

Testimony Before the
U.S. Senate Homeland Security & Governmental Affairs Committee
“Deferred Action on Immigration: Implications & Unanswered Questions”

Testimony of
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**“Is U.S. Citizenship & Immigration Services Ready to
Take on the President’s New Immigration Initiative?”**

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Mr. Chairman, Ranking Member, and Committee Members: thank you for allowing me the honor of testifying before this committee, for which I was once a staff member. By way of background, I have worked on immigration law and policy since 1996, starting as an attorney advisor at the State Department, and later as a senior executive at the Department of Homeland Security (DHS) from 2007-2009. In between, I worked as a Congressional staff member on various immigration reform and border security bills in both the House and Senate. I am now a practicing immigration attorney in the private sector.

The President’s initiative to stay deportation of an estimated four to five million undocumented immigrants in the United States will greatly increase pressure on U.S. Citizenship & Immigration Services (USCIS) to handle millions of new immigration applications in the coming months of 2015. There is clearly a potential for bottlenecks to form at the intake, fee processing, data-collection, adjudication, request-for-evidence, document manufacturing stages, in corollary applications, and even perhaps at foreign consular offices (that are issuing passports and foreign official documents). At each of these bottlenecks, there may be a temptation to streamline processing or change processing priorities.

Background on DAPA/DACA and Immigration Reform Efforts

The President announced on November 20 of last year a program, known as Deferred Action for Parental Accountability (DAPA), that would allow an estimated five million undocumented immigrants in the United States to obtain protection from deportation and legal work authorization; it would also expand an earlier program called DACA (Deferred Action for Childhood Arrivals) which has seen 692,000 initial applications, with 610,000 approvals. Many commentaries have been made that this program including that many of those eligible for the program will not take up the offer for fear that the program will be rescinded at a later date when their location and employment might be revealed to enforcement agencies. Others have commented on whether this program usurps Constitutional and traditional Congressional authority over immigration and naturalization law and policy.

During consideration of the 2005, 2006 and 2007 comprehensive immigration bills, I was a staffer in the House and then Senate but I witnessed a monumental effort by the George W Bush administration to pass comprehensive immigration reform, to include sending two cabinet officials – Secretary of Homeland Security Chertoff and Secretary of Commerce Gutierrez – to negotiate a bill over countless hours in Senate Chambers. A similar effort is needed in working with Congress to reform our immigration system in a way that can be accepted by all sides and constitutes good long-term immigration policy. To be sure, most law-abiding immigrants have and will contribute greatly to the wealth of the nation and Congress should consider how best to handle and process immigration applications in a safe and secure manner.

Based on the President's announcement, USCIS has begun work to handle a massive surge in workload from incoming DAPA and DACA-expansion applications and DACA extensions. USCIS is slated to take in DACA-expansion cases later this month, and DAPA applications are expected to be available 180 days after the President's announcement in November (i.e., May 20, 2015). The Administration estimates that about five million individuals are eligible to apply under the DAPA and expanded-DACA program.¹ Various organizations, including DHS and Pew Foundation have estimated the undocumented immigrant population to be 10-12 million.² All of these are *estimates*, however, and it is impossible to know exactly how many individuals will actually apply under the program. Thus, USCIS' workload may be much greater or less than estimated, and USCIS needs to be ready for any contingency for handling the intake of initial DAPA applications as well as processing documents and security checks.

Impact of USCIS Processing Timeliness

Talk within the immigrant community indicates some unease with applying for the program. There are questions over whether the program will continue in future years and whether their application information will be shared with law enforcement, but there is also concern that the process will not be smooth and that they and their employers may be left in a lurch. From their perspective, they may be in a relatively stable, albeit unauthorized, position with an employer, but the moment they apply for DACA or DAPA, compliance and Employment Authorization Documents (EADs) come into the picture. USCIS processing can have quite an impact on both employers and immigrants.

For employers, they must fill out I-9 forms (for employment eligibility verification) and check EADs or other documents, and comply with wage, insurance, and other requirements, which may increase their costs. That means if an EAD is not processed before expiration, there will be work stoppage. Unlike normal processing for legal employment-based immigrants, there is usually a labor certification process with the Department of Labor, which takes measures to assure that no American worker is willing and available to take positions that a foreign worker is applying to take. Since the DACA and DAPA program skips these labor market tests, the impact of millions of new workers with legal employment authorization documentation on the economy will be uncertain and processing speed for EADs could be influenced by changing economic conditions. The impact on wages and business costs becomes more unclear if USCIS cannot process DAPA and DACA cases in timely manner.

For DAPA and DACA applicants, delays in or simply lengthy USCIS processing may put them in a more-difficult position as they may not have stable employment once they enter the program. The Citizenship & Immigration Services Ombudsman held a teleconference last month

¹ White House, <http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>. I have been given estimates from DHS officials that the expected number may be closer to 2-3 million applicants.

² Pew Research Center, Unauthorized Immigrants: 11.1 million in 2011. <http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011/>. See also Ruth Wasem, Congressional Research Service, "Unauthorized Aliens in the United States: Estimate Since 1986," <http://fpc.state.gov/documents/organization/39561.pdf>. Hoefler, et al, DHS, "Estimates of the Unauthorized Immigrant Population Residing in the United States," https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2011.pdf.

with immigration practitioners concerning DACA renewals; some participants revealed that a significant number of DACA applicants who were approved for EADs are not able to get reauthorized in time to keep their employment authorization current, forcing them to stop work indefinitely. Timely production and control of EADs has been an issue in the past as reported by the CIS Ombudsman in 2011.³ Although USCIS is required by regulation to approve EADs within 90 days,⁴ they have asked DACA applicants to file 120 days in advance of expiration, but are still not able to process EADs in time.⁵ Reliable sources have informed me that USCIS actually adds 90 days EAD processing time to the end of the DACA processing, which might be more justified for an initial DACA application, but makes no sense for a DACA renewal, which will take just as long (i.e., an applicant for renewal can expect to be out of employment authorization for up to 180 days while the renewal and then EAD applications are considered one after another).⁶ Few American employers and employees are satisfied with this result as work stoppage results in hardship for both.⁷ I can imagine how a DACA applicant under these circumstances might feel as if the DACA (or DAPA) program is not worth it.

The addition of an estimated five million more applicants may overwhelm USCIS' ability to issue EADs in time and USCIS may consider extending the validity of EADs to keep processing under control.⁸ In fact, almost all EADs (i.e., the employment authorization cards) are produced at one facility, and it is not clear that the facility has the physical capacity to produce that many EADs in short order.

General Description of USCIS as an Application Processing Agency

USCIS is an organization of roughly 13,000 full-time officers and 5,000 contractors, who engage in the processing of about six million immigration benefit applications of one type or another each year. Contractors can only fulfill support functions and not actual adjudication, as that is considered an inherently governmental function. Both the number of personnel and applications changes each year, but over the past few decades, the number of both have grown

³ CIS Ombudsman, "Employment Authorization Documents," Meeting the 90 Day Mandate and Minimizing the Impact," July 18, 2011, <http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-documents-07182011.pdf>.

⁴ 8 CFR 274a.12.

⁵ USCIS data for Fourth Quarter, FY2014, indicates 374,589 EAD applications are pending, http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performancedata_fy2014_qtr4.pdf

⁶ USCIS apparently has stopped the issuance of interim EAD documents (as it make no sense for USCIS to divert resources from approving the regular EAC) and there have been past concerns regarding fraud and security in issuing them from local USCIS offices. The Department of Justice Inspector General found "thousands of controlled employment authorization documents unaccounted for and equipment missing" and another audit found "thousands of unaccounted for certificates of naturalization." Office of Inspector General, Department of Justice, "Follow-up Inspection of the Immigration and Naturalization Service Document Fraud Records Corrections," Report Number I-2000-021, and "Document Fraud Records Corrections," Report Number, I-96-09, citing various other OIG Reports.

⁷ CIS Ombudsman, "Employment Authorization Documents," Meeting the 90 Day Mandate and Minimizing the Impact," July 18, 2011, <http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-documents-07182011.pdf>.

⁸ Normally, an EAD is valid for one year, but in certain cases, EADs are issued with two years or more validity. USCIS, <http://www.uscis.gov/news/questions-and-answers/uscis-issue-employment-authorization-and-advance-parole-card-adjustment-status-applicants-questions-and-answers>.

dramatically. However, the USCIS systems and processes remain the same: it is fundamentally a labor-intensive, case-intensive, *paper*-based adjudicatory entity. That is, by-and-large, each year six million *paper* applications are taken in through the mail by USCIS, data-entered, and reviewed by officers with support from contractors. Note that most application adjudications are handled at one of four service centers that are not open to the public, but other services are handled at hundreds of local USCIS offices.

The first step in application processing is intake, which has in recent years changed somewhat for security and control purposes, but is also fundamentally a paper mail-based intake system. Once an applicant sends an application and fee to USCIS, most applications are scanned and payment taken at USCIS “lockbox” facilities. Fees fund almost all of USCIS’ \$3.2 billion budget, but all of it until recently was taken in by paper checks. In 2008, when I investigated USCIS’ “lockbox” (there are now three) where fees are collected for applications, I could not get an answer as to why USCIS refused to accept other forms of payment such as credit cards, especially as private bank executives who were present said it would be easily possible. The fact is, all applicants are required to calculate total amounts from a menu of USCIS fees and pay *the exact amount* by check – if that amount is off by even a penny (overpayment or underpayment) the check and application are rejected and sent back. At that time, the Ombudsman’s office calculated that *seven percent* of applications were mailed back, costing USCIS millions in postage and processing, but more damaging, many applicants missed deadlines to maintain their status and employers waited longer to get their employees on board. USCIS recently has made efforts to allow applicants to pay for some applications by credit card, but as the Citizenship & Immigration Services Ombudsman recently reported, the system still faces many challenges.⁹

In addition to credit card payments for some applications, the USCIS Transformation Office has finally set up a Web-based application system for a small handful of applications.¹⁰ However, none of these applications are A to Z electronic processes, and often supporting documents and a copy of the application must still be sent in to USCIS by mail. Although the application for an EADs is one of these applications, it cannot be used in conjunction with an application for DAPA or DACA. Thus, all 692,000 previous DACA applications were paper-based applications mailed to USCIS, and as it stands, the estimated millions of DAPA and expanded-DACA applications will be accepted in this manner.

Normally, acceptance of paper applications in the mail do not face problems in intake processing, but application surges in the past have resulted in mail and applications sitting in vulnerable and exposed overflow areas and in some cases purposely destroyed.¹¹ The Transformation Office at USCIS has spent roughly \$1 billion to date and is slated to spend \$1.7 billion to get an electronic application system (now called Electronic Immigration System, ELIS) in place.¹² USCIS has finally set-up a small number of applications that can be entered

⁹ DHS CIS Ombudsman, 2014 Annual Report to Congress.

¹⁰ There are currently eight USCIS applications that can be filed electronically (including I-140 Petition for Alien Worker, I-90 Application to Replace a Lost/Stolen Green Card, I-131 Application for Travel Document, I-765 Application for EAD, I-821 Application for Temporary Protected Status, I-907 Premium Processing, I-526 Alien Entrepreneur Application, I-539 Change of Status). <http://www.uscis.gov/e-filing>.

¹¹ John Broder, “INS Shredder Ended Work Backlog, U.S. Says,” The New York Times, January 31, 2003.

¹² GAO, “Consistent Adherence to DHS Acquisition Policy Could Help Improve Transformation Program Outcomes,” November 2011.

electronically,¹³ but many of them still require sending in a paper copy and supporting documents. One has to wonder whether there is really an incentive for USCIS to transition to electronic processing as new systems may require a new personnel structure. Electronic-filing, through ELIS or otherwise will not be ready for DAPA and DACA intake.¹⁴

Once paper applications are taken in by USCIS, and fees accepted, most applications are sorted out and sent to one of four service centers around the country where they are adjudicated. Officers and contractors at Service Centers take applications and manually check information in the paper-application with a “Wang-era” computer database system called CLAIMS3 which serves as USCIS’ primary case management and information database concerning applications and applicants.¹⁵ CLAIMS3 has almost no search functionality and provides very limited information about application numbers and case status.

Normally, once an adjudicator actually examines a paper application from the pile sitting in their cubical, the application is reviewed against a checklist of required items and requirements for the relevant type of immigration status (“visa”). Often an officer finds some deficiency or weak evidence and types up what is known as a Request for Evidence (RFE) that is sent back to the applicant. The applicant has a set amount of time to respond to the RFE or the application is rejected. Many applicants have complained about the amount and nature of RFEs as some appear to be perfunctory or sometimes nonsensical. In some cases, during the pendency of the case, an adjudicator may find an indicator of fraud, or may conduct a name check, and send the case to the USCIS anti-fraud office (called Fraud Detection & National Security Directorate, FDNS) for investigation. With or without RFE response, an adjudicator approves or rejects an application, usually within a certain target timeframe for differing application types – six months is the longest USCIS-stated target, while EADs must be done within 90 days by regulation. If the application is denied, USCIS normally sends the applicant an explanation as to why the application did not meet the relevant criteria. If an application is approved, an approval form is sent to the applicant.

For some applications, this may be all that is needed to form a basis to remain in the U.S. or work legally. For others who are waiting abroad, they must make an appointment at a U.S. Consulate or Embassy to be interviewed for an actual visa stamp. If the interviewing consular officer believes, even with the approved USCIS application, that the case is fraudulent or otherwise does not meet the criteria for a visa, the consular officer may conduct an investigation abroad and/or send the application back to USCIS for review. USCIS can reaffirm or deny the application, but many cases are simply lost in the shuffle.

USCIS DAPA Processing and Possible Pitfalls

The regulations and guidance for DAPA have not yet been issued, but preliminary documents from the Department of Homeland Security (DHS) indicate that applicants must

¹³ See note 9.

¹⁴ I understand that USCIS has plans to introduce a computer “wizard” program that may assist applicants in filling out DAPA and DACA applications by posing queries and inputting responses into the applications, but that ultimately the application and supporting documentation must be mailed to USCIS.

¹⁵ Other types of applications, such as naturalization applications, will go into another database, CLAIMS4.

submit an application and provide proof that they have continuously resided in the U.S. since January 1, 2010, similar to the residency requirements under DACA.¹⁶ To prove residence, applicants must submit utility bills, employment records, bank, school, or religious records, and affidavits. DACA applicants are required to prove identity by providing a passport, birth certificate, or “any other document with a photo.” They are also required to show their criminal record, and are barred from the program if they have been convicted of a felony, significant misdemeanor,¹⁷ or three misdemeanors.¹⁸ The irony of this program is that applicants must *prove that they were in the United States illegally* during this time, and USCIS was known under the DACA program to send requests for more evidence that applicants were actually in the U.S. *illegally* before the relevant date (while most of the time other applicants are trying to prove that they are legally in the U.S. and USCIS is determining whether they were actually legally here). Under DACA, applicants filled out an application, known as an I-821D, with supporting documents as just described above. DAPA applicants will have to fill out an application that is substantially similar to this.

The previous DACA application process appears on its face to have been run through USCIS without too much difficulty and without hiring significant numbers of permanent staff¹⁹ to handle the 690,000 DACA applications.²⁰ However, USCIS practiced a surge tactic used in the past of diverting officers working on one type of application to concentrate on a higher-priority application – in this case DACA.²¹ The result of this diversion of resources is not usually recognized outside of USCIS until significant backlogs of other applications are discovered and applicants begin to complain. In the case of DACA, backlogs formed for I-90 (renew/replace green cards) and I-130 (family-based green cards),²² in some cases, such that processing times exceeded 12 months. Backlogs at USCIS in the past, such as in 2003-2004, have required specific appropriated backlog funds to obtain additional temporary resources.

¹⁶ Note that resided is a term that could mean someone left and reentered the country, but still intended to live in the U.S.

¹⁷ This generally includes crimes involving domestic violence, sexual abuse, drug distribution, unlawful possession of a firearm, and driving under the influence. See Immigrant Legal Resource Center, http://www.ilrc.org/files/documents/ilrc-2012-daca_chart_1.pdf.

¹⁸ These bars are similar to bars used in the 1986 legalization program, Immigration Reform and Control Act of 1986. Note these are substantially different bars than are used to exclude persons abroad who wish to enter the U.S. under normal legal processing (which include bars for conviction of a crime of moral turpitude, health-related reasons, terrorism or other security concerns, likelihood to become a public charge, child abduction, intent to work without labor certification, intent to immigrate permanently, and a host of others).

¹⁹ It has been reported that 900 new employees (mainly contractors) were hired in response to the increased workload from DACA. J. Gerstein, “Bureaucratic Nightmare on Immigration?” Politico, Nov 21, 2014. <http://www.politico.com/story/2014/11/immigration-action-government-implement-113108.html>.

²⁰ See latest USCIS DACA figures at:

http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_fy2014_qtr4.pdf, including FY2014 numbers that indicate that 32,395 applications were denied and 59,715 are pending to date.

²¹ J. Gerstein, “Bureaucratic Nightmare on Immigration?” Nov 21, 2014.

<http://www.politico.com/story/2014/11/immigration-action-government-implement-113108.html>

²² See USCIS Data Sets for 2012 - 2014, <http://www.uscis.gov/tools/reports-studies/data-set-form-i-130-petition-alien-relative>. In FY2012, third quarter, USCIS had a total of 82,496 pending I-130s; in June 2013, there were 1.9 million pending I-130s; that number went down in September 2013 to 885,935 and in March 2014 to 840,017. In fourth quarter, FY2014, there were 478,121 I-90 applications pending.

http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performancedata_fy2014_qtr4.pdf.

USCIS has typically shifted workload away from other types of applications to handle priority or high-profile applications, and will probably do so with the DAPA applications. Using this tactic alone will not be sufficient to meet the flood of millions of applications expected under DAPA and expanded-DACA, and the question arises whether it is fair for these other applicants to be waiting extended periods because of DAPA.

The administration has informed this Committee that it plans to hire 1000 new workers (700 of which will be new federal agents, and 300 contractors). However, questions immediately surface whether this number will be sufficient without either creating extreme backlogs in one or more applications type, or damaging the quality of application adjudications. DACA involved application numbers that are about 1/10th the estimated size of the DAPA applicant pool at five million (versus 690,000 for DACA). It is hard to see how an additional 1000 workers, even if fully trained and experienced, can make up for an additional five million applications USCIS is expected to receive – meaning each new worker would have to process and adjudicate 4500 applications within the six month target (including weekends, that would mean 25-27 applications per day for 1000 adjudicators).

Further, it is unclear how USCIS will hire 700 full time federal agents, screen them for employment and then for security clearances, train them, and deploy them in time to handle millions of new applications and meet the six-month turn-around time for each application submitted. Training new employees in the complexity of immigration law and policy is no small matter – a number of federal courts and Congressional Research Service (CRS) have likened the complexity of immigration law to that of the tax code.²³ The Department of Justice Inspector General discussed numerous problems with new officers' inadequate training that led to a host of problems under a program called Citizenship USA, conducted during the end of the Clinton administration. Internal sources inform me that USCIS intends to quickly hire new officers (many veterans are expected to qualify for these jobs under veterans preference and quickly be selected). Further, some retirees are expected to take the new positions, and some more seasoned officers will move over from other parts of USCIS. This may create gaps in other parts of USCIS' application processing.

Past Experience with Citizenship USA Program and Background Checks

Under the Citizenship USA program, USICS (then called the Immigration & Naturalization Service, INS) saw a massive increase in and prioritization of what turned out to be over one million naturalization applications from 1995 to 1996. To handle the increased workload, INS abbreviated training, from 16 weeks to one week (in some cases less than 40 hours of training), of newly hired officers.²⁴ INS at the time also requested abbreviated FBI background checks for new employees (and I have heard rumors that USCIS intends to do the same with their new hires for DAPA). Depending on the security clearance and background check type, this process currently may take an average of 53 days.²⁵ In the rush to complete over

²³ Stephen Vina, Congressional Research Service, July 29, 2005.

²⁴ Department of Justice, Office of Inspector General, Report on Citizenship USA, <http://www.justice.gov/oig/special/0007/cusaimp.pdf>.

²⁵ Christensen, et al, Congressional Research Service, "Security Clearance Process: Answers to Frequently Asked Questions," September 9, 2013.

one million naturalizations, thousands of applications were incorrectly approved. Some 10,800 approvals included persons with felony records, and another 60,398 had no record of any background check at all, according to the Department of Justice. In the end, DOJ underwent a long program of trying to denaturalize many of them through court proceedings.²⁶ What happened was in part due to poor planning and coordination with FBI, which could not handle the massive upsurge in background checks, but also because of a disregard for fraud checks.

Background checks are important not only for USCIS employees but for any applicant we legalize or allow into the country as well. Those who have entered the U.S. with a visa that was issued abroad, including those who may have overstayed their visa, have undergone some background screening before entering the U.S. Those who entered the U.S. without any inspection have probably never been screened. In either case, it is incumbent on USCIS to conduct vigorous background checks on those we invite into legal status in the U.S.

However, one report last year, based on a Freedom of Information Act (FOIA) request, revealed that USCIS memorandums instructed USCIS to conduct “lean and lite” background checks, including an abbreviated TECS²⁷ check, on DACA applicants, before their applications are adjudicated, and that “biometric processing should not be refused because an applicant does not present an acceptable ID.”²⁸ Informal responses to this report indicate that DACA applicants were biometrically checked with the FBI, but that the anti-fraud office, FDNS, was not invited to investigate or examine specific cases or patterns of fraud.

Criminal and Terrorism Checks – Boston Marathon Bomber Case

According to the Administration, all applicants for DAPA will be checked through IDENT, FBI, and TECS databases. Since the time of Citizenship USA, most FBI checks are conducted electronically, and responses are quick if there is no derogatory information about an applicant; however, any flags that arise from a check must be examined manually and resolved, creating a potential bottleneck with a surge of cases.

The FBI check is mainly for criminal background checks (for suspects and crimes committed in this country) and it is less clear how vigorous the counter-terrorism check is, but all the more important for individuals in this country who have never been screened before entry. As you may recall, the Boston Marathon bombing, April 15, 2013, involved two brother perpetrators, one of whom (Dzhokhar “Jahar” Tsarnaev) was naturalized September 11, 2012, despite the FBI having information from Russian authorities that the brothers were involved with

²⁶ Chicago Tribune, “33 Felons’ Citizenship to be Revoked by INS,” March 6, 1997, http://articles.chicagotribune.com/1997-03-06/news/9703060195_1_citizenship-usa-citizenship-applications-citizenship-last-year.

²⁷ The Treasury Enforcement Communications System, TECS, is Customs and Border Protection’s main immigration screening database.

²⁸ Judicial Watch, June 11, 2013, “Documents Reveal DHS Abandoned Illegal Alien Background Checks to Meet Amnesty Requests Following Obama’s DACA,” which has links to various USCIS emails obtained by Freedom of Information Act requests.

terrorist activity.²⁹ If the counter-terrorism namechecks were working in conjunction with immigration application background checks, a red flag should have been raised.

While applicant background checks are vetted through the FBI Terrorism Screening Center (TSC), this database only contains an abbreviated terrorist watch list (i.e., the no-fly and “selectee” lists) and it is not clear that immigration applications are checked against the larger database of known or suspected terrorists, the Terrorist Identities Data-mart Environment (TIDE).³⁰ This can result in a “no record” response to an FBI background check, even if the Intelligence Community has derogatory information concerning an applicant. Information-sharing and coordination on known or suspected terrorists has been a problem with past cases, such as with Umar Abdulmuttalab, the “underwear bomber,” who ignited explosive materials on a flight on its approach to Detroit in December, 2009. In that case, the perpetrator was placed in the TIDE database, but not on the no-fly list.³¹ The terrorist (no-fly and selectee) watch list still also relies on agencies to nominate individuals to the list and that does not always happen.³² In addition to foreign-based terrorism, homegrown terrorism continues to be a threat, with the year between May 2009 and November 2010 alone seeing 22 homegrown jihadist-inspired terror plots in the U.S. (many resulting in arrests).³³

USCIS FDNS has officers at almost all Joint Terrorism Task Forces (JTTFs), at FBI TSC and the National Counterterrorism Center (NCTC), to resolve immigration related terrorism issues, but it is not clear that they have access to all information needed to resolve immigration application issues related to suspected terrorists. Even with access, the background check that is run for USCIS applicants apparently does not automatically check against the entire TIDE database and flag cases so that an officer can examine the case more closely.

USCIS Fraud Detection & National Security Directorate (FDNS) and Anti-Fraud Efforts

Fraud can be hard to measure – you do not really know how many fraudulent applications get through. When I was stamping visas early in my career at overseas posts, we generally assumed many documents would be fraudulent. But at USCIS, when a facially valid application is presented, it can be hard to deny. Something has to trigger an adjudicator to send it to the anti-fraud office to investigate.

FDNS is the primary office for USCIS anti-fraud investigations. FDNS has a budget of around \$100 million, \$40 million of which comes from a set-aside of a portion of employment-

²⁹ U.S. House of Representatives, Committee on Homeland Security, “The Road to Boston: Counterterrorism Challenges and Lessons from the Marathon Bombings,” March 2014. Reuters, “Russia Warned U.S. about Boston Marathon bomb suspect Tsarnaev, report,” March 25, 2014.

³⁰ See Krouse, et al, Congressional Research Service, “Terrorist Watchlist Checks and Air Passenger Prescreening,” December 30, 2009, RL33645, for an explanation of various watchlist formation, dissemination, and use.

³¹ Eileen Larence, Government Accountability Office, “Terrorist Watchlist: Routinely Assessing Impact of Agency Actions Since the December 25, 2009 Attempted Attack Could Help Inform Future Efforts,” May 2012, GAO-12-476.

³² Id. See also, Senate Homeland Security & Governmental Affairs Committee, “A Ticking Time Bomb,” report on Fort Hood shootings of 2009, February 3, 2011, http://www.hsgac.senate.gov/imo/media/doc/Fort_Hood/FortHoodReport.pdf?attempt=2.

³³ Bjelopera, et al, Congressional Research Service, “American Jihadist Terrorism: Combating a Complex Threat,” December 7, 2010.

based non-immigrant visa fees that is mandated in law. Fraud does occur in the context of more than just temporary employment visa applications and one can question why a substantial portion of the FDNS budget comes from that alone. It is hard to say whether that budget is sufficient to deter or combat fraud when dealing with six million, and with DAPA perhaps far more, immigration applications. FDNS provides indicators of fraud to USCIS adjudicators and asks them to refer cases. It follows up with investigations of cases when warranted; this includes sending personnel to the field to verify businesses and offers for employment, or the veracity of a claimed family relationship. Sometimes investigations can take many months, possibly because of limited resources. At this time, FDNS has limited capacity to conduct proactive data-mining of CLAIMS3 to search for indications of fraud in particular cases or examine fraud trends. If it had expanded ability to electronically verify facts, perhaps using private database services, fraud investigations could be less time consuming. Without transformation of CLAIMS3 to a more advanced case processing system, like ELIS, FDNS capability is also limited. Nevertheless, I understand FDNS has extracted some data from CLAIMS3 to conduct limited searches.

DACA applications had a low refusal rate (at about four percent) and this may not be unexpected because with a population of individuals who have little to no records or identity trail, there will also be little in the way of derogatory information. However, I have been informed that another reason was that the anti-fraud office (FDNS) was taken out of processing so that no investigations would be conducted. That is not to say that there was a high rate of fraud or basic background checks are not conducted, but it would be difficult to verify without FDNS involvement.

For DACA and DAPA entrants who entered the U.S. without inspection, we have never conducted a background check on them and have very little knowledge of their identity; much of their base identity and documents will be established through foreign embassies and consulates (e.g., passports, birth certificates).³⁴ In addition, DAPA applications will be based on family relationships that will only be verified by assertions, affidavits, foreign documentation, or easily manufactured documentation.

To improve security and anti-fraud measures on this application pool, USCIS might consider the following. In the short term, USCIS could contract with independent data services to verify employment and employer relationships and verify residency and identity inputs in DAPA and DACA applications. USCIS also could have FDNS extract data on already approved DACA applications to study trends or search for fraud indicators. Applications are scanned at intake and used to populate CLAIMS3 data; FDNS may be able to use the scanned data to examine patterns of fraud. USCIS may want to consider random or data-driven checks of applications and possible interviews by FDNS officers. FDNS could run random or data-driven checks on DAPA family relationships (i.e., possible DNA testing) if there are indications of fraud. FDNS could build relationships with foreign official document issuing agencies to verify documents and understand the strength of foreign official documentation used in conjunction with DAPA and DACA applications. Although FDNS does conduct checks with INTERPOL for wanted criminals that may be in the applicant pool, further coordination with foreign law enforcement may raise flags for applicants with little known background. USCIS should modernize application intake through the ELIS system or some other system, in such a way that

³⁴ See Instructions for I-821D, <http://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf>.

USCIS anti-fraud efforts can “data-mine” for indicators of fraud. USCIS also may expand FDNS data-driven anti-fraud capability through further USCIS access and better resources (as this type of anti-fraud effort is less intrusive and time-consuming than the current field investigation).

Conclusion

I want to be clear that most USCIS officers are hardworking and patriotic officials of the DHS and I am confident in the ability of USCIS officers to handle any major increase in workload, but DAPA and expanded-DACA would be an unprecedented increase in applications submitted at any one time. Currently, USCIS officers handle six million applications of varying degrees of complexity each year,³⁵ and each application type has a current stated processing time (or backlogs) of between two to six months (the targeted maximum length of time for USCIS processing), including six months for DACA applications.³⁶ The addition of an estimated five million applications to the system will be no small matter and there is a strong possibility that bottlenecks will form at the intake, fee processing, data-collection, adjudication, request-for-evidence, document manufacturing stages, in corollary applications, and even perhaps at foreign consular offices (that are issuing passports and foreign official documents). At each of these bottlenecks, there may be a temptation to streamline processing without proper quality checks.

So in answering the theme of this testimony – is USCIS ready for DAPA – I would say that it is of course “ready” if expectations are tempered. USCIS can take in four to five million additional applications, but certain facilities and processes must be ready for the flood. At the intake level, there may be physical limitations for excess mail and throughput at fee collection. At other levels USCIS must be ready for additional data-entry/collection, anti-fraud review, and document production (especially employment authorization cards). At the adjudication level, there must be enough *fully-trained* officers to handle millions of new applications, and USCIS must be given clear direction on priorities – should American businesses that went through the legal process to get (often specialty or low-supply) foreign workers on board expect longer processing periods because resources have been pulled to handle DAPA applications? Should American citizens expect longer processing times for their spouses or immediate relatives because of the same? These questions should not be left unresolved, and hidden in months old backlog data, but should be clarified up-front. And if the answer to these questions is “no,” then USCIS should expect to ramp up resources sufficient to meet the expected DAPA application inflow, or temper expectations for processing times.

Thus, with DAPA, USCIS and the administration should be realistic about the speed and care with which they can process millions of DAPA applications. In being realistic and forthcoming about expectations for processing times, USCIS will increase trust with policy-makers and the public, and will be able to fulfill its mandate to handle quality adjudications of all its applications.

³⁵ USCIS Data, <http://www.uscis.gov/tools/reports-studies/immigration-forms-data>.

³⁶ USCIS Processing Times, <https://egov.uscis.gov/cris/processingTimesDisplay.do>. (It should be noted that many applicants for green cards, once processed, must wait in line for years to obtain their legal green card.)