Office of the
Citizenship and Immigration Services Ombudsman

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

RECOMMENDATION FROM THE CIS OMBUDSMAN TO THE DIRECTOR, USCIS

To:	Dr. Emilio T. Gonzalez, Director, USCIS
Cc:	Michael P. Jackson, Deputy Secretary, Department of Homeland Security
From:	Prakash Khatri, CIS Ombudsman
Date:	April 12, 2006
Re:	Recommendation to accept DNA test results as secondary evidence of family relationship, to grant authority to directors to require DNA testing and to initiate a DNA testing pilot project to study the impact of requiring DNA testing as evidence of family relationship.

I. RECOMMENDATION

A recommendation to accept DNA test results as secondary evidence of family relationship[1], to grant authority to directors to require DNA testing[2] and to initiate a DNA testing pilot project to study the impact of requiring DNA testing as evidence of family relationship.

II. BACKGROUND

Despite the increasing acceptance of DNA test results as the most conclusive scientific evidence of paternity and the unreliability of birth records from many countries, DNA test results are listed as neither primary nor secondary evidence of family relationship in USCIS regulations and forms. USCIS relies almost exclusively on documentary evidence and customer interviews to verify the legitimacy of claimed family relationships. USCIS policy concerning DNA testing was established in a July 2000 memorandum from Michael D. Cronin, then Acting Executive Associate Commissioner of the INS, which allows field offices to "suggest" DNA testing only "when initial and secondary forms of evidence have proved inconclusive…."[3] Commissioner Cronin states that while 8 CFR 204.2(d)(2)(vi) allows directors to require Blood Group Antigen

[1] At a minimum, USCIS should add language to appropriate USCIS forms and form instructions indicating that DNA test results are acceptable secondary evidence of family relationship and instructing customers concerning the process for obtaining valid DNA test results. USCIS should also consider revising 8 CFR § 204.2 to include specific reference to DNA test results as acceptable secondary evidence of family relationship. Proposed additional language is provided in the appendix.

[2] To implement this recommendation, USCIS may need to "update" 8 CFR § 204.2(vi). 8 CFR § 204.2(vi) gives authority to directors to require blood tests that were commonly used to verify family relationships at the time the regulation was written, but which are now obsolete. USCIS could revise 8 CFR § 204.2(vi) by replacing references to these blood tests with references to DNA testing. A proposed amended regulation is provided in the appendix.

[3] Memorandum from Michael D. Cronin, Acting Ex. Assoc. Comm., Programs, HQADN, *Guidance on Parentage Testing for Family-Based Immigrant Visa Petitions* (July 24, 2000).

or Human Leukocyte Antigen (HLA) blood parentage tests, there is no similar statutory or regulatory authority allowing them to require DNA testing, even though "Blood Group Antigen and HLA tests are no longer widely available for testing by laboratories, and are not considered to be as reliable as DNA tests."[4] Consequently, unlike its technological predecessors, DNA testing is completely voluntary.

USCIS customers bear the complete responsibility of arranging and paying for DNA testing through laboratories accredited by the American Association of Blood Banks (AABB). The price varies from lab to lab depending on the number of people to be tested and their country of residence. While there are many AABB-accredited labs, several labs conduct the bulk of testing for USCIS customers. USCIS does not monitor the testing, nor does it have a contractual relationship with any of the labs that conduct the testing. DNA testing of USCIS customers generally occurs only after a petition is filed, and after USCIS suggests it in a Request for Further Evidence (RFE) or Notice of Intent to Deny (NOID).

Customers who wish to have DNA test results submitted by a lab to USCIS at the same time they submit their petition generally encounter complications. USCIS offices typically accept DNA test results only if DNA samples collected overseas are collected by a panel physician approved by the State Department and, where required, witnessed by an embassy or consulate official.[5] Panel physicians are reluctant to collect samples—and embassy/consulate staff unwilling to witness collection—from the intended beneficiaries of immigration petitions not yet filed with USCIS. State Department personnel at some consulates and embassies consider the witnessing of DNA sample collection even from the beneficiaries of filed (but unapproved) USCIS petitions a low priority task outside the scope of their official duties.[6] An intending petitioner's choice is to either file the petition and wait for an RFE or NOID, or

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[4] *Id.* It should be noted that DNA testing is also less intrusive than these obsolete blood tests. DNA samples are typically collected from saliva extracted by means of a swabbing of the inner cheek, rather than from blood specimens. The procedure is simple and painless.

[5] Requirements vary from post to post. Some posts require witnessing of all DNA sample collections by an embassy official, while others have no witnessing requirements.

[6] Recent events at the U.S. Embassy in Ghana illustrate this. On August 22, 2005, Sara Revell, Unit Chief for the Immigrant Visa Unit of Consular Affairs at the U.S. Embassy in Accra issued a memorandum to DNA labs in the United States stating that State Department personnel at the Embassy would "no longer be scheduling nor collecting samples for DNA parentage tests for immigrant visa petitions that have not yet been approved…from a DHS/USCIS office in the U.S." Memorandum from Sara Revell, Immigrant Visa Unit Chief, U.S. Embassy Accra, *DNA sample collections at the U.S. Embassy in Accra* (August 22, 2005). The memorandum further informs the labs that collection/witnessing requests for unapproved USCIS petitions "should be handled by USCIS and will not be accepted by our office," even though USCIS had no procedures for monitoring DNA sample collection overseas. *Id.* After the memorandum was brought to the attention of State Department and USCIS officials in Washington D.C. by the Ombudsman's office and others, it was determined that DHS personnel at the U.S. Embassy in Accra would assume the responsibility of witnessing DNA sample collection from the beneficiaries of unapproved USCIS petitions. The Ombudsman is not aware of plans to implement a similar policy at other embassies or consulates, and it is too early to fully assess the impact of the change in Accra. However, the Ombudsman notes that DHS/USCIS does not have staff in all consulates and embassies, making it especially difficult to implement such a policy universally.

proceed with a "private" test. A private test is a test in which the samples are collected by a private doctor and the results are reported directly to the petitioner and not USCIS. Petitioners who submit the results from private tests to USCIS are often informed that they must have the test redone in the manner explained above.[7]

USCIS does not maintain any statistics on the DNA testing of its customers. USCIS does not require or request DNA testing statistics from the labs that perform testing on behalf of USCIS customers. Consequently, USCIS does not possess such basic information as the volume of testing, inclusion and exclusion rates from different countries[8], etc. Furthermore, because DNA testing is voluntary and privatized, evaluating the impact mandatory DNA testing would have on the adjudication process is difficult.

III. JUSTIFICATION

Family reunification is a pillar of U.S. immigration policy. USCIS must be able to verify, and its customers must be able to establish, that the claimed family relationships that constitute the basis of eligibility for immigration benefits are legitimate. USCIS verifies family relationships by examining documents, primarily birth records, and by interviewing petitioners and intended beneficiaries. However, few USCIS adjudicators are trained forensics experts, and their ability to distinguish altered or forged documents from authentic ones is limited. USCIS adjudicators can send questionable documents to the Forensic Document Laboratory operated by Immigration and Customs Enforcement (ICE) to verify their authenticity. But cost and time factors make forensic evaluation of a significant volume of documents impractical. Furthermore, many relationship documents that appear to be authentic official documents validly issued by a foreign government actually contain false information. In some cases, this false information is merely the result of poor recordkeeping and clerical errors, but customers are nonetheless subjected to increased scrutiny, and possibly denied benefits, because of errors for which they are not responsible. In other cases, this false information is the direct result of fraud or other malfeasance—on the part of individuals, foreign government officials, or both—committed in obtaining the documents. In either instance, such documents are not a reliable means to verify identity and family relationship.

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[7] USCIS is not in error for demanding strict controls over sample collection overseas and rejecting the results of private tests. Ensuring the integrity of the sample collection process is essential. Sample collection performed by approved panel physicians and witnessed by an embassy or consulate official will continue to be necessary in many, if not all, circumstances. However, USCIS should accept responsibility for the administrative burden this imposes on consulate and embassy staff. In addition, where possible, USCIS or other DHS personnel should assume the task of witnessing DNA sample collection for USCIS customers. Finally, to dedicate the resources necessary for sample collection witnessing, USCIS and/or the State Department should consider imposing a DNA sample collection witnessing fee.

[8] *Inclusion* refers to DNA test results that verify a claimed relationship, while *exclusion* means just the opposite. In the United Kingdom, the government contracts all immigration DNA testing to one lab, which results in a volume discount and the tracking of inclusion/exclusion rates and other statistics. Likewise, the Canadian government, while not in an exclusive contractual relationship with one lab, requires that labs providing DNA testing for immigration petitioners report testing statistics to the government. Staff at U.S. labs contacted by the Ombudsman's office expressed a willingness to provide such statistics to USCIS.

USCIS adjudicators doubting the authenticity of relationship documents, and/or the legitimacy of the relationships for which they are submitted as evidence, can require customers to submit further documentary evidence or appear for an interview. USCIS relies on the interviewing skills of its adjudicators and their counterparts in the State Department to determine if claimed relationships are bona fide. The result is a resource-intensive and time-consuming process that is more art than science; a process in which all customers, honest or not, are subject to scrutiny and suspicion; and a process, in spite of the concerted effort and considerable skill of adjudicators, that is prone to error.

DNA testing would bring simplicity and certainty to the adjudications process and would benefit both USCIS and its customers. For USCIS, DNA testing offers a scientifically conclusive means of verifying family relationships that would increase adjudicators' confidence in their decisions, deter the filing of fraudulent petitions, and reduce the time and expense of adjudication. For customers, DNA testing offers a simple means to establish family relationships while also diminishing (and possibly eliminating) the burdens of obtaining documents from overseas, responding to requests for further evidence from USCIS and enduring interviews with USCIS and State Department officials. Not only would these benefits justify the additional cost of DNA testing, they may actually result in cost savings equal to or greater than the added expense.

The Ombudsman believes that DNA testing will play a greater role in the USCIS of the 21st Century. As technology advances and costs decline, DNA testing could become as ubiquitous as fingerprinting. The Ombudsman envisions, as part of upfront processing, a procedure whereby customers provide a DNA sample along with other biometrics at Application Support Centers or USCIS offices. USCIS will contract with one (or more) of the DNA labs to perform DNA testing, thus gaining more control over the testing process and reaping benefits such as statistical analysis and volume price discounts.[9] The precise nature and scope of a future DNA testing process will best be determined through analysis of a DNA pilot project in which DNA testing is required of a diverse cross-section of USCIS customers.[10] The purpose of this recommendation is to encourage USCIS to implement a pilot project and to take the necessary steps toward studying and implementing an expanded, systematic DNA testing process. To properly conduct a pilot project, USCIS must have the authority to require DNA testing and DNA test results must be acceptable secondary evidence of family relationship.

[9] Informal inquiries by the Ombudsman's office reveal that these discounts could be significant, as indicated on the following chart of hypothetical discount rates provided by one lab to the Ombudsman's office in late 2005:

Case Volume	*Discount*	*Case Volume*	*Discount*	*Case Volume*	*Discount*
50,000	30%	150,000	40%	250,000	50%
100,000	35%	200,000	45%	300,000	55%

[10] Ideally, this cross-section should include customers of all or as many nationalities as possible. It should also encompass the various types of USCIS adjudications (e.g. district, service center, asylum, refugee) and applications/petitions (involving both petitioner/beneficiary and applicant/derivative relationships).

IV. BENEFITS

A. National Security

This recommendation poses no risks to national security. It will likely enhance national security by deterring fraud and bringing scientific certainty to USCIS adjudications.

B. Customer Service:

DNA testing offers customers a scientific means of proving to USCIS that their claimed relationships are bona fide. USCIS confidence in DNA testing results will improve the relationship between USCIS and its customers by diminishing the need to subject customers to requests for further evidence and interviews.

C. USCIS Efficiency:

DNA testing offers a scientifically conclusive means of verifying family relationships that will increase adjudicators' confidence in their decisions and reduce adjudication errors. DNA testing will reduce the need to request further evidence from customers and conduct customer interviews, allowing USCIS to reallocate resources to other important activities such as backlog reduction and prevention. Required DNA testing will deter the filing of fraudulent petitions, which will reduce the time and expense of adjudication generally.

APPENDIX

(PROPOSED REVISIONS TO CFR)

To add to end of 8 CFR § 204.2(d)(2)(v)

The results of DNA or genetic testing may also be accepted.

To replace 8 CFR § 204.2(d)(2)(vi)

(vi) DNA (deoxyribonucleic acid) or Genetic Testing. The director may require that DNA or genetic testing be conducted to verify an alleged biological relationship. Tests will be conducted by an approved laboratory accredited by the American Association of Blood Banks (AABB) using the Polymerase Chain Reaction-Short Tandem Repeat (PCR-STR) test or Restriction Fragment Length Polymorphism (RFLP) test, or other test that the Service determines has been accepted by the scientific community as achieving or surpassing the qualities of these tests. Test samples should be collected through a non-invasive procedure, such as buccal swabs, whenever possible. Tests will be conducted, at the expense of the petitioner or beneficiary, by a qualified medical specialist designated by the Department of State or the Service overseas and/or a qualified medical specialist designated by the laboratory in the United States and approved by the Service. To ensure the integrity of genetic testing results, all stages of testing must be conducted under appropriate safeguards. These safeguards must include strict controls concerning protection of the chain of custody of biological samples, identification of the parties to be tested, and correct preparation of test results. In all phases of testing, communication of the results of the test must be directly between the laboratory, designated medical specialist, and the Service and/or Department of State. Under no circumstances should a third party, including the individuals being tested, be permitted to carry or transport biological samples or test results. Refusal to submit to DNA testing when requested may constitute a basis for denial of the petition, unless a legitimate medical or religious objection has been established. When a legitimate medical or religious objection is established, alternate forms of evidence may be considered based upon documentation already submitted.