



May 19, 2021

Samantha Deshommes  
Regulatory Coordination Division Chief  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
5900 Capital Gateway Drive  
Camp Springs, MD 20746

**Re: Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input**

Dear Ms. Deshommes,

The Center for Immigration Studies (CIS) submits the following public comment to the U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) in response to the agency’s request for public input on how USCIS “can reduce administrative and other barriers and burdens within its regulations and policies, including those that prevent foreign citizens from easily obtaining access to immigration services and benefits.”<sup>1</sup>

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation’s only think tank devoted exclusively to the research of U.S. immigration policy to inform policymakers and the public about immigration’s far-reaching impact. The Center is animated by a unique **pro-immigrant, low-immigration** vision which seeks fewer immigrants but a warmer welcome for those admitted.

**I. INTRODUCTION**

On February 2, 2021, President Biden issued Executive Order (E.O.) 14012, “Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans”.<sup>2</sup> The E.O. in part, directed relevant federal agencies to “identify barriers that impede access to immigration benefits and fair, efficient adjudications of those benefits.”<sup>3</sup> Notably, this E.O. failed to define “barriers” or “impede access” and the Request for Public Input only references “paperwork requirements, waiting time, and other obstacles” in the context of potential “administrative barriers and burdens”. As a result, this entire initiative creates highly subjective interpretations that will vary widely.

By contrast, the USCIS mission is very clear and precise. As stated on the USCIS website, the agency “administers the nation’s lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.”<sup>4</sup> With this framework guiding

how USCIS should conduct business, the Center offers the following input to the specified questions provided by the agency.

## **II. REQUEST FOR INPUT – QUESTIONS FOR COMMENTERS**

### **A. What are Not Barriers**

#### *1. Numerical Limits*

Congress, through the Immigration and Nationality Act (INA), has established various levels of permanent and temporary legal immigration per fiscal year. Numerical limits or caps are not barriers but are instead the rules under which our legal immigration system operates.

Generally speaking, the INA establishes three avenues for an alien to become an LPR: family based, employment based, and visa lottery.<sup>5</sup> Within the family-based and employment-based avenues, Congress established overall annual limits as well as preference allocations that further subdivide the total annual limits.<sup>6</sup> The third avenue is the visa lottery whereby Congress allocates up to 55,000 visas per year that are randomly distributed to aliens from countries that have low levels of immigration in the United States.<sup>7</sup>

The formula for family-based immigration allows an annual level of 226,000 family-based green cards subject to numerical limitation.<sup>8</sup> Congress allocates those 226,000 visas as follows:<sup>9</sup>

- First preference – Unmarried sons and daughters of U.S. citizens: 23,400
- Second preference – spouses and unmarried sons and daughters of LPRs: 114,200, with at least 77 percent of this allocation for spouses and children (under age 21) of LPRs
- Third preference – Married sons and daughters of U.S. citizens: 23,400
- Fourth preference – Brothers and sisters of U.S. citizens: 65,000

Immediate relatives of U.S. citizens are exempt from numerical limitation. The INA defines “immediate relatives” as children and spouses of a U.S. citizen as well as the parents provided the U.S. citizen is at least 21 years old.<sup>10</sup> As a result, this category alone accounts for nearly 500,000 new LPRs every year.

The worldwide level of employment-based immigration is generally 140,000 per fiscal year.<sup>11</sup> Congress allocates those 140,000 visas as follows:<sup>12</sup>

- First preference – Priority workers (aliens of extraordinary ability, outstanding professors and researchers, certain multinational executives and managers): 28.6 percent
- Second preference – Aliens with advanced degrees or exceptional ability: 28.6 percent
- Third preference – Skilled workers, professionals, and other workers: 28.6 percent
- Fourth preference – Certain special immigrants: 7.1 percent
- Fifth preference – Employment creation: 3.1 percent

Within the employment-based third preference category, “skilled workers” are defined as defined as immigrants performing non-temporary or seasonal labor that requires at least two years of training or experience; “professionals” hold baccalaureate degrees; and “other workers” are unskilled laborers.<sup>13</sup> Not more than 10,000 visas may be issued to “other workers”.<sup>14</sup> The employment-based fourth preference category is not really a work-based category but a catch-all of certain aliens defined in INA section 101(a)(27). Within the employment-based fifth preference category, also not really a work-based category, at least 3,000 visas are issued to immigrant investors who invest in a new commercial enterprise which creates employment in a targeted employment area.<sup>15</sup>

Another element of the 1965 Immigration Act was to replace the national origin-based system for distributing immigrant visas with one that generally limits the number of visas that nationals of a specific country can obtain in a given fiscal year to 7 percent of the cap. This so-called per country cap serves the important function of ensuring diversity in the immigrant population which prevents very large countries from capturing all of the green cards to the exclusion of the rest of the world and, thereby encouraging assimilation among new immigrants.

Separately, the United States offers an alphabet soup of temporary visas that aliens can avail themselves of to work (e.g., H-1B, H-2B, H-2A), study (e.g., F-1, J-1), and tourism (B-1). In the temporary work visa categories alone, the U.S. admits over 700,000 aliens a year.

Regardless of how one defines “barriers”, numerical limits are not barriers unless the policy objective is unlimited immigration. This proposition is an impossibility and is also widely unpopular with the American people.

## *2. Request for Evidence*

There seems to be a fundamental misunderstanding by some in the public, including advocacy groups, media, and politicians, about the nature of a Request for Evidence (RFE). An underlying premise of U.S. immigration law is that the burden of proof is always on the applicant or petitioner to establish eligibility for the benefit sought. So ideally, applicants and petitioners only submit “perfect” applications and petitions, meaning a completed form with all evidence and fees included that efficiently allows an adjudicator to make an approve/deny decision.

When this does not occur, which is often, the adjudicative process drags on inefficiently. Under 8 C.F.R. 103.2, if all required initial evidence is not submitted with the benefit request or does not demonstrate eligibility, USCIS has the discretionary authority to deny the benefit request or request that the missing initial evidence be submitted within a specified period of time. When USCIS chooses the latter route, an RFE is the mechanism which informs the applicant or petitioner the type of evidence missing.<sup>16</sup> Therefore, an RFE is a generous opportunity to cure a flawed application or petition, not a hurdle to obtaining an immigration benefit.

## *3. Collecting Biometrics*

The Department of Homeland Security (DHS) was created by Congress as a result of the September 11, 2001 terrorist attacks which occurred, in part, due to significant failures in our

immigration vetting. USCIS, the component of DHS responsible for administering the nation's lawful immigration system, utilizes outdated and incomplete measures to thoroughly screen and vet all individuals involved in the immigration benefit process.

The previous administration attempted to cure the screening and vetting shortcomings through a proposed regulation entitled, "Collection and Use of Biometrics by U.S. Citizenship and Immigration Services".<sup>17</sup> In general, this rule would modernize biometrics collections by establishing a uniform definition of "biometrics" for all of DHS, replacing the patchwork of specified identifying modalities (e.g., fingerprint, photograph) used for various DHS purposes. By contrast, the current practice of using "name and date of birth" identifiers or submitting documents to establish identity are unreliable and can be easily misrepresented or counterfeited.

In fact, the DHS Office of Inspector General (OIG) issued an alarming report in 2017 about how past reliance on "name and date of birth" identifiers instead of fingerprints gave rise to massive fraud where a significant number of aliens used multiple identities in order to obtain immigration benefits they were not eligible for.<sup>18</sup> Beyond the concerning flaws of "name and date of birth" identifiers, it is also not uncommon for identity documents to be unreliable due to their having been issued by a failed state (e.g., Yemen, Somalia) or unavailable if the alien was fleeing persecution.

In addition to defining "biometrics", the rule provides *permissive* authority for DHS to collect iris image, palm print, and voice print to improve identity and records management. Importantly, the rule would require biometrics for every application, petition, or related immigration request, eliminating the misguided current regulatory prohibition of collecting from those under the age of 14. Additionally, the rule would codify DHS's DNA collection authority to perform functions necessary for administering and enforcing immigration laws, combat fraudulent families at the southern border, and strengthen DHS's response against human trafficking and human smuggling.<sup>19</sup>

Rather than recognizing that screening and vetting is a nonpartisan issue that keeps the country safe, USCIS, under the Biden administration, politicized this regulation and subsequently withdrew it. The press release announcing the withdraw cites EO 14012 yet fails to identify with specificity a single barrier that would have been erected had the USCIS biometrics rule been finalized.<sup>20</sup> The only barrier the USCIS biometrics rule erected was preventing ineligible aliens from obtaining immigration benefits, including nefarious actors who may seek to exploit a weakened immigration system to harm this country. Perhaps if the USCIS biometrics rule had been in place years ago, the agency would have been spared the embarrassment of hiring someone who fraudulently obtained U.S. citizenship after lying his way through multiple immigration benefits undetected.<sup>21</sup>

## **B. List of Questions for Commenters**

Responses below correspond with the numerical questions posed by the agency in Section III.C of the RPI.

1. The following regulations or policies are unjustified because they have no basis in law or are in violation of statute and should be removed or discontinued:

- H-4 EAD
- International Entrepreneur Parole
- Adjustment of status/concurrent filing EAD
- Advance parole
- Order of Supervision EAD (current practice violates the statute)<sup>22</sup>
- “Elimination of ‘Blank Space’ Criteria”<sup>23</sup>

3. Mass immigration, both legal and illegal, permanent and temporary, disproportionately harm marginalized Americans. The oversupply of workers at the bottom of the labor market reduces wages and job opportunities for Americans at that level. Specifically, the Americans who lose out due to mass immigration tend to be those without a college degree, including African Americans and other minorities, the young, and the disabled. As the National Academies of Sciences (NAS) found in its 2016 report entitled, *The Economic and Fiscal Consequences of Immigration*, “... the evidence suggests that groups comparable to the immigrants in terms of their skill may experience a wage reduction as a result of immigration-induced increases in labor supply” and that “[s]ome research also suggests that, among those with low skill levels, the negative effect on native’s wages may be larger for disadvantaged minorities and Hispanic high school dropouts with poor English skills.”<sup>24</sup> The NAS study found that by increasing the labor supply, immigration could reduce the wages of workers by approximately \$500 billion while the owners of capital gain about \$550 billion.<sup>25</sup>

4. The H-1B temporary worker program functions to harm and suppress the wages of college educated or white collar Americans, especially in the science, technology, engineering, and mathematics (STEM) fields. Unlike H-2Bs, there is no requirement that most employers show they unsuccessfully tried to recruit Americans first. The lone exception is for “H-1B dependent employers” or those who have a large amount of H-1Bs within their workforce. But because of a lobbyist driven loophole in the law, “H-1B dependent employers” can bypass the American recruitment requirement, i.e., not even try to recruit Americans, if they pay a salary of at least \$60,000. USCIS data show that 99 percent of H-1B dependent employers avoid the American recruitment requirement through the salary loophole, with most paying exactly \$60,000 salaries. The overrepresentation of H-1Bs in one industry (tech) in one geographic area (Silicon Valley) disproportionately burdens Americans in this industry and region.

5. The American people are the primary stakeholders of U.S. immigration law and taking into account the effect of immigration policies on Americans will “better inform [USCIS’s] qualitative and quantitative analyses”.

12. USCIS and all DHS components should have robust data sharing agreements under the notion of “One DHS”. This means there should not be limitations or prohibitions on sharing information one agency obtains with another (e.g., DACA policy prohibiting USCIS from sharing with ICE). To deter fraudulent, frivolous, and otherwise non-meritorious applications and to ensure immigration enforcement occurs promptly, the free flow of data and information between DHS and its immigration components is essential.

15. USCIS should modernize and become a fully electronic form-based agency. The antiquated paper-based approach for most benefits is inefficient and adds unnecessary burdens on the agency.

17. The NTA policy that was erroneously discontinued under the Biden administration is a clear example of a past policy that is a “bright spot”. Similarly, the delayed H-1B Selection Final Rule is a “bright spot” in maximizing limited H-1B visas for the highest paid and most experienced alien workers. This benefits employers who identify truly top notch talent, those aliens, and U.S. workers who are less likely to be displaced by foreign workers at the top of the market compared to the bottom or entry level. Additionally, the 2020 version of the naturalization civics test was thoroughly developed by career officials and successfully made the test more meaningful compared to the mostly trivia-based format of the 2008-2009 test. Reverting to the old test for purely political reason was another misguided and arbitrary and capricious action by the Biden administration.

### III. CONCLUSION

EO 14012 is a flawed directive in that it wholly fails to define with specificity a concrete problem it is trying to solve. Instead, it appears to be a blunt object to provide political appointees cover to dismantle any policies that even have the hint of immigration enforcement. In the United States, Congress makes the law and the Executive Branch implements them. If the current administration does not like any current immigration laws, the proper method to change them is through Congress, not executive fiat. As stated above, numerical limitations, RFEs, screening and vetting, and reasonable processing times are not burdens. Rather than focusing on the alien’s perspective, U.S. immigration policy should be driven by the impact it will have on Americans and legal immigrants already here.

Sincerely,

Robert Law  
Director of Regulatory Affairs and Policy  
Center for Immigration Studies

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- <sup>1</sup> See Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input (Document ID: USCIS-2021-0004-0001; Federal Register No.: 2021-07987; 86 FR 20398).
- <sup>2</sup> “Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans”, 86 FR 8277 (Feb. 5, 2021).
- <sup>3</sup> *Id.*
- <sup>4</sup> <https://www.uscis.gov/about-us/mission-and-core-values>
- <sup>5</sup> See INA 201, 203.
- <sup>6</sup> INA 203(a)-(b).
- <sup>7</sup> INA 203(c). Through NACARA, up to 5,000 visas are available to eligible aliens.
- <sup>8</sup> INA 201(c).
- <sup>9</sup> INA 203(a).
- <sup>10</sup> INA 201(b)(2)(A)(i).
- <sup>11</sup> INA 201(d).
- <sup>12</sup> INA 203(b).
- <sup>13</sup> INA 203(b)(3).
- <sup>14</sup> *Id.*
- <sup>15</sup> INA 203(b)(5).
- <sup>16</sup> See, e.g., <https://www.uscis.gov/sites/default/files/document/data/understanding-requests-for-evidence-h-1b-petitions-in-fiscal-year-2018.pdf>.
- <sup>17</sup> <https://www.federalregister.gov/documents/2020/09/11/2020-19145/collection-and-use-of-biometrics-by-us-citizenship-and-immigration-services>.
- <sup>18</sup> See <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-111-Sep17.pdf>.
- <sup>19</sup> See <https://cis.org/Law/Modernizing-Biometrics-Collection-Immigration-Vetting>.
- <sup>20</sup> See <https://cis.org/Law/DHS-Quietly-Withdraws-Two-Key-Immigration-Integrity-Regulations>.
- <sup>21</sup> See <https://cis.org/Law/Fraudulent-Asylee-Became-USCIS-Adjudicator>.
- <sup>22</sup> See <https://cis.org/Law/Employment-Authorization-Certain-Classes-Aliens-Final-Orders-Removal>.
- <sup>23</sup> See <https://cis.org/Law/USCIS-Announces-It-Will-Violate-Law>.
- <sup>24</sup> National Academies of Sciences, *The Economic and Fiscal Consequences of Immigration*, at p. 189, p. 168, available at <https://www.nap.edu/read/23550/chapter/1#xi>.
- <sup>25</sup> See <https://www.nationalreview.com/2016/09/united-states-immigration-policy-economic-fiscal-impact-education-native-born/>.