 thus far, one employer stated that RFEs had doubled, across nonimmigrant categories.

The issuance of vastly more RFEs is significant because it drives much longer timelines. This is because the RFEs USCIS currently issues are quite voluminous and require weeks if not months to prepare an effective response. The agency now shows high RFE rate across nonimmigrant petition categories. For example, according to **USCIS data**, the percentage of annually completed H-1B adjudications with RFEs was as low as 12% in 2015 and 2016 and has increased five-fold to 60% in 2019 (there has been a 400% rate of increase in the percentage of completed H-1B adjudications that receive RFEs). This reflects the fact that USCIS has not done a satisfactory job in communicating its current interpretation or changed expectations for documentation. As a result, it may be USCIS is being careless with respect to its obligation to use the public's resources efficiently and effectively. This obligation extends not only to the use and justification of user fees that are represented in the USCIS budget, but also to the private sector's time and resources that USCIS commands through the adjudication process of Requests for Evidence.

The linkage of longer timelines, more RFEs, and more denials are also troublesome when considering the free movement of professional workers in our economy, both American and foreign-born. Where an employer seeks to laterally hire an engineer who happens to be employed in H-1B status with a different employer in the same or a similar job, both employer and employee must think carefully on how to proceed and the current backlogs and agency practices ultimately deter the lateral movement of H-1B workers. While portability of such workers is supposed to be encouraged, and protected by statute (section 214(n) of the INA), such porting becomes risky when the employee and the new employer are faced with the prospect of waiting six months (or longer) and then summarily receiving a denial.

These timing and outcome uncertainties and unusually long delays create real world disruption for U.S. employers for which they cannot plan.

USCIS POLICY CHANGES DRIVE AGENCY DELAYS IN HIGH-SKILLED IMMIGRATION CASES

While there have been no statutory or regulatory changes finalized under the Trump administration that directly govern adjudication standards for high-skilled immigration matters, there have nevertheless been innumerable changes in practices and procedures by USCIS. We believe it is these policy changes by USCIS that have directly propelled the expansion of adjudication timelines in employment-based adjudications and created timing impossibilities for employers. Specifically:

A. As a direct result of the agency's unpredictable position on a qualifying H-1B specialty occupation, employers have had over the previous two years to continue to recalibrate the type of information necessary to submit to USCIS and to increasingly be responsible for responding to RFEs and be subject to processing delays.

B. As a direct result of the agency's elimination of deference to its prior decisions, USCIS takes longer to adjudicate vastly more cases and is more likely to issue an RFE in cases involving an extension of a previously granted benefit including those for employers continuing to employ the same worker in the same occupation, resulting in processing delays.

C. As a direct result of the agency's addition of new obligations to provide contracts with terms not typically addressed in real world agreements and for the agency to conduct interviews when they were (correctly) determined 25 years ago to be unnecessary, cases are subject to more RFEs and processing delays.

A. Changes in H-1B Eligibility without Statutory or Regulatory Change

An agency is free to choose whether to develop policy through rulemaking or adjudication. However, agencies have either no authority or very limited authority to use adjudications to overrule an existing policy already established by regulation.[7] As a matter of fairness and predictability, it is undoubtedly clear that it is highly problematic when administrative agencies utilize adjudications to take positions at least arguably inconsistent with longstanding regulations. This is precisely what employers have faced in the last two years with regard to H-1B adjudications under current regulations governing the H-1B category at 8 CFR 214.2(h)(4)(ii)-(iii).

Congress has limited H-1B visa holders to, principally, those foreign professionals coming to the United States to provide services "in a specialty occupation." In the controlling statute, the Immigration and Nationality Act (INA), Congress delineated the definition of "specialty occupation" as an occupation that requires: (A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.[8]

In implementing these statutory requirements, legacy Immigration and Naturalization Service (hereafter "INS") promulgated regulations to which USCIS is bound today. The regulations INS

---

[7] For a discussion of this complex question, see 1 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise, Sections 6.6, 13.2 (3d ed. 1994) and Richard K. Berg, Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication, 38 Admin. L. Rev. 149, 151 n.21 (1986).

[8] INA Section 214(i)(1) – emphasis added

The term specialty occupation means an occupation that requires–

(A) theoretical and practical application of ***a body*** of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in ***the specific*** specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Section 214(i)(1) of the Immigration and Nationality Act (INA) was added by the Immigration Act of 1990 (IMMACT90).

promulgated in 1991[9] at 8 CFR 214.2(h)(4)(ii)-(iii) to implement the statutory language have never been revised, and do not communicate the new interpretations adopted by the Trump administration.

The current rules essentially establish two principles about an offered job that control whether an employer can successfully petition for H-1B classification for that job to be filled by a foreign-born professional. First, the job offered must be in "an occupation which requires theoretical and practical application of *a body* of highly specialized knowledge."[10] Second, a four-year university degree or graduate or professional degree must be the *"usual, common, or typical"* requirement for the job.[11] Patterns in H-1B adjudications over the last two years suggest other standards are being applied.

We have observed three changes in H-1B adjudication practices under the current administration that seem to permeate most of the increased H-1B adjudication inconsistencies experienced by employers. The agency appears to be acting outside of its own regulations and the controlling statute by requiring petitioners to comply with the agency's current view that:

- a comparatively entry-level job, and corresponding wage level, cannot be in a specialty occupation,
- the specific field of study requirement for a specialty occupation means the job must necessitate completion of a *single* major or qualifying degree, and
- the requirement for an occupation to *usually* carry a degree prerequisite means a degree must *always* be needed.

The agency has the option to evaluate, consistent with the statute, the viability of a new regulatory definition of specialty occupation and we are aware that the Trump administration's Unified Agenda states the intent to engage in a formal rulemaking on this subject. We certainly welcome the opportunity to share our thoughts in any public notice and comment rulemaking in this important area. In the meantime, it remains unclear that the above-listed, three H-1B adjudication practices are appropriate under the statute or regulations.

At a minimum, the revisions to *employer* practices and procedures that are necessary to accommodate the new USCIS approach to H-1B adjudications require the agency to provide significantly more detail about its change in interpretation and policies.

---

[9] Final rule at 8 CFR 214.2(h)(4)(ii)-(iii) published at 56 FR 61111, December 2, 1991 (see p. 61121). Proposed rule published at 56 FR 31553, July 11, 1991 (see p. 31559). The regulations defining specialty occupation have never been revised by either INS or USCIS.

[10] 8 CFR 214.2(h)(4)(ii) – emphasis added
Definitions.
Specialty occupation means an occupation which requires theoretical and practical application of ***a body*** of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in ***a specific*** specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

[11] 8 CFR 214.2(h)(4)(iii) – emphasis added
Criteria for H-1B petitions involving a specialty occupation.
(A) Standards for specialty occupation position. To qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is ***normally*** the minimum requirement for entry into the particular position;
(2) The degree requirement is ***common*** to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
(3) The employer ***normally*** requires a degree or its equivalent for the position; or
(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is ***usually*** associated with the attainment of a baccalaureate or higher degree.

B. Elimination of Deference

Perhaps most notable for the current backlogs and delays facing employers, USCIS adopted a ***New Policy Eliminating Deference***, *effective October 27, 2017.*

Under a policy previously in place,[12] USCIS had deferred to prior nonimmigrant petition approvals issued by the agency when adjudicating extension requests involving the same employer, same employee, and same underlying facts as the initial determination, absent a material change in fact or a legal error by the agency. The new 2017 policy rescinds all such deference.

The new policy seems to fly in the face of the agency's regulations which establish that "supporting evidence [for a petition extension] is not required unless requested by the director."[13] (Emphasis added.) It is facially inconsistent with this regulation to instead adopt a policy that supporting evidence is always required for a petition extension. Without any notice as to the new policy or explanation for the new policy's rationale, it was unanticipated by stakeholders given that it is inconsistent with the black letter agency regulatory text on the books. As a matter of fairness, stakeholders presume that determinations by any government agency are arbitrary and capricious when they are contrary to decisions made on essentially the same facts in a prior agency determination. That is the basis for the long-accepted and well-recognized principle of administrative law that "justice demands that cases with like antecedents should breed like consequences."[14]

The result of the October 2017 policy is that over the last 18 months Compete members report instances of denials being issued on extension requests even where there were no changes in fact and without the agency proving or even suggesting a legal error. Of course, the agency always has the authority to rescind an approval or deny an extension where it finds fraud or a misrepresentation, and did not need to change its deference policy in order to accommodate this inherent authority. The Compete coalition fully respects the need to protect the integrity of the immigration system, and root out abuse. Yet, coalition members have experienced a significant expansion of RFEs on extension petitions involving the same employer, same employee, and no material changes in fact. Eliminating deference to the agency's prior decisions leaves, for example, individuals who are in long green card backlogs and have held valid H-1B status for a decade or longer now subject to ambiguity and, consequently, possible denials, necessitating they depart the country and abandon their quest for lawful permanent resident status. This year, such denials and RFEs have indeed been issued, even with respect to H-1B professionals that have long been employed by the sponsoring H-1B employer, are being sponsored for Lawful Permanent Resident status, and are the beneficiaries of an approved I-140 Immigrant Visa Petition to classify an individual qualified for an employment-based green card.

To ensure consistency and timeliness in decision-making, USCIS should issue guidance returning to the 2004 guidance recognizing agency deference – and simultaneously publish a rule proposing that this guidance be codified as a binding regulation applicable to all USCIS adjudicators – that establishes a regulatory obligation to approve H-1B, L-1A, and L-1B visa petition extensions of stay involving the same employer and same employee except in those instances where (A) there was a material error with

---

[12] Providing deference to prior agency decisions is not a Republican or Democratic issue. It was the George W. Bush administration that adopted a policy granting deference to the agency's prior nonimmigrant petition adjudications. On April 23, 2004, USCIS had issued a policy memorandum titled **"The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity"** (the old memo is available through the Homeland Security Digital Library).

[13] See, e.g., for the H-1B classification, the regulation at 8 CFR 214.2(h)(14).

[14] See, e.g., pronouncements from "the father of administrative law" and legal scholar Professor Kenneth Culp Davis in Davis, "Doctrine of Precedent as Applied to Administrative Decisions," 59 W.Va.L.Rev.111 (1957) and his treatise Davis on Administrative Law (1978).

regard to the previous petition approval; or (B) a substantial change in circumstances has taken place with regard to the employer or the nonimmigrant or his or her work.

In conjunction with a new binding deference policy, a revised Form I-129 Nonimmigrant Visa Petition should be published requiring the petitioning employer to attest under penalty of perjury whether there has been any substantial change in an extension filing. The agency's ability to identify material error regarding a previous case or to discover new material information could be driven by USCIS's ongoing site visits in the Administrative Site Visit and Verification Program (ASVVP) or other existing investigatory tools.

After adopting the new policy eliminating deference, processing times have increased substantially for extensions in I-129 Nonimmigrant Visa Petitions – the only cases entitled to deference. Pinpointing official processing times just for these extension cases is not presently available. Differentiated data on RFE and denial rates are provided by USCIS concerning initial petitions as compared to continuation of employment petitions (but the latter includes change of employer requests, which are very common); however, no breakdown of data solely on extensions filed by the same employer for the same employee is publicly available.

C. Examples of Other Policy Changes Driving Agency Delays

Other policy changes have played a role in creating delays in the employment-based immigration system. For example, USCIS adopted a ***New Third Party Worksite Evidence Policy***, *effective February 22, 2018.* This new policy governs when contracts and itineraries are required for H-1B petitions on behalf of professionals whose work takes them to worksites other than those of their direct employer, even when the employer can document a qualifying employer-employee relationship, including the right of control, without ever providing an itinerary or contracts. The policy memo is written to suggest that certain documents not readily available are nevertheless required and to suggest the new policy applies to all petitioners, and because of this overbreadth has caused difficulty in implementation.

The new policy was presented by USCIS merely as an enforcement tool for a general filing regulation that has long been on the books.[15] However, that regulation was promulgated before the statute creating the current H-1B classification for specialty occupations, does not seem to ever have been intended to regulate H-1B specialty occupation workers that might be changing worksites, and had not been interpreted or enforced since 1995 in the way suggested by the new policy.[16] Indeed, in 1998 the agency proposed rescinding the applicability of the general contracts and itinerary rule to the H-1B category because the agency realized that the contracts and itinerary rule was not an appropriate mandatory requirement for H-1B classification.[17]

As with the changes in deference policy, it is not possible to directly track the impact of the new contracts and itineraries approach with official agency data, but anecdotally and logically the ensuing inconsistency has contributed to delays at least for those employers who have been issued an increasing number RFEs related to this new requirement.

---

[15] The underlying regulation was proposed in late 1988 and finalized in early 1990 (55 Fed. Reg. 2606, January 26, 1990), prior to the enactment of the Immigration Act of 1990 (Pub.L. 101–649, November 29, 1990) that codified the current H-1B category. Before the 1990 amendments, the old H-1 category included all athletes and performers of distinguished ability that do a lot of moving around among worksites – but the 1990 Act moved these individuals to the new O and P visa categories, that have their own contract and itinerary requirements.

[16] See November 13, 1995 and December 29, 1995 memos from INS, available on the InfoNet of the American Immigration Lawyers Association, AILA Doc. Nos. 95111390 and 95122590.

[17] 63 Fed. Reg. 30419 (June 4, 1998).

For a further example of USCIS policy choices driving delays, consider that USCIS issued a ***New Employment-Based Adjustment Interview Policy***, *announced August 28, 2017, effective October 1, 2017*. Based on practices in place since 1992, INS and USCIS had recognized that in-person interviews for employment-based Adjustment of Status applicants are generally, but not always, "unnecessary" pursuant to 8 CFR 245.6 and as explained in the Adjudicators Field Manual.[18] That does not mean that no employment-based adjustment interviews are (or should be) conducted, or that DHS is not actively engaged in assessing when such interviews should indeed occur. For example, some employment-based adjustment cases are presently subject to an in-person interview based on protocols to prevent fraud and abuse and wherever an adjustment applicant has had contact with law enforcement. And, all such cases are subject to a variety of security-related clearances, which of course could be expanded at any time – and should be expanded however needed to best protect national security. But such security clearances do not require a default in-person interview.

Mandating that every employment-based adjustment applicant undergo an in-person interview, which reasonably could be anticipate to directly cause ensuing associated delays, is exactly the type of approach that the agency found "unproductive" and was the basis of the rule change 25 years ago. In publishing the rule in 1992, legacy INS explained that it was necessary to eliminate mandatory interviews "to ease the burden of unproductive interviews on the Service and the public."[19] Specifically, INS stated the following:

> "Although the interview procedure can be a useful tool in obtaining information pertinent to the adjudication of adjustment of status applications, the Service has determined that the probability of gathering such information does not warrant the burdens placed on the Service and the public by requiring an interview in every case. The Service has sufficient information available, including record checks from other agencies, to make the determination whether to waive the required interviews on individual applications."[20]

These findings seem just as valid today. Even after September 11, 2001, the George W. Bush Administration retained confidence that the best way to ensure productive interviews is to review each application on a case-by-case basis to determine whether an interview is needed, in addition to adopting a litany of new security and clearance protocols.

After adopting the new interview requirement, processing times for employment-based I-485 Adjustment of Status cases have jumped by 50%, from an average of about 8 months in FY17 (the new interview requirement went into effect) to average processing time of over 12 months in the first quarter of FY19, with such applications in some locations now taking about 24 months (according to **USCIS data**).

---

[18] The current Policy Manual (replacing the Adjudicators Field Manual with regard to Adjustment of Status) provides that all employment-based adjustment requests should have the adjustment interview *waived* where the immigrant is currently "working for the same petitioner who submitted the approved underlying employment-based immigrant visa petition or is eligible for adjustment portability" – a provision that covers almost all employment-based adjustment applicants. See Policy Manual, Volume 7-Adjustment of Status, Part A-Adjustment of Status Policies and Procedures, Chapter 5-Interview Guidelines (available on the USCIS website).

[19] 57 Fed Reg. 49374 at 49375 (November 2, 1992). Interim Final Rule effective November 2, 1992. In publishing the final rule without change, INS further discussed the elimination of mandatory adjustment interviewing, reflecting on its four years of experience with that approach (61 Fed. Reg. 59825, November 25, 1996). INS explained in the final rule preamble that converting to selective interviewing does not assure any particular applicants that they will not be interviewed and does not limit the government's ability to interview a particular applicant for permanent resident status.

[20] 57 Fed. Reg. 49374 at 49375 (November 2, 1992).

CONCLUSION

Each federal agency, including U.S. Citizenship and Immigration Services, should have limited ability to change the rights and obligations of the regulated community without a thoughtful process. Such a process requires that federal agencies identify the problems they are trying to solve and limit policy changes to those that afford targeted solutions to those problems that can be operationalized and implemented without unintended consequences. There is no reason why high-skilled immigration actions by the agencies should be exempt from this priority.

Yet, in administering the nation's high-skilled immigration laws over the last two years USCIS has ignored the value of this sort of thoughtful process. We are certain that USCIS joins our coalition members in being committed to the importance of protecting the integrity of the immigration system. The need for such integrity includes, but of course is not limited to, preventing fraud and ensuring compliance in the implementation of the nation's high-skilled immigration laws. Pursuing and improving such integrity does not necessitate regularly changing policies, practices, and procedures without detailed and deep consideration of implementation challenges, without evaluation of and fulsome response to public input, and without any agency accountability for the ensuing uncertainty and growing adjudication backlogs.

We hope that bipartisan and bicameral congressional inquiry concerning these matters will result in USCIS being able to recommit itself to the citizenship and immigration services the agency was created under the Homeland Security Act to provide while also taking appropriate steps to protect the integrity our nation's immigration system.