

**TESTIMONY OF
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BEFORE THE

**COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CLAIMS
U.S. HOUSE OF REPRESENTATIVES**

CONCERNING

REDUCTION OF THE IMMIGRATION SERVICES BACKLOG

JUNE 23, 2004

Mr. Chairman, I thank you for inviting me to speak before the Subcommittee on the issue of immigration backlog and its effect on the business community. As managing partner of the business immigration group at Shaw Pittman LLP, I represent commercial clients in a variety of industries, including in particular the communications, information technology and financial services sectors. My clients range from mid-size businesses to Fortune 500 companies, with both regional and global operations.

I am testifying today because the adverse impact to U.S. businesses of the continuing immigration case backlog is potent. Thus in the past week alone, my experiences have included:

- hearing reports from officials from the Departments of Homeland Security and State citing visa delays as the primary cost of doing business for U.S.-based companies;
- participating in an international trade conference focused on the obstacles that the “new security paradigm” at the U.S. immigration agencies creates for American attraction of global talent; and
- receiving press inquiries about the estimated billions of dollars that U.S. companies lose because of ongoing delays and erroneous denials at various points in the visa process – from the adjudication of petitions at U.S. Citizenship and Immigration Service (“USCIS” or “the Agency”) to the review of visa applications at the Department of State’s worldwide consular posts to the port inspection process by Customs and Border Protection.

The urgent need for a comprehensive management program to streamline the immigration process is wholly visible. Last week, in testimony before this Subcommittee, Director Eduardo Aguirre introduced the USCIS Backlog Elimination Plan. I believe it to be an excellent initiative, and I focus my remarks today on building from this proposal and adding a commercial perspective to the plan for resolution of this most pressing issue.

I. THE DELAYS IN THE PROCESSING OF IMMIGRATION BENEFITS JEOPARDIZE COMMERCIAL OPERATIONS, IMPOSE UNDUE COSTS ON COMPANIES AND CANDIDATES AND COMPROMISE AMERICA’S ABILITY TO ATTRACT TOP TIER INTERNATIONAL TALENT.

A. The Nature of the Delays

The underlying problem our country faces is that the elongated timeframes for the processing of immigration benefits are completely divorced from the reality of the users’ needs. The current system is inordinately burdensome to the user community both in terms of time and cost. At every point in the application and inspection process, businesses and families are encountering multiple-week, multiple-month and even multiple-year delays.

The queues at USCIS accumulated since the late 1990s under the predecessor agency, the Immigration & Naturalization Service (“INS”). Since that time, companies relying on global talent have lived with the reality of an ever-expanding backlog of immigration cases. These

companies face a constant challenge – they must explain to their employees why their visa cases are not progressing, why international travel is impeded and why they must wait an indefinite period for the approval of their cases. As weeks and months pass, these companies must watch as anxiety, demotivation and frustration affect the professional and personal lives of their workers.

Three examples in our current caseload illustrate how substantial the bottleneck has become.

1. A software engineer in the Washington, D.C. area whose company sponsored him for residency in 2000 is still awaiting conclusion of his “green card” processing. Adjustment of status, the final phase of residency processing, alone is taking close to two and one-half years;
2. An outstanding researcher with a New Jersey telecommunications company that is developing leading-edge wireless solutions for global communications has been waiting since October 2002 for approval of the underlying immigrant petition required to establish his eligibility to ultimately be awarded the “green card”;
3. The southwest operations center of a major financial services company is paying the \$1,000 premium processing fee for even routine H-1B extensions for key members of its credit-related operations because normal processing for these extensions is taking close to six months.

Director Aguirre indicated in his testimony last week that the Agency has at last “crested the peak” of backlogs that have accumulated over the past decade. USCIS has committed to attaining a timeframe of three months for nonimmigrant petition processing and six months for residency, naturalization and other more long-term benefits, in accordance with the President’s mandate to reduce the backlog. It is imperative that USCIS succeed in meeting these timeframes, if an ailing process is ever to achieve restored credibility and deliver its promise to applicants that have been kept waiting much too long.

B. The Costs to Business

In the business sector, the dynamism of project activities and an intensely competitive global market makes the types of delays outlined above unacceptable. A recent study by eight renowned business associations indicates that visa delays alone are responsible for some \$31 billion in lost dollars to U.S. businesses since July 2002. See The Santangelo Group, “Do Visa Delays Hurt U.S. Businesses?” (June 2, 2004). The foundation of any commercial success is the organization’s pool of people talent. In the technical and scientific fields in particular, international talent is essential to provide premier skills to our country’s job base. Absent a fluid visa process, businesses are encouraged to launch operations offshore, rather than to expand their U.S. operations.

An example of the debilitating commercial impact of the ongoing delays in USCIS processing arises in the context of multinational employers seeking to expand U.S. operations. For instance, one of my clients is a well-known global provider of electronic manufacturing services to the telecommunications industry. Having reduced its U.S. operations during the

softening of the economy in 2000, the company is now aggressively working towards a strong recovery. Each time the company acquires a multi-million, multi-year contract in the United States, it requires an immediate ramp up of personnel to staff the job. To meet these evolving staffing needs, the company turns to its offices in Europe, Asia-Pacific or Latin America, expecting to transfer seasoned personnel to staff the project at its inception, while the U.S. business unit actively recruits American workers for the long term. The workers from abroad are critical to new contracts because they serve the dual purposes of immediately staffing services and training new U.S. workers as they join the operation. Although the L-1 category was designed for this very purpose, the company has consistently received significant queries, delays and even denials for the core group of foreign workers. These obstacles have created substantial costs, compromised deliverables on contracts and come dangerously close to causing our client to lose major contracts to offshore competitors.

Similar experiences by other clients have led them to consider launching their own offshore centers, rather than having to confront the U.S. visa process each time they seek to expand a U.S. project quickly. Predictability and cost containment are critical parameters in any commercial project plan, and businesses are becoming increasingly reluctant to undertake a process – the visa application – that has run counter to both.

At the same time, we have seen numerous reports over the past several years that American universities are capturing lower percentages of top-tier academic talent as the student visa process becomes more cumbersome. Thus, the extraordinary burden imposed by the U.S. visa process is a deterrent both to companies seeking to expand their work force and project base, and to the most coveted graduates of scientific and technical academic programs that are essential to those staffing needs.

II. TO ACHIEVE BACKLOG REDUCTION, USCIS NEEDS A COMMERCIAL MANAGEMENT APPROACH.

In launching a comprehensive Backlog Elimination Plan, USCIS has recognized the tremendous costs of the backlog and expressed its commitment to eradicate it. The challenges USCIS faces are substantial. The Agency is presented with relentless volume, in the context of a dynamic legislative environment. The immigration laws of this country have been reformed on a broad scale every other year since I began practicing law in 1986. New immigration programs are a fact of life, and USCIS has a limited pool of resources to address a demand that has now reached 6.1 million pending cases, 3.7 million of which the Agency has identified as being delayed past the mandates for adjudication established by the Administration.

To reduce the backlog and achieve accuracy in case decisions, USCIS must reengineer its adjudication processes by infusing a commercially-oriented approach to the effort. A clear mission with unambiguous standards and goals, an effective internal communications system and training program, application of technology and risk management to streamline processes and an uncompromising commitment to quality assurance are all essential elements of any successful commercial program. This type of approach will assist the Agency to surmount the paralysis for which the former INS was criticized. In establishing a smooth case adjudication process, USCIS will be best equipped not only to achieve the service mandate that is currently lacking, but to identify true security threats.

A. The Development of Clear Legal Standards and Policies

A primary cause of the current backlog is the historical failure to provide specific standards governing the issuance of immigration benefits. While USCIS' leadership has clearly articulated the mission to restore service and reduce the backlog, the Agency must develop precise adjudication standards. By clarifying what legal standards and policies mean in a real-world context, USCIS can avoid inconsistent adjudications. In so doing, USCIS also will address the reflexive and growing issuance of requests for evidence ("RFEs"). As noted by USCIS in its Backlog Elimination Plan, the RFE problem "not only increases cycle time, but it signifies that either applicants do not understand the eligibility requirements or there has been a shift in the way that adjudicators interpret those requirements." See USCIS Backlog Elimination Plan (June 16, 2004) at 7.

The failure in the past to articulate clear parameters has led Agency field offices to take increasing latitude in implementing differing standards for regulations. In this context, field office practices have created standards that deviate from the statutory mandate and raise the bar of eligibility without appropriate legislative or, at a minimum, regulatory changes. Our clients, for example, have been subjected to RFEs requesting proof of unavailability of American workers in H-1B cases, where the statutory and regulatory criteria require proof of degreed training in a specialty field and compliance with the U.S. wage system, not proof of a job market test. Similarly troubling is the reliance by some field offices on sources other than the Agency's regulations or policy memoranda for interpretation of eligibility standards (e.g., some field offices have routinely used Webster's dictionary to augment their definition of key standards).

The problem of inconsistent standards has been exacerbated by the lack of timely promulgation of regulations, including those necessary to accommodate comprehensive changes in statutes (e.g., the regulations corresponding to the American Competitiveness in the 21st Century Act have yet to be published). Although headquarters issues field guidance periodically, field offices fill the regulatory vacuum by launching their own policies. In one example, at various times since 2001, specific Service Centers have been reluctant to accept academic equivalency evaluations from reputable credentials agencies, while others have been comfortable with them. The clearest guidance from headquarters on the propriety of such evaluations dates back to 1995.

Without transparent national standards, field officers will continue to develop divergent – and mistaken – interpretations of the immigration laws. The result is an inconsistent application of key legal standards and an invitation for users to forum shop. In order to reduce case cycle time in a meaningful way, USCIS needs to devote its first line of resources – policy experts at headquarters and management representatives from key field offices – to develop specific standards for each key immigration benefit. These standards must then be approved by the Agency's leadership, and explicit guidance must be included regarding application of those standards to the real-world scenarios that field officers face daily. Additionally, USCIS should establish timelines that minimize the delay between statutory implementation and regulatory issuance.

B. Communication and Training

Once national standards are established, they must be communicated throughout the management chain and to all field offices. Headquarters will need to develop compliance metrics and training objectives. All USCIS adjudicators and customer service personnel must be trained on the key categories of immigration benefits. Training must include not only initial education on key categories, but also periodic instruction on current policies and trends. In addition, all staff must have electronic access to relevant statutory, regulatory and policy guidance, with a national library of samples for critical issues (e.g., legitimate bases for issuing RFEs).

Field managers will need to insure that line officers implement these standards. In this regard, field managers should establish a protocol for communications within each office and, in turn, each “business unit” within the operation. Weekly or bi-monthly staff meetings that provide a forum to discuss key policy trends, the application of governing standards and the allocation of staff for adjudication challenges should be implemented by each manager.

On-site visits from leaders at headquarters to field offices will also cement the message of what the Agency’s mission is. Director Aguirre and senior members of his staff have engaged in these types of visits since the summer of 2003, and it is important that these meetings between the field and headquarters continue.

Intra-agency communications and training are vital to counter the “deer in the headlights” syndrome that field officers have exhibited since September 11. In the wake of that tragedy, the Agency’s field officers became painfully mindful of the increased public scrutiny of their work, and of the consequences of error. Since then, these officers have witnessed the dismantling of the former INS. They have also received internal Agency directives advocating “zero tolerance” and warning in sweeping terms that mistakes will not be tolerated. Although the Agency has formally revised its directive to a more realistic message, the field has been hindered by a mindset that is at times fearful and cautious, at other times skeptical and even openly hostile to the applicants for benefits. Only with ongoing and specific direction from the Agency’s leadership can this negative outlook be transformed so that the field can successfully attack bureaucratic inefficiency and a daunting backlog.

With regard to external communications, the Agency’s user database should be dynamic. Improvements must be implemented periodically to facilitate further milestone tracking and provide current processing time information. E-mail communications should augment paper transfers of receipts, RFEs and approvals in all cases, not simply where a “premium processing” fee is paid. All changes in policy or processing requirements should be announced on the USCIS website, with a resource library that includes policy guidance organized by subject matter and that is equipped with full search capabilities.

C. Streamlining the System

The current system must be streamlined for the efficient processing of applications. The Backlog Elimination Plan already outlines several streamlining initiatives, such as the pre-certification program whereby an employer may bypass the requirement to repeatedly prove its

ability to pay workers the offered wage or salary. USCIS also has identified areas in which screening may be unnecessarily duplicative and is seeking to eliminate those occurrences.

In addition to these initiatives, there must be an underlying reengineering of the adjudication process so as to reduce cycle time while maximizing accuracy in decision-making. At the most fundamental level, headquarters should identify a process for field managers to perform basic triage on incoming cases. Field officers must assess incoming petitions at the outset to determine if they have the degree of complexity or risk to warrant intensive scrutiny. Alternatively, if the documentation evidences compliance with eligibility criteria, the case should be handled in a more routine manner. The Agency has alluded to such a streamlined approach when the case presents an extension request and the underlying terms of the petition have not changed materially since the initial adjudication. Similar treatment must be provided to cases that involve a request for initial classification where eligibility criteria are evident.

The need for technological enhancement also remains a priority. To build on existing efforts, USCIS databases should be consistently upgraded to facilitate web-enabled communications systems across offices. Electronically-scanned files should also be developed to avoid hard copy transfers in the event of queries that involve more than one office. Individual file data progress and tracking need to be maintained on a comprehensive database that may be checked across USCIS offices, with milestones and comments identified in the database. There is no reason why USCIS cannot maintain the type of “enterprise resource management” software that allows express couriers such as Federal Express and DHL to track the precise progress of packages as they move point to point in the delivery process.

D. Quality Control

By proposing quality initiatives in its Backlog Elimination Plan, USCIS has recognized the need for effective quality assurance. It is crucial that these quality control measures be implemented with a clear reporting structure and a specific chain of command. For each measure implemented by USCIS, there must be accountability both within field offices (from line officers to field managers) and between the field managers to headquarters. Moreover, as with any commercial enterprise, there must be specific measurements of progress.

Top-down management techniques need to be implemented. USCIS must establish firm lines of authority and communication, with clear allocation of roles and responsibility (i) between headquarters and the various Service Centers and District Offices, and (ii) at each level of staff in each field office. Managers must be available to review cases that line adjudicators identify as problematic. Supervisors also should conduct “spot checks” of case decisions, particularly those made by newly-hired officers.

Consistency in adjudication must be made the norm, with clear targets in timelines for processing and required reporting to headquarters when backlogs exceed the stated timeline, so that resources may be allocated to curtail the backlog before it becomes unmanageable. Field offices must be graded not only on the volume of cases acted upon, but on the pipeline of backlogged cases. Headquarters also needs to review the overall trends at field offices to gain a sense of when a pattern of inappropriate or redundant RFEs or decisions arises.

Measurable progress on the backlog will reduce the need for the user community to rely on the Agency's \$1,000 per case "premium processing" program. Premium processing is a necessary and practical augmentation of the application process. Users, especially business users in a fast-paced environment, often have a legitimate need for the accelerated provision of services. If normal case processing accelerates to a reasonable timeframe, the expense of premium processing will act as a supplement, not a surrogate, for timely processing.

A final consideration is that timely adjudication, alone, is not enough. End product review is critical to insure that field officers are adjudicating cases based on the correct legal standards. Decisions thus must be measured against existing statutory and regulatory standards, with policy guidance being used only after it is vetted by the chain of decision-makers and formally adopted. The Backlog Elimination Plan identifies an action item for the development of such end product review, which is unquestionably a priority if the Agency's reengineering is to succeed.

E. Resource Allocation

As new immigration programs are launched, an analysis of the realistic ability of current resources to match the demand created by each program must be undertaken. If, for example, Congress passes legislation creating a new guest worker program, consideration must be given to the opening of special support centers or the redeployment of officers and staff. USCIS, which faces a formidable task in combating the existing backlog, should not be given added responsibilities without the necessary resources.

III. CONCLUSION

Our diversity has been the very lifeblood of this country – we have always been able to attract the best and the brightest. We must be conscious of the fact that the United States does not exercise a monopoly on Ph.D. recipients, Nobel Prize winners, or the world’s leading scientists. We are already losing this talent to Canada, to Australia, to Europe and to Asia-Pacific. The commitment of Congress and the Administration to backlog elimination is essential to stem that tide.

USCIS’ Backlog Elimination Plan recognizes that the immigration policy of the United States encompasses two overarching principles – facilitating entry of eligible foreign nationals, and barring entry of those who pose a threat to our populace. These two goals are inextricably linked. Security and service are converse components of the same machine; neither can function unless the other is working properly. For example, an ill-intentioned green card applicant may avoid in-depth security checks for years, while his green card application remains pending. It is, in short, impossible to advance national security without eliminating the Agency’s unnecessary backlog. Bottom line, if we do not advance service, we cannot advance security.

The former INS was dismantled to launch a separate agency, one fully dedicated to the service component of U.S. immigration policy. USCIS was empowered by Congress and the President to confirm America’s promise to foreign nationals seeking residency and citizenship within our borders. A commercial, goals-oriented approach is essential to the success of this mission of service. With this type of pragmatism, the goal articulated by Director Aguirre last week – to “provide the right benefit to the right person in the right amount of time, and prevent the wrong person from accessing immigration benefits” – is attainable.