AMERICAN IMMIGRATION LAWYERS ASSOCIATION

September 24, 2025

Department of Homeland Security
U.S. Citizenship and Immigration Services Office of the Director
20 Massachusetts Avenue, NW Washington, DC 20529-2140

Submitted via e-mail: policyfeedback@uscis.dhs.gov

Re: AILA Feedback on Derogatory Information, USCIS Policy Manual, Volume 1: General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence

To Whom it May Concern:

The American Immigration Lawyers Association (AILA) submits the following comment in response to updated USCIS policy guidance regarding changes to the disclosure of derogatory information unknown to benefit requestors, found in Volume 1: General Policies and Procedures, Part E, Adjudications, Chapter 6, Evidence, as announced in a Policy Alert dated June 12, 2025 ("Policy Alert").

AILA is a voluntary bar association of more than 18,000 immigration law professionals practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

We are troubled by the agency's decision to introduce policy changes that will lead to applicants for immigration benefits not being given the full opportunity to review all the evidence used to make a decision on their application. Below are the changes USCIS has introduced and our comments on the changes.

I. The Policy Manual Update Violates Due Process Because it Permits Inadequate Disclosures and Redactions That Prevent Applicants From Making Meaningful Rebuttals.

USCIS's updated policy about withholding certain information, specifically its refusal to provide a written or verbal summary of classified information, raises serious concerns about fairness and

due process. This blanket prohibition of a summary is more restrictive than existing regulatory safeguards under 8 CFR § 103.2(b)(16)(iv).

Under 8 CFR § 103.2(b)(16)(iv) when classified information is used in adjudication, the USCIS Director or designee may authorize disclosure of the general nature of the information to the applicant or petitioner, provided that appropriate safeguards are in place to protect the source and the integrity of the information. This regulatory provision reflects a balance between national security interests and the applicant's right to know the basis of an adverse decision. In addition, this provision allows individuals the opportunity to present rebuttal evidence in response to adverse information.

The new policy manual section, however, eliminates this balance by categorically prohibiting any form of disclosure of classified information, even if it is generalized or summarized. This substantive addition of the new policy manual section on derogatory information conflicts with 8 CFR § 103.2(b)(16)(iv). In changing the regulation without providing appropriate notice and comment, the agency violates the APA. This approach deviates from the regulations, undermines procedural fairness, and violates principles of administrative due process by denying applicants a meaningful opportunity to respond to adverse information that could affect their eligibility for immigration benefits.

Due process, guaranteed by the Fifth Amendment, requires that individuals be given notice and a meaningful opportunity to respond before a deprivation of a property or liberty interest. Immigration benefits—especially when statutorily eligible applicants face discretionary denial—are often considered protected interests.[1] Specifically, when disclosing other agency records, the policy update allows for summaries rather than source documents, and for supposed "detailed descriptions," or highly redacted documents rather than source materials, thereby limiting applicants' ability to rebut derogatory information.

The policy update memorandum states this update is meant to implement the holding in *Zerezghi v. USCIS,* No. 18-35344 (9th Cir. 2020). There, the court held that USCIS violated due process by denying an I-130 petition based on derogatory information that was not disclosed to the petitioners and that they had no opportunity to rebut (in this case, the failure to disclose a rental agreement upon which the government relied). The court emphasized that even in the immigration benefit context, due process requires notice and a meaningful opportunity to be heard; it is insufficient for USCIS to rely on undisclosed evidence, especially when it plays a

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[1] *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Zerezghi v. USCIS 15 (Ching. V. Mayorkas, 725 F3d 1149 (9th Cir. 2013)* established grant of I-130 petition is a nondiscretionary, statutory entitlement where the applicant is entitled to the protections of due process; *Goldberg v. Kelly*, 397 U.S. 254, 262-63 1970)(applicants for welfare benefits entitled to due process to contest determination of ineligibility.) Even for discretionary benefits, the inability to rebut undisclosed evidence has more drastic consequences since review or appeal rights are much more limited.

central role in a benefit denial; and, the court criticized USCIS for failing to provide even the gist of the derogatory content to the applicant(s).

Here, the policy manual update undermines the right to confront evidence used in application denials that rely on derogatory evidence of various types. It directly contradicts the court's holding in *Zerezghi* and the existing regulatory framework to ensure that applicants are afforded notice and an opportunity to respond, even when classified information is involved, consistent with the safeguards outlined in 8 CFR § 103.2(b)(16)(iv).

II. USCIS Gives Too Much Discretion to Officers to Determine "Sufficient Detail" in Summaries of Evidence.

A person's statutory eligibility must be determined solely based on information in the official record that USCIS disclosed, unless the classified exception applies, as stated in 8 CFR 103.2(b)(16)(ii). Certain information may be disclosed, whether it is other agency information, law enforcement sensitive, sensitive but unclassified, or about investigations, through a summary of the derogatory information. USCIS must clearly explain the derogatory information in "sufficient detail" to allow the benefit requestor a fair and informed chance to respond to the adverse information informing the decision. By giving the immigration officer total authority to determine what is "sufficient" "detail" to "describe" derogatory information, rather than providing uniform standards, or the source materials themselves, it raises the prospect that such interpretation by the officer can be arbitrary and capricious in violation of the Administrative Procedures Act (APA), and/or a violation constitutional due process. Applicants must guess what evidence they must rebut, a problem exacerbated in more complex cases where discretion and context are key such as in O-1, EB-1, EB-2, asylum, and waiver cases, among others.

Zerezghi and cases cited therein explain examples of unconstitutional violations of due process when the government provided vague or opaque summaries of evidence rather than the actual evidence denying applicants the opportunity to rebut the evidence:

- *Zerezghi, supra,* finding of denial of due process found in marriage fraud case involving notice of intent to deny was based on "records indicate[ing] that....", but the key record, a rental agreement, was not disclosed until the BIA opinion affirming the USCIS denial.
- *ASSE Int'l, Inc v. Kerry,* 803 F3d 1059 (9th Cir. 2015): Cultural exchange program third party host accused by participant of misconduct lead to State Department's Notice of Intent to Impose Sanctions based on "records" it reviewed but never turned over such as transcript or notes from an interview with the accusing participant. The Court held this violated ASSE's right to due process.
- *Kaur v. Holder*, 561 F.3d 957 (9th Cir. 2009), held BIA's reliance on classified information from DHS summarized as "reliable confidential sources have reported Kaur has conspired to engage in alien smuggling, has attempted to obtain fraudulent documents; and has engaged in immigration fraud by conspiring to supply false documents for others" was a violation of due process by relying on "secret evidence"

without a proper summary" amounting to Kaur's inability to rebut what has not been alleged."

Here, the new policy lacks transparency by allowing adjudicating officers to rely on vague descriptions or hidden sources at their own discretion, thereby limiting applicants' ability to understand the full context and source of the derogatory information.

III. Withholding of Sources or Names Undermines Agency Credibility and Transparency and Makes it More Difficult for Applicants to Challenge Derogatory Information Used Against Them

USCIS asserts it may conceal the identities of informants or third parties (e.g., neighbors during site visits) who provide derogatory information. Withholding sources and names violates due process and even minimal standards of administrative fairness. It is no different than secret evidence practices, which courts have condemned in similar contexts.[2] Without knowing who made the statements, applicants cannot assess credibility, bias, or motive—a fundamental part of rebutting adverse claims by the government against applicants.[3]

Here, the policy manual update codifies the very behavior that the Ninth Circuit rejected in *Zerezghi*—relying on undisclosed or vaguely summarized derogatory information (or secret or selectively disclosed evidence) that violates due process and the APA standards for decision making (5 U.S.C. §§555, 706), and record-based adjudication. This conduct also violates 8 C.F.R. §103.2(b)(16). Further, it would make discoverable information through FOIA (5 U.S.C. §552) more difficult by issuing decisions not grounded in a fully disclosed and rebuttable record. Rather, the policy update permits decisions based on information that is redacted to the point of uselessness or is never disclosed; the policy prevents meaningful rebuttal, violating procedural fairness. The discretionary language (e.g., "'may' provide a copy" or "may omit details") leaves room for systemic noncompliance with *Zerezghi, supra,* and *Ching v. Mayorkas,* 725 F.3d 1149, 1155–59 (9th Cir. 2013), holding that petitioners of I-130 nondiscretionary benefit applicants must be given a meaningful opportunity to review and rebut adverse information used against them.

IV. The New Policy also Violates the Administrative Procedures Act and the Freedom of Information Act.

The Policy Manual allows USCIS to withhold information that would be discoverable under FOIA or relevant in litigation. It avoids the procedural rigor of the APA 5 U.S.C. §§ 551–559 by making adverse decisions based on secret or selectively disclosed evidence, without clear rights

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[2] *Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("where government action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." See also, *Am.-Arab Anti-Discrimination Comm. V. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995) ("use of undisclosed information in adjudications should be presumptively unconstitutional.")

[3] This seems to contradict footnote 30 to the policy manual update which states: "If an officer intends to issue an adverse decision based on derogatory information of which the benefit requestor is unaware, the officer **must** disclose the information and provide the benefit requestor the opportunity to rebut the information and present information in the requestor's own behalf. See 8 CFR 103.2(b)(16)(i).

to review. This undermines the legal standards of reasoned decision-making and record-based adjudication, which are basic APA principles in immigration cases. Instead, the policy update lacks standards and invites arbitrary decisions by the government. It avoids established mechanisms[4] for review of evidence.

V. Inadequate Disclosure of Source Information to Applicants Will Have a Chilling Effect Based on Abuse of Discretion, Arbitrariness, and/or Capriciousness.

The policy update violates the APA's prohibitions against agency abuse of discretion, arbitrariness and/or capriciousness, by failing to fully disclose information and discouraging robust rebuttal. As a result, this policy may intimidate applicants from defending themselves, especially if they believe that contesting information could trigger retaliation or deeper scrutiny, particularly for those from sensitive backgrounds (e.g., asylum seekers, people of certain nationalities, whistleblowers, or dissidents).

VI. The New Policy Will Invite Litigation

The use of secret information to deny a benefit request will ultimately result in one of two scenarios, both of which are detrimental to USCIS and the requestor. Either the evidence will not be identified in the decision because it remains undisclosed or it will be identified or described for the first time in the decision. While the legal analysis of this result is described as a due process violation, requestors subject to such denials will understand the basic unfairness of the decision-making process. Because this unfairness will appear to the requestor as arbitrary and capricious, it is more likely to result in federal court challenges. Courts have consistently held that requestors are entitled to basic due process, and this includes the adequate notice or an opportunity to respond to the alleged adverse information. *See e.g*. *Zerezghi v. USCIS*, 955 F.3d 802, 810 (9th Cir. 2020). Apparently arbitrary decisions not only invite litigation challenges to the decision, but they also undermine the credibility of the agency. This creates both the appearance of arbitrariness but also inefficiencies for the public and USCIS. Because the negative information may ultimately be discoverable in litigation or through FOIA requests, the policy not only violates due process and the perception of fairness but could ultimately result in more federal court reversals of USCIS decisions.

VII. Conclusion

[4] 8 C.F.R. § 103.2(b)(16) ("If the decision will be adverse to the applicant or petitioner and is based on derogatory information unknown to the applicant or petitioner, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered…"); FOIA requests, 5 U.S.C. § 552 (USCIS relies on **n**on-FOIA-tested labels like "Law Enforcement Sensitive (LES)" or "SBU" to withhold information without offering a meaningful challenge or appeal.); RFE, NOID, NOID, NOIT (USCIS may use summary descriptions, redacted or vague notices rather than actual evidence making rebuttals impossible; APA 5 U.S.C. §§ 555, 706, USCIS's policy of withholding or summarizing evidence undermines this mechanism, since reviewing courts may never see the full record or context or how the applicant could have responded, whether in administrative MTRs, appeals, or federal court litigation (judicial review per INA §242).

The prior USCIS policy guidance, in effect until June 12, 2025, appropriately provided benefit requestors with adequate notice and a meaningful opportunity to rebut the derogatory information to present evidence in support of the benefit requested. This approach aligned with both 8 CFR § 103.2(b)(16) and the principles of due process under the APA. However, the newly issued guidance fails to uphold these standards. In some instances, the applicant, petitioner, or beneficiary will not be afforded a meaningful opportunity to rebut derogatory information because the new policy will bypass the opportunity to review relevant information This deviation from prior practice undermines the ability of individuals to meaningfully rebut the allegations, especially when they are unaware of the nature or origin of the adverse information. Moreover, the new policy raises serious concerns under the APA, particularly regarding arbitrary and capricious agency action and failure to follow required procedures. The APA requires that individuals affected by agency decisions be given notice and a fair opportunity to respond. When failing to disclose critical information, it risks rendering the decision-making process legally vulnerable because it does not provide the transparency and procedural fairness required by law. This undermines trust in the adjudication process.

Thank you for your time and consideration.

Sincerely,

American Immigration Lawyers Association