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Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication

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Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication

By Jill E. Family*

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I. INTRODUCTION

Immigration adjudication is more diverse than it may seem. Scholars tend to focus on one aspect of immigration adjudication, the decision-making process established to determine whether an individual may be removed (deported) from the United States. But there is a whole other function of immigration adjudication that relatively is ignored in the legal literature. Immigration adjudicators are also tasked with determining whether to grant immigration benefits, such as whether to grant lawful permanent resident (green card) status.

Both types of immigration adjudication, removal and benefits, face major challenges. The manifestations of the crises in removal and benefits adjudication are different. This article argues, however, that both crises are linked to a lack of transparency in immigration law. In the removal context, the lack of transparency stems, at least in part, from the complexity of the law and from the negative discretion infused into the law. In the benefits context, the lack of transparency at least partially stems from the use of administrative guidance to adjudicate benefits applications and from the obscurity of the administrative appellate adjudicating body, the Administrative Appeals Office (AAO).

This lack of transparency presents big challenges for both removal and benefits adjudication, and once recognized, opens new lines of inquiry. In the removal context, the lack of transparency: (1) must be considered as a contributor to overwhelming caseloads; (2) highlights a lack of decisional independence for immigration adjudicators; (3) must be considered as a factor in the extreme lack of lawyers in the system; and (4) adds to the negative mystique surrounding immigration law. In the benefits context, the use of administrative guidance and the obscurity of the AAO help to explain the confusion, uncertainty and extreme lack of confidence characteristic of the benefits adjudication system.

This article is a second step in examining the connections between immigration law and the crisis in immigration adjudication. A contemporaneous article more broadly explores the role of

immigration law in problems affecting removal adjudication.¹ This article focuses on how the lack of transparency is linked to removal adjudication, as well as expands the study by examining how the lack of transparency is linked to benefits adjudication. Badly needed reform of both removal and benefits adjudication must consider these links.

II. REMOVAL ADJUDICATION

A. Removal Adjudication Challenges

In a removal (deportation) case, the government charges a foreign national with an immigration violation that may result in expulsion from the United States. There is an administrative adjudication system housed within the executive branch designed to determine whether to issue a removal order. The administrative system is comprised of immigration judges, who make up the trial level of administrative adjudication, and the Board of Immigration Appeals, which is the administrative body that hears appeals from immigration judge decisions.²

There are four major challenges facing the adjudication of removal cases at the administrative level. First, the administrative components of the system are expected to adjudicate an astounding number of cases per year. Second, both immigration judges and members of the Board of Immigration Appeals lack decisional independence. Third, there is an extreme lack of lawyers in the system representing the interests of foreign nationals. Fourth, immigration adjudication suffers from a lack of esteem, which both feeds on and helps to promote a negative mystique surrounding immigration law.

Cases are simply clogging the administrative adjudication system. The federal government set a new record for the number of removals

¹ Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541 (2011).

² There *may* be judicial review of the administrative decision. 8 U.S.C. § 1252. This article focuses on the administrative adjudication component.

in Fiscal Year 2009.³ There is no indication that this trend will reverse, especially as more state and local governments put pressure on the federal government to increase enforcement efforts.⁴ Therefore, the number of cases entering the system per year likely will increase as the executive branch seeks to remove greater numbers of individuals each year.⁵

During Fiscal Year 2009, about 230 immigration judges heard 290,233 proceedings.⁶ In terms of workload, “proceedings” includes only intensive hearings, and not motions or bond hearings.⁷ These numbers equate to over 1200 intensive hearings per year per judge.

Both the nature of these proceedings and the existing case backlog serve as evidence that this workload per judge is too high. These are not high volume cases. Often, immigration judges are called upon to make time intensive credibility determinations and to consider thorny questions of law. For example, in an asylum case, an immigration judge must determine if an applicant has a well-founded fear of persecution if returned to his or her home country.⁸ Often these cases are not well-documented due to the nature of the claim. An applicant usually does not have the time or the ability to gather

³ U.S. Dep’t. of Homeland Security, Office of Immigr. Statistics, *Immigration Enforcement Actions: 2009* at 1 (2010) (explaining that the 2009 total marked the seventh consecutive record high).

⁴ For example, if implemented, Arizona’s SB 1070 would require state law enforcement officers to determine the immigration status of many more individuals who come into contact with the police, as well as all of those arrested. A.R.S. § 11-1051(B). Each additional check is a potential case for the federal adjudication system.

⁵ In an earlier article, I raised the point, however, that more deportations do not automatically result in more cases in the adjudication system, as the executive branch can divert foreign nationals from the adjudication system. Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595 (2009).

⁶ Transactional Records Access Clearinghouse, *Number of Immigration Judges*, available at <http://trac.syr.edu/immigration/reports/225/include/payroll.html>; U.S. Dep’t. of Justice, Executive Office for Immigr. Review, 2009 Statistical Yearbook at B7 [hereinafter “2009 Statistical Yearbook”].

⁷ 2009 Statistical Yearbook at B7.

⁸ See *infra* notes 67 to 78.

documentation of persecution before fleeing.⁹ Also, adjudicating a fear-based claim often requires detailed understanding not only of US law, but also of international conventions.¹⁰ Not surprisingly, an extremely large backlog has developed in the immigration courts. As of June 2010, 247,922 cases were pending before the immigration courts, and the average wait time for a case pending in the immigration courts was 459 days.¹¹

The Board of Immigration Appeals has a controversial history of managing its own large caseload. In Fiscal Year 2009, the Board completed 33,103 cases.¹² The Board is authorized to have 15 members, but currently it has 14.¹³ Again, these are not high volume cases. While the Board is currently completing more cases per year than it receives, by 2001 a backlog of 56,000 cases had developed.¹⁴ To combat the backlog, the Board implemented a controversial procedure called “streamlining.”¹⁵ Under mandatory streamlining, pre-scripted, two sentence opinions became the staple of the Board’s work product. To allow the Board to work faster, the streamlining changes forbade the Board from issuing reasoned decisions in large

⁹ Stephen Yale-Loehr & John R.B. Palmer, *Evidentiary Issues in Asylum Cases*, 6 BENDER’S IMMIGR. BULL. 595, 595 (2001).

¹⁰ For example, the U.S. Senate has ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That convention forbids a signatory state to send an individual to another state where “there is a substantial likelihood that she would be tortured.” Lori Nessel, “Willful Blindness” to Gender-Based Violence Abroad: United States’ Implementation of Article III of the United Nations Convention Against Torture, 89 MINN. L. REV. 71, 74 n.9, 90-94 (2004).

¹¹ Transactional Records Access Clearinghouse, *Immigration Case Backlog Continues to Grow* (August 12, 2010), available at <http://trac.syr.edu/immigration/reports/235/>.

¹² 2009 Statistical Yearbook at S1.

¹³ U.S. Dep’t. of Justice, *Board of Immigration Appeals*, available at <http://www.justice.gov/eoir/fs/biabios.htm>.

¹⁴ Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,656 (June 18, 2008) (to be codified at 8 C.F.R. pt. 1003).

¹⁵ Family, *supra* note 5, at 605.

classes of cases.¹⁶ Streamlining also decimated the use of three-member panels in favor of single member review.¹⁷

The nature of the caseloads of both the immigration courts and the Board raise questions about how the tremendous caseloads affect both adjudicators and the foreign nationals who are the subject of the proceedings. The answers to those questions are disturbing on both fronts. Immigration judges scored higher on a workplace burnout test than any other professional group, scoring higher (meaning higher burnout) than prison wardens.¹⁸ As far as foreign nationals, the federal courts of appeals have been raising serious questions about the quality of administrative immigration adjudication.¹⁹ Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit wrote that administrative immigration adjudication has fallen “below the minimum standards of legal justice.”²⁰

Immigration judges and Board members are called on to manage these enormous caseloads without the benefit of decisional independence.²¹ This is the second major challenge facing the adjudication of removal cases at the administrative level. Immigration judges and Board members do not hold the job

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Stuart L. Lustig et al., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER'S IMMIGR. BULL. 22 (2008).

¹⁹ See, e.g., *Tekle v. Mukasey*, 533 F.3d 1044 (9th Cir. 2008); *Ali v. Mukasey*, 529 F.3d 478 (2d Cir. 2008); *Kaita v. Attorney General*, 522 F.3d 288 (3d Cir. 2008); *Floroiu v. Gonzales*, 481 F.3d 970 (7th Cir. 2007).

²⁰ *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

²¹ Professor Stephen Legomsky has identified and focused on one type of constraint on decisional independence in the immigration adjudication context: “the threat of personal consequences for the adjudicator” in the context of immigration adjudication. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 389 (2006). Professor Legomsky described:

Under this constraint, the case is presumed to be one that the law clearly allows the adjudicator to decide, and there is no attempt by a superior to directly dictate the outcome of that case, but there are general threats, real or perceived, that decisions which displease an executive official could pose professional risks for the adjudicator.

Id. Professor Legomsky has argued that decisional independence is necessary, at a minimum, at some point in the immigration adjudication system to uphold the rule of law. *Id.* at 386, 394-401, 403.

protections of other types of administrative law judges.²² In fact, immigration judges and Board members are mere employees of the Department of Justice. Their boss is the Attorney General of the United States. The entire Board exists by regulation only, and the Attorney General is in charge of hiring, firing, training and reviewing the immigration judge corps.²³

The bureaucratic structure provides no formal protections for these administrative decision makers. Two recent controversies drew attention to this lack of decisional independence. These two scenarios include signals from the top that understandably would cause an immigration adjudicator to consider what his or her boss might think about his or her decision-making record.

First, there is evidence that Attorney General John Ashcroft used his power over immigration adjudication to fire ideologically-selected members of the Board of Immigration Appeals. As a part of the streamlining reforms mentioned above, Attorney General Ashcroft fired members of the Board. Research revealed that those fired held decision-making records that were more favorable to foreign nationals.²⁴ The message from the Attorney General made its way to the immigration judges. The President of the National Association of Immigration Judges explained that immigration judges saw the Board firings as politically motivated.²⁵ This immigration judge called the Attorney General's actions "selective downsizing" and noted the "chilling effect" of the firings.²⁶

Second, the administration of George W. Bush hired new immigration adjudicators based on their political loyalties. The U.S. Department of Justice Office of Professional Responsibility and the

²² See, e.g., 5 U.S.C. § 7521(a) (addressing removal of Administrative Law Judges by the Merit System Protection Board).

²³ See 8 C.F.R. § 1003.1 (2009); *Authorities Delegated to the Director of the EOIR, and the Chief Immigration Judge*, 72 Fed. Reg. 53673 (Sept. 20, 2007) (explaining that immigration judges are "Department of Justice attorneys who are designated by the Attorney General to conduct such proceedings, and they are subject to the Attorney General's direction and control").

²⁴ Legomsky, *supra* note 21, at 376 (2006); See also Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154 (2004).

²⁵ Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 11 (2008).

²⁶ *Id.* at 11, 14.

U.S. Department of Justice Office of the Inspector General issued a report detailing the unlawful politicization of hiring for immigration judge positions.²⁷ Immigration judges fill career civil service positions.²⁸ These are not purely political positions.²⁹ The report concluded that the Bush administration violated civil service laws and departmental policy in selecting candidates for immigration judge positions based on political ties rather than based on professional qualifications.³⁰

Compounding troubles of too-high caseloads and a lack of decisional independence for immigration adjudicators is the third major challenge facing immigration adjudication: a lack of quality legal representation for foreign nationals in immigration court. Recent statistics show that 61% of respondents in immigration court did not have attorney representation.³¹ Of those detained during the civil immigration hearing process, less than 20% appeared with an attorney.³² There is no right to government funded counsel during immigration proceedings for foreign nationals, but the government is represented by a corps of lawyers who work either for the Department of Homeland Security or the Department of Justice.³³ There are also serious concerns about the quality of representation for those foreign nationals who do secure representation, including worries about poor lawyering and the unauthorized practice of immigration law.³⁴

The fourth major challenge is immigration law's esteem problem. Immigration law has an esteem problem because it is sometimes

²⁷ U.S. Dep't of Justice, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and other Staff in the Office of the Attorney General* (2008).

²⁸ *Id.* at 70.

²⁹ *Id.* at 11-15.

³⁰ *Id.* at 69.

³¹ 2009 Statistical Yearbook at G1.

³² Vera Institute of Justice, *Improving Efficiency and Promoting Justice in the Immigration System*, 1 (May 2008) available at http://www.vera.org/download?file=1780/LOP%2BEvaluation_May2008_final.pdf

³³ See 8 U.S.C. § 1229a(b)(4)(A).

³⁴ Family, *A Broader View of the Immigration Adjudication Problem*, *supra* note 5, at 604.

perceived as an outlier among and inferior to other areas of law,³⁵ including administrative law.³⁶ This lack of esteem exists not because immigration law is too easy or fails to present a challenge to seasoned lawyers and judges.³⁷ Rather, from an outsider perspective looking in, the system is criticized both by identifications of shortcomings in some immigration adjudicators and by acknowledgement of the poor quality of legal representation that is too often on display.³⁸ It is not unusual to find U.S. Court of Appeals judges identifying biased behavior or the use of poor legal analysis among immigration adjudicators.³⁹ Circuit judges have also raised serious concerns about poor lawyering on behalf of foreign nationals and overzealous prosecution by government attorneys.⁴⁰

³⁵ See Leslie C. Levin, *Guardians at the Gate: The Backgrounds, Career Paths, and Professional Development of Private US Immigration Lawyers*, 34 LAW & SOC. INQUIRY 399, 400 (2009). In fact, even among immigration lawyers, representation of individuals in removal hearings is perceived as a non-prestigious type of immigration law practice. *Id.* at 412-14.

³⁶ See Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 18 (2008) (“[I]mmigration law—although administered and enforced through a complex and powerful administrative bureaucracy—is considered to be a specialty area outside the mainstream of administrative law or U.S. law generally”); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1653-54 (1996) (addressing an impression “that immigration law is too specialized to be a useful field of inquiry for those who are not tutored in its complexities”).

³⁷ See, e.g., *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (“This case vividly illustrates the labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike.”)

³⁸ See, e.g., *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005) (“This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”). See also Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 543-44, 562 (2009); Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 584-86 (2009).

³⁹ See cases cited *supra* note 19.

⁴⁰ Robert A. Katzmman, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 10 (2008) (explaining that “too many

Additionally, the esteem problem is founded in immigration law's status as an isolated, over-complicated area of law where usual legal conventions do not apply.⁴¹

The state of removal adjudication is unsatisfactory. Adjudicators are worn out trying to keep up with unmanageable caseloads. The bureaucratic placement of immigration adjudicators raises serious concerns about their dependence on politically appointed law enforcement officials. The great majority of foreign nationals working their way through this system have no attorney assistance to guide them. Perhaps not surprisingly, the entire adjudication system is not admired.

B. A Lack of Transparency: The Complexity of Immigration Law and the Role of Negative Discretion

This section will explore connections between the four main challenges facing the removal adjudication system discussed above—too high caseloads, a lack of decisional independence, a lack of lawyers for foreign nationals, and the esteem problem—to a lack of transparency in immigration law. While these connections may not explain all of the system's troubles, these connections do provide a new perspective on the crisis. The opacity of immigration law in this context is exemplified by its extremely complex nature and by the role of negative discretion. Both of these characteristics, complexity

of the briefs that I see are barely competent, often boilerplate submissions”); *Kang v. Attorney General*, 611 F.3d 157, 167 (3d Cir. 2010) (admonishing the Government's appeal by stating that “[i]t is disappointing, even shocking, that the government fails to acknowledge that the evidence . . . compels the conclusion that [the applicant] will likely be tortured,” as well as by reminding the government that “it is duty-bound to ‘cut square corners’ and seek justice rather than victory.”).

⁴¹ See Stacy Caplow, *ReNorming Immigration Court*, 13 NEXUS 85, 94-95 (2008) (discussing the lack of rules of evidence in immigration adjudication); Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L.R. 1599, 1622 (2010). (“U.S. immigration laws deviate dramatically from other areas of American law.”); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) (“Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.”).

and an abundance of negative discretion, make it difficult to understand what the law is or how it will be applied.

Immigration law is notoriously complex. For example, Justice Alito has emphasized the intimidating task of determining whether a particular criminal offense renders someone removable.⁴² Even the briefest glimpse at the Immigration and Nationality Act and its accompanying regulations reveals a reader's need for very advanced statutory reading skills and a healthy amount of patience and persistence. Immigration law is indeed a labyrinth. It takes intensive study, even for law professors and seasoned lawyers, to grasp what the immigration laws are trying to say.

Also, the harshness of the law compounds the complexity. The scope of activities that may render someone removable has expanded broadly.⁴³ At the same time, the immigration consequences for those activities are not proportional.⁴⁴ Instead, the potential punishment, no matter the immigration violation, is removal. The stakes are therefore very high. There is much on the line, and the complexity of the law makes it difficult to access the law to determine whether someone has, in fact, done something that renders them removable or whether there is any potential relief from removal.

In addition to its complexity, immigration law is also infused with negative discretion. By negative discretion, I mean discretion granted to immigration adjudicators to deny a benefit or relief, even though it might look like the person is eligible for the benefit or relief under the law.⁴⁵ There is very little room for immigration adjudicators to consider positive equities. Instead, immigration adjudicators are given space to deny relief no matter what, and where equities are considered, the law often prohibits adjudicators from

⁴² *Padilla v. Kentucky*, 130 S.Ct. 1473, 1489 (2010) (Alito, J., concurring) (referring to a “dizzying paragraph” in an immigration law guidebook that attempts to explain whether a particular offense renders someone deportable).

⁴³ *Id.* at 1478 (“The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.”)

⁴⁴ See Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009).

⁴⁵ See *infra* notes 55, 63 to 65, 78, and accompanying text.

considering the positive equities of the foreign national, but rather what effect the removal of the foreign national may have on United States Citizen or green-card holding immediate family members.⁴⁶

It is not hard to find examples of breathtaking complexity and negative discretion.⁴⁷ Elsewhere I have discussed a potential waiver available to those who are not legally admissible into the United States due to a controlled substance violation.⁴⁸ Anyone who committed, or admits committing, or who admits committing acts which constitute a controlled substance violation is not admissible.⁴⁹ There is a potential waiver available for those seeking admission as a lawful permanent resident.⁵⁰ What is required to obtain this waiver, however, is notoriously difficult to comprehend. It is difficult to comprehend not only from a statutory interpretation perspective, but also because there is negative discretion built into the waiver, and the waiver statute incorporates other ambiguous immigration law concepts.

From a statutory interpretation perspective, it takes advanced statutory reading skills to decipher this waiver provision. This section often causes much grumbling among law students. While it is a very useful teaching tool, it is troubling to think what a foreign national representing himself or herself must think of it. Here is a visualization of the statute's structure:

⁴⁶ See, e.g., 8 U.S.C. § 1229b(b)(1)(D).

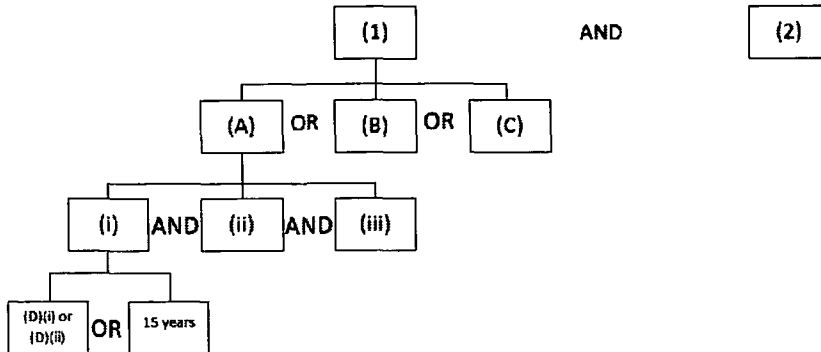
⁴⁷ This discussion continues an exploration of the complexity of substantive immigration law. See Family, *supra* note 1.

⁴⁸ *Id.* at 552-55.

⁴⁹ See 8 U.S.C. § 1182(a)(2)(A)(i)(II).

⁵⁰ See 8 U.S.C. § 1182(h).

8 U.S.C. § 1182(h)



BUT NOT anything in the paragraph following (2)

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⁵¹ See *id.* Here is the full text of the statute:

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if--

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that--

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien is a VAWA self-petitioner; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has

Once the statute's structure is understood, the next step is to understand what all of those sections are trying to say. To do so requires an understanding of other complicated immigration law concepts, such as "extreme hardship" and what constitutes an "aggravated felony."⁵² Extreme hardship is a very fact-specific standard. To gather a sense of what might constitute extreme hardship, one needs to be familiar with a body of administrative decisions that apply the standard to a variety of circumstances.⁵³ Determining whether a particular crime is an aggravated felony for immigration purposes requires careful examination of the statute of conviction to determine if it falls under one of the congressionally created categories of immigration aggravated felonies.⁵⁴ Once those concepts are mastered, there is still negative discretion to conquer. The executive branch may decide not to grant the waiver, even if the foreign national satisfies the thicket of statutory requirements. The statute says that the executive branch "may, in [its] discretion, waive . . . if"⁵⁵

consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

Id.

⁵² See 8 U.S.C. § 1182(h)(1)(B); 8 U.S.C. § 1182(h)(2).

⁵³ See, e.g., *Matter of Cervantes*, 22 I&N Dec. 560, 565-68 (BIA 1999).

⁵⁴ For example, one aggravated felony, for immigration purposes, is a "crime of violence." To determine whether a particular crime is a "crime of violence" requires a careful comparison of the mental state required by the statute of conviction versus the mental state required for a crime to qualify as a "crime of violence." See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

⁵⁵ See 8 U.S.C. § 1182(h).

Similarly complex and infused with negative discretion are the rules governing adjustment of status. Adjustment of status is an immigration term of art that refers to the process of transforming one's immigration status to lawful permanent resident (green card holder) without having to leave the United States.⁵⁶ In its typically overly complicated manner, the law distinguishes procedures for those who apply for a green card from abroad, versus those who apply from within the United States.⁵⁷ Immigration judges decide adjustment applications by foreign nationals in removal proceedings.⁵⁸

The complexity of the adjustment of status statute is revealed through an examination of who may not adjust status, that is, who may not transform their status to lawful permanent resident from within the United States. Adjustment of status is not available to those: who were not inspected and admitted into the United States; who are not admissible to the United States; who are not eligible for an immediately available permanent resident visa; who have engaged in unauthorized employment; who have not maintained lawful immigration status; who entered the United States under the Visa Waiver Program or who entered in transit without a visa; who are deportable as terrorists; or who violated the terms of a nonimmigrant visa.⁵⁹ Understanding each of these exclusions takes considerable skill. For example, understanding whether someone is admissible to the United States requires an understanding of the myriad of inadmissibility grounds and potential waivers (one of which is described above). Also, understanding whether a permanent resident visa is immediately available requires comprehension of the complex visa quota system, while determining whether there has been unauthorized employment is not always as simple as it may seem it ought to be.⁶⁰

⁵⁶ See 8 U.S.C. § 1255(a).

⁵⁷ See Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 51.01.

⁵⁸ See 8 C.F.R. § 1245.2(a)(1).

⁵⁹ See 8 U.S.C. § 1255(a); 8 U.S.C. § 1255(c).

⁶⁰ Under the employment authorization regulation, there is no single, obvious and definitive way to determine if a foreign national is authorized to work in the United States. See 8 C.F.R. § 274a.12.

There also are potential exceptions to these bars on adjustment of status. The bars on adjustment to those who have engaged in unauthorized employment or have failed to maintain lawful status, for example, do not apply if the applicant for adjustment is seeking that transformation as an “immediate relative.”⁶¹ “Immediate relative” is another immigration term of art that refers to specific familial relationships.⁶² If one is seeking permanent resident status based on marriage to a United States Citizen, for example, that person is seeking that status as an immediate relative.

As with the inadmissibility waiver described above, there is also negative discretion built into the adjustment of status decision-making process. Even if the complicated statutory requirements are met, the decision whether to grant adjustment of status is left to the discretion of the executive branch.⁶³ The statute states that the status of an individual “may be adjusted” by the executive branch, in its discretion, if the statutory requirements are met.⁶⁴ The maze of statutory requirements is merely a prerequisite to ask the executive branch to please do not deny the application.⁶⁵

Asylum cases provide other examples of complexity and negative discretion. In fiscal year 2009, the immigration courts completed

⁶¹ See 8 U.S.C. § 1255(c).

⁶² See 8 U.S.C. § 1151(b)(2)(A)(i).

⁶³ See 8 U.S.C. § 1255(a).

⁶⁴ *Id.*

⁶⁵ The importance of the adjustment of status procedure is emphasized by further complexity in the substantive law. Recall that to be eligible to adjust status, the foreign national must be admissible into the United States. See 8 U.S.C. § 1255(a). One inadmissibility ground provides that if a foreign national has been “unlawfully present” in the United States for more than 180 days but less than one year, and then voluntarily departs the United States, this foreign national faces a three year bar from returning to the United States. See 8 U.S.C. § 1182(a)(9)(B)(i)(I). If the unlawful presence period extends to one year or more, the foreign national faces a ten year bar. See 8 U.S.C. § 1182(a)(9)(B)(i)(II). Determining what counts as unlawful presence is another notoriously complicated task. There are exceptions, tolling and waiver provisions. See 8 U.S.C. § 1182(a)(9)(B)(iii)-(v). If a foreign national with unlawful presence wants to transform to permanent resident status, adjustment of status is unavailable because he or she is inadmissible. But if the individual leaves the United States to try to apply for a green card from abroad, the individual will be subject to a three or ten year bar to readmission.

44,830 asylum cases.⁶⁶ Under the law, the executive branch may grant asylum to an applicant who establishes that he or she is a “refugee.”⁶⁷ A refugee is a person outside of his or her country of nationality “who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁶⁸ The applicant has the burden of proof, and meets that burden by showing that one of the identified grounds—race, religion, nationality, membership in a particular social group or political opinion—“was or will be at least one central reason” for persecution.⁶⁹ To be considered, all applications for asylum must be filed within one year of the applicant’s arrival in the United States.⁷⁰

There are many exceptions. Ineligible for asylum is someone who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁷¹ Also ineligible are those convicted of a “particularly serious crime,” those for whom “there are serious reasons for believing [the person] has committed a serious nonpolitical crime outside the United States,” those for whom there are “reasonable grounds” to regard the person as a “danger to the security of the United States.”⁷² Further exclusions apply to those who fall under terrorism-related removal grounds.⁷³ Yet another provision denies asylum eligibility if the applicant “was firmly resettled in another country” before his or her arrival in the United States, while another provides that asylum is not available if the applicant may be removed to a safe third country.⁷⁴

⁶⁶ 2009 Statistical Yearbook at 12.

⁶⁷ See 8 U.S.C. § 1158(b)(1)(A).

⁶⁸ See 8 U.S.C. § 1101(a)(42)(A).

⁶⁹ See 8 U.S.C. § 1158(b)(1)(B)(i).

⁷⁰ See 8 U.S.C. § 1158(a)(2)(B). There is an exception to the one-year filing deadline for changed circumstances. See 8 U.S.C. § 1158(a)(2)(D).

⁷¹ 8 U.S.C. § 1158(b)(2)(A)(i).

⁷² 8 U.S.C. § 1158(b)(2)(A)(ii)-(iv).

⁷³ See 8 U.S.C. § 1158(b)(2)(A)(v).

⁷⁴ See 8 U.S.C. § 1158(b)(2)(A)(vi); 8 U.S.C. § 1158(a)(2)(A).

Asylum law has yielded a large crop of difficult legal questions and requires adjudicators to make time-intensive and careful factual determinations. Legal issues include: What counts as a well-founded fear of persecution?⁷⁵ What is persecution on account of political opinion?⁷⁶ What standards should guide an immigration judge's credibility findings when the applicant's own testimony may be the only available evidence?⁷⁷ To adjudicate the claim, an immigration judge must hear live testimony (often translated), as well as try to understand the political and societal conditions of the applicant's home country. This can involve expert testimony and examining reports translated into English from other languages.

In addition to the complexity of asylum law, asylum law provides another example of negative discretion. As with the inadmissibility waiver and adjustment of status, an asylum grant is dependant on the executive branch's decision to refuse to exercise the negative discretion afforded to it under the statute. If an applicant is a refugee and otherwise qualifies for asylum, the executive branch "*may* grant asylum."⁷⁸

These complicated statutes infused with negative discretion present big challenges for removal adjudication.⁷⁹ Beginning with caseloads, the complexity of the substantive law cries out for a low volume adjudication system. Each case takes considerable effort to adjudicate, no matter if it is an asylum case, or a case that requires understanding and application of the complicated statutes that govern admissibility or deportability. Asylum cases require not only thoughtful consideration of tricky legal issues, but also require time-intensive credibility determinations. Determining admissibility or deportability can require resolving novel issues of law, such as whether a particular crime is an aggravated felony, while also raising difficult issues of fact, such as whether a removal will result in extreme hardship. While the substantive law cries out for a low volume system, the system is engineered for each immigration judge

⁷⁵ See, e.g., *Matter of Acosta*, 19 I & N Dec. 211 (BIA 1985).

⁷⁶ See, e.g., *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

⁷⁷ See *Yale-Loehr & Palmer*, *supra* note 9.

⁷⁸ See 8 U.S.C. § 1158(b)(1)(A) (emphasis added).

⁷⁹ This analysis does not assert that a lack of transparency explains all of the troubles affecting removal adjudication. For example, the lack of decisional independence is rooted in a particular bureaucratic structure that could be changed.

to quickly move through over a thousand intensive hearings per year. The large backlog is not surprising, given this mismatch.

The complexity of the law and the use of negative discretion are also linked to the lack of representation problem. There is a steep learning curve to immigration law, both in terms of mastering the complexity and in terms of building expertise regarding, or a feel for, how the negative discretion is exercised. To practice immigration law well, a lawyer needs to devote his or her practice to, or at least to dedicate a substantial amount of time and effort to, becoming an expert on the law. Additionally, the lawyer needs to invest time in developing networks of informal contacts who can provide advice about the most opaque areas of the law, such as negative discretion. It is very difficult to dabble in immigration law, whether for a fee or pro bono. The opacity of the law creates high barriers to entry, which may result in fewer lawyers available to take on immigration cases.⁸⁰

At the same time, the complexity of the law makes pro se representation virtually impossible. It is difficult to see how a foreign national that lacks U.S. legal training, or even a command of English, will be able to comprehend meaningfully what immigration law says.⁸¹ The futility of pro se representation can lead an immigration judge to attempt to explain the law to an unrepresented foreign national. These efforts further compound the caseload problem by extending the time it takes to complete a hearing.

A foreign national's need to rely on the immigration judge to explain the law also highlights concerns about the lack of decisional independence for immigration adjudicators. In immigration court, the government is represented by immigration counsel, while the foreign national is not the majority of the time. The foreign national has little to no chance of understanding the substantive law on his or her own, thus leaving the foreign national at the mercy of an

⁸⁰ There are other contributors to the lack of lawyers. See Markowitz, *supra* note 38, at 546-51, 556-63.

⁸¹ The Department of Justice has acknowledged this concern by funding a legal orientation program. This program attempts to provide detained foreign nationals in removal proceedings with basic information about the proceedings and about immigration law itself. U. S. Dep't. of Justice, Executive Office of Immigr. Review, *Legal Orientation Programs*, available at <http://www.justice.gov/eoir/probono/MajorInitiatives.htm>.

immigration judge to explain the law, and that immigration judge is merely an employee of the Department of Justice.

The complexity of the law and the role of negative discretion together are connected to the esteem problem, which, in turn, is linked to the lack of representation problem. The complexity and the use of negative discretion help to create the negative mystique of immigration law. Because the law is so difficult to access and to comprehend, those outside of immigration law are understandably baffled. Again, the high barriers to entry may dissuade non-specialist attorneys from taking on immigration cases. The lack of available representation, in turn, feeds into a negative perception of immigration adjudication.

This section reveals connections between the lack of transparency of immigration law and the problems facing removal adjudication. The opacity of the law is evidenced by its complexity and its embrace of negative discretion. This lack of transparency makes it difficult for lawyers, and virtually impossible for foreign nationals, to figure out what the law is or to predict how it will be applied. The murkiness of the law opens new lines of inquiry as to why the case backlogs are so big and why there are too few lawyers for foreign nationals, while at the same time highlights a concern about a lack of decisional independence for immigration adjudicators and feeds a negative impression of immigration law.

III. BENEFITS ADJUDICATION

A. Benefits Adjudication Challenges

Scholars have paid less attention to another subset of immigration adjudication.⁸² There are immigration adjudicators other than immigration judges and members of the Board of Immigration Appeals. Outside of the context of removal, there is an adjudication framework established to approve or deny applications for immigration benefits. For example, every day, individuals and

⁸² Relatively few scholarly articles address benefits adjudication. Exceptions include Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203 (2002) and Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297 (1986).

employers file paperwork with the hope of obtaining approval for a loved one to gain legal immigration status or for a prospective employee to gain permission to work in the United States. This is a huge undertaking. United States Citizenship and Immigration Services (USCIS), a part of the Department of Homeland Security, reports that on any given day it processes 30,000 applications for benefits.⁸³ The benefits adjudication system is facing a crisis of confidence and confusion. The system is unpredictable and obscure.⁸⁴ The unpredictability is tied to complaints about an uncertainty of what legal standards the system will apply, and the obscurity is tied to complaints about mysterious decision-making processes.⁸⁵

The benefits adjudication framework includes both an initial decision-making level and a level of administrative appeal, but otherwise this benefits framework vastly differs from the removal

⁸³ See U.S. Dep't. of Homeland Security, U.S. Citizenship and Immigr. Servs., *A Day in the Life of USCIS* (Feb. 2009), available at <http://www.uscis.gov/files/nativedocuments/dayinthelife.pdf>.

⁸⁴ The unpredictability and obscurity of the process is not a new phenomenon. See Benson, *supra* note 82, at 318 (“[U]nderstanding the procedures used to properly file the applications, identifying the standards the adjudicator will apply, predicting the outcome in any particular case, and measuring the consistency of the adjudications are all extremely difficult, if not impossible tasks.”)

⁸⁵ See, e.g., Matt Cameron, *This Whole Court Is Out of Order! Why the AAO Has No Reason to Live, and Why It Matters*, Mass Appeal!, June 11, 2009, available at <http://www.mattcameronlaw.com/2009/06/this-whole-court-is-out-of-order-why-the-aao-has-no-reason-to-live-and-why-it-matters/> (but see Matt Cameron, *This Whole Court is Not Entirely Out of Order! How the AAO has Improved and Why it Matters*, Mass Appeal!, available at <http://www.mattcameronlaw.com/2010/10/this-whole-court-is-not-entirely-out-of-order-how-the-aao-has-improved-and-why-it-matters/>); Memorandum from Prakash Khatri, CIS Ombudsman, to Robert Divine, Acting Deputy Director, USCIS, *Recommendation from the CIS Ombudsman to the Director, USCIS* (Dec. 6, 2005), available at http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_12-07-05.pdf; Brandon Meyer, *The Administrative Procedures Act and USCIS Adjudications: Following the Law?*, IMMIGR. BRIEFINGS (May 2009); U.S. Dep't. of Homeland Security, U.S. Citizenship and Immigr. Servs., *Questions and Answers: USCIS American Immigration Lawyers Association (AILA) Meeting at 2, March 19, 2009*, available at http://www.uscis.gov/files/nativedocuments/aila_aao_qa_19march09.pdf. See also Benson, *supra* note 82.

framework discussed above. An example helps to explain the benefits framework. If an employer wishes to ask the government for a temporary work visa for a potential employee, the employer files a petition with USCIS.⁸⁶ A front-line adjudicator reviews the petition and ultimately approves or denies it.⁸⁷ The adjudicator's initial response may be to issue a Request for Evidence to ask for clarification or additional evidence, but ultimately the adjudicator will dispense with the petition through an approval or a denial.⁸⁸ To decide, the adjudicator will rely on the Immigration and Nationality Act, other federal statutes, regulations and a dizzying array of agency guidance materials, such as the Adjudicator's Field Manual, Operation Instructions and individual memoranda.⁸⁹

These front-line adjudicators are not immigration judges. Instead, they are employees of USCIS, and these adjudicators are not required to be lawyers, despite that the job requires adjudicators to "[i]ndependently research, interpret and analyze an extensive spectrum of sources including pertinent sections of the law and regulations, operating instructions, references and guidance contained in legislative history, precedent decisions, state and local laws, international treaties and other legal references"⁹⁰ New adjudicators undergo eight weeks of training,⁹¹ and most are attached to a regional service center, where they process each petition based

⁸⁶ See, e.g., 8 C.F.R. § 214.2(h)(1)(i). An approved Labor Condition Application from the Department of Labor may be a prerequisite to obtaining an approved petition from USCIS. See, e.g., 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). Also, if the employee is overseas, the employee will need to apply to the Department of State for a visa to travel to the United States after receiving petition approval from USCIS. This paper focuses on the adjudication of petitions within USCIS, and does not address the Department of Labor's processes or the Department of State's decision-making process regarding the issuance of visas. For a broader discussion of the benefits application process, see Benson, *supra* note 82, at 220-62.

⁸⁷ See 8 C.F.R. § 214.2(h)(9)-(10).

⁸⁸ See 8 C.F.R. § 103.2(b)(8).

⁸⁹ U.S. Dep't. of Homeland Security, U.S. Citizenship and Immigr. Servs., Adjudicator's Field Manual, at § 3.4(a). The Adjudicator's Field Manual is available through USCIS' website, uscis.gov, by clicking on "Laws" and then "Immigration Handbooks, Manuals and Guidance."

⁹⁰ USAJOBS listing number CIS-364380-NBC, Immigration Services Officer, Department of Homeland Security, Citizenship and Immigration Services (on file with author).

⁹¹ See *id.*

solely on a paper or electronic submission.⁹² USCIS employed 3,683 adjudicators as of August 30, 2008.⁹³

The front-line adjudication process is unpredictable. It is difficult to predict what legal standards one particular adjudicator may apply in a given application.⁹⁴ Part of the uncertainty can be traced to the agency's use of guidance documents, addressed below.⁹⁵ This unpredictability also manifests in the context of the Request for Evidence.⁹⁶ Immigration attorneys have expressed concern about rogue, overly broad requests for evidence that ask for information that is not relevant under what the lawyer at least perceives to be the legal standard for adjudication.⁹⁷ USCIS has acknowledged the concern by beginning the "Request for Evidence (RFE) Project," which aims to "engage stakeholders in a concerted effort to review and revise the RFE [Request for Evidence] templates used at the Service Centers" and to, in part, ensure their consistency and relevancy.⁹⁸

⁹² Adjudications officers positioned at the service centers are responsible for about 70% of USCIS adjudications. U.S. Citizenship and Immigr. Servs., *USCIS Annual Report for Fiscal Year 2008* at 56, available at <http://www.uscis.gov/USCIS/Resources/Reports/uscis-annual-report-2008.pdf>.

⁹³ *Id.* at 38.

⁹⁴ See *supra* note 85.

⁹⁵ See *infra* Part III(B).

⁹⁶ "Based on feedback from stakeholders across the country, few processes rival Requests for Evidence (RFEs) as a source of widespread public concern about lack of uniformity and efficiency in USCIS adjudications." U.S. Dep't. of Homeland Security, *Citizenship and Immigration Services Ombudsman Annual Report 2010* at 36 (June 30, 2010), available at http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf.

⁹⁷ One immigration attorney has called this phenomenon "rulemaking by RFE [Request for Evidence]." Charles Kuck, *What Happens When USCIS Breaks the Law?* (Jan. 31, 2010), available at <http://ailaleadershipblog.org/2010/01/31/what-happens-when-uscis-breaks-the-law/>. See also Angelo A. Paparelli, *I am Furious (Yellow)—at USCIS and its AAO* (March 13, 2011) available at <http://www.nationofimmigrators.com/general-immigration/i-am-furious-yellow---at-uscis/> (referring to the "ever-proliferating boilerplate Request for Additional Evidence, asking for the sun, the moon and the kitchen sink . . .").

⁹⁸ U.S. Citizenship and Immigr. Servs., Executive Summary, *Listening Session- Request for Evidence (RFE) Review and Revision* (April 12, 2010), available from USCIS' website by clicking on "Outreach," and then "Notes from Previous Engagements." On August 18, 2010, USCIS issued an Interim Policy Memorandum for comment addressing the need for consistency. U. S. Citizenship

The Administrative Appeals Office (AAO) hears administrative appeals of certain decisions made by these front-line adjudicators, including our hypothetical temporary worker petition. The AAO is also a part of USCIS.⁹⁹ It is one of eleven program offices that report to the Director of USCIS.¹⁰⁰ Other program offices include Legislative Affairs, Policy and Strategy and the Chief Counsel's office. Parallel to these program offices within USCIS are seven directorates.¹⁰¹ One directorate, for example, is Service Center Operations, which includes the work of the front-line adjudicators whose work is reviewed by the AAO.¹⁰² Despite the parallel framework, the AAO has described its relationship with a Service Center as "analogous to the relationship between a United States Court of Appeals for a particular circuit and a United States District Court for a district within the territory of that circuit."¹⁰³ Here is an organizational chart visualizing the structure:

and Immigr. Servs., Policy Memorandum, PM-602-0005, 87 INTERP. RELEASES 1661 (Aug. 23, 2010). This Interim Policy Memorandum provides guidance for adjudicators considering certain types of benefit applications. The memorandum states its purpose as "to ensure that [USCIS] processes [these] petitions . . . with a consistent standard." *Id.*

⁹⁹ Information about the AAO can be found on USCIS's website, uscis.gov, by clicking on "About us," then "Directorates and Program Offices."

¹⁰⁰ See USCIS Organizational Chart (accessible on USCIS's website, uscis.gov, by clicking on "About us," and then "USCIS Organizational Chart" in the "More Information" box to the right).

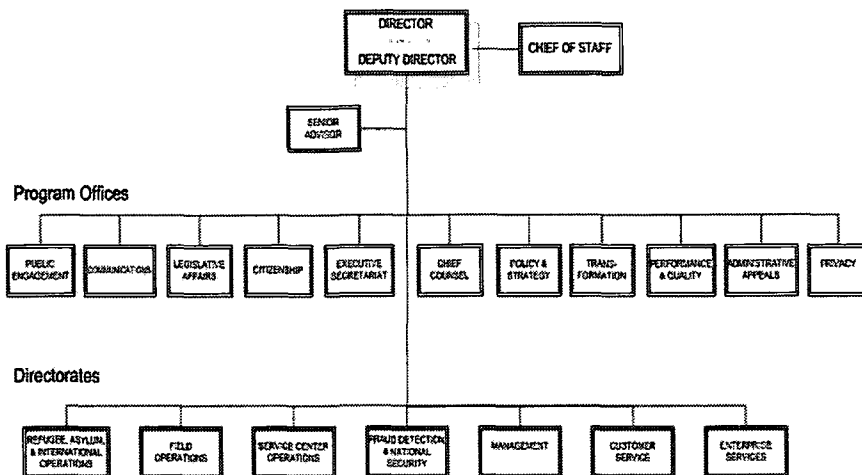
¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ AAO Response to Freedom of Information Act Request of the Center for Human Rights and Constitutional Law at 21 (on file with author).

USCIS Organizational Chart

Effective 01/06/10



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In 2011, USCIS reported that “88 employees, 59 of whom are adjudications officers,” staffed the AAO.¹⁰⁵ Not all adjudicators are attorneys, but the majority are attorneys.¹⁰⁶ The AAO is split into nine branches, divided by type of petition.¹⁰⁷ In April 2010, the Chief of the AAO reported that the AAO had between 14,000-15,000 appeals pending.¹⁰⁸

¹⁰⁴ See *supra* note 100.

¹⁰⁵ U.S. Citizenship and Immigr. Servs., *Executive Summary, USCIS Administrative Appeals Office Stakeholder Engagement* at 1 (Feb. 2, 2011), available from USCIS’ website by clicking on “Outreach” and then “Notes from Previous Engagements.” New adjudicators may be on the way. See *id.*; American Immigration Lawyers Association, *AAO Updates* at 1 (Dec. 3, 2010) (on file with author).

¹⁰⁶ *USCIS Administrative Appeals Office Stakeholder Engagement*, *supra* note 105, at 4. The appeals officer position requires “detailed analysis of the pertinent facts in the context of applicable law, regulations, and appropriate precedent” AAO Response to Freedom of Information Act Request, *supra* note 103, at 8.

¹⁰⁷ Information about the AAO can be found on USCIS’s website, uscis.gov, by clicking on “About us,” then “Directorates and Program Offices.”

¹⁰⁸ U. S. Citizenship and Immigr. Servs., *Executive Summary, Vermont Service Center Stakeholder Engagement* (April 19, 2010), available from USCIS’ website by clicking on “Outreach,” and then “Notes from Previous Engagements.” In documentation obtained by the Center for Human Rights and Constitutional Law,

Identifying the jurisdiction of the AAO is no easy task. The AAO has expressed its intent to clarify its jurisdiction through a regulation, but has not done so.¹⁰⁹ The instructions on the form used to file an appeal (Form I-290B, Notice of Appeal or Motion), state that the form is used “to file an appeal . . . over which the Board of Immigration Appeals (BIA) does not have appellate jurisdiction.”¹¹⁰ The instructions also reference 8 C.F.R. § 103.3. According to 8 C.F.R. § 103.3, “[d]ecisions under the appellate jurisdiction of the [AAO] are listed in § 103.1(f)(2).”¹¹¹ Section 103.1(f) no longer exists, however. At the time of the creation of the Department of Homeland Security in 2003, Secretary of Homeland Security Tom Ridge delegated to the Bureau of Citizenship and Immigration Services (now USCIS) the authority “to exercise appellate jurisdiction over the matters described in 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003).”¹¹² Once the February 28, 2003 version of 8 C.F.R. § 103.1(f)(3)(E)(iii) is located, one finds a list of over forty different matters subject to the AAO’s jurisdiction. In general, the AAO hears appeals over benefits applications, except for appeals based on family-based petitions for benefits (based on a familial relationship, rather than an employment

the AAO reported over 12,000 pending appeals at the end of fiscal year 2010. AAO Response to Freedom of Information Act Request, *supra* note 103, at 381.

¹⁰⁹ Email from Perry Rhew, Chief, Administrative Appeals Office, to Matt Cameron (Oct. 22, 2010), *available* at <http://www.mattcameronlaw.com/2010/10/this-whole-court-is-not-entirely-out-of-order-how-the-aao-has-improved-and-why-it-matters/>. In the published notes of an October 2009 meeting between USCIS and the American Immigration Lawyers Association, USCIS stated that the AAO had drafted a proposed rule to “update and re-insert” information about the AAO’s jurisdiction. U. S. Citizenship and Immigr. Servs., *USCIS-American Immigration Law Association (AILA) October Meeting* (Oct. 27, 2009), *available* from USCIS’ website by clicking on “Outreach,” and then “Notes from Previous Engagements.”

¹¹⁰ U.S. Citizenship and Immigr. Servs., Instructions, Form I-290B, Notice of Appeal or Motion, *available* from USCIS’s website by clicking on “Forms.”

¹¹¹ See 8 C.F.R. § 103.3(a)(1)(ii).

¹¹² U.S. Dep’t. of Homeland Security, Delegation to the Bureau of Citizenship and Immigration Services, Delegation 0150.1 (U) (Mar. 1, 2003). Finding this delegation is difficult. The author obtained a copy from the AAO. See also *U.S. v. Gonzales & Gonzales Bonds and Ins. Agency, Inc.*, 728 F. Supp.2d at 1082-83 (N.D. Cal. 2010) (describing the complicated source of the AAO’s jurisdiction).

relationship).¹¹³ The family-based appeals are directed to the Board of Immigration Appeals.¹¹⁴

The AAO's standard of review is also difficult to locate. The AAO employs de novo review, but that standard arises from case law.¹¹⁵ Despite reference to a planned Notice of Proposed Rulemaking to address the standard of review, to date no such notice has been placed in the federal register.¹¹⁶

Only petitioners or applicants (and not beneficiaries) may file appeals to the AAO, and appeals generally must be filed within thirty days of the decision.¹¹⁷ Appellants may be represented by an attorney.¹¹⁸ Appellants may request oral argument, although there is no standard publically available as to when oral argument is appropriate.¹¹⁹ Briefs are accepted, but not mandatory, and the filing fee for an appeal is \$585.¹²⁰

Once an appeal is properly filed, the original adjudicating officer reviews the appeal and decides whether to grant the appeal or to forward the appeal to the AAO.¹²¹ Once at the AAO, an individual officer reviews the appeal and drafts a decision, which is subject to supervisory review by an "Editor."¹²² AAO decisions are anonymous, however, as they are issued in the name of the AAO

¹¹³ See Immigration Law and Procedure, *supra* note 57, at § 3.02(6)(a).

¹¹⁴ *Id.*

¹¹⁵ See Memorandum from Prakash Khatri, *supra* note 85, at 2.

¹¹⁶ U.S. Dep't. of Homeland Security, U. S. Citizenship and Immigr. Servs., *Questions and Answers: USCIS American Immigration Lawyers Association (AILA) Meeting*, *supra* note 85, at 17.

¹¹⁷ 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 103.3(a)(2)(i).

¹¹⁸ 8 C.F.R. § 103.3(a)(1)(iii)(B).

¹¹⁹ 8 C.F.R. § 103.3(b); Memorandum from Prakash Khatri, *supra* note 85, at 3.

¹²⁰ 8 C.F.R. § 103.3(a)(2)(vi); Instructions, Form I-290B, Notice of Appeal or Motion, available from USCIS' website by clicking "Forms."

¹²¹ 8 C.F.R. § 103.3(a)(2)(ii)-(iv).

¹²² Memorandum from Prakash Khatri, *supra* note 85, at 2; U.S. Citizenship and Immigr. Servs., *AAO Flow Chart*, available from USCIS' website by searching for "AAO Flow Chart" within the site.

only and signed by the Editor, Branch Chief, Deputy Chief or Chief.¹²³

As of July 2010, AAO processing times ranged from two to twenty-six months.¹²⁴ For our temporary worker example, as of July 2010, the AAO took from eight to twelve months (depending on the precise classification) to adjudicate an appeal.¹²⁵ The AAO reported in March 2009 that it collects data on its workload for its internal use, but does not share that data with outside entities (including the public) because the data “are not . . . official USCIS production data and are not 100% accurate.”¹²⁶

All AAO decisions are public, but each decision, by regulatory default, is non-precedential.¹²⁷ Some AAO decisions are available on the USCIS website, but only those dating back to 2005 are available,¹²⁸ and the available opinions are not searchable.¹²⁹ USCIS

¹²³ U.S. Citizenship and Immigr. Servs., *AAO Flow Chart*, *supra* note 122; Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, *supra* note 82 at 290.

¹²⁴ U.S. Citizenship and Immigr. Servs., *AAO Processing Times as of July 1, 2010* (on file with author).

¹²⁵ *Id.* The AAO reported improved processing times in early 2011. *USCIS Administrative Appeals Office Stakeholder Engagement*, *supra* note 105, at 3.

¹²⁶ U.S. Dep’t. of Homeland Security, U.S. Citizenship and Immigr. Servs., *Questions and Answers: USCIS American Immigration Lawyers Association (AILA) Meeting*, *supra* note 85, at 16. *See also* *USCIS Administrative Appeals Office Stakeholder Engagement*, *supra* note 105, at 4 (“USCIS noted that it is limited in its ability to provide statistics as the statistics are not owned by the agency, but rather, are owned by the U.S. Department of Homeland Security (“DHS”).

¹²⁷ *Immigration Law and Procedure*, *supra* note 57, at § 3.02(6)(c)(vii).

¹²⁸ E-mail from Suzie Clarke, Community Relations Officer, Office of Public Engagement, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, to the author, Dec. 1, 2010. In response to the question whether every AAO non-precedential opinion is included on the website, the AAO responded that the available opinions date back to 2005 and that the AAO “forward[s] all of the decisions in the categories listed on the website for publication.” *Id.* Whether that means there are categories of opinions not listed on the website is unclear. *See also* *USCIS Administrative Appeals Office Stakeholder Engagement*, *supra* note 105 at 3 (“USCIS recognized that accessing information, particularly AAO decisions, still remains an issue . . .”),

¹²⁹ In a December 2010 Liaison Report, the American Immigration Lawyers Association recommended to its members to use a Google Advanced Search to

may designate certain decisions precedential. Only these precedent decisions are binding upon the agency.¹³⁰ There are no regulations that govern how and when a particular decision becomes precedential, but apparently both the Department of Homeland Security and the Department of Justice must agree on the label.¹³¹ According to a PowerPoint presentation posted on the USCIS website, the following entities review a decision before it receives the precedential label: USCIS Administrative Appeals Office; USCIS Office of Chief Counsel; USCIS Director; Department of Homeland Security Office of General Counsel; Department of Justice Executive Office for Immigration Review; Department of Justice Office of Legal Counsel; and Department of Justice Board of Immigration Appeals.¹³²

The USCIS ombudsman reported in 2005 that, according to the AAO, decisions are of precedential value when a decision addresses a “novel issue of law or fact and when it is necessary to provide clear and uniform guidance concerning the proper implementation and administration of the statute and regulations where applicable regulations are unclear or silent.”¹³³ In this same 2005 memo, the ombudsman highlighted that no decision had earned the “precedent” label since 1998. In October 2010, the AAO issued two precedential decisions, its first since 1998.¹³⁴ From 1998 until 2010, we may assume, then, that there were no cases raising novel issues of law or

search for terms within the AAO opinions posted on the USCIS website. American Immigration Lawyers Association, *AAO Updates*, *supra* note 105, at 4.

¹³⁰ 8 C.F.R. § 103.3(c).

¹³¹ Immigration Law and Procedure, *supra* note 57, at § 3.02(6)(c)(vii); Memorandum from Prakash Khatri, *supra* note 85, at 2-3.

¹³² In researching the AAO, it is not unusual only to find information in less formal sources. U.S. Dep’t. of Homeland Security, Citizenship and Immigr. Servs., *Administrative Appeals Office: Precedent Decisions*, available at <http://www.uscis.gov/USCIS/Laws/AAO/AAO%20DHS%20Precedent%20Decision%20Process%20Print%20Version.pdf>.

¹³³ Memorandum from Prakash Khatri, *supra* note 85, at 2-3 (quoting response from AAO to CIS Ombudsman).

¹³⁴ *In re Wazzan*, 25 I&N Dec. 359 (AAO 2010); *In re Chawathe*, 25 I&N Dec. 369 (AAO 2010). Both of these decisions were already existing decisions that the AAO labeled precedential in 2010. The American Immigration Lawyers Association reported that the AAO expects to issue ten to twelve precedent decisions per year moving forward. American Immigration Lawyers Association, *AAO Updates*, *supra* note 105, at 1.

fact and that there was never a need for clear and uniform guidance. In the complex world of immigration law, that seems highly unlikely. Or, perhaps, the AAO, for some reason or reasons, chose not to issue any precedential decisions. There is some indication that the process of issuing a precedential opinion is at least part of the problem. The lengthy and difficult process to adopt a precedent decision lead the AAO to create a new category of decision—an “adopted” decision.¹³⁵ An adopted decision is treated as binding policy guidance and serves as a transition status while the precedential review is taking place.¹³⁶

The AAO contributes to the crisis in immigration benefits adjudication through its obscurity. The AAO is an obscure organization that has a mysterious reputation.¹³⁷ Its obscurity is caused by its bureaucratic placement as just another piece of USCIS, even in placement with those whose work it reviews and with those who make agency policy, and the lack of information available about the AAO, including its operating practices. This obscurity is only enhanced by the use of agency guidance documents within USCIS, a topic addressed below.

The AAO itself seems to recognize its mysterious reputation. The AAO recently has taken several steps to increase its transparency, but its adjudication still remains murky. For example, in 2010, the AAO launched its first presence on the Internet through the USCIS website.¹³⁸ The AAO information is not easy to navigate, however, and there is an absence of information about AAO workload. While AAO opinions are now posted on this website, the opinions date back only to 2005, and the opinions are not searchable. Also, while the AAO did announce two precedent decisions in 2010, even the AAO acknowledged it was an “effort” to do so, and those two opinions clarify only a tiny fraction of the outstanding issues.¹³⁹

¹³⁵ Immigration Law and Procedure, *supra* note 57, at § 3.02(6)(c)(vii).

¹³⁶ *Id.*

¹³⁷ Cameron, *supra* note 85. See also Benson, *Breaking Bureaucratic Borders*, *supra* note 82, at 247-48.

¹³⁸ E-mail from Perry Rhew, Chief, Administrative Appeals Office, to Matt Cameron, *supra* note 109. AAO Chief Rhew has initiated an effort to “enlighten the public on how the AAO conducts business.” *USCIS Administrative Appeals Office Stakeholder Engagement*, *supra* note 105, at 1.

¹³⁹ E-mail from Perry Rhew, Chief, Administrative Appeals Office, to Matt Cameron, *supra* note 109; For a discussion of some unanswered immigration

The mystery surrounding the AAO, in combination with shifting standards applied by front-line adjudicators, and the agency's use of administrative guidance discussed below, has created a crisis of confidence and confusion in immigration benefits adjudication. The AAO "may be the most mysterious appellate body in the American legal system,"¹⁴⁰ while USCIS adjudication involves the application of standards that "vary in consistency" and also features "unannounced shifts in adjudication patterns."¹⁴¹ As the American Immigration Lawyers Association (AILA)¹⁴² has described, "there is a general inability to determine what the requirements are for key visa categories leaving U.S. employers and applicants 'in the dark.'"¹⁴³

B. A Lack of Transparency: The Use of Administrative Guidance and the Obscurity of the Administrative Appeals Office

This section explores how a lack of transparency in immigration law, manifested by USCIS' use of administrative guidance and the obscurity of the AAO, are connected to the lack of confidence in and confusion about the benefits adjudication system. The agency's over-use of guidance documents contributes to a lack of transparency because an extreme lack of force-of-law regulations leaves precious little firm ground in immigration benefits adjudication. The agency's tendency to govern by memo raises doubts as to what the law is

benefits questions, see Naomi Schorr, *It Makes You Want To Scream—Who Knows?*, 15 BENDER'S IMMIGR. BULL. 1387 (Oct. 15, 2010).

¹⁴⁰ Cameron, *supra* note 85.

¹⁴¹ Meyer, *supra* note 85. See also Paparelli, *supra* note 97.

¹⁴² The American Immigration Lawyers Association is the premier organization representing the interests of private bar immigration attorneys. See American Immigration Lawyers Association, *About AILA*, available at <http://www.aila.org/content/default.aspx?docid=1021>.

¹⁴³ U.S. Dep't. of Homeland Security, U.S. Citizenship and Immigr. Servs., *Questions and Answers: USCIS American Immigration Lawyers Association (AILA) Meeting*, *supra* note 85, at 2. As Professor Lenni Benson has observed, the problem is even deeper in that stakeholders are confused about more than just the substantive requirements. Stakeholders are also confused by obscure procedural obligations. Benson, *supra* note 82, at 312.

today and what it might be tomorrow.¹⁴⁴ The obscurity of the AAO does little to resolve questions of what law the agency will apply. In fact, the practices of the AAO serve to heighten concerns about unpredictability.

Controversy surrounding the use of administrative guidance is not unique to immigration law. Administrative guidance consists of sub-regulatory agency documents that “guide” the agency and the public as to an agency’s interpretation of other legal sources or that “guide” the agency and the public as to the agency’s outlook on enforcement issues not wholly or specifically addressed through statutes or regulations.¹⁴⁵ Guidance allows an agency to fill in the gaps and to provide information to agency officials and the public without the procedural hurdles and time investment of notice and comment rulemaking. Under notice and comment rulemaking, the Administrative Procedures Act generally requires an agency to publish notice of a proposed rule, to accept and consider public comments on the proposed rule, and then to issue a final rule after the comment period.¹⁴⁶ The product of notice and comment rulemaking is a legislative rule.¹⁴⁷ Only legislative rules are binding and have the force of law.¹⁴⁸

The Administrative Procedures Act exempts guidance documents from the requirements of notice and comment rulemaking.¹⁴⁹ Agencies are permitted to use guidance documents in certain circumstances, but those guidance documents are not binding, and again, do not have the force of law.¹⁵⁰ Determining the proper use of such guidance documents is a notoriously complex area of

¹⁴⁴ The procedural obstacles documented by Professor Benson are another source of uncertainty. Benson, *supra* note 82, at 208 (“The immigration process is so replete with procedural obstacles that employers and would-be immigrants are unable to predict when or if their petitions will be approved.”)

¹⁴⁵ See generally, Jeffrey S. Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING at 73-104 (2006).

¹⁴⁶ 5 U.S.C. § 553(b)-(d).

¹⁴⁷ Lubbers, *supra* note 145, at 74-75.

¹⁴⁸ *Id.*

¹⁴⁹ 5 U.S.C. § 553(b)(3)(A).

¹⁵⁰ Lubbers, *supra* note 145, at 74-75.

administrative law.¹⁵¹ The complexity arises in part because while these guidance documents do not *de jure* hold the force of law and are not legally binding, they have the effect of law because agency officials and the public tend to view the information in the guidance document as if it is law.

The Office of Management and Budget (“OMB”) published a final bulletin in 2007 establishing “Agency Good Guidance Practices” in response to concerns “that agency guidance practices should be more transparent, consistent and accountable.”¹⁵² The OMB cited the promise of agency guidance—constraining agency discretion and increasing efficiency and fairness—but also acknowledged the existence of “poorly designed or improperly implemented” guidance documents, as well as the lure of overusing guidance documents in lieu of engaging in rulemaking.¹⁵³ OMB expressed that the Good Guidance Practices aimed to “ensure” that guidance documents are “developed with appropriate review and public participation, accessible and transparent to the public, of high quality, and not improperly treated as legally binding requirements.”¹⁵⁴ By establishing the Good Guidance Practices, OMB addressed both the issues of improper reliance on guidance documents when rulemaking is needed and of how guidance is developed.

The Administrative Conference of the United States addressed similar issues in 1992.¹⁵⁵ The Conference expressed its concern about “situations where agencies issue [guidance documents] which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address.”¹⁵⁶ In response to this concern, the Conference recommended that agencies not use

¹⁵¹ The analysis for determining when an agency has properly employed a guidance document in lieu of rulemaking is described as “enshrouded in considerable smog.” *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975).

¹⁵² Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 3433. The Obama Administration revoked the Good Guidance Practices. See Exec. Order No. 13,497, 74 Fed. Reg. 22 (Jan. 30, 2009).

¹⁵⁵ Administrative Conference of the United States, *Agency Policy Statements (Recommendation No. 92-2)*, 1 C.F.R. § 305.92-2 (July 8, 1992).

¹⁵⁶ *Id.*

guidance documents “to impose binding substantive standards or obligations.”¹⁵⁷ When an agency does issue a guidance document, the Conference recommended that the agency make clear its nonbinding nature both to agency staff and to the public.¹⁵⁸ To allow for feedback from affected parties, the Conference further recommended that agencies allow “requests for modification or reconsideration” of agency guidance documents.¹⁵⁹ Such a procedure not only would allow affected parties a chance to challenge the contents of a guidance document, but also could serve as a signal to an agency that the subject of the guidance document is better addressed through notice and comment rulemaking.¹⁶⁰

Issues of misunderstanding the proper use of guidance and a lack of transparency in the creation of guidance are highly relevant to immigration law. AILA has expressed its concern and frustration over the lack of transparency in USCIS adjudications, and has explained that the use of guidance plays a role in that lack of transparency.¹⁶¹ Also, USCIS appears to rely on guidance to great extent. In fact, since the founding of the Department of Homeland Security in 2003, USCIS has only placed sixteen Notices of Proposed Rulemaking in the Federal Register.¹⁶² About half of those notices deal with procedural issues (such as the adjustment of application fees) and the establishment of a genealogy program.¹⁶³

The over-use of guidance affects both adjudicators and stakeholders. For example, the Adjudicator’s Field Manual contains a section titled “Adherence to Policy” that instructs USCIS adjudicators that there is a difference between correspondence and policy.¹⁶⁴ According to the Manual:

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ U.S. Dep’t. of Homeland Security, U.S. Citizenship and Immigr. Servs., *Questions and Answers: USCIS American Immigration Lawyers Association (AILA) Meeting*, *supra* note 85, at 2-3.

¹⁶² The sixteen Notices of Proposed Rulemaking were discovered by searching for USCIS Proposed Rules on regulations.gov.

¹⁶³ *Id.*

¹⁶⁴ Adjudicator’s Field Manual, *supra* note 89, at § 3.4.

It is important to note that there is a distinction between “correspondence” and “policy” materials. Policy material is binding on all USCIS officers and must be adhered to unless and until revised, rescinded or superseded by law, regulation or subsequent policy, either specifically or by application of more recent policy material. On the other hand, correspondence is advisory in nature, intended only to convey the author’s point of view. Such opinions should be given appropriate weight by the recipient as well as other USCIS employees who may encounter similar situations. However, such correspondence does not dictate any binding course of action which must be followed by subordinates within the chain of command.¹⁶⁵

As examples of “policy,” the manual lists statutes and regulations, field manuals, operations instructions, precedent decisions, and memoranda bearing the label “P,” for policy.¹⁶⁶ Examples of correspondence include non-precedent decisions and memoranda not bearing the label “P.”¹⁶⁷ Notwithstanding the Manual’s use of terminology that is inconsistent with the Administrative Procedures Act, the Manual appears to take a position that is also plainly at odds with the Act. The Manual explains that some guidance documents, such as memoranda bearing the label “P,” are binding on the agency. This seems to contradict the Act, which declares that only notice and comment rules are binding. To further complicate matters, the Introduction to the Manual states, “Important Notice: Nothing in the [Manual] shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.”¹⁶⁸ Under the Manual’s own version of administrative law, certain guidance documents are binding on the agency, but those documents do not create any legally enforceable

¹⁶⁵ *Id.* at § 3.4(a).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at Introduction to the Adjudicator’s Field Manual.

right. The agency may rely on those documents, but the public may not.

USCIS itself recognizes its guidance troubles. In 2010 it announced an agency-wide policy review and sought stakeholder input to prioritize its review.¹⁶⁹ USCIS Director Alejandro Mayorkas said, “As an agency, we must achieve consistency in the policies that guide us and in how we implement them for the public benefit.”¹⁷⁰ Also, USCIS recently began to post draft guidance memoranda for comment on its website as a part of “a continued effort to promote transparency and consistency in [USCIS] operations.”¹⁷¹

The problems with guidance appear to be multifaceted. One issue is the agency’s use of changing standards through guidance.¹⁷² A second issue is the use of guidance at all, when rulemaking is appropriate.¹⁷³ A third issue specifically addresses problems presented by the AAO’s treatment of agency guidance.¹⁷⁴ These three issues are discussed below by examining a few current controversies in immigration benefits adjudication.

One of the available visa categories for highly skilled workers is called H-1B.¹⁷⁵ This is a nonimmigrant category that allows temporary admission to an individual coming to the United States to fill a specialty occupation.¹⁷⁶ A specialty occupation is one that

¹⁶⁹ U.S. Citizenship and Immigr. Servs., *USCIS Announces First Ten Areas of Focus for Agency-wide Policy Review* (July 26, 2010), available on USCIS’ website by clicking on “News.”

¹⁷⁰ *Id.*

¹⁷¹ USCIS posts the drafts on a section of its website called Draft Memorandum for Comment, which is available by visiting USCIS’s website, clicking on “Outreach,” and then clicking on “Feedback Opportunities.”

¹⁷² See Meyer, *supra* note 85 (describing a scenario where “the rules of the game [are] subject to change without notice”); see also David H.E. Becker, *Judicial Review of INS Adjudication: When May the Agency Make Sudden Changes in Policy and Apply Its Decisions Retroactively?*, 52 ADMIN. L. REV. 219 (2000).

¹⁷³ See Meyer, *supra* note 85 (describing a policy memorandum as “a poor substitute for proper rulemaking under the APA”).

¹⁷⁴ See, e.g., U.S. Dep’t. of Homeland Security, U.S. Citizenship and Immigr. Servs., *Questions and Answers: USCIS American Immigration Lawyers Association (AILA) Meeting*, *supra* note 85, at 2-3; Schorr, *supra* note 139.

¹⁷⁵ 8 U.S.C. § 1101(a)(15)(H)(i)(B).

¹⁷⁶ *Id.*

requires “theoretical and practical application of a body of highly specialized knowledge” and requires the “attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.”¹⁷⁷ As a part of an H-1B application to USCIS, the potential employer must submit a petition to USCIS seeking H-1B status for a potential employee (or seek renewal of that status).¹⁷⁸ The petitioner must also include a Labor Condition Application approved by the Department of Labor with the petition to USCIS.¹⁷⁹

While there are regulations governing the H-1B category,¹⁸⁰ there are also many policy memoranda that address the category.¹⁸¹ Of particular controversy is a 19 page memorandum dated January 8, 2010 from Donald Neufeld, the Associate Director for Service Center Operations.¹⁸² This memorandum illustrates the problem of shifting standards through guidance, as well as the use of guidance instead of rulemaking. This “Neufeld Memo” to USCIS Service Center Directors addresses the standard used to determine whether an H-1B petitioner (potential employer) would hold the necessary employment relationship with the H-1B beneficiary (potential employee).¹⁸³ Buried on page ten of the Memo is a statement that the Memo “is intended solely for the training and guidance of USCIS personnel in

¹⁷⁷ 8 U.S.C. § 1184(i)(1)(A)-(B).

¹⁷⁸ 8 C.F.R. § 214.2(h)(1)(i).

¹⁷⁹ 8 C.F.R. § 214.2(h)(4)(i)(B)(1).

¹⁸⁰ See, e.g., 8 C.F.R. § 214.2(h).

¹⁸¹ See, e.g., Michael D. Cronin, *Initial Guidance for Processing H-1B Petitions as Affected by the "American Competitiveness in the Twenty-First Century Act" (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396)* (June 19, 2001); William R. Yates, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the AC21 Act* (May 12, 2005); Barbara Q. Valarde, *Requirements for H-1B Beneficiaries Seeking to Practice in a Health Care Occupation* (May 20, 2009). Policy memoranda are available by visiting USCIS’s website by clicking “Laws,” then “Policy Memoranda,” and then “By Subject.” These policy memoranda are listed under the “H-1 Visas” Category.

¹⁸² U.S. Citizenship and Immigr. Servs., Donald Neufeld, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements* (Jan. 8, 2010), available by visiting USCIS’s website by clicking “Laws,” then “Policy Memoranda,” and then “By Subject.” This policy memorandum is listed under the “H-1 Visas” Category.

¹⁸³ *Id.*

performing their duties It is not intended to, does not, and may not be relied upon to create any right or benefit . . . enforceable at law....”¹⁸⁴ The substance of the Memo, however, sends mixed signals about its legal effect.

For purposes of the H-1B category, a regulation defines an employer as:

[A] person, firm, corporation, contractor, or other association, or organization in the United States which:

(1) Engages a person to work within the United States;

(2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

(3) Has an Internal Revenue Service Tax identification number.¹⁸⁵

The Neufeld Memo addresses what constitutes an employer-employee relationship for the purpose of adjudicating H-1B petitions. As the Neufeld Memo explains, prior to the issuance of the Memo, USCIS relied on common law principles and Supreme Court cases in adjudicating whether the appropriate relationship exists for H-1B purposes.¹⁸⁶ According to the Memo, the absence of agency guidance on the subject caused problems, “in particular, with independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites.”¹⁸⁷ The Memo makes it more difficult for self-employed entrepreneurs and staffing firms to prove an employer-employee relationship exists, thus narrowing access to the H-1B category.

The Neufeld Memo establishes a vision of control—that is petitioner control over the beneficiary—that calls into question employment arrangements other than traditional employment. The Memo instructs that in adjudicating H-1B petitions, “[t]he petitioner

¹⁸⁴ *Id.* at 10-11.

¹⁸⁵ 8 C.F.R. § 214.2(h)(4)(ii) (emphasis added).

¹⁸⁶ Neufeld Memo, *supra* note 182, at 2.

¹⁸⁷ *Id.*

must be able to establish that it has the right to control over when, where and how the beneficiary performs the job”¹⁸⁸ The Memo lists eleven factors that USCIS “*will consider*” in adjudicating H-1B petitions.¹⁸⁹ It is important to list all eleven, as the factors reveal how the Neufeld Memo instructs adjudicators to consider the issue:

- (1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
- (2) If the supervision is off-site, how does the petitioner maintain such supervision, i.e. weekly calls, reporting back to main office routinely, or site visits by the petitioner?
- (3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?
- (4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
- (5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
- (6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
- (7) Does the petitioner claim the beneficiary for tax purposes?
- (8) Does the petitioner provide the beneficiary any type of employee benefits?
- (9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
- (10) Does the beneficiary produce an end-product that is directly linked to the petitioner’s line of business?
- (11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?¹⁹⁰

¹⁸⁸ *Id.* at 3.

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ *Id.* at 3-4.

The Memo further advises that these factors are a part of a totality of the circumstances test aimed at establishing a right of control throughout the length of the beneficiary's proposed stay in H-1B status.¹⁹¹

Despite the Memo's acknowledgement that this inquiry is inherently case-specific, the Memo presents scenarios that would fail the test. First, self-employed beneficiaries fail the test because the petitioning company, despite that it may be a separate corporate entity, is the beneficiary, and thus there is no evidence that the petitioning company will have control over the beneficiary.¹⁹² Second, independent contractors fail the test where, for example, a salesperson engaged by the petitioner also sells other products and the petitioner does not set the work schedule or conduct performance reviews of the salesperson.¹⁹³ Third, the Memo establishes that third-party placements fail the test. The Memo provides an example of a third-party placement: a computer consulting company that contracts with other companies to provide staff to the other company, and where the other company, and not the petitioning consulting company, supervises the daily work.¹⁹⁴

Stakeholders have described the requirements of the Neufeld Memo as "demanding, burdensome and commercially unreasonable" and as formulated "without APA compliance or policy rationale."¹⁹⁵ AILA described the Memo as "significantly alter[ing] USCIS' definition of the employer-employee relationship."¹⁹⁶ Of concern are both the content of the Memo and the procedure used to announce the content. Ironically, USCIS stated that the Memo was not intended to change policy but rather to increase transparency and consistency.¹⁹⁷

¹⁹¹ *Id.* at 4.

¹⁹² *Id.* at 5-6.

¹⁹³ *Id.* at 6.

¹⁹⁴ *Id.* at 6-7.

¹⁹⁵ Angelo A. Paparelli and Ted J. Chiappari, *New USCIS Policy Clips Entrepreneurs, Consultants and Staffing Firms*, 15 BENDER'S IMMIGR. BULL. 641, 641, 644 (May 1, 2010).

¹⁹⁶ *USCIS Holds Stakeholders Session on New H-1B Employer-Employee Relationship Memorandum*, 8 INTERP. RELEASES 438 (February 22, 2010).

¹⁹⁷ *Id.*

Instead, it created a firestorm of protest, confusion¹⁹⁸ and at least one lawsuit.¹⁹⁹

As far as the content of the Memo, stakeholders view the explanation of the requirements to establish an employer-employee relationship as a major change in adjudication.²⁰⁰ For example, the Memo dictates that beneficiaries who own the petitioning entity are not eligible for H-1B status. This is seen as a major shift away from adjudications that recognized the separate legal entity of the business organization and found there to be an employer-employee relationship.²⁰¹ Also, the Memo restricts, if not eliminates, third-party placement, while stakeholders note that staffing businesses regularly successfully petitioned for beneficiaries in the past.²⁰²

Stakeholders also expressed distress that the Memo was issued without any opportunity for notice and comment.²⁰³ A lawsuit challenging the Neufeld Memo alleged that the Memo “changed existing law” in the absence of rulemaking.²⁰⁴ The complaint alleged that the Memo is not consistent with the regulatory requirement that defines an employer as “a person, firm, corporation, *contractor*, or other association, or organization in the United States which [h]as an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or

¹⁹⁸ Although, as at least one immigration attorney has mentioned, the issuance of the Neufeld Memo did corral into one place an explanation of what adjudicators should consider. Gus Shihab, *The January 8, 2010 Neufeld Memo, a Reason to Panic or Breathe the Sigh of Relief?* (January 25, 2010), available at <http://www.immigration-visa-lawyer-blog.com/2010/01/the-january-8-2010-neufeld-mem.html>.

¹⁹⁹ *Broadgate v. U.S. Citizenship and Immigration Services*, No. 10-CV-0941 (D.D.C. 2010).

²⁰⁰ Malcolm Goesch, *An Attack on Entrepreneurialism: A Review of USCIS Adjudication of H-1B Petitions for Startups and Small Companies in 2009*, 19 INT'L H.R. J. 15 (2010).

²⁰¹ *Id.*

²⁰² *USCIS Holds Stakeholders Session on New H-1B Employer-Employee Relationship Memorandum*, *supra* note 196. Stakeholders emphasize that the Memo has repercussions for the health care industry, where some states prohibit hospitals from directly employing doctors. *Id.*

²⁰³ *Id.*

²⁰⁴ *Broadgate v. U.S. Citizenship and Immigration Services*, Complaint at 2 (D. D.C. 2010).

otherwise control the work of any such employee.”²⁰⁵ According to the complaint, the Memo contravenes the regulation because the regulation specifically recognizes contractors as employers, and because the regulation defines an employer-employee relationship (“as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee”) in a different way than the Memo.²⁰⁶

The District Court for the District of Columbia dismissed the Neufeld Memo complaint.²⁰⁷ The court concluded that the Neufeld Memo is not a legislative rule, because it “establishes interpretive guidelines for the implementation of the Regulation, and does not bind USCIS adjudicators”²⁰⁸ Therefore, according to the court, the Neufeld Memo is not final agency action and is therefore not subject to judicial review.²⁰⁹

This decision is unlikely to stifle stakeholder complaints about the Neufeld Memo, however. Even if the Neufeld Memo is a non-binding interpretive rule, its existence and the non-transparent process used to create it nevertheless causes confusion and frustration within the benefits adjudication system.²¹⁰ Either adjudicators will effectively treat the memorandum as binding, which will cause frustration because technically it is not binding, or adjudicators will stray from the memorandum, causing confusion as to what exactly is the standard for adjudication. Additionally, the USCIS Ombudsman concluded that the issuance of such guidance may cause front-line adjudicators to issue more Requests for Evidence, which is a further source of frustration in the system.²¹¹ A flurry of non-binding policy

²⁰⁵ *Id.* at 10 (emphasis added).

²⁰⁶ *Id.* at 12.

²⁰⁷ *Broadgate v. U.S. Citizenship and Immigration Services*, 730 F. Supp.2d 240 (D. D.C. 2010).

²⁰⁸ *Id.* at 246.

²⁰⁹ *Id.* at 247.

²¹⁰ For example, one immigration attorney posted this response to the government’s argument that the Neufeld Memo is merely guidance: “Can you see the milk shooting out my nose? . . . Are they really saying that Service Center Adjudicators are free to ignore this ‘contour refining guidance’? Really?” Charles Kuck, *Don’t Get so Uptight. It’s Only a Guideline* (July 6, 2010), available at <http://www.ilw.com/articles/2010,0708-kuck.shtm>.

²¹¹ U.S. Dep’t of Homeland Security, *Citizenship and Immigration Services Ombudsman Annual Report 2010*, *supra* note 96, at 43-47.

memoranda detract from any goal of achieving the consistency in adjudication that stakeholders crave.²¹²

While the Neufeld Memo is an example of a controversy surrounding the use of a guidance document in the face of an existing regulation, the use of guidance in the absence of regulation is exemplified by the implementation of the American Competitiveness in the Twenty-first Century Act of 2000 ("AC-21").²¹³ AC-21, among other things, allows certain H-1B visa holders to extend their stay past the normal six year cap and made H-1B visas more portable.²¹⁴ No less than five USCIS policy memoranda exist on this topic, but there are no regulations.²¹⁵ None of the agency work-product is in the form of a notice and comment regulation, despite continuing assurances over the past nine years from the agency that rulemaking is in the works,²¹⁶ and despite that AC-21 has produced

²¹² *Id.* at 47.

²¹³ American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. no. 106-313, 114 Stat. 1251 (2000).

²¹⁴ *Id.* at §§ 105, 106.

²¹⁵ Michael D. Cronin, *Initial Guidance for Processing H-1B Petitions as Affected by the "American Competitiveness in the Twenty-First Century Act" (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396)* (June 19, 2001); William R. Yates, *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)* (Aug. 4, 2003); William R. Yates, *Sunset of Additional \$1,000 Filing Fee Imposed by American Competitiveness and Workforce Improvement Act (ACWIA) and Return to 65,000 Annual Limit on H-1B Petition Approvals* (Sept. 15, 2003); William R. Yates, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the AC21 Act* (May 12, 2005); Donald Neufeld, *Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485, Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000* (May 30, 2008). The memoranda are available by visiting USCIS's website by clicking "Laws," then "Policy Memoranda," and then "By Subject." These memoranda are listed under the "American Competitiveness in the Twenty-First Century Act of 2000 (AC21)" Category.

²¹⁶ Michael D. Cronin, *Initial Guidance for Processing H-1B Petitions as Affected by the "American Competitiveness in the Twenty-First Century Act" (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396)* (June 19, 2001) ("The following guidelines establish interim procedures for use by Service personnel in the processing of new benefits under AC21 and the related legislation. Forthcoming regulations will promulgate

some tricky procedural and legal issues.²¹⁷ While stakeholders appear to be more satisfied with the content of the AC-21 memoranda than the Neufeld Memo, one commentator has described “this happy situation” as “tenuous at best, since a new memorandum could be approved at any time that could completely change USCIS’ extra-legal, unofficial interpretation of regulation-free AC-21.”²¹⁸ Additionally, this commentator acknowledges that when (if ever) USCIS issues regulations addressing AC-21, those regulations could “disregard[] not only . . . AC-21 . . . memoranda, but the decade-long history of how AC-21 has operated in this legal vacuum.”²¹⁹

The story of the administration of the EB-5 Immigrant Investor program is similarly full of twists in policy and a feeling among stakeholders of shifting ground. The EB-5 story, however, also includes a prominent role for the AAO and exemplifies how the AAO’s treatment of agency guidance causes confusion and complications in benefits adjudication.

Congress has created a category of legal, permanent immigration open to foreign nationals who are willing to invest in the United States.²²⁰ Under 8 U.S.C. § 1153(b)(5), green cards are available through a category known as EB-5 (Employment-Based Fifth Preference) to those “seeking to enter the United States for the purpose of engaging in a new commercial enterprise.”²²¹ The immigrant investor must have invested, or be in the process of investing, one million dollars, or less (now \$500,000) if the

substantive standards to be utilized in the adjudication of these new benefits.”); Donald Neufeld, *Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485, Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000* at 2 n.2 (May 30, 2008) (“At a future date, USCIS plans to incorporate all previous still applicable guidance into forthcoming rulemaking relating to various AC21 . . . statutory provisions”).

²¹⁷ See, e.g., H. Ronald Klasko, *American Competitiveness in the 21 Century: H-1Bs and Much More*, 77 INTERP. RELEASES 1689 (Dec. 11, 2000).

²¹⁸ Meyer, *supra* note 85, at 7.

²¹⁹ *Id.*

²²⁰ There are other investor-based categories that allow for a temporary stay, but the EB-5 program allows beneficiaries to become lawful permanent residents of the United States.

²²¹ 8 U.S.C. § 1153(b)(5)(A).

investment is made in a targeted employment area.²²² The investment must also “benefit the United States economy” and create at least 10 full-time jobs.²²³

USCIS’ implementation of this statutory category has been notoriously unpredictable.²²⁴ While regulations do exist, the implementation of the statute and its regulations has been subject to dramatically shifting interpretations. The EB-5 program remains relatively unpopular. While most legal immigration categories face years of pent-up demand, the EB-5 program has never exhausted its yearly quota.²²⁵ Both the United States Government Accountability Office (GAO) and the USCIS Ombudsman have highlighted the roller-coaster history of the program as reasons for the category’s failure to attract applicants.²²⁶ Even USCIS itself reported to the GAO that the uncertainty inherent in the program is likely a contributing factor to the very limited interest in the category.²²⁷ USCIS’ implementation and adjudication of the EB-5 category is a textbook lesson in how a lack of transparency through the use of guidance can undermine a congressional objective.

²²² 8 U.S.C. § 1153(b)(5)(C). A targeted employment area is “a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).” 8 U.S.C. § 1153(b)(5)(B)(ii).

²²³ 8 U.S.C. § 1153(b)(5)(A)(ii). A full time job is one “that requires at least 35 hours of service per week at any time.” 8 U.S.C. § 1153(b)(5)(D).

²²⁴ For more information on the history and development of the EB-5 program, see Becker, *supra* note 172; William P. Cook, *The Demand for Rulemaking: The Sage of the EB-5 Program Continues*, ALI-ABA (May 6, 1999); Leslie K.L. Thiele and Scott T. Decker, *Residence in the United States Through Investment: Reality or Chimera?*, 3 ALB. GOV’T L. REV. 103 (2010).

²²⁵ The limit per year is 10,000 EB-5 visas. Immigration Law and Procedure, *supra* note 57, at § 39.07. In 2009, USCIS reported that less than 1000 are used annually. Office of the Citizenship and Immigration Services Ombudsman, *Employment Creation Immigrant Visa (EB-5) Program Recommendations* at 1 (March 18, 2009).

²²⁶ U. S. Government Accountability Office, *Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors* (April 2005); Office of the Citizenship and Immigration Services Ombudsman, *Employment Creation Immigrant Visa (EB-5) Program Recommendations*, *supra* note 225, at 1.

²²⁷ *Immigrant Investors: Small Number of Participants Attributed to Regulations and Other Factors*, *supra* note 226, at 9.

As the USCIS Ombudsman has noted, uncertainty has “[p]lagued” the immigrant investor program “since inception.”²²⁸ The EB-5 program can be divided into three phases: birth, near-death, and then a potential resuscitation.

Congress created the EB-5 category in 1990. From 1990 until late 1997, the program endured some growing pains as the agency developed regulations and issued guidance. But the agency was forming a foundation for how the program would function on the ground. During this period, the agency defined statutory terms and elaborated on details, and the program functioned without any major shifts in agency interpretation.²²⁹ In fact, some signs pointed to the development of a more generous program. For example, in 1992, Congress added a pilot program to open up the EB-5 category to those invested in a Regional Center.²³⁰ Those invested in a Regional Center could count indirect job creation toward their job creation requirement.²³¹

A seismic shift developed from late 1997 through 1998. A dramatic and opaque shift in agency adjudication stifled the growth of the program. Concerns about fraud led the agency to reconsider its founding implementation of the program.²³² In November 1997, the Immigration and Naturalization Service (“INS”) (the predecessor to USCIS), placed a hold on the adjudication of certain EB-5 petitions.²³³ The General Counsel of INS issued an opinion the

²²⁸ Office of the Citizenship and Immigration Services Ombudsman, *Employment Creation Immigrant Visa (EB-5) Program Recommendations*, *supra* note 225, at 7.

²²⁹ The now defunct Immigration and Naturalization Service issued regulations implementing the new EB-5 program throughout the early 1990s. These regulations addressed such issues as defining “capital” and determining what counts as “a new commercial enterprise.” See *Employment-Based Immigrants*, 56 Fed. Reg. 60897 (Nov. 29, 1991); *Immigrant Investor Pilot Program*, 58 Fed. Reg. 44606 (Aug. 24, 1993); *Immigrant Investor Pilot Program*, 59 Fed. Reg. 17921 (April 15, 1994).

²³⁰ Pub. L. no. 102-395, 106 Stat. 1828, 1874 (1992).

²³¹ *Id.*

²³² Office of the Citizenship and Immigration Services Ombudsman, *Employment Creation Immigrant Visa (EB-5) Program Recommendations*, *supra* note 225, at 7-8.

²³³ Cook, *supra* note 224, at 1-2. In December 2007, the Department of State decided to suspend processing of these types of EB-5 cases. *Id.*

following month explaining that “[o]ver the last several years, a number of serious issues have arisen regarding the legality of certain types of business arrangements” contained in EB-5 petitions.²³⁴ The General Counsel reviewed these types of business arrangements and found them not to qualify under the EB-5 statute and regulations.²³⁵ The suspect arrangements all raised questions about whether the foreign national’s investment was truly at risk, and included: the use of promissory notes as investment vehicles; the use of installment plans as a means of making an investment; the use of an option given to sell or buy the investment at a fixed price; and the use of guaranteed returns.²³⁶

After the issuance of the General Counsel’s legal opinion, INS continued to pause adjudication of EB-5 cases that contained these types of business arrangements.²³⁷ INS next ordered its first tier adjudicators to select four EB-5 petitions containing these types of business arrangements, to immediately remove the hold and to adjudicate those four petitions.²³⁸ INS instructed those first-tier adjudicators to then forward to the AAO the newly adjudicated petitions.²³⁹

After the hold, the AAO adjudicated the four cases selected by INS for AAO adjudication and issued four precedent decisions from late June through July of 1998.²⁴⁰ According to the USCIS Ombudsman, these decisions “altered the previously issued guidance and substituted new and more restrictive interpretations of the law.”²⁴¹ For example, before the 1997-98 changes to the program,

²³⁴ Immigration and Naturalization Service, Office of General Counsel, Memorandum to Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs (Dec. 19, 1997), *available at* <http://shusterman.com/eb5investorsinsmemo1998.html>.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Cook, *supra* note 224, at 4-5.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *In re Soffici*, 22 I&N Dec. 158 (June 30, 1998); *In re Izummi*, 22 I&N Dec. 169 (July 13, 1998); *In re Hsiung*, 22 I&N Dec. 201 (July 31, 1998); *In re Ho*, 22 I&N Dec. 206 (July 31, 1998).

²⁴¹ Office of the Citizenship and Immigration Services Ombudsman, *Employment Creation Immigrant Visa (EB-5) Program Recommendations*, *supra* note 225, at 8.

both redemption provisions and guaranteed returns were permissible, but not after.²⁴² Also, before the changes, promissory notes were much more widely used as part of an investment.²⁴³ The cherry-picked precedent decisions the AAO issued during the summer of 1998 made the EB-5 program harder to access, but also shifted the ground under those who were in the process of making, or had already made, investments that were once acceptable, but now were not.

The shift in adjudication was met with a steep drop in the number of filed EB-5 petitions.²⁴⁴ But the change in standards did more than discourage new applicants. INS decided to apply the precedent decisions retroactively, and to remove (deport) some whose EB-5 petitions had been approved under the old standards.²⁴⁵ Others were placed in a strange legal limbo. Congress established the EB-5 program to first grant conditional green cards to investors.²⁴⁶ Those conditions would need to be removed after two years, thus building in a second look to make sure the investor followed through on his or her commitments.²⁴⁷ Those who held conditional green cards at the time of the AAO precedent decisions faced the real probability, especially given INS' decision to retroactively apply the decisions, that the conditions on their green card would never be removed.²⁴⁸

The change in standards injected intense uncertainty into the EB-5 program, and also bluntly angered stakeholders. As one commentator wrote in 1999:

Essentially instead of presenting clear guidelines, the AAO opted to dispose of seven (7) years of established EB-5 precedent in favor of a complete reversal of accepted practice and blithely disavowed dozens of the Service's own pronouncements about practices it long held acceptable in the EB-5 Program.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 9-10.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

And worse, the Service laid down the gauntlet that it fully intended to apply these new rules retroactively to cases long since approved, even to those cases where visas had been issued without [the immigration agency's] objection.²⁴⁹

The change in standards, combined with the retroactive applications of those standards, sent a signal to current and potential investors that the decisions of the agency could not be relied upon, and that the law could change without notice.

The EB-5 category lay dormant from the 1997-98 period of change until a recent rebirth of interest in the EB-5 program after a series of congressional amendments to the program. In 2000, 2002 and 2003, Congress broadened the permissible business activities of an EB-5 investment and clarified aspects of the program.²⁵⁰

The EB-5 program still has its problems, however. For example, the 2002 amendments also aimed to bring relief to those EB-5 investors stuck in the legal limbo created by the change in standards in conjunction with their conditional green card status.²⁵¹ USCIS has been slow to close this chapter, however, as by 2009 it was still drafting regulations that would implement Congress' directive.²⁵²

In this EB-5 scenario, the AAO overturned existing guidance of agency officials through precedent opinions. Those opinions did provide firmer ground, but did so by injecting a lack of confidence in the system. The precedent decisions overturned existing practices, and applied the new standards retroactively. Also, the procedure used to issue the precedent decisions left room to infer that the rest of USCIS and the AAO worked together to achieve a pre-ordained result.

This discussion about guidance reveals that USCIS' use of guidance in benefits adjudication makes the system opaque, and

²⁴⁹ Cook, *supra* note 224, at 11. Another commentator called the changes "unexpected and drastic." Becker, *supra* note 172, at 220.

²⁵⁰ Brandon Meyer and Karen Caco, *Spreading Like Wildfire! What Explains the Explosive Growth of EB-5 Regional Centers?* IMMIGR. BRIEFINGS (Feb. 2010).

²⁵¹ Office of the Citizenship and Immigration Services Ombudsman, *Employment Creation Immigrant Visa (EB-5) Program Recommendations*, *supra* note 225, at 10.

²⁵² *Id.*

recognition of the lack of transparency leads to an understanding of the frustration shared by stakeholders about the system. The stories of the Neufeld Memo, AC-21 and EB-5 provide context to stakeholder complaints about unpredictability, uncertainty and unreliability. The Neufeld Memo shows the confusion and lack of confidence that can develop when an agency chooses guidance over rulemaking, and when an agency changes course through guidance. AC-21 is an example of a total absence of standards that hold the force of law, while the story of the EB-5 category shows how the AAO's treatment of agency guidance can contribute to confusion and a lack of confidence.

When USCIS governs by memorandum, there is no firm ground. Any ground that a memo provides is never firm, especially because USCIS has exhibited a willingness to change course dramatically. Stakeholders lack clear direction as to even how the agency itself will treat such memos, and an absence of notice and comment regulations leaves them to rely on memoranda. It is not surprising that stakeholders complain about an uncertainty of what legal standards will apply.

But the problems with benefits adjudication do not end with the use of guidance. Benefits adjudication is also not transparent due to the obscurity of the AAO. As described above, the AAO's obscurity is tied to its bureaucratic placement and to its operating practices. The AAO is buried within USCIS. Its place in the immigration bureaucracy is far less prominent than that of the Board of Immigration Appeals, for example. The Board, while lacking decisional independence, at least exists outside of the Department of Homeland Security. The Board is placed within the Department of Justice, which is still a law enforcement agency, but at least is a different agency than the agency charged with enforcing immigration law.²⁵³ Also, the AAO exists within USCIS in a non-exalted place. The AAO appears to reside at the same level of the bureaucracy as Service Center Operations, and the AAO is tasked with reviewing the

²⁵³ The Board of Immigration Appeals is a part of the Executive Office for Immigration Review, which is a part of the Department of Justice. U.S. Dep't. of Justice, Executive Office for Immigr. Review, *About the Office*, available at <http://www.justice.gov/eoir/orginfo.htm>.

work product of those service centers.²⁵⁴ Also, the AAO adjudicators themselves lack status, as they are not Administrative Law Judges,²⁵⁵ and they may not even issue a precedent decision without outside approval.

The AAO's operating practices are also obscure. The internal workings of the AAO are a mystery, even to seasoned immigration law practitioners. The jurisdiction of the AAO is hard to discern, and its internal operating procedures are revealed only through sources that are obscure themselves, such as notes of meetings with stakeholders or through an ombudsman's report. As explained above, the AAO will not even share information on its workload data. Researching the AAO can feel like investigating a super secret organization, picking up bits and pieces of information from decentralized sources.²⁵⁶ This is especially surprising given the size of the AAO's caseload of between 14,000 to 15,000 appeals per year, and given that its work is not extraordinary or especially sensitive. Even the AAO's output is obscure. Its decisions are hard to locate and are subject to an overly complicated system that produces adopted decisions in lieu of full precedential decisions. Again, the AAO did not issue a precedential decision from 1998 until late 2010, when it issued two.

If no precedential decisions are issued, then there is little to bind adjudicators, whether front-line or AAO, and there is little concrete information for use by petitioners and their counsel.²⁵⁷ The lack of precedent also reflects on the perceived independence of the AAO. Without rules in place, the AAO appears to function as a policy arm

²⁵⁴ For further discussion on the differences between the Board and the AAO, see Legomsky, *Forum Choices*, *supra* note 82, at 1317-19.

²⁵⁵ See *supra* note 22.

²⁵⁶ In fact, some policy memoranda related to the AAO's operations appear to be impossible to locate unless one is a paying member of the American Immigration Lawyers Association. Brent Johnson, a Widener University School of Law librarian, had tremendously difficulty locating several agency memoranda pertaining to the AAO.

²⁵⁷ To further complicate matters, the AAO has declined to follow a memorandum bearing the "P" policy label. Schorr, *supra* note 139, at 1394-95. The AAO did so, however, through an unpublished decision, which, according to the Adjudicator's Field Manual, is not binding. Adjudicator's Field Manual, *supra* note 89, at § 3.4(a).

of USCIS rather than as an independent adjudicator.²⁵⁸ The precedent process itself contributes to the AAO's reputation. After all, the AAO may not even issue a precedent decision without the approval of USCIS and other agency components.

Both the use of guidance and the obscurity of the AAO illustrate the lack of transparency in immigration law when it comes to benefits adjudication. This infusion of opacity contributes to stakeholder complaints about the benefits adjudication system. By relying on shifting standards for so many fundamental issues and by allowing its appellate adjudication function to operate under such a cloud of mystery, USCIS has created an atmosphere of unpredictability and unreliability that harms the practice of immigration law, as well as the reputation of a government agency charged with making life-changing decisions.

IV. CONCLUSION

There are major problems affecting both removal and benefits immigration adjudication. Immigration adjudicators hearing removal cases lack decisional independence, and make up a low-respected system that pushes its adjudicators to rush through cases that actually require a great deal of time and attention, while the great majority of foreign nationals appearing before these adjudicators lack quality legal representation. The benefits adjudication system is plagued by a reputation of a system that causes much confusion and frustration, and is also unreliable.

This article explores a connection between the crises in removal and benefits adjudication. The opacity of immigration law presents challenges to both removal and benefits adjudication. This connection suggests that the lack of transparency in immigration law is a broad and deep problem.

In the removal context, the lack of transparency is exemplified by the law's complexity and its use of negative discretion. The

²⁵⁸ See Leon Wildes, *Review of Key Decisions of the Administrative Appeals Units*, Practising Law Institute at 51-52 (October 1, 1987); but see *USCIS Administrative Appeals Office Stakeholder Engagement*, *supra* note 105, at 2 ("While the AAO has a long history of discussing legal and policy issues with other USCIS entities, it does not seek their input prior to reaching a decision in an individual case.").

complexity of the law sets up a mismatch of a low volume law uncomfortably jammed into a high volume removal adjudication system. The complexity of the law and the use of negative discretion make it difficult to litigate removal cases without dedicating one's practice to such cases, which may discourage legal representation, while the lack of lawyers in the removal system, in combination with the complexity of the law, highlights the problem presented by a lack of decisional independence for removal adjudicators. All of the above understandably contribute to a negative mystique about immigration law.

In the benefits context, the lack of transparency is exemplified by the agency's use of administrative guidance materials and by the obscurity of the agency's Administrative Appeals Office. An atmosphere of confusion, unpredictability, and unreliability pervades benefits adjudication. The roots of this atmosphere may be found in agency practices where adjudicatory standards sharply shift without warning, where too few legal regulatory rules exist, and where the role and duties of the administrative appellate body are shrouded in mystery.

Examining the crises in removal and benefits adjudication makes plain a great need for reform. This article reveals links between murky immigration law and both the removal and benefits adjudication systems. These links must be considered in crafting any reform.

