



# **Nebraska Service Center**

## **OMBUDSMAN'S ANNUAL REPORT 2001**



***Nebraska Service Center***



**U.S. Department of Justice**  
Immigration and Naturalization Service

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425 I Street NW  
Washington, DC 20536

May 6, 2002

Subject: The Nebraska Service Center Ombudsman's Annual Report

The Nebraska Service Center was designed to maximize service to our customers by allowing for as many benefits petitions and applications as practicable to be processed by mail, rather than in person. In so doing, it was also designed to allow for the most efficient use of Service resources. However, no system that is designed by people to serve people is infallible or immune to the effects of change, or to the desires of its customers for improved services.

Customers' complaints and suggestions are among the best means available for any business to identify ways to improve its services and effectively implement change. Therefore, to benefit from our customers' input, we must provide a means for customers to submit their complaints and suggestions in order to obtain appropriate resolutions and responses.

For that reason, I established the position of Center ombudsman. I invite you to read this report for a detailed explanation of the services that can be rendered by the incumbent of this position. It is my intention that the ombudsman not only respond to the types of complaints described in this report, but also seek to utilize customers' complaints and suggestions as a means to aid this Center in improving the services that it renders.

It is my hope that this position will continue to be successful, and that it will be a model of service for others to follow. To that end, I welcome your comments and suggestions.

Sincerely,

A handwritten signature in cursive script that reads "Terry E. Way".

Terry E. Way  
Director

## Table Of Contents

**WHAT IS THE PURPOSE OF THE ANNUAL REPORT?**

**WHY AND HOW WAS THE NSC OMBUDSMAN ESTABLISHED?**

**WHAT DOES THE NSC OMBUDSMAN DO?**

**WHAT ARE THE NSC OMBUDSMAN'S CREDENTIALS?**

**HOW AND WHEN DOES THE NSC OMBUDSMAN RESOLVE COMPLAINTS AND RESPOND TO REQUESTS?**

**HOW DO COMPLAINTS AND REQUESTS REACH THE NSC OMBUDSMAN?**

## Appendices

- A. Special Problem Criteria**
- B. Complaint Initiated Investigations: Time is at issue**
- C. Self-Initiated Investigations: Requirements are at issue**
- D. Special Intervention: Thinking outside the box**
- E. Special Assistance: Service beyond the decision**
- F. Observations and Discoveries: Information is the key**
- G. Ombudsman's Statement**

## Abbreviations

<b>ACD</b>	<b>Assistant Center Director</b>	<b>NSCO</b>	<b>Nebraska Service Center Ombudsman, also known as the NSC Ombudsman and as a Center Adjudications Officer (Ombudsman)</b>
<b>AAO</b>	<b>INS' Administrative Appeals Office</b>		
<b>CAO</b>	<b>Center Adjudications Officer</b>		
<b>DA</b>	<b>Department of Agriculture</b>	<b>OBL</b>	<b>INS' Office of Business Liaison</b>
<b>DOL</b>	<b>Department of Labor</b>	<b>OCL</b>	<b>INS' Office of Congressional Liaison</b>
<b>DOS</b>	<b>Department of State</b>	<b>ROP</b>	<b>Record of Proceeding</b>
<b>EPA</b>	<b>Environmental Protection Agency</b>	<b>SCAO</b>	<b>Supervisory Center Adjudications Officer</b>
<b>FOIA</b>	<b>Freedom of Information Act</b>	<b>SOP</b>	<b>Standard Operating Procedure</b>
<b>INS</b>	<b>Immigration and Naturalization Service</b>	<b>USOA</b>	<b>United State's Ombudsman Association</b>
<b>IJ</b>	<b>Immigration Judge</b>	<b>USPS</b>	<b>United States Postal Service</b>
<b>ISD</b>	<b>Immigration Services Division</b>		
<b>NSC</b>	<b>Nebraska Service Center</b>		

## **WHAT IS THE PURPOSE OF THE ANNUAL REPORT?**

Many ombudsmen demonstrate accountability to the public by producing and disseminating an annual report. Most reports cite the authority by which the ombudsman was established, and use anecdotal stories and statistics to describe the services rendered by the ombudsman.

The ability to offer criticism is fundamental to the performance of the duties of an ombudsman. Criticisms in this report are offered for the purpose of promoting improved customer service. Affected organizational elements have been afforded an opportunity to rebut information in this report. No rebuttals were offered.

Information in this report has not been compiled for use in any other form or format, and is not intended for presentation in any other context, forum, or media. Use of all or a part of this information for a purpose other than that for which it was originally intended could compromise the integrity and validity of the information. Therefore, use of this information outside the context of this report is discouraged.

This report does not include internal matters related solely to the internal personnel rules and practices of this Service, or internal memoranda relating to the deliberative process of this Service. Such material are excluded so as: (1) to encourage open, frank discussions on matters of policy between the ombudsman, and this Service's subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for this Service's decision in any particular case.<sup>1</sup>

## **WHY AND HOW WAS THE NSC OMBUDSMAN ESTABLISHED?**

The position is newly authorized by the Immigration and Naturalization Service (INS) Headquarters Immigration Services Division (ISD). On December 30, 2000, the Nebraska Service Center (NSC) hired its first Center Adjudication Officer (Ombudsman) or NSC Ombudsman (NSCO). The NSCO reports directly to the Director, NSC.

The Director, NSC chose to fill the position of the NSCO as a means of enhancing the quality of decisions rendered and services provided by the NSC. He initially envisioned that the position would perform duties similar to those of an analyst; but be imbued with adjudication knowledge, skills, and authority not generally found among federal management and program analysts. He also envisioned that the position would perform as a special assistant to aid him in developing a customer-focused organization.

Aside from the "government classified and approved" description of duties, little information was known about the actual duties of an ombudsman, much less the history or significance of the field. After reviewing information provided by the United State's Ombudsman Association (USOA) and other sources, the Director, NSC sought membership for the NSCO position in the USOA. The USOA granted the NSCO voting membership in the fall of 2001.

The NSCO attended the 22<sup>nd</sup> Annual USOA Conference in Concord, New Hampshire where she met ombudsmen from the States of Alaska, Arizona, and Nebraska; federal ombudsmen from the Environmental Protection Agency; municipal ombudsmen; ombudsmen from various state and municipal agencies; and even foreign ombudsmen from Canada, Israel, Jamaica, Mexico, and Spain. All of the conference participants possessed higher or advanced education, some were attorneys, and most had many years of experience serving the public in positions of trust. All of the conference participants were professional; dedicated; and willing to share knowledge, expertise, and keys to success.

At the Conference, the NSCO received training in report writing, evaluation of an ombudsman's office, internal complaint mechanisms within agencies, outreach, and legal issues facing ombudsmen. She also participated in various workshops, and received copies of members' annual reports. The Conference provided knowledge and personal contacts necessary for the NSCO to properly establish, and perform the duties and responsibilities of this new position.

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<sup>1</sup> 5 United States Code §552(b)(5).

## WHAT DOES THE NSC OMBUDSMAN DO?

The NSCO receives and acts on complaints, and requests for intervention or assistance where it appears that the customer has (or will have) a justified complaint or request; and where it appears that efforts will yield the greatest good for the customer, the NSC, and the INS.

The NSCO determines whether a complaint or request is justified based on facts that show whether the customer has been (or will be) unable through normal means to achieve fair, consistent, effective, and efficient administration of a decision and/or service rendered by the NSC. To achieve resolution, the NSCO investigates and/or analyzes the facts; and, usually through persuasion, seeks a final outcome that is in the best interests of the customer, the NSC, and the INS.

*A complaint or request submitted to the NSCO does not remove responsibility from the petitioner, beneficiary, or applicant to comply with all statutory and regulatory provisions of the immigration law of the United States.*

## WHAT ARE THE NSC OMBUDSMAN'S CREDENTIALS?

On December 30, 2000, Ms. Tracey Coleman entered on duty as the first NSCO. In December 2001, she achieved twenty years of service in positions of trust within the federal government.

Ms. Coleman's federal career began as an officer in the United States Army where she served for more than 6 years. Her duties included management and supervision of post level enlisted personnel records, assignments, and overseas levies sections; administration of a military community's alcohol and drug abuse prevention and control program; and command of a military community's 120 person company headquarters unit.

Ms. Coleman resumed her federal career as a civilian employee when she began working with the United States Army Corps of Engineers in Omaha, Nebraska. She worked for 5 years as a management analyst and, later, as a contract specialist. While working as a management analyst, she attended the United States Army Materiel Command's Management Engineering College in Rock Island, Illinois where she completed courses in Administrative Systems Analysis and Design, Organization Planning, Productivity Measurement and Enhancement, and Planning and Conducting Management Audits and Studies.

Ms. Coleman again resumed her federal career when she began working with the INS as a Center Adjudication Officer (CAO) at the NSC. She is a Journeyman CAO, having achieved the full-performance level for the CAO position, and having completed the Service's four-month Immigration Officer Basic Course, its Post-Completion Training, and its two-week Journeyman School. Although trained to adjudicate nearly every type of petition and application that may be submitted to the NSC, Ms. Coleman has predominantly adjudicated immigrant and non-immigrant worker petitions.

She has also served on details at Washington, D.C.; at the California Service Center; and as an Acting, Supervisory CAO at the NSC in its Business Product Line. She served as the President of American Federation of Government Employees Local 3928, representing federal bargaining unit employees located at both the NSC and the Omaha District Office. While serving as a union official, Ms. Coleman received training in interest based bargaining from the Federal Mediation and Conciliation Service, and participated in a workshop in mutual gains negotiations conducted by Cornell University's New York State School of Industrial and Labor Relations.

In February 2001, she visited and received valuable guidance from the Nebraska State Ombudsman's Office, one of the most well known and successful ombudsman's offices in the United States. In October 2001, the NSCO position was granted voting membership in the USOA and attended its 22<sup>nd</sup> Annual Conference. In December 2001, she attended training at the Office of Personnel Management's Eastern Management Development Center where she participated in a renowned training course entitled, "Developing a Customer-Focused Organization."

In 1977, Midwestern State University in Wichita Falls, Texas awarded Ms. Coleman a Bachelor of Science degree in Criminal Justice, summa cum laude. In 1980, Webster College in St. Louis, Missouri awarded her a Master of Art's degree in Management (at the off-site institution that serves Fort Bliss in El Paso, Texas). And in 1988, Webster University (previously Webster College) awarded Ms. Coleman

a Master of Art's degree in Procurement and Material Management (at the off-site institution that serves Fort Carson and the Air Force Academy in Colorado Springs, Colorado).

## **HOW AND WHEN DOES THE NSC OMBUDSMAN RESOLVE COMPLAINTS AND RESPOND TO REQUESTS?**

The NSCO receives and acts on complaints and requests that come from within a twenty state territorial jurisdiction where companies, citizens, and aliens who file petitions and applications at the NSC physically reside. The NSCO also receives and acts on complaints and requests involving certain (limited jurisdiction) petitions and applications that may only be filed at the NSC, regardless of where the complainant or requestor physically resides.

The sheer volume of the services rendered by the NSC, the complex nature of many of the adjudications and processes, as well as the significance of the benefits being sought all demand that the NSCO exercise the greatest degree of skill that may be had within the field of ombudsmandry. Moreover, the NSCO is a limited resource.

The NSCO considers whether to accept a complaint or request based on the special problem criteria described at Appendix A. The special problem criteria were created in compliance with the requirements of the position description.

The NSCO accepts only those complaints or requests that appear to be non-frivolous. When the NSCO accepts a complaint or request, either the NSCO or the Director's secretary will telephonically notify the complainant, requestor, or their representative. Due to time or other constraints, the NSCO may decline to accept a non-frivolous complaint or request. When the NSCO declines to accept a non-frivolous complaint or request, the NSCO gives that complaint or request to the appropriate NSC or INS office for action. It is the responsibility of that office to contact the complainant or requestor, as appropriate. When the NSCO determines that a complaint or request appears to be frivolous, the NSCO will discard it. The NSCO does not issue written notification of acceptance or rejection of a complaint or request.

The NSCO usually accepts complaints or requests where negative consequences to the complainant, requestor, other like customers, and/or this Service appear substantial or significant; and where normal, available remedies or resources have been exhausted or appear inadequate. A benefit must generally have been denied, at least once, before the NSCO will consider accepting a related complaint or request. The NSCO accepts complaints, and requests for intervention or assistance where petitions or applications have been denied and motions or appeals have been filed; or where a petitioner or applicant whose petition or application has been denied files another like petition or application for the same benefit (ex. Forms I-730). *However, the NSCO does not routinely accept complaints or requests merely because a case has been denied and a motion, appeal, or like petition/application has been filed.* Additionally, the NSCO does not have jurisdiction over a case that has physically left the NSC, for which an appellate authority has rendered its decision, or that is under investigation by this Service's enforcement personnel.

When a complaint or request involves an individual case or a few related cases, the NSCO usually examines the specific petition(s)/application(s). The NSCO then gathers other relevant information, makes one or more conclusions, presents one or more recommendations, and seeks concurrence and implementation of the recommendation(s) at the lowest appropriate organizational level within the NSC. If resolution cannot be achieved at the lowest level, then the NSCO generally continues to seek concurrence with and implementation of recommendations through increasingly higher levels within the NSC. The NSCO seeks the Director's intervention at any time where his intervention appears appropriate or necessary.

The NSCO generally seeks to formally resolve a complaint, or respond to a request when the investigation or analysis:

- (1) reveals problems with established law, regulations, policy, procedures, or processes;
- (2) involves a significant or particular customer population, field of endeavor or occupation, or product;
- (3) involves a particularly sensitive fact or issue; and/or
- (4) involves the NSC staffing or budget.

Although the NSCO seeks to resolve complaints and respond to requests at the lowest possible organizational level, a formal resolution or response generally requires the approval of the Director, NSC prior to implementation, execution, or issuance.

The NSCO endeavors to resolve complaints and requests as quickly as possible. However, complaints and requests are prioritized in a manner commensurate with considerations such as the sensitivity, complexities and time involved in obtaining resolution; and the scope and/or nature of actual or potential impact to the customer, other like customers, and/or this Service.

## **HOW DO COMPLAINTS AND REQUESTS REACH THE NSC OMBUDSMAN?**

Primary sources of complaints, and requests for intervention and assistance have been Congressional representatives; private sector liaison personnel for stakeholder organizations; representatives for petitioners whose submissions constitute substantial fee revenues for the NSC; and INS managers, supervisors, and liaison personnel. Secondary sources of complaints and requests have been other non-federal ombudsmen, NSC adjudicators, NSC liaison personnel, and other NSC employees. Due to their extensive immigration knowledge, experience, and/or perspective, these sources can generally be relied upon to assess whether a complaint merits NSCO intervention and to make contact with the NSCO on the customer's behalf.

Complaints and requests must be written and are generally mailed to the NSCO. See also Appendix A, Submission of Complaints.

Express mail intended for the NSCO must be sent to:

**Immigration & Naturalization Service  
Nebraska Service Center  
Attn: NSC Ombudsman, Tracey Coleman  
850 "S" Street  
Lincoln, NE 68501**

Non-express mail intended for the NSCO must be sent to:

**Immigration & Naturalization Service  
Nebraska Service Center  
Attn: NSC Ombudsman, Tracey Coleman  
P.O. Box 87333  
Lincoln, NE 68501-7333**

*It is important to note that:*

1. *A complaint, or request for intervention or assistance by the NSCO does not remove responsibility from the petitioner, beneficiary, or applicant to comply with all statutory and regulatory provisions of the immigration law of the United States.*
2. *The receipt number for the petition, application, motion and/or appeal must be included in correspondence to the NSCO.*
3. *Envelopes or correspondence sent to the NSC street address (above) and that is addressed to the attention of the "Director" or the "Director or Ombudsman" may be assigned by the Director to someone other than the Ombudsman.*
4. *All mail submitted to the NSCO is subject to the same processing as all other mail received at the NSC. That is to say that the mail is opened and examined for live petitions, applications, and money by authorized mailroom personnel. Envelopes containing live petitions, applications, or money will be processed in the same manner as routine submissions of a like nature. In this manner, the integrity of the services that may be rendered by the NSCO is protected.*
5. *If the complaint or request involves sensitive information or documentation, then a request must be submitted that asks the NSCO to initiate contact with the complainant or requestor by telephone. The NSCO will contact the complainant or requestor to ascertain the nature of the sensitive information or documentation. If the NSCO accepts the complaint or request, then she will make special arrangements to facilitate submission of the complaint or request in a way that protects the sensitivity of the information, as well as the integrity of the services rendered by the NSCO.*

# APPENDIX A

## SPECIAL PROBLEM CRITERIA

Revised October 5, 2001

The NSCO is a full-time, permanent federal position that, unlike some others in the federal government, has not been defined in law. Rather, the INS classified, approved, and made the position available to each of its Service Centers.

The NSCO answers to the NSC Director, and exercises the powers and duties of the position within the jurisdictional boundaries assigned to the NSC by the INS. Additionally, since many of the complaints received by the NSCO demand that the incumbent have adjudicative expertise, and in light of the complex and time sensitive nature of immigration law and processes, the INS provided for the position to have the authority to render significant adjudicative decisions. Therefore, the NSCO may be categorized as an Executive (Specialty) Ombudsman.

The NSCO is charged with reducing the public's burden, while protecting the rights of both the government and the affected parties. To accomplish this, the NSCO endeavors to resolve adjudicative and procedural problems. However, priority is given to cases that substantially impact agencies at federal, state, and local levels; and national and international industrial, corporate, and economic levels. Priority is also given to cases that are the most difficult and sensitive in nature, involving the greatest degree of discretion.

### Powers and Duties<sup>2</sup>

The NSCO's powers and duties include but are not limited to the following:

- (1) to investigate, on complaint or on the NSCO's initiative, any *administrative act* of the NSC, without regard to the finality of the administrative act;
- (2) participate in or cooperate with persons and elements within the NSC, as well as persons, offices, or agencies outside the NSC at such conferences, inquiries, meetings, training, or studies which might improve the functioning of the NSC or lessen the risks that objectionable administrative acts will occur;
- (3) to make or undertake inquiries, meetings, training, or studies, and obtain assistance and information from any NSC element or person as required for the discharge of the duties. The NSCO's access to NSC personnel is not restricted;
- (4) access to and the ability to examine and copy any NSC records, including records which are confidential by law. The NSCO shall not disclose confidential records and is subject to the same penalties as the legal custodian of the records for any unlawful or unauthorized disclosure;
- (5) access to unrestricted premises of the NSC;
- (6) require any NSC employee to appear and produce documentary or other evidence that is reasonably relevant to the matters under investigation;
- (7) to maintain confidential any matter related to complaints and investigations, including the identities of the complainants and witnesses, except as necessary to discharge the NSCO's duties;
- (8) with the concurrence of the Director, adopts, promulgates, amends and rescinds rules and procedures required for the discharge of the NSCO's duties, including procedures for receiving and processing complaints; conducting investigations; and reporting findings, conclusions and recommendations;
- (9) to adjudicate by rendering the final NSC adjudicative decision for difficult, convoluted and/or sensitive cases that involve discretion, appear to be precedent setting, have high visibility, and are of importance to the INS and the Administration;
- (10) to prepare and publish an annual report that will be disseminated to parties deemed appropriate by the Director.

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<sup>2</sup> Derived from the Model Ombudsman Act for State Governments (1997) developed by the American Bar Association and endorsed by the United States Ombudsman's Association. Minor modifications have been made to improve readability, incorporate adjudicative authority provided in the position description, and provide for an annual report.

### **Investigation of Complaints<sup>3</sup>**

The NSCO shall conduct a suitable investigation of a complaint that is an appropriate subject for investigation. An appropriate subject for investigation by the NSCO includes any administrative act which the NSCO believes might be:

- (1) Contrary to law or regulation;
- (2) Based on mistaken facts or irrelevant consideration;
- (3) Unsupported by an adequate statement of reasons;
- (4) Performed in an inefficient manner;
- (5) Unreasonable, unfair, or otherwise objectionable, even though in accordance with law; or
- (6) Otherwise erroneous.

The NSCO may exercise discretion to decide whether or not to investigate a complaint because:

- (1) The complainant could reasonably be expected to use another remedy or channel;
- (2) The complaint is trivial, frivolous, vexatious, or not made in good faith;
- (3) The complaint has been too long delayed to justify present examination;
- (4) The complainant is not personally aggrieved by the subject matter of the complaint;
- (5) Resources are insufficient for adequate investigation.

The decision to decline to investigate a complaint shall not bar the NSCO from proceeding to investigate an administrative act whether or not included in the complaint.

### **Submission of complaints**

Complaints to the NSCO or requests for intervention by the NSCO must be submitted in writing and must:

- (1) include the complainant's complete postal and electronic mail addresses, and telephone and fax numbers.
- (2) include copies of all correspondence issued by this Service in response to prior efforts to solve the problem(s).
- (3) describe the problem(s).
- (4) explain steps taken and name individuals contacted in prior efforts to solve the problem(s).
- (5) specify the desired solution(s).

Complainants may be asked to submit copies of the relevant petition(s) or application(s), all supporting documentation, and the relating motion(s) or appeal(s).

*A complaint or request for intervention or assistance by the NSCO does not remove responsibility from the petitioner, beneficiary, or applicant to comply with all statutory and regulatory provisions of the immigration law of the United States.*

### **Development of a Customer-Focused Organization**

The NSCO will compliment efforts to resolve customer complaints by also acting as an agent of change who fosters the development of a customer-focused organization at the NSC.

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<sup>3</sup> Derived from the Model Ombudsman Act for State Governments (1997) developed by the American Bar Association and endorsed by the United States Ombudsman's Association. Minor modifications were made to improve readability.

## APPENDIX B

### COMPLAINT INITIATED INVESTIGATIONS: Time is at issue

Adjudication: Form I-730  
Humanitarian Late Filing

*Title 8 Code of Federal Regulations Parts 207.7(d) and Parts 208.21 (c) and (d) provide that the principal refugee/asylee may file a Form I-730, Refugee/Asylee Relative Petition for each qualifying family member within two years of the date on which the principal alien is either admitted into the United States as a refugee or granted asylum.*

*As stated in 63 Federal Register 3792 published January 27, 1998, delayed filings do not expediently reunite families in order for them to make the difficult transition to a new life, and may deplete limited refugee numbers and refugee resettlement monies needed for currently emerging refugee populations. Therefore, extension of the two-year filing period may only be granted for humanitarian reasons.*

*Furthermore, as stated in the Federal Register, this Service considers that defining specific qualifying humanitarian reasons would only act to restrict the category and shut the door on those who need this exception. Therefore, this Service's regulations do not define humanitarian reasons.*

*A principal refugee/asylee who files a Form I-730 more than two years after obtaining such status in the United States may request extension of the two-year filing period based on a humanitarian reason. The Service will extend the filing period on a case by case basis in light of compelling evidence.*

The NSC denied a late filed Form I-730. In its decision, the NSC called the veracity of the petitioner's own affidavit into question; and then concluded that documentation issued by a Doctor and a medical treatment facility were not sufficient to establish a humanitarian reason for the petitioner's delay in filing the petition.

The petitioner complained that she could not understand this Service's written decision. The NSCO observed that the decision was argumentative. Complicating the situation was the fact that the beneficiary, an adopted child, was due to "age out"<sup>4</sup> within 3 months.

The NSCO consulted with the Supervisory Center Adjudications Officer (SCAO) for Forms I-730. Together, they determined that at the time that this case was adjudicated, organizational and processing considerations necessitated that other supervisors assist the SCAO for Forms I-730 in the review of many of the denied cases. Indeed, the decision to deny this case was reviewed by a supervisor who was not the SCAO for Forms I-730.

As a consequence, it appears that the case was denied even though evidence submitted in support of the petition established that the petitioner had suffered from a medical condition which she alleged had prevented her from timely filing the petition. The SCAO for Forms I-730 and NSCO determined, upon examination of the evidence, that the petitioner had suffered from a medical condition for at least two years immediately following admission into the United States. Further, review of a home medical guide indicated that the effects of the medical condition, which neither the Doctor nor the medical facility had actually described, could have prevented the petitioner from timely filing the petition.

The SCAO for Forms I-730 worked diligently with the NSCO to expeditiously resolve this complaint. This Service's prior decision was replaced with a decision that was favorable to the petitioner and the beneficiary. And the beneficiary was successfully admitted into the United States pursuant to approval of the petition.

It should also be noted that a satisfactory resolution might not have been possible if this petition had not benefited from a processing initiative instituted by the SCAO for Forms I-730 and his supervisor, the Assistant Center Director (ACD) for the Family Product Line. That initiative provides for all Forms I-730 where the beneficiary is within one year of achieving age 21 to be immediately identified and made available for adjudication ahead of its actual filing date order. As a result of that initiative, this case was adjudicated about 90

<sup>4</sup> On his or her 21<sup>st</sup> birthday, a beneficiary will "age out." A person who is an "age out" is no longer a child for immigration purposes and is not eligible for benefits that may only be granted to a child.

days prior to the date on which the beneficiary would have achieved age 21. That allowed time for the NSCO to effect a positive resolution to the complaint and helped to ensure that at least 30 days remained, after the date on which the NSC approved the petition, for the Department of State (DOS) to process the beneficiary for admission into the United States.

**Adjudication: Form I-765  
Delayed Asylum Hearing Before the Immigration Judge**

*Title 8 Code of Federal Regulations Section 208.7(a)(1) states in pertinent part:*

*Subject to the restrictions contained in sections 208(d) and 236(a) of the Act, an applicant for asylum who is not an aggravated felon shall be eligible...to submit a Form I-765, Application for Employment Authorization. [In this case]...the application shall be submitted no earlier than 150 days after the date on which a complete asylum application submitted in accordance with §§ 208.3 and 208.4 has been received. ...An applicant whose asylum application has been denied by an asylum officer or immigration judge within the 150-day period shall not be eligible to apply for employment authorization. If an asylum application is denied prior to a decision on the application for employment authorization, the application for employment authorization shall be denied.*

A customer complained to the INS Office of Congressional Liaison (OCL) about a recently denied Form I-765, Application for Employment Authorization. Since two of the alien's prior Forms I-765 had been approved, the alien concluded that the Service erred when it denied this most recent application. The OCL asked for assistance from the NSCO. The NSCO informed the OCL that the nature of the program under which the alien was seeking an immigration benefit may have allowed approval of the prior filed applications. Regardless, since each application must stand on its own, it cannot be presumed that prior approvals portend future approvals, or even that the prior approvals were necessarily wrong simply because they are now followed by a denial.

The NSCO obtained and examined the recently denied application and all supporting documentation. The denial carefully detailed a chronology of events, and explained that the alien requested and/or caused a delay in his scheduled hearing before the Immigration Judge (IJ). The period of that delay could not be counted as part of the 150-day required waiting period.

The NSCO explained to the OCL that, in the past, this Service granted employment authorization when circumstances indicated that the IJ's decision had been delayed due to the needs of this Service, and that this Service had inconvenienced the alien. However, in this case, the alien caused what appeared to be this most recent delay. Moreover, computerized Service records showed that significantly fewer than 150-creditable days had elapsed before the IJ rendered a decision to deny the alien's application for asylum.

Since no Service Center may affect the total number of creditable days documented in the electronic record, at the time of adjudication it was presumed that this Service had correctly calculated the total number of elapsed days for this alien's case. Consequently, the adjudicator did not request additional evidence to establish the accuracy of that number and, accordingly, rendered a decision to deny the application.

The NSCO also explained to the OCL that a motion filed against this denial must include evidence that shows that the Service's electronic record was in error, and that action has been taken by the appropriate INS office to correct the electronic record. If the alien submits such evidence, a decision to reopen and approve the case probably would not occur until the actual electronic record is corrected.

## **APPENDIX C**

### **SELF-INITIATED INVESTIGATIONS: Requirements are at issue**

**Adjudication: Form I-129 H1B1**

**Municipal Public School District Seeks to Employ Foreign Teachers**

#### **Part A: Case Study**

Nationwide shortages of public school teachers are prompting public school systems to employ foreign teachers. In an effort to identify the types and severity of problems encountered by public schools with this Service's requirements and the NSC's processes, the NSCO sought to examine several Forms I-129, Petitions for Nonimmigrant Workers, filed by public schools on behalf of foreign teachers. Since in the past only a few such petitions have been received at any given time at the NSC, it was thought that a computer search for these types of cases would only result in those for which decisions and processes had already been completed. However, an opportunity arose to observe problems as they actually occurred when a municipal public school district sought assistance to file petitions on behalf of nearly 50 foreign nationals.

Initially, the immigration attorney representing the municipal public school district sought assistance through INS' Office of Business Liaison (OBL). In April 2001, the OBL informed the NSC that numerous petitions would be filed on behalf of foreign teachers by one municipal public school district. The OBL forwarded questions asked by the immigration attorney to the NSC, but declined to name the school district or its attorney. The NSCO provided responses to the attorney's questions through the OBL in April 2001. Later, in June 2001, the NSC again provided the same information directly to the immigration attorney. (See the questions and answers in Part B below.)

The municipal public school district filed some of the cases with the NSC in late June and the remaining cases in early July. In an effort to manage the cases as a whole and to preserve equitable processing times for all Forms I-129 H1B1 filed at the NSC, supervisory staff determined that adjudication of all of the cases could occur as early as July 18, 2001. Through various fax, e-mail, and voice-mail communications, the attorney raised concerns about the date on which the cases would be adjudicated and about the duration of the validity periods that would be granted. With the concurrence of the ACD for the Business Product Line, the NSCO explained to the attorney that the cases did not qualify for expedited adjudication and processing, and that the cases could not be "pre-adjudicated." The NSCO also explained that the validity periods would be dependent on the type of licensure granted by the states of intended employment.

When the time came for the cases to be adjudicated, they were evenly assigned between two adjudicators whose supervisor instructed them to work together so that any requests for additional evidence they might issue would be consistent. Both adjudicators decided to request additional evidence for all of the cases that they each adjudicated. However, one adjudicator consistently requested only two additional items of evidence, while the other requested from among 14 additional items of evidence.

The NSCO examined all of the petitions and the supporting evidence in an effort to ascertain the reasons for the differences among the requests for additional evidence.

The NSCO's examination revealed that the petitions were similar in that they:

- (1) were filed by the same school district;
- (2) involved teaching positions that were subject to the same State's licensure requirements; and
- (3) were filed on behalf of foreign teachers who possessed foreign degrees, or combinations of foreign degrees and experience that could be adjudged to be the equivalent of at least baccalaureate level degrees from accredited United States educational institutions of higher education.

The NSCO's examination revealed that the petitions differed because the:

- (1) principal teaching fields for each of the proffered positions were not the same, and some involved special education;
- (2) fields of study for several of the foreign teachers did not appear to equate to the fields in which the school intended to employ them.

Comparison of the two adjudicators' requests for additional evidence revealed significant inconsistencies. Examination of the types of additional evidence requested indicated that one of the two adjudicators was confused about the types of evidence that are acceptable to establish eligibility for this benefit. This confusion caused that adjudicator to issue predominantly irrelevant requests for additional evidence.

Examination of the evidence submitted in support of the petitions also led the ACD and NSCO to further conclude that evidence of the State's actual licensure requirements was deficient. The evidence consisted of unsigned letters and, in some cases, only partial copies of portions of what merely appeared to be State issued documents. The evidence was also deficient because the State appeared to impose several requirements for licensure, while the petitioner submitted no or little evidence to show that all of those requirements had been met or waived.

The ACD determined that the only additional evidence that needed to be submitted for all of the cases was that which would establish that the foreign teachers were or would be eligible for licensure by the State after arrival in the United States. To that end, the ACD gave instructions that both adjudicators would issue second requests for additional evidence for each of the petitions. Those second requests focused squarely on evidence needed to establish the State's actual licensure requirements, and to show that each foreign teacher had either met the requirements or been granted a waiver by the State. Upon receipt of this additional evidence, the adjudicators approved each of the petitions for the duration of the foreign teachers' temporary licenses (one year).

#### **Part B: Questions & Answers from an e-mail message issued by the NSCO to the petitioner via the INS' OBL**

*Note: Names of actual individuals, organizations, and the State of employment where the public school system is located have been omitted. Some minor edits were also made to improve readability.*

The answers were reviewed and agreed upon by the two NSC SCAOs who were responsible for Forms I-129 H-1B; and by the Actg. ACD for the Business Product Line. The Director approved release of the answers.

1. **Question:** If the public school files all of the I-129 H-1B petitions soon, will the NSC be able to adjudicate all of the petitions so that the teachers can arrive in the United States and commence teacher transition related activities no later than the end of June?

**Answer:** From the information you have provided, it does not appear that there is a basis to expedite these cases. Additionally, it is not possible to accurately project the number of petitions that will be filed between today and the day on which these petitions are filed. Also additionally, it is not known whether there are any backlogs at the DOS which may delay issuance of the visas. Therefore, it is not possible to state with any certainty that these cases will be adjudicated so that the aliens may arrive by the end of June.

Additionally, if a petition is not properly filed it may be rejected. A properly filed petition includes signed Forms I-129 and I-129W, and is accompanied by the appropriate fee. Improperly filed petitions will be rejected and must be refiled. Refiled petitions will be adjudicated in date order as of the date on which they are received as properly filed. Refiled petitions will not be adjudicated ahead of other petitions properly filed and received on earlier dates.

Also, if evidence submitted in support of a properly filed petition fails to establish that the position and/or beneficiary qualify for the benefit sought, then a request for additional evidence will be issued. If the petitioner provides its or its attorney's FAX number, then we will FAX requests for additional evidence to that number where it appears appropriate to adjudication of the case. Any requests for additional evidence that are FAXed will be held at the adjudicating officer's desk for at least 3 workdays awaiting a FAXed response from the petitioner or petitioner's attorney. After 3 workdays, the case is moved to a holding area where it will wait until either a response is received or the maximum period allowed for response (12 weeks) expires.

The possibility that requests for additional evidence will be issued is significantly reduced when a petition is supported by all required documentation. Petitions should be supported by copies of Forms ETA 9035, Labor Condition Applications for H-1B Nonimmigrants that have been certified by the Department of Labor (DOL) for the desired periods of employment. Also, the adjudicator will consider wages and all of the duties to be performed, even those performed prior to the start of the official school year or between official school years, when determining whether the proffered position qualifies as a specialty occupation. Therefore, evidence submitted by the petitioner should show that the beneficiary will be paid no less than the prevailing wage for the proffered position and will perform qualifying duties during the entire period of employment. As evidence, the petitioner may submit a complete, signed, legible copy of the employment

agreement entered into between it and the beneficiary, so long as the agreement specifies the wage to be paid, the duties to be performed, and the duration during which those duties will be performed.

Finally, the adjudicator will consider evidence of the beneficiary's qualifications. Diplomas and/or transcripts that are in a foreign language must be accompanied by English language translations, state the type of degree awarded (associate, bachelor's, master's, doctor's), and specify the field of study. A degree that forms the basis of a beneficiary's qualifications must be equivalent to at least a baccalaureate degree level education from an accredited United States institution of higher education. Also, the petitioner should explain the nexus between the beneficiary's field of study and the field in which the beneficiary will teach if the two are not the same or similar.

It is not anticipated that the State will permit anyone to teach who does not possess a foreign degree that is the equivalent of a United States bachelor's degree from an accredited institution of higher education. So, this e-mail does not address that eventuality.

2. **Question:** What is the maximum validity period that may be granted for these petitions?

**Answer:** The period during which a beneficiary may work will depend on the period requested by the petitioner in Part 5 of the Form I-129, the period certified by the DOL in the Form ETA 9035, and the licensure requirements established by the State of employment (absent any conflicting federal law). If the periods do not all agree, then the maximum validity period that may be granted will be the shortest of all of these periods.

Additionally, it appears that a temporary license will not be issued to each beneficiary until they have arrived in the United States and commenced working for the petitioner. If that is the case, then the petitioner must submit documentation in support of each petition that will establish the current licensure requirements for secondary school teachers in the State of employment. Acceptable evidence includes a signed letter on State letterhead from an authorized State official and/or complete, legible copies of relevant, current State code.

So, if the State permits an individual to teach for a specified period prior to issuance of an initial, renewed, or extended license, then the adjudicator may consider that the licensure requirements have been met for an otherwise unlicensed beneficiary during those periods of employment. For example, if the State of employment allows the beneficiary to teach for 3 months pending issuance of an initial temporary license, then issues a temporary license which covers that 3 month period and the following 9 months, then allows the beneficiary to teach for 6 months after the temporary license has expired and while awaiting the results of a mandatory skills test and any re-tests allowed by State law, then the maximum validity period that may be granted is 18 months (providing that this is the same period shown on the Form I-129 and certified ETA 9035).

**Final Comment:**

The questions you raised have been answered absent an actual petition. Therefore, there is a possibility that the scenario you described may not be the same scenario we see when the petitions are actually filed. However, we are confident that any misunderstandings that may arise can be quickly and effectively resolved.

**Adjudication: Form I-129 H1B1  
TaekwonDo Instructors**

The NSCO was approached by an NSC employee with concerns about the adjudication and processing of several Forms I-129, Petitions for Nonimmigrant Workers filed on behalf of aliens whom the petitioner desired to employ as TaeKwonDo instructors.

Upon examination of the cases, the NSCO considered that the adjudicating officer erred in approving the petitions. The NSCO secured all of the petitions, and obtained copies of several non-precedent decisions issued by this Service's Administrative Appeals Office (AAO). The NSCO then endeavored to resolve the errors by presenting the cases and the non-precedent decisions to the SCAO who was responsible for Forms I-129 H1B1. The SCAO instructed the NSCO to seek to resolve the errors through direct contact with the adjudicating officer. The NSCO sought to do so. However, the adjudicating officer was reluctant to change the decisions. Also, approval notices for some of the cases had already been issued.

The NSCO consulted with the ACD for the Business Product Line who had responsibility over all business petitions. Subsequently, the ACD and NSCO advised the Director, NSC that the best course of action would be to allow the adjudicating officer to choose between two

options. The officer could reopen the cases on motion for the purpose of either issuing notices of intent to revoke the approved cases, or certifying the approvals to the Administrative Appeals Office (AAO). The adjudicating officer chose to certify the approvals to the AAO.

The AAO examined the certified approvals and issued detailed decisions for each of the cases. In each of its decisions, the AAO reversed the approvals. The AAO's decisions should eventually be available for review on the INS WebPages. When available, they may be accessed through the menu by clicking "About INS and FOIA," "Freedom of Information and Privacy Acts," "Electronic Reading Room," "Administrative Decisions" (rendered on October 15, 2001).

#### **Adjudication: Form I-129 H2B**

##### **We've got the beef. Where are the meat dressers?**

A petitioning employer sought to obtain H2B, temporary non-agricultural worker classification, for alien beneficiaries whom it desired to employ as meat dressers.

Immigration law provides that a petitioning employer may be granted this benefit if it can establish the following three facts: (1) it regularly employs permanent workers to perform the services or labor; (2) the need to supplement its permanent staff is temporary due to a *seasonal or short-term demand*, and (3) the temporary addition to its staff will not become a permanent part of its regular operation.

The petitioner encountered difficulties when it sought to establish the second fact, that the need was temporary due to a "peak load" (short-term) demand for production. Evidence submitted by the petitioner included its letter where it made various assertions about the nature of beef production, a letter from a company that supplied the petitioner with beef cattle, and a letter from a meat retailer. Other evidence included a Form ETA 750, Application for Alien Employment Certification certified by the DOL for alien workers approved to work for a period of 9 1/2 months.

The Service informed the petitioner that it intended to deny the petition based on the Service's determination that the petitioner's need did not meet the definition of "peak load." To overcome the Service's intention, the petitioner was instructed to submit additional evidence that the need was not permanent and to show production numbers substantiating the peak load nature of beef production. The Service also requested evidence to show whether the meat dresser positions have been filled in the past (that the additional staff will not become part of the petitioner's regular operation). Finally, the Service informed the petitioner that the role of the DOL in temporary worker petitions is advisory and that the temporary labor certification is not binding on the Service.

Additional evidence submitted by the petitioner showed that the petitioner produces only beef, and included numbers of heads of cattle slaughtered by the petitioner on a weekly and monthly basis in 2000. The production figures failed to establish the peak load nature of the petitioner's need. Other additional evidence submitted addressed the affects on the petitioner's operations of variations in consumer demand in the United States and overseas for beef products. Evidence failed to show that consumer demand in the United States for products produced by the petitioner drop during holiday seasons. Evidence also showed that the petitioner chooses not to produce products desired overseas because to do so would require more commitment from its labor force than it could justify.

The NSCO became aware of congressional interest in this case. Although that interest was later withdrawn, the NSCO considered that further investigation into the actual nature of beef production was warranted. The industry has long been plagued by employment difficulties related to temporary non-immigrant workers, and evidence submitted by the petitioner was insufficiently detailed and unsophisticated given the significance of the industry within the United States.

In the course of the investigation, the NSCO contacted state and federal government offices responsible for overseeing beef production, and nationally renowned non-government associations involved in monitoring and lobbying on behalf of the beef industry (cattle growing and meat processing). Non-government sources asked to remain anonymous so that their ability to continue to work within the beef industry would not be adversely affected.

The Nebraska Department of Agriculture does not maintain and could not provide information about the seasonal or peak load nature of beef production within the petitioner's own State. However, the United States Department of Agriculture's (DA's) Economic Research Service compiles statistics for beef and pork slaughter rates in the United States. DA economists helped the NSCO locate relevant statistics by accessing the DA's Internet Web Page at [www.usda.gov](http://www.usda.gov), and by clicking "On Line Data Base," "US and State Data," "Slaughter," "Species and Classes."

A non-government source reported that calving used to occur only once a year, but that constant demand for beef products has caused cattlemen to breed cattle so that calving now takes place twice a year, in the spring and fall.

Another non-government source reported that while consumer demand may affect some businesses, such as those that package beef as gifts, it is rare for a meat processor to be dependent on consumer demand that is seasonal in nature. Some cuts of beef may be seasonal (e.g. middle meats from Memorial Day to Labor Day, end meats from Labor Day into spring). Nevertheless, the meat processor should be able to corroborate its claims for seasonal demand of certain cuts of meat by submitting documentation issued by those who retail its products. Also, most meat processors strive to stabilize production volume so that they can maximize profit. Therefore, it is very unusual for a meat processor to serve only those customers who have seasonal demands.

The source also said that some meat processors who also provide packing services depend on customer demand and can experience production lulls. Also, some decline in beef production can occur in January for some meat processors who also process lamb and ham products. The NSCO noted, however, that the petitioner in this case did not submit any evidence to show that it also provides meat-packing services, or that it also processes lamb and ham products.

The non-government source concluded by saying that December 1999 showed the highest demand for meat products ever recorded as more consumers decided to eat steak during that holiday season.

A renowned non-government source within the academic community reported that industry publications periodically report on "seasonality" in the beef industry. However, notwithstanding those articles, the source concluded that there is no seasonal nature to beef production. The seasonal nature of calving no longer exists, and consumer demand is high with insufficient variations to meet the requirements for H2B classification. Rather, turnover and injury rates among workers in the meat processing industry, more than anything else, affect demands for foreign labor.

The non-government academic source concluded by saying that there is some seasonality to pork processing only because consumer demand has not yet risen to the point where pig farmers are breeding pigs to produce piglets more than once each year. However, as demand for pork increases in the future, even pork's "seasonality" will disappear.

A simple search of the DA's database corroborated the non-government academic source.

Information gained by the NSCO as a result of investigation into the actual nature of beef processing supports the adjudicator's decision to deny the petition filed by a beef processor on behalf of non-immigrant workers whom it desired to employ as meat dressers. The investigation also indicates that adjudicators will not be able to approve petitions filed for pork processing positions in the event pork producers begin breeding piglets more than once each year.

## APPENDIX D

### SPECIAL INTERVENTION: Thinking outside the box

Adjudication: Form I-129 H1B1

Dairy Farm Supervisor

A Wisconsin dairy farm appealed the NSC's decision to deny a petition it had filed on behalf of an alien it desired to employ as its dairy farm supervisor. The case came to the attention of the NSCO before it had left the jurisdiction of the NSC.

Evidence showed that the alien acquired a four-year foreign baccalaureate degree in veterinary science that could be adjudged to be the equivalent of a baccalaureate degree from an accredited United States educational institution of higher education.

Additionally, the NSCO determined that the duties of the proffered position involved the application of dairy science and agricultural business concepts at what appeared to be at least a baccalaureate degree level. This determination was based on the petitioner's detailed job description, evidence that established the nature and scope of the petitioner's dairy operations, and other evidence which showed that several accredited United States educational institutions offer established baccalaureate degrees specifically in the field of dairy farming and science. The evidence also showed that one of the educational institutions indicated a recent placement rate in excess of 98% in agribusiness positions, both on and off the farm, for graduates of its dairy program.

The NSCO further determined that information in the DOL's Occupational Outlook Handbook did not appear to provide sufficient detail about modern dairy farming and agribusiness to support denial of the petition.

Some at the NSC who believed that dairy farms rely predominantly on unskilled laborers had difficulty accepting that any but a very few mid-western farm owners could employ a position that requires at least a baccalaureate degree level education. They considered that the case was an anomaly or could show a change in an industry standard, and that any decision to approve the case should be certified to the AAO.

Therefore, the NSCO also contacted a District Director to inquire as to the actual nature of the dairy farms with which his enforcement personnel had contact. Without hesitation, the District Director attested to the modern nature of today's mid-western dairy farms and refuted beliefs that dairy farms rely predominantly on the work of unskilled laborers.

Additionally, evidence submitted in support of the case did not support conclusions that the position was either an anomaly or indicative of an industry-wide change in standards. Rather, the evidence showed that as with most other United States agricultural endeavors, competition among modern dairy farms is marked by an increasing reliance on technology, scientific innovation, modern agribusiness management techniques, and highly qualified professionals and specialists in the field.

The case was reopened and approved. It should also be noted that neither the number of individuals employed by the dairy farm, the education of those whom the alien would supervise, nor the job title of the proffered position were significant factors in the decision to approve the case. Rather, of significance was evidence submitted to establish the alien's qualifications; and the actual nature and scope of the duties to be performed by the alien, as indicated by the herd size and the type of operation (eg. equipment, technology, science, management, federal and state agricultural regulatory requirements).

Adjudication: Form I-131

Travel Documents Pending Removal of Conditional Resident Status

*Title 8 Code of Federal Regulations*

*Section 223.2(b)(1) states in pertinent part:*

*...[An] application [for a reentry permit] may be approved if filed by a person who is in the United States at the time of the application and is a lawful permanent resident or conditional permanent resident.*

*Section 223.3(a)(1) states in pertinent part:*

*A reentry permit issued to a conditional permanent resident shall be valid for 2 years from the date of issuance, or to the date the conditional permanent resident must apply for removal of the conditions on his or her status, whichever comes first.*

*Section 223.3(c) states in pertinent part:*

*A reentry permit...may not be extended.*

An alien gained conditional permanent resident status by virtue of his marriage to a United States citizen. The period during which the alien could hold this status was 2 years. To remove the conditions and acquire permanent resident status, the alien filed a Form I-751, Petition to Remove Conditions on Residence.

Forms I-751 are filed at Service Centers, but may not be filed more than 90 days before the end of the 2-year period of conditional permanent resident status. Most Forms I-751 are adjudicated at the Service Centers. However, some are selected for adjudication at District Offices, where the applicants may be interviewed.

Although the alien filed his Form I-751 at a Service Center, it was selected for adjudication at a District Office. Although the alien had completed the interview at the District Office, a final decision in his case remained pending for more than 1 year after the date on which his conditional permanent resident status had expired. Indeed, increasing numbers of aliens were experiencing the same delays, and the circumstances affecting this alien did not appear unique.

Previously, adjudication delays for Forms I-751 did not exceed 1 year. Since it did not appear that the regulations provided for the issuance of a reentry permit after the expiration of an alien's conditional permanent resident status, the NSC denied any Form I-131, Application for Travel Document submitted by an alien whose conditional permanent resident status had expired. Moreover, denial of the request for a reentry permit did not appear egregious to some in the Service. They reasoned that an alien could still, freely depart from the United States even if he did not possess a United States reentry permit. They further reasoned that the alien could and should use a passport from his own country of nationality to facilitate travel outside the United States. Lastly, they noted that the Service ameliorated the inconvenience by allowing the affected alien to seek readmission into the United States by presenting his expired Form I-551, Permanent Resident Card; and a copy of the notice issued to him by this Service upon receipt of his Form I-751. In effect, the notice extended the alien's conditional permanent resident status by 1-year.

The notice did not, however, extend the alien's conditional permanent resident status beyond 1-year. So, when adjudication of this alien's Forms I-751 went beyond 1 year, he filed a Form I-131, requesting a reentry permit as a means to facilitate readmission into the United States. The NSC could not effect adjudication of the Form I-751 at the District Office. Therefore, the NSC denied the Form I-131. The alien filed an appeal against denial of the Form I-131 to the AAO. The AAO upheld the alien's appeal, and ordered the NSC to approve his Form I-131. The AAO did not, however, stipulate the period for which the reentry permit was to be valid. Therefore, since the alien's conditional permanent resident status had expired, some at the NSC concluded that the reentry permit could not be issued or could only be issued with an already expired validity period.

The Director, NSC asked the NSCO to examine the situation and provide recommendations.

The NSCO advised against issuing a reentry permit with an expired validity period. Instead, the NSCO advocated a policy of continuing de facto 1-year extensions. Essentially, as long as there is a pending Form I-751, the Service considers status to have been extended in 1-year increments from the expiration date on the conditional I-551 card. If there are no other grounds for denial, the NSC will approve the Form I-131 and grant validity periods in 1-year increments from the date on the conditional Form I-551, to run concurrently. Also, the NSCO recommended that written guidance to adjudicators include examples of various adjudication scenarios that will help to prevent the issuance of a reentry permit with an extant or nearly extant validity period. The examples provide that reentry permits issued pursuant to these types of circumstances will be valid from the date of adjudication for no less than 3 months and no more than 15 months, expiring on the anniversary of the date on which the alien's conditional permanent resident status expired.

The Director, NSC accepted a final version of the NSCO's recommendations, produced with modifications desired by the ACD for the Family Product Line.

It should also be noted that, upon later revisiting the issues, the NSCO advocated issuance of the reentry permit, for aliens affected by these Service delays, for periods of up to 2 years rather than only 1 year. This recommendation was made based on the decision rendered by the AAO, and in light of the NSCO's own reading of the regulations. The Director, NSC did not favorably receive this recommendation. Instead, under the AAO's insistence, the issue is still under consideration at a higher level within the INS.

**Adjudication: Form I-485  
Whistleblower**

A state ombudsman requested that the NSCO intervene in the adjudication of a pending Form I-485, Application to Register Permanent Residence or Adjust Status that had been filed by an alien who had been employed by the state and who had filed a whistleblower complaint against the State. The State found that the whistleblower complaint was founded, and that the alien had suffered retaliation. To protect the alien from further retaliation and with his concurrence, the State found new, like employment for him. However, the State was concerned about the effect this could have on the alien's pending application for adjustment of status. The NSCO determined that certain discretion was warranted and appropriate, conferred with the Director, NSC and a decision that was favorable to the alien was rendered.

## **APPENDIX E**

### **SPECIAL ASSISTANCE: Service beyond the decision**

#### **Service Delivery: Customer Service Initiative Teams**

At the Deputy Director's behest, the NSC Steering Committee established teams for the purpose of exploring four particular types of problems affecting NSC customers. The NSCO participated on each of the four teams.

#### ***Card Correction Team:***

One team addressed problems with Employment Authorization Cards (Forms I-688) and Permanent Resident Cards (also known as Alien Resident Cards) (Forms I-551).

The team determined that an incorrect card issued as the result of an error committed by an NSC employee ("Service error") may not simply be corrected without the applicant's submission of a new Form I-90 for a replacement Form I-551.

This determination was made in light of an INS policy memorandum, Subject: Processing Inquiries Regarding Unreceived Permanent Resident Cards when initial ADIT stamp is about to expire; Mailing Immigrant Visas from Ports of Entry; and Handling incorrect Permanent Resident Cards. The policy memorandum was issued by the Office of the Executive Associate Commissioner on October 22, 1998. It states that... "inventory and integrity controls prevent us from simply changing a card order and reprinting a card at this time."

This determination also prevented implementation of a Standard Operating Procedure (SOP) entitled, "Document Correction for I-551 Cards (ARC) & I-765 (EAD) SOP" that had been created by a previous NSC Card Correction Team. Section 7 of the SOP contained a provision that did not comport with the aforementioned INS policy memorandum.

#### ***Notices Team:***

Another team addressed problems with notices issued by the NSC to customers who file petitions and applications with the NSC. The team determined that insufficient information exists upon which to conclude that notices are issued for all cases and in all circumstances where notices are requested. Stated another way, the NSC produces huge volumes of notices (receipt, approval, and other types) every day. Yet, current processes do not allow for quality reviews of notice production.

The team also determined that verbiage on Forms I-797, Notices of Action fails to provide accurate information for all of the form types for which these notices are issued. The team confirmed that INS allows Service Centers to make only minor changes in these notices.

In light of this restriction, the team considered alternative means of communicating with the public. The team learned that 60% of the public's calls to the NSC involve requests for information about pending Forms I-485, 15-20% involve requests to expedite pending Forms I-131, 10% involve requests for information about pending Forms I-130 and filing procedures for United States citizenship, and 10% involve requests for information about other pending petition and application types. The team rejected creating product specific information sheets that could be attached to the Form I-797 due to the high cost in materials and labor involved in such an undertaking. The team considered that while the INS Web Page is not available to customers who do not have access to computers or the Internet, and while it does not yet provide information about a specific petitioner's or alien's case, it provides a wealth of information that many customers still seek to obtain by telephone. The team determined that the INS would continually seek to enhance its Web Page and that customer use of that medium would increase accordingly. The team did not consider any other alternate means of providing information to the NSC's customers.

Finally, at the NSCO's behest, the team considered the benefits and drawbacks of establishing a fax number dedicated to receiving very specific requests for service from the NSC's customers. Although there was a great deal of concern that this type of service might be used by customers seeking assistance other than that for which the fax number would be intended, the team submitted the proposal to the NSC Steering Committee. The NSC Steering Committee did not approve the proposal.

### ***Address Change Team:***

Another team addressed problems with the forwarding of mail issued by the NSC, and with the receipt and processing of customers' address change requests for services rendered at the NSC other than those related to Forms N400, Application for Naturalization.<sup>5</sup>

At the time the team met, the NSC's mail was being franked with a message that required the United States Postal Service (USPS) to return rather than forward mail when the customer's address had changed. The NSC was not allowing its mail to be forwarded to the customer's new address. The NSC's mail processes complied with a national contract that governed all Service Centers' mail processes. The contract stipulated that where pre-sort services were available, the Service Center would frank its mail to preclude forwarding by the USPS. (Pre-sort services are not available at all Service Centers, thereby allowing that Center's mail to be forwarded and giving rise to customers' perceptions that the NSC's practice was arbitrary and unfair.) This practice kept the cost of Service Center mail processing to a minimum. Omitting franked instructions to the USPS on each piece of mail sent by a Service Center would allow that mail to be forwarded to a customer's new address, however, under the provisions of the national contract it would also significantly increase the Service Center's total mailing costs.

A solution presented itself when the INS modified the existing national contract to provide for a Fast Forward service by its pre-sort providers. The new pre-sort service, implemented in April 2002, still requires that the NSC frank each envelope with instructions that the USPS return rather than forward that piece of mail. However, the pre-sort company compares all of the addresses shown on the NSC's mail against a continuously updated national address listing provided by the USPS before handing the NSC's mail off to the USPS for delivery. The pre-sort company annotates new addresses on all pieces of mail for which the customer initiated a change of address as few as 7 days prior to the date on which the NSC intends that the piece be mailed. When a new address is detected, the pre-sort company returns that piece of mail to the NSC rather than handing it off to the USPS. The NSC opens the mail so that it can identify the customer (by receipt number, name, alien number, date of birth, prior address, etc.), and updates that customer's electronic Service record to show the new address. The NSC then resends the same piece in another envelope that bears the new address. The newly addressed envelope goes through the pre-sort again and, absent any further changes to the address, is handed off to the USPS. The whole process, from identification of a change in address by the pre-sort company to re-mailing in a new envelope annotated with the new address by the NSC, takes about 48 hours.

Problems involving the receipt and processing of customers' address change requests for all forms processed at the NSC, other than Forms N400 have not yet been completely resolved. The team last considered recommending that a separate post office box number be designated for the receipt of nothing but requests to change addresses for forms other than Forms N400. However, operational requirements at the NSC forestalled team meetings. While that recommendation has not yet gone forward to the NSC Steering Committee, the Supervisor of the NSC's Congressional Liaison Unit and the NSCO presented it to the Deputy Director. The Deputy Director is exploring the initiative as of the date of issuance of this report.

### ***Consular Return Team:***

Another team addressed problems associated with visa petition packets returned to the NSC by the Department of State's (DOS) Consular Offices.

When the DOS declines to issue a visa, it returns the relating petition packet that includes a copy of the NSC approved petition to the NSC. Contract personnel at the NSC are responsible for connecting the returned visa petition packets with the INS record copy of the petition and supporting documents. This can be problematic, and may involve procedures and timelines unique to each different type of petition.

The team determined that procedure checklists that are supposed to aid the contractor in the performance of this function were either outdated or non-existent for all petition types. At the team's request, NSC SCAOs drafted checklists for each of the affected form types. Updated checklists are now in use and the team's leader determined that procedural problems associated with the performance of this function appear to have been reduced or eliminated.

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<sup>5</sup> Customers who have a pending Form N-400 and who desire to report an address change must call the INS National Customer Service Center toll-free number at 1-800-375-5283.

The team also determined that the contractor had not been devoting sufficient personnel resources toward the performance of this function. Contractor team personnel explained that the contract did not include performance measures for this function. Since the NSC has never measured the performance of this function, the contractor reasoned that it could not justify assigning dedicated resources toward its performance. Therefore, contractor resources were only sporadically assigned to this function.

The NSC's Contract Performance Audit Unit is currently investigating whether the contract provides a means for measuring the performance of this function. It is anticipated that a means will be found and that such measurements will commence. Once performance is measured, it is anticipated that the contractor will assign resources accordingly.

**Adjudication: Form I-129 H1B1**

**Advice to the Lovelorn**

An adjudicator sought the NSCO's assistance for a petitioner who filed a temporary nonimmigrant worker petition on behalf of a man she knew only through conversations over the Internet, but whom she claimed she loved and desired to employ. The petitioner had filed a Form I-129 H1B1 and had paid the requisite filing fee of \$1,110. A friend later advised her to file another form type, so she sought to withdraw the Form I-129 and to have the \$1,110 fee refunded. The NSCO issued a letter, explaining that the fee could not be refunded and encouraging the petitioner to explore the INS Web Page for more information about United States immigration law and programs relevant to her particular situation.

**Adjudication: Form I-730**

**Director's Assessment Memorandum**

The Director sought information from the Deputy, the ACD for the Family Product Line, the SCAO for Forms I-730, and the NSCO to assist him in assessing how well the NSC was performing its responsibilities with regard to Forms I-730. He determined that the NSC was performing in an acceptable manner and tasked the Deputy, ACD, SCAO, and NSCO to prepare an internal memorandum for his signature. The memorandum reiterated that where a petitioner requests to be granted a waiver of the two-year filing period, an adjudicator should grant the waiver only if there is compelling evidence to show that the petitioner was prevented from filing during the required filing period.

## APPENDIX F

### OBSERVATIONS AND DISCOVERIES: Information is the key

#### Adjudication: NSC Motions and Appeals Training

The NSCO considers that complaints involving motions and appeals<sup>6</sup> are among the most significant types of complaints that can be submitted to the NSC by its customers. Motions and appeals often cannot be filed unless an additional fee is paid to this Service, and can precede or portend lawsuits filed against this Service.

Complaints involving motions and appeals are generally received in two ways. The American Immigration Lawyers Association generally complains on behalf of several of its members who have been experiencing a particular problem. Usually, the members perceive that adjudicators do not adequately examine or properly consider evidence submitted in support of a motion or appeal before rendering a decision on the motion or before forwarding the appeal to the AAO. Individual attorneys or representatives generally complain about adjudicators' errors involving the handling or adjudication of motions or appeals for which they are the attorneys or representatives of record. Those complaints are generally made within the body of letters that accompany the actual motions or appeals. Adjudication supervisors generally find complaints submitted in this manner at the time of supervisory review of decisions rendered by adjudicators for motions, or immediately prior to transfer of appeals to the AAO.

In November 2001, the NSCO observed NSC motions and appeals training, and examined the training materials provided to a small group of NSC adjudicators. The NSCO reported her observations to the Director, Deputy Director, ACDs for the various adjudication product lines, Center Attorney, and Center Employee Development Specialist.

The NSCO observed that the trainees' various adjudication responsibilities, job series, and grades (experience) may have made it difficult for the trainer to provide training that met all of the trainees' various needs. The training manual was not relied upon in the training. Also, the training manual could be considered deficient because it included outdated guidelines, copies of notes and e-mail messages treated as Center policy, and errors. The NSCO particularly noted, however, that the training failed to instruct trainees that they should examine all evidence submitted on motion or appeal, regardless of whether the motion or appeal was filed timely. Instead, the training gave the impression that an adjudicator should, but may choose not to examine evidence submitted in support of an untimely filed motion or appeal. It was also noted, however, that the training provided in 2001 compared favorably against the training provided to the NSCO herself in 1993 because these most recent trainees were immediately provided with actual sample cases to be worked and reviewed by the trainer.

The Director has since established and is in the process of staffing an NSC Training Unit. It is anticipated that that unit will endeavor to rectify the deficiencies noted by the NSCO.

#### Service Delivery: Public Copies

##### References:

5 USC 552(a)(2) (as amended by the Electronic FOIA (E-FOIA) of 1996)

8 CFR § 103.9(e)

HQFPB 160/5—C memorandum issued by the Office of the Executive Associate Commissioner, Subject: Field Offices No Longer Required To Maintain Reading Rooms, dated April 4, 2000

NSC adjudicators document decisions to approve petitions or applications by merely stamping and signing the Action Block of the form. Written explanations for decisions are usually rendered only when the adjudicator: (1) intends to deny an otherwise unadjudicated case; (2) denies a case; (3) intends to deny or to revoke a previously approved case; (4) denies or revokes a previously approved case; (5) reopens a denied or revoked case, and approves that case. In rare instances, a written explanation is rendered when the adjudicator certifies the decision to a higher authority. In very rare instances, a revised decision may be rendered when an adjudicator decides to reopen and clarify the prior issued decision.

<sup>6</sup> In particular situations, an adjudicator may reopen a case that has been appealed to the AAO on a Service motion. See 8 Code of Federal Regulations Sections 103.3 and 103.5.

When a written decision is rendered for a case where the petitioner seeks to employ a non-immigrant, the NSC prints a copy of the decision designated the "Public Copy." The public copy is maintained inside and on the non-record side (right side) of the case folder where it remains until the case folder and all of its contents are destroyed. The public copy is not made available for viewing by the public. Neither is it copied and redacted in response to Freedom of Information Act (FOIA) requests. When responding to requests for information under the FOIA, FOIA officers use a copy of the decision that is retained on the record side (left side) of the case folder.

In a non-immigrant petition, if the decision is appealed or certified to the AAO, then documentation that is essential to the decision and maintained on the left side of the case folder (also called the Record-of-Proceeding or ROP) is removed from the case folder and forwarded to the AAO. All non-essential documentation, including the public copy, is retained in the case folder and maintained at the NSC pending the AAO's decision.

After the AAO renders its decision, the essential documentation is returned to the NSC and matched up with the case folder housing the non-essential documentation. Once all of the documentation is consolidated, the case is returned to the NSC adjudicator for review and any action that may be ordered by the AAO. The adjudicator cannot accomplish the AAO's order until all of the documentation is matched and consolidated into the case folder.

In most instances, the only non-essential document in the case folder is the public copy of the decision. Also in several instances, the case folder housing only the public copy has been misplaced or lost altogether. The NSCO reasoned that the entire case folder could be forwarded to the AAO and the matching process eliminated if the public copy was not required to be stored in the case folder.

On July 27, 2000, the Director, NSC asked the Chief of the FOIA Policy and Planning Section whether Service Centers are exempt from producing public copies of decisions. The Chief answered that when Service Centers were first created, their main function involved the legalization process. When the statute was enacted, Congress attached specific confidentiality requirements to these (legalization) records. These requirements made the contents of the applications and supporting documents exempt from public disclosure. Also, since the Service Centers did not receive the public as part of their day-to-day operations, they were exempt from having a public reading room. However, the Chief also stated that the role of the Service Centers has changed. Since Service Centers now adjudicate decisions other than those involved in the legalization program, then a public copy should be provided to the HQFOIA Office, in accordance with Service policy (the above referenced memo), for inclusion in the INS Electronic Reading Room. As for appealed decisions, AAO provides the HQFOIA with a public copy. There is no need for Service Centers to duplicate this effort.

Additionally, the NSC continues to produce public copies of decisions to deny, and of decisions that are certified to a higher appellate authority. The public copies are not being forwarded to the HQFOIA, though, because the NSC does not possess the resources necessary to collect, redact, and mail the approximately 140,000 such decisions that it alone has rendered during this calendar year. (Indeed, it has been estimated that all of the Service Centers combined annually render between 600,000 to 900,000 decisions for which public copies must be made.)

Finally, a specific drawer has been set aside by the NSC records support contractor to store all of the case folders for petitions that have been appealed or certified to the AAO. This accommodation should help ensure that non-essential documentation will be available for consolidation with essential documentation immediately after the AAO renders its decision and returns the ROP to the NSC.

#### **Service Delivery: Compilation of Questions and Answers**

The NSCO contacted a regional EPA Ombudsman in an effort to learn more about how ombudsmen perform in other federal agencies. The regional EPA Ombudsman had many years of experience as an ombudsman in and outside of the federal government. At one time, he was responsible for setting up an ombudsman's office from scratch. From that experience, he suggested that the NSCO seek to find records of questions asked by customers, and the NSC's answers to those questions. This would demonstrate customers' interests and concerns, and where their energies are being spent. It would also show the types of answers provided by the NSC, and whether the responses were timely, accurate, and consistent.

With the assistance of the Director's secretary, the NSCO collected and compiled a list of questions and answers received by some stakeholder groups. At the suggestion of the ACD for the Business Product Line, and again with the assistance of the Director's secretary, the NSCO put the compilation on an electronic Service Center bulletin board. The compilation is available for viewing by all

Service Center employees. It is expected that it will be used by INS supervisors, adjudicators, information officers, and others at the NSC who are preparing to participate as speakers at conferences or in meetings, and/or who otherwise interact with the public.

The compilation documents the kinds of information our customers most desire to receive, and may aid in identifying information that should be added to this Service's Internet Web Page.

# APPENDIX G

## OMBUDSMAN'S STATEMENT

It occurred to me that the thing of greatest value to the reader is the information about the duties and responsibilities of the position, procedures relating to the performance of those duties and responsibilities, and descriptions of actual outcomes. I provided my credentials at the beginning of the report only because they are important to help establish credibility, both for the position and for me as its incumbent. My comments, even as the ombudsman, seemed to me to be the thing of least value to the reader. So, I have placed them here near the end of the report.

Moreover, my statement will simply describe those events that contributed to the development of this office from its opening on December 30, 2000, when I entered on duty; to the last day of this reporting period, December 31, 2001. If this type of information proves beneficial, then this portion of each annual report may continue to describe events that shape the development of this office.

For the first few months in the position, cases that I had previously examined continued to come to me for a final decision after the receipt of additional evidence or a motion, and for review after receipt of an appeal of my decision. I completed those cases rather than pass them on to another officer. Initially, I divided my time between working those cases, exploring how best to perform the duties described in my position description, and drafting the special problem criteria stipulated in my position description (without benefit of information from other ombudsmen).

As stated earlier in this report, it was envisioned that this position would perform duties similar to those of an analyst; but be imbued with adjudication knowledge, skills, and authority not generally found among federal management and program analysts. It was also envisioned that the position would perform as a special assistant to aid the Director, NSC in developing a customer-focused organization. The Director, NSC and I knew nothing about the field of ombudsmandry. Rather, as is generally the case with federal employees, we relied on the position description to provide the basis for this position's duties, responsibilities, and authorities. It did not occur to either of us to explore the actual meaning of the word ombudsman since the meaning should have been intrinsic to the position description.

Nevertheless, one day, I realized that other NSC employees and I often abbreviated the word "ombudsman" as "OMB." That realization caused me to consider that the initials "OMB" are usually attributed to the Office of Management and Budget. In that regard, they have a distinct meaning, but not one that is normally associated with immigration issues. Certainly, I wondered, what relationship could the NSC ombudsman's position have to a position at the OMB? (And, why is this word "ombudsman" so hard to pronounce?)

My explorations into the field of ombudsmandry began when I read the definition for the word "ombudsman" given in Webster's II: New Riverside University Dictionary, purchased by the government for our use here at the NSC. According to Webster, the word is of Norwegian origin. In Old Norse, it meant steward or manager; and can be literally translated as a man whose responsibilities are "about command." Today it has two meanings. The first is as a government official, especially in Scandinavian countries, charged with investigating citizens' complaints against the government. The second is as one who investigates complaints, such as those from consumers (of government services or benefits), and assists the complainants in achieving fair settlements.

The introduction to the position description agrees with this definition and states:

The incumbent serves as a Center Adjudications Officer (Ombudsman) for a Service Center within the Immigration and Naturalization Service (INS). The incumbent is the primary point of contact for business groups and congressional delegations for conflict resolution to promptly and properly resolve client benefits-related problems that have not been resolved through normal channels. Because this position involves resolving the troubling and sensitive INS benefits issues; it has a direct impact on a large portion of the INS public and government client population. The position is specifically charged with reducing client burden and protecting both his/her rights and the government's rights when it pertains to granting or denying an immigration benefit.

Nevertheless, I considered that while the English language adopts many foreign words and their original foreign meanings, most such words come into common usage. This word "ombudsman," was foreign and appeared in an English language dictionary, but did not

appear to me to have come into common usage. After all, I didn't commonly use the word. And, since some of the remaining portions of the position description appeared to deviate from the description in the introduction, it seemed to me that there was not a common understanding of ombudsmandry among those who classified the position.

I wondered, "Is anyone other than the INS using this word and, if so, how?" I searched for information on the Internet and found Web Pages for the USOA, two other United States ombudsmen's associations, and various foreign ombudsmen's offices all around the world. Initially, I did not find any information about other United States federal ombudsmen.

The USOA web page indicated that that organization was comprised predominantly of public sector ombudsmen, especially those who endeavor to resolve citizens' or residents' complaints. I contacted the USOA and obtained information about the organization, its members, and the field of ombudsmandry. I shared that information with the Director, NSC. Using that information, he approved a revision to the special problem criteria that comports to a model used by most other ombudsmen. (See Appendix A.) The Director also determined that membership in the USOA would be beneficial for the full, professional development of this position.

Now, several months later, I have compiled information from various sources about several United States public sector (including federal government) ombudsman positions. I have also learned that the two other United States ombudsmen's associations predominantly represent a variation of the classical concept, investigating complaints from employees and assisting those complainants in achieving fair settlements from their employers. Those ombudsmen serve the needs of United States businesses by seeking to resolve employees' complaints as quickly, inexpensively, and effectively as possible. They are characterized as "internal" ombudsmen because they work to help resolve complaints that arise from within an organization's workforce. Ombudsmen who work to resolve consumers' complaints are characterized as "external." If I understand the history of the field correctly, then "classical" ombudsmen are established through an act of the highest elected body within a government, serve the constituents of that same government body, and report to that same government body. Again, if I understand the field correctly, the only truly "classical" ombudsmen in the United States appear to be ombudsmen who receive complaints from the citizenry and residents of the States of Alaska, Arizona, Hawaiï, Iowa, and Nebraska.

This position is probably best characterized as that of an "external" ombudsman.

And, this is where I conclude the NSC Ombudsman's Statement for 2001. It is my hope that you have found the time you spent reading this report to be beneficial. You are welcome to comment on all aspects of this annual report, including format, content, and readability. Please submit your suggestions, observations, and questions to me no later than December 31, 2002, so that I will have an opportunity to consider them before I begin preparing the Annual Report for 2002.