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Policy Brief

Reopening America: How the Department of State Can Reduce Delays and Eliminate Backlogs and Inefficiencies to Create a Welcoming America

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Contact: Sharvari Dalal-Dheini, SDalal-Dheini@aila.org and Paul Stern, pstern@aila.org¹

Introduction

Immigration to the United States from overseas has been significantly hampered due to various assaults by the prior administration to close its doors to individuals based on their religion, their country of origin, their wealth, and their health. The final blow was delivered by the COVID-19 global pandemic, which shuttered the door to America for more than a year through the imposition of travel bans that used the pandemic as a pretext to keep people out of the United States and through closures of the U.S. embassies and consulates. Despite rescinding certain travel bans, President Biden resurrected regional travel bans under the guise of COVID-19, exacerbating already crisis-level immigrant and nonimmigrant visa backlogs and visa processing delays at the Department of State (DOS). These restrictions and the pandemic in general have had significant consequences for individuals, families, and U.S. businesses for more than a year. The travel restrictions have kept families separated, restricted the issuance of immigrant and nonimmigrant visas, cost individuals their chance at the American Dream, and impaired the ability of U.S. businesses to bring in and bring back foreign talent to fill seasonal and permanent positions, thereby impacting our nation's economic recovery from the COVID-19 pandemic. Now that the COVID-19 pandemic is subsiding due to the miracles of modern science, it is time for America to reopen its borders and for DOS to get back to business.

As U.S. embassies and consulates around the world were shut down due to the pandemic, DOS suffered significant financial difficulties, just like many other businesses around the world. Notwithstanding significant budget constraints, DOS has historically found ingenious ways to provide high-volume, world-class, and efficient consular services to U.S. citizens and visa applicants around the globe. However, the significant pandemic-related decrease in DOS's fee revenue, coupled with an eight-fold increase in the consular immigrant visa backlog,² prevents DOS from meeting its demands within a reasonable period without additional creativity and

¹ Special thanks to Sandra Sheridan Reguerin, Dominique Pando Bucci, and AILA's Department of State Liaison Committee.

² See March 9, 2021 Foreign Press Center Briefing With Consular Affairs Acting Deputy Assistant Secretary for Visa Services, Julie M. Stufft on the Topic: Update on U.S. Immigrant Visa Processing at Embassies and Consulates, <https://savediversityvisa.org/2021/03/10/update-on-u-s-immigrant-visa-processing-at-embassies-and-consulates/>.

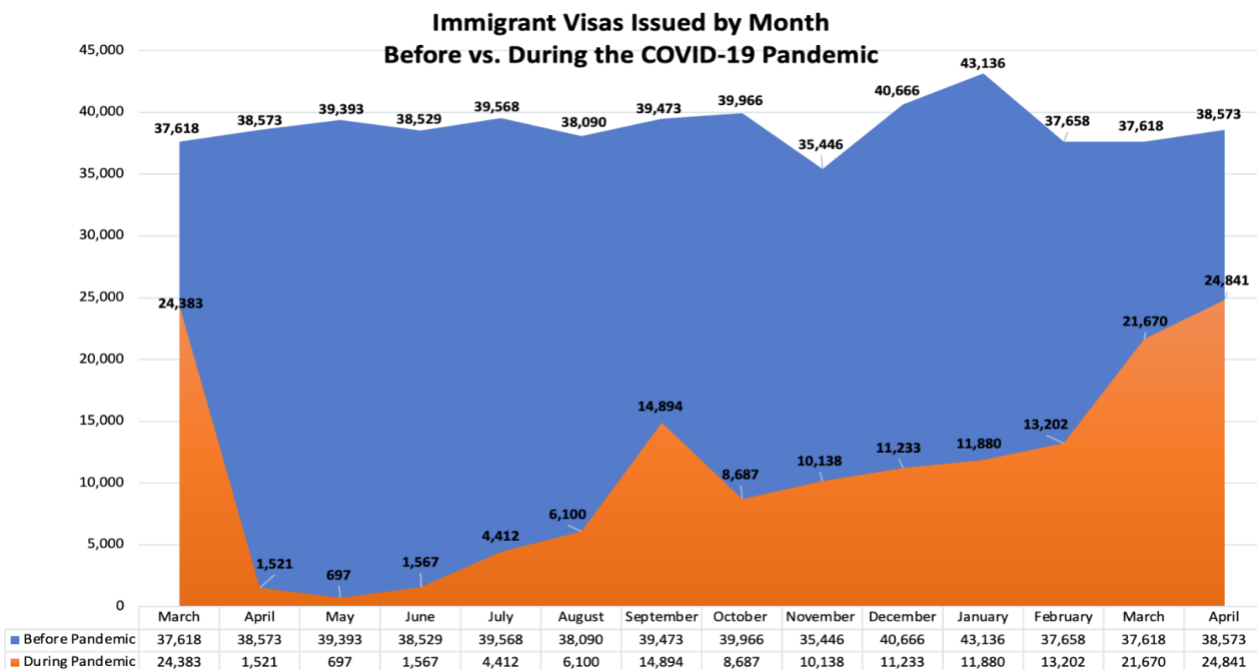
ingenuity to overcome these hurdles, as well as a commitment from Congress for increased funding and support.³ DOS must prioritize the implementation of efficient policies and procedures to ensure the continued operations of its components across the globe.

AILA provides this policy brief to offer sensible policies and procedures that DOS can utilize to ensure the continued efficient function of DOS beyond the COVID-19 global pandemic.

Current State of Visa Backlog and Processing Delays

Throughout the COVID-19 global pandemic, there has been a sharp reduction in the issuance of immigrant visas (IVs) and nonimmigrant visas (NIVs). This reduction is the result of, among other factors, travel restrictions implemented by the Trump administration suspending entry of certain immigrants and nonimmigrants, the ongoing restrictions targeting certain countries and regions including China, Iran, Brazil, the Schengen Area, the U.K., Ireland, South Africa and India, and in-country COVID-19-related protocols that have sharply reduced the number of staff and services in many consular posts.

Over the course of the pandemic, the number of immigrant visas issued has sharply fallen, even with recent increases in March and April of 2021, the average number of IVs issued per month during the pandemic is just over 11,000. This is a nearly 70-percent drop and a far cry from the pre-pandemic average of close to 39,000.

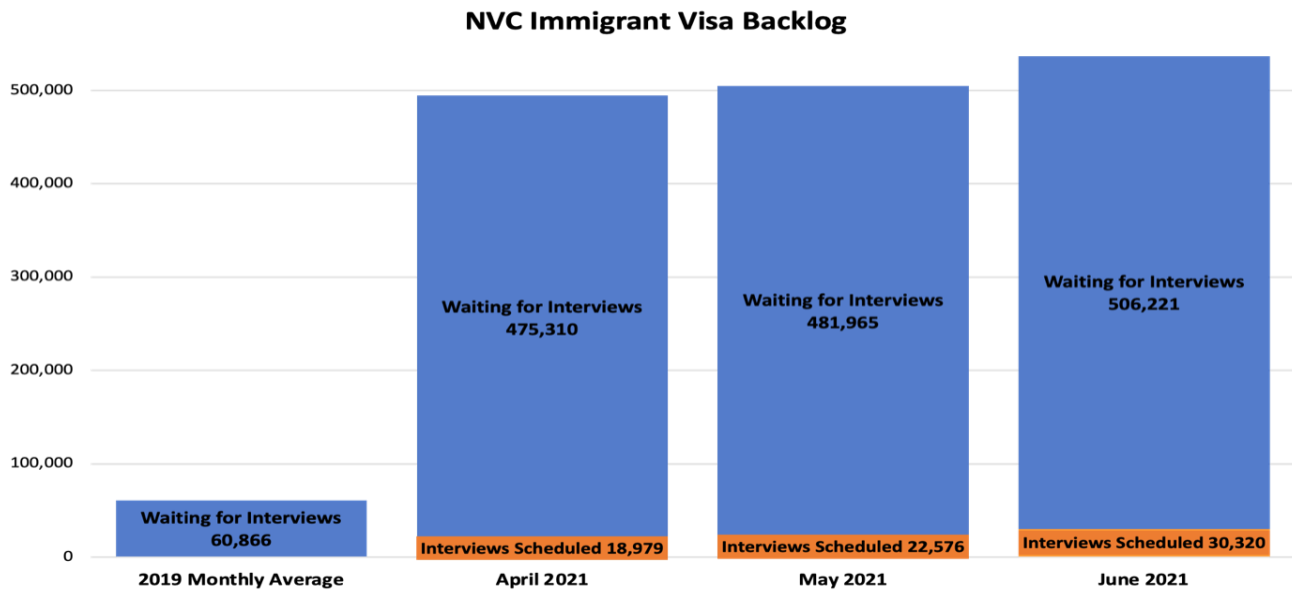


Source: Analysis of data from DOS webpage, “Monthly Immigrant Visa Issuance Statistics”
<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/immigrant-visa-statistics/monthly-immigrant-visa-issuances.html>

³ The Biden Administration has proposed a budget of \$58.5 billion for the Department of State and USAID, of which \$320 million will be directed to consular services. See Opening Remarks by Secretary of State Antony J. Blinken Before the Senate Committee on Appropriations, available here: <https://www.state.gov/opening-remarks-by-secretary-of-state-antony-j-blinken-before-the-senate-committee-on-appropriations/>.

In 2019, the monthly average of immigrant visa cases pending at the National Visa Center (NVC) waiting for an interview was 60,866. Two years later, those numbers have skyrocketed, with the NVC reporting 506,221 immigrant visa applications awaiting interviews in June 2021—an approximately 732 percent increase.

As the NVC confirmed in the February 2021 meeting with AILA, it continues to schedule cases only for posts that can conduct interviews.⁴ DOS has thankfully expanded interview waiver eligibility for NIVs⁵ and consular posts are beginning to phase in more routine visa services⁶ as shown by the jump in both IV and NIV issuance in March and April 2021. While things appear to be trending in the right direction, the restrictions brought on by the pandemic have created an enormous IV backlog that continues to rise.



Source: Analysis of data from DOS webpage, “National Visa Center (NVC) Immigrant Visa Backlog Report”
<https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visas-backlog.html>

Nonimmigrant visa issuance also fell sharply during this time with monthly averages for issuances falling from over 721,305 to about 144,224 per month, a roughly 80 percent fall on average.

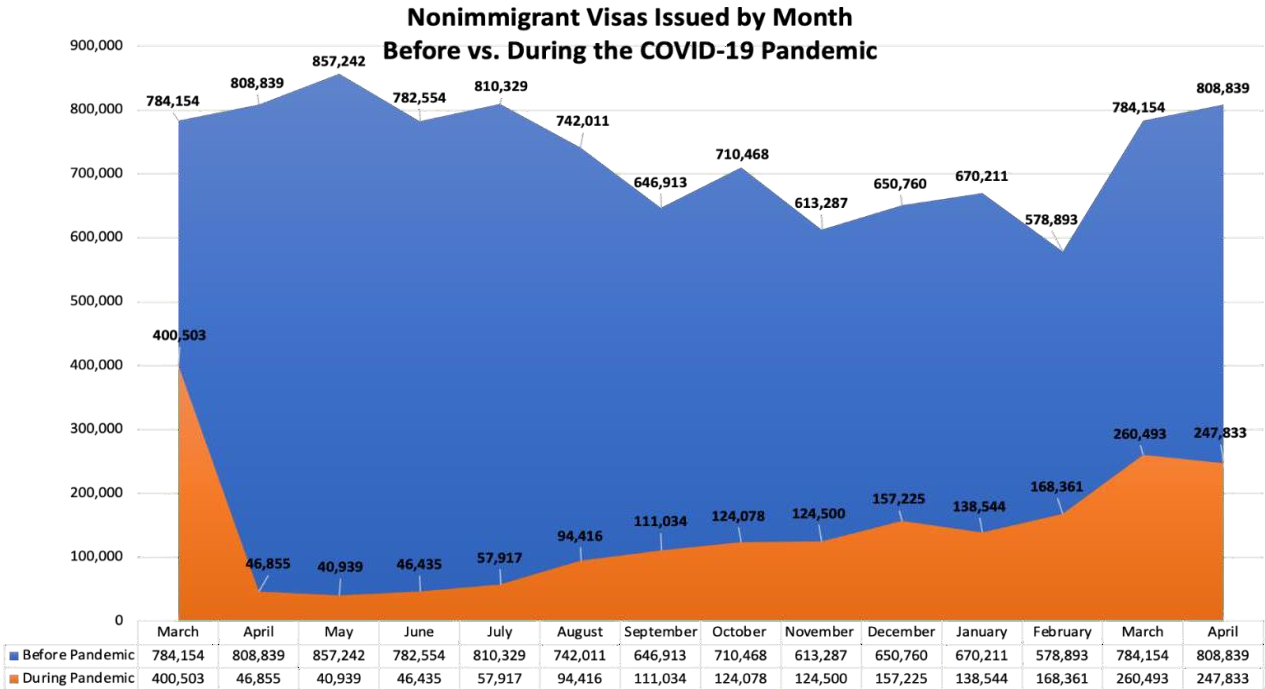
⁴ See National Visa Center Meeting with AILA on February 17, 2021, available here:

<https://travel.state.gov/content/travel/en/News/visas-news/national-visa-center-meeting-with-aila.html>.

⁵ See Expansion of Interview Waiver Eligibility, available here:

<https://travel.state.gov/content/travel/en/News/visas-news/expansion-of-interview-waiver-eligibility.html>.

⁶ See Immigrant Visa Prioritization, available here: <https://travel.state.gov/content/travel/en/News/visas-news/immigrant-visa-prioritization.html>.



Source: Analysis of data from DOS webpage, “Monthly Nonimmigrant Visa Issuance Statistics”
<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics/monthly-nonimmigrant-visa-issuances.html>

Recommendations to Eliminate Pandemic-Related Consular Backlogs

AILA understands the significant hurdles exacerbated by the COVID-19 global pandemic that DOS is currently facing and appreciates the work of DOS staff across the United States and in posts across the globe. Notwithstanding the significant challenges presented by a post-COVID world, there are several effective tools and policies that DOS can reinstitute or employ for the first time to eliminate backlogs and resume normal processing while creating U.S. jobs.

1. Reopen America

As the COVID-19 pandemic subsides in the United States and individuals here and around the world are being vaccinated, it is time for the administration to terminate travel bans that were enacted under the guise of stopping the spread of the disease. Restrictions put into place and maintained by Title 42⁷ and Presidential Proclamations 9984, 9992, 10143 and 10199⁸ are not

⁷ See A Guide to Title 42 Expulsions at the Border, available here:
<https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

⁸ See Presidential Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus (PP 9984 China), available here:
<https://www.aila.org/infonet/presidential-proclamation-coronavirus>; Presidential Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus (PP 9992 Iran), available here: <https://www.aila.org/infonet/presidential-proclamation-suspension-coronavirus>; Presidential Proclamation on the Suspension of Entry as Immigrations and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease (PP 10143 Schengen Area, UK, Ireland, South Africa, Brazil), available here: <https://www.aila.org/infonet/presidential-proclamation-suspension-of-entry>;

common-sense measures that are based on science. With the availability of vaccinations, rapid testing, and quarantine, science—not travel bans—can help prevent the spread of COVID-19 and its variants, without indiscriminately keeping certain individuals out of the United States with the continued impact of separating families and hampering U.S. businesses. The imposition of the presidential proclamations has created an additional layer of complexity and adjudication burdens on DOS and the Department of Homeland Security (DHS) by establishing a new, complicated, and everchanging national interest exemption analysis. President Biden must terminate these travel restrictions to re-establish a welcoming America and allow DOS and DHS to focus their adjudicative efforts on clearing the ever-growing backlogs.

2. Resume stateside processing of visa renewals.

The Deputy Assistant Secretary for Visa Services at DOS possesses authority under 22 CFR Section 41.111(b) to renew nonimmigrant visas from within the United States, and did so routinely for the C, E, H, I, L, O, and P visa categories until July 16, 2004.⁹ In September 2002, DOS suspended nonimmigrant visa renewals in the United States for the A-3, G-5, and NATO-7 categories¹⁰ but continues stateside renewals of nonimmigrant visas in the following diplomatic nonimmigrant categories: A-1, A-2, G-1 to G-4, and NATO-1 to NATO-6.¹¹

In suspending the stateside reissuance policy for non-diplomatic visa categories in 2004, DOS acknowledged that stateside visa renewals were convenient to the international business community. It cited a new law requiring biometric identifiers as part of the visa issuance process and its inability to capture biometrics in the United States as the motivation for its decision.¹² Seventeen years later, the capture of biometrics is ubiquitous and should no longer be a problem. DOS can reuse the biometric identifiers from the existing visa to conduct clearance checks and to incorporate into the new visa. In addition, DOS should consider working with DHS and U.S. Citizenship and Immigration Services (USCIS) to allow DOS to utilize already established biometrics facilities.

At a time when the immigrant visa backlog is more than eight times the normal backlog and encompasses more than half a million documentarily qualified applications, reinstating U.S. nonimmigrant visa reissuance for the categories above would be a tremendous step in allowing consular posts to focus on reducing the backlog and other key priorities, instead of reissuing the classes of nonimmigrant visas included above. Furthermore, as these are employment-based nonimmigrant classifications, this would further enable international travel and commerce to resume more freely as we move beyond the pandemic, further spurring economic activity which is sorely needed at this time. Lastly, as domestic operations would undoubtedly need to scale up

and Presidential Proclamation Suspending Entry as Nonimmigrants of Certain Individuals Present in India Who Pose a Risk of Transmitting COVID-19 (PP 10199 India), available here:

<https://www.aila.org/infonet/proclamation-suspending-entry-as-nonimmigrants>.

<https://www.aila.org/infonet/proclamation-suspension-of-entry>

⁹ See 69 FR 35121 (June 23, 2004).

¹⁰ See *Id.*

¹¹ See Renewing A, G, and NATO Visas in the United States, available here:

<https://travel.state.gov/content/travel/en/us-visas/other-visa-categories/visa-employees-nato/renewing-a-g-nato.html>.

¹² Section 303 of the Enhanced Border Security and Visa Entry Reform Act ([Pub. L. 107-173](#), 116 Stat. 543) requires that U.S. visas issued after October 26, 2004, include biometric identifiers.

to meet this demand, such a policy would create U.S. jobs to further assist in alleviating the economic impact of the pandemic.

3. Expand visa interview waiver eligibility.

In the interest of efficiency and minimizing the number of in-person interviews at posts, AILA applauds DOS's expansion of the nonimmigrant visa interview waiver to all nonimmigrant categories for 48 months through the end of 2021.¹³ This is an important step in helping consular posts prioritize applicants who require in-person interviews and facilitating posts' ability to resume normal consular operations. AILA respectfully requests that DOS further extends the program through June 30, 2022, to give posts additional time to adjust to in-person interviews for these individuals and allow posts to reduce the visa backlog by prioritizing other consular services.

To further maximize the efficiency of the visa interview waiver process and reduce the number of potential applicants for interview, AILA recommends that DOS further expand who may qualify for a visa interview waiver. Some applicants would be eligible for the interview waiver process, except that their passport had been stolen or lost in the past. Subsequently, some of these applicants were interviewed and issued new visas. However, the current DS-160 does not distinguish these applicants from someone who has recently lost their passport for interview waiver eligibility. It would be important for DOS to implement a process that would distinguish these two, and perhaps allow the low-risk category to be eligible for the visa interview waiver process.

4. Automatically extend visas that have expired during the COVID-19 global pandemic by 24 months.

DOS should further consider providing 24-month automatic extensions for nonimmigrant visa holders who were either stranded abroad or required to return home for urgent business or family emergencies during the COVID-19 global pandemic, provided that they have a valid I-797 notice from USCIS or a valid DS-2019 or I-20. DOS recently announced that it would allow return travel on recently expired U.S. passports,¹⁴ DHS Customs and Border Protection announced that LPRs may be able to return on certain expired documents,¹⁵ and DOS acknowledged during our May 27, 2021, liaison meeting that on a case-by-case basis, COVID could be a reason for an LPR to not return to the United States within the required one-year period.¹⁶ Further expanding this leniency for nonimmigrant visas would help alleviate the backlog by reducing burdens on consular posts and allowing consular officers to make use of available resources for other

¹³ See March 11, 2021 posting, Expansion of Interview Waiver Eligibility, <https://travel.state.gov/content/travel/en/News/visas-news/expansion-of-interview-waiver-eligibility.html>.

¹⁴ See Return Travel on Recently Expired U.S. Passports, available here: <https://www.state.gov/return-travel-on-recently-expired-u-s-passports/>.

¹⁵ See CBP Issues Guidance to Carrier Liaison Program on the Boarding of Lawful Permanent Residents, available here: <https://www.aila.org/infonet/cbp-issues-guidance-to-carrier-liaison-program>.

¹⁶ See The Department of State Meeting with the American Immigration Lawyers Association (AILA) on May 27, 2021, available here: https://travel.state.gov/content/travel/en/News/visas-news/20210602_dept-of-state-meeting-with-aila.html.

services and would enable individuals who were unfairly stuck abroad without recourse during the pandemic to continue to work and travel.

5. Maximize staffing on IV processing at consular posts.

While we trust that the above recommendations will help streamline consular processing and free up capacity for consulates to prioritize immigrant visa processing, **increasing consular staffing will also be necessary to successfully tackle the pandemic-related backlogs.** AILA recommends filling long-standing vacancies in DOS and DHS at the ambassadorial, Deputy Assistant Secretary (DAS), and Assistant Secretary (AS) levels to restore proper management and operations at both agencies.

In addition to staffing leadership positions, it will be necessary to increase staffing at consular posts and, to a lesser extent, at the Visa Office. AILA recommends that DOS utilize all proven historical methods to quickly increase consular staffing, including deputizing staff to act as consular officers and calling back experienced former consular officers and other DOS officials. DOS should also recruit recent graduates and consider offering, over time, to forgive student debt in exchange for their service.

6. Revise regulations to allow virtual immigrant and nonimmigrant visa interviews.

AILA commends the DOS announcement in the Spring 2021 Unified Agenda that it intends to publish a temporary final rule allowing the waiver of certain in-person appearance and oath requirements for immigrant visa applicants.¹⁷ AILA urges DOS to quickly finalize that rule and to ensure that it is broadly applicable to streamline as much of the immigrant visa processing as possible.

Moreover, AILA similarly recommends that **DOS revise current regulations to authorize virtual interviews for initial nonimmigrant visa applicants to aid in tackling the backlog while minimizing physical contact, allowing staff from anywhere in the world to interview applicants safely.** Security concerns can still be addressed since the officer will be able to see the applicant and compare the applicant to the passport picture. Biometric identifiers in the passport and biometrics taken by DOS prior to the interview would also address any identity and security concerns.

In conjunction with the Kentucky Consular Center (KCC), DOS could review its research on fraud risk factors and develop algorithms to identify and prioritize low fraud cases that could qualify for remote processing. Higher-risk cases could continue to require in-person interviews.

¹⁷ See Agency Rule List – Spring 2021 Unified Agenda, Department of State, available here: https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1400&csrf_token=D75B913C6F31624754B45B05F1BDFB3CFFD73B29E69877287D8D79FFAF7D456E2FF6AB61992BD4804BFF9E4164417B98DC10.

7. Leverage U.S.-based consular officers to adjudicate visa applications.

In addition to in-country foreign service officers (FSOs), new FSOs, deputized civil servants, and retirees could be trained as supplemental personnel to engage in remote visa interviews and handle other aspects of the visa issuance process from within the United States, resulting in reduced appointment wait times and avoiding space constraints at consular posts abroad. This would be an inexpensive and faster way to eliminate the backlog, as lack of space to physically distance applicants and personnel at consular posts cannot be quickly addressed.

Recommendations to Leverage Interagency Coordination with U.S. Customs and Border Protection (CBP) to Maximize Efficiency and Eliminate Unnecessary Visa Processing

8. Admit all U.S. lawful permanent residents (LPRs) returning to the United States from abroad without conducting an abandonment analysis if they last departed the United States on or after December 31, 2019, or who had a valid reentry permit on that date and discourage SB-1 returning resident visa applications.

Although LPRs residing abroad at the outset of the pandemic were not constrained by any COVID-19 health-related or labor market-related travel bans,¹⁸ there are a myriad of pandemic-related reasons why they may have felt constrained from returning to the United States before their reentry permits expired or within a year of their last departure from the United States.¹⁹

Current regulations impose a presumption of abandonment for LPRs who have been outside the United States for more than one year.²⁰ Such LPRs are typically required to apply for an SB-1 Returning Resident Visa at a U.S. consulate abroad before returning to the United States. Given the massive backlogs at consular posts, most of which have not yet resumed normal consular operations, adopting a policy allowing all LPRs to board flights to the United States²¹ and be admitted without a CBP abandonment analysis or the need for an SB-1 returning resident visa application would avoid unnecessary consular applications. CBP's March 5, 2021, Reminder of Current Policy of Boarding Lawful Permanent Residents²² is a great first step in facilitating return of all LPRs in possession of valid LPR cards.

AILA recommends that the abandonment analysis be formally waived as a matter of policy to eliminate inconsistent adjudications among ports of entry. AILA further recommends that DOS issue internal and public guidance to the effect that posts will not prioritize SB-1 returning

¹⁸ See AILA's Resources for Geographic COVID-19-Related Travel Bans, available here: <https://www.aila.org/advo-media/issues/all/covid-19/resources-national-interest-exceptions> and Resources Related to Presidential Proclamations Temporarily Suspending Entry of Certain Immigrants and Nonimmigrants into the United States, available here: <https://www.aila.org/advo-media/issues/all/covid-19/eo-temporary-suspension-immigration>.

¹⁹ These reasons may include high COVID-19 infection rates in the U.S., or an inability to return to their expat assignment host country following travel to the U.S. due to the host country's COVID-19 restrictions, etc.

²⁰ See 8 CFR Section 211.1(a)(2).

²¹ Airlines, and particularly non-U.S. airlines, may be wary to board LPRs who have been absent from the U.S. for more than one year and who lack a valid reentry permit, fearing U.S. fines.

²² See CBP Issues Guidance to Carrier Liaison Program on the Boarding of Lawful Permanent Residents, available here:

<https://www.aila.org/infonet/cbp-issues-guidance-to-carrier-liaison-program>.

resident visa applications for LPRs who fall within CBP's guidance. Such a policy could be limited to LPRs who last departed the United States on or after December 31, 2019, or who possessed a valid reentry permit or valid LPR card on or after December 31, 2019.

9. Adopt a policy to automatically extend immigrant visas from 6 months to 18 months, in coordination with CBP.

By law, immigrant visas issued at consular posts are typically valid for up to six months.²³ INA Section 221(c)(3) and the FAM outline circumstances and procedure by which these visas can be reissued.²⁴

The current scheme allows for the reissuance of an immigrant visa that was unable to be used for reasons beyond the applicant's control and for which the applicant was not responsible, if reissued within the same fiscal year. In similar circumstances, but where the initial immigrant visa was issued in a prior fiscal year, DOS recaptures the visa number to the year it was issued and requires the applicant to reapply for a new visa and pay a new fee. While this is clearly aligned with the statute, as a practical matter, requiring immigrant visa holders whose visas expired in FY2020 due to the pandemic to reapply for new immigrant visas at a time when the immigrant visa backlog is approaching half a million will add to the consular burdens and makes little sense.

The travel restrictions imposed have prevented an unprecedented number of individuals issued immigrant visas within six months of the onset of the pandemic from traveling to the United States before those visas expired. To avoid the administrative burden of having to reissue those visas, and in recognition of the travel constraints caused by the pandemic, it's prudent to include, among the administration's COVID-relief priorities, a legislative provision that would extend, by operation of law, the validity of all immigrant visas issued on or after June 30, 2019, through June 30, 2022. This action will prevent unnecessary bureaucratic processing at consular posts and free up consular officers to focus on eliminating the immigrant visa backlog and resuming routine nonimmigrant visa processing.

Recommendation to Limit the Impact of the COVID-19 Global Pandemic on Visa Issuance and Ensure that DOS Is Adequately Funded to Perform Necessary Work to Return to Pre-Pandemic Levels of Service

10. Recapture and avoid the loss of unallocated visas.

We understand that even if DOS were to adopt all these recommendations, given the magnitude of the IV backlog and the continued procedural hurdles in place due to the COVID-19 global pandemic, it is unlikely that DOS will be able to process all available IVs before the end of FY2021. As such, it is likely that hundreds of thousands of IVs may be permanently lost, even though many individuals have been waiting years, if not decades, for an IV. In addition, in

²³ See INA Section 221(c)(1) and 9 FAM 504.10-2, Immigrant Visa Validity: <https://fam.state.gov/FAM/09FAM/09FAM050410.html>.

²⁴ See INA Section 221(c)(3) and 9 FAM 504.10-5 Issuance of New or Replacement Visas: <https://fam.state.gov/FAM/09FAM/09FAM050410.html>.

FY2020, over 100,000 family-based and diversity preference category visas went unused.²⁵ As our nation looks towards a return to normalcy, it is imperative that, per INA §206, DOS administratively recapture those visas that were lost.²⁶ Moreover, looking forward, DOS must take active steps to reduce the impact of delays and issues created by the pandemic to ensure that all visa numbers available for FY2021 are fully allocated and do not get wasted simply due to processing delays.

Congress should also take action to recapture those visas unused during the COVID-19 pandemic in addition to the approximately 200,000 visas lost between 1992 and 2019.²⁷ Congress should enact a statutory fix to ensure that unused visas are properly reallocated moving forward to realize its intent that all available IVs are properly allocated.

Conclusion

Throughout the COVID-19 global pandemic, DOS's visa backlog has exploded, and limited staffing along with in-country COVID-19 protocols have only exacerbated visa processing delays. The COVID-19 global pandemic has necessarily changed the way the world operates into a more flexible, nimble, and virtual world. The impact and effects of the pandemic are far reaching and will continue to impact the agency's operations moving forward unless DOS transforms itself by considering additional policies that can help reestablish the United States as a welcoming nation as we come out of the COVID-19 pandemic.

²⁵ See Tracking the Biden Agenda on Legal Immigration In the First 100 Days, available here: https://www.americanimmigrationcouncil.org/sites/default/files/research/tracking_biden_agenda_legal_immigration_first_100_days_0.pdf.

²⁶ See Stop the Incinerator: the high cost of green card slots going unused and the benefits of recapturing them, available here: <https://www.niskanencenter.org/stop-the-incinerator-the-high-cost-of-green-card-slots-going-unused-and-the-benefits-of-recapturing-them/>.

²⁷ *Id.*