U.S. Citizenship and Immigration Services

WRITTEN TESTIMONY

OF

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FOR A HEARING ON

"H-1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers"

BEFORE
THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

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INTRODUCTION

Chairman Gallegly, Ranking Member Lofgren, and Members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss the H-1B program and U.S. Citizenship and Immigration Services' (USCIS) efforts to combat fraud and misuse of this nonimmigrant visa classification. I am Donald Neufeld, the Associate Director for the Service Center Operations Directorate (SCOPS) of USCIS. In this position, I am responsible for overseeing the adjudication of petitions for the H-1B nonimmigrant classification. I welcome this opportunity to explain how the H-1B program works and USCIS' efforts to combat fraud while ensuring that U.S. companies are able to obtain the highly skilled temporary workers needed to conduct business and strengthen our economy. I will begin with a summary of the procedural steps for seeking the H-1B visa, the necessary qualifications to obtain the visa, and the role of USCIS and the Departments of Labor and State in the process.

The H-1B nonimmigrant classification is a vehicle through which a qualified alien may seek admission to the United States on a temporary basis to work in his or her field of expertise. An H-1B petition can be filed for an alien to perform services in a specialty occupation, services of an exceptional nature requiring exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project or coproduction project, or services as a fashion model of distinguished merit and ability. To begin the process of employing an H-1B temporary worker, the U.S. employer must first receive certification from the Department of Labor (DOL) that it filed a Labor Condition Application (LCA). The LCA specifies the job, salary, length, and geographic location of employment. In addition, the employer must agree to pay the alien at least the actual or prevailing wage for the position, whichever is greater. Following receipt of the certification, the employer must then file an H-1B petition with USCIS.[1]

The H-1B petition may be used to sponsor an alien for an initial period of H-1B employment or to extend or change the authorized stay of an alien previously admitted to the United States in H-1B status or another nonimmigrant status. Additionally, an employer may file the petition to sponsor an alien who currently has H-1B nonimmigrant status working for another employer or amend a previously approved petition.

REQUIREMENTS TO QUALIFY FOR H-1B CLASSIFICATION

USCIS is responsible for evaluating an alien's qualifications for the H-1B classification, and for adjudicating petitions for a change to H-1B status for aliens who are already in the United States in another nonimmigrant classification by assessing whether the alien will be performing services in a field of expertise determined to be a specialty

[1] An LCA is not required for petitions involving DOD cooperative research and development projects or coproduction projects. See 8 CFR 214.2(h)(4)(vi)(A)(2).

occupation, services relating to a DOD cooperative research and development project or coproduction project, or services of distinguished merit and ability in the field of fashion modeling. As a majority of H-1B petitions are for specialty occupations, this testimony will primarily focus on those. In order to perform services in a specialty occupation, an alien must meet one of four enumerated criteria related to his or her specific education or licensing level attained.[2] To qualify as a specialty occupation, the position must also meet one of four specific requirements concerning the licensing or educational degree required by the occupation.[3]

ADJUDICATION OF H-1B PETITIONS

H-1B petitions are submitted on behalf of alien workers by their prospective employers on USCIS Form I-129, Petition for a Nonimmigrant Worker, the H Classification Supplement to Form I-129, and the H-1B Data Collection and Filing Fee Exemption Supplement. The petitions are mailed to one of two USCIS Service Centers for processing depending on the location of the beneficiary's worksite and whether the petition is exempt from the statutory numerical cap.

Upon receipt of a properly filed petition,[4] USCIS stamps each petition with the date of arrival at the service center. A clerk creates a paper file that contains the original petition and all supporting documentation. This file becomes the official file of record for all activities connected with the petition.

After being sorted into potential cap and non-cap cases, the file is assigned to an adjudicator who determines whether there is adequate information in the file to approve or deny the petition. If sufficient evidence is available, the adjudicator makes a decision and enters the corresponding information into the tracking system. In the case of insufficient evidence, the adjudicator may request additional information from the petitioner. If the employer does not respond to the request within a set period, the petition will be denied. Our adjudicators are trained to review each petition and supporting documentation in its entirety. They are instructed to refer petitions to the

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[2] The criteria are: (1) hold a U.S. bachelor or higher degree, as required by the specialty occupation, from an accredited college or university; (2) possess a foreign degree determined to be equivalent to a U.S. bachelor or higher degree, as required by the specialty occupation, from an accredited college or university; (3) have any required license or other official permission to practice the occupation (for example, architect, surveyor, physical therapist) in the state in which employment is sought; or (4) have, as determined by USCIS, the equivalent of a U.S. bachelor's degree required by the specialty occupation acquired through a combination of education, specialized training, and/or progressively responsible experience related to the specialty. See 8 CFR 214.2(h)(4)(iii)(A). Specialty occupations include, but are not limited to, computer systems analysts and programmers, physicians, professors, engineers, and accountants.

[3] The requirements are: (1) a bachelor's or higher degree or its equivalent is normally the minimum entry requirement for the position; (2) the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, the position is so complex or unique that it can be performed only by an individual with a degree; (3) the employer normally requires a degree or its equivalent for the position; or (4) the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with attainment of a bachelor's or higher degree. See INA 214(g)(4).

[4] Petitions that are improperly filed (e.g., submitted without the proper signatures or required fees) are rejected by the service center. Rejected petitions are returned to the petitioner with any submitted fees and will not retain a filing date. 8 CFR 103.2(a)(7).

Center's Fraud Detection Office when there is a suspicion of fraud based on established guidelines.

After adjudication, petitions and supporting documentation are forwarded to either the USCIS records center for storage or the Kentucky Consular Center for consular processing. The USCIS approval of an H-1B petition does not, however, guarantee issuance of an H-1B visa or admission to the United States in H-1B status.

If an alien seeking H-1B status is outside of the United States, the responsibility for visa adjudication rests with the U.S. Department of State (DOS). Once the H-1B petition has been approved by USCIS, DOS, at a U.S. embassy or consulate abroad, will determine whether a prospective alien employee is eligible for a visa. Finally, U.S. Customs and Border Protection (CBP) is ultimately responsible for making admissibility determinations for aliens seeking to enter the United States in H-1B – or any other – status at a port of entry.

The alien may be admitted to the United States in H-1B status for a maximum period of six years;[5] however, each H-1B petition may only be approved for a maximum period of three years.[6] At the end of the six-year period, the alien generally must either change to a different status (if eligible) or depart the United States.[7] USCIS regulations provide that an alien who has been outside the United States for at least one year may be eligible for a new six-year period of admission in H-1B status.[8] There is an exception to this general rule in that an alien involved in DOD cooperative research and development projects or coproduction projects may be admitted to the United States in H-1B status for a maximum period of ten years;[9] however, such H-1B petitions may only be approved for a maximum period of five years.[10]

In general, the number of aliens issued H-1B visas or otherwise accorded H-1B status may not exceed 65,000 per fiscal year. Congress established the annual H-1B "cap" when it created the H-1B category in 1990. USCIS approved 64,600 petitions subject to the Fiscal Year 2010 cap and 20,000 petitions under the advanced degree exemption for that fiscal year. During Fiscal Year 2010, USCIS approved 192,990 H-1B petitions submitted by employers on behalf of alien workers. The number of approved petitions exceeds the number of individual H-1B workers sponsored because more than one U.S. employer may file a petition on behalf of an individual H-1B worker.[11]

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[5] See INA 214(g)(4).
[6] See 8 CFR 214.2(h)(9)(iii)(A)(1).
[7] Certain aliens are not subject to the six-year maximum period of admission under the provisions of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Pub. L. No. 106-313.
[8] 8 CFR 214.2(h)(13)(iii)(A).
[9] 8 CFR 214.2(h)(13)(iii)(B).
[10] 8 CFR 214.2(h)(9)(iii)(A)(2).
[11] Of this number, a total of 76,627 petitions (includes petitions subject to the cap, as well as petitions not subject to the cap) were for initial employment. The corresponding number of petitions for continuing employment was 116,363. Furthermore, of the petitions approved in Fiscal Year 2010, approximately 171,754 were both filed and approved during Fiscal Year 2010. The remaining 21,236 were filed prior to Fiscal Year 2010.

H-1B BENEFIT FRAUD COMPLIANCE AND ASSESSMENT (BFCA)

The Government Accountability Office (GAO) Report 02-66 of January 2002, entitled *Immigration Benefit Fraud: Focused Approach Is Needed to Address Problems*, found that the U.S. legal immigration system was being abused and potentially used to threaten national security and public safety and contribute to other illegal activities, such as human and narcotics trafficking. The report recommended that the legacy Immigration and Naturalization Service implement a sound anti-fraud benefit strategy, designate the detection of immigration benefit fraud as a priority initiative, and create a mechanism to collect and report data to identify the volume and scope of fraud that exists. As I will outline today, USCIS has addressed these concerns with a robust anti-fraud program.

In May 2004, USCIS created the Office of Fraud Detection and National Security (FDNS) as the organization responsible for fraud detection and prevention. In 2010, FDNS (which was created as an office within a Directorate) was elevated to a Directorate, raising the profile of this work within USCIS, bringing about operational improvements, and increasing the integration of the FDNS mission into all facets of the agency's work. Today, FDNS remains a vital part of the USCIS effort to ensure the integrity of the nation's immigration benefits processes.

In February 2005, FDNS developed and implemented the Benefit Fraud Assessment (BFA) program as the initial effort to quantify the nature and extent of fraud in selected benefit programs. The initial focus of the BFA program was on those areas where the highest volumes of immigration benefit fraud was thought to exist. In 2009, the BFA program was renamed the Benefit Fraud and Compliance Assessment (BFCA) program to account for technical and other noncompliance issues that did not clearly appear to be fraud-based, but represented potential abuses of the system. USCIS is currently evaluating its BFCA processes and resources to strengthen the underlying methodologies and corresponding operational value.

USCIS conducted a study of the H-1B nonimmigrant worker program involving a review of 246 randomly selected I-129 petitions filed between October 1, 2005, and March 31, 2006. Relying on systematic file reviews, site visits, interviews, overseas document verification requests, and systems checks, the BFCA sought to verify information that was critical to establishing eligibility for the benefit sought. Results of these reviews were then studied to identify the types of fraud and abuse uncovered and then isolate indicators that could be provided to officers who adjudicate H-1B petitions.

Released in September 2008, the H-1B report (or BFCA), revealed a 13.4 percent fraud rate and a 7.3 percent technical violation rate— a total violation rate of 20.7 percent. Violations ranged from document fraud to deliberate misstatements regarding job locations, wages paid, and duties performed. USCIS also discovered that some petitioners shifted the burden of paying American Competitiveness and Workforce Improvement Act fees to beneficiaries in contravention of the intent of the H-1B Visa Reform Act of 2004.

Analysis of the data collected during the BFCA yielded fraud indicators. These indicators are generally used to identify potential fraud risks in applications or petitions.

Relying on these indicators, we now have guidance and processes to ensure that officers recognize the relative risk and that they will take appropriate actions when a particular indicator—or combination of indicators—suggests further inquiry is warranted.

USCIS ACTIONS IN RESPONSE TO THE BFCA

Field Guidance

After determining the fraud and violation rates, isolating fraud indicators, and determining which combinations of indicators represented a level of risk that required FDNS attention, USCIS issued internal guidance to adjudicators in October 2008. This guidance provided the fraud indicators, instructions on the issuance of Requests for Evidence, Notices of Intent to Deny, or Notices of Intent to Revoke when potential violations or non-compliance with the H-1B program were identified, and instructions on the referral of petitions to FDNS when further administrative investigation activities—including site inspections—were warranted.

On January 8, 2010, USCIS issued a memorandum to the Service Center Directors titled "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements." While this memorandum did not change any of the statutory or regulatory requirements for an H-1B petition, it provided clarification to adjudicators on what constitutes a valid employer-employee relationship for the H-1B specialty occupation classification. It also clarified such relationships particularly as they pertain to independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites.

In addition, the memorandum discussed the types of evidence petitioners may provide to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the requested H-1B validity period. H-1B regulations require that a U.S. employer establish that it has an employer-employee relationship with respect to the beneficiary, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee.[12] Adjudicators evaluate whether the petitioner has the "right to control" the beneficiary's employment, such as when, where, and how the beneficiary performs the job. No one factor is decisive, and adjudicators review the totality of the circumstances when making a determination as to whether the employer-employee relationship exists.

USCIS held several stakeholder engagements following implementation of this memorandum. On February 18, 2010, USCIS hosted a collaboration session to discuss implementation of the memo. USCIS also hosted a listening session on March 26, 2010, to provide medical professionals and legal practitioners who represent medical professionals with an opportunity to discuss perceived impacts of the memorandum on the healthcare industry.

In March 2010, USCIS headquarters personnel provided training to the Vermont Service Center and the California Service Center on the updated guidance. Furthermore, in February 2010 my Directorate instituted 100 percent supervisory review of all Requests

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[12] See 8 CFR 214.2(h)(4)(ii).

for Evidence (RFEs) and Notices of Intent to Deny (NOIDs) based on the contents of the memorandum and, in March 2010, 100 percent SCOPS headquarters review of all RFEs, NOIDs, and denials on healthcare staffing petitions and petitions where the alien is the sole proprietor of the business, in response to concerns voiced during the stakeholder engagements. SCOPS ended these 100 percent reviews in August 2010 after determining that adjudicators were properly applying the guidance contained in the memorandum.

Combined, these guidance documents provide USCIS officers with tools that are helpful in defining and identifying eligibility requirements, as well as in detecting and investigating H-1B fraud and providing clear instructions on how to handle petitions when fraud is suspected.

Administrative Site Visit and Verification Program (ASVVP)

During the course of the BFCA, and consistent with an earlier assessment of the religious worker program, USCIS recognized the value of site visits as a verification tool. Building on this, in July 2009 USCIS implemented an Administrative Site Visit and Verification Program (ASVVP). Currently, FDNS conducts unannounced post-adjudication site visits to verify information contained in randomly-selected H-1B visa petitions. Using BFCA findings and indicators as a guide, USCIS developed a standard series of questions that inspectors ask when conducting a site visit. Possible actions taken when inspectors are unable to verify or validate information provided include further review by an adjudicator and potential issuance of a Notice of Intent to Revoke, or referral to an FDNS field office for further investigation. USCIS does not deny or revoke a petition solely based on information obtained during an ASVVP site visit without first providing petitioners and their representatives of record an opportunity to review and address the information.

In Fiscal Year 2010, USCIS conducted 14,433 H-1B ASVVP site inspections. Of those petitions subject to an ASVVP inspection, 14 percent were “not verified,” resulting in referrals to adjudicators or FDNS for further inquiries. Of those petitions that were “not verified,” 11 percent were reviewed by adjudicators and reaffirmed with an approval, and 46 percent were referred to FDNS for further fraud inquiries or revoked by adjudicators. The remaining “not verified” cases are still pending review by adjudicators or FDNS. As compared to the nearly 21 percent fraud and noncompliance rate in 2008, the 14 percent “not verified” rate suggests a reduced level of fraud in the H-1B program. As it continues to analyze ASVVP results and resolve those cases that have not been reaffirmed or revoked, USCIS expects to determine a current fraud rate in the program.

VALIDATION INSTRUMENT FOR BUSINESS ENTERPRISES (VIBE)

Background of VIBE

In the spring of 2008, SCOPS formulated a concept initiative, “Validation Instrument for Business Enterprises” (VIBE). VIBE is an adjudication tool for most employment-based nonimmigrant and immigrant classifications, including the H-1B classification. It uses commercially available data from an independent information provider to validate basic information about companies or organizations petitioning to employ alien workers.

USCIS adjudicators review all information received through VIBE along with the evidence submitted by the petitioner in order to verify the petitioner's qualifications. VIBE creates a standardized means of validating whether a petitioning company or organization is legitimate and financially viable.

SCOPS formed a beta-testing group comprised of adjudicators from all four service centers in June 2010 to begin testing VIBE with actual petitions. Beta-testing of VIBE was expanded to all adjudicators working the affected employment-based petitions in January and February 2011. SCOPS headquarters personnel traveled to each service center to assist with this training. Each of the service centers then held further training and roundtables in the following weeks. I am proud to announce that beta-testing has nearly concluded.

CONCLUSION

USCIS has taken a number of steps to guarantee the integrity of the H-1B program while ensuring U.S. employers have access to the specialized temporary workforce needed to compete in the global market.

On behalf of USCIS Director Alejandro Mayorkas and all of our colleagues at USCIS, thank you for your continued support of the H-1B program and for giving us the tools to combat H-1B fraud. Instrumental to the expansion of our anti-fraud efforts, particularly as they relate to H and L nonimmigrant visa fraud, has been the availability of funds allocated to DHS resulting from the Fraud Detection and Prevention Fee. For USCIS, these funds have enhanced fraud detection capabilities by facilitating the hiring and deployment of 93 FDNS Immigration Officers and Supervisory Immigration Officers to USCIS Headquarters and to the field to focus on immigration benefit fraud.

Mr. Chairman and Members of the Committee, thank you again for the opportunity to provide information on the status of our program. I look forward to answering your questions.