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Laura Dawkins
Chief of Regulatory Coordination Division
USCIS Office of Policy and Strategy
20 Massachusetts Avenue NW
Washington D.C. 20529

Re: Streamlining the Legal Immigration System (Comments to Request for Information, DHS Docket No. USCIS-2014-0014)

Asian Americans Advancing Justice | AAJC (Advancing Justice | AAJC) is a national non-profit, non-partisan organization that works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. We hope to build a more powerful and unified voice for Asian Americans and Pacific Islanders.

Asian Americans are the fastest growing racial group in the U.S., currently making up about six percent of the population. Our community is remarkably diverse in terms of ethnicity, language, educational attainment and income. Notable for the Department of Homeland Security (DHS) is that sixty percent of Asian Americans are foreign born. Our community members come to the United States in various ways – as students, family members, workers, or refugees and asylees. DHS estimates that 1.3 million Asian Americans are undocumented. With so many community members who are directly impacted by immigration policies, we recognize the pressing need for streamlining and modernizing the legal immigrant visa system.

On November 21, 2014, President Obama issued a presidential memorandum on visa modernization that directed an interagency group to recommend areas for improvement in the legal immigration system, including family and employment-based visas. On December 30, 2014, the Department of State (DOS) and the Department of Homeland Security (DHS) put out a Notice of Request for Information in the Federal Register (DHS Docket No. USCIS-2014-0014). This letter is in response to questions in the RFI that pertain to streamlining the legal immigration system. The current legal immigration system is intended to promote family unity and immigration of skilled workers to the United States. However, the system is substantially backlogged. The following ideas are just some ways in which the Administration can modernize the legal immigration system to streamline and improve the processing of certain visas.

I. STREAMLINING THE LEGAL IMMIGRATION SYSTEM

Response to Nos. 1 and 2

1. Standard Section 214(b) Denial Letters Should Provide More Detail as to Reasons for Denial

Most non-immigrants, such as B or F-1 students, who want to travel to the United States are required to establish that they do not have immigrant intent. The statutory grounds for refusal on the basis of immigrant intent is § 214(b). In FY 2013, DOS statistics revealed that over 1.4 million denials were issued on the basis of § 214(b), making up the vast majority of visa denials.¹ Only 1.1 percent of applicants were able to overcome the refusal.² This can be attributed to the fact that a refusal under § 214(b) is a boilerplate denial rather than a detailed letter specifying reasons for denial. Worse, the decision is not subject to administrative or judicial review, due to the doctrine of consular non-reviewability. Attorneys for clients seeking non-immigrant visas frequently try to contact consular officers for further clarification on these vague denials, which impacts the overall efficiency of consular processing. A recommended resolution to this would be to provide as much detail as prudent in the initial § 214(b).

2. Prioritize the Processing of Cases Caught Up In Administrative Processing

When a consular officer cannot make a decision on a case, she or he submits it for “administrative processing.” Specifically, members of the Arab, Middle Eastern, Muslim and South Asian community have reported frequent problems with having their applications re-routed to administrative processing while consular processing for visas abroad. Apparently, persons with “Muslim names” who are applying to come to the United States as either immigrants or non-immigrants are caught up in administrative processing for months, if not years.³ Many individuals have had to resort to litigation to get their cases out of administrative processing or contacted their Congresspersons to resolve the issue, often to no avail. This is highly inefficient, a waste of judicial and Congressional resources and runs counter to the principle of family unity. Advancing Justice | AAJC recommends prioritizing the processing of these cases that have been caught in administrative limbo. Consulates should issue either admissions or denials instead of merely holding cases in abeyance for years without any resolution.

Response to No. 3

Immigrant-Visa Petitions

1. Set a Provisional Priority Date for Various Oversubscribed Preference Categories, and Hold These Cases in Abeyance.

DHS may grant lawful permanent residence to non-citizens who are inspected and admitted, or paroled into the United States, and who make an application for lawful permanent residence. INA § 245(a), 8 U.S.C. § 1255(a). However, INA § 245(a)(3) only allows the filing of the I-485

¹ Department of State, *Table XX Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2013*, Report of the Visa Office 2013, available at <http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXX.pdf>.

² *Id.*

³ Edward Cody, *Travelers with Muslim Names Find Themselves Fighting for U.S. Visas*, WASH. POST (Apr. 1, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/31/AR2010033103613.html?wpisrc=nl_cuzhead.

when a visa is “immediately available” at the time of filing the application. An immigrant visa is “immediately available” if the priority date for the preference category is current according to the Department of State Visa Bulletin issued for the month in which the application for adjustment of status is filed. 8 C.F.R. §§ 245.1(g)(1), 245.2(a)(2)(i)(B). The priority date is fixed on the date when an approved visa petition is filed. 8 C.F.R. § 245.1(g)(2).

The State Department maintains “waiting” lists to determine whether a given quota is current. It does so by matching the supply and demand country-by-country and preference-by-preference as determined by a report from a Consul that a person is “documentarily eligible” and adjustment numbers from the United States Citizenship and Immigration Services (USCIS). This system of priority dates is arbitrary and in need for major reform, given that its gate-keeping function has not served to help families immigrate legally. As a temporary fix, the Administration should set a provisional priority date and allow permanent residence applications to be filed concurrently, or any time after an immigrant visa petition is filed and approved. Visa applications submitted under the provisional priority date can be held in abeyance by the USCIS or the State Department. This has several benefits for applicants:

- Work authorization and travel authorization for all categories;
- Prevents accruing of unlawful presence as applicants residing in the United States would be “Persons Residing Under Color of Law” (PRUCOL) and hence, be lawfully present;
- Ability to freeze the age of a child to preserve the benefits of the Child Status Protection Act; and
- Adjustment portability for employment-based categories.

Such a move would not be unprecedented. During the processing time of a visa application, sometimes the quota recedes and a non-citizen who had a current priority date at the time of filing no longer has a current priority date. Under these circumstances, the adjustment of status cannot be completed until the priority date becomes current. In such cases, USCIS has often permitted the applicant to remain in the United States while holding the immigrant visa application in abeyance. The courts have also upheld the discretionary authority of USCIS to hold cases in abeyance. *Seydi v. U.S. Citizenship & Immigration Servs.*, 779 F. Supp. 2d 714, 719 (E.D. Mich. 2011) (“USCIS had discretion to hold alien's status adjustment application in abeyance”); *Orlov v. Howard*, 523 F. Supp. 2d 30, 35 (D.D.C. 2007) (“Congress clearly intended to leave the pace of processing adjustment applications within the discretion of USCIS, and that the applicable regulations do so as well”); *Zahani v. Neufeld*, 2006 WL 2246211, at *2 (M.D. Fla. June 26, 2006) (stating “it is clear that 8 C.F.R. § 103.2(b)(18) provides USCIS with discretion to withhold adjudication of the adjustment of status application”).

This change might not alleviate the delays in obtaining lawful permanent residence but applicants present in the United States would be free to work and travel while they wait, and it would help to mitigate some of the more unforgiving consequences of the immigration system, such as aging out of eligibility for a green card. The small fix would not require significant resources from the State Department. An additional benefit to this administrative change is that applicants who are currently present in the United States and who could legally immigrate to the United States once their priority dates became current, would no longer be subject to detention and deportation, which would reduce waste and increase efficiency at Immigration and Customs

Enforcement (ICE). Ability to allow for preregistration and hold cases in abeyance would also bring in millions in fee revenue.

If preregistration and holding cases in abeyance is too cumbersome, the Administration can alternatively, allow persons waiting in oversubscribed family and employment visa categories to work legally in the United States while they await adjustment of status. This does not allow as many legal benefits as preregistration, but it would provide work and travel authorization to many individuals who are presently living in the United States.

2. Family Visa Backlog: Grant Parole to Persons Awaiting Visas in Oversubscribed Preference Categories, and Parole-in-Place to Unauthorized Immigrants Who are Eligible for Adjustment of Status

On October 1, 2014, the fiscal year (FY 2015) came around promising visa for many individuals seeking lawful permanent residence through their employment or family members. Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000, and an annual limit of 140,000 for employment based visas.⁴ As in past years, this allotment will not cover many of the family-based and employment-based applicants seeking permanent residence.

Given that the family-sponsored preference limit is capped at 480,000 a year, with 4.3 million applications backlogged, it would take many years to clear the backlog of family petitions. In particular, the family visa backlog is devastating for Asian Americans in the United States. Six of the top ten countries on the family-visa waiting list come from the Asian region: Philippines, India, Pakistan, Bangladesh, China and Vietnam.⁵ Together, these six countries comprise nearly 1.8 million of the more than 4.3 million immigrants waiting to join their families in the United States.⁶ This means that almost one-third of potential immigrants to the United States are waiting in a long line to join Asian American families already living in the United States.

In the absence of Congressional action on the visa backlogs, the Administration can use the parole power to reunite certain family members of United States citizens and lawful permanent residents. The Secretary of Homeland Security has the discretion to parole temporarily into the United States, under such conditions as he or she may prescribe, any non-citizen applying for admission.⁷ The Secretary may exercise this discretion only on a case-by-case basis for “urgent humanitarian reasons” or “significant public benefit.” There is no reason why the current Administration cannot use the discretionary parole power to assist family members who are waiting in the oversubscribed family preference categories with immigrating to the United

⁴ See 8 U.S.C. § 1151.

⁵ Department of State, *Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based Preferences Registered at the National Visa Center as of November 1, 2014*, Report of the Visa Office 2014, available at <http://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingListItem.pdf> (hereinafter “DOS Report”).

⁶ *Id.*

⁷ See 8 U.S.C. § 1182(d)(5) (Supp. IV 1980). The Secretary is constrained to use the parole power only ‘for emergent reasons or for reasons deemed strictly in the public interest.’ *Id.* Legacy INS regulations have authorized the DHS Secretary and the district directors to grant parole at virtually any stage in the exclusion process, from prior to inspection to after a finding of inadmissibility has been made. See 8 C.F.R. § 212.5(a) (1982) (revised 1982).

States. Indeed, the Obama Administration has already used the parole power in four other situations to promote family unity.

In the first instance, parole was used to enable Haitian orphans abroad to join their prospective and adoptive parents in the United States.⁸ In the second instance, the Administration extended parole-in-place (PIP) to the spouse, child, or parent of an individual who is currently a member of the Armed Forces or the Selected Reserve (or who previously served in the Armed Forces or Selected Reserve).⁹ A grant of parole-in-place eliminates two of the bars to adjustment of status normally applicable to those applicants who entered without inspection. First, the parole grant means that the individual is no longer inadmissible under § 212(a)(6)(A)(i) (covering persons who entered without inspection). Second, the grant of parole satisfies the requirement that an adjustment applicant must have been “inspected and admitted or paroled.” More recently and upon the request of the Department of Defense, the Obama Administration also extended the use of PIP to spouses, children and parents of United States citizens and lawful permanent residents seeking to enlist in the Armed Forces.¹⁰

Finally, in late 2014, DHS announced the Haitian Family Reunification Parole Program to expedite family reunification for certain eligible Haitian family members of United States citizens and lawful permanent residents.¹¹ Under the newly-established Haitian Family Reunification Parole program, which starts in 2015, Haitians who are paroled will be allowed to enter the United States and apply for work permits but will not receive permanent resident status until their priority dates become current.¹² This is yet another example of how the Administration is using the parole power to reunite families who are impacted by the visa backlogs. Certainly then, precedent does exist to use parole similarly for nationals of other countries with severely impacted backlogs such as Mexico, China, India and the Philippines.¹³

Beyond using the parole power to reunite a few hundred thousand family members who have been caught up in the visa backlog for years, the Administration should also grant parole-in-place to unauthorized non-citizens in the United States who have not been admitted or paroled, but who are eligible for adjustment of status. By granting PIP, USCIS can eliminate the need for qualified adjustment applicants to obtain a provisional hardship waiver and return home for consular processing, which would reduce both processing times and family separation. This benefit can and should be extended to the cases of minors who entered without inspection, primary caretakers of disabled United States citizen children or spouses, or elderly persons who have resided in the United States for many years—all cases where consular processing abroad is

⁸ 2010 WL 1368925 (D.O.J.).

⁹ See U.S. Citizenship and Immigration Services, Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i), Nov. 15, 2013,

http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf.

¹⁰ Memorandum of Jeh Johnson, Families of Armed Forces and Enlistees, Nov. 20, 2014, http://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf.

¹¹ 91 NO. 41 Interpreter Releases 1925.

¹² *Id.*

¹³ Department of State, Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based preferences Registered at the National Visa Center as of November 1, 2014, *available at* <http://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingListItem.pdf>.

either improbable or would result in hardship for qualifying family members in the United States.

The parole power can also be used in the following circumstances:

- Humanitarian parole for the deported spouses of United States citizens, and parents of United States citizens who are 21 and older provided that these persons can also receive a concurrent waiver of the INA § 212 (9)(A)(ii)(I) inadmissibility bar for prior deportation;
- Humanitarian parole for the partners of lesbian, gay, bisexual and transgender asylees in the United States who are still living in dangerous conditions abroad;
- A renewable humanitarian parole program granted for up to a year to family members of sick, elderly and disabled United States citizens and lawful permanent residents (such as family members of Filipino American World War II veterans);
- Humanitarian parole for relatives of citizens and lawful permanent residents who are residing in regions that are devastated by ongoing armed conflict, or natural disasters; and/or
- Parole for asylum seekers currently in detention who have demonstrated credible fear of persecution.

This list is not meant to be exhaustive. Applications for parole or parole-in-place can be made through the existing Form I-131 “Application for Travel Document” and would also bring much-needed revenue to USCIS.

3. Eliminate Summary Denials

DHS should amend 8 C.F.R. § 103.2(b)(8) to eliminate the practice of summary denials of petitions and applications for immigration benefits without first issuing a request for evidence (RFE) or a notice of intent to deny (NOID). The regulation should require supervisory review of an adjudicator’s decision to issue an RFE or NOID before it is served on the petitioner and/or attorney. Additionally, the 12-week time frame for responding to RFEs and the 30-day fixed time frame for responding to NOIDs should be reinstated.

Non-Immigrants

4. Create New Regulations Granting All H-4 Visa Holders Work Authorization

USCIS has broad authority to grant employment authorization to virtually anyone for any purpose.¹⁴ Proposed changes to regulations would allow H-4 spouses to apply for employment authorization if the H-1B worker is a beneficiary of an approved I-140 immigrant petition or, if the H-1B worker has been granted an extension of stay based upon the American Competitiveness in the Twenty-first Century Act of 2000 (AC21).¹⁵ While this change is

¹⁴ INA 274A(h)(3)(B).

¹⁵ Department of Homeland Security, “DHS Reforms to Attract and Retain Highly Skilled Immigrants,” Jan. 31, 2012, <http://www.dhs.gov/news/2012/01/31/dhs-reforms-attract-and-retain-highly-skilled-immigrants>.

welcome, it is exceedingly narrow and only provides work authorization to a limited number of H-4 visa holders. DHS should consider extending work authorization benefits to all H-4 visa holders. This includes the children of H-1B workers, who often age out of eligibility for a green card due to the significant employment-visa backlog, and are unable to benefit from programs such as Deferred Action for Childhood Arrivals (DACA) due to their lawful status as of June 15, 2012. Doing so would allow the United States to retain high-skilled immigrants, and ensure family unity for many hard-working immigrant families.

5. Extend Work Authorization Automatically Upon the Filing of the I-765, Application for Employment Authorization

With new programs such as DACA and Deferred Action for Parental Authority in the pipelines, applications for employment authorization are taking longer than 90 days to adjudicate. The regulations provide for issuance of an interim Employment Authorization Document (EAD) in such a scenario but USCIS is no longer producing these locally, leading to unnecessary loss of employment and productivity. USCIS should restore the ability to obtain an interim EAD to individuals who may face a lapse in work authorization even with timely filing. Alternatively, employment authorization should be extended automatically upon the receipt of an application to extend employment authorization.

6. Expand the Availability of Premium Processing to More Visa Petitions

Premium Processing Service provides expedited processing for certain employment-based petitions and applications. Specifically, USCIS guarantees 15 calendar days processing to those petitioners or applicants who choose and pay for use of this service. USCIS has designated only certain I-129 and I-140 cases for premium processing. In order to increase the efficiency of services and generate more revenue, the agency should expand premium processing capability to all I-140 and I-130 applications.

Humanitarian Petitions

7. Provide Travel Authorization for U-Visa Non-Immigrants And Designate a Certifying Official In Each LEA

In 2000, Congress created the U-visa to encourage the investigation of crimes committed against immigrants and the prosecution of the individuals who committed those crimes.¹⁶ Per regulation, a U visa holder can apply for a nonimmigrant visa at a consulate overseas and enter the United States as a nonimmigrant. However, a pending application for U status does not provide individuals with ability to travel abroad on advance parole. Even after obtaining a U-visa, an individual who travels abroad loses U-visa status and must get an actual visa before she or he is allowed to return to the United States. In some instances, U-visa holders are also rendered inadmissible due to unlawful presence when they travel abroad. DHS can remedy this issue by providing U non-immigrants with the ability to travel abroad on advance parole.

¹⁶ 8 U.S.C. § 1101(a)(15)(U)(i)(III).

Additionally, in order to receive a U-visa, a law enforcement agency must sign a certification stating that the non-citizen victim “assist[ed] in the investigation or prosecution of qualifying criminal activity...”¹⁷ Currently, law enforcement agencies are under no obligation to issue a certification to a U visa applicant. In many instances, individuals seeking a U-visa due to a qualifying crime are either refused certification by the law enforcement agency or have to do a lot of research to ensure their request for certification ends up in the right hands. In order to alleviate this shortcoming of the U-visa process, we recommend that DHS designate a certifying official in each agency. This would ensure that each law enforcement agency knows about the U visa, and individuals seeking such certification are better able to obtain them.

Response to No. 4

1. Expand the Dual Intent Doctrine to Other Non-Immigrant Categories

Currently, USCIS recognizes the concept of dual intent for H-1B, H-1C, L-1, O, P and V nonimmigrants.¹⁸ USCIS should expand dual intent to other long-term non-immigrants on F, O, TN, P and E visa holders. This would help such non-immigrants remain in authorized status, and travel abroad without having to obtain advance parole while their adjustment applications are pending. It would also assist in family unity with respect to young individuals who are waiting for immigrant visas in oversubscribed preference categories, and want to study in the United States. Additionally, individuals on such visas would be able to maintain non-immigrant status in the event that USCIS denies their adjustment application.

2. Expand the Grace Period to Depart the U.S. for Certain Non-Immigrants

Many non-immigrants on H, L, E, O and other employment-based visas, bring their families to the United States, enroll their children in schools, buy homes, and sign long-term contracts. However, under existing regulations, they are expected to leave the United States within ten days of losing their status.¹⁹ This is entirely insufficient in many cases where such workers have established roots in the United States. USCIS should amend 8 C.F.R. § 214.2. to expand the grace period to ninety days so that non-immigrant workers can conclude their affairs, and depart the United States in a reasonable period of time.

Response to No. 5

1. Temporary Protected Status: Allow Persons with TPS Who Entered Without Inspection Adjustment of Status

A person who entered the United States without having been admitted or paroled normally would not be eligible for adjustment of status absent a waiver or travel on advance parole. However, the Sixth Circuit has recently held that a person granted temporary protected status is in lawful status as a nonimmigrant for purposes of adjustment of status. *Flores v. U.S. Citizenship and*

¹⁷ USCIS Interim Final Rule: New Classification for Victims of Criminal Activity; Eligibility for ‘U’ Nonimmigrant Status, 72 Fed. Reg. 53014 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274(a) and 299).

¹⁸ See 8 C.F.R. § 214(h); 8 C.F.R. § 214.2(o)(13); 8 C.F.R. § 214.2(p)(15).

¹⁹ 8 C.F.R. § 214.2.

Immigration Services, 718 F.3d 548 (6th Cir. 2013). Despite this favorable court decision, individuals with Temporary Protected Status continue to be deemed ineligible to adjust or change status. USCIS should permit these individuals to adjust or change status. Opening this pathway will help thousands of applicants achieve lawful permanent residency without leaving the country, and increase USCIS revenue.

2. Publish Guidance On Whether Applicants for Adjustment of Status Can Serve Out the 3/10 Year Inadmissibility Bars Stateside

USCIS previously issued a memo on “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act.”²⁰ However, it left out any discussion on whether individuals subject to the unlawful presence bars could cure their inadmissibility through time spent both inside and outside the United States. Such guidance is critical since the statute is silent on the question, and many individuals who are applying for the I-601A provisional waiver do not need the waiver if they have cured their inadmissibility while in the United States. Additionally, USCIS should hold these cases in abeyance until further guidance is issued.

3. Hold Adjustment of Status Applications in Abeyance While I-601 Waivers Are Pending

USCIS should allow individuals to file the I-485, Application to Adjust Status, concurrently with the I-601A, Application for Provisional Unlawful Presence Waiver, and hold the I-485 application in abeyance until final resolution. This would allow applicants present in the United States to apply for and obtain work authorization, while their provisional waiver applications are pending. Additionally, USCIS should also allow individuals to appeal denials of the provisional waiver to the Administrative Appeals Office.

4. Create a Rebuttal Presumption of Extreme Hardship Standard for the I-601, Application for Waiver of Grounds of Inadmissibility and I-601A, Application for Provisional Unlawful Presence Waiver

INA §§ 212(a)(9)(B)(i)(I) and (II) render inadmissible individuals who have been unlawfully present in the United States for 180 days or one year, respectively, and then depart. By statute, USCIS can waive these grounds of inadmissibility for certain immediate family relatives of United States citizens and lawful permanent residents if individuals applying for admission or adjustment of status can demonstrate extreme hardship to the qualifying relative. Generally, USCIS has construed the extreme hardship standard narrowly, with the exception of Section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), where legacy INS created a “rebuttable presumption of extreme hardship.”²¹ Under the presumption, all eligible

²⁰ Memorandum from Donald Neufeld, Lori Scialabba, & Pearl Chang, U.S. Citizenship and Immigration Services (USCIS), Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act (May 6, 2009), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.

²¹ See 75 Interpreter Releases 1649 (Dec. 7, 1998).

NACARA applicants were presumed to have established extreme hardship for suspension or cancellation purposes if they submitted a completed application that answered basic questions regarding extreme hardship.

In order to streamline and increase the efficiency of processing the I-601 and I-601A applications, Advancing Justice | AAJC recommends that USCIS issue new guidance or engage in rulemaking to create a rebuttable presumption of extreme hardship for these applications. Doing so should increase the number of eligible individuals applying for waivers, but it would also decrease the amount of time required to process such applications, promote family unity and avoid the significant financial costs that individuals must undertake currently to file such waivers.

5. Allow Travel Outside The U.S. For Certain Non-Immigrants Adjusting Status

Current regulations allow applicants for adjustment of status who have H-1 or L-1 status to travel abroad without advance parole, and re-enter the United States on the H-1 or L-1 visa.²² This benefit should be expanded to adjustment of status applicants with other valid non-immigrant classifications.

Response to No. 6

1. Allow Re-Entry Permits To Be Filed Abroad

8 C.F.R. § 223.2(b)(1) requires reentry permits to be filed while an applicant is in the United States. However, oftentimes, lawful permanent residents have to travel abroad urgently, and have limited time to file the necessary paperwork. The regulations should be amended to allow lawful permanent residents to apply for re-entry permits abroad.

2. Exempt Lawful Permanent Residents From U.S. VISIT

Under the Office of Biometric Identity Management, DOS and Customs and Border Protection (CBP) officers collect biometric information from almost all non-U.S. citizens between the ages of 14 and 79, when they apply for visas or arrive at major ports of entry. Visitors admitted on diplomatic visas, United States and Canadian citizens are not required to be digitally fingerprinted or photographed when they enter the United States. The Secretary of Homeland Security and the Secretary of State can and should jointly exempt lawful permanent residents of the United States from such screenings.

3. Make Changes to Traveler Redress Inquiry Program (TRIP) to Restore Constitutionally Protected Liberty Interests

DHS TRIP makes it easier for travelers to resolve cases of misidentification, such as false-positive matches in which the name of a law-abiding traveler is similar to that of a person who is on the “No Fly List.” However, as a federal judge has noted recently, beyond cases of misidentification, DHS TRIP provides no effective means of redress for unfair or incorrect

²² 8 C.F.R. § 245.2(a)(4)(ii)(C).

designations.²³ Regulations should be developed to make the TRIP system more effective and allow law-abiding travelers to challenge their inclusion in the No Fly list. This would free up agency resources, and allow the DHS to focus on actual threats.

Response to No. 14

Provide Meaningful Right to Counsel

Federal regulations (8 C.F.R. § 292.5(b)) provide for the right of representation by an attorney or accredited Representative, except for primary and secondary inspection cases. Despite this regulation, Immigration Customs and Enforcement and CBP routinely fail to provide meaningful access to counsel when questioning represented individuals, restrict attorney-client communications in detention facilities, and discourage noncitizens from seeking legal counsel. The importance of providing meaningful access to legal representatives in a complex and evolving immigration system cannot be overstated. It also improves the quality and efficiency of immigration decision-making. Additional regulations are necessary to ensure that the right to legal representation applies to all DHS proceedings, including primary and secondary inspection.

II. ENSURING THE USE OF ALL IMMIGRATION VISA NUMBERS

Response to No. 15

We all recognize that for years now the demand for immigrant visas has far outpaced the limited number of visas available. As a consequence, all of the family preference categories are oversubscribed and nationals of some countries face unacceptable waiting times of 20 years or more to be reunited with their loved ones in the United States. As described above, Asian countries make up nearly half of the over 4 million close family members waiting for their visas to become available. Similarly, India and China face the longest wait times for certain employment visa preference categories.

The backlogs and wait times impact the Asian American community at all levels. Simply put, prolonged separation hurts families and, by extension, our entire community. Intact families in the United States are able to integrate more easily and focus on building roots here. Reunited families can provide economic support and stability for each other, including pooling resources to start small businesses or purchase homes or providing childcare so other family members can work, which make the United States more successful overall. Also, citizens and green card holders are less pressured to send remittances or other support abroad because their close family members are with them here. Family members also provide important emotional support as newer Americans establish new lives in our communities. Many family members waiting for visas are unable to receive tourist visas so they cannot visit loved ones in the United States, if they could even afford to travel here. Asian Americans speak about the pain of family members

²³ *Latif v. Holder*, No. 3:10-CV-00750-BR, 2014 WL 2871346 (D. Or. Jun.24, 2014) (finding that the government's process for redressing erroneous placements of airline passengers on the No-Fly List carried high risk of erroneous deprivation of constitutionally-protected liberty interests and lacked any meaningful procedures to afford such passengers opportunity to contest their placement on the list).

missing important life events such as weddings, birthdays and funerals because they are stuck in the backlogs and unable to come to the United States.

We recommend that the administration change how family members are counted for purpose of the visa caps. Current practice counts both the principal visa beneficiaries and their derivatives (i.e., spouses and minor children) against the visa caps. This method of assigning each and every family member a visa has the effect of creating even greater demand for the already limited number of visas available each year. For example, in FY2012, the majority of the visas reserved for the brothers and sisters of United States citizens actually went to the spouses and minor children of those brothers and sisters.

However, this current practice is not required by statute (see e.g., INA § 203(d)) or regulation. Prior to the Immigration Act of 1990 (IMMACT90), INA § 201(a) required the current practice of counting principals and derivatives. But IMMACT90 eliminated language that requires counting both principals and derivatives for purposes of the numerical limits. Further, the current version of INA § 203(d), which relates to treatment of family members contains no language requiring that derivatives be individually counted.

Instead, principals and their derivatives could be counted as a single family unit for purposes of the numerical limitations. For example, using this new counting method, the brother of a United States citizen, his wife, and one daughter would be counted a single family unit requiring only one F4 visa, rather than three F4 visas under the current practice. This change would not constitute an exemption from the existing numerical caps and it would not increase the number of visas issued. It is a reasonable interpretation of the INA and would promote the goals of family reunification and efficiency. This practice could be equally applied to the employment-based visa system which is also heavily backlogged.

Response to No. 16

Flaws in the current legal immigration system have resulted in a situation where not all of the available immigrant visas are used in any given year. To help ease the current backlog, Advancing Justice-AAJC recommends the administration “recapture” unused visas from prior years and issue them to individuals waiting for visas.

DHS and the State Department have an obligation to use all visas allocated by Congress. But due to inefficiencies and delays in the current system, visas have gone unused despite the incredible demand for them. For example, in FY 2006, “over 10,000 employment-based visas were lost, even though USCIS had an estimated 100,000 to 150,000 pending applications for employment-based green cards.”²⁴ Similarly, in 2010, an estimated 241,000 family-based visas and 326,000 employment-based visas were available for recapture.²⁵

²⁴ USCIS Ombudsman Annual Report (2007), available at <http://www.dhs.gov/sites/default/files/publications/2007%20Annual%20Report.pdf>.

²⁵ USCIS Ombudsman Annual Report (2010), available at http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf.

There is precedent for recapturing unused visas. *Silva v. Bell*, 605 F.2d 978 (7th Cir. 1979), dealt with visa recapture when the INS incorrectly charged Cuban refugees against the numerical limits for Western Hemisphere countries. In *Silva*, the federal government agreed with plaintiffs that “relief, in the form of a program to recapture and reissue the wrongfully issued visa numbers, is appropriate.” *Id.* at 985. Similarly, in *Galvez v. Howerton*, a district court ordered DOS to issue visas to individuals and charge them against the previous fiscal year. 503 F. Supp. 35 (C.D. Cal. 1980). In *Galvez*, the court found the United States “may be estopped to deny the availability of visas to those otherwise eligible but for the government’s acts.” *Id.* at 38. Significantly, there is no statutory language prohibiting recapture for family- and employment-based visas. A recapture program would not increase the number of allocated visas because it is simply using visas which Congress already set aside for the preference categories – and which Congress intended to be used but were not.

Currently, there are significant numbers of family members and workers who have approved applications but must wait even longer because our current system does not utilize each of the limited visas available. Looking back to recapture unused visas and issuing them now would provide significant benefit to American families and employers, in addition to the waiting visa beneficiaries. Advancing Justice-AAJC also strongly recommends that recaptured visas be issued to those preference categories for which they were intended.

III. MODERNIZING IT INFRASTRUCTURE

Response to No. 17

USCIS has come a long way since the days of paper-only submissions, but it still has some ways to go with respect to modernizing technology solutions that would serve petitioners and applicants. To that end, we offer the following recommendations:

- DHS and DOS should strive to ensure that all immigrant and non-immigrant applications can be e-filed;
- Build a multilingual website: Ensure that, in the least, form instructions are available in languages other than English, such as Spanish, Tagalog, Mandarin, Vietnamese and Korean;
- Enable users to pay for their applications online via credit card.

Taking the steps above would enhance user-experience, increase the efficiency of the USCIS while also providing more revenue.

Response to No. 18

DHS and DOS should make available the following existing government-collected data and metrics:

- An online calculator that helps determine approximate wait-times for I-130 and I-140 approved beneficiaries;
- Actual processing time for immigrant visa petitions at USCIS service centers and consulates abroad;

- Statistics for actual number of immigrants admitted or adjusting status, per nationality;
- Statistics for actual number of individuals denied admission or adjustment of status, per nationality;
- Statistics for LGBT individuals who are immigrating or adjusting status through marriage post-DOMA;
- Statistics on numbers and country of origin of individuals placed in removal proceedings by the now-rescinded NSEERS program;
- Statistics on lawful permanent residents who are placed in removal proceedings upon re-entry for past convictions.

* * *

Thank you again for the opportunity to review and comment on the RFI. We look forward to working with the DHS and DOS on the changes proposed above. If you need additional information, please contact Erin Oshiro (eoshiro@advancingjustice-aaajc.org) or Prerna Lal (plal@advancingjustice-aaajc.org) or (202) 296-2300.

Sincerely,

Asian Americans Advancing Justice | AAJC

