

FOIA...

The Never Ending Story



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In Spring of 2018, I wrote an article about IIUSA’s “FOIA woes” – the increasingly frustrating and lengthy process by which IIUSA collects most of its data on the EB-5 program. FOIA, short for Freedom of Information Act, is the basis from which most of IIUSA’s data reports are born. We request information from U.S. Citizenship & Immigration Services (USCIS) on almost everything you can think of relating to the EB-5 Program in order to analyze it and turn it into digestible reports which inform our members about trends in the industry.

When I published my last article on IIUSA’s FOIA requests, it included the Table 1 which were statistics on our FOIA requests as of March 2018.

As you can see, IIUSA makes several

requests, most of which are recurring for which we request data on a quarterly, semi-annual, or annual basis. Depending on unique developments of the industry, we will request one-off requests as needed as well.

Table 2 is an updated chart of IIUSA’s FOIA requests which again demonstrates the volume of requests we make, but also the increasingly slow rate of responses we are experiencing.

In the 17 months between my last FOIA article, we have made an additional 66 requests and our pending cases have increased from 42 to 70, though we only received an additional 4 denials in that time span. It is perhaps most important to note that in those 17 months, we only received 33 responses, many of which were requests from 2017 and 2018. Since 2011, IIUSA

made a total of 248 FOIA requests, only 36% of which have been fulfilled by USCIS, while there are 158 requests fulfilled, 70 requests are pending as of August 2019.

Not a single FOIA request made in 2019 has been fulfilled and 36 of the 44 requests (or 73%) made in 2018 are still pending. This poses a critical obstacle in the ability for IIUSA to provide timely and necessary intelligence to its members through the knowledge and analysis of the data we so keenly rely on from USCIS.

Why is all of this important to note? First, the exceedingly slow turnaround time to get the information which we are legally allowed to request from the government makes most of the data we do receive irrelevant or at the very least unhelpful

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TABLE 1: IIUSA FOIA Requests as of March 2018

TOTAL REQUESTS	PENDING	DENIED	IN APPEAL	FULFILLED
191	42	16	8	125

TABLE 2: IIUSA FOIA Requests as of August 2019

TOTAL REQUESTS	PENDING	DENIED	IN APPEAL	FULFILLED
248	70	20	0	158

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FIGURE 1: IIUSA FOIA Requests Since 2011

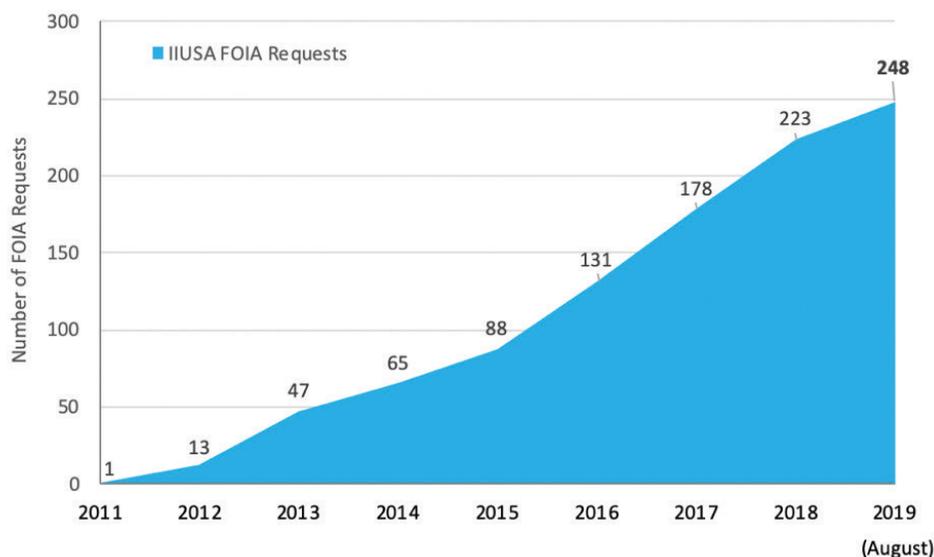


FIGURE 2: IIUSA FOIA Requests Fulfilled vs Pending by Year of Submission

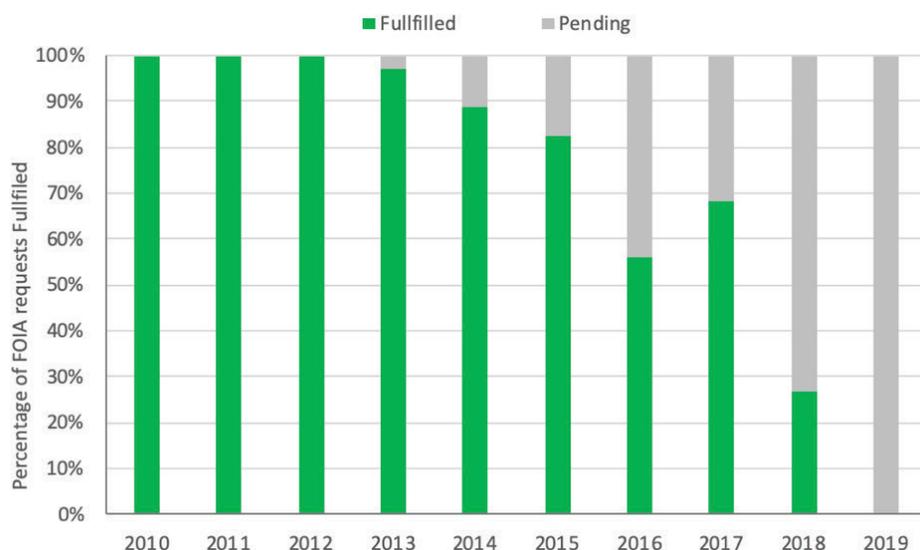
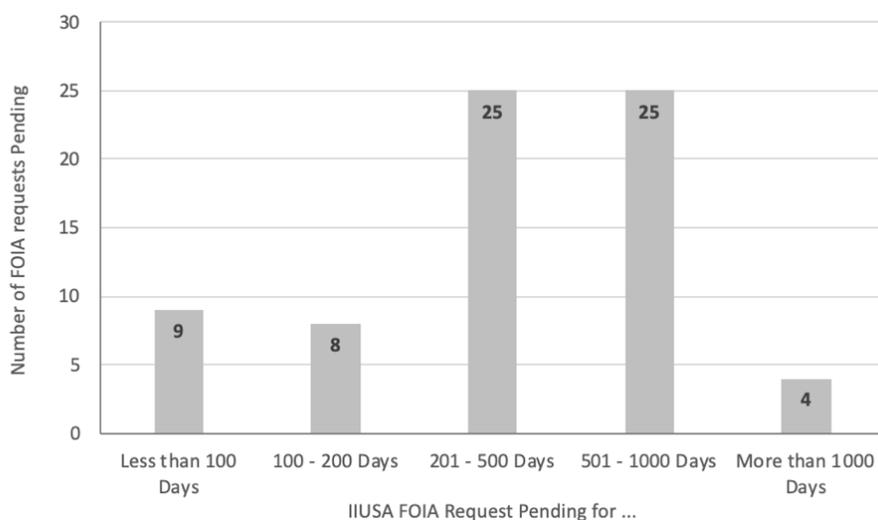


FIGURE 3: IIUSA FOIA Requests Pending



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by the time it is in our hands. Second, this is not just a blip in time where responses have slowed, but rather a trend that only continues to get worse as time goes on. Without the ability to know, for instance, the approval and denial statistics for immigrant investors by country of origin or reasons for Requests for Evidence (RFEs) and denials for the various EB-5-related forms, we are unable to arm our members with information that allows them to adapt their businesses to succeed in the every-changing landscape of EB-5. We are so reliant on this process as your EB-5 information and education source and without it working even quasi-smoothly, we are paralyzed in our ability to deliver the resources our members have come to rely upon.

In my previous article, I explained that processing of FOIA requests depends on the type and volume of information being requested. For the type of information IIUSA requests (non-A-file, or non-Alien-file, information), there are two tracks and most of IIUSA's requests fall into Track Two. Currently, according to first.uscis.gov, Track Two requests are taking, on average, 295 days to process. In March 2018, Track Two requests were averaging 121 days.

IIUSA's oldest pending request is now 1,056 days old. In fact, we have yet to receive a control number (indicating receipt by USCIS) for this request. The next oldest pending request is 827 days. This request, for FY2016 I-924As, was made on May 15, 2017. Although we received a receipt with control number just three days later, that request has been pending for more than 800 days. Without this vital information, IIUSA is unable to create accurate economic impact reports that not only inform the industry, but also the public and elected officials about the very real and tangible benefits and impact of the EB-5 industry.

As part of my ongoing commitment to our FOIA process, I regularly audit our requests and follow up with contacts at the National Records Center. From time to time, this has proven to be a useful exercise when we find out that a response was somehow lost in the mail or it was sent to the wrong address. But more and more, my contacts

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are less responsive and my polite badgering is not resulting in securing information. It is important, nonetheless, to continue the exercise to demonstrate diligence and monitoring.

A quick Google search shows that IIUSA is not alone in experiencing delays. An ongoing analysis by the Project On Government Oversight (POGO) and Politico revealed in February 2018 that the Environmental Protection Agency (EPA) had fulfilled less than 17% of its pending FOIA requests¹ and was under fire through several lawsuits for slow response times. The Department of Homeland Security (DHS) and two of its sub-agencies, Immigration and Customs Enforcement

¹ <https://www.pogo.org/analysis/2018/02/epa-drags-its-feeet-with-records-requests-aimed-at-scott-pruitts-office/>

(ICE) and Customs and Border Patrol (CBP) were sued in 2018 for failure to respond to requests² and the New York Times reported in 2012 of receiving a response to a request made in 1997³.

By law, the government is supposed to respond to FOIA requests within 20 business days of receipt, but obviously with the volume and complexity of requests, this is seldom reality. Nevertheless, waiting 1,056 days and counting is frustrating, to say the least, and debilitating to aspects of our business to say the most.

With all that said, what really are our options? Of course, taking cues from other organizations, we could sue USCIS for failure to respond in a timely fashion

² <https://jsis.washington.edu/humanrights/2018/09/21/uwchr-sues-dhs-ice-cbp/>

³ <https://www.nytimes.com/2012/01/29/us/slow-freedom-of-information-responses-cloud-a-window-into-washington.html>

and/or failure to divulge information. That, however, would be timely, costly and ultimately, I would venture to guess, a not very fruitful exercise. With 70 requests from IIUSA in the queue and more added every month, I have doubts that a lawsuit would in fact result in our mailbox being suddenly stuffed to the brim with FOIA data.

While I hope that FOIA processing times pick up and we once again can enjoy the responsiveness and the quality data acquisitions we did a few years ago, I am not entirely optimistic. We will continue to send in our monthly, quarterly, semi-annual and annual requests as it is important to continue to seek the information from our government and to inform the industry. ▶

A special thank you is owed to my colleague, Lee Li, for providing the graphs for this article.



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