

Citizenship and Immigration Services Ombudsman

EMPLOYMENT AUTHORIZATION DOCUMENTS: MEETING THE 90 DAY MANDATE AND MINIMIZING THE IMPACT OF DELAY ON INDIVIDUALS AND EMPLOYERS

July 18, 2011

Economic opportunity and family reunification are primary reasons many immigrants seek to live in the United States. It follows naturally that employment authorization is a critical immigration benefit; important to the U.S. economy and essential to support one's self and family. U.S. Citizenship and Immigration Services (USCIS) recognizes this, and has committed in regulation to a 90 day processing time for Employment Authorization Document (EAD) applications.

USCIS, in fact, does adjudicate the vast majority of EAD applications in 90 days or less, but delays do occur. These recommendations, if implemented, would ensure that processes are in place to quickly adjudicate cases that remain pending past 90 days.

Individuals, and the organizations that employ them, may suffer economic hardship when EAD applications are delayed. The effect of these delays is aggravated by the lack of a fast, easily accessible method for resolving EAD-related processing problems. In my work as the Ombudsman, I have heard firsthand from employers and employees who have been impacted by delayed EAD processing. Employers have noted that timely EAD processing is especially important at a time when the Department of Homeland Security is deploying an enhanced comprehensive worksite strategy. Meanwhile, EAD applicants share a desire to put their skills to use and to earn the means to integrate themselves and their families into the communities they've come to live in.

These recommendations seek to help USCIS to become more responsive and to improve customer service. Already, in response to the development of these recommendations, USCIS has initiated a data review to better understand the scope of the problem. USCIS and the Ombudsman's Office have begun to meet regularly on these issues. The Ombudsman's Office welcomes further action to improve EAD processing.

Most sincerely,



January Contreras
Citizenship and Immigration Services
Ombudsman

RECOMMENDATIONS

The Ombudsman's Office recommends that USCIS:

- 1) Establish methods at local offices to facilitate immediate resolution;
- 2) Establish a uniform processing time goal of 45 days for adjudication and 60 days for issuance of an EAD;
- 3) Improve monitoring and ensure real-time visibility through an automated system for tracking processing times;
- 4) Follow established internal procedures for issuing interim EADs in cases where background checks are pending; and
- 5) Issue replacement EADs with validity dates beginning on the date the old EAD expires.

REASONS FOR THE RECOMMENDATIONS

- USCIS in some cases fails to meet its regulatory requirement to process applications for employment authorization in 90 days, and USCIS generally does not issue interim EADs.
- When processing for EADs is delayed, individuals and employers experience adverse consequences. Applicants experience financial hardship due to job interruption and termination, business operations stall due to loss of employee services, families face suspension of health benefits, and individuals have difficulty renewing drivers' licenses.
- EAD processing delays are exacerbated by the lack of immediate resolution through USCIS' designated venues.



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The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.

Executive Summary

In this study, the Citizenship and Immigration Services Ombudsman (Ombudsman's Office) reviews delays in U.S. Citizenship and Immigration Services (USCIS) adjudication of employment authorization applications and makes recommendations to address these delays. While USCIS adjudicates the vast majority of Forms I-765, Application for Employment Authorization (I-765), within the 90 day regulatory processing period, when processing for Employment Authorization Documents (EADs) is delayed, individuals and employers experience significant adverse consequences such as job loss and disruption in business operations.

The Ombudsman's Office finds that certain procedural challenges persist in EAD processing. These challenges include: 1) Divergence from the regulatory requirement to process EADs in 90 days or issue interim EADs; 2) No immediate resolution through designated venues; and 3) Delays related to the resolution of security background checks.

The Ombudsman's Office makes the following recommendations to improve USCIS' EAD process:

- 1) Establish methods at local offices to facilitate immediate resolution;**
- 2) Establish a uniform processing time goal of 45 days for adjudication and 60 days for issuance of an EAD;**
- 3) Improve monitoring and ensure real-time visibility through an automated system for tracking processing times;**
- 4) Follow established internal procedures for issuing interim EADs in cases where background checks are pending; and**
- 5) Issue replacement EADs with validity dates beginning on the date the old EAD expires.**

BACKGROUND

Employment authorization may be granted as an ancillary benefit based on a primary benefit such as an application for permanent residence or asylum.¹ There are a variety of ways in which an individual may become eligible to apply for employment authorization.

¹ 8 CFR § 274.12.

These recommendations focus on delays due to processing and adjudications issues, both of which tend to be exacerbated when: there are surges in the number of employment authorization applications; individuals contact USCIS for assistance when an application has been pending close to or past 90 days; background check issues must be resolved; or erroneous cards are produced.² The agency has implemented procedures to resolve certain issues, but many problem areas have not been addressed.

Methodology. In conducting this study, the Ombudsman’s Office met with USCIS Headquarters officials, visited USCIS service centers, and discussed EAD processing with stakeholders. The Ombudsman’s Office reviewed EAD data, including National Customer Service Center (NCSC) service requests generated by customers seeking assistance with processing delays. The Ombudsman’s Office also regularly receives case problems with EADs pending past 90 days, and works with USCIS to resolve these cases.

Legal Framework and General Processing Procedures. The pertinent regulations allow eligible individuals to submit applications for employment authorization.³ USCIS is obligated to adjudicate employment authorization applications within 90 days or issue an interim EAD.⁴ Adjudicators determine an applicant’s eligibility and complete background checks before rendering a final decision.⁵ The obligation to complete processing within 90 days stops if USCIS issues a Request for Evidence (RFE) and resumes when USCIS receives a response.

Currently, most I-765s are adjudicated at service centers and the National Benefits Center (NBC).⁶ While the regulatory requirement to complete EAD adjudications within 90 days or issue an interim EAD remains in place, service centers and the NBC typically seek to adjudicate a delayed application, rather than issue an interim EAD.⁷ USCIS does not usually issue interim EADs, and has ceased producing cards at local offices. The decision to refrain from issuing interim EADs is particularly problematic when employment hangs in the balance during a lengthy final adjudication, even though the regulations contemplate interim EADs to facilitate employment.

Impact on Individuals and Employers. The consequences of USCIS delays in adjudicating EAD applications are significant: applicants experience financial hardship due to job interruption and termination; business operations stall due to loss of employee services; families face suspension of health benefits; and individuals have difficulty renewing drivers’ licenses. The effect of these delays is aggravated by USCIS’ decision to avoid issuing interim documents and the lack of a fast, easily accessible method for resolving EAD-related problems.

² When there are errors on an EAD, USCIS requires applicants to return the document with errors before issuing a corrected EAD card. Meanwhile, the individual is left without evidence of employment authorization.

³ 8 CFR § 274.12.

⁴ 8 CFR §274a.13 (d).

⁵ Legacy Immigration & Naturalization Service Policy Memorandum “Completion of Interagency Border Inspection System (IBIS) Lookout Checks on Applications/Petitions for Immigration Benefits,” Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, September 5, 2001; USCIS Policy Memorandum, “Interagency Border Inspection System Records Check,” Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations, July 2, 2002.

⁶ USCIS Interoffice Memorandum, “Elimination of Form I-688B, Employment Authorization Card” (Aug. 18, 2006); http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/elim688b_081806r.pdf (accessed May 23, 2011).

⁷ USCIS Response to Recommendation #35 (Jan. 2, 2009);

http://www.dhs.gov/xlibrary/assets/uscis_response_to_cisomb_recommendation35_01_02_09.pdf (accessed Mar. 31, 2011).

Prior Ombudsman's Office Recommendations and USCIS Response. The Ombudsman's Office issued recommendations on EAD processing in 2006 and 2008.⁸ Specifically, the following recommendations were issued in October 2008: (1) Adjudicate EAD applications within 90 days or issue interim EADs; (2) Inform the public of reasons for delays; (3) Provide consistent guidance to the public via the NCSC toll-free number and local USCIS offices; and (4) Reconsider expanded use of multi-year EADs.⁹

USCIS did not agree that EAD processing delays were a systemic issue.¹⁰ According to USCIS, many inquiries regarding delays were within the 90 day processing period, had a RFE tolling the processing period, or involved issues connected with undelivered cards. Nevertheless, USCIS announced a multi-faceted approach to complying with the 90 day processing requirement including: routine system sweeps to find cases pending for 60 days and not yet assigned to an immigration officer; the acceptance of service requests via the NCSC toll-free number at day 75; and the adjudication, within 10 days, of expedite requests pertaining to cases pending past 90 days. USCIS also planned to provide guidance on how RFEs affect the 90 day processing period and posted an EAD fact sheet to explain the steps to take if applications remain pending beyond the regulatory requirement.¹¹ However, the EAD fact sheet discussed mainly the issuance of two year EADs and offered little information about delays.

EAD Data. USCIS is unable to furnish accurate statistical data regarding how many I-765s are pending beyond 90 days and the reasons for such delays. According to USCIS, each service center produces biweekly reports on I-765s pending more than 90 days. However, USCIS cannot provide a breakdown detailing how many cases are delayed due to a RFE or some other factor beyond the agency's control, which would toll the 90 day regulatory processing time; and how many are delayed due to USCIS operational difficulties.¹²

USCIS does have data on inquiries to the NCSC for EAD applications that indicate processing delays.¹³ In FY 2010, USCIS received over 16,000 service requests related to EAD processing delays (beyond regulatory timeframe or approaching regulatory timeframe) (See Appendix 2). In the first six months of FY 2011, from October 2011 through March 2011, USCIS received over 9,000 service requests (beyond regulatory timeframe).¹⁴

It is not clear how many of these service requests are actually for EAD applications pending past 90 days, where there is no RFE. USCIS has stated to the Ombudsman's Office that it is now conducting an in-depth review of this data to try to ascertain the scope of the problem.

⁸ Recommendation #25 (Mar. 20, 2006); http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_25_EAD_03-20-06.pdf. Recommendation #35 (Oct. 2, 2008); (http://www.dhs.gov/xlibrary/assets/cisomb_ead_recommendation_35.pdf accessed Mar. 24, 2011).

⁹ Recommendation #35 (Oct. 2, 2008); http://www.dhs.gov/xlibrary/assets/cisomb_ead_recommendation_35.pdf (accessed Mar. 24, 2011).

¹⁰ See *supra* note 7.

¹¹ USCIS Fact Sheet: USCIS to Issue Two-Year Employment Authorization Documents (EADs) New EADs Limited to Certain Individuals Who have Applied for LPR Status (Aug. 28, 2008); <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=62ae15d3ffd7a110VgnVCM100004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> (accessed May 16, 2011).

¹² Information provided by USCIS to the Ombudsman's Office (May 10, 2011).

¹³ When a customer contacts the NCSC with processing time concerns for a pending I-765 application, the USCIS representative may generate the following service requests: (1) approaching regulatory timeframe if the application has been pending for 75 days or more; (2) beyond regulatory processing timeframe if it is pending for 90 days or more; and/or (3) expedite if a customer can show one or more criteria that warrants expedited processing. USCIS "Expedite Criteria" (Sept. 21, 2010), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=16a6b1be1ce85210VgnVCM10000082ca60aRCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD> (accessed Apr. 29, 2011).

¹⁴ Information provided by USCIS to the Ombudsman's Office (May 10, 2011).

Failure to Anticipate and Prepare for a Filing Surge. Periodically, there are spikes in EAD filings, which present processing challenges. In 2010, USCIS receipts data for I-765s signaled problems. Receipts at the Nebraska Service Center doubled from January to March, and tripled by June 2010 (See Appendix 1). The Texas Service Center experienced a similar surge from February to June 2010.¹⁵

The increase in receipts in 2010 partly stemmed from applicants who filed an EAD request with their permanent residence applications during the 2007 filing surge, due to visa numbers becoming available for employment categories.¹⁶ On June 30, 2008, USCIS began issuing two-year EADs to pending applicants, for whom a visa number was unavailable, and the supporting Form I-140, Immigration Petition for Alien Worker, had already been approved. Many of those applicants filed to renew their EADs in 2010, which resulted in an increase in receipts. By summer 2010, individuals were contacting USCIS and the Ombudsman's Office in increasing numbers regarding delayed EADs.

No Immediate Resolution through Designated Venues. USCIS directs applicants experiencing EAD delays to contact the NCSC or the local district office.¹⁷ However, neither venue has the ability to provide direct assistance. USCIS Customer Service Representatives or Immigration Services Officers assist individuals with delayed I-765s by submitting service requests or sending emails to the NBC or service centers. As of this writing, USCIS is reviewing the procedures in place and may provide field offices with updated guidance on how to assist individuals with EAD applications pending past 90 days.

While both service requests and emails alert the applicable office of a delay, it may take up to ten days or more for an I-765 to be adjudicated and an EAD to be delivered. Additionally, while customers receive responses to service requests in five days for expedite requests, and 15 days for all other requests, the responses are often generic and unhelpful. Sometimes the responses state that an applicant's case is "under review" and do not provide a timeline for issuance of the EAD. Other times, the responses merely state that a decision will be issued in 30 or 60 days – when the application is already pending past 90 days. Such responses fail to address the problem because they do not assist the customer in rapidly obtaining an interim or final EAD. The failure to communicate useful information to customers often results in repeated telephone and in-person inquiries causing inefficiencies for USCIS.

CASE ASSISTANCE: An applicant filed a renewal application 90 days prior to expiration of his then unexpired EAD. There was no RFE that tolled the processing time. On day 84 and again on day 90, he contacted the NCSC, but USCIS responded both times that he should a decision in 30 days. His EAD expired, and he was unable to work; meanwhile, the case remained pending. The applicant contacted the Ombudsman's Office 102 days after filing, and USCIS approved the EAD on the same day.

USCIS' website also lists alternative contact information, such as email addresses, for service centers and the USCIS Headquarters Office of Service Center Operations.¹⁸ However, prior to sending emails to these

¹⁵ The spike in I-765s at the Vermont Service Center in FY 2010 was related to applications for Temporary Protected Status, but is not discussed herein.

¹⁶ See Ombudsman's Annual Report 2008, p. 8-9 (June 30, 2008);

http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2008.pdf?bcsi_scan_1CFAD6D3D20A37D6=moEtwrWoxgQZUqjhSgmzat8DsLQIAAAAnzq3Lg==&bcsi_scan_filename=CISOMB_Annual_Report_2008.pdf (accessed Apr. 26, 2011).

¹⁷ *Supra* note 11.

¹⁸ USCIS "Contact Us," (June 1, 2011);

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=ddce0b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=ddce0b89284a3210VgnVCM100000b92ca60aRCRD> (accessed June 14, 2011).

addresses, USCIS advises customers to wait 30 days for a response from the NCSC, and 21 days for the service centers, when even one day of delay may lead to financial loss for EAD applicants and business disruption for employers.

Delays Due to Background Checks. USCIS conducts background checks on all individuals filing for immigration benefits and resolves any derogatory information prior to final adjudication. If the primary benefit application underlying an I-765 has not been denied, and USCIS has not issued an RFE, the agency remains obligated to issue an EAD within the standard 90 day timeframe. EAD applications with background check issues often remain pending past 90 days, with no issuance of interim EADs. This problem is complicated by the fact that USCIS does not have a tracking system to ensure that cases undergoing background check reviews are adjudicated within the 90 day regulatory period.

Stakeholder meetings and inquiries have highlighted that USCIS is not communicating essential information on how to make or renew a deferred action request.¹⁹ While stakeholders acknowledge that a grant of deferred action by USCIS is a discretionary decision, they have expressed that general guidance from USCIS would be helpful to determine whether clients should be advised to step forward and seek this relief. Stakeholders explain that preparing a deferred action request requires a significant investment of time and effort. Due to the level of staff resources needed to submit requests, representatives and attorneys who assist people in seeking deferred action note that directions and guidance are especially critical.

CASE ASSISTANCE: An applicant contacted the NCSC and visited the local office when his application to renew his EAD remained pending past 90 days. There was no RFE that tolled the processing time. He was informed that his case was under review with an officer, but it remained pending. Meanwhile his EAD expired and he experienced difficulty supporting his family due to loss of income. He contacted the Ombudsman's Office after 116 days had passed since filing to renew his EAD. The Ombudsman's Office found that the background checks had not been resolved. The Ombudsman's Office contacted USCIS, and the case was approved, but 145 days had passed since filing.

Stakeholders report difficulties in obtaining status updates on pending requests. After filing the initial request, many individuals are not provided a USCIS point of contact or a written acknowledgement that the request has been filed. This makes it difficult to submit additional supporting documentation or to obtain information regarding the processing of the request.

¹⁹ Recent publications have highlighted the need for public guidance on how to submit a deferred action request to USCIS and to expect subsequent to the submission. See Penn State Law School, Duane Morris & Maggio+Kattar, *Private Bills & Deferred Action, Toolkit* (May 17, 2011), http://law.psu.edu/file/PBDA_Toolkit.pdf (accessed on July 5, 2011); Mary Kenney, *Prosecutorial Discretion: How to Advocate for Your Client* (June 24, 2011), <http://www.legalactioncenter.org/practice-advisories/prosecutorial-discretion-how-advocate-your-client> (accessed on July 5, 2011); Donald M. Kerwin, Doris Meissner & Margie McHugh, *Executive Action on Immigration: Six Ways to Make the System Work Better* (Mar. 2011), <http://www.migrationpolicy.org/pubs/administrativefixes.pdf> (accessed on July 5, 2011).

ANALYSIS & RECOMMENDATIONS

The Ombudsman's Office recommends that USCIS take the following actions to address EAD processing issues:

1) **Establish methods at the local offices to facilitate immediate resolution.**

USCIS eliminated local production of EADs in favor of centralized card production, but the agency remains capable of adjudicating EADs locally. Accordingly, the Ombudsman's Office recommends making methods available at the local field offices for the same-day adjudication of EADs pending close to or beyond 90 days. USCIS would enhance customer service by also establishing local avenues to receive and destroy cards containing erroneous information; accept and examine documents supporting expedite requests; and arrange for biometric appointments, if necessary.

BEST PRACTICE: The Vermont Service Center has a five day processing time goal for background checks conducted in connection with adjudication of an I-765. Adjudicators send cases to the Background Check Unit (BCU) via email, identifying the form type and marking it as an expedite request in the subject line. The BCU monitors the inbox to ensure that cases are promptly referred to adjudicators and resolved within the specified timeline. With this process, USCIS is able to resolve minor concerns immediately while carefully reviewing cases that involve national security, egregious public safety issues, criminal convictions, or immigration fraud.

USCIS could utilize existing internal email or service request procedures and direct the NBC and service centers to adjudicate EADs received from field offices within 24 hours, if there are no RFEs or other issues that would prevent adjudication.

2) **Establish a uniform processing time goal of 45 days for adjudication and 60 days for issuance of an EAD.**

While USCIS completes most EAD cases in less than 90 days, the agency could establish a uniform adjudications goal of 45 days at all service centers and the NBC, and 60 days for issuance of an EAD. This would allow USCIS to accommodate any problems that may be encountered, produce the card, and issue it well within the required 90 day period.

3) **Improve monitoring and ensure real-time visibility through an automated system for tracking processing times.**

USCIS lacks a process to calculate the number of days an EAD application has been pending. There is no function in the USCIS case management system for I-765s that shows the number of days since filing, accounting for any stoppages.²⁰ To ensure accountability and compliance with 90 day processing requirement, USCIS should create an automated system for tracking the number of days an EAD application has been pending.

²⁰ Information provided by USCIS to the Ombudsman's Office (Jan. 4, 2011).

4) Follow established internal procedures for issuing interim EADs in cases where background checks are pending.

According to USCIS, referral for the resolution of background check information does not stop the 90 day processing clock for EADs.²¹ However, the Ombudsman's Office finds that USCIS often does not adhere to the regulatory processing timeframe for EADs when cases are referred for review and resolution of background check information. Since USCIS is required to adjudicate the EAD application within 90 days, it should establish a national tracking mechanism for resolving cases requiring the review and resolution of background check information, in order to ensure that adjudication is not unduly delayed. When background check concerns cannot be resolved within the prescribed time period, USCIS should issue interim EADs.

5) Issue replacement EADs with validity dates beginning on the date the old EAD expires.

The Ombudsman's Office previously recommended that USCIS issue new EADs valid from the date of expiration of the current card. However, USCIS still issues renewal EADs that are valid from the date on which the renewal I-765 was approved, and customers continue to express frustration with losing periods of authorized employment due to non-sequential validity dates. As a result, some individuals have to pay the filing fee every nine to ten months instead of every 12 months. USCIS previously responded that changing its current system would be resource intensive, but the agency recently indicated to the Ombudsman's Office that it is reconsidering the previous position and exploring ways to implement this recommendation.²²

CONCLUSION

Regulations require that USCIS adjudicate employment authorization applications in 90 days or issue an interim EAD.²³ While a vast majority of EADs are adjudicated timely, where applications remain pending past 90 days, individuals and employers may experience financial burdens. USCIS could improve EAD processing by: reestablishing local authority to adjudicate EAD requests; establishing uniform processing time goals for EAD applications; establishing a uniform process for completing backgrounds checks; and issuing EADs with coterminous validity dates. These steps would significantly reduce unnecessary EAD delays and help USCIS to meet its regulatory mandate. USCIS and the Ombudsman's Office have begun to meet regularly to identify and resolve EAD processing challenges.

²¹ Information provided by USCIS to the Ombudsman's Office (Mar. 1, 2011).

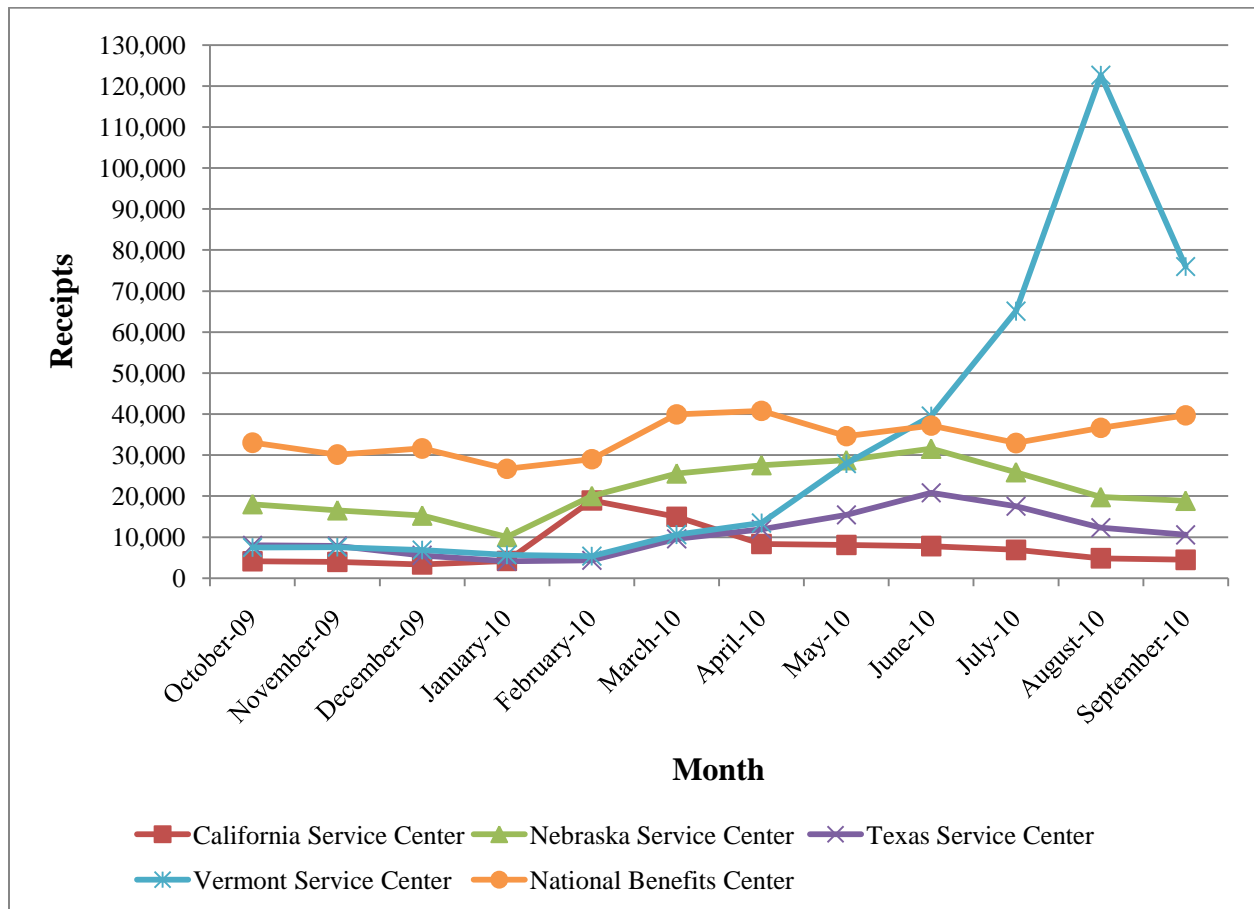
²² USCIS Response to Recommendation #25 (June 20, 2006);

http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_25_EAD_USCIS_Response-06-20-06.pdf (accessed Apr. 29, 2011).

²³ See *supra* note 4.

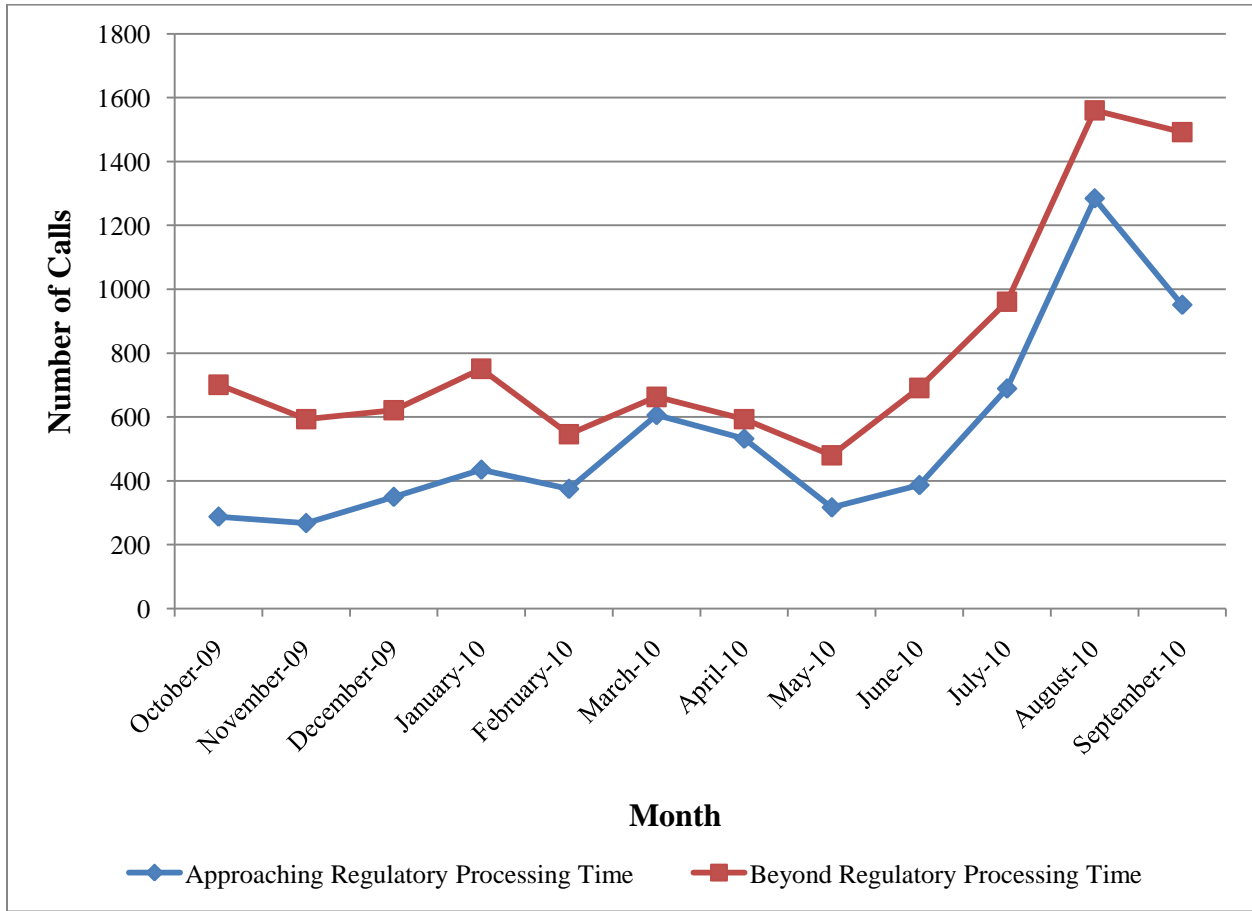
Appendix 1

I-765 Receipts for Fiscal Year 2010



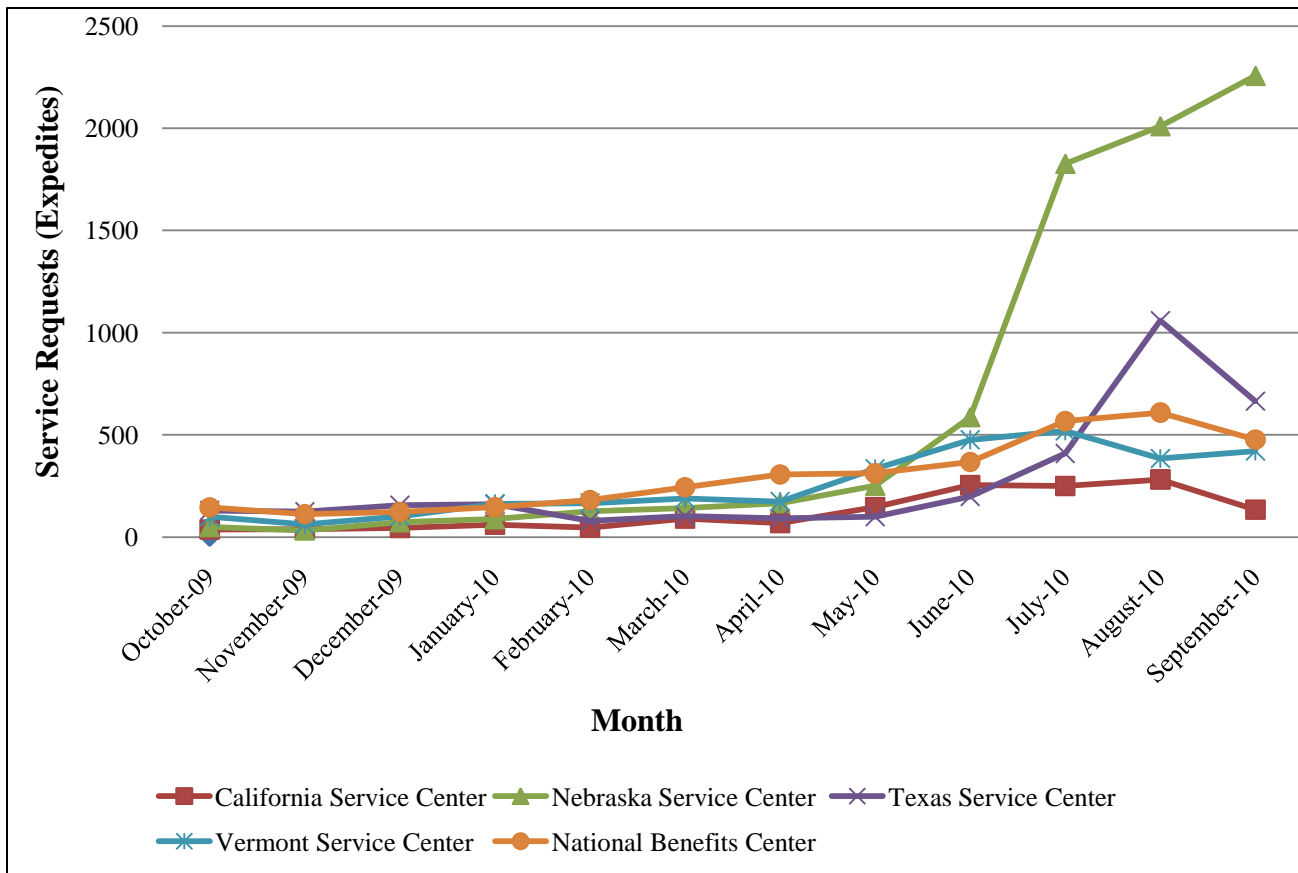
Appendix 2

NCSC Service Requests on I-765 Approaching Regulatory Timeframe and Beyond Regulatory Timeframe for Fiscal Year 2010



Appendix 3

NCSC Service Requests on I-765 Expedites for Fiscal Year 2010



Source: Information provided by USCIS to the Ombudsman’s Office (Nov. 3, 2010; Nov. 15, 2010; May 10, 2011; June 15, 2011).