

## What Does the USCIS Ombudsman Do, And Not Do?

By David North

There is an odd little backwater in the U.S. immigration system: the Ombudsman's Office for U.S. Citizenship and Immigration Services (USCIS), a small office in the Department of Homeland Security (DHS). It is both a relatively tiny, *de facto* appeals system regarding some individual USCIS cases and a persistent in-house lobby, always pressing USCIS to say "Yes!" more often, more distinctly, and more rapidly.

Its newly published annual report<sup>1</sup> seems to indicate that, while it is not doing much for many of the individual cases, it is quite active in pressing its policy positions with USCIS, an agency that already has a strong preference for saying "yes" to every alien and alien-employer in sight.

As a some-time writer of such color-them-grey governmental reports in other agencies at both the federal and state levels, I have a feel for what such documents say and what they do not say. But first, let's step back a minute and look at the context in which the Ombudsman's Office operates.

**Cases Seen by the Ombudsman.** There is a lot of advocacy for specific aliens in the immigration system, most of it privately funded.

Often if aliens, or their employers, do not get what they want from the system they hire lawyers, or use pro-bono lawyers. Sometimes the disgruntled go to their member of Congress for intervention. Then there are the newspapers and TV stations, that can, given the right circumstance — it usually involves a real tear-jerker — do something like saving an illegal-alien valedictorian from deportation.

Another approach, both much less flamboyant and much more rarely used, is for the alien with a grievance to go to the Ombudsman's Office, an entity supported by public funds.

What proportion of USCIS cases wind up in the hands of the Ombudsman's Office? Here are the relevant (rounded, except the last) numbers:

Applications received by USCIS, FY 2011:	5,412,000
Applications not approved in that year:	427,000 <sup>2</sup>
Cases received by Ombudsman, CY 2012:	4,500
Success stories in Ombudsman's annual report:	5

So, USCIS OK'd 92.2 percent of the cases it saw at the staff level. That leaves 7.8 percent not approved. Then all of 1.1 percent of the much smaller group of non-approvals went to the Ombudsman; put another way, that office sees less than 0.1 percent (one tenth of one percent) of the USCIS caseload. It sees a tiny sliver of the non-approved cases in the system, and non-approvals, in turn, are a sliver of the overall caseload.

We are forced to use the awkward term (and the concept) of "non-approved" instead of "denied" because USCIS, as is its wont, published data on receipts of cases and approvals, and we deducted the latter from the former to

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secure the number of non-approvals. All too often USCIS fails to publish denial data. Non-approvals consist of several outcomes, such as denials, requests for evidence, and non-actions of various kinds.

Getting back to the study group of cases seen by the Ombudsman's Office, they appear to be about as good a sample of the mainstream USCIS cases as the sample of the elephant studied by the storied blind man who grasps the animal's tail, and concludes, understandably, that the elephant is a snake.

Needless to say, this kind of cold-eyed statistical analysis is completely missing in the official reports.

**The Office.** The Office was created by Congress and was mandated to "assist individuals and employers in resolving problems [with USCIS] ... to identify areas in which individuals and employers have problems ... to ... propose changes in the administrative practices of [USCIS]".<sup>3</sup>

The Office is not part of USCIS, it is one of 15 entities that report to the DHS Deputy Secretary, and since it is not part of USCIS, which is largely fee-supported, it is funded by taxpayers. (There appear to be no fees associated with appealing one's case to the Ombudsman. This is in contrast with most USCIS transactions, including appeals to its in-house review body, the Administrative Appeals Office, all of which require a fee. These fees are usually measured in the hundreds of dollars.)

The enacted FY 2012 DHS budget shows an appropriation of \$6,200,000 and an full-time-equivalent staff level of 35 for the Ombudsman's Office. The *Annual Report* mentioned 32 staff members. Currently the Office has an acting leader, Debra Rodgers, who was until recently a senior USCIS official supervising decision-making regarding claims for immigration-related benefits.

The statute of creation, cited above, calls for a network of local Ombudsman Offices, including a charge to: "make available at least one such ombudsman for each state." There are no references to any local ombudspople in the *Annual Reports* so one can assume that this is a largely Washington, D.C.-based operation.

Incidentally, the Ombudsman's Office is not to be confused with another over-arching entity, the DHS Inspector-General's (IG) Office. The latter has a different role, and a larger jurisdiction. The Ombudsman deals only with USCIS and focuses on the rights of those seeking benefits from that agency.

The IG's Office deals with all of DHS and worries about a much larger range of issues. The IG plays the role in the department that the Government Accountability Office plays in the U.S. government as a whole.

**Dealing with the Individual Cases.** As noted above, the first task of the Ombudsman's Office is to help individuals and employers with problem cases. Further the statute reads, regarding the annual reports: "Any such report shall contain full and substantial analysis, in addition to statistical information."

With those words in mind one might expect considerable reporting on the Office's work with individual applicants. One would be wrong.

In the 2011 report<sup>4</sup> the "full and substantial analysis" of the caseload consists of this one sentence on page 1:

"During the April 1, 2010, through March 31, 2011, reporting period, the Ombudsman's Office opened 3,247 case inquiries."

That year's report also had five little boxes scattered through the text, each a mini-case study; of the five, three had been resolved to the satisfaction of the alien or employer; the other two were instances of aliens being thwarted or mistreated by the system, with no positive outcomes. As a one-time writer of such documents, I find it odd that in 2011 the agency did not choose to report on five successes in their five cases; maybe such success stories are really rare.

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There was a tiny bit of additional case history reporting in the following year. In addition to describing an intake of “about 4,500 cases” the 2012 report describes three break-outs of its caseload: 1) type: humanitarian, 15 percent, employment, 27 percent, general, 27 percent, and family and children, 31 percent; 2) mode of submission: electronic, 60 percent, fax, 4 percent, and mail 36 percent; and 3) state of filing, ranging from one in each of the Dakotas to 493 in California.<sup>5</sup>

There were also the five case histories, all of which, in 2012, were resolved in favor of the alien’s employer (two cases)<sup>6</sup> or the individual alien (three cases).

While it is interesting to know that some aliens still use fax machines, there is nothing, in either of these reports about what happened to the complaints. How often was the Ombudsman able to resolve these matters? How often were the alleged grievances more alleged than real? In a sense I can feel for the report’s writer on this matter, because the Office is obviously between a rock and a hard place.

Bear in mind that USCIS says “yes” 92.2 percent of the time to aliens and employers. Also bear in mind that the remaining 7.8 percent of the cases must be pretty dreadful to be refused or even delayed by such a generous agency, and bear further in mind that all of the Ombudsman’s cases come from the not-very-attractive 7.8 percent segment.

Here’s the problem for the Ombudsman: If the Office is able to turn around a considerable portion of these often challenging cases, say 20 or 25 percent, then the Office will be flooded with desperate applicants, all attracted by both the possibility of success and the assurance of no fee. If, on the other hand, the Office can resolve only a few, say 5 to 10 percent of the cases to the satisfaction of the alien or the alien’s employer, the agency will look useless.

My suspicion is that the success rate is quite low, given what little we know about the very low reversal rate of staff decisions in another appeals agency, USCIS’s own Administrative Appeals Office (AAO),<sup>7</sup> and the obvious fact that the Ombudsman’s reports say nothing about the agency’s batting averages.

So rather than reporting a low rate of success, which I suspect is the case, the Office looks for five nice little case histories a year, and reports no numbers at all, despite a congressional mandate for a “full and substantial analysis.”

One of the advantages to DHS of *not* reporting any numbers is that it does not put one DHS agency in the position of grading another DHS agency. If the Ombudsman’s Office were to find a large percentage of its cases potentially reversible that could cast a bad light on USCIS.

Before leaving this subject I should say that bureaucracies sometimes make mistakes, especially if you have enough opportunities — and five million chances a year creates a lot of opportunities — and it is useful to have a mechanism such as the Ombudsman’s Office to handle such matters. The Ombudsman’s resolution of one such error, involving a military spouse, is the subject of one of the 2012 case histories.<sup>8</sup>

**Lobbying the Various USCIS Systems.** It is not that the Ombudsman’s staff is not busy, for the most part it is simply doing something other than dealing with individual cases. It is essentially lobbying colleagues in USCIS to be still more responsive, generally, to the requests of aliens and their employers and much of the report deals with that subject.

As background, USCIS deals with an immense range of specific benefits, each tied to a specific form or set of forms, and specific procedures. In order to be effective in-house lobbyists for quicker, more-positive reactions to these applications, it is necessary for the staff to examine procedures in detail, and press for highly specific changes in the system. This can be time consuming and can use up a lot of the agency’s \$6.2 million-dollar-a-year budget.

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It is within this context that the Ombudsman's report shows no sense of priorities. Virtually every recommendation it makes about faster, better-coordinated decision-making systems, (recommendations largely designed to "get to yes" more quickly, but never so described) costs money or staff time. But all of the Ombudsman's recommendations are made at the same level of enthusiasm, as if all the subsets of client groups are equally deserving.

Not only are there potential conflicts for financial resources among the client groups of concern to the Ombudsman there are, in some circumstances, competitions for numerically limited visas as well. There is no recognition of this complication.

In the 2012 report, for example, the Office shows concern about the need to ease, and speed up, migration decision-making processes for:

- Immigrants of Extraordinary Ability (EB-1)
- Young illegal aliens under court supervision (EB-4)<sup>9</sup>
- Immigrant Investors (EB-5)

But to do these things one needs relatively high-level governmental talent like lawyers and regulators, which are in short supply because of tight budgets. Further, all three of these groups are in the employment-based priority cluster and in some circumstances they are in competition with other groups for numerically controlled visas.

While a lot of people would regard aliens of extraordinary ability as more deserving of staff attention and visa slots than a subset of youngsters in the hands of the juvenile courts, the Ombudsman's Office makes no such distinctions, and never mentions the question of priorities *among* would-be immigrants.

Similarly, there are two other large objects in the room (I do not want to overuse those elephants) that relate to the matters addressed by the Ombudsman, but are never mentioned.

If resources are tight within USCIS it can, without waiting for Office of Management and Budget or congressional approval, simply raise the fees it charges to various groups of aliens. In that way it could hire more professionals and ease some of the logjams cited by the Ombudsman. The report does not mention this (admittedly controversial) matter.

And, at a time of extensive unemployment of residents of this country, if an employer upset by the lack of speed of USCIS abandons an effort to bring an alien into an American job, maybe a resident of this nation will get that job. That's a happy by-product of bureaucratic slowness that the Ombudsman does not discuss.

My least favorite of the Ombudsman's many specific recommendations is that if a U.S. employer fails to follow DHS regulations on filing duplicate copies of requests for foreign workers, the government should not delay the process by telling the employer to follow the rules and submit the needed number of copies; what the government should do is make the *extra copies at public expense*, otherwise the bid for a foreign worker might be delayed.<sup>10</sup>

Other proposed changes in practices and procedures designed to "get to yes" sooner and with less trouble for the applicants include faster Employment Authorization Documents for various alien populations, shorter decision times in the Administrative Appeals Office, a more welcoming set of arrangements to grant asylum to unaccompanied minors (who are largely from Central America), better arrangements for aliens whose green card applications relate to other, now dead, aliens, and a smoother system to allow alien spouses in the two-year conditional resident status to get their green cards.

Some of these recommendations make sense — such as speeding up the AAO appeals — but they would be more meaningful if the Ombudsman spelled out what is needed to reach those goals. In this case, higher AAO fees charged to aliens and their employers so that more AAO adjudicators can be hired; it is as simple as that.

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**Lobbying Results.** While I am not very enthusiastic about many of the Ombudsman's efforts to ease every migrant-screening procedure in sight, there is good news. The Office, according to its own report, is not very good at the inter-agency lobbying process.

One of the appendices of the report<sup>11</sup> "lists each prior formal recommendation and its current classification". There are four categories: "implemented", "active", and "declined", which are all self-explanatory, and "closed", which is not.

My sense of "closed" in this context is a listing of a recommendation that cannot be regarded as "implemented" and hence should not be so listed; some may have become moot with the passage of time.

In any case, here is the score for the 53 recommendations made between June 18, 2004, and May 16, 2012:

Implemented:	11
Active:	19
Declined:	7
Closed:	<u>16</u>
Total:	53

To use a baseball analogy, that's a batting average of .207, which is likely to relegate a player to the minors. The average would still be only .216 if the two 2012 recommendations listed as "active" were removed from the calculation.

Many of the implemented recommendations sound both useful and minor-league in nature, such as "modification of fee instructions", "customer service training", "online change of address procedures", and "study and recommendations on Naturalization Oath Ceremonies". Regarding the last named, as I wrote in a long out-of-print report to the Ford Foundation some years ago, "The Long Grey Welcome", our naturalization ceremonies, while appropriately solemn and serious, are pretty drab compared to the livelier ones of Australia and Canada.

**The Report.** While narrow, incomplete, and sometimes misleading, the actual report is an above-average government publication of its kind. (Faint praise to be sure.) The report is readable, there are charts and illustrations, and it is not too long.

Many of the larger photo illustration, all without captions, deal with Ellis-Island-Era immigration, presumably a not-too-subtle reminder that America is a "nation of immigrants", but they *do* break up the text.

Viewed alongside the truly dreary annual report of USCIS itself, which I have compared, unfavorably, to the phone book,<sup>12</sup> this document virtually sparkles.

**The One-Sidedness of It All.** I have no problem with the existence of a small, in-house agency to review problem individual cases among the vast flow of USCIS decisions, but it would seem to be more appropriate if that entity spent just as much time seeking to sort out fraud in applications as it does delays in application processing.

That, however, is neither the design, nor the current approach, of the Ombudsman's Office.

## End Notes

<sup>1</sup> Citizenship and Immigration Services Ombudsman, *Annual Report 2012*, Department of Homeland Security, Washington, D.C., June 25, 2012, <http://www.dhs.gov/xlibrary/assets/cisomb-2012-annualreport.pdf>.

<sup>2</sup> These two numbers are, respectively, copied and calculated from the USCIS document “U.S. Citizen and Immigration Services / Service-wide Receipts and Approvals for All Form Types / Fiscal Year 2011”, November 8, 2011, [http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/AllFormTypes\\_PerformanceData\\_FY11.pdf](http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/AllFormTypes_PerformanceData_FY11.pdf).

<sup>3</sup> *Annual Report 2012, op. cit.*, p. 38.

<sup>4</sup> Citizenship and Immigration Services Ombudsman, *Annual Report 2011*, Department of Homeland Security, Washington, D.C., June 29, 2011, <http://www.dhs.gov/xlibrary/assets/cisomb-annual-report-2011.pdf>.

<sup>5</sup> *Annual Report 2012, op. cit.*, pp. 4 and 5.

<sup>6</sup> One of the employer case histories deals with the medieval agricultural practice of sending shepherds into the mountains with their sheep during the summers, with the workers on duty (if not necessarily awake) 24 hours a day and seven days a week. It is hard to get legal residents to take these jobs at the artificially low wages that the government allows (\$750 a month plus food and make-shift housing in most states, a bit higher in California) so some Western sheep ranchers depend on foreign workers in the H-2A program. There were some hiccups in the process during the reporting period, and one can almost hear the violins as the Ombudsman writes (on pp. 4-5 of *Annual Report 2012*):

“[M]any of the most experienced of the shepherders were given H-2A expiration dates that fell during the critical lambing season, forcing them to depart the United States prior to assisting in the delivery of lambs. Stakeholders reported that without the experienced shepherders to assist in the lambing process a large percentage of the lambs would die.”

Note that the word “lamb” or “lambing” appears *four times* in a passage of 36 words. Not a word, however, about the miserly wages and the miserable working conditions inflicted on these shepherders, to use the industry’s term. For more on how the government preserves this out-of-date agricultural practice, see the CIS blog “Medieval Farm Labor Practice OK’d by USCIS” at <http://www.cis.org/north/medieval-farm-labor-practice-okd-uscis>.

<sup>7</sup> See my recent blog on AAO, “Work-Load Data Revealed for Secretive USCIS Agency”, at <http://www.cis.org/north/work-load-data-revealed-secretive-uscis-agency>.

<sup>8</sup> *Annual Report 2012, op. cit.*, p. 20.

<sup>9</sup> *Ibid.*, p. vii. The report uses the softer term “special immigrant juveniles” to describe this population; they are illegal aliens under the age of 21 who are in the hands of juvenile court systems and who claim that they were abused by their parents, most of whom are also illegal aliens. They are one of several victim populations — this century’s “huddled masses” — that are of concern to the Ombudsman. For more on the juvenile population, see my CIS blog “USCIS Makes It Easier for Aging Juvenile Delinquents to Get Amnesty”, at <http://www.cis.org/North/Juvenile-Delinquents-Amnesty>.

<sup>10</sup> *Ibid.*, pp. 32-33; and, for a blog of mine on the same subject see “USCIS Ombudsman Wants to Help Incompetent Employers Hire Alien Workers”, at <http://www.cis.org/north/ombudsman-wants-help-incompetent-employers-hire-alien-workers>.

<sup>11</sup> *Ibid.*, pp. 40-41.

<sup>12</sup> See “USCIS Annual Report Lacks Editorial Punch of the Phone Book”, at <http://www.cis.org/north/uscis-annual-report-lacks-editorial-punch-phone-book>.