U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

U.S. Citizenship and Immigration Services

December 27, 2005

Mr. Prakash I. Khatri
USCIS Ombudsman
Mail Stop: 1225
Washington, DC 20528-1225
Via E-mail to: cisombudsman@dhs.gov

Re: Reforming the Employment-Based Green Card Application Process

Dear Mr. Khatri:

This is in response to the Ombudsman's recommendation that US Citizenship and Immigration Services (USCIS) adopt rules similar to those used for the H-1B petition process regarding the acceptance of employment-based adjustment of status applications. Basically, the recommendation is that USICS would reject filings when it determines that it has accepted a number sufficient to exhaust the supply of visas available in the current fiscal year.

Adopting this recommendation would place a "cap" on the filing of employment-based adjustment of status applications, despite the immediate availability of an immigrant visa number. While it is suggested that the recommendations could be quickly and easily adopted through a simple rule change, the issue is far more complex. Comprehensive statutory changes, regulatory changes, and form changes would be required. The proposed recommendation also conflicts with other legislative provisions, such as the 21st Century Department of Justice (DOJ) Appropriations Act (AC 21) and the Child Status Protection Act, which Congress enacted to ensure certain protections for petitioners, beneficiaries, and their dependent children during the course of the immigration process.

USCIS believes the proposed change would require legislation. The process for permanent immigration is by legislative design different from that for temporary workers. For temporary workers caps are applied at the petition stage because that is most appropriate given the temporary nature of the employment. It also allows open filing until the limit is reached.

The existing construct for permanent immigration allows employers to qualify workers and individuals to qualify relatives for a preference classification in order to let them 'get in line' among others qualified and waiting to immigrate. This provides an orderly pre-qualifying process. Limiting the ability to file an immigrant petition until a visa number is available would have several unfortunate effects. It would significantly hinder projections of visa availability versus demand because there would be no way to measure

potential demand. Further, each time there would be any small opening in visa availability, the process would emulate today's diversity visa lottery, with hundreds of thousands or millions of individuals and employers attempting to get their application to us first to get the few available slots. Beyond the logistical issues, since the proposed process would not allow for today's process of early pre-qualification through the petition process, the necessary resultant review of qualifications would delay the person's immigration.

Further, we believe the current different administrative ways of exercising limits for temporary workers and permanent workers is appropriate to the type of benefit being sought and best recognizes the significant differences in demand versus supply for temporary worker programs and permanent immigration.

We note that statistically, 70 percent of all I-140 cases have been concurrently filed with an I-485. Of the 70 percent, 32 percent of all concurrently filed cases are ultimately denied, because of issues with the underlying I-140. USCIS is promulgating a proposed rule to eliminate the concurrent filing provisions. Eliminating the concurrent filing practice will allow USCIS to greatly reduce future backlogs, by limiting adjustment filings to those appliçants with an approved classification and to whom a visa number is available. This, in turn, partially accomplishes the Ombudsman's desire to limit interim benefits to qualified applicants.

Additionally, implementing the recommendation would require the existing Information Technology (IT) infrastructure to be modified to capture data on the specific preference category, priority date, and country of chargeability. Considerable contractor resources would be required to sort these employment-based adjustment cases, and additional physical space would have to be procured to house the files according to various discreet groupings. USCIS intends to capture such data in its new processes under the Transformation Initiative, and we hope and expect that under this system USCIS will be able to project more completely and accurately to the Department of State the USCIS "pipeline" of immigrant petitions and related adjustment applications. This, too, will help to accomplish the goals of your recommendation. We look forward to continued collaboration with your office to set form fields, workflow and reporting capabilities in ways that will achieve the department's objectives.

Sincerely,

Robert C. Divine

Robert Divine
Acting Deputy Director, USCIS

cc: Michael Jackson, Deputy Secretary