SAFEGUARDING THE INTEGRITY OF THE IMMIGRATION BENEFITS ADJUDICATION PROCESS

HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION POLICY AND ENFORCEMENT

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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FEBRUARY 15, 2012

SAFEGUARDING THE INTEGRITY OF THE IMMIGRATION BENEFITS ADJUDICATION PROCESS

WEDNESDAY, FEBRUARY 15, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION
POLICY AND ENFORCEMENT,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:40 p.m., in room 2141, Rayburn Office Building, the Honorable Elton Gallegly (Chairman of the Subcommittee) presiding.

Present: Representatives Gallegly, Smith, Lofgren, Gowdy, Waters, Gohmert, Jackson Lee, and King.

Staff present: (Majority) Andrea Loving, Counsel; Marian White, Clerk; and (Minority) David Shahoulian, Subcommittee Chief Counsel.

Mr. GALLEGLY. I call the Subcommittee to order.

I welcome all of you here today. Congress designs our immigration policy to benefit the American people. When immigrants receive visas or citizenship that they are not entitled to, Americans are worse off whether it is workers, taxpayers or simply citizens. If there is a credible allegation that this is occurring, we have a duty to determine the truth.

Such allegations were made by a January 2012 Department of Homeland Security Office of Inspector General report. The report was entitled "The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Service Officers."

The inspector general found that U.S. Citizenship and Immigration Services adjudicators are not receiving adequate training to uncover fraud and immigration benefit applications. The IG found that USCIS performance measures favor quantity over quality. This encourages the rubberstamping of applications.

The IG found that the adjudicators feel inappropriately pressured by supervisors and USCIS leadership to approve petitions that don't meet the standards for approval. USCIS leadership seems to favor "get to yes" instead of "get it right."

Is it important that the adjudicators make their decision in a timely manner? Yes. But it is also important that they have adequate time and support to ensure that the individuals who receive immigration benefits, such as a temporary visa, permanent residency or citizenship are in fact eligible for those benefits.

Immigration benefit denial rates obtained from USCIS show a rise in denials in severalcertain categories between the years of 2008 and 2010. Some will argue that this shows that there is no improper pressure on adjudicators. However, this rise in denials may simply be a result of adjudicators following the law, and the increased pressure by USCIS leadership to approve applications may be an attempt to reverse this recent trend.

I know that many in this business community are concerned that their petitions for alien workers are being denied and they are being required to answer excessive requests for additional evidence, known as RFEs.

But why did denial and RFE rates go up? It very well could be because of statutory changes that were implemented and major decisions that were issued.

For instance, the changes made by the L-1 Visa Reform Act of 2004 to prevent contracting-out of alien workers were not implemented by the agency wide level until 2008. As one would expect, there was a corresponding rise in USCIS denial rates in fiscal year 2008.

And the 2010 "Neufeld Memo" on H-1B visas issued by the USCIS Associate Director for Service Center Operations provided new guidance on what should be considered by employer-employee relationship between the petitioning company and the beneficiary. After that, the Government Accounting Office noted companies' petitions were no longer being approved at previous rates.

And the GST decision was issued by the USCIS Administrative Appeals Office in July 2008. It provided a new framework for adjudicators when determining whether or not a petition meets certain L-1B visa requirements.

Both those who support and oppose this AAO ruling can agree that it has had the natural result of increasing subsequent denial rates in the L-1B category.

But whatever may be the cause of the denial rates in a particular visa category for a particular year, USCIS' own data shows that the overall denial rate for nonimmigrant worker visas has fallen over 30 percent since President Obama took office in 2009, and that the approval rate for all kinds of immigrant benefits is at an all-time high of 91 percent.

There is never a legitimate reason to pressure adjudicators to deny petitions where the beneficiary is eligible for the benefit and there is never a legitimate reason to pressure adjudicators to approve petitions that do not meet the statutory requirements.

But according to the inspector general, some USCIS adjudicators feel such pressure. That is why we are here today. We will receive testimony from the DHS inspector general, who will explain his January 2012 report findings.

We will receive testimony from the president of the National Citizen and Immigration Services Council, which represents USCIS adjudicators.

He will discuss how performance standards that emphasize quantity over quality imperil the integrity of the adjudicators' process and we will hear from the USCIS director, Director Ali Mayorkas, who will help us determine whether or not there is a "get to yes" mentality at the USCIS.

And with that, I would yield to my good friend, the Ranking Member, from my home state, California, the gentlelady, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

There is an old parable about blind men and an elephant. One blind man feels the elephant's leg, thinks it is a column. Another feels its tail, thinks it is a rope. Another feels the trunk and says it is a tree branch. Having felt only one part of the elephant, each blind man is in total disagreement with the other about what they are touching.

And in some ways, although I have great respect for the inspector general and the mission of the IG to prevent and detect waste, fraud and abuse in government operations, that is kind of what we ended up with in this report.

The IG system is really important. I am a big fan of the IG system. It is essential to get facts for Members of Congress so we can be guided in our policy making for an effective and efficient government.

But a report that reminds me of the blind men with the elephant is not what we need and I am afraid it is what we got in this case.

When I first received the OIG report, I did what I always do. I turned to the methodology page because a report is meaningless if its methodology is not sound. Are its surveys fairly worded and statistically valid? Does it include objective analysis of hard data? On these questions, I believe the report comes up short. The report does not review available statistical data. The OIG did not, apparently, seek input from outside stakeholders. It does not look like they talked to other government components, critical to an understanding of USCIS, such as the Ombudsman's Office.

Instead, the report is based almost entirely on 147 interviews and 256 self-selected responses to an online survey, representing just over 2 percent of the 18,000 people who work at the USCIS.

In general, reports can be useful if the questions are useful. But the responses have to be not self-selected for bias, and what we have here, I am afraid, is a self-selected group of people who have a complaint. Their complaints may be valid but they are certainly not representative.

For example, the report finds that there may be undue pressure on adjudicators based on the responses for the following question. Here is the question in the report: Have you personally ever been asked by management or a supervisor to ignore established policy or pressured to approve applications that should have been denied based on fraud or ineligibility concerns?

Importantly, 75 percent of those who chose to respond said no but 63 individuals said yes. That is out of 18,000 people who work for the USCIS. But that doesn't tell us very much about this response.

We don't know when they felt this pressure. Was it 6 months ago? Was it during the Reagan administration? We have no idea, from this report. And we don't know whether it happened once or whether it was repeatedly, and we don't know what the pressure actually was.

Was it a simple request to have the adjudicator look again at the facts of the case or something improper? There is no way to tell from the report.

Yet, based on this slim reed, the report paints a picture of an agency in which almost every facet is tilted toward the approval of applications and petitions. Based on the interviews and survey responses, the report endorses the proposition that USCIS suffers from a culture of "getting to yes."

Now, this would be concerning if it weren't so surprising because for the last several years I have repeatedly heard from interest groups, constituencies, the Chamber of Commerce, the business community, that the agency is actually suffering from the reverse problem, that they are saying no to cases that should be approved.

American businesses in my district and elsewhere say that the agency has become more stringent, that the increase in denials and delays are unreasonable, that petitions that used to be approved quickly are now denied or slowed by lengthy requests for evidence. And they have shared some cases indicating that adjudicators may have altered long established requirements or tightened standards without notice to stakeholders or the Congress.

They share examples of requests for evidence that really boggle the mind, such as asking, and I saw this, a well-established Fortune 500 company that employs thousands of people to provide leases and floor plans and fire escape routes to prove that they actually exist.

When I first saw the report I asked my staff to request and review data for all the adjudications in the last decade, and I understand that upon receiving the report the majority made the same request.

This data which, unbelievably, was not analyzed by the OIG, shows a sizeable increase in denial rates for key business visa categories and appears to support what I have been hearing from businesses for the last several years. In some categories, the denial and RFE rates have increased by 300 to 500 percent during the Obama administration.

Now, I can't tell and I am not claiming whether—what the right approval rate should be. You know, maybe it is too low now. Maybe it is too high now. You can't tell from the report whether this is higher quality or adheres to law or whether it is more mistakes and, certainly, the OIG report gives us no guidance on that.

I would take issue with some of the report's recommendations as well. To end an informal appeals process and "special review of denied cases" is such a mistake. I can't believe the OIG would have made this recommendation if they had engaged with stakeholders and reviewed some of the actual cases, and let me just give you a couple of examples.

I mean, perhaps with one or two exceptions, virtually every Member of Congress has contacted the USCIS to ask for a review of cases that were erroneously denied and, certainly, I am among them.

For example, I had a recent case in which the USCIS denied an employment-based petition because the adjudicator determined that the company only had $15,000 in annual revenue and therefore couldn't possibly pay the worker.

It turned out, however, that the adjudicator had failed to note that the figures were listed in thousands. It was actually $15 million in revenue. So the OIG's recommendation for a formal appeal process would have required a 2-year process just to point out that the person in the bureaucracy misread the file. Truly, that couldn't be a wise response.

I had another case where an H-1B worker with an approved employment-based green card petition had his application for adjustment denied because he did not provide evidence establishing eligibility for the Cuban Adjustment Act.

Well, the applicant wasn't Cuban and he wasn't applying under the Cuban Adjustment Act. He was applying under a different provision of the law. Under the proposal, this individual with an approved petition would have had to go back to his country in Europe for 2 years because the USCIS employee screwed up. How could that be a reasonable response to somebody making a mistake in the bureaucracy?

I think, finally, in light of the Committee Chairman's op-ed in the Politico today entitled, "Obama's Lax Visa Policy Imperils U.S.", I do believe one part of this report needs to be emphasized and here is a direct quote from the report: No ISOs—that is immigration service officers—presented us with cases where benefits were granted to those who pose terrorist or national security threats to the United States. Even those employees who criticize management express confidence that USCIS would never compromise national security on a given case.

I yield back, Mr. Chairman.

Mr. GALLEGLY. The gentleman from Texas, the Chairman of the full Committee, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

The vast majority of those who apply for immigration benefits have no ill intent toward the U.S. They come here for legitimate work or travel. But American immigration benefits, whether they are in the form of H-1B visas, permanent residence for relatives of U.S. citizens, employment authorization documents or naturalization are of great value around the world.

For that reason, there are foreign nationals who will do and say whatever they think will get their benefits approved—forge documents, get bogus employers to sponsor them, and even deny their terrorist ties. So we must have policies in place that help ensure we will not admit those who intend to cause us harm or make a mockery of our immigration system. We need immigration policy designed to protect American workers and taxpayers.

Officers at U.S. Citizenship and Immigration Services are the first line of defense against those trying to come into the United States by fraudulent means.

In 2002, the then General Accounting Office found that immigration benefit fraud was "pervasive," "on the increase" and "rampant" at the Immigration and Naturalization Service.

And in 2006, the now Government Accountability Office again found that, "although the full extent of benefit fraud is not known, available evidence suggests that it is an ongoing and serious problem."

GAO reported that the immigration officers interviewed felt management didn't emphasize fraud control, but instead focused on "production goals designed to reduce the backlog of applications almost exclusively."

Also in 2006, the Department of Homeland Security Office of Inspector General reported on a lack of incentives for USCIS personnel to combat fraud, as opposed to simply rubberstamping applications to get gold stars for improved productivity.

The allegations of rubberstamping continued and whistleblowers began providing details to congressional investigators.

In October 2010, Senator Chuck Grassley asked the DHS Inspector General to again look into whether, "senior U.S. Citizenship and Immigration Service leaders are putting pressure on employees to approve more visa applications even if the applications might be fraudulent or the applicant is ineligible."

Last month, the Inspector General released a report detailing findings based on Senator Grassley's request.

Specifically, the IG reported that the mindset of quantity over quality has not ended at USCIS.

In fact, according to the report, nearly 25 percent of immigration service officers that responded to the IG survey "have been pressured to approve questionable applications."

This mindset is called "get to yes" regardless of the consequences. Where does it come from, rogue supervisors or from the very top of USCIS?

Such pressure undermines the rule of law, the integrity of U.S. immigration policy and national security. This rubberstamp process leaves an ink trail of fraud and abuse.

For instance, in 2005, the Office of Fraud Detection and National Security, FDNS at USCIS, reported a 33 percent fraud rate in the religious worker visa program. Following that disturbing find, in 2008, USCIS issued a rule designed to strengthen the requirements for religious worker visa processing. The rule included a site visit requirement and last December FDNS issued a follow-up report noting a fraud rate of less than 6 percent in the program.

And in 2008, FDNS found a 21 percent fraud rate in H-1B cases.* The FDNS report triggered site visits to H-1B employers which resulted in nearly 1,200 adverse actions by USCIS and the prosecution of 27 people.

As long as FDNS is allowed to operate in an unhindered fashion it is an asset to USCIS and to all Americans. USCIS processes more than 6 million immigration benefits applications or petitions each year. That is no small job.

And security should be the number-one priority in that process. At the same time, legitimate petitions should be approved in a timely manner.

I look forward to the witnesses' testimony so we can be assured that security is in fact the top priority at USCIS.

Thank you, Mr. Chairman. I want to say also that I am going to need to go to another Committee hearing momentarily but I will return, I hope, in a few minutes for questions.

Thank you. I yield back.

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*The rate includes fraud and technical violations.

Mr. GALLEGLY. I thank the gentleman.

We have a very distinguished panel of witnesses on our first panel today and I would just ask that you help us all by trying to keep your opening statement limited to the 5 minutes. But your statements will be made a part of our record of the hearing in its entirety.

And so with that, let me introduce our two distinguished witnesses. First is Director Alejandro Mayorkas. Director Mayorkas has served as the director of the U.S. Citizenship and Immigration Services since 2009.

Prior to his appointment, Director Mayorkas was a partner in the law firm of O'Melveny and Myers and before he served as the U.S. Attorney for the Central District of California. Director Mayorkas is a graduate of the University of California at Berkeley and holds a J.D. from Loyola Law School.

Our second witness is Mr. Charles Edwards. Mr. Edwards is Acting Inspector General of the U.S. Department of Homeland Security. Prior to this position, Mr. Edwards served as a deputy general of the Department of Homeland Security and held leadership positions at several Federal agencies.

Mr. Edwards is a graduate of Loyola College in Maryland and has a double Master's degree in electrical engineering and computer engineering.

So with that, we will open the hearing to Director Mayorkas. Welcome.

TESTIMONY OF THE HONORABLE ALEJANDRO MAYORKAS, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES

Mr. MAYORKAS. Thank you, Chairman.

Chairman Gallegly, Ranking Member Lofgren, Members of the Subcommittee, thank you for the opportunity to testify before you about the efforts of U.S. Citizenship and Immigration Services to protect the integrity of our Nation's immigration system and to help safeguard our Nation's security.

I appreciate the Committee's interest in learning about our continued prioritization of the agency's efforts, which are unprecedented in their scope and effect.

I want to take this opportunity to thank the men and women of USCIS whose dedication to the agency's mission is unwavering and whose hard work makes our vital mission a reality. Together, as an agency, we are committed to administering our Nation's immigration laws efficiently and with fairness, honesty and integrity.

I also want to thank the U.S. Department of Homeland Security's Office of Inspector General for its role in reviewing our efforts. The OIG's independent review of our agency's operations assists us in our pursuit to improve each and every day including in the priority areas of combating fraud and strengthening national security.

I came to this country as a refugee, escaping the communist takeover of Cuba. My father and mother instilled in me a profound and abiding appreciation of and respect for the rights and responsibilities that define my United States citizenship and the rule of law that is its foundation.

It was the values my parents instilled in me that led me to become an Assistant United States Attorney specializing in the inves-

tigation and prosecution of criminal fraud. For my nearly 12 years as a Federal prosecutor, culminating in my service as a United States Attorney for the Central District of California, I learned what it means to enforce the law and to do so in furtherance of our national security and public safety.

Historically, our agency has been challenged by a culture that focused primarily upon making adjudication decisions quickly, resulting in a significant and ongoing tension between the quality of our adjudications and the speed with which they are made.

This tension in an agency that processes approximately 7 million applications and petitions annually has existed for many years.

When I came to the agency in August 2009, its first of ten top priorities was to achieve production goals. Early in my tenure, I determined there was an opportunity for organizational changes to both the culture and structure of the agency in several areas, including our anti-fraud and national security programs.

I also determined that we must enhance the emphasis on quality in our adjudicative approach. This means that immigration benefit decisions are informed, adhere to the law and the facts, are made in a timely manner, and further the integrity and goals of the immigration system.

Within 5 months of my arrival at USCIS, I realigned our agency's organizational structure. I created the Fraud Detection and National Security directorate, an elevation and expansion from its previous status as an office within a directorate. The resulting prioritization of these core responsibilities has enabled us to achieve unprecedented results. I also created an Office of Performance and Quality to ensure that our agency prioritizes quality throughout its adjudicative practices and mission support processes.

As the leader of an agency that administers the immigration laws of the United States, as a former Federal prosecutor who has devoted the greatest part of his career to law enforcement, and as a refugee whose blessing of becoming a United States citizen depended on the integrity of our system, it is of paramount importance to me that no USCIS employee—whether because of any perceived pressure to process an immigration benefit quickly or for any other reason—ever adjudicates a case other than in accordance with what the law and the facts warrant.

This is an ethic I have articulated and reinforced since I first became the Director of USCIS.

Mr. Chairman, Ranking Member Lofgren and Members of the Subcommittee, thank you again for the opportunity to share with you the great work we in U.S. Citizenship and Immigration Services have done and continue to do to safeguard our national security and combat fraud.

This work allows us to remain the welcoming Nation of immigrants we are so proud to be.

And finally, I want to again express my deep thanks and appreciation to the men and women of USCIS who dedicate each and every day to our noble mission and whose hard work and commitment to our principles have made our achievements possible.

Thank you.

[The prepared statement of Mr. Mayorkas follows:]

U.S. Citizenship and Immigration Services

WRITTEN TESTIMONY

of

ALEJANDRO N. MAYORKAS
DIRECTOR
U.S. CITIZENSHIP AND IMMIGRATION SERVICES

FOR A HEARING ON

SAFEGUARDING THE INTEGRITY OF THE IMMIGRATION BENEFITS ADJUDICATION PROCESS

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

February 15, 2012
2:00 p.m.
2141 Rayburn House Office Building
Washington, DC

Chairman Gallegly, Ranking Member Lofgren, Members of the Subcommittee,

Thank you for the opportunity to testify before you about the efforts of U.S. Citizenship and Immigration Services (USCIS) to protect the integrity of our nation's immigration system and to help safeguard our nation's security. I appreciate this Committee's interest in learning about our continued prioritization of the agency's efforts, which are unprecedented in their scope and effect.

I want to take the opportunity to thank the men and women of USCIS whose dedication to the agency's mission is unwavering and whose hard work makes our vital mission a reality. Together as an agency we are committed to administering our nation's immigration laws efficiently and with fairness, honesty, and integrity.

I also want to thank the U.S. Department of Homeland Security's Office of Inspector General (OIG) for its role in reviewing our efforts. The OIG's independent review of our agency's operations assists us in our pursuit to improve each and every day, including in the priority areas of combating fraud and strengthening national security. In its report, *The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers*, the OIG made valuable recommendations to improve our efforts to detect fraud in immigration benefit adjudications. We already have begun to implement many of the recommendations.

As soon as I took the oath of office as the Director of USCIS in August 2009, I began to deliver on my promise to the Senate Judiciary Committee and promptly commenced a top-to-bottom review of the agency. I did so through the perspective of my previous federal service.

From my current and former positions in the federal government, I know what can be accomplished when the dedicated men and women of a federal agency are motivated and supported to excel and deliver their very best in the service of our country. I previously had the honor to serve as United States Attorney for the Central District of California, leading an office of 245 Assistant United States Attorneys responsible for the largest federal judicial district in the nation, comprised of approximately 180 cities with an aggregate population of 18 million people. From my nearly twelve years as a federal prosecutor, I also know what it means to enforce the law and to do so in furtherance of our national security and public safety. It is these collective experiences, and the wise counsel of outstanding USCIS employees and current and former USCIS leaders, that I have applied to define the direction of the agency throughout these past few years.

Upon arriving at USCIS, I determined that there was an opportunity for organizational changes to both the culture and structure of the agency in several areas, including in our anti-fraud and national security programs. As I had emphasized to the Senate Judiciary Committee during my confirmation hearing:

> Protecting our national security and public safety is a critical component of the USCIS mission, not an after-thought. This means we must continue to strive to improve the Agency's fraud prevention and detection operations, increase collaboration with U.S. Immigration & Customs Enforcement (ICE) and other law enforcement agencies to respond to fraud, and improve the efficiency and accuracy of the E-Verify system.

Historically, USCIS has been challenged by a culture that primarily focuses upon making adjudication decisions quickly, resulting in a significant and ongoing tension between the quality of adjudications and the speed with which they are made. This tension, in an agency that processes approximately seven million applications and petitions annually, has existed for many years.

The most recent decade provides a compelling snapshot. Ten years ago, Congress was focused on reducing the backlog of cases that arose from the then-Immigration and Naturalization Service's slow processing times. Five years ago, USCIS promulgated a fee rule that committed to proportionately faster-than-ever processing standards, requiring the agency to reduce its processing times by more than 20 percent. Indeed, when I came to the agency in August 2009, its first of ten top priorities was to achieve production and service goals.

Early in my tenure, I determined that we must enhance the emphasis on quality in our adjudicative approach. This means that immigration benefit decisions are informed, adhere to the law and the facts, are made in a timely manner, and further the integrity and goals of the immigration system. In order to institutionalize a culture of quality and one that reinforces the integrity of the immigration benefits system, in January 2010 – five months after my arrival – I realigned our agency's organizational structure.

Chief among the organizational changes I made was the creation of the Fraud Detection and National Security Directorate (FDNS), an elevation and expansion from its previous status as an office within a directorate. The previous alignment did not fully reflect my priorities. At the time, I informed all USCIS employees that "[t]his change reflects the prioritization of our anti-fraud and national security responsibilities and will bring greater focus to them." The prioritization of these core responsibilities has in fact enabled us to achieve unprecedented results, most of which were not included in the Inspector General's report. For example, our significant achievements since January 2010 include the following:

Fraud Detection Enhancements

- To date, we have increased the number of FDNS officers, analysts, and staff to more than 780, an approximately 25 percent increase over the prior two years, and allocated new FDNS positions in field offices and service centers to strengthen coordination and collaboration with our front-line employees.

- We established a new National Security Branch in our Field Operations Directorate to achieve more integrated and effective coordination on national security and fraud matters, both within Field Operations and with other USCIS offices. The new National Security Branch supports our enhanced collaboration on intelligence and enforcement matters via the Joint Terrorism Task Forces (JTTFs) around the country.

- We enhanced our overseas verification efforts, increasing the number of FDNS officers posted overseas. Our overseas verification program combats immigration fraud by helping foreign-based USCIS officials confirm statements and authenticate documents that originate overseas. We developed standardized protocols to enhance the program's consistency and effectiveness and have continued to increase the staffing of FDNS officers overseas.

- We increased the staffing of our Administrative Site Visit Verification Program (ASVVP) and expanded the analytical use of ASVVP data. Through ASVVP, we conduct unannounced pre- and post-adjudication site inspections to verify information contained in certain visa petitions. The program is designed both to detect and deter fraud. We hired and trained more than 74 new federal officers to replace contractors, hired 13 senior officers and analysts to oversee the program, performed more than 17,000 ASVVP inspections in FY 2011 (an increase of over 2,000 ASVVP inspections from the previous fiscal year) and began to use data derived from ASVVP in analytical studies that inform and improve our ongoing anti-fraud efforts.

- We launched the Validation Instrument for Business Enterprises (VIBE), a Web-based tool that uses commercially available information to validate the business operations of companies and organizations looking to employ foreign workers. VIBE enhances USCIS's ability to adjudicate employment-based immigrant and nonimmigrant petitions efficiently and accurately.

- We enhanced the analytics and reporting capabilities of our Fraud Detection and National Security Data System (FDNS-DS). The system is used to document, analyze, and manage our agency's fraud and national security cases. Among other steps, the separate applications previously used to manage fraud cases and national security cases, respectively, were combined into a single system. The new, consolidated system allows officers to conduct person-centric queries and display all relevant information about an applicant, petitioner, or beneficiary. We also expanded the system's ability to import application-related data from other USCIS systems, substantially enhancing the breadth, accuracy, and utility of records in FDNS-DS.

- We launched fraud reporting tools and began delivering fraud bulletins in real-time to agency personnel. The fraud-detection bulletins are designed to inform our officers of the latest fraud issues, including identifiable trends and practices.

National Security, Screening and Vetting Enhancements

- We created a new office to centralize and effectively manage our screening initiatives with partners inside and outside the agency and enhanced our rigorous existing screening for national security threats. We broadened the scope of our screening protocols and also increased their frequency to ensure that we address national security threats as soon as they are identified within the Department of Homeland Security or by other law enforcement and intelligence partners. We also developed a comprehensive recurrent vetting strategy to lead the Department's biographic and biometric screening initiatives and studies.

- We enhanced our collaboration with JTTFs and other intelligence and law enforcement partners. FDNS officers have established working relationships with 39 local JTTFs and all State and Major Urban Area Fusion Centers. FDNS officers are detailed to the U.S. Immigration and Customs Enforcement National Security Unit, the U.S. Customs and Border Protection National Targeting Center, the Department of Homeland Security's Office of Intelligence and Analysis, the Department of Homeland Security's Threat Task Force, the National Joint Terrorism Task Force, the National Counter-Terrorism Center, the Department of State's Kentucky Consular Center and National Visa Center, the FBI's Operational Deconfliction and Analysis Team, the Terrorist Screening Center, the FBI's National Name Check Program, the Central Intelligence Agency, and INTERPOL's U.S. National Central Bureau.

- We strengthened the international exchange of threat information, including biometrics. Working with US-VISIT, we expanded our exchange of information related to asylum claimants under existing data-sharing agreements with foreign-government partners.

- We developed and implemented with the intelligence community new vetting protocols for refugee applicants. The new vetting protocols subject refugee applicants to more rigorous screening against a number of security databases to ensure that they are eligible for refugee status and that they do not pose a threat to national security or public safety.

Anti-Fraud and National Security Improvements to Process Integrity

- We issued a newly designed, more secure naturalization certificate to reduce fraud. The redesigned certificate features the naturalization candidate's digitized photograph and signature embedded into the document. The background also features a color-shifting ink pattern that is difficult to reproduce. In addition, we began using a more secure printing process that renders the certificate more tamper-proof.

- We issued a newly designed, more secure Employment Authorization Document and a more secure permanent resident card, commonly known as the "Green

Card." State-of-the-art technologies incorporated into the new cards, including more secure optical media, holographic images, laser engraved fingerprints, and high resolution micro-images, prevent counterfeiting, obstruct tampering, and facilitate quick and accurate authentication of card holders.

- We expanded the Secure Mail initiative. We partnered with the U.S. Postal Service to enable delivery confirmation for secure immigration documents (Permanent Resident Cards, employment-authorization documents, and travel documents). Secure Mail allows our agency to confirm mailing and delivery and enables the U.S. Postal Service to track delivery and respond to applicants' status queries. The initiative enhances the integrity of the system and improves customer service.

- We further strengthened the E-Verify program's anti-fraud capabilities. We introduced U.S. passport photo-matching as a new feature in the E-Verify program, enhancing the program's integrity by enabling E-Verify to check the validity and authenticity of all U.S. passports and passport cards presented for employment verification. This tool enhances E-Verify's previous, more limited, capacity to detect identify theft by enabling the employer to ensure that the identity document presented belongs to the applicant. We also began expanding E-Verify's anti-fraud capabilities in partnership with state motor-vehicle bureaus. The new effort allows USCIS for the first time to verify driver's licenses presented for employment authorization against state records. We began piloting the effort with one state, with opportunities for other states to participate as the program expands.

- We promoted E-Verify to attract wider use, developing a robust customer service and outreach staff to increase public awareness of E-Verify's significant benefits and inform employers and employees of their rights and responsibilities. In fiscal year 2011 alone, we informed more than 37 million people about E-Verify through radio, print, and online ads in English and Spanish, and approximately a half million more through 130 live presentations, 111 conference exhibitions, 305 live webinars, and distribution of informational materials. We also handled more than 98,000 calls from employees through our employee hotline. As a result of these collective efforts, 17.4 million queries were run in fiscal year 2011, one million more than the previous year. More than 958,000 worksites were enrolled, with more than 1,000 employers enrolling per week.

- We worked with the Department of Justice and the Federal Trade Commission to launch the Unauthorized Practice of Immigration Law initiative. Together, we partnered with state and local governments to develop and implement a comprehensive initiative that combats the unauthorized practice of immigration law by building capacity to deliver legitimate assistance, educating the public about finding bona fide legal advice, and strengthening prevention and enforcement efforts.

I am proud of these initiatives and the steps that we have taken to combat fraud and advance our nation's security. Some members of the public have not been so pleased. In fact, some stakeholders have been critical of our prioritization of these efforts, believing that the balance is shifting away from efficiency in favor of security.

Despite these public criticisms, I have been unwavering in my steadfast commitment to the fraud detection and national security aspects of our work. I believe firmly that as a federal fee-for-service agency, it is our mandate and our responsibility to deliver both efficiency and security in our adjudications for the benefit of the customers we serve and for the country we protect. As I repeated to agency personnel last year, "USCIS has no mission more important than guarding against those who might seek access to the United States to do our nation harm." I have continued to set this tone for the agency, and our top strategic priority for the last two years emphasizes this effort: "Strengthen National Security Safeguards and Combat Fraud."

I appreciate that the DHS Inspector General, in his recent report, recognized and praised our anti-fraud efforts and noted the many recent advances our workforce achieved to further integrate our efforts:

> Through process improvements and additional systems checks, USCIS has taken important steps to improve national security and fraud detection. USCIS has also increased fraud detection resources and training.

The Inspector General then made several recommendations as to how the agency could better achieve its goal of combating immigration fraud. We concurred with many of the recommendations and are already implementing them. For example, efforts to promote better collaboration between FDNS officers and our adjudications officers are underway, and training programs are being strengthened for all decision-makers, including improved guidance on the roles and responsibilities of officers and supervisors in the area.

The Inspector General's report, admittedly based on limited testimonial information and not empirical data, captures the reality that the tension, whether real or perceived, between quality and speed still exists. No one has sought to tackle the breadth of the age-old tension between quality and speed more vigilantly than I. I have not only articulated my expectations both inside and outside the agency, I also have made structural improvements to strengthen a culture of quality within the agency.

In addition to the creation of the FDNS directorate in January 2010, I also created an Office of Performance and Quality to ensure that our agency prioritized quality throughout its adjudication practices and mission-support processes. In addition, we have been working to reform the agency's performance management system, striving to implement metrics that reinforce a broader focus on quality rather than production alone. The Inspector General recognized the importance of this undertaking:

> USCIS recently revised its policies and reorganized its organizational structure to address immigration security concerns and facilitate fraud

> detection. One key change is a shift from employee performance measures that focus on the number of applications or petitions that an [Immigration Services Officer] processes.

It is of paramount importance to me that no USCIS employee, whether because of any perceived pressure to process an immigration benefit quickly or for any other reason, ever adjudicates a case other than in accordance with what the law and the facts warrant. This is an ethic I have articulated and reinforced since I first became the Director of USCIS. Indeed, in a public question-and-answer session in early 2010, an immigration attorney articulated her hope that USCIS adjudicators will exercise their discretion "to get to yes." My response was clear and direct on this point: "[T]he discretion to get to yes can be as pernicious as the discretion to get to no. It's supposed to be the discretion to get to 'right'." In a conversation with the USCIS workforce last year, I reiterated to an employee who expressed concern about the effect of time pressure on adjudicative quality:

> And if in fact there is a supervisor that is instructing an individual to just be fast at the expense of quality, then that's something that one should raise to the top leadership . . . who would not tolerate that instruction and who, I can assure you, would find that instruction to be not consistent with the teachings of the program nor the agency as a whole.

I appreciate that the Inspector General emphasized that this is the ethic that I and the leadership of the agency continue to demand and promote:

> USCIS has taken action to diminish threats to the immigration benefits system. General employee concerns about the impact of production pressure on the quality of an ISO's [Immigration Services Officer's] decisions do not mean that systemic problems compromise the ability of USCIS to detect fraud and security threats. No ISOs presented us with cases where benefits were granted to those who pose terrorist or national security threats to the United States.
>
> ....
>
> The Director of USCIS informed us that managers and supervisors must ensure the integrity of each benefit determination, based on the evidence presented in the case file. ISOs who are pressured to approve cases that do not warrant approval should report such incidents to OSI [the Office of Security and Integrity].

Mr. Chairman, Ranking Member Lofgren, and Members of the Subcommittee, thank you again for the opportunity to share with you the great work we in U.S. Citizenship and Immigration Services have done and continue to do to safeguard our national security and combat fraud. This work allows us to remain the welcoming nation of immigrants we are so proud to be. Thank you again to the Inspector General for his independent work to further these efforts.

And, finally, I want to once again express my deep thanks and appreciation to the men and women of USCIS who dedicate each and every day to our noble mission, and whose hard work and commitment to our principles have made our achievements possible.

Mr. GALLEGLY. Thank you, Director Mayorkas.

Our next witness, Mr. Edwards.

TESTIMONY OF THE HONORABLE CHARLES K. EDWARDS, ACTING INSPECTOR GENERAL, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. EDWARDS. Good afternoon, Chairman Smith, Chairman Gallegly, Ranking Member Lofgren and Members of the Committee.

I am Charles Edwards, Acting Inspector General for the Department of Homeland Security. Thank you for inviting me here today to discuss our report, "The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers."

This inspection effort was designed to respond to questions from Senator Grassley after he received whistleblower complaints from USCIS service center employees. Our conclusions are based on interviews and survey responses as well as review of hundreds of email messages, reports, appeal decisions and media stories.

We received input from more than 400 USCIS employees, including Director Mayorkas, and we thank them for their perspective and their collaboration.

Our inspection reviewed ways to improve fraud detection in the immigration benefit caseload.

In our report, we determined that important steps have been taken to promote the integrity of the immigration benefit system. Nonetheless, additional work is necessary to maximize efficiency and mission performance.

It is important to note that several of the problems we identified have been documented for over a decade. Production pressure in the immigration benefit caseload has existed for a long time. Data shows that some benefit denial rates have increased in recent years.

Nonetheless, even a benefit that has a relatively high denial rate may still be subject to production pressure.

Our report included 11 recommendations for USCIS and a discussion about the standard of proof in immigration benefit determinations. My statement for the record includes further details about all sections of our report.

Our first three recommendations relate to the interaction between Immigration Service Officers, or ISOs, who process benefit requests, and fraud detection Immigration Officers, or IOs. Our report recommended that USCIS promote more collaboration between ISOs and IOs. USCIS concurred with these recommendations.

Our fourth recommendation pertains to the identification of aliases. Individual aliases or multiple spellings of names complicate the security check process. Because files can be large, ISOs can miss aliases during the review of a case file.

We recommended additional quality assurance review to decrease the risks involved in unidentified aliases and USCIS concurred.

Recommendations five and six discuss further ways to improve ISO performance evaluations.

The recently revised ISO performance measures prioritize quality and national security as critical elements. We recommended that

USCIS perform on-site outreach efforts to support the new performance criteria and to solicit comments from field staff about the new measures. USCIS concurred.

In the remaining parts of the report we discussed some other pressures ISOs have perceived to approve cases despite doubts they have about a person's eligibility. We recommended that ISOs be given additional time for case processing, and although USCIS did not concur the issue will be studied further.

Several USCIS employees informed us that ISOs have been required to approve specific cases against their judgment. Any such instruction by a supervisor would be contrary to USCIS policy. When it occurs that a higher ranking and probably more experienced supervisor believes the case approvable, the supervisor is supposed to sign the decision. An ISO should never sign something when he or she disagrees with the decision, even at the request of a higher-ranking officer.

Some ISOs may not be aware of this policy and USCIS concurred with our recommendation that it be enforced. We also recommended that USCIS make improvements to policy on Requests for Evidence, or RFEs, which are sent if an ISO needs additional information to make a decision.

The USCIS adjudications manual is unclear, stating both that RFEs should if possible be avoided and that ISOs should request evidence needed for thorough correct decision making. USCIS concurred with our recommendation to clarify RFE policy.

USCIS did not concur with the final two recommendations in our report, which suggested new policies to define more clearly the procedure to be followed if USCIS managers and attorneys seek to affect the adjudications process.

Mr. Chairman, this concludes my prepared remarks and I will be happy to answer any questions that you or the Members may have.

Thank you.

[The prepared statement of Mr. Edwards follows:]

STATEMENT OF CHARLES K. EDWARDS

ACTING INSPECTOR GENERAL
U.S. DEPARTMENT OF HOMELAND SECURITY

BEFORE THE

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

"SAFEGUARDING THE INTEGRITY OF THE IMMIGRATION BENEFITS ADJUDICATION PROCESS"

February 15, 2012

Good morning, Chairman Gallegly, Ranking Member Lofgren, and Members of the Committee. I am Charles K. Edwards, Acting Inspector General for the Department of Homeland Security (DHS). Thank you for inviting me here today to discuss our January 2012 report, *The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers.*

As you know, the DHS Office of Inspector General (OIG) was established in January 2003 by the *Homeland Security Act of 2002*, which amended the *Inspector General Act of 1978*. The DHS OIG seeks to promote economy, efficiency, and effectiveness in DHS programs and operations and reports directly to both the DHS Secretary and the Congress. We fulfill our mission primarily by issuing audit, inspection, and investigative reports that include recommendations for corrective action.

My testimony will focus on our report, which recommended changes to improve fraud detection in the immigration benefit caseload. This inspection effort was designed to respond to questions from Senator Grassley after he received whistleblower complaints from USCIS service center employees. Our conclusions are based on interviews and survey responses, as well as the review of hundreds of e-mail messages, reports, appeals decisions, and media stories. We received input from more than 400 United States Citizenship and Immigration Services (USCIS) employees, including Director Mayorkas. We thank all of them for their perspectives and collaboration.

USCIS determines the eligibility of individuals who seek immigration and citizenship benefits. Each year, USCIS processes more than 6 million applications or petitions, including requests for U.S. citizenship, lawful permanent residence, employment authorization, humanitarian relief, and other benefits.

In our report, we determined that important steps have been taken to promote the integrity of the immigration benefit system. Nonetheless, additional work and continued vigilance is necessary to maximize efficiency and mission performance. Our report included 11 recommendations for USCIS and a discussion about the standard of proof in immigration benefit determinations.

Additional Collaboration is an Important Way to Combat Benefit Fraud

Benefit fraud detection is challenging and has created difficulties for federal agencies. USCIS recently revised its policies and reorganized its organizational structure to address immigration security concerns and facilitate fraud detection. One key change is a shift away from employee performance measures that focus on the number of applications or petitions that an Immigration Services Officer (ISO) processes. USCIS also elevated the Office of Fraud Detection and National Security (FDNS) to directorate status. The USCIS Director told us that this change reflects his commitment to antifraud and national security responsibilities. Although FDNS issues fraud policy, fraud detection Immigration Officers (IOs) – based in the field and supervised by the service center or office where they are located – are responsible for identifying and pursuing immigration benefit fraud.

The IO fraud experts work with ISO adjudicators at USCIS offices throughout the country. IOs are responsible for reviewing information when ISOs have a concern about possible fraud.

Therefore, the policies and practices that govern the relationship between ISOs and IOs on particular cases are central to the success of the adjudication process.

ISOs use both national and local fraud indicators to determine whether a file contains possible fraud information. Files are referred to an IO when fraud indicators are evident. The file is accompanied by a written referral memorandum in which the ISO articulates questions and suspicions. The IO conducts research, including Internet searches and queries of databases not available to ISOs, to review the referral. Based on what the IO discovers, a statement of findings is returned to the ISO.

Our review indicated that ISOs seek more direct interaction with IOs. Additional communication between ISOs and IOs would allow ISOs to engage in meaningful dialogue on the reasons for a fraud referral, and how particular information would assist adjudication of the case. Before deciding to send a file to an IO, the ISO would have an opportunity to ask an IO questions about the case, discuss fraud indicators, and determine whether the case warrants a referral. In addition, the ISO could obtain an IO's comments on the adequacy of the referral memo that the ISO sent. ISOs desire confirmation that the information sent to an IO was useful.

ISOs desire more information on fraud detection practices and trends so they can make better fraud referrals. Improved training on fraud issues is a reasonable way to meet this need. IOs could provide general training on immigration benefit fraud, as well as examples of what types of cases should be referred. Our interviewees and survey respondents offered several ideas about how and when training can be provided. The most common suggestion was for IOs to brief ISOs during meetings. At these meetings, IOs could provide information on fraud trends or particular individuals of concern. One survey respondent said FDNS briefings of this type "are very helpful in combating fraud at our office." Another respondent suggested that the ISOs should take the IO training course to expand their knowledge of fraud issues.

Our report recommended that USCIS promote more collaboration between ISOs and IOs. We also recommended that the level of interaction be monitored, and corrected as needed, to ensure maximum efficiency from the relationship between ISOs and IOs. We also suggested additional detail opportunities so more ISOs are temporarily assigned to fraud units. USCIS concurred with these three recommendations.

Additional Procedures Can Strengthen Identification of Names and Aliases

During the adjudication process, ISOs complete security checks on law enforcement and immigration systems to determine whether an applicant is a possible security or criminal risk. Individual aliases or multiple spellings of names complicate the security check process. A staff report of the National Commission on Terrorist Attacks Upon the United States reported that the 9/11 hijackers used 364 different names and aliases. Because files can be large—hundreds of pages in some cases—ISOs can miss aliases during the review of a case file.

Quality assurance data we reviewed demonstrate that further work is needed to identify more aliases in some benefit applications and petitions. Challenges in alias identification are compounded because USCIS uses cumbersome and outdated immigration data systems. Both

USCIS employees and some law enforcement agency users express frustration with USCIS systems. Our recent report on overseas screening noted that information on foreign nationals is fragmented among 17 data systems. Officers must conduct labor-intensive, system-by-system checks to verify or eliminate each possible match to terrorist watch lists and other derogatory information. USCIS intends to solve this problem through its Transformation initiative. In the meantime, we recommended developing additional quality assurance procedures to decrease the risks involved in unidentified aliases. USCIS concurred with this recommendation.

Greater Employee Outreach is Key to New Performance Measures

In fiscal year (FY) 2011, USCIS implemented a new ISO performance evaluation process. The revised ISO performance measures prioritize quality and national security as critical elements. The forms used to evaluate employee performance contain several elements, some of which are critical to successful performance, while others are noncritical. In the past, performance evaluations established production as a critical element. This meant that an ISO had to process a certain number of benefit requests over a given period to earn an excellent rating.

With the new FY 2011 performance measures, production is noncritical to performance. The new ISO performance measures are designed to protect the integrity of the immigration system through a focus on national security and fraud identification. This should improve fraud detection and national security.

USCIS faces a complex task as the new measures are finalized. We learned that ISOs and supervisors are concerned that—

- Insufficient training on the performance measures hinders their success;
- Production remains the focus, even under the new measures;
- Rating an ISO's fraud detection skills is difficult; and
- Certain ISOs will be disadvantaged because of the form types they adjudicate.

Based on these comments and suggestions from staff, we recommended that USCIS perform onsite outreach to discuss the performance measures, as well as solicit comments from field staff about the new measures. Because of the preliminary nature of the FY 2011 measures, USCIS should endeavor to learn as much as possible from the field about how employees view the performance measures. This would facilitate the continued development of performance measures and improve the measures over time. USCIS concurred with our recommendations.

Production Pressure Remains a Concern

ISOs informed us that production pressure remains a part of the adjudication process. ISOs in multiple locations are concerned that production expectations are too high. An important part of our interviewees' concern about production pressure is the perception that USCIS strives to satisfy benefit requesters in a way that could affect national security and fraud detection priorities. The Department of Justice (DOJ) OIG identified similar problems prior to the creation of USCIS. Its reports noted that adjudicators may skip systems checks that could be done quickly because some parts of the process would interfere with timely completion of the required

number of cases. In 2000, the DOJ OIG reported that time pressures "discouraged the pursuit of potentially disqualifying issues" in immigration benefit adjudications. At that time, many adjudications officers said that "the pressure they were under was, in fact, pressure to *approve* applications and not just to complete as many naturalization cases as possible." The increased likelihood of benefit approvals under such circumstances was obvious.

Approval of a case takes significantly less time and effort than does documenting a denial, writing a fraud referral, or requesting more evidence. ISOs who feel pressed for time or behind in their work, and wish to meet production goals, might opt to approve a marginal case and move on to the next file.

Our interviews and survey responses indicated that district and field office ISOs generally must complete between 12 and 15 interviews per day. Most of the ISOs we interviewed said that they must complete interviews in less than 30 minutes. Fifteen interviews per day, with 30 minutes for each interview, is 7.5 hours per day. These ISOs have other responsibilities, and some interviews last longer than 30 minutes. Such time pressure does not allow the ISO to review cases prior to interviews, or ask questions of coworkers or supervisors.

The comments we received suggest that ISO production expectations have not changed, although an ISO's performance rating no longer treats production as a critical job element. The new performance measurement system based on fraud and national security identification skills faces significant challenges if production goals remain as prominent across USCIS as our interviewees and survey respondents reported.

A year before the 9/11 attacks, the DOJ OIG suggested that the adjudications process was subject to immense production pressure that should be lessened. In a report released 8 months after the attacks, the DOJ OIG cited problems with immigration benefit issuance for two 9/11 hijackers. A recommendation in that 2002 report suggested that those who adjudicate immigration benefit requests needed "more time to review files and seek additional information." USCIS did not concur with our recommendation to ensure that ISOs have more time to process cases.

Certain Policy Improvements Could Improve Benefit Adjudications

Several USCIS employees informed us that ISOs have been required to approve specific cases against their will. Some ISOs told us that they complied with the demands of their supervisors and approved visa applications containing suspect information. Other ISO said that a supervisor will reassign a case to another ISO rather than sign a directed decision. One district ISO wrote, "Cases are sometimes taken away from us and given to officers who the supervisor knows will approve the case." A Service Center Operations senior manager said that supervisors can reassign work in general, so an ISO should not be surprised when a debatable case goes to a colleague. One service center provided us a local policy similar to the senior manager's views.

USCIS policy actually informs ISOs to not sign a case file if the ISO believes that the facts of the case do not warrant such a decision. When it occurs that a higher ranking and probably more experienced supervisor might disagree, and believe the case approvable, the supervisor is supposed to sign the decision. The USCIS manual states that an ISO should never sign

something when he or she disagrees with the decision, even if a higher ranking officer requests the ISO's signature.

Some ISOs might not be aware of the policy on directed decisions. A survey respondent, who was concerned about production pressure and the drive for approvals, did not know that an ISO could refuse to sign a directed decision. Another survey respondent was threatened with a formal reprimand if a case was not approved as the supervisor required. When discussing another directed decision, one ISO wrote, "management found someone else" after the ISO did not concur with the approval.

Reassigning a file to a second ISO could foster rivalry between ISOs, lead ISOs to please supervisors through approval of problematic cases, and decrease office morale. A supervisor may be correct to override an ISO's judgment in certain cases, but the supervisor should then be required to sign the case as the deciding officer, in accordance with USCIS policy. USCIS concurred with our recommendation to enforce existing guidance on directed decisions.

We also recommended that USCIS make improvements to policy on requests for evidence (RFEs). If additional information is needed before an ISO can make a decision on a case, a RFE is sent to the applicant or petitioner. An RFE allows the individual who seeks the benefit to provide further proof of entitlement. Although the need for RFEs in some situations is obvious, the USCIS adjudications manual establishes that "RFEs should, if possible, be avoided," while also guiding ISOs "to request the evidence needed for thorough, correct decision-making."

Quality assurance data demonstrate the effect of ISO confusion about RFE policy. Quality reviewers noted incomplete evidence in some approved petitions. RFEs, rather than approval letters, should be issued in cases where evidence is unclear. Also, there were inconsistencies in RFE issuances in some cases where denial letters were sent, although additional evidence could have demonstrated entitlement to the benefit. USCIS should rewrite current policy, which establishes the avoidance of RFEs as a policy preference. New policy would diminish ISO confusion about the role of RFEs in the adjudication process.

Because of contradictions in the *Adjudicator's Field Manual*, USCIS' RFE policy is not clear. This lack of clarity, 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. Clarification of USCIS policy in this area, in tandem with the RFE template improvements that are being implemented, should lead to better RFEs, less public confusion, and improved adjudication decisions. USCIS concurred with our recommendation to improve RFE policy.

USCIS Should Focus on Eliminating Inappropriate Pressure on the Adjudications Process

Many employees expressed concerns about how a small number of individuals in the USCIS Office of Chief Counsel (OCC) attempted to increase the approval of O visa benefit petitions. Congress created this status for aliens who have extraordinary ability in science, arts, education, business, or athletics. OCC informed service centers that certain questionable petitions should be approved and initiated changes to USCIS policy on O visas.

An O visa petition, that a university filed, led to much internal USCIS debate in late 2009. Based on our interviews, unease about this case and others like it still lingers throughout the agency. The California Service Center (CSC) denied the petition, based on insufficient evidence that the beneficiary had achieved the extraordinary ability that the statute requires. Senior OCC officials disagreed with the CSC's decision. This prompted a great deal of discussion and email about the appropriateness of the denial. OCC attorneys at the CSC generally supported the center's decision, but the former USCIS Chief Counsel remained adamant that an approval was necessary. Subsequently, the center's denial was upheld by a 26-page opinion from the USCIS Administrative Appeals Office (AAO). Although the AAO upheld the original CSC decision, a belief that USCIS headquarters wanted to push a high level of approvals has affected USCIS managers and ISOs.

OCC management attempted to change USCIS policy on O visas shortly after the university's petition was denied. In early 2010, OCC expressed heightened interest in O visa adjudications as a result of public complaints. One private attorney was concerned specifically about O visa petition denials from the CSC. This attorney admitted that he had not reviewed each of the cases, but he wrote directly to an OCC manager with his concerns that ISOs at the CSC issued inappropriate denials.

Like the complainant, the OCC manager had not examined the case files. Nonetheless, in an email to the CSC, which included a draft memo on O visa adjudications policy, the OCC manager noted the attorney's complaint and perceived problems with the CSC's denial decisions. The OCC manager declared an interest in "a more flexible and liberal policy for weighing the evidence and granting petitions."

Quality assurance information we examined demonstrates that excessive O visa approvals are more likely than denials. Service Center Operations staff conducts random reviews of completed I-129 adjudications. We analyzed 10 reports from these reviews that took place between November 2008 and February 2011. The quality assurance reviews revealed that some of the denials included statements such as, "No evidence to establish that the beneficiary qualifies as an alien of extraordinary ability," or "insufficient evidentiary criteria" to support the approval. Additionally, of the O visa petition denials we reviewed, there were no inappropriate denials. The data confirmed that USCIS was more likely to grant O visa status incorrectly, than to deny a legitimate petition.

As occurred in the university's case, the USCIS AAO frequently supports the ISO's decision on appeal. From January 2010 through February 2011, O visa petition appeals succeeded only 4 times out of 44 cases, a 9% success rate. The quality assurance and AAO data suggest that ISOs generally make good O visa petition denial decisions.

The intent of OCC's efforts in this area is unclear. Without reviewing individual cases, we are unable to determine how OCC could conclude that ISOs made improper decisions based on the statute or regulations. Because data and our analysis refute OCC's contentions, we believe that in certain instances OCC may have improperly responded to outside complaints through undue pressure on adjudication decisions. We recommended new policy to limit a manager or

attorney's ability to intervene in case decisions. Of course, USCIS attorneys must have contact with ISOs to provide legal advice on the correctness of decisions, what evidence is necessary, and other areas pertinent to adjudication decisions. Our concern is with those cases where OCC leaders may create pressure on the adjudications process so that improper approvals are or could be made. USCIS did not concur with our recommendation, but suggested a way to potentially meet the intent of our recommendation. We look forward to the USCIS corrective action plan in this area.

We understand that USCIS must engage with outside experts and be responsive to public questions. Caution should be exercised, however, when appearance of favors or special consideration exists.

On the issue of outside complaints creating a climate that stresses benefit approvals, USCIS faces the burden of history. In 2000, the DOJ OIG, in a review of INS actions during the Citizenship USA initiative, identified cases where outside entities "attempted to influence or manipulate" adjudications in a variety of ways, including pressure to approve cases or requests to transfer cases to adjudicators perceived as more lenient. The DOJ OIG wrote that adjudicators "perceived a perpetuation of the historical favoritism shown to certain organizations." According to interviewees and survey respondents, a culture of "get to yes" continues to exist at USCIS.

Some private attorneys recognize that their requests for special review are improper. In a note to an OCC manager, a private immigration attorney was "very aware that it is not permissible" to ask for special review of a case, but the attorney asked for OCC intervention. OCC forwarded the email to certain individuals in USCIS, which led the CSC to review the case again. After that review, the denial determination was reaffirmed.

ISOs and supervisors claimed that any informal process where an ISO is asked to review a case again implies that an approval is expected. One supervisor said that when a special review is requested, the center will "try to find a way to approve something." These types of actions have the potential to create a two-tier immigration benefit system: Those with private attorneys or contacts at USCIS get special treatment, while others do not. Although we received evidence that the Director of USCIS does not support special treatment for complainants, more attention must be paid to this matter.

USCIS has yet to find an effective balance between its interaction with the public, especially immigration attorneys, and the need to protect the integrity of the adjudications process. This is a dilemma, because many people have an interest in USCIS decisions, and public comment is vital to the regulatory process. USCIS should strive to recognize the differences between legitimate public opinions and requests to change individual case decisions. Those who gain a special review of their case essentially receive a second adjudication without having to file an appeal.

We recommended that USCIS end any informal appeals process. USCIS did not concur with our recommendation.

The Standard of Proof for Immigration Benefit Issuance is an Important Consideration

In most USCIS adjudications, the evidentiary standard is "a preponderance of the evidence," a common standard in civil proceedings. Two other common standards, "clear and convincing evidence" and evidence "beyond a reasonable doubt," require a higher level of certainty. A preponderance of the evidence is greater than a 50% certainty that a fact is true. ISO managers view clear and convincing evidence as approximately 75% certainty, and proof beyond a reasonable doubt as 95% or more certainty. These percentages illustrate the differences between standards, although an exact percentage may not be easy to quantify in a given case.

To protect the immigration system further, Congress may wish to raise the standard of proof for some or all USCIS benefit issuance decisions. A relatively low standard of proof may not account for all societal interests involved in the issuance of immigration benefits.

Even with the additional security checks and process improvements USCIS has made in the past several years, national security and fraud concerns may require more thorough review of immigration applications and petitions. These concerns may increase the time needed to process benefit requests. Concern about delays in issuing benefit determinations should not override all other interests. The potential negative effect of ongoing production pressure, the desire for longer interviews of applicants, and the incomplete nature of the new performance measures means that much work remains before USCIS instills a culture that emphasizes quality over quantity. A higher standard of proof, and implementation of this report's recommendations, offer a variety of means to improve the benefit issuance process.

Mr. Chairman, this concludes my prepared statement. Thank you for the opportunity to testify and I welcome any questions from you or Members of the Committee.

Mr. GALLEGLY. Thank you very much, Mr. Edwards.

Director Mayorkas, it is my understanding that a few years ago the Office of Fraud Detection and National Security issued a draft report detailing the amount of fraud in the L visa program. In fact, my staff has been provided with parts of that draft report which seemed to show many specific cases of L visa fraud.

My staff has also been told that you and other officials at USCIS put pressure on employees to downplay that fraud and there was belief that if this report were released on the heels of the H-1B fraud assessment, which showed a 21 percent fraud rate in that program, it would be a blow to the push for comprehensive immigration reform.

Even the former head of FDNS indicated that fraud was in double digits, high enough that there should be concern that the agency and department should want to correct it.

Director Mayorkas, can you tell us when you plan to release the final report?

Mr. MAYORKAS. Thank you very much, Chairman, for giving me an opportunity to address your concerns.

Any suggestion that I downplayed fraud or have ever downplayed fraud is categorically false and is belied by my record since the first day that I started as the Director of U.S. Citizenship and Immigration Services.

As I alluded to briefly, when I came into the office I conducted a top-to-bottom review of the agency and within 5 months created the Fraud Detection and National Security directorate, elevated its priority within the agency and have embarked upon and executed a series of initiatives that have demonstrated my prioritization of that critical mission set.

I think that the record speaks for itself. To provide some measure of the effectiveness of our anti-fraud efforts, in fiscal year 2011 adjudicators referred over 16,000 suspected fraud cases to the Fraud Detection and National Security directorate and in turn FDNS, as it is known, completed administrative fraud investigations on 8,739 cases, finding fraud in over 6,000 of those cases, approximately 70 percent. That is a 34 percent increase over the number of investigations completed in fiscal year 2010.

Mr. GALLEGLY. Pardon me, Director Mayorkas. I understand how proud you are of your record and I totally respect that.

But with all due respect to the time, that doesn't address the question I asked and the question I asked simply is when do you plan to release the final report?

Mr. MAYORKAS. One of the initiatives that we embarked upon, Chairman Gallegly, is to improve the benefit fraud and compliance assessment report process and so what we have done is we have brought expertise to bear to ensure that those reports are prepared in a statistically sound fashion and are well grounded in fact and study so that we can most effectively direct our operations accordingly.

What I have instructed our workforce in the interim is to use the report that it does have, to use the evidence that they do have currently in their possession, and make the operational decisions that they need to.

So we are addressing the fraud currently based on the data that we have and we are improving the report process, including its preparation.

Mr. GALLEGLY. So you do have a draft report that you are using as a basis to proceed ahead. What I would ask then, Director, is can you please provide me by the end of the work day today a copy of that draft benefit fraud and compliance assessment?

Mr. MAYORKAS. Thank you, Mr. Chairman.

Mr. GALLEGLY. Can you do that?

Mr. MAYORKAS. I certainly can, and whether it is at the end of the day or forthwith we certainly will.

Mr. GALLEGLY. As long as we have forthwith I would say by noon tomorrow, okay?

Mr. MAYORKAS. Very well, Chairman.**

Mr. GALLEGLY. Thank you very much.

Inspector General Edwards, there has been criticism of the section of your report stating that nearly 25 percent of the immigration service officers who responded to your online survey said they felt pressure to approve questionable applications.

Specifically, the criticism suggests that since these ISOs were at USCIS field offices, which do not adjudicate employment-based petitions, so this pressure is not apparent in the service centers where the employment-based visas are adjudicated.

I know in addition to the online survey your investigators also conducted 147 interviews, many of which were adjudicators at the service centers. Did your investigators hear the same kinds of concerns about the pressure to approve questionable applications during interviews they conducted with service center personnel?

Mr. EDWARDS. Thank you, Chairman.

Yes, we heard the same concerns during our interviews of the service center personnel.

Mr. GALLEGLY. So it is consistent.

Mr. EDWARDS. Yes, sir.

Mr. GALLEGLY. Very good. Thank you. I see my time has expired.

The gentlelady, the Ranking Member, Ms. Lofgren.

Ms. LOFGREN. Before I ask my questions, I would like to ask unanimous consent to include in the record a letter from the American Immigration Lawyers Association and also a letter from the U.S. Chamber of Commerce.

Mr. GALLEGLY. Without objection.

[The information referred to follows:]

**The information requested was received by the Subcommittee but is not being included in the printed hearing record.

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Testimony of the American Immigration Lawyers Association

Submitted to the
Subcommittee on Immigration Policy and Enforcement of the
Committee on the Judiciary of the U.S. House of Representatives

Hearing on February 15, 2012
"Safeguarding the Integrity of the Immigration
Benefits Adjudication Process"

The American Immigration Lawyers Association (AILA) welcomes this opportunity to provide testimony in today's hearing "Safeguarding the Integrity of the Immigration Benefits Adjudication Process."

The American Immigration Lawyers Association is a private bar association with more than 11,000 active members, established to promote justice and advocate for fair and reasonable immigration law and policy. Drawing upon the experience of AILA lawyers who represent clients in every aspect of the immigration benefits adjudication process, AILA offers the following testimony. The integrity of the immigration benefits adjudication process is vital to a properly functioning immigration system and, ultimately, to the economy as well as the stability of American families. The mission of U.S. Citizenship and Immigration Services (USCIS) should be to achieve fair, timely, and proper adjudication results. For many businesses represented by AILA lawyers, USCIS is falling far short of that mark.

Central to today's hearing is the January 2012 report of the Department of Homeland Security Office of Inspector General (OIG) entitled, "The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Service Officers" (report).[1] Among the report's findings is the conclusion that immigration service officers (ISOs) experience undue pressure to approve visa petitions and that the integrity of the overall system is at risk.

It is the experience of the businesses represented by AILA attorneys that USCIS often is not adjudicating cases fairly or in a timely manner. Claims by many in USCIS that these current trends in adjudications are in furtherance of fraud detection and prevention do not match with the experience of the myriad legitimate businesses whose applications and petitions are the subject of unconscionable delay and capricious denial. While legitimate fraud detection is a vital part of the adjudication process, shrouding the current negative trend in adjudication practices in the cloak of "fraud detection and prevention" compromises one of the agency's core missions: to grant immigration and citizenship benefits. The examples provided by AILA members listed at the end of this testimony illustrate the following key points:

[1] http://www.oig.dhs.gov/assets/Mgmt/OIG_12-24_Jan11.pdf

- In the current adjudications environment, USCIS applies arbitrary standards that exceed the rigorous tests required by law, issues excessively-detailed, intrusive and burdensome requests for evidence that require costly replies from legitimate employers, and metes out denials on petitions that, in many cases, are found to have merit.
- Denials and inconsistencies in adjudications, as well as the delays resulting from excessive requests for evidence, have resulted in substantial costs and uncertainty for businesses as well as lost jobs for U.S. workers, and make the U.S. a less attractive place for business investment and job creation.

The DHS Inspector General Report Is Based on Weak Evidence and Research
The report rests upon very limited data and research that was collected from only a small, self-selected sample of USCIS personnel. The OIG interviewed 147 managers and staff and received 256 responses to an online survey. This is just 2% of the more than 18,000 USCIS employees and contractors involved in processing benefit requests. This is an embarrassingly unscientific approach that should not be given any serious consideration when evaluating changes to the USCIS adjudication process.

USCIS Has Been Denying Petitions at High Rates
If the OIG report is correct that ISOs are being unduly pressured to grant petitions, then logically one would expect that approval rates must also be very high. USCIS data, however, shows the exact opposite has been occurring. A report issued last week by the National Foundation For American Policy entitled, "Analysis: Data Reveal High Denial Rates For L-1 and H-1B Petitions At U.S. Citizenship and Immigration Services" (NFAP report) shows that in the past several years there has been a clear spike in the proportion of *denials* issued by the agency.[2]

In the case of L-1B petitions, the denial rate jumped from 7% in 2007 to 27% in 2011. Furthermore, there has been a huge increase in "Requests for Evidence" (RFEs) used by adjudicators to obtain more information in lieu of making a decision on a petition based on the evidence presented. RFEs in the L-1B category jumped from 17% in 2007 to 63% in 2011.[3]

These changes in approval rates have taken place without any change in the applicable statutes, regulations, or policy guidance. If there is an appropriate focus of inquiry for the Office of the Inspector General, it should be on the issue of the dramatic change in outcomes without a corresponding change in law.

Current Adjudication Practices Hurt American Business and Job Growth
The standards that adjudicators apply to these petitions are not clear to those submitting petitions, and are often not traceable to any current provision of statute or regulation. This

[2] http://www.nfap.com/pdf/NFAP_Policy_Brief.USCIS_and_Denial_Rates_of_L1_and_H%201B_Petitions.February2012.pdf

[3] http://www.nfap.com/pdf/NFAP_Policy_Brief.USCIS_and_Denial_Rates_of_L1_and_H%201B_Petitions.February2012.pdf p.6

unpredictability is extremely detrimental to businesses, especially new businesses that are investing significant time and resources in the kinds of start-up operations that create jobs for Americans. If a business submits the documentation set out in the regulations, an RFE is likely to ensue asking for additional documentation not contemplated by the regulations, any other guidance or currently-valid precedent. And, because the additional evidence requested is beyond that required by regulations and controlling policy, petitions for individuals whose activities ultimately create additional jobs are being unlawfully denied in increasing numbers.

Essentially, USCIS adjudicators have been relying upon case law developed under the Immigration and Nationality Act as it existed prior to 1990. However, the law was changed by the Immigration Act of 1990 (IMMACT 90) to "broaden" the L-1B category to "accommodate changes in the international arena."[4] The then-INS acknowledged this broadening in the Supplementary Information accompanying the proposed regulations implementing IMMACT 90, observing that the changes in the L classification reflected the desire of Congress "...to broaden its utility for international companies." In addition, legacy INS revised its regulations to adopt "...the more liberal definitions of manager and executive now specified in section 101(a)(44)(A) and (B) of the Act."[5]

USCIS has been changing the criteria by which it adjudicates L-1B petitions during a period when there has been no corresponding change in the law. The narrowing has been accomplished through unpublished, non-binding decisions of the Administrative Appeals Office (AAO) of USCIS. Neither independent nor legally charged as an objective administrative appeal board, AAO has nevertheless generated a body of administrative opinions based on a selective review of legislative and regulatory history, selective reliance on precedent administrative decisions and federal district court cases that addressed the L-1B classification as it appeared prior to the Congressional intervention in 1990, and selective application of common dictionary definitions of such terms as "special" and "advanced."

Moreover, legitimate businesses that seek review of denials of bona fide petitions at the AAO are faced with processing delays that are unconscionable. In the critical H and L visa categories, the AAO takes an average of 22 and 23 months, respectively, to decide an appeal. For permanent resident ("green card") petitions for advanced-degree professionals, and for skilled workers and holders of bachelor's degrees, categories where employers have already demonstrated to the Labor Department that there are worker shortages, processing is 31 months and 35 months, respectively.[6] The axiom that "justice delayed is justice denied" resonates with resounding clarity.

In at least one instance, these adjudicative applications of standards that do not exist in the law were used by the OIG[7] to extol the virtues of RFEs to "clarify" issues that should not be

[4] H.R. Rep. 101-723(I), 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6710, 1990 WL 200418 (hereinafter "IMMACT 90 Committee Report").
[5] 56 Fed. Reg. 31553, 31554 (July 11, 1991).
[6] http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=8ff31eeaf28e6210VgnVCM100000082ca60aRCRD&vgnextchannel=dfe316685e1e6210VgnVCM100000082ca60aRCRD. (Last accessed Feb. 14, 2012.)
[7] Report, p. 21: In discussing multinational managers, the report stated that,"[t]he beneficiary must...be detached from day-to-day work." This predicate cannot be found anywhere in law, and is antithetical to modern business practice for small and start-up businesses.

issues at all. The report failed to bring a critical eye to the complaints being put forth by a handful of adjudicators that they were encountering resistance to their non-legally based formulations of new standards. Without this critical eye, the report's findings are highly questionable and counter to the experience of the served public.

As discussed above, the experiences of many businesses trying to deal with USCIS are directly contrary to the findings of the report. The following examples, while not a scientific survey, are provided to illustrate these experiences.

Case Examples: Employment-Based Petition Denials

Petitioner: Manufacturing
Position: Head of Investment Strategy/CEO
I-140: EB-1 Intracompany Manager or Executive

A company that manufactures and distributes ink cartridge refill kiosks began transferring business functionality from Spain to the U.S. in 2007. The beneficiary came in L-1A status to serve as Head of Investment Strategy, and more recently has been named CEO by the company board. The U.S. business took off, signed a number of contracts with large national retailers, and now employs approximately 45 workers. The company then sought to retain the beneficiary on a permanent basis submitting an I-140 petition to classify him as a multinational executive for green card purposes. The case was denied even though the company has received approvals for I-140 multinational managers/executives for positions that are subordinate to the beneficiary. The company is now considering moving to a country that is friendlier to immigrant investment and entrepreneurship if the green card situation for its CEO cannot be resolved.

Petitioner: Finance
Position: Market Research Analyst
H-1B (Specialty Occupation)

A mortgage lending company was established in 1997, currently employs approximately 305 individuals, and has offices in nine states. It filed an H-1B petition to employ the beneficiary as a Market Research Analyst. USCIS denied the H-1B, concluding that the position of Market Research Analyst does not normally require a bachelor's degree in a specialty. USCIS drew this conclusion despite the fact that the U.S. Department of Labor's Occupational Outlook Handbook (OOH) states that a bachelor's degree is the minimum for many market research jobs (and a master's degree may be required) and goes on to list specific courses of study that are generally required, such as marketing, business, and statistics. The employer has filed suit in district court challenging this decision.

Petitioner: Travel/Tourism
Position: Sales Development Manager
L-1A Intracompany Transferee (Manager/Executive)

A company established in 2009 in the U.S., that creates, facilitates, and markets customized global tour packages, is a wholly-owned subsidiary of one of the world's leading international tour companies, with operations in approximately 180 countries worldwide. It sought to transfer the beneficiary from its U.K. subsidiary in L-1A status to manage marketing and sales operations. The beneficiary was to supervise two existing employees and was to hire and manage two additional employees to accommodate the company's rapid U.S. expansion. Although USCIS agreed that the described duties were of a managerial or executive nature, it denied the petition by concluding that, due to the small size of the company, the beneficiary would ultimately not be performing those duties. As a result of the denial, growth of the U.S. business has stalled.

Petitioner: Aviation
Position: President
L-1A Intracompany Transferee (Manager/Executive)

A France based company engaged in small business management in the aviation industry established its U.S. subsidiary in 2009. The company president's initial L-1A was approved for one year so that he could launch the U.S. operations. After one year, the company sought to extend his L-1A so that it could continue to expand in the U.S., but the extension was denied. USCIS concluded that, based on the size of the company, it did not believe that the beneficiary would be engaged in managerial or executive duties, and also concluded that the evidence did not demonstrate the parent/subsidiary relationship of the U.S. and overseas companies. As a result of the denial, the beneficiary had to remove his young son from school and return to France with his family. After four months, the company president obtained an E-2 visa from the U.S. consulate and returned to the U.S. Meanwhile, a second L-1A petition was filed immediately after the denial of the first, with the same documentation and facts, and was approved. As a result of the disruption to the company's operations, two U.S. workers were laid off.

Petitioner: Technology
Position: Senior Product Engineer, Senior Software Engineer, Software Engineer
L-1B Intracompany Transferees (Specialized Knowledge)

A software development company established in the early 1990s in Florida has a subsidiary in India. The company has two divisions, one which works with companies to design custom software solutions and a second which markets, sells and implements a line of proprietary solutions. There are approximately 23 employees at the U.S. headquarters. For over ten years, until 2010, the company successfully used the L-1B for targeted situations. Since 2010, six L-1Bs have been denied. As a result, projects are not being implemented in a timely fashion and the company is having a difficult time meeting client deadlines and expectations.

CHAMBER OF COMMERCE
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AMY M. NICE
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IMMIGRATION POLICY

February 14, 2012

The Honorable Elton Gallegly
Chairman
House Judiciary Committee
Subcommittee on Immigration Policy and Enforcement
Washington, DC 20515

The Honorable Zoe Lofgren
Ranking Member
House Judiciary Committee
Subcommittee on Immigration Policy and Enforcement
Washington, DC 20515

Re: For the hearing record, concerning the February 15, 2012 hearing on:
Safeguarding the Integrity of the Immigration Benefits Adjudication Process

Dear Chairman Gallegly and Ranking Member Lofgren:

As you know, the U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses of every size, sector and region across the United States. Safeguarding the integrity of immigration benefits adjudications is, and should continue to be, a key concern, not only for the business community but for the nation. We applaud this committee's focus and attention on ensuring that the adjudications process for immigration benefits is fair and accurate with appropriate safeguards. However, the recent January 2012 Inspector General's report, on The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers (hereafter referred to as IG report), is an incomplete basis upon which to analyze whether U.S. Citizenship and Immigration Services (USCIS) is meeting or effectively addressing this important objective. Its conclusions are not statistically valid and are inconsistent with the experiences of our members in dealing with the agency.

The integrity of the immigration benefits adjudication process is vital to protect the interests of employers sponsoring foreign nationals for lawful status, and also for our national interest. We appreciate efforts toward a thoughtful review of the need to preserve such integrity in immigration adjudications, since such reliability and veracity is a linchpin to our immigration system. We agree, for example, that Immigration Services Officers adjudicating benefit requests

should have appropriate access to and understanding of the work of Immigration Officers engaged in fraud detection. We challenge, however, the notion that a few employees at the agency responsible for adjudicating benefits for the nation's immigrants can, or should, drive changes in the burden of proof or other legal criteria impacting all foreign nationals and their sponsoring employers entitled to benefits under our immigration laws. We request that the U.S. Chamber's views on this important issue be included in the hearing record.

STATISTICAL WEAKNESSES IN IG REPORT

The IG report ostensibly presents an overarching view of undue influence by USCIS leadership and a concerted effort to "get to yes" on approval of immigration benefit requests that runs directly counter to the experiences of the business community. It appears the problem may be that the IG report draws conclusions that are too broad in relation to the data and survey underlying the report. The Chamber's regulatory economist has confirmed that the number of respondents (256 respondents to a survey instrument, and 147 selected interview respondents) is sufficient to be statistically valid but that the sampling methodology used by the IG is very problematic. Our regulatory economist has concluded that the survey methodology should draw into question any reliance on the conclusions in the report, since it is "self response biased."

Response bias means that the survey results are not statistically reliable to make inferences regarding the entire population of immigration adjudications completed at both the Field Operations Directorate (FOD) and Service Center Operations (SCOPS). About 30% of immigration adjudications, and very few employment-based adjudications, occur in FOD. About 70% of immigration adjudications, and almost all employment-based adjudications, occur at SCOPS. However, the survey was only provided to FOD staff. Moreover, these respondents were not randomly selected and thus the survey responses only represent the individuals who chose to respond. It is unknown to what extent the response decisions were influenced by factors that distort the results. In particular, the IG should reveal the extent to which the responses may over-represent staff in a few offices. Even though at least some responses were claimed to have been received from most field offices, it is not clear whether the numbers of responses were distributed in proportion to the staff totals for each office. For example, if 80 percent of the responses came from an office that comprises only 10 percent of total field office staff, then the summary of responses would inaccurately represent the overall field office situation and primarily represent only the peculiar circumstances in one office. In that case a problem that is specific and isolated could be misdiagnosed as a system and widespread problem.

For all of the above reasons, the IG report results are misleading if applied to the overall immigration benefits adjudications system. The IG's results and recommendations at best only reflect conditions in the subset of staff located in the field offices, and, as such, should not be broadly considered in measuring the integrity of the immigration adjudications process.

COMPANY EXPERIENCES

Contrary to the concerted effort suggested in the IG's report to find ways to approve cases, companies have explained the following types of experiences in adjudications. A simple review of this sampling of case summaries hardly supports the notion that agency leadership is engaged in a pattern of exercising influence over employment-based adjudications.

- A company manufacturing equipment conducts product testing in the United States after global teams develop new equipment specifications. A team of American engineers collaborating with company staff at design centers in North America, Asia and elsewhere comes together to complete product testing in the U.S. before manufacturing commences. Products are manufactured principally in the U.S. although some manufacturing is also conducted abroad. Products are principally sold outside the U.S. and most competing manufacturers in the particular industry are foreign corporations manufacturing solely outside the U.S. Visa petitions are denied for the foreign engineers working on the design team to come to the U.S. for product testing. Product testing is delayed, new product specifications can't be finalized, manufacturing engineering process are delayed, and US-based manufacturing jobs are reduced or new hiring delayed, while foreign competition is helped.

- A company has proprietary game software and a team of engineers working globally on updates and expansions to the product, with the product team based in the U.S. A foreign engineer already in the U.S. needs an extension of stay to continue his work on a key aspect of the game. A lengthy request for evidence is issued in the visa petition extension proceedings, questioning whether the worker qualifies to retain the same job for the same employer that he is already fulfilling, and in this case happens to hold several patents related to the game.

- A company designs and manufactures precision controls. It has three design facilities in the United States, two in Europe, and one in Asia. Individuals working on product design are typically in three or more locations, working jointly on different aspects of the project. The expertise of the engineers is not narrowly held within the company; instead a large number and percentage of the engineers is expert on precision controls and the company's proprietary systems. However, the expertise is narrowly held within the industry and work on the design projects cannot be done without the engineers internal to the company. The company has regularly received denials over the last few years when it petitions for a visa to have an intra-company transfer come to the U.S. to continue working on new product designs with American staff.

- A company has a leadership program where key up and coming staff come to the US to both facilitate US-centric experience for the future management of the company and promote the cross-fertilization of ideas that is needed in a multinational company. Visa petitions are

regularly denied, despite the interest of the American company to ensure its professional, degreed staff is exposed to American business methods.

- A company wants to open a fulfillment center in the U.S. where on-line orders can be processed and sent to North American customers. Visa petitions to bring in a handful of foreign staff well-versed in the company's internal processes are denied. While the foreign staff would have trained new American staff to be hired, the center cannot be opened without some experienced internal staff. Instead, the company considers opening a fulfillment center in Canada.

CASE STUDY IN CURRENT USCIS ADJUDICATIONS WHERE THE FACTS AND DATA ARE INCONSISTENT WITH THE IG REPORT CONCLUSIONS

Companies have observed an erosion over the last several years in the consistency and fairness of L-1B decision-making,[1] a trend that companies started noting pre-dating the tenure of the current USCIS Director. Companies now believe that the definition of qualifying specialized knowledge has been severely and inappropriately narrowed, in ways not contemplated by the controlling statute or regulations.

As you know, the L-1 category was created by Congress in 1970 legislation, and updated in 1990, to facilitate the ability of multinational companies to identify their own managers and executives (L-1A visas) and other personnel with advanced or specialized expertise (L-1B visas) who are needed in the United States. You may be familiar with the fundamental determination for L-1B classification, which is whether the beneficiary employee possesses "specialized knowledge." While an amorphous concept, in the context of L-1B status such knowledge may be best summarized as an advanced expertise about something the company values in its ability to do business.

On January 30th the U.S. Chamber hosted an L-1B legal and policy discussion. The impetus for the meeting at the Chamber was that despite best efforts to respond to the new agency approaches in L-1 adjudications, companies have not been able to manage their intra-company transfers of specialized knowledge staff with any predictability.

There were over 325 people participating in the L-1B event at the Chamber, either in person or listening in by phone, representing a wide range of careful and responsible employers who use the L-1B category.

While it is USCIS regulation and USCIS guidance that by law implement Congressional intent in the L-1B visa category, the State Department plays a critical role in identifying which

[1] A review of official USCIS statistics on L-1B approvals and L-1B Requests For Evidence (RFEs) 2003 to the present should confirm the grim changes to which multinational companies have been exposed, when comparing the period 2003-2007 with 2008-2011. Such data was apparently released to the National Foundation for American Policy, which issued a report on February 9, 2012 regarding USCIS H-1B and L-1 adjudication trends, Data Reveal High Denial Rates.

L-1B visa applicants are "clearly approvable" consistent with USCIS's policies. Thus, both agencies are directly involved in the L-1B area. The companies shared that they have each experienced a stark shift in L-1B adjudications, both at USCIS and at American consular posts abroad.

In particular, the companies' remarks attributed the increased delays, denials, and inconsistency in the L-1B category to new agency views on four critical points:

1. **Improper focus on numbers of similarly situated staff**. When agencies determine if someone is a key employee with specialized or advanced knowledge, adjudicators incorrectly are focusing on the number of employees in the global organization who "do the same type of work" without engaging in a relativistic, case-by-case analysis of the facts or business need. In some cases, if more than one person has a similar skill set, the agency states it cannot find specialized knowledge.
2. **Improper focus on O-1 standard of accomplishment**. In determining where someone's knowledge falls on the spectrum between "universally held" and "narrowly held," examiners are improperly asking for evidence of the type required to confirm O-1 eligibility, such as patents created as a result of the employee's knowledge and published material about the employee's work. Officers also regularly inquire about the level of the employee's remuneration as compared with others.
3. **Failure to recoguize legitimate business requiremeuts**. The current approach by consular posts and USCIS Service Centers gives no weight to the company's projects, products, research and development, testing, transitions after merger and acquisition, leadership or cross-fertilization programs, or professional services contracts for which the beneficiary employee's skill set is needed, even though such context would allow adjudicators to validate whether the beneficiary's knowledge is advanced or specialized.
4. **Improper *de novo* review on extensions**. In reviewing an extension or reissuance request for an L-1B worker, agencies give no weight to prior decisions for the same employee, working in the same job, for the same assignment, for the same employer, even where there are neither changes in circumstances, material error in the prior approval, or new evidence that impacts eligibility.

The companies explained that these four agency misconceptions have lead to an unfounded narrowing of the definition of specialized knowledge. The companies also made the following important and related observations:

- In a world where not all intellectual capital is housed in the United States, one of the keys to maintaining a multinational company's competitive position is the organization's ability to deploy specific people or specific internal skill sets for assignments in the U.S. Such deployment is integral to a multinational company being able to expand U.S. operations and create and retain jobs in America.
- Companies are not just seeing denials in the grey areas of L-1B interpretation. They see denials in cases where employees had levels of specialized knowledge far greater than what has traditionally been the minimum acceptable standard.

- Requests for evidence in L-1B petitions have become remarkably burdensome, to include agency requests for extensive data on whole segments of the workforce of large, publicly traded companies or further information on staff who are patent holders in areas related to an employer's proprietary products.
- The dramatic increase in denials and requests for evidence suggests an L-1B policy that is drastically more restrictive than at any time since the category was created in 1970. The only apparent policy goal is to reduce L-1B visa usage, a policy that is not recognized under the law and has not been subject to any public review or analysis on its impacts on business and on the U.S. economy.
- A continuation of the current USCIS and State approach to L-1B classification dilutes the ability of companies to create and retain jobs and investment in the United States.

CONCLUSION

None of what we have heard from companies suggests that USCIS is in the process of making it easier for petitions to be approved, that USCIS leadership is intervening on behalf of employers, or that requests for evidence are being limited. In that the business community experience seems directly contrary to the IG report, we hope that these factors will be taken into account in assessing the value of the IG report.

We thank you for your consideration of these views.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits

Amy M. Nice
Executive Director
Immigration Policy

Ms. LOFGREN. I would just note in the letter from the Chamber of Commerce is this statement: All regulatory economists that reviewed the report—this is for the U.S. Chamber of Commerce—has concluded that the survey methodology should draw into question any reliance on the conclusions in the report, and that is a concern that I have.

Now, having said that, and this is with all due respect, Mr. Edwards, and it is not personal to you but I was astounded at the amateurishness of this report, and I expect better and I am hoping that maybe we can sit down and talk about the need for statistical analysis for future reports. And I may have some direct questions for you that I will go into off calendar.

But, certainly, we don't want fraud, I mean, and I remember being in this chamber a number of years ago in the 90's and pointing out concern about H-1B approvals, and one Sunday morning I took the addresses listed in the top 20 and they were all in Silicon Valley and I drove around.

They were post office boxes and I remember saying, you know, if a middle-aged Congresswoman can find out that the employer is a post office box there was a problem. This was way before you were here, Mr. Mayorkas. It was in the 90's. And so, certainly, there is room to improve and you have made tremendous improvements.

I would just note that in terms of just the statistics, if you take a look at the H-1B denial rates and who knows whether this is the post office boxes I saw back then but, for example, in the year 2004 the denial rate was 11 percent on H-1Bs. In the year 2011, it is 17. When you take a look at the request for evidence rates in 2004 it was 4 percent. In 2011, it was 26 percent. I mean, that is a big jump.

In the L-1B request for evidence rates, it was 2 percent in 2004, 63 percent in 2011. So you are really ramping up the evidentiary standards in the inquiry and, certainly, we don't want fraud but there is a price to pay as well if it is a legitimate effort and it is delayed unduly. And I want to just raise a couple of questions. For example—and this is an actual case, I won't mention the country or the name of the individual out of respect for the process—but it is a former head of state of a Western European nation whose name is a household name, who was applying to come give a speech and was asked to list his employment dates and his employer. It is like, give me a break.

I mean, how could that be a reasonable use of our time and effort? And I am wondering—well, for example, a case where the U.S. Chamber has cited where a company wanted to open a fulfillment center in the United States and there were visa petitions to bring in a handful of foreign staff to train American staff for the new center, and they couldn't get the visas approved and so the company went to Canada instead.

Or an issue raised by the immigration lawyers of an intracompany manager for a cartridge refill kiosk company that was moving from Spain to the United States. The business took off. They submitted an I-140 for the CEO. It was denied even though people who reported to him had been approved and so now the company is looking to move outside of the U.S.

I say this not to be critical of you, Mr. Mayorkas, because you are a breath of fresh air for this agency. You have computerized it. You have modernized it. You have rooted out fraud. But what can we do systematically to make sure that our anti-fraud efforts don't tie up legitimate businesses?

I worry that if you delay—the easy thing to do is to say no and saying no has a price to our economy because when you just say no, companies move offshore and Americans lose jobs. I know you care about that. What are your thoughts on that?

Mr. MAYORKAS. Thank you very much, Ranking Member Lofgren.

Let me, first, say that one will always be able to present to any large organization an example of a mistake that has been made.

Ms. LOFGREN. Sure.

Mr. MAYORKAS. But I am immensely and deeply proud of the quality of the work that is performed at U.S. Citizenship and Immigration Services.

It is all about quality. It is all about the quality of work that we deliver, and I agree with Chairman Gallegly's statement that there is never a legitimate reason to deny a petition where the beneficiary is eligible for the benefit and there is never a reason to approve a petition that does not meet the statutory requirements.

Ms. LOFGREN. I agree with that as well.

Mr. MAYORKAS. And we have focused extensively on improving the quality of our work and providing the tools to adjudicators to perform at the highest level. They have that desire, they have that drive and they have that commitment to our agency.

In the realignment, to which I referred in response to the Chairman's first question, I created the Office of Performance and Quality to really shift the focus of our agency from an agency that historically has put a great deal of prioritization on speed to the quality of our work, and the approval or denial rates are not defining.

What is important is: are we approving the cases that should be approved, are we denying the cases that should be denied, and are we providing the adjudicators with the tools to do that.

Ms. LOFGREN. If I may, Mr. Chairman, it seems to me that sometimes there are informal methods to help improve processes, and it is not you. It is the State Department. But I think back to years ago of a case in my office, my constituent, an American citizen, who needed a kidney transplant and her brother, her younger brother, wanted to donate that kidney. I got a call from the physician, her physician, the surgeon at Stanford, and said she is going to die if we can't get this done in a time frame.

Her brother went in to get a visa and was denied and so we sent an inquiry please—you know, we have talked to the doctor. The physician called and they denied it again, and I just wrote to the State Department, this is your decision but if you kill my constituent, I mean, I think 60 Minutes is going to cover it.

And so somebody sometimes needs to look at these things from outside and say, yeah, this is fraud, we don't want to approve it, or we are all human. Mistakes can be made and to correct them quickly instead of after 2 years is an appropriate thing to do.

My time has expired, Mr. Chairman. I yield back.

Mr. GALLEGLY. I thank the gentlelady for being sensitive to the clock.

I would now yield to Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman.

I thank both of our witnesses. First, Mr. Edwards, this phrase "get to yes," is that a phrase that originated with you and if so what evidence did you find to support the notion that there has been a shift in the paradigm and now the objective is to get to yes as opposed to get to correct or get to complete, which would make more sense to me?

Mr. EDWARDS. Thank you, sir.

We don't know who originated that phrase. It is something we came across many times during our field work during this inspection. But determining who originally said it was not our focus of our review. So I am not sure who started that.

Mr. GOWDY. Well, let me——

Mr. EDWARDS. I know Director Mayorkas talks about it in his testimony about getting to the truth but this getting to yes, we don't know who originated that.

Mr. GOWDY. Getting to the truth would be very hard to disagree with. Getting to yes is a little more subjective, particularly in light of fraud referrals. Let me ask you one other thing before I speak to the director.

The other phraseology that I found problematic was the notion that outside counsel is running the office, that private immigration attorneys are running the office.

What substantiates that allegation? Was it pervasive? Was it episodic? How did that wind up in your report?

Mr. EDWARDS. Well, there were several cases of this type of improper pressure brought to our attention. I don't know the exact number in front of me but I would be happy to provide that to you in writing or I can come by and brief you.

Mr. GOWDY. Well, I would like that and let me start by saying I listened very intently as you went through your background, particularly as a prosecutor. I have great regard for that. I commend you for the years you have served. You mentioned as a Federal prosecutor.

I don't know whether you were a state or not but, regardless, thank you for your service. You will agree, I am sure, that if there were an indication that the criminal defense bar were running the DA's office we would find that very objectionable and while the reality matters, and I am not overlooking the reality, the perception matters as well. And if there is a perception within the office that outside counsel has more influence than the reviewers within the office, that is a problem.

So did it exist before you got there? What are you doing about it or is it an unfair accusation?

Mr. MAYORKAS. Thank you very much, Congressman, for your inquiry because I think you hit on a very important point, that if there is a perception within the agency that is quite divorced from actually what is really happening, we, as leadership in the agency, have to address that even if that misperception is amongst an incredibly small number of people.

I have spoken repeatedly throughout the agency about the fact that there should not be a culture of "get to yes" nor should there be a culture of "get to no," of which we are also accused, but rather

the culture that should prevail from every quarter and across the entire agency is a culture of "getting to right," which I think you alluded to.

The notion that outside counsel or anyone outside our agency runs our agency is categorically false, of course, and I think what the inspector general's report reveals to us is that we have to communicate a bit better throughout the agency and amplify the messages that we already have communicated, I, in particular, everywhere I go throughout the agency, not only domestically but internationally.

Mr. GOWDY. My time is almost up. I want you to hearken back to the old days as an AUSA. If you had made a decision and the criminal chief or the civil chief had overruled you because they had gotten a phone called from defense counsel you would be appropriately outraged.

Did you find any instances where that did happen, where the decision maker was overruled either because an email or a telephone call was placed to a supervisor?

Mr. MAYORKAS. I myself have not either as a Federal prosecutor in the United States Attorneys Office for 12 years or as the Director of this agency.

Mr. GOWDY. Mr. Edwards, did you find any evidence that outside counsel was able to overturn decisions that were made by line reviewers?

Mr. EDWARDS. Well, a poorly documented and regulated process to allow some cases to be reexamined in a favorable light is undesirable. It lacks transparency and lacks internal controls and it creates unfairness. Who you know should not affect the outcome of the process, of the petition, but I am not aware of any myself.

Mr. GOWDY. The clock is off but I don't think that means you are giving me unlimited time so——

Mr. GALLEGLY. Time of the gentleman has expired and at this time the Chair would yield to the gentlelady from California, my good friend, Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman.

I am very appreciative for you holding this hearing. I would like to welcome our witnesses today and say hello to my old friend, Mr. Mayorkas, who served as U.S. Attorney in the L.A. area and I got to know him. I am very pleased that he is here with us today in this very important role.

I simply want to get a better explanation of the EB-5 foreign investor visas and try and understand the requirement for investment in high unemployment areas with investments of, I think, $500,000 or so.

We have been trying to figure out—for example, in the L.A. area we have located all of our regional offices. We are trying to determine how they define the high unemployment areas getting the benefit of these investments. Could you help me to understand this a little bit better, Mr. Mayorkas?

Mr. MAYORKAS. Thank you, Congresswoman.

The EB-5 program is an immigrant investor visa program that provides (in tremendous summary fashion) that a foreign investor who invests the required amount of capital in a new commercial enterprise that creates at least ten new jobs may obtain conditional

lawful permanent resident status, and the amount of investment that must be made is $1 million unless the new commercial enterprise is located in what the legislation describes as a targeted employment area, an area of high unemployment, specifically one that endures 150 percent of the national average.

And the targeted employment area is defined geographically by a state according to the regulations that implement the statute and then our agency verifies that the geographic boundaries defined by the state as a targeted employment area actually do suffer 150 percent of the national average of unemployment. That is a very quick sketch of the program.

Ms. WATERS. Does it work?

Mr. MAYORKAS. The program does work. We can provide data if you should so request with respect to the amount of capital that has been invested in the United States and the number of jobs that have been created as a result of the program.

Ms. WATERS. So when you have potential investors do you suggest places for them to invest? And most of these are like construction projects, I understand.

But are they looking for places to invest? Do you suggest to them where they can go where it would be helpful for dealing with unemployment? How much do you get involved in this?

Mr. MAYORKAS. Congresswoman, we do not encourage investment in a particular project. We do not make recommendations with respect to the advisability of an investment.

Rather, it is our responsibility to determine whether the petitions that have been submitted to us do or do not meet the statutory eligibility requirements and, on the facts that are presented to us in adherence to the law that Congress has passed, whether the petition should be approved or denied.

Ms. WATERS. Are you——

Mr. MAYORKAS. That is—if I may, Congresswoman, that is the standard that guides all our work, not just with respect to the EB-5 program.

Ms. WATERS. Are you familiar with this article by Patrick McGheehan and Kirk Semple dated December 18, 2011, that says "Rules Stretched as Green Cards go to Investors?" Are you familiar with this article?

Mr. MAYORKAS. I am.

Ms. WATERS. And do you agree or disagree with it?

Mr. MAYORKAS. It is not really a question of whether I agree or disagree with it, Congresswoman, respectfully.

What the report, I think, sought to identify was what the reporters perceive as a potential for abuse in the regulations that define a targeted employment area and, specifically, the ability of states to designate that.

Ms. WATERS. This article talks about the giant Atlantic Yards project in Brooklyn which abuts well-heeled brownstone neighborhoods that has qualified for special concessions using a gerrymandered high unemployment district. The crescent-shaped zone swings more than two miles to the northeast to include poor sections of Crown Heights and Bedford-Stuy.

A local blogger and critic of Atlantic Yards, Norman Oder, has referred to the map as "Bed-Stuy Boomerang." Are you familiar with that?

Mr. MAYORKAS. I am familiar with the article. I did not study the underlying case about which they reported.

Ms. WATERS. Mr. Mayorkas, have you studied any of the cases that have been identified either in this article or other articles that maintain that the rules are being stretched?

Mr. MAYORKAS. I am familiar with the concerns underlying the reporters' identification of particular cases.

Mr. GALLEGLY. The time of the gentlelady has expired. Before I go to Mr. Gohmert, I just briefly want to make a clarification.

When I introduced our director as the former U.S. Attorney for the Central District of California, I didn't note that the Central District of California, which is my home, is also the largest district in the Nation by population. So that may answer your question, Mr. Gowdy.

With that, I would yield to Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman, and I appreciate the witnesses being here today.

It is rather fortuitous as far as the timing of this hearing and my friend from California brought out the EB-5 visa issue because I have been finding out more about that just in recent days because here is the scenario.

A man named Hector Hernandez Javier Villarreal, former secretary executive of Tax Administration Service of Coahuila, Mexico, apparently was arrested with his wife, charged with stealing money, embezzling money from Mexican banks.

Local law enforcement in east Texas tell me that they were told it could be hundreds of millions, even billions of dollars that were embezzled.

Anyway, they were arrested and folks back home were told they put up a million dollars in cash to be bonded out of jail in Mexico and then applied for an EB-5 visa, which was granted.

I am not sure if there was a policy of "get to yes" but certainly yes was gotten to rather quickly with these folks because they needed out of Mexico if they were going to be true fugitives and jumped their bond. So they came to east Texas on a EB-5 visa.

Local law enforcement and Homeland Security personnel in Texas were told that actually within two or 3 days of the visa being granted it was revoked. Well, local law enforcement in Tyler, Texas, stopped a car for a traffic violation. They have a good sense on some things just not seeming right when they found a car with $67,000 in cash, two kids, shotgun and a driver.

They started running these folks and stirred up a lot of interest of ICE as well as Homeland Security. ICE immediately stepped in, wanted to know why they were running the shotgun, which also raises issues. I wonder if this was involved in "Fast and Furious." We have no idea.

But the Federal authorities stepped in. ICE took these folks and the materials that were obtained by local law enforcement to the Dallas detention facility and then Homeland Security reported to the sheriff's office in Tyler, also concerned about the running of the

name and the gun, and they were told, well, you have to follow ICE because they have taken these folks to Dallas.

Once in Dallas, the law enforcement tells me that the State Department told them they had held them for 48 hours, they got to let them go—that even though the visa was revoked they got into the country before the visa was revoked.

Therefore, they are lawfully in the United States and therefore you have got to let them go anywhere they want to go in the United States. So ICE reluctantly, as I was told, released them and within a day or two the State Department said, you know what, our neighbor to the south has warrants out on these folks.

We really need to get them back. But since they had such large amounts of cash they have apparently not had trouble going to other places as yet undetermined.

So it raises all kinds of questions. Are people able to just buy their way into this country by saying look, you know, we know you have got tough economic times in the U.S. so whether it is a million dollars or, as I understood it, these folks were willing to put up $500,000. It must have been, perhaps, in a high-unemployment area.

But it sounds like an EB-5 visa is just that, a way for people to buy their way into this country. And why in the world would a State Department direct the release of people for whom there were warrants out in our neighbor country? Supposedly, the State Department wants them to be a law and order country in Mexico.

So I am open to any suggestions as to how we correct this kind of fiasco from happening, and it makes you wonder do we have terrorists that have utilized this same system to buy their way in. But any suggestions either one of you way may have.

Perhaps we need an IG inspection on this or an investigation on just what all has gone wrong here. But any comments?

Mr. MAYORKAS. Congressman, thank you.

I am not familiar with the case.

Mr. GOHMERT. Well, I didn't figure you would be but if things were as have been revealed to me as I have conveyed to you I would like your suggestions on how we fix things the way they are now.

Mr. MAYORKAS. Let me, if I can, given my unfamiliarity with the case that you describe, make some critical foundational points.

Number one, we as an agency conduct extensive background checks of individuals who seek to enter the United States——

Mr. GOHMERT. Or you are supposed to.

Mr. MAYORKAS. We do. Who——

Mr. GOHMERT. Well, it would have turned up a warrant if that had been done here.

Mr. MAYORKAS. As I said, Congressman, I can't speak to the fact of that——

Mr. GOHMERT. Right.

Mr. MAYORKAS. Of the case but——

Mr. GOHMERT. So all you can say is you are supposed to do a thorough background check.

Mr. MAYORKAS. Yes, indeed.

Mr. GOHMERT. Right.

Mr. MAYORKAS. Yes, indeed. And we adhere to our responsibilities scrupulously in a way that makes me quite proud. We have actually expanded the breadth and frequency of the background checks that we conduct during my tenure.

You asked a question about the EB-5 program and whether it is really a vehicle for individuals to purchase entry into the United States.

The EB-5 program—and I would respectfully submit that it is not—the EB-5 program does not provide, as legislated by Congress, that if you pay $500,000 in a targeted employment area or $1 million outside of one you shall gain entry into the United States, rather that you must invest your capital into a new commercial enterprise that creates jobs for United States workers.

It is an immigrant investor visa program that is designed to create jobs for U.S. workers and so it is not a vehicle for individuals to buy a visa. And so I would welcome the opportunity to speak with you separately.

I will learn about the case to which you refer and I will be in a position to address the facts of the case specifically.

Mr. GALLEGLY. The time of the gentleman has expired.

Mr. GOHMERT. Mr. Chairman, could I just ask unanimous consent to ask the IG if this is something he would be able and willing to investigate?

Mr. GALLEGLY. Without objection.

Our day is getting short. We have another panel. We have to be out of here by 4:30.

Mr. EDWARDS. Congressman, if the Chairman makes the request, I will definitely look into it.

Mr. GOHMERT. Okay. Thank you. Chairman, I know where I need to go after the hearing.

Mr. GALLEGLY. The time of the gentleman has expired.

Ms. Jackson Lee?

Ms. JACKSON LEE. Again, let me thank the witnesses for their presentation and as well to acknowledge the Chairman and the Ranking Member for this hearing.

First of all, Mr. Edwards, did you find fraud, conspicuous and open fraud, in this process that the former U.S. Attorney is over the benefits aspect of immigration? Did you find conspicuous fraud?

Mr. EDWARDS. No, ma'am.

Ms. JACKSON LEE. All right. A wonderful Greek name, I believe, Mr.—I want to pronounce it right—it is Mr.——

Mr. MAYORKAS. It is Mr. Mayorkas and I come from a long line of bad spellers. It is a Spanish name.

Ms. JACKSON LEE. Spanish. All right. [Laughter.]

Then I stand even more corrected.

Mr. Mayorkas, let me make sure that that is correct. And the agency that you are over out of the department is a civil agency, right? It doesn't deal with criminal issues.

Mr. MAYORKAS. That is correct. It is an administrative agency.

Ms. JACKSON LEE. Okay. And so the idea of this issue of private lawyers running your shop, what does that mean to you? And I am going to be doing rapid questions. I mean, what do I understand when someone says private lawyers are running the shop?

Mr. MAYORKAS. What it means is that because we are a transparent agency and an agency that engages with all stakeholders that apparently that transparency has created a misimpression that somehow somebody other than the leadership of the agency runs the agency, and it is a misperception that we will address through robust communication.

Ms. JACKSON LEE. Well, let me thank you for that because, first of all, being administrative and not criminal or not being a judicial agency per se the issue of ex parte contact is not an issue. Lawyers have a right to have a conversation. They are civilians.

Your workers or employees are civilians as well and I assume they take information from whoever they might be able to get it from, including advocates for immigrants. Is that not correct? There are some individuals who will have an advocate from a nonprofit agency.

I assume they have the opportunity to bring information forward on behalf of an immigrant or someone seeking status. Is that correct? You take information from all?

Mr. MAYORKAS. We take information from all and we have established channels to receive that information. I think, if I may, Congresswoman, what the Chairman was concerned of and what the inspector general focused on and what we are focusing on always is the fact that there should be no communication that provides an avenue for undue influence on the adjudication, that an adjudication must be independent based on the facts and the law and nothing else.

Ms. JACKSON LEE. And I agree with that. But as my, and I do not want to put words in her mouth, but as my colleague from California, the Ranking Member, indicated, where there is life or death matters we have all made mistakes and your agency has made mistakes in its denial. And so sometimes people are extremely zealous to save a life to get someone with a transplant, to get families reunited who were trying to get back from a funeral and they are in India and they have been begging for—while the person was ailing. Then the person dies and they are denied.

So I don't want this hearing to be a statement that you should close your eyes and ears to mercy requests, to information. I have no problem with transparency and I want the system to be held to the highest standard. So let me just lay that on the record and let me go forward on these questions.

I happen to think there is some value to the employment-based visas. It is my understanding that 10,000 visas a year are set aside for the EB-5 program. However, less than half of these are actually issued. What do you see as the major obstacles for that?

Mr. MAYORKAS. If I may, Congresswoman, I——

Ms. JACKSON LEE. And let me just give these questions so it could be on the record. It is my understanding that each immigrant who is accepted on an EB-5 their investment is required to create U.S. jobs.

I would like to know how you monitor that and I think that is a response to Ms. Waters' question as to how do you tie in Bed-Stuy and don't do anything for them. Then under EB-5 what kind of accountability is there for contributing to deficit reduction and

job creation. We can use these effectively and I think they should be used. But go ahead, Mr. Mayorkas.

Mr. MAYORKAS. Thank you, Congresswoman.

The EB-5 program has enjoyed growth in its usage over the last 3 years. We are improving the quality of our adjudications and we are focused on improving the integrity of the program as well.

So while the visa program has been underutilized in terms of the maximum number of visas that are allowed, we have seen material growth in its usage.

Ms. JACKSON LEE. Is it——

Mr. GALLEGLY. The time of the gentlelady has expired, Mr. King.

Mr. KING. Thank you, Mr. Chairman.

I thank the witnesses for your testimony and your response to the questions from the panel. I turn first to Mr. Edwards and ask him, first, I want to give you an opening to respond to anything that might have been said that you didn't have the chance to say, but then if you could go into a little more depth on your sense of the analysis of the "get to yes" culture that you have observed exists within the department.

Mr. EDWARDS. Well, the 400 folks that we interviewed and surveyed there is extreme pressure for them to get to yes. There are cases that are clearly approvable and there are cases that is clearly deniable. It is the cases in that gray area that raises the concern.

Adjudicators, ISOs, have told my folks that it is easier to say yes and approve it and if they don't approve it, it comes back to them. So that is what we found.

Mr. KING. It is easier to say yes because there is a load of paperwork to fill out if you say no?

Mr. EDWARDS. Because there is a pressure to get things approved.

Mr. KING. Uh-huh. But you say it is the culture. Is there a process also? Can I count the extra pieces of paper I have to fill out if I say no as compared to those if I say yes, as an officer?

Mr. EDWARDS. Yes. Yes.

Mr. KING. Did you quantify that in your report or is that possible to quantify that?

Mr. EDWARDS. I will have to get back to you for that.

Mr. KING. I would pose that question to you formally in the hearing and ask you to get back on that.

Mr. EDWARDS. Sure.

Mr. KING. If you can quantify how much more paperwork is required to say no than it is to say yes.

Mr. EDWARDS. Sure.

[The information referred to follows:]

Answer to Question in the Record to Acting IG Edwards from Representative King

Section 10.2 of the USCIS *Adjudicator's Field Manual (AFM)* stresses that the detailed record of each case is the responsibility of the Immigration Services Officer (ISO) to whom the case is assigned.

Section 10.7 of the *AFM* lists five elements of a denial, which are:

1. An introduction that describes the benefit being sought;
2. A description of the criteria that must be met before an approval is authorized;
3. A description of the beneficiary's evidence;
4. Why the evidence provided failed to justify an approval; and
5. A conclusion that announces the denial and provides information about appeal rights.

An approval notice does not require a detailed review of the case facts. The approval notices we have reviewed are usually only two pages long and appear to have been generated automatically by the CLAIMS data system using existing information about the case.

A successful petitioner does not need a detailed review of why an approval was rendered, but merely instructions on how to request entry into the United States.

Case files can be very large, and there may be multiple reasons that justify a denial. Letters that inform a petitioner that the benefit request is denied are often many pages in length. In a recent case we reviewed, the denial letter was eight pages long, typical for complicated cases.

An important reason why a denial notification needs to be carefully written to the facts of the particular case – and therefore takes longer to write – is the need to document all of the legal considerations. The denial is often subject to an appeal. The denial decision must have sufficient legal justification in order for USCIS to support the decisions that ISOs make. USCIS may need to demonstrate to another authority why a petitioner's particular set of facts do not legally justify an approval. A decision to approve does not have this burden because petitioners do not appeal favorable decisions.

USCIS can provide the most authoritative and complete information regarding documents supporting denial notifications.

Mr. KING. If it is 91 percent more of that index exactly with the forms of the highest level of approvals that we have seen.

I thank you, Mr. Edwards, and then I turn to Mr. Mayorkas and I also appreciate your service and your testimony.

Just curious about, as I was listening in on some of the exchanges here, if your department says no to an application and that might prevent someone from otherwise exercising a privilege, not a right but a privilege, and that could be extrapolated into the end of life for someone—could be anything, it could be a plane that crashed, a car wreck, it could be an illness—would you take that as an action by your department that would have killed someone?

Mr. MAYORKAS. I look at the question as follows. What is the responsibility before us based on the facts that are presented and as we apply the laws that Congress has passed, and if in fact an individual applies for a benefit to which he or she is not eligible, under the laws that have been passed, the regulations that implement them and the facts as presented, then we are to adjudicate the case

accordingly. The consequences of an adjudication do not guide the adjudication but, rather, the facts and law do.

Mr. KING. Then how does that impact you when you hear from this panel, if you kill my constituent?

Mr. MAYORKAS. I don't think that is what Ranking Member Lofgren was asking me, quite frankly.

Mr. KING. Can you identify that? I would like to hear that.

Ms. LOFGREN. Would the gentleman yield? Because I——

Mr. KING. I would yield. I would like to hear this and I think you should have an opportunity to speak to it.

Ms. LOFGREN. I think you misunderstood my point.

Mr. GALLEGLY. It is the gentleman's time.

Mr. KING. So I would yield to the gentlelady from California.

Ms. LOFGREN. The point I was making, and I think you probably didn't hear what I said, this was the State Department, not USCIS, and it was a constituent of mine who was dying and needed a kidney transplant, and her brother was willing to donate his kidney.

Mr. KING. I understood this so far.

Ms. LOFGREN. They denied his application to come in and donate the kidney.

Mr. KING. Yes.

Ms. LOFGREN. And we had the doctor calling us, we had the hospital, and they just wouldn't listen. And it was their decision but I finally said, you know, you kill the constituent there is going to be a dust-up. And when they actually did look at what the doctor said they issued a visa. The brother came——

Mr. KING. Okay.

Ms. LOFGREN. And he donated the kidney and then he went home.

Mr. KING. I am reclaiming my time and I appreciate the gentlelady reiterating. That was the way I heard it and it just troubled me the extrapolation component of that, and I am hopeful that another statement the gentlelady made from California, the easy thing to do is say no, doesn't get easier to say no even if it is the State Department and not USCIS.

And so I appreciate the testimony that you have had, Mr. Mayorkas, that it needs to be an objective evaluation of each individual case separate from statistical data on the other cases.

It needs to be on the law and it needs to neither advantage nor disadvantage individuals. It needs to respect and reflect the rule of law and I think sometimes here we are pushing the line back and forth.

But that is the result that we need yet the data supports something otherwise and the culture that must exist that has been spoken to by the gentleman, Mr. Edwards, and I am looking at the chart here of the approvals and the disapproval rate from 2009 until 2011 that show that the disapproval rating has gone down, the approval rating has gone up and I haven't heard yet to what you attributed that, and I would ask if you would let us know what that is.

What does that data show us then?

Mr. MAYORKAS. Congressman, there are categories in which the denial rate has increased and there are categories in which the denial rate has decreased and there are times over the stretch of his-

tory when one would see an ebb and flow in denial and approval rates.

The critical question is, what is the quality of the adjudications that U.S. Citizenship and Immigration Services is issuing. Are we approving cases that should be approved and denying cases that should be denied or are we doing otherwise? That is the critical question. It is a matter of quality.

Mr. KING. But what do I learn from the data? Can I draw any conclusions from the direction the data has been going over the last couple of years?

Mr. MAYORKAS. Well, let us pose a data point that Chairman Gallegly presented in his opening remarks. The denial rate in the L-1B visa category has increased dramatically over the last 5 years.

We can draw from that fact quite a number of conclusions, any of which might be right, any of which might be wrong. The question that I have and the question that I ask internally is not data driven but is addressing the substance of the work that we perform.

Mr. KING. Then can I conclude that——

Mr. MAYORKAS. Are we getting it—if I may—are we getting it right? Are we requesting evidence when in fact further evidence is needed to make a meritorious adjudication and are our requests for evidence well framed to further the agency's goals and to be clear to the applicant or petitioner?

Are we deciding a case correctly, not worried——

Mr. KING. I hear your message, Director, and just in conclusion here then can I conclude and would you support an inclination that the quality of the H-1B applications are greater than they have been because that is the trend that we are seeing with the approval rates?

Mr. MAYORKAS. I am not prepared to make that conclusion based on——

Mr. KING. Thank you. I yield back.

Mr. GALLEGLY. The time of the gentleman has expired.

For clarification purposes, I would just like to follow up on the question that was asked of Mr. Edwards regarding the process.

Perhaps, Mr. Mayorkas, could you give us a simple yes or no answer, in the process of adjudicating a yes or a no, if there is a "yes" or an approval it merely requires an approve or a stamp "yes" whereas if there is a denial there has to be a detailed explanation for why there is a denial, not just denied versus a rubberstamp "yes?"

Is that fundamentally correct, Mr. Mayorkas?

Mr. MAYORKAS. I think it is fair to say, Chairman, and I know you asked for a monosyllabic response but I think it is fair to say that there are instances in which to deny a case requires more paperwork.

Mr. GALLEGLY. But the fact remains is it doesn't really require more—from a requirement standpoint than a stamped "yes" or an explanation for why it has been denied.

Mr. MAYORKAS. There are occasions when that is so and let me, if I can, say that I am addressing that issue as part of our Office of Performance and Quality.

Mr. GALLEGLY. And that part I appreciate. But historically, there is no requirement—I guess the threshold issue is I guess you can do a lot of things. But there is no requirement to explain anything when you put a "yes" down but when you put a denial there is a requirement for the rationale for the denial. That was my question.

Mr. MAYORKAS. May I——

Mr. GALLEGLY. Sure.

Mr. MAYORKAS. May I have a moment?

Mr. GALLEGLY. It is my understanding that it is in the adjudication manual. That is my question.

Mr. MAYORKAS. I will have to, if I may——

Mr. GALLEGLY. Would you check the adjudication manual? And we will check it, and just for the record we will make it a part of the record of the hearing.

[The information referred to follows:]

U.S. Citizenship and Immigration Services

\ afm \ Adjudicator's Field Manual - Redacted Public Version \ Chapter 10 An Overview of the Adjudication Process. \ 10.3 General Adjudication Procedures

10.3 General Adjudication Procedures [Chapter 10.3(f) update effective June 18, 2007.].

(h) Decision: Denial.

If a case is to be denied, the adjudicator must so note the action block and prepare the written denial notice. Denials may consist mainly of "boilerplate" paragraphs explaining the legal basis for the adverse decision or they may be entirely original. In all cases, the specific facts of the individual case must be explained in the decision. If a denial is based on precedent decisions, those decisions should be properly cited in the body of the denial notice.

The applicant or petitioner (or representative) must be advised of the action and provided with information concerning his or her right of appeal. Depending upon local procedures, denied cases may be held in suspense until an appeal is filed or the appeal period lapses, or the case file may be sent to another office for follow up action.

Denial decisions are normally sent to a supervisory officer for review and signature prior to mailing. Service of a decision is ordinarily accomplished by routine service as prescribed in 8 CFR 103.5a. Personal service is required only when an adverse action is being initiated by USCIS, such as a rescission or revocation.

\ afm \ Adjudicator's Field Manual - Redacted Public Version \ Chapter 10 An Overview of the Adjudication Process. \ 10.3 General Adjudication Procedures

Mr. GALLEGLY. I thank the panel for being here, and I apologize for getting started a little late. Unfortunately, I don't nor does any Member of this Committee have much power over when the bells ring around here to go to vote.

So thank you very much and I look forward to getting the responses on those couple issues that we discussed. With that, we will call up the second panel.

Mr. MAYORKAS. Thank you, Mr. Chairman. Thank you.

Mr. EDWARDS. Thank you.

Mr. GALLEGLY. Introducing our second panel, I will let the witnesses be aware of the fact that their written statements will be entered into the record in their entirety and request that you keep your opening statement to the requisite 5 minutes, and with that I would like to introduce our first witness, Mr. Mark Whetstone.

Mr. Whetstone is the president of the American Federation of Government Employees of that National Citizenship and Immigration Services Council. Mr. Whetstone joined the Immigration and Naturalization Service in 1999 and has since held numerous appointments.

Throughout his career with U.S. Citizenship and Immigration Services, Mr. Whetstone has adjudicated thousands of applications for work permits, travel documents, permanent residence and petitioned for immigrant workers.

Our second witness is Mr. Bo Cooper, who is the partner of Berry Appleman and Leiden in Washington, D.C.'s office where he provides business immigration advice to companies, hospitals, research institutions, schools and universities. Mr. Cooper served as general counsel of the Immigration and Naturalization Services from 1999 until February of 2003.

Mr. Cooper earned his J.D. from Tulane University Law School and holds a Bachelor of Arts from Tulane University.

Welcome to both of you.

Mr. Whetstone?

TESTIMONY OF MARK WHETSTONE, PRESIDENT, NATIONAL CITIZENSHIP AND IMMIGRATION SERVICES COUNCIL

Mr. WHETSTONE. Thank you, Chairman Gallegly and Ranking Member Lofgren, and Members of the Subcommittee.

I greatly appreciate this opportunity to provide our union's input at today's hearing. My focus today is specifically on the effects of adjudication, performance expectations and training levels of the immigration services officer as it relates to benefit fraud in the immigration service system.

It is our belief that continuing pressures in the production environment of adjudications coupled with inadequate levels of training pose a significant threat to protecting the immigration system from benefit fraud and consequently impacting national security.

The recent report by the DHS OIG concerning the effects of adjudication policies on fraud detection correctly points to the need for USCIS to permit more time for officers' review of case files.

This isn't the first time the agency has heard the same recommendation. In May of 2002, the DOJ OIG suggested that performance standards should be changed to allow more time to review files and seek additional information. In response to this most recent recommendation, USCIS did not concur and seeks to further analyze the need for additional time by adjudicators.

There are many things in the most recent report that we can embrace. However, the efforts by USCIS in the area of performance measurement is not one of them. The report would lead you to believe that the production performance measures for all adjudicators were rated non-critical in fiscal year 2011.

In fact, only 40 percent of the adjudicator population nationwide realized that adjustment in their performance standards and even then the reality was that other critical elements were used to entice officers toward production quotas.

The larger segment of adjudicators working in field offices saw no reduction in the quantity-based production standards. Several officers reported working through rest and lunch breaks to reach quota levels necessary to attain just satisfactory ratings.

Again, this is nothing new to CIS. In 2002, the GAO reported that because performance appraisal system was based largely on number of cases processed rather than on the quality of the review, adjudicators are rewarded for the timely handling of petitions rather than careful scrutiny of their merits.

Although the recent OIG report states that the decision to make production standards non-critical is a significant change that should improve fraud detection and national security, USCIS has recently moved to change that standard back to a critical element.

In reality, production pressure was never off and this latest action is a reversal of their stated position in the report. In that same report, supervisors and managers noted that adjudicators missed alias names for benefit seekers when conducting security checks during the adjudication process.

They go on to assert pressures to adjudicate quickly may hinder an adjudicator's ability to identify and query alias names during the security check process. It is our belief that such issues in this area pose direct hindrance to the detection of immigration benefit fraud.

In an August of 2011 report, the DHS OIG observed that USCIS has not developed a formal post-basic fraud training program. Additionally, fraud prevention training is not provided to all adjudicators responsible for just adjudication of specific benefits.

We understand USCIS is currently developing post-basic training fraud courses. We also are told that USCIS has agreed to begin the necessary steps to ensure officers receive this training annually once their courses are developed.

Although we can applaud any steps toward adequate training for adjudicators, our concern is the frequency of the training will be inadequate. The people perpetrating fraud work hard every day to alter their methods.

Providing training to officers only on an annual basis would continue to leave them without sufficient confidence to know when to refer cases of suspected fraud to officers with more expertise and equipped with advanced research capabilities.

We believe this is a gaping hole. We know that it is not easy to strike the balance between efforts to process the volume of requests for immigration benefits while protecting the system from fraud. It is our belief that USCIS policies in this area of production expectations and frequency of training could have a negative effect on the detection of immigration benefit fraud.

This concludes my statement. I look forward to answering your questions.

[The prepared statement of Mr. Whetstone follows:]

STATEMENT BY

MARK WHETSTONE, PRESIDENT

NATIONAL CITIZENSHIP AND IMMIGRATION SERVICES COUNCIL
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

OF THE

HOUSE COMMITTEE ON THE JUDICIARY

ON

SAFEGUARDING THE INTEGRITY OF THE IMMIGRATION BENEFITS ADJUDICATION PROCESS

FEBRUARY 15, 2012

Thank you, Chairman Gallegly and Ranking Member Lofgren. My name is Mark Whetstone, and I am the President of the American Federation of Government Employees' National Citizenship and Immigration Services Council. I greatly appreciate this opportunity to provide our input at today's hearing.

My focus today is specifically on the effects of adjudication performance expectations and the training levels of the Immigration Services Officer (ISO) as it relates to benefit fraud in the immigration system. It is our belief that the continuing pressures in the production environment of adjudications, coupled with inadequate levels of training, pose a significant threat to protecting the immigration system from benefit fraud and consequently impacting national security.

The recent report by the DHS OIG concerning the effects of adjudication policies on fraud detection correctly points to the need for USCIS to permit more time for the officer's review of case files. This isn't the first time the agency has heard that same recommendation. In May of 2002 the DOJ Office of Inspector General also suggested performance standards should be changed to allow more time to review files and seek additional information. In response to this most recent recommendation, USCIS did not concur and seeks to further analyze the need for additional time by adjudicators.

There are many things in the most recent report that we can embrace; however, the efforts by USCIS in the area of performance measurement is not one. The report would lead you to believe that the production performance measures for all adjudicators were rated as noncritical in FY 11. In fact, only 40% of the adjudicator population nationwide realized that adjustment and, even then, the reality was that other critical elements would be used to entice officers toward production quotas. The larger segment of adjudicators working in field offices saw no reductions in the quantity-based production standards. Several officers reported working through rest and lunch breaks to reach quota levels necessary to attain just satisfactory ratings. Again, this is nothing new to USCIS. In 2002, the GAO reported that because the performance appraisal system was based largely on the number of cases processed, rather than on the quality of the review, adjudicators are rewarded for the timely handling of petitions rather than for careful scrutiny of their merits.

Although the recent DHS OIG report states that the decision to make production noncritical is a significant change that should improve fraud detection and national security, USCIS recently moved to change the standard back to a critical element. In reality, the production pressure was never off and this latest action is a reversal of their stated position in the report.

In that same report, supervisors and managers noted that adjudicators miss alias names of benefit seekers when conducting security checks during the adjudication process. They go on to assert that production pressures to adjudicate quickly may hinder an adjudicator's ability to identify and query alias names during the security check process. It is our belief that issues such as this pose a direct hindrance to the detection of immigration benefit fraud.

At the same time officers are pressured to move the workload expeditiously, their confidence level in making correct decisions and detecting benefit fraud is weakened by a lack of adequate training in fraud detection.

In an August 2011 report, the DHS OIG observed that USCIS has not developed formal, post-basic, fraud training program. Additionally, fraud prevention training is not provided to all adjudicators responsible for adjudication of specific benefits. In at least one instance, 85% of the employees responsible for adjudication of a specific benefit were not provided the fraud detection training.

We understand USCIS is currently developing post-basic training fraud courses. We also are told that USCIS has agreed to begin the necessary steps to ensure officers receive this training annually, once the courses are developed and implemented. Although we can applaud any steps toward adequate training of adjudicators, our concern is that the frequency of the training will be inadequate.

The people perpetrating fraud work hard every day to alter their methods. Providing training to officers only on an annual basis would continue to leave them without sufficient confidence to know when to refer cases of suspected fraud to officers with more expertise and equipped with advanced research capabilities. This, we believe, leaves a gaping hole in the deterrence of immigration benefit fraud.

We recognize it's not an easy task to strike the balance between efforts to process the volume of requests for immigration benefits while protecting the system from fraud. It is our belief that USCIS policies in the area of production expectations and frequency of training could have a negative effect on the detection of immigration benefit fraud.

This concludes my statement. I look forward to responding to your questions.

Mr. GALLEGLY. Thank you very much, Mr. Whetstone. Mr. Cooper?

TESTIMONY OF BO COOPER, PARTNER, BERRY APPLEMAN AND LEIDEN, LLP

Mr. COOPER. Now? Thanks.

Thank you, Chairman Gallegly, Ranking Member Lofgren and distinguished Members of the Subcommittee. I really appreciate the opportunity to join in this hearing today.

I would like to focus my remarks on the inspector general's report and I would like to state at the outset that when I was in government much that we did was made better because of recommendations that were given to us by the inspector general.

They serve a critical role and much that the USCIS does will be made better by the recommendations in this report. There is a lot in there that will help the agency to become better in its critical responsibility to ferret out fraud in the system and to improve our national security protections.

But there are certain aspects of the report that are not in this vein and that, in my view, lack foundation, they are contrary to what happens in the actual adjudications world and they would be deeply problematic if they were to inform policy choices.

I would like to focus my testimony on four points today. The first is that the inspector general's conclusions that the USCIS fosters a "get to yes" culture and that it has got an institutional bias in favor of approvals and against requests for additional evidence were made without any evaluation of agency data or any analysis of what the agency's actual adjudication patterns are.

Second, the data that surrounds the agency's actual adjudication patterns doesn't support this conclusion. It refutes them. For the key employment-based benefits adjudications, as we have heard today, the rates of denials and RFEs have skyrocketed over the last several years.

Third, these actual adjudications patterns have serious real-life consequences that hurt the country's interests. These programs exist to foster economic activity that helps the United States.

Careful responsible employers are having greater and greater difficulty because of these actual adjudications patterns in bringing in talented foreign professionals who could help drive American growth and foster economic recovery.

And fourth, any of the report's recommendations that would lead to guidance to simply encourage numerically more RFEs or to raise the standard of proof in a way to prompt more denials would just make this consequence worse. The data indicates that if there is an adjustment trend to be managed at USCIS, certainly in the employment-based adjudications, it is not a trend toward reckless approvals.

It is a trend toward more restrictive decision making in programs that could promote economic growth in the United States.

The key issue with this aspect of the report—again, many elements of it were good—the key issue is that it drew conclusions based on discussions and statements that are important as statements and as indications of what adjudicators feel but they should have led to more analysis of data.

They were conclusions that would lead anyone, and the Subcommittee was right to hold this hearing, anyone to think it is a rubberstamping agency that is approving questionable adjudications.

But the data don't show this at all. As we have focused on today, the data shows an agency moving in the opposite direction and the L-1B program is the clearest indication.

Denial rates have quadrupled since 2008 in the L-1B program. RFE rates have skyrocketed so that two-thirds of the matters that are filed in the L-1B arena are subject to requests for additional evidence.

This is, clearly, contrary to the notion of a rubberstamping agency that is trying to handcuff its adjudicators in their efforts to reach correct decisions. And the L-1B program is, in addition to the starkness of the statistics, it is an important illustration because of the strength with which it illustrates the problems that result from these adjudications patterns.

I think we can all agree that not all brain power in the world exists in the United States and these programs, these L and H and O programs, exist because of Congress' recognition that it can be in our economic interest to bring these people onto our team in the U.S. It helps American workers. It helps the U.S. economy.

These kinds of adjudications patterns are restricting the ability of American employers to do that in ways that could help return job growth and economic strength to this recovery, and therefore, in my view, it was not responsible advice to the agency or to the Congress to draw the conclusions based on the absence of data that were drawn in the inspector general's report and that should not be the basis of policy making in this arena.

Thanks, and I would be glad to respond to any questions that the Subcommittee may have.

[The prepared statement of Mr. Cooper follows:]

Statement of Bo Cooper

Partner, Berry Appleman & Leiden LLP

United States House of Representatives Committee on the Judiciary

Subcommittee on Immigration Policy and Enforcement

"Safeguarding the Integrity of the Immigration Benefits Adjudication Process"

Washington, DC

February 15, 2012

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."

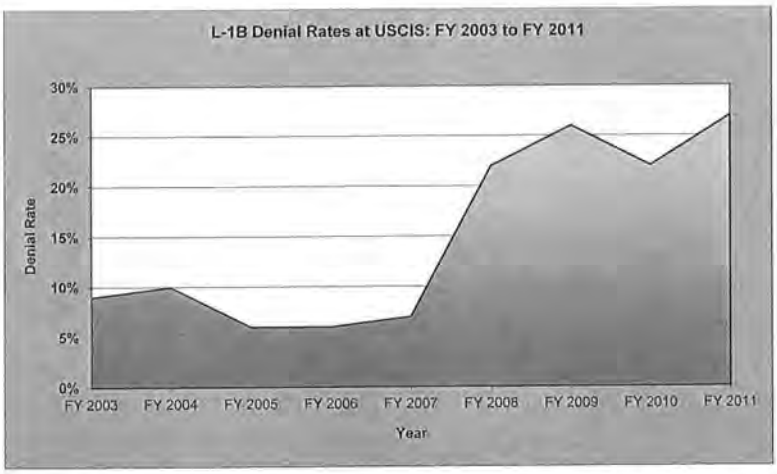
A reasonable reader coming to this issue fresh would read these sorts statements with great alarm. They give the impression that the immigration agency is tying one arm behind its own back, and willfully declining to take steps to avoid giving immigration benefits to people who are undeserving and even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

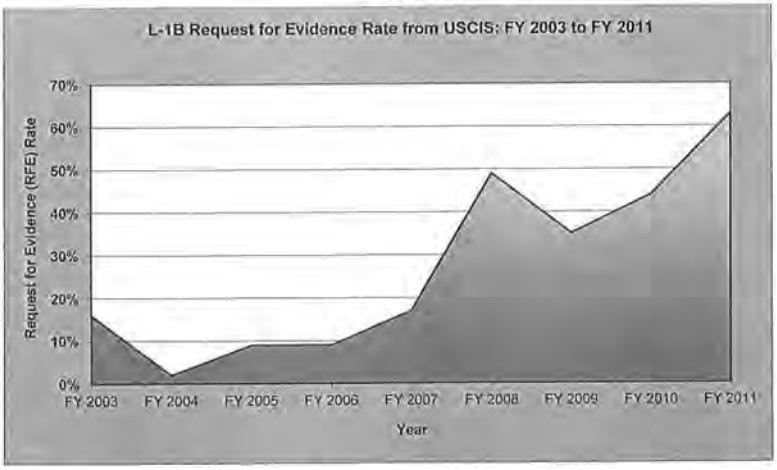
Figure 1



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.

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Mr. GALLEGLY. Thank you very much, Mr. Cooper.

Mr. Cooper, your testimony discusses at length the USCIS data showing that denial rates in the L-1B visa category had jumped from 7 percent in 2007 to 27 percent in 2011.

Looking at this same USCIS data, did you also notice that the overall denial rate for non-immigrant working petitions has fallen over 30 percent since President Obama took office?

Mr. COOPER. I am sorry. Which category was that, Mr. Gallegly?

Mr. GALLEGLY. That was all non-immigrant visas.

Mr. COOPER. From my reading of the data and my experience in seeing the process, there has been an increase in denial rates. Now, I think it is important to emphasize that there is not a correct denial rate. There is not a correct approval rate.

Adjudicators have to work in every case to figure out what the right application of the facts and the law are and get to the right result.

My point is, what I wanted to emphasize is that with these skyrocketing RFE and denial rates that should cause us to question very seriously the conclusions that the agency is prodding its adjudicators to rubberstamp questionable applications in a way that is leading to fraud.

Mr. GALLEGLY. On that note, over to Mr. Whetstone.

Is it your understanding that the quantity of cases processed will soon once again be officially considered as a critical element of the adjudicators' performance rating?

Mr. WHETSTONE. That is absolutely correct. As a union, we received notice from the agency in September that they intended to move the 40 percent—in fact, that is all that were really non-critical. Of the ISOs in the country only 40 percent were placed on a non-critical element. We received notice in September that yes, they are moving right now to take the element back to critical.

Mr. GALLEGLY. What are the national security implications of pressure on adjudicators whether it come from outside immigration attorneys or from USCIS officials or supervisors to improve immigration benefits?

Mr. WHETSTONE. Thank you. I think that the easiest way to say that is the wrong person getting the benefit. If you have pressures being placed on you to move quickly in adjudicating cases, the likelihood of you cutting corners, possibly letting mediocre cases, you know, borderline cases just flip to yes instead of to a denial, I think that would be the national security implications.

Mr. GALLEGLY. Okay.

Mr. Cooper, are you familiar with the July 2008 Administrative Appeals Office decision in the GSE case?

Mr. COOPER. Yes, Mr. Chairman. I am.

Mr. GALLEGLY. Are you familiar with the issuance of the Neufeld H-1B memo?

Mr. COOPER. Yes, Mr. Chairman.

Mr. GALLEGLY. Do you agree that according to the data provided by USCIS a rise in denial rates for non-immigrant worker petitions seems to have occurred shortly after the GST decision and around the time of the Neufeld memo issuance?

Mr. COOPER. Yes, I do.

Mr. GALLEGLY. Would you like to maybe just expand that a little bit?

Mr. COOPER. Yes, I would.

First, with respect to the Neufeld memo on H-1Bs, that was focused principally, as was noted before, on the employer-employee

relationship and it was addressed mainly at the agency's perceived problems when H-1Bs were being sent to third-party, to client sites, rather than the site of the employer. What we have seen in practice is that the rise in H-1B RFE rates and the rise in H-1B denial rates actually affects cases far beyond those that are just thirty-party placement cases.

Likewise, in the GST situation this, in my view, is a very serious adjudications issue at the agency because, in my view, the USC takes the position, correctly I think, that GST is a non-precedent decision. But I actually do think that it is very closely tied to the increase in denial rates for L-1Bs.

My real concern with that case and its effect is that that is precisely an example of a situation where, despite the absence of agency policy making and despite the kinds of interaction with the public that the Administrative Procedures Act would call for, for example, when there is to be a policy change, this is an adjudications-level change toward greater restriction that has brought about severe limitations in the program in ways not that ferret out fraud but that actually hinder businesses from being able to bring in employees who could help spur economic recovery in the United States.

Mr. GALLEGLY. I see my time has expired.

I yield to the gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Well, first, let me thank both of the witnesses for not only being here today but their service—Mr. Whetstone, your service in the public and, Mr. Cooper, your many years of service as general counsel. They are appreciated and the expertise you bring here today is appreciated.

Looking at the report, 109 individuals said that they didn't have enough time on the interviews and I am sure that those 109 individuals were sincere in that analysis. However, we have got to have some kind of—I mean, in the private sector you are going to have some measurement of outcome.

I mean, I am assuming, Mr. Whetstone, that you are not suggesting that productivity not be a factor at all in considering how people are doing as employees.

Mr. WHETSTONE. No, not at all. But I think that it should be taken from possibly the individual level to team level or office level where you——

Ms. LOFGREN. But if you have one guy who is not doing anything and the rest of the team is knocking themselves out you should be able to look at the guy who is not performing.

Mr. WHETSTONE. I think the proper motivational efforts by the supervisory staff when they recognize that would be appropriate, yes.

Ms. LOFGREN. Okay. Thank you very much. I just thought it was important to clarify that.

Now, Mr. Cooper, you were general counsel under the Bush administration just before the current administration and do you see a difference—now you are in the private sector—do you see a difference in terms of in your interactions with the agency that the agency is trying to approve questionable applications?

Mr. COOPER. I don't see at all that the agency is trying to approve questionable applications. In my experience, what the agency is doing is narrowing access to these critical visas.

Ms. LOFGREN. Now, I will just lay out. I mean, we don't have really good data at all as to the quality, as Director Mayorkas had said. I mean, what is it, lies, darn lies and statistics?

I mean, we have some numbers but you really can't—what we want is quality decisions. We don't want fraudulent applications to be approved but legitimate applications, we don't want to tie them up because we pay a price in that case as well.

I had a concern just based on anecdotes that L-1s were substituting for H-1Bs when we hit the H-1B cap and, honestly, I shared that concern with the agency because that would be an improper use of the L-1 visa.

Are you seeing that the request for evidence is related to ferreting out what, of the L-1B applications, really were more properly H-1B individuals?

Mr. COOPER. I do think there is a sentiment among adjudicators that Ls are being improperly substituted for Hs and that that is driving a lot of their general instincts to be a little bit narrower on Ls.

I mean, in my view, there is not a situation where a case must be an H or must be an L. They have differing requirements.

Ms. LOFGREN. Right.

Mr. COOPER. But there certainly are cases where a person's qualifications and the job qualifications will be overlapped between the two and in that instance it seems perfectly appropriate for the employer to be able to choose whichever one the employer would like.

And so in that instance, I don't think there is such a thing as really improperly using an L for one that should have been an H. But one point that is very important about the—you know, you raise the issue of the numbers of filings that are being made.

One thing that is very illustrative is that this spike in RFEs, request for additional evidence, is coming at a time when actually the numbers of L-1B——

Ms. LOFGREN. Are down. Yeah.

Mr. COOPER. Petitions that are being presented to USCIS are dropping and that is inconsistent with the experience that I had in government and since where when there is a program that seems to have some gap or some loophole that would draw fraud usually the numbers of actual petitions——

Ms. LOFGREN. Yeah. It usually spikes.

Mr. COOPER. Go up in that setting.

Ms. LOFGREN. Yeah. Can I ask you a question about sort of the informal appeals process, for lack of a better name?

I used some real-life examples in my opening statement where—and, you know, we are all human. We can all make a mistake. You read a chart and it says 15,000 but if you read at the top it is in thousands so it is actually 15 million.

The inspector general seemed to indicate that if an inspector had made an error and read that as 15,000 instead of 15 million it would be somehow improper to point that out so it could be cor-

rected and that the only way to do it would be to go to a 2-year appeal process.

Isn't that what we are talking about? I mean, if you can't just give some input oh, by the way, you have denied my client under the Cuban Adjustment Act but he is not Cuban and he is not applying under the Cuban Adjustment Act, wouldn't that be a helpful piece of information to give to the adjudicator, not heavy handed but here is a mistake?

Mr. COOPER. I think that is important both from the standpoint of those who present petitions and applications to the system and from the standpoint of the agency itself.

First, from the standpoint of the user of the system, the person who is making the application, the inspector general's report seems to suggest I guess it is premised on the notion that a formal appeal to the Administrative Appeals Office is the only appropriate route to be followed where a petitioner thinks a decision was mistaken.

But it is important to just reemphasize that right now, according to its most recent processing times report, an appeal of an H-1B petition that was denied takes 22 months to be resolved. An appeal of an L-1B petition that was denied takes 23 months to be resolved, almost 2 years.

That is a time frame that simply does not work in the business world that is meant to be served by the proper use of these programs and so that is just not a viable alternative way. That is just not a viable means of addressing problems in today's business world.

Second, from the standpoint of the agency, it is actually in the agency's interest to have situations pointed out to them that they can—if there has been a mistake that they can correct it in a way that is prompt and that doesn't require the additional resources that get tied up in dealing with an administrative appeal where it is not necessary and so on.

And so, in my view, there should be better access for these kinds of situations where people are trying to present the agency with something that they should have another look at, not less. Obviously, if people are, you know, calling and saying, can you do me this favor as my pal or that——

Ms. LOFGREN. That would be wrong.

Mr. COOPER. It is entirely inappropriate. But that is not, in my experience, either inside or outside the prevailing culture within the agency.

Ms. LOFGREN. My time has expired, Mr. Chairman. Thank you.

Mr. GALLEGLY. Thank you, the gentlelady.

Mr. Gowdy?

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. Whetstone, do you believe that there is a culture of trying to "get to yes?"

Mr. WHETSTONE. In a short answer, no, I don't. I believe that there are some folks that have that perception. I believe that sometimes the way—I am taking this from folks that I talk to regularly—I believe that they sometimes have that perception.

There are some people that do have that perception. But I don't know that that is—there is certainly nothing stated.

Mr. GOWDY. Well, perception is important, perhaps only secondary to reality. So let me see if I can venture into reality for a second.

It seems as if, statistically, denials are down, approvals are up and fraud referrals are down. I don't get out like I used to but I don't think the human condition has changed that much since 2009. So are we just getting better quality applicants or how do you explain the statistical discrepancies?

Mr. WHETSTONE. Well, I think that, as you laid it out, Congressman, I would say that the pressures to move the workload might have a lot to do with that, and coupled with people or adjudicators' discomfort with the level of training that they have in the area of detecting fraud.

Mr. GOWDY. So it is easier to say yes than no.

Mr. WHETSTONE. Nobody complains about an approval. They only complain about a denial.

Mr. GOWDY. So why did you say no when I first asked you whether there was a culture of "get to yes?" Because it seems like you described a culture of "get to yes."

Mr. WHETSTONE. I don't know that you would call—I don't agree with the term "culture of get to yes," I guess, that phrase. I don't think that we have a culture——

Mr. GOWDY. How about disproportionate benefits to saying yes as opposed to no? Do you agree with that?

Mr. WHETSTONE. I would say that there are pressures placed on adjudicators to approve cases rather than go through the denial process.

Mr. GOWDY. Do you agree or disagree that pressure from outside attorneys can get a denial turned into an approval?

Mr. WHETSTONE. No.

Mr. GOWDY. You disagree with the email streams that we have where that, in fact, has happened?

Mr. WHETSTONE. I am not familiar with those.

Mr. GOWDY. Are you aware of any instances where pressure was brought by outside counsel to supervisors and get people to change their mind or else overrule them?

Mr. WHETSTONE. I think on a regular basis, particularly in the interview situations and field offices, that you have outside counsel taking issue with how the—if it falls against their client that they take issue with the way the interview was conducted, et cetera, and I think we see that on a frequent basis in the field offices.

In the service centers, it is probably less frequent. But I have known of instances where an AILA attorney or someone would make a complaint about some decision that they received and it would get reworked, if you will, and the officer is left with the impression that it was the outside influences that caused that decision to go another way.

Mr. GOWDY. Well, if we agree on the number that fraud referrals are down 22 percent and if we exclude the option that the human condition has improved dramatically since 2009, what other explanation would there be for a reduction in fraud referrals?

Mr. WHETSTONE. Well, I think that officers might—like I said before, their training level—they probably don't have the confidence to actually refer. I think it—we have had reports from individuals

saying that their supervisors discouraged referrals to the fraud detection officers.

Mr. GOWDY. Are you aware of any retaliation? I think Chairman Gallegly began this by making reference to Senator Grassley, who was approached by whistleblowers.

Are you aware of any retaliation against the whistleblowers or any complaints of retaliation?

Mr. WHETSTONE. I am aware of the complaints by those whistleblowers. But as far as retaliation, I can't say that I am aware of that, no.

Mr. GOWDY. But those complaints have not been adjudicated yet, or if they have been you——

Mr. WHETSTONE. You know, I have really lost track of that case. I don't know, you know——

Mr. GOWDY. I think it would be cases, plural.

Mr. WHETSTONE. There is two there, I think.

Mr. GOWDY. I would yield back the balance of my time, Mr. Chairman.

Mr. GALLEGLY. I thank the gentleman.

Mr. King?

Mr. KING. Thank you, Mr. Chairman. I thank the witnesses.

I would just start, first, with Mr. Cooper and I recall your testimony. You addressed earlier that data refutes the claims of the previous witnesses and some of the reports that you have seen before this Committee today, and you pointed to the L-1B program as the example of the data that refutes the claim.

Could you point to another program, another visa, that also refutes the claim?

Mr. COOPER. The L-1B is the most—is the sharpest example numerically. But, certainly, across the employment-based programs the trend is just the same. With H-1Bs the——

Mr. KING. But if we went—excuse me. If we went, I will just say the Obama administration 2009 to 2011, and I look at that data, that is the most recent trend we have under current administration.

So do you have any other visa categories other than L-1B that would support your position with regard to the data demonstrating the opposite of the balance of the testimony here, other than your own?

Mr. COOPER. Sure. Well, in the H-1B program, of course, if you go back to 2007 it went from 11 percent to 29 percent in 2009 and it has subsided since that 29 percent rate. But it is still much higher than it had been in, say, 2007.

Mr. KING. We know that there has been some reforms that took place that tightened down the regulations. I think you answered that response. It was to the question of Mr. Gallegly on that.

So I just look at the rest of the data and I would just make the point I have looked at the last 2 years and I can find another example that supports your position. It is as marginal as can be but it is L-1A in 2009 until 2011. In that gap that I am addressing, it went from 13 percent to 14 percent denial rate.

So, you know, statistically, level but the balance of this shows the opposite in the data that I am looking at. And I would just ask, in your leisure time if you could review the data for the 2009

through 2011, which would be the most pertinent data we have for the current administration. And not to beat that point.

I just recognize your point but it appears to be an exception on the current administration information.

Another question is, listening and thinking about what the IG's testimony was, if it does come down to who you know and may or may not—I have listened to Mr. Gowdy's exchange also with Mr. Whetstone and you may or may not know that either, whether it comes down to who you know depending on where you sit and what you hear.

But if the IG went in and did a thorough examination and came back with a report and if it was an issue of who you know, how would he know that it was who you know and how could you quantify that?

Can you imagine any way that the IG could actually conduct an investigation to come to a conclusion that there is data points along the way that would bring it back to it being influenced by who you know?

Mr. COOPER. Yeah. I think the data points would actually be quite scant because the fact is that there is no real formal way to reach into the agency that is effective other than the actual filing of the petition and the paper responses when they ask you for more information.

And so it is not surprising that that sort of impression emerges from the commentary of the people who were interviewed and those who responded to the district-level online survey. And, you know, I think it is important to note that this sort of sentiment does exist in the agency. It certainly did when I was there. And it is not that the sentiment is unimportant. It is very important to have structures that where you get buy-in from your adjudications personnel, structures where you can make a policy and have your adjudicative personnel abide by it substantively and so on. So I am certainly not disputing that that sentiment exists.

Mr. KING. Mr. Cooper, would we agree that even when the sentiment exists it may or may not be based on fact and that in the end it is going to be a subjective opinion from wherever you sat?

If you are an inspector, if you are an IG investigator, if you are an attorney that is an advocate, you are going to have a different perspective on how much influence might change this. But would we agree that immigration attorneys do attempt to influence in that fashion?

Mr. COOPER. Oh, it is certainly the case that attorneys try to bring to agency's attention when they think that there has been a mistake, a substantive mistake in the adjudication. That certainly happens and it should happen more often in my——

Mr. KING. But, I mean, we are not presuming that a well-positioned attorney wouldn't drop a name here and there when they are discussing this with the inspectors—with the investigators.

Mr. COOPER. I am not making an assumption one way or the other on that. I can agree——

Mr. KING. But, I mean, we are people of the world here and we couldn't possibly assume that that doesn't happen. I don't think we need to examine that any further. I just make the point that it is subjective.

People do try to influence with who they know. Whether it gets through or not is another question and if it does get through there is no way to quantify it. And just would you agree with that, Mr. Cooper?

Mr. COOPER. I would agree with that. It is subjective. In my view, it is not at all the case that the agency is owned by outside counsel.

Mr. KING. Okay. And watching my clock turn here, do you think that it is proper for immigration attorneys to have direct access to USCIS supervisors?

Mr. COOPER. I think that if there were regular access the system would probably work better.

Mr. KING. If you think there were regular access from immigration attorneys to the USCIS supervisors?

Mr. COOPER. Not necessarily supervisors but to the system. You know, as of right now there is an appeal, there is the 800 number for the customer service number and there is the paper filing and none of those is an effective way of having an efficient exchange of the information——

Mr. KING. You may advocate for an open dialogue but then if there is direct access to a supervisor wouldn't that also mean taking it up the chain and trying to apply the leverage and the influence?

Mr. COOPER. Yeah. I am not talking about leveraging influence with supervisors. I am just saying that if there were a better way for the agency to have access to information and arguments that could help it understand when it may have made a mistake, and I know this from experience inside the government, that can help you to avoid unnecessary litigation. It can help you to avoid unnecessary administrative appeals cost and it can lead to a lot of benefits for both sides.

Mr. KING. So you are speaking objectively and procedurally rather than from personal influence.

Mr. COOPER. I am speaking from my experience inside the government and my observations since.

Mr. KING. Thank you, Mr. Cooper.

Mr. Whetstone, I am sorry I didn't have time to get to you but I am sure you are the reason for the sharpest knives in the drawer. So I appreciate you coming here to testify and the service you have and I yield back the balance of my time.

Mr. GALLEGLY. I thank the gentleman and——

Ms. LOFGREN. Mr. Chairman?

Mr. GALLEGLY. Yes?

Ms. LOFGREN. May I ask unanimous consent to include in the record the denial rates showing a massive increase in denials between the Bush administration and the Obama administration?

Mr. GALLEGLY. Without objection.

[The information referred to follows:]

H-1B Adjudication Rates: 2003 to 2011

Calendar Year	H-1B Approval Rates	H-1B Denial Rates
2003	88%	12%
2004	89%	11%
2005	88%	12%
2006	87%	13%
2007	89%	11%
2008	84%	16%
2009	71%	29%
2010	79%	21%
2011	83%	17%

L-1A Adjudication Rates: 2003 to 2011

Calendar Year	L-1A Approval Rates	L-1A Denial Rates
2003	88%	12%
2004	87%	13%
2005	89%	11%
2006	91%	9%
2007	92%	8%
2008	91%	9%
2009	85%	15%
2010	87%	13%
2011	86%	14%

L-1B Adjudication Rates: 2003 to 2011

Calendar Year	L-1B Approval Rates	L-1B Denial Rates
2003	91%	9%
2004	90%	10%
2005	94%	6%
2006	94%	6%
2007	93%	7%
2008	78%	22%
2009	74%	26%
2010	78%	22%
2011	73%	27%

O-1 Adjudication Rates: 2003 to 2011

Fiscal Year	O-1 Approval Rates	O-1 Denial Rates
FY 2003	90%	10%
FY 2004	94%	6%
FY 2005	94%	6%
FY 2006	93%	7%
FY 2007	94%	6%
FY 2008	96%	4%
FY 2009	90%	10%
FY 2010	90%	10%
FY 2011	94%	6%

Fiscal Year	H-1B RFE Rates
FY 2003	15%
FY 2004	4%
FY 2005	12%
FY 2006	15%
FY 2007	18%
FY 2008	20%
FY 2009	35%
FY 2010	28%
FY 2011	26%

Fiscal Year	L-1A RFE Rates
FY 2003	12%
FY 2004	4%
FY 2005	10%
FY 2006	18%
FY 2007	24%
FY 2008	27%
FY 2009	32%
FY 2010	37%
FY 2011	51%

Fiscal Year	L-1B RFE Rates
FY 2003	16%
FY 2004	2%
FY 2005	9%
FY 2006	9%
FY 2007	17%
FY 2008	49%
FY 2009	35%
FY 2010	44%
FY 2011	63%

Fiscal Year	O-1A RFE Rates
FY 2003	17%
FY 2004	1%
FY 2005	14%
FY 2006	17%
FY 2007	13%
FY 2008	19%
FY 2009	28%
FY 2010	30%
FY 2011	27%

Mr. GALLEGLY. And I would ask unanimous consent to enter into the record a statement from the Senate Judiciary Committee Ranking Member Charles Grassley noting that the "get to yes" culture is a direct contradiction to our number-one priority of protecting the homeland and that undue pressure on adjudicators must be dealt with in order to ensure integrity and root out fraud in the immigration system; number two, the statement of John Lynch, a USCIS adjudicator in the San Diego field office whose personal ex-

perience validate the OIG findings that there is pressure of adjudicators to approve applications despite an adequate processing time or fraud indicators; and number three, an email chain between the USCIS officials stating that USCIS wants to get to the point where the cases denied are those that couldn't possibly be approved under the law.

With that, I want to thank the—without objection. Hearing no objection, those requests will be added to the record of the hearing.

[The information referred to follows:]

Prepared Statement of the Honorable Charles E. Grassley, a U.S. Senator from the State of Iowa

Congressional oversight is often an overlooked function for members of Congress. It's not always glamorous and it's a lot of hard work. However, it's an important responsibility for the Legislative Branch that helps our government work more efficiently for the American people.

I commend the House Judiciary Committee for having a hearing today to discuss the shortcomings of our immigration benefits adjudication process. Oversight of this process is crucial to ensuring that our immigration system works for all people, including foreign nationals who wish to live and work in the United States.

The Inspector General at the Department of Homeland Security issued a report in January of this year entitled, "The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers." The report provides an insightful look through the eyes of agents on the line. The Inspector General issued this report after I expressed concern about fraud detection efforts by U.S. Citizenship and Immigration Services.

While I have long been interested in fraud prevention and rooting out abuse in many visa programs, I really dived into the benefits adjudication process in the fall of 2010. Immigration officers in the field reported to me that they were being subject to pressure to approve applications and petitions because that was the message of managers in headquarters. Many officers felt intimidated and pressured. Some were being relocated. Some were being demoted. The stories were similar, and it appeared that people in Washington were preaching a "get to yes" philosophy when it was apparent that the answer should have been "no."

In September of 2010, I wrote a letter to USCIS Director Mayorkas. I was unsatisfied with his response to issues that whistleblowers brought up to me. Since he refused to answer the allegations, I took the issue to the Secretary and the Inspector General. I told the Secretary that, after many interviews, the evidence suggested that Director Mayorkas was fostering an environment that pressures employees to approve as many applications as possible.

According to several USCIS employees, Director Mayorkas was less concerned about fraud and more about making sure officers were looking at petitions from the perspective of the customer. Some said that USCIS leadership expressed a goal of "zero complaints" from "customers," implying that approvals were the means to such an end. The Department of Homeland Security conducted a human capital survey where USCIS scored low because employees felt pressured by upper management to approve applications. Many said that USCIS leadership "cultivated a culture of fear and disrespect."

So, the Inspector General agreed to investigate. He said that the "integrity of the benefit issuance process is vital," inappropriate pressure on the adjudications process must be avoided. Nearly 52% of respondents in their survey said that USCIS policy is too heavily weighted toward promoting immigration. The fact that a quarter of the immigration service officers surveyed felt pressure to approve questionable applications is alarming. There are all kinds of pressure, including from supervisors and outside attorneys. There's also pressure to approve in order to meet agency performance goals.

It's no secret that USCIS officers have been judged on quantity, not quality of their work. For many years, adjudicators have felt pressure to approve so many cases in an hour or a day. Moreover, according to the Inspector General, 90 percent of respondents felt they didn't have sufficient time to complete interviews of those who seek benefits. The Inspector General said that "the speed at which immigration service officers must process cases leaves ample opportunities for critical information to be overlooked." Adjudicators are more apt to approve a petition because it takes less time, and they fear getting behind if they have to put a lot of effort into a case.

I applaud the Director for initiating new performance measures so that there's more focus on fraud and security. However, like the Inspector General noted, many employees will continue to feel as though their work hinges on numbers. Despite the new measures, immigration service officers and supervisors are concerned that production remains the focus. They feel this way because of "the perception that USCIS strives to satisfy benefit requesters in a way that could affect national security and fraud detection priorities." The new performance measures may not be perfect. They may need to be massaged. I hope the Director takes comments of agents into consideration as this issue evolves.

Unfortunately, however, I am concerned that the agency is not taking seriously the Inspector General's recommendation to develop standards to permit more time for review of case files. In fact, USCIS did not concur with this recommendation and said that additional time is not the solution to addressing national security and fraud concerns. Director Mayorkas should reconsider the department's initial response to this recommendation and create an environment that ensures a thorough and complete analysis of all applications.

The Inspector General also recommended that USCIS develop a policy to establish limitations for managers and attorneys when they intervene in the adjudication of specific cases. This recommendation was made because it appeared that certain high-ranking employees at USCIS headquarters were inserting themselves into specific cases, and in one case, putting pressure on adjudicators to approve an application when the individual clearly wasn't eligible. The report also discusses how private attorneys and other parties contacted USCIS managers or attorneys to request a review of a case that an immigration service officer had denied. The perception for many officers was that outside attorneys had too much influence in the process. While the Director of USCIS does not support special treatment for complainants, it's concerning that the agency did not fully concur with the recommendation to issue a policy that ends any informal appeals process and the special review of denied cases.

Overall, this report is eye-opening. The Inspector General discussed the adjudications process with many officers in the field, and brought these issues to light. He made many thoughtful and serious recommendations that should not be ignored.

Unfortunately, despite what the Inspector General has reported, there are still nay-sayers. People within the agency want to discredit the research and findings of the Inspector General. I'm told that some aren't taking this report seriously. That's why leadership on this issue is crucial to enacting any true reform.

In 2008, I was glad to hear the president-elect talk about making this the most transparent government ever. Unfortunately, up to this point, this administration has been far from transparent.

And, it's clear that for the current administration, the rule of law is more about perception than reality. They've circled the wagons, made denials and generally been non-responsive to constitutionally proper inquiries by members of Congress.

Since the founding of our country, our immigration laws have been a source of discussion. We were born a nation of immigrants. We have welcomed men and women of diverse countries and provided protection to many who flee from persecution.

We have been a generous nation. Yet, we have seen our country face many challenges. During these struggles, it is important for lawmakers to bear in mind that the policies we make should benefit our country over the long term and that we must be fair to current and future generations.

People in foreign lands yearn to be free. They go to great lengths to be a part of the United States. It's a privilege that people love our country and want to become Americans. At the same time, however, we must not forget one great principle that our country was founded on. That is the rule of law. We want to welcome new Americans, but we need to live by the rules that we've made. We cannot let our welcome mat be trampled on and we cannot allow our system of laws to be undermined.

For years, USCIS has seen themselves as a service-oriented agency. They strive to make their customers happy. Unfortunately, this "get to yes" culture is a direct contradiction to our number one priority of protecting the homeland. USCIS must do more to ensure that fraud, abuse, and national security are a higher priority than appeasing its customers. It is going to take a strong-willed and determined leader to change this culture.

Reform shouldn't be a bad word. It should be embraced so that immigrants continue to feel welcomed in America and receive the best service possible when trying to navigate the bureaucratic process.

Again, I commend the committee for discussing the integrity of our immigration system, including our benefits adjudication process. With constant vigilance, we can

root out fraud and abuse, and enact reforms that will be meaningful for future generations of new immigrants.

Prepared Statement of John Lynch

Mr. Lynch's Background:

John Lynch serves as an Immigration Services Officer or "ISO" (adjudications officer) at the San Diego Field Office of USCIS. Mr. Lynch received his bachelors degree from the University of California at Berkeley and his Masters Degree in Business Administration from San Francisco State University. In addition to receiving his undergraduate degree, Mr. Lynch also was a Distinguished Military Graduate. In between his undergraduate and Graduate Degrees, Mr. Lynch served as an Army Intelligence Officer, providing daily intelligence briefings and analysis on Russian military and economic assistance to North Vietnam and troop strength along the Russian/Chinese Border. Mr. Lynch personally briefed Senator McCain's father, Admiral Mc Cain, and House of Representatives Armed Services Committee Chairman Sonny Montgomery, when Senator McCain was a Prisoner of War in Hanoi, North Vietnam during that war. After completing his military Service, Mr. Lynch worked for three Fortune ranked companies: IBM, Bank of America, and General Electric in Corporate Finance positions before returning to government service with USCIS in 2003. Mr. Lynch has served as an adjudicator for the past ten years in Southern California, working in the Los Angeles, Santa Ana, and San Diego Field Offices. He also worked as an Asylum Officer at the Los Angeles Asylum Office for 18 months, and briefly at the California Service Center, as a Center Adjudications Officer. In addition to his Immigration Officer duties, Mr. Lynch coordinated and emceed the largest military naturalization ceremony aboard the USS Midway in San Diego on July 2, 2010. He also serves as Vice President of the AFGE ICE Local in San Diego, representing adjudicators from that District.

The Inspector General of the Department of Homeland Security issued a report on adjudications on January 5, 2012. This report comments on the pressure by management for adjudicators to decide or "rubber stamp" applications for permanent resident status (green cards) and naturalization. This report also recommends that adjudicators be given more time to review files prior to conducting an interview. The adjudications conducted in the field are always face-to-face meetings, whereas the adjudications conducted at the Service Centers are paper or "non-interview" decisions. If the adjudicators at the Service Centers determine from a file that more information is warranted, they will send a request for information "RFE" or send the file to a Field Office for a personal interview.

While it is true that there is tremendous pressure on adjudicators to approve applications, the report does not mention the threat that adjudicators face that a file one day could land on the Region"s 120-day aging report (date of filing to decision) that is the prime motivator supervisors and field office directors use to push Adjudicators to a decision. Furthermore, any file that ages to this report is then reported to District and Region management with the reason why the file is still with the adjudicator.

Another accelerant for adjudicators to approve applications is the quarterly audit. Supervisors pressure adjudicators normally after the first interview to make a decision on an application. Typically these are applications where the adjudicator may find that something is not right after the interview, unusual travel patterns overseas, a lookout posted by another agency, or the fact that the applicant's "lifestyle" is not supported by their income, in these cases, more analysis is need prior to a decision.

To speed up the process even more, a greater emphasis today Is placed on the reliance on negative FBI name checks and negative fingerprint results to speed an approval. so the actual interview time is reduced further due to required computer entries to speed files along. In actuality, this limited time reduces the actual "talk" time with the applicant. So in the case of naturalization, the face time is usually taken up with testing on English and Civics tests and confirming " yes or no" questions on the applications they have long prepared to answer. Little time is dedicated to actually finding out why the applicant wishes adjust status or naturalize. Adjustment of Status interviews are harder because the applicant usually has been in the country for a very short time, many times less than six months, so there is no established track record of the applicant's residence in the United States file to help guide the adjudicator's decision. In high volume countries such as China, tourist visa interviews usually last usually less than 5 minutes so there is added pressure on the adjudicator to make a quick decision on the application. Many tourists apply

to change their status or remain a long-term overstay before requesting to change their status.

The adjudicators take their jobs seriously and are perhaps one of the hardest working groups I have seen both in and out of the government! But, every day that they come to work, it becomes a game of "Beat the clock", there is little margin for error. Any experienced adjudicator will tell you that if an adjudicator needs more time with an applicant to make a decision, the supervisors make it difficult to do so because they may either be in a meeting and unavailable, or the scheduling is so tight to meet production standards, that there is no one else to give the next file too, so the adjudicator falls behind, and it perpetuates itself throughout the day as it delays all the other remaining interviews in that adjudicators docket. This happens far more frequently than the agency is willing to admit.

As previously stated, there is great pressure on adjudicators to approve cases and this is further compounded by the number of files assigned to an adjudicator per day to meet production standards. There is no better example of this than where I work in the San Diego District. This District has three field offices: San Diego, Chula Vista, and Imperial. For months now, due to the increasing national administrative requirements and more local requirements that are dictated in processing files, I have repeatedly asked management to reduce our daily docket load to create more time for the adjudicators to complete their work. This pressure is even more acute when processing green card interviews. Instead of helping to resolve the problem, management only adds to it. We have complained about this problem in Town Hall meetings, labor management meetings, and even after training courses, that it is impossible to keep up the aggressive interview pace, but since management is paid on production, it's a topic they are not willing to resolve because such as resolution would ultimately come out of their pocket. Management usually prefers to delay the decision by asking the Union to send management a "proposal" that is only ignored, and the stress continues. With the increasing volume of cases in daily dockets and added computer entries, we have adjudicators experiencing increased health problems because management will not provide any relief.

When we became aware that the IG had recently completed its report, we decided to gather reliable information from our other Southern California Field Offices, see Exhibit A,*** and the feedback was startling. Despite all our calls for relief, we learned that our San Diego field office adjudicators are assigned the highest number of cases per shift in all of Southern California. I immediately filed a grievance on February 2, 2012, and just last Thursday, prior to my departure for Washington, I was handed a letter indicating that our request for a reduced daily docket was denied and management's response did not even address the issue, but only the form in which our request was submitted. But I also learned In its denial that management cannot even read the dates that appeared in my letter correctly, that the form number we used for our submittal was incorrect (this is not so because there is no such form CIS–827, it was only a placeholder that management and labor used until contract discussions were completed. The correct form is G–1162 and was the form submitted. But best of all, the agency's denial was based not on the substance of the report, but only about the form of submission, and that was how it was decided. (See Exhibit A.)

In conclusion, I leave it to the subcommittee to draw its own conclusion, based on the testimony presented, if adjudicators are being dealt with fairly by management in conducting interviews and that all the appropriate steps have been taken to guard against National Security threats and that benefit fraud can be an kept to a minimum.

***The material referred to, Exhibit A, was not received by the Subcommittee.

O Adjudication Standards Memo Email

This email exchange is included in the hearing record in order to show the propensity of USCIS officials in favor of approving immigration benefits if at all possible under the law no matter what concerns are raised by adjudicators.

From: Salem, Claudia S
Sent: Monday, February 01, 2010 5:36 PM
To: Velarde, Barbara Q; Kennedy, Julia C; Young, Claudia F; Brown, John W; Cummings, Kevin J
Cc: Fisher, Sheila C; Dalal, Andy; Dalal-Dheini, Sharvari P; Johnson, Bobbie L; Bacon, Roxana; Chang, Pearl B; Rhew, Perry J; Hernandez, Efren
Subject: RE: O adjudication standards memo

Thanks Barbara,

We welcome that type of discussion. You're right that we discussed those cases and I'm willing to bet that we won't ever have every single detail that was at the adjudicator's disposal. But if I understood correctly, and I've added Roxie, Pearl and Perry if I didn't, even if USCIS had a 1% denial rate, if the basis for denial is not mandatory, then we ought to address by messaging to adjudicators that it's legally defensible and indeed desirable from a policy perspective, to take a more open-handed approach. I think this requires some careful explaining to adjudicators on how much discretion they have in weighing evidence and factors and that it's acceptable – even desirable – to view the evidence in a light favorable to the petitioner. I think the approval rates speak for themselves (85-90%) and we luckily don't have to worry about those, but it's the 10%-15% of the cases that seem to be bogging USCIS down in terms of leading to inquiries, newspaper articles, stakeholder meetings, appeals etc. If those are solid and necessary denials, it comes with the territory. But if we're unnecessarily taking too strict of an approach at the SC level, we can change that and for that reason we discussed that it's vital to have you involved early on to facilitate that change. The goal we discussed last week is to have USCIS accomplish "a more flexible and liberal – but defensible - policy for weighing the evidence, allowing the granting petitions".

I know it concerns all of us any time that we hear that a case could have been approved but was denied instead. I *think* that's what I heard about the Mongolian specialist case. We can defend supportable denials but USCIS wants to get to the point were the cases denied are those that couldn't possibly be approved under the law (sorry, I know that's not the most concrete or specific guidance in the world but that's what we ought to be messaging).

Here are my answers to Claudia Y's earlier technical questions: Yes, AFM update/format is the correct approach since its guidance adjudicators would have to become aware of and implement. Since this memo is intended to be guidance for the Service Centers, SCOPs taking the pen now would make a lot of sense. The important thing is that we all work together, esp. with OPS, since a lot of the work that needs to be done is in the policy-making arena. I don't know who signs this type of memo. Has the process changed? Traditionally, it would have been Don.

Regards,

C

Claudia Salem

Department of Homeland Security

USCIS Chief Counsel's Office

Adjudications Law Division

[redacted]

From: Velarde, Barbara Q
Sent: Monday, February 01, 2010 3:57 PM
To: Salem, Claudia S; Kennedy, Julia C; Young, Claudia F; Brown, John W; Cummings, Kevin J
Cc: Fisher, Sheila C; Dalal, Andy; Dalal-Dheini, Sharvari P; Johnson, Bobbie L
Subject: RE: O memo

Claudia et al:

I think a discussion on O issues and what in fact we are seeing in the field would be very healthy and beneficial. Perhaps we have a bit of a different perspective given the review of the actual files and the caliber of the beneficiaries being sought under this visa classification at least in the cases cited below. It would appear that perhaps some assumptions are being made without full visibility of the cases that are being used as a discussion point on the field's adjudicative standards for the Os. With regards to the Mongolian Post-doctoral candidate (a case still under review at the AAO), I think that anecdotally it might be helpful to provide some additional information when we tried to find a way for the beneficiary to qualify. When offered the potential of filing an I-140 the attorney responded that the university did not believe the beneficiary was of the caliber that they wanted to invest in an immigrant visa. An H1B was also not viable because of the need for the waiver under the J1. So there are issues that come into play that help add another layer to the adjudication and the request for the O visa classification.

Clearly there is need for discussion and we all understand the desire for a more liberal interpretation where folks qualify under the eligibility requirements spelled out in the statute and regulation. However for folks who are "young and promising" in their artistic career, at least from our historical perspective as to who qualifies as an O-1, it doesn't sound immediately approvable. However we of course look forward to a discussion and are eager to hear the legal arguments to support any type of policy call. I am happy to provide the actual cases cited below to inform the discussion if it can help us all move forward.

Thank you all for including us in these discussion.

Barbara Q. Velarde

Deputy Associate Director

Service Center Operations Directorate

U.S. Citizenship and Immigration Services

[redacted]

From: Salem, Claudia S
Sent: Monday, February 01, 2010 3:01 PM
To: Kennedy, Julia C; Young, Claudia F; Brown, John W; Cummings, Kevin J; Velarde, Barbara Q
Cc: Fisher, Sheila C; Dalal, Andy; Dalal-Dheini, Sharvari P
Subject: RE: O memo
Importance: High

Sorry, I hit "send" to soon. I was going to add more to my message but the point is that we wanted to bring SCOPs into the loop now so we could all work together. Here is the new draft O-1 standards guidance for your consideration. I can leave it to Kevin to speak authoritatively from a policy perspective, but from a legal perspective we can tell you that USCIS has flexibility and discretion in weighing the evidence to fit into the 3 minimum criteria that need to be established in most cases. Note that my comments were sent to OPS initially, not in response to JB's draft, but rather initially as an outline for the memo.

C

Claudia Salem

Department of Homeland Security

USCIS Chief Counsel's Office

Adjudications Law Division

[redacted]

From: Salem, Claudia S
Sent: Monday, February 01, 2010 2:54 PM
To: Kennedy, Julia C; Young, Claudia F; Brown, John W; Cummings, Kevin J; Velarde, Barbara Q
Cc: Fisher, Sheila C; Dalal, Andy; Dalal-Dheini, Sharvari P
Subject: FW: O memo

Thanks Julia!

We'll review the O validity memo you just sent us. Thanks for keeping the ball rolling.

Now, speaking of "Os", we have more than one ball in the air so sorry for the "tic for tac" or however than saying goes. Please see attached draft (very draft) "O" adjudication standards policy guidance memo.

We just started working on this last week and it's not too far off the ground yet. I have to thank John Brown for really taking a good stab on it. In speaking to OPS (Pearl and Kevin) and AAO (Perry Rhue) along with Roxie last week, it became apparent that some clarification is also desired/intended for adjudication of "O" cases. The purpose behind this - as agreed at last week's gathering - was to present SCOPs with a draft new memo on O-1 adjudication standards to accomplish a more flexible and liberal policy for weighing the evidence and granting petitions.

From what I can piece together, I can tell you that *part* of the reason for this push on guidance, to be followed up by training, is the recent communication from Jonathan Ginsburg below, who we all know is a strong voice in the O-1 arts community. The email was passed on to me. Another part was a recent petition filed by a University for a Mongolian studies expert that was denied and certified to the AAO for a second look. The assessment on that case was that it could have been approved just as, if not more easily, than denied if only there was a better understanding that "O-1" can - under statute and reg - be applied more flexibly than it appears it has been to date.

Claudia Salem

Department of Homeland Security

USCIS Chief Counsel's Office

Adjudications Law Division

[redacted]

From: Ginsburg, Jonathan [redacted]
Sent: Tuesday, January 19, 2010 2:50 PM
Cc: Robert Deasy; Heather Noonan
Subject: FYI

We've just begun to see a spate of RFEs, all involving vocalists, all with this new language from CSC:

The fundamental nature of this highly restrictive visa classificaiton demands comparison between the beneficiary and others in the field.

The regulatory criteria describe types of evidence that the petition may submit. However, it does not follow that every opera singer who has performed on stage, recorded a CD, appeared on television, been featured in a newpaper article, or who has received praise or endorsements from well know [*sic.*] or well respected experts in the field, possesses a demonstrated, sustained record of extraordinary achievement within the field of endeavor. The evidence should show how the beneficiary clearly stands out among other very talented and skillful singers in her field of endeavor.

The O-1 classification, as it pertains to the arts, is NOT highly restrictive, especially as compared to the other two O-1 flavors (O-1 of extraordinary achievement in motion picture & TV productions, and of extroardinary ability in business, science, education, athletics). Absolutely no comparison is required; indeed, the concept really can't apply to the arts. Moreover, if petitioner documents the standard articulated below, why wouldn't beneficiary qualify? To say that the evidence has to show how the benie "clearly stands out among ather very talented and skillful opera singers" fundamentally distorts the regulatory standards as applied to O-1s in the arts.

The League of American Orchestras and OPERA America are very concerned. I told Heather Noonan, wha heads Governmental Relations for the League that, while there's no harm to approaching CSC directly, it is fair to assume CSC knows what it is daing and who it is doing it to. It won't, of course do simply ta eliminate this language while continuing to enforce a higher evidentiary standard than warranted by the statute/regulations.

I'm bringing this to your attention first in part because a) Don Neufeld et al already told the arts that there's nothing more to discuss, b) they're probably saying something similar to other interested parties in the Administration, and c) I'm a bit taken aback that CSC continues to operate with such apparent insouciance. Sure there are other ways to address this issue, but I'd rather work with you.

Here are the WAC numbers (I believe one was denied): Chicago Opera Theater WAC 10-006-50597; Chicago Opera Theater WAC10-036-51327; Chicago Opera Theater WAC10-054-51514; Topeka Symphony Orchestra WAC1005050560; Cleveland Symphony Orchestra WAC1080002388. Nate that I haven't reviewed each of these cases, so I'll assume they were of varying quality. Even so, none of these organizations hires untalented performers.

I asked Robert Kruszka a simple question at our last meeting: why all the changes, and why now? He said he didn't know, and that he'd get back to me. He won't, but the question stands: why is CIS subjecting the arts to this pressure? What's to be gained by doing so? I apologize if I seem

brusque, but we're getting hammered here, yet no one within CIS will admit to it or explain the motivation/policy at issue. Help!

****

Jonathan Ginsburg | Fettmann, Tolchin & Majors PC · [redacted]

-----Original Message-----
From: Kennedy, Julia C
Sent: Monday, February 01, 2010 12:53 PM
To: Salem, Claudia S; Dalal, Andy; Cummings, Kevin J; Brown, John W; Fisher, Sheila C
Cc: Young, Claudia F; Johnson, Bobbie L
Subject: O memo

Hello everyone,

SCOPS would first like to thank OCC for starting the process of drafting guidance relating to validity periods for the O category. We have reviewed the OCC memo and made a few revisions to conform more to Service Center guidance memos. Please find attached the clean version of the memo. Also, Heather Noonan from the Performing Artists Visa Working Group has provided comments related to determining validity periods when there are gaps in the itinerary.

In reviewing regulations, Heather Noonan's email, and also OCC's first draft of the validity period issue, SCOPS believes we have a memo which conforms to regulations, will provide clearer guidance to the adjudicator, and should provide a clearer understanding of the adjudicative process for stakeholders.

We would like OCC and OPS to review the attached memo and provide any comments and/or edits by COB Thursday. We will be sending this through

ExecSec for official concurrence but wanted to get your comments first. The goal would be to have a final version to the centers and posted to the web by next week.

We appreciate your help with this!

Julia

Julia C Kennedy

Adjudications Officer

SCOPS

[redacted]

Mr. GALLEGLY. I want to thank our two witnesses and, in fact, all of our witnesses. I think that this has been a productive hearing and without objection all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which will be forwarded and ask that the witnesses to respond as promptly as they can so the answers will be made a part of the record of the hearing, and without objection all Members have 5 legislative days to submit any additional materials for inclusion in the record.

Again, I want to thank the witnesses and thank the Members of the Committee. And with that, the Subcommittee stands adjourned.

[Whereupon, at 4:38 p.m., the Subcommittee was adjourned.]