Statement of Bo Cooper

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United States House of Representatives Committee on the Judiciary

Subcommittee on Immigration Policy and Enforcement

"Safeguarding the Integrity of the Immigration Benefits Adjudication Process"

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Thank you, Chairman Gallegly, Ranking Member Lofgren, and distinguished members of the subcommittee. I am grateful for the opportunity to join you at this hearing. My name is Bo Cooper. I chair the Washington, D.C. office of Berry Appleman & Leiden, a national immigration law firm. I served for over a decade as an attorney for the former Immigration and Naturalization Service, and as the agency's General Counsel from 1999 to 2003. I have also taught immigration at law schools in Michigan and here in Washington D.C., including courses on immigration and national security. I work closely with Compete America, a coalition of corporations, universities, research institutions, and trade associations that advocates for reform of America's immigration policies surrounding high-skilled foreign professionals.

I have therefore had the opportunity to be involved in the immigration benefits adjudications process that we are discussing today from a full range of perspectives: as a government official charged with both services and enforcement responsibilities, including national security and fraud detection; as a practitioner in the midst of the flow of the process; as an academic; and as a policy advocate.

I would like to focus my testimony today on the January 2012 report of the Department of Homeland Security's Office of Inspector General, entitled "The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Service Officers."

Inspectors General play a very important role in the continual process of seeking enhancements to the efficiency, effectiveness, and integrity of the executive agencies. The focus of this report – fraud detection and the protection of national security in the immigration benefits process – is a critical one, and the report makes a number of important and positive recommendations. It makes very good sense, for example, for USCIS to promote more effective collaboration and cross training between the Immigration Service Officers (ISOs) who adjudicate benefits requests and the Immigration Officers (IOs) who are charged with helping the agency to inhibit and detect fraud within those benefit requests. Likewise, strengthening the mechanisms for temporary "details" of personnel between these units is an excellent means of cross fertilization, improved skills, and an enhanced understanding of complementary agency missions. The OIG's recommendation to strengthen the agency's ability to identify aliases is a critical step toward ensuring that USCIS can carry out essential background checks and thwart fraudulent efforts to gain immigration benefits improperly. Continued development of the USCIS revised performance measurement system can help the agency come closer to its goal of fostering high-quality decisions – decisions that, as the Director puts it, "get to right." These recommendations, properly carried out, could generate significant improvements to the immigration benefits adjudication process.

Two particular recommendations and conclusions in the report, however, lack foundation, run contrary to what actually happens in the benefits adjudications process, and would be deeply problematic if they were to gain acceptance and inform policy choices. The first is the report's unsupportable implication that "a culture of 'get to yes'" exists at USCIS. The second is the OIG's startling recommendation that a

higher standard of proof should be imposed on USCIS benefits adjudications. I would like to focus my testimony on these matters.

One point that must be made clear at the outset of this discussion is that the report's conclusions rest in key respects on a deficient base of information. The report was based on a modest number of interviews with USCIS personnel, and upon a limited number of responses to an online survey. That method of information gathering might be a useful way to gain an introductory understanding of perceptions and viewpoints among a sampling of the USCIS workforce, and it might be useful in identifying issues or ideas for possible improvements. It is not, however, a basis for sound conclusions about adjudication patterns at the agency, much less about solutions.

The OIG interviewed 147 managers and staff at USCIS headquarters, the four services centers and the National Benefits Center, and six field offices. The OIG also sent an online survey to a random selection of ISOs at the twenty-six USCIS district offices, and received 256 responses. For perspective, USCIS has a total workforce of over 18,000 employees and contractors. Several points stand out as illustrations of the limits on what this sort of information pool can help demonstrate.

First, as valuable as interviews may be as anecdotal indications of possible patterns that warrant closer analysis, they are only that, and must still be tested against the data. Second, gathering a response through an online survey nets data from sources that are self-selected. Again, this does not at all make the responses valueless; it does, however, limit tremendously the extent to which those responses alone can be considered a basis for broad conclusions and recommendations. Finally, the report does not analyze even the anecdotal and self-selected responses by reference to what kinds of benefits are being adjudicated by the respondents. For example, the online survey was sent to respondents at the USCIS field offices. Many benefit types – such as the programs designed to enable America's employers to engage highly skilled professionals – are not adjudicated in those offices at all, and instead are generally adjudicated by personnel at USCIS service centers. The responses to those surveys would therefore have nearly no bearing at all on the processes for adjudicating H-1B petitions for professionals in specialty occupations; L-1 petitions for managers, executives and specialists being transferred within multinational corporations; petitions seeking immigrant visas for aliens of "extraordinary ability" or other professionals, or the other classifications that are so critical to America's employers and to their ability to innovate and create jobs in this country.

If the information that came from the interviews and online survey responses was to be useful, it was as a basis for targeting further information gathering and analysis. What that initial information called out for was data. Do the actual adjudications trends at USCIS bear out the concerns expressed by some of the respondents about the benefits adjudications process?

Instead, on the basis of what should properly be considered only preliminary feedback from a small sampling of agency personnel, the report draws certain very serious conclusions. For example, the report includes the following sampling of OIG conclusions and apparent endorsements of statements from among its interviews:

- "[A]culture of 'get to yes' continues to exist at USCIS."

- "Existing manual policy establishes a bias against RFEs." ("RFEs" are requests for additional evidence, beyond what is submitted in the initial petition, that USCIS adjudicators can make to petitioners as part of the adjudications process.)
- USCIS's "current policy ... establishes the avoidance of RFEs as a policy preference."
- "USCIS leans too heavily toward limiting RFEs and increasing approvals."
- The "lack of clarity [in USCIS's RFE policy], coupled with continued pressure to process applications and petitions, decreases the chance that RFEs will be issued. Suppressing RFE issuance is not the best response to the problem of inconsistent or improper RFEs."
- "USCIS strives to satisfy benefit requesters in a way that could affect national security and fraud detection priorities."

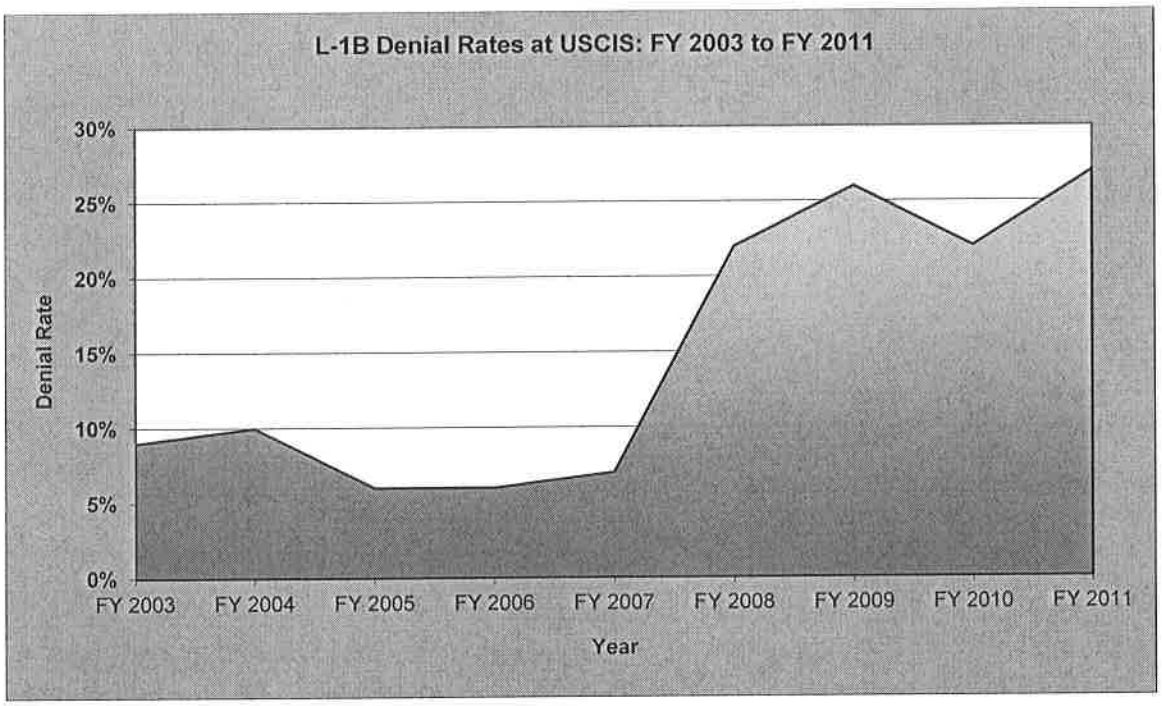
A reasonable reader coming to this issue fresh would read these sorts statements with great alarm. They give the impression that the immigration agency is tying one arm behind its own back, and willfully declining to take steps to avoid giving immigration benefits to people who are undeserving and even dangerous.

Since the OIG report was issued early last month, however, official data has become available from USCIS. This data, analyzed in a report from the National Foundation for American Policy (NFAP), refutes concerns that USCIS may be institutionally biased toward unjustified approvals and that the agency observes policies that would suppress RFE issuance. The data tells the opposite story. Particularly with respect to the key nonimmigrant categories for foreign professionals, denial rates and RFE rates have risen very sharply in recent years.

The most startling example appears in the L-1 program. The L-1 program is used by multinational corporations to transfer their managers, executives, and specialists into the United States. These visas are an essential component of a huge range of productive economic activity in this country. L-1 visas are critical, for example, to attracting the foreign investment that has been so important to the creation of jobs for U.S. workers, and for which the competition among the states is so fierce. L-1 visas are critical when U.S. companies acquire companies based overseas, and need to have the acquired company's specialists come into the United States to integrate expertise and processes. L-1 visas are critical to companies who need to bring specialists from their overseas affiliates into their research centers and operations in the United States. Without predictable, reliable access to these visas, employers find themselves having to move jobs and projects to other countries.

Instead, the data in the L-1B program, for employees with "specialized knowledge," shows a steep rise in denials and requests for evidence beginning in 2008. From 2005 to 2007, the denial rate for L-1B petitions ranged from 6 to 7 percent. In 2008, the denial rate more than tripled, to 22 percent. It has never sunk below that point since, and was 27 percent in 2011 – nearly quadruple the pre-2008 rate.

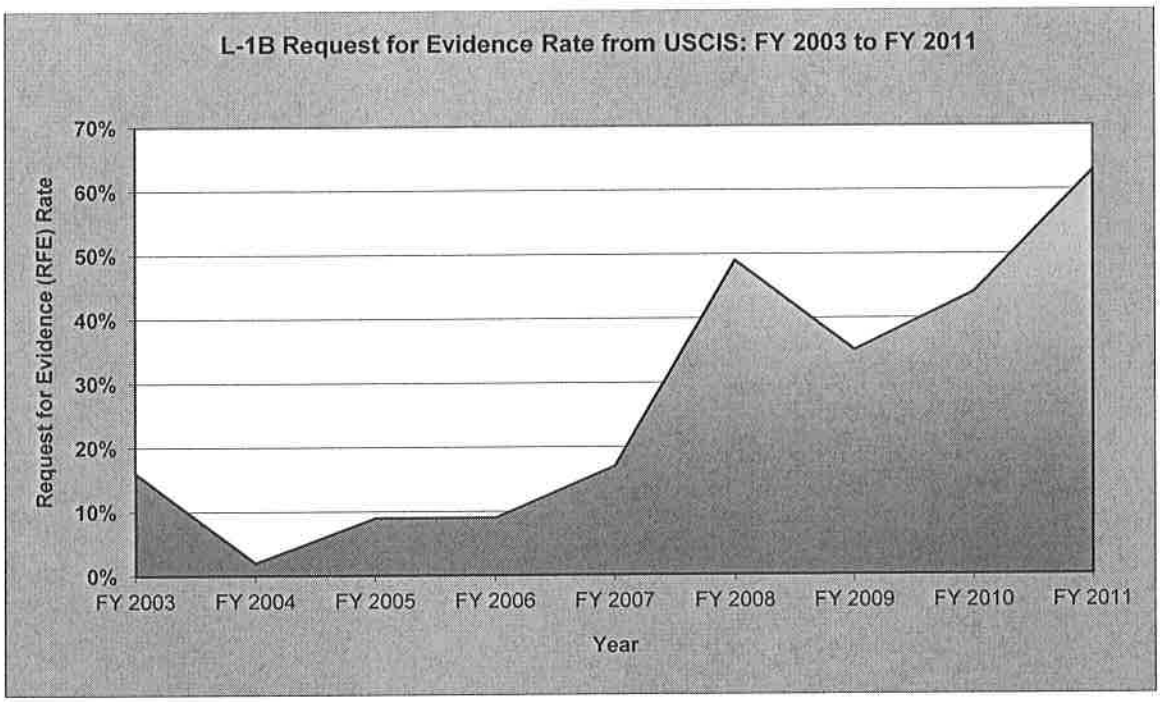
Figure 1



Source: U.S. Citizenship and Immigration Services; National Foundation for American Policy; Data run for all nationalities of Citizenship and Immigration Services Centralized Operational Repository (CISCOR). Note: Data include both initial applications and renewals and are calculated by USCIS by measuring approvals and denials in a category in a year. USCIS labels its data fiscal year but CISCOR states the calendar year is used for data on I-129 petitions for L-1, H-1B, and O-1 petitions.

The RFE rate change is even starker. In 2005 and 2006, RFEs were issued in 9 percent of the cases. In 2007, it began to move upward, to 17 percent. Then in 2008, the year of the upward burst in the L-1B denial rate, the RFE rate also rose precipitously – almost tripling, to a rate of 49 percent. The RFE rate stayed between one-third and one-half in 2009 and 2010, and last year in 2011 it soared to 63 percent. This is an arresting statistic. Despite the fact that employers, because of the heightened RFE and denial rates, tended generally to file L-1B petitions with an extreme extra level of detail and support, *nearly two-thirds* of the petitions received by the agency were generating requests for more information.

Figure 2



Source: U.S. Citizenship and Immigration Services; National Foundation for American Policy; Data run of Citizenship and Immigration Services Centralized Operational Repository (CISCOR). Note: Data include both initial applications and renewals. USCIS labels its data fiscal year but CISCOR states the calendar year is used for data on I-129 petitions for L-1, H-1B, and O-1 petitions.

This soaring increase in the rate of RFEs, and the steep rise in denials during this same period, came during a period when the number of L-1B petitions submitted to USCIS was dropping, not rising. The number of L-1B petitions received by USCIS decreased in every year since 2007. That year, according to the USCIS data, it received 32,014 L-1B petitions. That number dropped to 26,442 in 2008; to 21,531 in 2009; to 20,680 in 2010; and to 19,599 – less than two-thirds of the 2007 caseload – by 2011. Nor can the precipitous increase in the L-1B denial and RFE rates be attributed to any regulatory or other announced policy change affecting L-1B eligibility. In my twenty years of immigration experience, it has generally been my observation that where loopholes or gaps appeared in a program that would make it more vulnerable to fraudulent filings, there tended to be steep increases in the number of filings, and spikes in denial rates could be tied to these factors. The filing numbers instead show L-1B filings to be at a very modest and decreasing level during the years at issue.

The L-1B program, where RFE and denial rates have each risen nearly 400 percent in approximately the last five years, is the most vivid illustration of the mismatch between the data and the concerns expressed in the report over an agency bias in favor of approvals and against RFEs. That mismatch, however, is demonstrated in other areas as well. According the USCIS statistics analyzed by NFAP, in the L-1A program, for managers and executives being transferred within multinational corporations, the RFE rate rose from 10 percent in 2005 to 51 percent in 2011. Denial rates, while not as high as for L-1Bs, rose 75 percent over five years, from 8 percent in 2007 to 14 percent in 2011.

In the H-1B program for professionals in "specialty occupations," the denial rate increased from 11 percent in 2007 to 29 percent in 2009. They have subsided somewhat since, but have nevertheless remained higher than before, at 21 and 17 percent respectively in 2010 and 2011. In 2011, over a quarter of all H-1B filings generated an RFE, after spiking at 35 percent in 2009.

What is crystal clear is that the actual adjudications data contradicts the perception reported in the OIG report that there is a "get to yes" culture within USCIS. The data undermines the reported perception that "USCIS leans too heavily toward limiting RFEs and increasing approvals." It is difficult to reconcile how, without having addressed this data, the OIG report would reach a conclusion that USCIS's "response to the problem of inconsistent or improper RFEs" – which is a real problem that the agency is grappling with – was "suppressing RFE issuance."

Seen in the light of the data, there is no basis for the concern expressed in the OIG report that USCIS has an institutional bias in favor of approvals or against RFEs. The data shows the opposite trend. USCIS indicated in its response to the OIG report that it is reviewing its policy governing requests for evidence and aims to issue new RFE guidance this year. It is clear from the statistics that adjustment of USCIS's RFE patterns is needed. The new policy should reflect the needs of today's business environment and the innovation economy; it should be monitored carefully once put into practice; and it should be based not on the assumptions of pro-approval, anti-RFE agency dynamics expressed in the report, but on the goal to equip USCIS adjudicators efficiently to make the best possible decisions based on the law and the facts.

The report's recommendation that the standard of proof should be raised across benefits adjudications, also based on faulty assumptions about adjudication trends, does not seem supportable and would be ill-advised. While national security concerns must be paramount, and fraud detection is critical to the immigration benefits program, protecting those imperatives will not be achieved by introducing a new, complex legal standard for immigration benefits. Those who seek to harm or defraud the U.S. typically submit clean, eligible applications, and adjudicators rely on information sharing with law enforcement agencies and other fraud-detection tools to deny those cases and protect the country. The agency must free up the ability of adjudicators to utilize that information and those tools effectively, and directing them to spend more time on complex eligibility standards runs contrary to that goal. USCIS would be much better advised to devise ways for its adjudicators to spend more time generating higher quality adjudications, and on more effective interactions with agency and department counterparts, as suggested in earlier recommendations in the OIG report.

My experience, having reviewed the files in many national security cases, is that the issue is generally not the substantive eligibility of the person seeking the benefits, but whether the immigration authorities have the best access possible to information that bears on whether the person may pose a security risk. Likewise, effective fraud detection comes from the kinds of information-sharing, trendspotting, and coordination efforts that USCIS and the other immigration agencies have been working toward in recent years, including a number of the improvements recommended in this report. Focusing adjudicators on exacting even more evidence having to do with such eligibility factors as specialized knowledge, extraordinary ability, and so on would simply misdirect agency resources better

spent on core anti-fraud and national security efforts. It would simply impose even greater counterproductive obstacles on employers seeking to bring on professionals who are well-qualified, whose talents are essential to complement the available supply of American professionals in key fields, and whose contributions would help drive innovation in this country.