

**Written Questions for Alejandro Mayorkas  
Nominee to Serve as Director of USCIS  
from Chairman Patrick Leahy  
June 30, 2009**

**1. One-Year Filing Deadline in Asylum Cases**

Asylum officers and immigration judges too often construe the one-year asylum filing deadline narrowly and in a manner that is inconsistent with congressional intent and with U.S. obligations under the Refugee Protocol. Exceptions were written into the law for extraordinary or changed circumstances to ensure that genuine asylum seekers would not be denied protection. Yet, a restrictive interpretation of the exceptions, combined with a patchwork of regulations and guidance, now govern the application of the exceptions. These inconsistent statements of administration policy, combined with a paucity of case law, negatively affect the claims of asylum seekers. Adjudicators rarely, if ever, recognize exceptions beyond those explicitly listed in the regulations.

**Q. Will you issue policy guidelines affirming that the statutory exceptions to the deadline are to be broadly interpreted, consistent with congressional intent?**

**Q. Will you reconcile the various non-exhaustive lists of examples of exceptional or changed circumstances in policy guidance and other memoranda, adopting the most expansive lists, expanding lists of recognized exceptions if appropriate, and clarifying through policy guidance that the new set of examples is also non-exhaustive?**

I fully recognize and appreciate the role and importance of our country in providing refuge to individuals fleeing persecution. It is a role steeped in our country's history. If I am confirmed, I will be committed to ensuring that this important and noble role of ours is fully realized as Congress intended.

If I am confirmed, I will promptly request the USCIS Office of the Chief Counsel and the Office of Refugee, Asylum and International Operations to review the lists of examples of exceptional or changed circumstances in current training and policy guidance and conduct a study of how these lists are applied in the field and with what results, so that USCIS better understands whether and how the exceptional or changed circumstances are considered in light of Congressional intent. I will then communicate with you and your Staff, and with the Committee and appropriate Department personnel, with the goal of issuing additional policy guidance if warranted, that will appropriately ameliorate any shortcomings, in USCIS' current interpretation or implementation of the one-year filing deadline.

**2. EB-5 Regional Center Program**

**The EB-5 Regional Center program facilitates foreign investment in the United States and results in the creation of new domestic jobs. The program has been responsible for the investment of billions of dollars in communities around the United States, and the creation of tens of thousands of new jobs. I believe this program, if administered effectively, can play a significant positive role in the American economy, and should be a permanent part of our immigration system. Although 10,000 visas are authorized each year for this program, approximately 800 are issued each year, indicating that the program is substantially underused.**

**Q. If confirmed, will you work with Congress to ensure that this program is administered and supported in such a way that is workable, efficient, and as predictable as possible for American entrepreneurs and foreign citizens who seek to invest in the United States?**

**Q. Will you be responsive to feedback from domestic stakeholders who use the program to develop domestic investment projects?**

I am aware of and appreciate the significant potential economic benefits of the EB-5 program.

If confirmed, I am committed to working with Congress and other stakeholders to ensure the EB-5 program -- and all immigration programs -- are properly supported and administered so that they are workable and efficient, and so that the applicable rules and expectations are well-publicized and predictable. Further, if I am confirmed USCIS stakeholders will find the agency under my administration to be a willing and eager partner dedicated to achieving the goals of our country's immigration laws and regulations. This is true with respect to the EB-5 program and its intent to develop critically important domestic investment projects.

### **3. H-2A and Dairy**

**An issue that I am also concerned about is the inability of dairy farmers to use the H-2A visa program. Due to the year-round nature of dairy farming, under current regulations dairy farmers cannot make the certifications necessary to obtain H-2A workers. As a result, dairy farmers in desperate need of workers sometimes turn to undocumented workers. Farmers should not be put in this position when the immigration laws contain an agriculture-specific visa.**

**Q. If confirmed, will you work with me, whether through comprehensive immigration reform or other legislation to refine the H-2A visa provisions so that dairy farmers can have access to lawful year-round workers?**

**Q. Apart from legislation, will you commit to exploring changes to current regulations that would allow dairy farmers to obtain workers through the H-2A visa program?**

If I am confirmed, I look forward to studying the problem of dairy farmers' inability to avail themselves of a visa program to obtain lawful qualified workers due to the year-round nature of their work. If confirmed, I commit to exploring all avenues by which this problem can be addressed. I recognize, however, that the solution to the dilemma in which dairy farmers find themselves may lie only in legislation. I look forward to working with you, the Department of Labor, and other stakeholders to achieve a solution to this problem.

**4. Relief for Surviving Spouses**

**Three Circuit Courts of Appeals have ruled in favor of surviving spouses who sought relief despite the fact that their U.S. citizen spouses died before an application for adjustment of status for the surviving spouse could be processed. These three circuits, the First, Sixth, and Ninth, analyzed the statute, 8 USC §1151(b)(2)(A)(i), and found that it clearly provided relief to such surviving spouses. The Third Circuit ruled for the government and against a surviving spouse petitioner. Litigation is pending at the district court level in several other circuits. Meanwhile, USCIS issued policy in June 2009 that will defer action on the removal cases of such surviving spouses and others for two years. In addition, legislation is pending in Congress to resolve the matter.**

**Q. If confirmed, how will you treat applications filed in the First, Sixth, and Ninth Circuits that fit the fact patterns of binding precedent in those circuits? See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2005); *Lockhart v. Napolitano*, 561 F.3d 611 (6th Cir. 2009); *Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009). Specifically, will you direct USCIS to grant relief to eligible surviving spouses whose U.S. citizen spouses applied for adjustment of status for the surviving spouse, but died prior to the adjustment being granted and prior to the length of the marriage reaching two years?**

I am aware that on June 9, 2009, the Secretary of Homeland Security announced a policy providing that surviving spouses of U.S. citizens—as well as their unmarried children under 21 years old—who reside in the United States and who were married for less than two years prior to their spouse's death will be granted deferred action for two years, and that this policy was issued while dispositive legislation is pending. If I am confirmed, I will work with the USCIS Office of Policy and Strategy and Office of Chief Counsel, as well as the Department's Office of Policy and General Counsel, to ensure this policy is implemented fully, effectively, and in accordance with law.

**5. Application Fees**

**Q. I remain concerned that the summer 2007 fee increases have put adjustment of status and naturalization out of reach for many eligible immigrants. If confirmed, what actions will you take to ensure that fee waivers are offered to all eligible persons in a transparent manner?**

I am informed that the 2007 fee increase was needed to enable USCIS, as an agency whose funding is predominantly fee-based, to achieve its mission. At the same time, I am keenly aware of the prohibitive effect a fee increase can have on qualified applicants who cannot afford the greater costs. If I am confirmed, I will, as part of a full internal review of USCIS, review the fee waiver program. I am committed to sharing my findings with you, the full Committee, your Staff, and other stakeholders as USCIS, in coordination with the Department, considers any possible needed changes to the fee waiver program so that it more fairly and effectively achieves its objective.

**6. Family Reunification**

**Petitions from refugees to have spouses and minor children join them in the United States (called the I-730 petition) should be treated as priority cases and processed expeditiously, ideally within three to six months. Presently, due to bureaucratic delay USCIS adjudicates I-730 petitions in approximately 18 months. Meanwhile, the families of many resettled refugees continue to face danger while they wait for permission to enter the United States.**

**Q. Will you agree to expedite these cases for humanitarian reasons as well as for family reunification?**

**Q. Will you issue USCIS policy guidance to clarify that minor children will not age-out of eligibility due to bureaucratic delay?**

I recognize that the even temporary disruption of the refugee family unit during the pendency of the application process can have significant adverse, even tragic, consequences. If I am confirmed, I am committed to working with USCIS personnel as well as the Department of State to determine how the U.S. Government can most securely and effectively process I-730 petitions in the future, including a process for prioritizing cases in which there is an urgent humanitarian need.

Further, if I am confirmed, I will also work to develop, in coordination with the Department and with you, the Committee, your Staff, and other stakeholders to develop policy guidance to address the potential for minor children to lose eligibility by virtue of delays not attributable to family conduct.

## **7. Facilitate Timely Work Authorization for Legitimate Asylum Seekers**

To prevent fraud, the immigration statute prevents an asylum seeker from lawfully working until his asylum application has been pending for 180 days. See INA §208(d)(2); 8 USC §1158(d)(2). However, asylum seekers often wait much longer than 180 days, because the “asylum clock” is stopped any time the asylum seeker delays the case. Delay is interpreted to include the denial by an asylum seeker of an expedited hearing date. Yet, accepting an expedited date often requires the asylum seeker to appear in court within days of filing his or her application, before securing counsel, medical and other expert witnesses, and before adequately preparing a case. While fraud may be deterred by this rule, the unfortunate consequence is that asylum seekers who seek time to prepare a case are penalized, and left to rely on charity while they await the ability to seek lawful employment.

**Q. Will you issue policy guidance stating that when an asylum seeker declines an expedited hearing, it should not automatically toll the 180-day clock for work authorization? The guidance should balance deterrence of abuse and fraud with recognition of the asylum seeker’s need to retain counsel and prepare a case.**

**Q. Will you issue guidance authorizing asylum offices to keep the asylum clock running when an applicant requests rescheduling for good cause, such as a need to seek medical or psychological treatment, or that the application was filed in skeletal form to prevent the expiration of the one year deadline?**

If I am confirmed, I commit to working with the Office of Refugee, Asylum, and International Operations to review and better understand the dilemma asylum seekers face when confronted with the workings of the “asylum clock,” and I will seek to ensure that the policies and procedures of USCIS to implement statutory mandates to prevent fraud and abuse are met while at the same time recognizing the asylum seeker’s right to retain counsel and need to prepare adequately his or her case and ensuring that an asylum seeker is not unfairly punished by the passage of time occasioned for good cause.

I also commit to evaluating how the “asylum clock” works and determining whether the process needs to be revised to strike the right balance between the legitimate case preparation needs of an asylum seekers and the Department’s interest in discouraging the submission of frivolous or fraudulent asylum applications in order to protect program integrity.

## **8. Naturalization Delays**

The USCIS Ombudsman has described USCIS as following an “active case management” system, which defines certain applications as outside the production queue and therefore not part of the naturalization backlog. Files that await a background check are deemed by the agency to be outside the queue and therefore not

**counted as part of the backlog. As a result, the agency reports numbers to the public and to Congress that are not wholly accurate.**

**Q. If confirmed, will you release statistics to Congress and the public that fully and accurately reflect the number of applications pending and the lengths of time they have been pending?**

If I am confirmed, I am committed to improving USCIS' transparency and credibility. It will be one of my goals to ensure that Congress and the public understand fully the data USCIS publishes and have full confidence in its accuracy. USCIS will share its successes and its challenges with candor and openness, with the desire to work in partnership with all stakeholders to achieve the Agency's mission in the secure, fair, and effective administration of our country's immigration laws.

## **9. FBI Name Checks**

**According to the Department of Justice's Office of Inspector General, the FBI processes 86% of name checks within 60 days. The remaining 14% experience delays of several months to more than a year, with a small number of checks taking more than 3 years. In recent years, the FBI and USCIS have blamed one another, with each agency claiming that delays are largely the fault of the other.**

**Q. What specific actions will you take to improve cooperation between USCIS and the FBI to ensure that all naturalization applications are processed expeditiously?**

Throughout my twelve years of experience in law enforcement, including my leadership of one of the largest United States Attorney's Offices in the country, I developed close and collaborative working relationships with varied federal agencies, including the FBI. If I am confirmed, I will promptly reach out to the FBI to expand the working group dedicated to improving the name check system, capitalizing on the progress made through the USCIS and FBI partnership over this past year.