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IS THE LABOR DEPARTMENT DOING ENOUGH TO PROTECT U.S. WORKERS?

HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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IS THE LABOR DEPARTMENT DOING ENOUGH TO PROTECT U.S. WORKERS?

THURSDAY, JUNE 22, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CLAIMS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:05 p.m., in Room 2141, Rayburn House Office Building, the Honorable John Hostettler (Chairman of the Subcommittee) presiding.

Mr. HOSTETTLER. The Subcommittee will come to order.

Good afternoon.

Today we have the opportunity to examine issues raised in a new report issued by the Government Accountability Office entitled,"H-1B Visa Program: Labor Could Improve Its Oversight and Increase Information Sharing." This report raises serious questions about whether the Department of Labor is adequately protecting U.S. workers from being harmed by foreign workers on H-1B visas.

The H-1B visa program exists to allow employers to bring a limited number of highly skilled workers to the United States each year. The law requires employers who petition for an H-1B worker to first file a labor condition application, or LCA, with the Department of Labor. In the LCA, the employer attests that it will pay the worker the prevailing wage in the area, or the same wage it pays other workers for a similar job; whatever is greater. The employer also attests that it will offer the same working conditions to H-1B workers as it offers to citizens, that no strike or lockout is ongoing, and that the employer has notified its other employees that it intends to hire an H-1B worker.

When an employer files such an application with the Department of Labor, it is now reviewed electronically. While the process is quick, the Department only checks for omissions and obvious inaccuracies on the LCA. Even then, the GAO found that some inaccuracies are not caught by the system. For example, over 3,000 LCAs were approved despite the fact that the actual wages to be paid the H-1B employee were below the prevailing wage. This is concerning, because it means that potentially 3,000 jobs were given to foreigners who are paid less than Americans for the same job.

The H-1B program is based on employers making promises, promises to pay the prevailing wage and so on. It is up to the Labor Department to ensure that the employers are making good on their promises. The Department has the authority to investigate

in situations where an employer is believed to have violated the terms of the H-1B program.

Most complaints are filed by aggrieved parties, such as the H-1B worker himself, or others with knowledge of a violation. The Department of Labor may also conduct random investigations of employers who have previously violated the program's requirements. According to the GAO, such random investigations were just begun several months ago, and were not conducted sooner because of a lack of resources due to high caseloads.

There have been allegations that Labor does not vigorously enforce the H-1B program, that H-1B workers are routinely mistreated, and that this lack of enforcement has resounded to the detriment of American high-tech workers. We will address the truths of these allegations at today's hearing.

I find it disturbing that the Department of Labor has recently asked appropriators to divert money for an H-1B antifraud account recently created by this Committee specifically for the purpose of funding H-1B enforcement. The account is funded through a new $500 antifraud fee which is split between the Labor, State, and the Department of Homeland Security. The Department of Labor has asked for a redesignation of these funds away from immigration enforcement when it appears they don't have the resources or motivation to do an adequate job as it is.

I am interested in learning more from the Department of Labor on how they are currently using H-1B anti fraud funds. Furthermore, if the Department has difficulty effectively expending all available funds on H-1B fraud due to some roadblock in the law. I would hope that we can work together to examine those barriers and determine if a change in the law is warranted.

Finally, the GAO report notes that information sharing between the Department of Labor and the Department of Homeland Security is a problem. Barriers in current law might prevent commonsense information sharing for the purpose of combating H-1B fraud. For example, in processing H-1B renewals, Citizenship and Immigration Services occasionally runs across situations in which an employee is not being paid the prevailing wage; however, the Department of Labor has concluded it cannot use this information in an investigation. I hope that we can take a close look at such barriers today and evaluate whether changes to the law are needed in order to facilitate information sharing.

I am hopeful that today's hearing will provide a forum to examine both the current law and the current enforcement structure at the Department of Labor. The reason the Department of Labor has a role in H-1B visa approvals is to protect American workers and their livelihoods. We must ensure that the Department is fulfilling its obligations in this regard. If Congress needs to tweak the current law to facilitate aggressive enforcement of the H-1B program, then I hope we can examine such changes as well.

At this time the Chair recognizes the gentleman from Texas for the purposes of an opening—to make an introduction.

Mr. SMITH. Thank you, Mr. Chairman. I do not have an opening statement other than to thank you for having this hearing today.

What I would like to do, however, is to recognize some friends and constituents who traveled all the way to Washington, DC from

Dripping Springs, Texas, and one of the primary reasons they came to Washington, DC, Mr. Chairman, is because of a specific interest in the subject of immigration. We just had a nice discussion in my office, and they are knowledgeable, interested and informed.

I would like to ask them to stand just so we can express our appreciation for their interest in the subject at hand today. If there are more Members here, Mr. Chairman, I would ask our colleagues to be on good behavior because of their presence, but since it's just you and me right now, I hope we are in good company.

Let me ask them to stand and just be recognized. Wonderful. Thank you all for being here.

Thank you, Mr. Chairman.

Mr. HOSTETTLER. The gentleman yields back his time, and welcome as well from the Chair.

At this point I would like to introduce our distinguished panel of witnesses.

Dr. Sigurd Nilsen is the Director for Education, Workforce and Income Security Issues at the United States Government Accountability Office, where he has served since 1984. He is a national expert on workforce development issues and performance management, who frequently participates in forums where policy alternatives are developed in advance.

Working for Congress, Dr. Nilsen has been responsible for research on a range of issues related to Federal workforce programs and labor policy areas. He is regularly asked to testify before Congress and has appeared before numerous national associations and on National Public Radio to discuss these issues.

Alfred B. Robinson, Jr., was named the Acting Director, Wage and Hour Administration, effective June 14, 2004. The Wage and Hour Division of the Employment Standards Administration administers and enforces a variety of labor standard statutes that are national in scope and enhance the welfare and protects the rights of our Nation's workers.

Before joining the Department of Labor, Mr. Robinson served in the South Carolina House of Representatives and on the board of the South Carolina Jobs-Economic, where he focused on job creation and economic development.

John Miano is the founding chairman of the Programmers Guild and currently serves as a director of that organization. He is an expert in computer science, having 18 years in computer software development. Mr. Miano currently operates his own computer consulting firm, Colosseum Builders, Inc., in Summit, New Jersey.

In December of last year, the Center for Immigration Studies published a study authored by Mr. Miano on the wages of H-1B workers in the computer programming profession. He has testified on the H-1B program before this panel in March of this year.

Ana Avendano, in her capacity as Associate General Counsel and Director of the Immigrant Worker Program at the AFL-CIO, provides legal and technical assistance on matters related to immigration and workers' rights to labor unions and their members in all sectors of the economy, from farm workers to high-tech workers. Ms. Avendano served as the United States Worker Representative to the International Labor Organization Committee on Migration in 2004 and on the ILO's Panel of Experts on Migration in 2005. She

has also served as a consultant to the National Immigration Law Center and in the appellate court branch of the National Labor Relations Board.

I would now ask the witnesses to please stand and raise your right hand.

[Witnesses sworn.]

Mr. HOSTETTLER. Let the record show that the witnesses have responded in the affirmative.

At this time, before we turn to our witnesses for opening statements, the Chair recognizes the Ranking Member of the Subcommittee, the gentlewoman from Texas, for purposes of an opening statement.

Ms. JACKSON LEE. Mr. Chairman, thank you, and I will ask unanimous consent that my opening statement in its entirety be submitted into the record.

Mr. HOSTETTLER. Without objection.

Ms. JACKSON LEE. I will just make a few points. First of all, I would like to thank our witnesses for their presence here today, and I will acknowledge on the record that the Department of Labor is not performing the functions dealing with enforcing labor condition applications under H-1B visas as well as we would like it to do so.

In fact, the GAO study on the H-1B program, which is entitled "Labor Could Improve Its Oversight and Increase Information Sharing with Homeland Security," speaks to that issue, and I hope that this hearing will be enlightened.

What I will say is that we are in the throes of a dilemma as relates to immigration reform. I would have much preferred that we were in the process of a conference to really address the concerns of the American people, and that is comprehensive immigration reform that might, in fact, even answer some of these concerns inasmuch as we would have the opportunity to provide legislative teeth to enforcement, employer sanctions and enforcement of their responsibilities.

We would also be able to, if you will, ensure that attestations work. We would have the potential of a pathway to citizenship, and, yes, of course, we would have another vital aspect of comprehensive immigration reform, and that would be border security. But we are here today discussing H-1Bs, which is a limited aspect of immigration reform.

In fact, as I have met with a number of immigrant groups, including, Mr. Chairman, a 60-plus group of stakeholders in Houston, Texas, coming from the medical profession, coming from the pros and the cons, meaning those against and those for, some sort of immigration reform, advocates, nonadvocates, religious leaders, all wanting to get at least a voice on this issue.

We are here with the H-1B, which certainly has its elements of fractures, but it is certainly a legal program, as the J1 visa is, with some need for reform. At the same time, if we are going to look at the H-1B, and we are not going to have comprehensive immigration reform, then we should also be looking at 245(i), the ability to reunite families.

Then I would say that one of the issues that I would hope would come to our attention, and probably additional failures that may

not be spoken about at this particular hearing with the H-1B visas, is that it was supposed to create a pool of dollars to assist in training Americans. We thought that the fees utilized by H-1B applicants could then be a partner to Americans who were desirous of vital new job training that met the market of today.

Frankly, I think that we have failed in the utilization of those funds. The Department of Labor has failed in educating Americans, nonprofits and others about those funds. As we move toward comprehensive immigration reform, I think it is imperative that besides border security and the requisite responsibility and the insight about undocumented individuals who are here in this country working and paying taxes, what are we doing for Americans?

I think it would be very important that as we make our way through this process, that we reinstitute the dollars that would be used for any pathway to citizenship, any new visas, any new temporary workers that should be invested in job-training dollars for Americans. We should say to Americans, when I say that, to citizens who are here—who might be prone to accept the divisive debate that this immigrant system is taking something away from them we have an obligation, even in this Committee, Mr. Chairman, to look to utilizing those funds that we might garner from any sort of legalization process to invest in our underserved, underutilized urban and rural areas that need investment of job-training and job-creation dollars.

So I will look forward to listening to all of the, if you will, menders of this system, because this is all that I assume these particular witnesses can talk about is mending a system, because the overall system of immigration is broken. For that reason I would hope that we would expand our reach and begin to look at a comprehensive system.

By the way, Mr. Chairman, since we worked on a number of issues dealing with legal immigration, I think it's important to note that the legal immigration system has its failures. Why does it have its failures? Because staff is overworked, underpaid; we are losing both documentation and fingerprints. We have people aging out, who have been on the list who happen to have been children. And so I hope that our voices will be raised for a comprehensive response to all of the ills we are looking at before us and will not subject ourselves to piecemeal mending, which I believe these witnesses will offer us today.

With that, I yield back.

Mr. HOSTETTLER. I thank the gentlewoman.

The Chair recognizes the gentleman from Texas for purposes of an opening statement.

Mr. GOHMERT. I want to thank the Chairman. I appreciate the hearing. These are critical things we are talking about, and I don't want the gentlewoman from Texas to fall out of her chair, but I agree with her on so many things she had to say.

Immigration is broken. It needs some fixing, and these kinds of hearings are a step toward doing that. I personally think not only should we be looking at H-1B visas and how we need to fix those and make them more available as needed, we are hearing from the industry more and more, it seems, about the importance of that,

then we hear from the Administration, gee, we need a guest worker permit or something of that nature.

We have things called worker visas, temporary worker visas, and it may be that it's manual labor. We ought to be looking at that instead of some additional program, I believe.

We appreciate your being here, the witnesses today. We appreciate the input that you have given in writing and that you will give orally. I would just urge us to keep moving on in this direction, Mr. Chairman, with H-1B visas and also other visas, because those of us who believe that the real cure will be securing the borders, and I do say borders, avenues of entry, so we know who is coming in, and that we can manage it effectively—because until we can secure our borders, we can have all the temporary visas, guest worker visas, all those things, it won't make a hill of beans difference because people are already coming and going, working, leaving. The first step is to get the border secure, and then these will mean a whole lot more than they do right now.

Thank you, Mr. Chairman.

Mr. HOSTETTLER. I thank the gentleman.

The Chair recognizes the gentleman from California for purposes of an opening statement.

Mr. ISSA. Thank you, Mr. Chairman. I want to thank you for holding this important hearing. The H-1B and perhaps the H-2A are perhaps the best examples of what we should be doing in theory and what we are not doing in reality.

I hope today we go a long way toward taking the H-1B and getting it to where it meets our real needs, getting rid of an artificially low cap, but, at the same time, finding ways to get rid of the exportation that is going on, the jury-rigging, the very question of whether or not an employee is needed, because without reforming farm workers, high-tech and other legitimate, needed worker programs to where they function, all the security in the world is still going to leave us with no legitimate way to bring in the workers that will be an addition to our economy.

I would like to associate myself with the gentleman from Texas, because, in fact, we do have to secure the border, but we also have to make these work. Every potential guest worker program that we would ever go into would be modeled substantially on these failed programs. If we can't get the high-tech workers that we need, we can't make sure that we actually need them, then where are we to go when we say that we want to explore potentially millions of needed jobs in this country, needed slots in this country, presently occupied by undocumented workers? In fact, there's no hope if we can't manage these programs that we will be able to manage a much broader program.

With that, I yield back.

Mr. HOSTETTLER. I thank the gentleman.

I would now turn to the witnesses for your testimony. Dr. Nilsen, we will begin with you. You will see a series of lights. The lights essentially will let you know when the testimony time is up with the red light, calling for termination in about 5 minutes. If you could sum up your remarks, without objection, your full written testimony is made a part of the record. If you can summarize that

as close to 5 minutes as you could, it would be very helpful. Thank you very much.

Dr. Nilsen.

TESTIMONY OF SIGURD L. NILSEN, Ph.D., DIRECTOR FOR EDUCATION, WORKFORCE, AND INCOME SECURITY ISSUES, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE

Mr. NILSEN. Thank you, Mr. Chairman.

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to assist you in your oversight of the H-1B immigrant visa program. I will discuss the results of a study being issued today that you, along with Ranking Member Jackson Lee and Representative Smith, requested to first describe how the Department of Labor carries out its H-1B responsibilities and, second, to assess how well labor works with other agencies involved in enforcing H-1B program requirements.

The administrative structure of the program is complex, involving parts of four different agencies. Labor takes the initial application and is also responsible for enforcing the rights of H-1B workers. Homeland Security approves the petition for which the State Department then issues a visa, and the Justice Department handles complaints from displaced U.S. workers.

First, with regard to Labor's role, we found that Labor's oversight of the H-1B program is limited, even within the scope of its existing authority. By law, Labor's review of employers' H-1B applications is limited to identifying omissions and obvious inaccuracies. Labor reviews almost all applications electronically by subjecting them to data checks and certifies or denies them within minutes.

Of the more than 960,000 applications that Labor reviewed from January of 2002 through September of 2005, 99.5 percent were certified. The Labor system does not consistently identify all obvious inaccuracies. For example, as the Chairman noted, we found 3,229 applications that were certified even though the wage rate on the application was lower than the prevailing wage rate listed on that application.

Additionally, Labor only looks at the application's employer identification number to make sure that it has the correct number of digits and the number does not appear on the list of employers who are ineligible to participate in the program. However, we found nearly 1,000 certified applications with invalid employer identification prefixes. Such errors can be indicative of a fraudulent application.

Labor enforces H-1B program requirements primarily by investigating complaints filed against employers. H-1B workers or others who believe an employer has violated program requirements can file a complaint with Labor's Wage and Hour Division, which received over 1,000 complaints from fiscal year 2000 through 2005. Over this period H-1B complaints and violations and corresponding employer penalties increased. In 2000, employers paid $1.2 million in back wages to 226 workers. By 2005, back-wage penalties quadrupled to $5.2 million to over 600 workers.

Next, I want to discuss the coordination between Labor and Homeland Security. Homeland Security reviews Labor's certified application as part of the adjudication process. However, it lacks

the ability to easily verify whether employers have submitted petitions for more workers than it originally requested on the application because its data system does not include Labor's application number. As a result, employers can potentially use the application for more workers than they were certified to hire.

In addition, during the process of reviewing employers' petitions, Homeland Security may find evidence the employer is not meeting the requirements of the H-1B program. But even if Homeland Security forwarded the information to the Department of Labor, current law precludes the Wage and Hour Division from using this information to initiate an investigation of the employer.

The Department of Justice is responsible for pursuing charges filed by U.S. workers who allege that an H-1B worker was hired in their place. Most of the 101 investigations started by Justice from 2,000 through 2005 were found to be incomplete, withdrawn, untimely, dismissed or investigated without finding a violation. Of the 97 investigations closed, Justice found discriminatory conduct in six cases and assessed $7,200 penalties in three of the six cases, all in 2003. In the other three cases, the actions appeared to be inadvertent, and no penalties were assessed.

In conclusion, we think that Congress should consider eliminating the restriction on using application and petition information submitted by employers to initiate an investigation and direct Homeland Security and Labor to share information to investigate whether an employer is fulfilling its H-1B responsibilities.

Further, we recommend that Homeland Security include Labor's application case number in its new information system. Homeland Security, incidentally, agreed with that recommendation.

Finally, we recommend that Labor strengthen its oversight of employers' applications by improving its procedures for checking obvious inaccuracies, including better procedures for checking for wage inaccuracies and invalid employer identification numbers. Labor took issue with this recommendation in our report, saying the benefit of using more stringent measures was unclear. However, we are concerned that the errors we uncovered by our cursory review may be indicative of additional problems.

Mr. Chairman, this concludes my prepared statement. I would be happy to respond to questions you or other Members of the Subcommittee may have at this time.

Mr. HOSTETTLER. Thank you, Dr. Nilsen.

[The prepared statement of Mr. Nilsen follows:]

PREPARED STATEMENT OF SIGURD R. NILSEN

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Immigration, Border Security and Claims, Committee on the Judiciary, House of Representatives

For Release on Delivery
Expected at 2:00 p.m. EDT
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H-1B VISA PROGRAM

More Oversight by Labor Can Improve Compliance with Program Requirements

Statement of Sigurd R. Nilsen, Director
Education, Workforce, and Income Security

GAO-06-901T

June 2006

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Highlights

Highlights of GAO-06-901T, a testimony before the Subcommittee on Immigration, Border Security and Claims, Committee on the Judiciary, House of Representatives.

H-1B VISA PROGRAM

More Oversight by Labor Can Improve Compliance with Program Requirements

Why GAO Did This Study

The H-1B visa program assists U.S. employers in temporarily filling certain occupations with highly-skilled foreign workers. There is considerable interest regarding how Labor, along with Homeland Security and Justice, is enforcing the requirements of the program. This testimony summarizes our report, GAO-06-720, that describes how Labor carries out its H-1B program responsibilities and how Labor works with other agencies involved in the H-1B program.

What GAO Recommends

The Congress should consider eliminating the restriction on Labor using information from Homeland Security to initiate an investigation and directing Homeland Security and Labor to share information on employers that may not be fulfilling program requirements., GAO recommends that Labor improve its checks of employers' applications; and that Homeland Security's U.S. Citizenship and Immigration Services (USCIS) include Labor's application case number in its new information technology system. Homeland Security agreed with our recommendations. Labor questioned whether more stringent checks were necessary and believes Congress intentionally limited Labor's role and placed program integrity with USCIS. We believe there are cost-effective methods that Labor could use to check the applications more stringently that would enhance the integrity of the H-1B process.

www.gao.gov/cgi-bin/getrpt?GAO-06-901T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Sigurd Nilsen at (202) 512-7215 or nilsens@gao.gov.

What GAO Found

While Labor's H-1B authority is limited in scope, it does not use its full authority to oversee employers' compliance with program requirements. Labor's review of employers' applications to hire H-1B workers is timely, but lacks quality assurance controls and may overlook some inaccuracies. From January 2002 through September 2005, Labor electronically reviewed more than 960,000 applications and certified almost all of them. Labor's review of the applications is limited by law to checking for missing information or obvious inaccuracies and does this through automated data checks. However, in our analysis of Labor's data, we found more than 3,000 applications that were certified even though the wage rate on the application was lower than the prevailing wage for that occupation. We also found approximately 1,000 certified applications that contained erroneous employer identification numbers, which raises questions about the validity of the applications. In its enforcement efforts, Labor's Wage and Hour Division (WHD) investigates complaints made against H-1B employers. From fiscal year 2000 through fiscal year 2005, Labor reported an increase in the number of H-1B complaints and violations, and a corresponding increase in the number of employer penalties. In fiscal year 2000, Labor required employers to pay back wages totaling $1.2 million to 226 H-1B workers; by fiscal year 2005, back wage penalties had increased to $5.2 million for 604 workers. Program changes, such as a higher visa cap in some years, could have been a contributing factor. In April 2006, WHD began randomly investigating willful violators of the program's requirements. Labor uses education as its primary method of promoting compliance with the H-1B program by conducting compliance assistance programs and posting guidance on its web site.

Labor, Homeland Security, and Justice all have responsibilities under the H-1B program, but Labor and Homeland Security face challenges sharing information. After Labor certifies an application, USCIS reviews it but cannot easily verify whether employers submitted petitions for more workers than originally requested on the application because USCIS's database cannot match each petition to Labor's application case number. Also, during the process of reviewing petitions, staff may find evidence that employers are not meeting their H-1B obligations. For example, Homeland Security may find that a worker's income on the W-2 is less than the wage quoted on the original application. USCIS may deny the petition if an employer is unable to explain the discrepancy, but it does not have a formal process for reporting the discrepancy to Labor. Moreover, current law precludes WHD from using this information to initiate an investigation of the employer. Labor also shares enforcement responsibilities with Justice, which pursues charges filed by U.S. workers who allege they were displaced by an H-1B worker. From 2000 through 2005, Justice found discriminatory conduct in 6 out of the 97 investigations closed, and assessed a total of $7,200 in penalties.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to assist you in your oversight of the H-1B nonimmigrant visa program. This program was established to assist U.S. employers in temporarily filling certain positions with highly-skilled foreign workers. Employers who want to hire H-1B workers must attest to meeting certain labor conditions—such as notifying all employees of the intention to hire H-1B workers and offering H-1B nonimmigrants the same benefits as U.S. workers. A small number of H-1B employers are required to make additional attestations concerning the non-displacement and recruitment of U.S. workers. In recent years, employers have requested more of these workers than are allowed to come into the country—the cap on H-1B visas has been reached before or shortly after the beginning of each fiscal year. Currently, the annual number of H-1B workers authorized to enter the United States is 65,000, but in previous years the cap has been as high as 195,000.

Several agencies are involved in the H-1B visa program. The Departments of Labor (Labor), Homeland Security (Homeland Security), and Justice (Justice) each have specific responsibilities during certain stages of the H-1B visa process, ranging from reviewing and approving an employer's request to hire an H-1B worker, to investigating complaints from both U.S. and foreign workers. The Department of State also has a role in issuing the worker's visa. Recently, there has been considerable interest regarding how Labor, in conjunction with the other agencies, is ensuring that employers comply with the requirements of the H-1B program.

I will draw on the results of a report we are releasing today that was conducted at the request of Chairmen Sensenbrenner and Hostettler, Ranking Member Jackson Lee, and Representative Smith, which describes (1) how Labor carries out its H-1B program responsibilities and (2) how Labor works with other agencies involved in the H-1B program.[1] To address these questions, we interviewed officials from Labor, Homeland Security's U.S. Citizenship and Immigration Services (USCIS), and Justice. We also reviewed laws and regulations pertaining to the H-1B program. We analyzed data on the applications electronically reviewed by Labor as well as data on the H-1B complaints received by Labor and the outcomes of the associated investigations. We also analyzed data on the H-1B petitions

[1] *H-1B Visa Program: Labor Could Improve Its Oversight and Increase Information Sharing with Homeland Security*, GAO-06-720.Washington, D.C.: June 22, 2006.

received by USCIS and conducted site visits to the California and Vermont service centers. Finally, we analyzed reports from Justice regarding the outcomes of its investigations into charges of U.S. worker displacement by H-1B workers. A detailed discussion of our methodology is available in our full report.

In summary, Labor's oversight of the H-1B program is limited even within the scope of its existing authority. Labor's review of employers' H-1B applications is limited by law to identifying omissions and obvious inaccuracies, but we found it does not consistently identify all obvious inaccuracies. For example, Labor certified more than 3,000 applications even though the wage on the application was lower than the wage the employers were required to pay for that occupation and location. Labor's Wage and Hour Division (WHD) enforces H-1B program requirements by investigating complaints made against H-1B employers and recently began random investigations of previous program violators. From fiscal year 2000 through fiscal year 2005, complaints and violations increased but changes in the program, such as temporary increases in visa caps, may have been a factor. Labor shares H-1B responsibilities with Homeland Security and Justice, but Labor and Homeland Security face challenges sharing information across agencies. Homeland Security cannot easily verify whether employers submitted petitions for more workers than they originally requested on their application to Labor because USCIS's data system does not match each petition to Labor's application case number. Additionally, during the process of reviewing petitions, USCIS staff told us they may find evidence that employers are not meeting their H-1B obligations. However, USCIS does not have a formal mechanism to report such information to Labor, and current law precludes WHD from using this information to initiate an investigation of an employer. Justice pursues charges filed by U.S. workers alleging they were not hired or were displaced so that an H-1B worker could be hired instead, but it has not found discriminatory conduct in most cases.

To increase employer compliance with the H-1B program and protect the rights of U.S. and H-1B workers, Congress should consider eliminating the restriction on Labor using petition information submitted by employers to Homeland Security as the basis for initiating an investigation. Congress should also consider directing Homeland Security to provide Labor with information received during the adjudication process that may indicate an employer is not fulfilling its H-1B responsibilities. To strengthen oversight of employers' applications to hire H-1B workers and to help ensure employers are complying with program requirements, we recommend that Labor improve its procedures for checking for completeness and obvious

inaccuracies, and, as Homeland Security's USCIS transforms its information technology system, it include Labor's application case number in the new system.

The agencies gave us technical comments on our report and Homeland Security agreed with our recommendations. Labor questioned whether more stringent checks were necessary and believes Congress intentionally limited Labor's role and placed program integrity with USCIS.

We believe there are cost-effective methods Labor could use to check the applications more stringently that would enhance the integrity of the H-1B process.

Background

The H-1B program was created by the Immigration Act of 1990, which amended the Immigration and Nationality Act (INA).[2] The H-1B visa category was created to enable U.S. employers to hire temporary workers as needed in specialty occupations, or those that require theoretical and practical application of a body of highly specialized knowledge. It also requires a bachelor's or higher degree (or its equivalent) in the specific occupation as a minimum requirement for entry into the occupation in the United States.[3] The Immigration Act of 1990 capped the number of H-1B visas at 65,000 per fiscal year.

Since the creation of the H-1B program, the number of H-1B visas permitted each fiscal year has changed several times. Congress passed the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), which increased the limit to 115,000 for fiscal years 1999 and 2000. In 2000, Congress passed the American Competitiveness in the Twenty-First Century Act (AC-21), which raised the limit to 195,000 for fiscal year 2001 and maintained that level through fiscal years 2002 and 2003. The number of H-1B visas reverted back to 65,000 thereafter.[4]

[2] The H-1 non-immigrant category was created under the Immigration and Nationality Act of 1952 to assist U.S. employers needing workers temporarily. Non-immigrants are foreign nationals who come to the United States on a temporary basis and for a specific purpose, such as to attain education and work.

[3] Fashion models of distinguished merit and ability also qualify for H-1B visas and do not need to meet the definition of specialty occupation.

[4] However, under AC-21 and the H-1B Visa Reform Act of 2004, some H-1B workers—such as those being hired by institutions of higher education, nonprofit or government research organizations, or those with a master's or higher degree from a U.S. institution—may be exempt from the annual cap.

Generally, an H-1B visa is valid for 3 years of employment and is renewable for an additional 3 years.

Filing an application with Labor's Employment and Training Administration is the employer's first step in hiring an H-1B worker,[5] and Labor is responsible for either certifying or denying the employer's application within 7 days. By law, it may only review applications for omissions and obvious inaccuracies. Labor has no authority to verify the authenticity of the information. Employers must include on the application information such as their name, address, rate of pay and work location for the H-1B worker, and employer identification number. All employers are also required to make four attestations on the application as to:

1. Wages: The employer will pay non-immigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for nonproductive time caused by a decision made by the employer; and offer nonimmigrants benefits on the same basis as U.S. workers.

2. Working conditions: The employment of H-1B nonimmigrants will not adversely affect the working conditions of U.S. workers similarly employed.

3. Strike, lockout, or work stoppage: No strike or lockout exists in the occupational classification at the place of employment.

4. Notification: The employer has notified employees at the place of employment of the intent to employ H-1B workers.

Certain employers are required to make three additional attestations on their application. These additional attestations apply to H-1B employers who: (1) are H-1B dependent, that is, generally those whose workforce is comprised of 15 percent or more H-1B nonimmigrant employees; or (2) are found by Labor to have committed either a willful failure to meet H-1B program requirements or misrepresented a material fact in an application during the previous 5 years. These employers are required to additionally attest that: (1) they did not displace a U.S. worker within the period of 90 days before and 90 days after filing a petition for an H-1B worker;

[5] Employers can submit applications to Labor up to 6 months prior to the H-1B worker's intended employment date.

(2) they took good faith steps prior to filing the H-1B application to recruit U.S. workers and that they offered the job to a U.S. applicant who was equally or better qualified than an H-1B worker; and (3) prior to placing the H-1B worker with another employer, they inquired and have no knowledge as to that employer's action or intent to displace a U.S. worker within the 90 days before and 90 days after the placement of the H-1B worker with that employer.[6]

After Labor certifies an application, the employer must submit a petition for each worker it wishes to hire to USCIS. On March 1, 2003, Homeland Security took over all functions and authorities of Justice's Immigration and Naturalization Service under the Homeland Security Act of 2002 and the Homeland Security Reorganization Plan of November 25, 2002. Employers submit to USCIS the application, petition, and supporting documentation along with the appropriate fees. Information on the petition must indicate the wages that will be paid to the H-1B worker, the location of the position, and the worker's qualifications. Through a process known as adjudication, USCIS reviews the documents for certain criteria, such as whether the petition is accompanied by a certified application from Labor, whether the employer is eligible to apply for H-1B workers, and whether the prospective H-1B worker is qualified for the position.

The Wage and Hour Division of Labor's Employment Standards Administration performs investigative and enforcement functions to determine whether an employer has complied with its attestations on the application. An aggrieved individual or entity[7] or certain non-aggrieved parties may file a complaint with Labor that an employer violated a requirement of the H-1B program. To conduct an investigation, the Administrator must have reasonable cause to believe that an employer did not comply with or misrepresented information on its application.

[6] These additional requirements first applied from January 19, 2001—September 30, 2003. However, the provision requiring these attestations sunsetted, or expired, and was not reinstituted until March 8, 2005. Consequently, from October 1, 2003, to March 7, 2005, H-1B dependent employers and willful violator employers were not required to make the additional attestations, and, in effect, were able to hire H-1B workers even if they displaced U.S. workers and did not make efforts to recruit U.S. workers.

[7] An aggrieved individual can be an H-1B worker, a U.S. worker, or a bargaining representative for workers; an aggrieved entity can be another federal agency, such as the Department of State, or a competitor who is adversely affected by the employer's alleged non-compliance with the application.

Employers who violate any of the attestations on the application are subject to civil money penalties or administrative remedy, such as paying back wages to H-1B workers or debarment, which disqualifies an employer from participating in the H-1B program for a specified period of time. Employers, the person who filed the complaint, or other interested parties who disagree with the findings of the investigation then have 15 days to appeal by requesting an administrative hearing.

The Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) of the Department of Justice also has some enforcement responsibility. Under statutory authority created by the Immigration Reform and Control Act of 1986, OSC pursues charges of citizenship discrimination brought by U.S. workers who allege that an employer preferred to hire an H-1B worker.

Labor Does Not Use Its Full Authority to Oversee Employers' Compliance with Program Requirements

Labor's H-1B authority is limited in scope, but it does not use its full authority to oversee employers' compliance with program requirements. Labor's review of employers' applications to hire H-1B workers overlooks some inaccuracies, such as applications containing invalid employer identification numbers. WHD investigates complaints made against H-1B employers and recently began random investigations of some employers who had previously violated program requirements. Labor uses education as the primary method of promoting employers' compliance with the H-1B program.

Labor's Review of Employers' Requests Is Fast but May Overlook Some Inaccuracies

Labor reviews applications electronically[8] by subjecting them to data checks, and its web site informs employers that it will certify or deny applications within minutes based on the information entered. We found that of the 960,563 applications that Labor electronically reviewed from January 2002 through September 2005, it certified 99.5 percent.

Labor's review of the application is limited by law to identifying omissions or obvious inaccuracies. Labor defines an obvious inaccuracy as when an employer:

[8] As of January 2006, Labor required applications to be submitted electronically. Special mail application filing procedures are available for employers without Internet access or with physical disabilities.

- files an application after being debarred, or disqualified, from participating in the H-1B program;
- submits an application more than 6 months before the beginning date of the period of employment;
- identifies multiple occupations on a single application;
- states a wage rate that is below the Fair Labor Standards Act minimum wage;
- identifies a wage rate that is below the prevailing wage on the application; and
- identifies a wage range where the bottom of the range is lower than the prevailing wage on the application.

Despite these checks, Labor's system does not consistently identify all obvious inaccuracies. For example, although the overall percentage was small, we found 3,229 applications that were certified even though the wage rate on the application was lower than the prevailing wage for that occupation in the specific location (see table 1).[9]

Table 1: Examples of Wage Rates and Prevailing Wages on Labor Condition Applications That Were Incorrectly Certified

Sample applications	Application wage rate	Application prevailing wage	Application status
Application 1 FY 2002	$60,163 per year	$83,833 per year	Certified
Application 2 FY 2003	$37,784 per year	$52,876 per year	Certified
Application 3 FY 2004	$32,000 per year	$35,000 per year	Certified
Application 4 FY 2005	$55,000 per year	$75,000 per year	Certified

Source: GAO analysis of Department of Labor data.

Additionally, Labor does not identify other errors that may be obvious. Specifically, Labor told us its system reviews an application's employer

[9] Prior to the enactment of the H-1B Visa Reform Act of 2004, Labor's regulations permitted employers to pay actual wages that were only 95 percent of the prevailing wage. Our analysis only includes those cases where the actual wage rate was less than 95 percent of the prevailing wage.

identification number[10] to ensure it has the correct number of digits and that the number does not appear on the list of employers who are ineligible to participate in the H-1B program. However, we found 993 certified applications with invalid employer identification number prefixes. Officials told us that in other programs, such as the permanent employment program, Labor matches the application's employer identification number to a database with valid employer identification numbers. However, they do not formally do this match with H-1B applications because it is an attestation process, not a verification process.

Likewise, Labor officials told us they frequently review the application process to determine where improvements can be made, but they rely on a system of data checks rather than a formal quality assurance process because of the factual nature of the form and the number of applications received. Also, officials said if they conducted a more in-depth review of the applications, they could overreach their legal authority and increase the processing time for applications. Additionally, they said the integrity of the H-1B program is ensured through enforcement and by the fact that there is actual review by staff when the employer submits the paperwork to USCIS.

Labor Investigates Complaints, and Has Begun the Process of Randomly Investigating Previous Violators

Labor enforces H-1B program requirements primarily by investigating complaints filed against employers by H-1B workers or others. Labor's Wage and Hour Division received 1,026 complaints from fiscal year 2000 through fiscal year 2005. Labor officials said they investigate the employer's compliance with all program requirements for all H-1B workers; therefore, an investigation may yield more than one violation.

While the number of H-1B complaints and violations has increased from fiscal year 2000 through fiscal year 2005, the overall numbers remain small and may have been affected by changes to the program. As shown in table 2, we found that the number of complaints increased from 117 in fiscal year 2000 to 173 in fiscal year 2005, and the number of cases with violations more than doubled, along with a corresponding increase in the number of employer penalties. In fiscal year 2000, Labor required employers to pay back wages totaling $1.2 million to 206 H-1B workers; by

[10] The employer identification number is used by the Internal Revenue Service to identify taxpayers who are required to file business tax returns. The number has nine digits and is issued in the XX-XXXXXXX format.

fiscal year 2005, back wages penalties had increased to $5.2 million for 604 workers. The most common type of violation each fiscal year involved a failure to pay H-1B workers the required wage. Labor officials told us it is difficult to attribute changes in complaints and violations to any specific cause because of multiple legislative changes to the program, such as the temporary increase in the number of H-1B workers allowed to enter the country and the additional attestations for certain employers that expired and then were reinstated.

Table 2: H-1B Complaints, Violations, Back Wages Due, and Civil Money Penalties Assessed

Fiscal year	Number of complaints	Number of cases with violations	Amount of back wages due (millions)	Number of employees due back wages	Civil money penalties assessed	H-1B fiscal year cap[a]
2000	117	93	$1.2	226	$21,000	115,000
2001	192	67	0.6	135	17,750	195,000
2002	238	210	3.8	830	48,350	195,000
2003	148	264	4.0	552	136,890	195,000
2004	158	271	4.2	390	114,125	65,000
2005	173	217	5.2	604	103,350	65,000
Total	**1,026**	**1,122**	**19.0**	**2,737**	**441,465**	**N/A**

Source: GAO analysis of Department of Labor, Wage and Hour Division data, the American Competitiveness and Workforce Improvement Act of 1998, and the American Competitiveness in the Twenty-First Century Act of 2000.

[a] N/A = not applicable.

Labor's Wage and Hour Division has recently begun random investigations of employers who have willfully violated H-1B program requirements in the past. Under the INA, as amended, Labor has had the authority to conduct these investigations since 1998, but officials told us the agency had not done so until recently for several reasons. First, these employers frequently go out of business because they are not allowed to participate in the H-1B program for a period of time. Second, there are only a limited number of willful violators—just 50 nationwide in late fiscal year 2005. In addition, we were told that H-1B investigators have heavy caseloads. However, Labor officials said they now have 59 cases that they can investigate, and in April 2006, directed each of their regional offices to initiate a random investigation of at least one employer prior to the end of fiscal year 2006.

Labor Relies Primarily on Education to Promote Employer Compliance

Labor uses education as the primary method of promoting employer compliance with the H-1B program. From 2000 through 2005, Labor's district offices conducted six presentations on H-1B compliance. Labor also holds compliance seminars in response to requests from employer associations and discusses program requirements with companies that do not have pending lawsuits related to the H-1B program. Additionally, Labor posts guidance and fact sheets on its web site. While some of its fact sheets have not been updated since the program was amended by the H-1B Visa Reform Act in 2004, officials said 26 new fact sheets will be posted on the agency's web site by the end of fiscal year 2006. During investigations of employers, Labor explains the employer's legal obligations and asks the employer about the changes it plans to make to comply with the law. When an investigation results in an employer's debarment, Labor publicizes the case through press releases highlighting the consequences for not complying with H-1B program requirements. Labor is also working with the Department of State to provide information cards to H-1B workers when they are issued their visa. These cards inform them about their employment rights, including required wages and benefits, illegal deductions, working conditions, records, and discrimination.

Homeland Security and Justice also use education to promote employer compliance with the H-1B program. Homeland Security publishes informational bulletins and uses its web site to advise the public of any changes to the program regarding filing fees or eligibility resulting from changes in the law. Justice engages in educational activities through public service announcements aimed at employers, workers, and the general public. The agency trains employers and works with other federal agencies to coordinate employer education programs. Justice also uses a telephone intervention hotline to resolve disputes between U.S. workers and H-1B employers, answers questions submitted via e-mail, issues guidance, and provides information on its web site.

Labor and Homeland Security Face Challenges Sharing Information

Labor, Homeland Security, and Justice all have responsibilities under the H-1B program, but Labor and Homeland Security face challenges sharing information that could help identify possible program violations. In addition to Homeland Security, Labor also shares enforcement responsibilities with Justice, which pursues charges filed by U.S. workers who allege that they were not hired or were displaced because of an H-1B worker. Justice has found discriminatory conduct in relatively few cases.

Labor and Homeland Security Coordinate to Process Employers' Requests to Hire H-1B Workers, but Do Not Use Certain Information to Investigate Possible Violations

Homeland Security reviews Labor's certified application as part of the adjudication process; however, it cannot easily verify whether employers have submitted petitions for more workers than originally requested on the application. USCIS's data system does not match each petition to its corresponding application because the system does not include a field for the unique number Labor assigns each application. As a result, USCIS cannot easily verify how many times the employer has used a given application or which petitions were supported by which application, potentially allowing employers to use the application for more workers than they were certified to hire. USCIS told us that while it has attempted to add Labor's application case number to its database, it has not been able to because of the system's memory limitations and it will be several years before a new information technology system is operational.

During the process of reviewing employers' petitions, USCIS may find evidence the employer is not meeting the requirements of the H-1B program, but current law precludes Labor's Wage and Hour Division from using this information to initiate an investigation of the employer. Some petitions to extend workers' H-1B status have been submitted with W-2 forms where the wage on the W-2 was less than the wage the employer indicated it would pay on the original Labor application, according to USCIS staff. If the employer is unable to adequately explain the discrepancy, USCIS may deny the petition but does not have a formal mechanism for reporting these discrepancies to Labor. Moreover, even if USCIS did report these cases, current law precludes WHD from using the information to initiate an investigation. According to officials from Labor, it does not consider Homeland Security to be an aggrieved party; therefore, Labor would not initiate an investigation based on information received from, or a complaint filed by, Homeland Security.

Justice Handles U.S. Worker Cases

Justice pursues charges filed by U.S. workers who allege that an H-1B worker was hired in their place. Such charges may be resolved before an administrative law judge, through an out-of-court settlement, or by dismissal for lack of reasonable cause to believe that a violation occurred. From 2000 through 2005, no cases were heard by an administrative law judge. Most of the 101 investigations started by Justice from 2000 through 2005 were found to be incomplete, withdrawn, untimely, dismissed, or investigated without finding reasonable cause for a violation. Of the

97 investigations closed, Justice found discriminatory conduct in 6 cases, and assessed $7,200 in penalties in 3 of the 6 cases, all in 2003.[11]

Conclusion and Recommendations

We found that Labor—in coordination with Homeland Security—could provide better oversight of employers' compliance with H-1B visa program requirements. Even though Labor's authority to review applications is limited, it is certifying some applications that do not meet program requirements or have inaccurate information. Additionally, USCIS may find information in the materials submitted by an H-1B employer that indicates the employer is not complying with the program requirements. However, these employers may not face consequences because USCIS does not have a formal mechanism for reporting this information to Labor, and current law restricts Labor from using such evidence to initiate an investigation. USCIS also has an opportunity to improve its oversight by matching information from its petition database with Labor's application case number to detect whether employers are requesting more H-1B workers than they were originally certified to hire. As Congress deliberates changes to U.S. immigration policy, it is essential to ensure that employers comply with program requirements designed to protect both domestic and H-1B workers.

To increase employer compliance with the H-1B program and protect the rights of U.S. and H-1B workers, Congress should consider the following two actions:

- Eliminate the restrictions on Labor using petition information submitted by employers to Homeland Security as the basis for initiating an investigation, and
- Direct Homeland Security to provide Labor with information received during the adjudication process that may indicate whether an employer is fulfilling its H-1B responsibilities.

[11] In the three cases where penalties were assessed, employers advertised for only H-1B workers for various information technology positions. Upon receiving notice of the charges, the employers immediately agreed not to post discriminatory advertising in the future and to take steps to recruit U.S. workers (as well as permanent and temporary residents, refugees, and asylees). In these cases, minimum penalties were imposed because there were no identifiable victims and, by statute, penalties are capped at $2,200 per violation or individual. In the three cases where penalties were not assessed, discrimination against U.S. workers appeared to be inadvertent, not intentional.

Further, we recommend that Labor strengthen its oversight of employers' applications to hire H-1B workers by improving its procedures for checking for completeness and obvious inaccuracies, including developing more stringent, cost-effective methods of checking for wage inaccuracies and invalid employer identification numbers. We also recommend that USCIS ensure employers' compliance with the program requirements by including Labor's application case number in its new information technology system, so that adjudicators are able to quickly and independently ensure that employers are not requesting more H-1B workers than were originally approved on their application to Labor.

We provided a draft of our report to the Departments of Labor, Homeland Security, and Justice for their review and comments. Each agency provided technical comments, which we incorporated as appropriate. Justice did not have formal comments on our report.

Homeland Security agreed with our recommendations, and stated that USCIS intends to include Labor's application case number in its new information technology system.

Labor questioned whether our recommendation for more stringent application review measures is supported by the low error rate that we found, as well as whether the benefits of instituting such measures would equal or exceed the added costs of implementing them. In addition, Labor said that Congress intentionally limited the scope of Labor's application review in order to place the focus for achieving program integrity on USCIS.

We believe that Labor is at risk of certifying H-1B applications that contain more errors than were found in the scope of our review. For example, we checked only for employer identification numbers with invalid prefix codes, and did not look for other combinations of invalid numbers or data. Therefore, we do not know the true magnitude of the error rate in the certification process. We continue to believe there are cost-effective methods that Labor could use to check the applications more stringently that would enhance the integrity of the H-1B process.

Mr. Chairman, this concludes my prepared statement. I would be happy to respond to any questions you or other Members of the Subcommittee may have at this time.

GAO Contacts and Staff Acknowledgments

For information regarding this testimony, please contact Sigurd R. Nilsen, Director, Education, Workforce, and Income Security Issues, on 202-512-7215. Individuals making key contributions to this testimony include: Alicia Puente Cackley, Gretta L. Goodwin, Amy J. Anderson, Pawnee A. Davis, Sheila McCoy and Rachael C. Valliere.

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Mr. HOSTETTLER. Mr. Robinson.

TESTIMONY OF ALFRED B. ROBINSON, JR., ACTING DIRECTOR, WAGE AND HOUR ADMINISTRATION, EMPLOYMENT STANDARDS ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, ACCOMPANIED BY BILL CARLSON, ADMINISTRATOR, OFFICE OF FOREIGN LABOR CERTIFICATION, EMPLOYMENT TRAINING ADMINISTRATION

Mr. ROBINSON. Thank you, Mr. Chairman and Members of the Subcommittee. I am pleased to appear before you today to discuss the H-1B provisions of the Immigration and Nationality Act. The Labor Department is responsible for H-1B—the responsibilities of the Labor Department for H-1B is divided between two agencies, the Employment Training Administration and the Wage and Hour Division of the Employment Standards Administration. Today I am joined by Bill Carlson, the Administrator of the Office of Foreign Labor Certification within ETA.

The mission of Wage/Hour is to promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation's workforce. Wage and Hour is responsible for administering and enforcing some of our Nation's most comprehensive labor laws, including the H-1B worker protections.

As noted earlier, the focus of today's hearing is a recently issued report from GAO on the H-1B visa program. In this report, GAO highlights the effective work that Labor performs in this program and outlines the respective responsibilities of the Departments of Labor, Homeland Security and State. While GAO made no formal recommendations for Wage and Hour, it raised two issues for Congress to consider that would affect Wage and Hour.

If Congress implements GAO's recommendations, the result would be an increase in H-1B enforcement by Wage and Hour. We fully support this outcome and agree with GAO's recommendations. Moreover, we believe consideration should be given to additional changes to the program to further enhance Wage and Hour's ability to ensure the integrity of the H-1B program, enforce employers' obligations and to protect U.S. workers and H-1B workers.

As noted by the Chairman, Wage and Hour currently initiates an H-1B investigation under four different authorities, aggrieved party, specific credible source, willful violator and secretarial certification. As you are aware, our written statement provides more details on each one of these limited authorities enabling Wage and Hour to initiate an investigation.

As part of the application process, an H-1B employer is assessed a $500 fraud fee that is divided equally between the Departments of Labor, Homeland Security and State. Wage and Hour's portion of this fee totals approximately $30 million annually. However, the statute limits DOL's use of this money only to the enforcement of the H-1B program.

Given the statutory restrictions on its investigative authority, the Department of Labor estimates that it will continue to spend approximately $4 to $5 million annually for H-1B enforcement and education. If Congress were to change the statute to include broader H-1B investigative authority, Wage and Hour could significantly increase its enforcement activities.

Wage and Hour has taken additional steps to improve enforcement of the H-1B program and its ability to detect fraud. For example, we have updated the H-1B chapter of our investigators' manual to encompass recent changes to the statute and to the regulations. Also, Wage and Hour is conducting nationwide training for its investigators and managers as well as attorneys from the Office of the Solicitor.

As part of its compliance assistance and educational efforts, we have implemented a number of activities including releasing 26 H-1B fact sheets that are available on our Website and distributing H-1B worker rights cards. The updated procedures, investigator training and new educational tools will protect domestic and foreign workers against fraud and enhance the integrity of the program.

Finally, assuming Congress were to expand H-1B enforcement authority of Wage and Hour, as the GAO recommends, we would still expect there to be a surplus of H-1B fraud fee funds because of the current statutory language that limits its use solely to H-1B enforcement.

The Department believes a modification to the statute would provide greater flexibility to fully utilize the antifraud money. Such a change in the statutory language would supplement overall enforcement activity to further combat fraud and protect American workers.

The effect of a change in the statutory language would permit Wage and Hour to maintain a strong and viable H-1B enforcement and compliance assistance program, and simultaneously to strengthen enforcement programs and activities that focus on low-wage industries likely to employ foreign workers.

Mr. Chairman, this concludes my statement, and I, along with Mr. Carlson, would be pleased to respond to any questions from Members of the Subcommittee. Thank you.

Mr. HOSTETTLER. Thank you, Mr. Robinson.

[The prepared statement of Mr. Robinson follows:]

PREPARED STATEMENT OF ALFRED B. ROBINSON, JR.

I. INTRODUCTION

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today to discuss the H-1B labor provisions of the Immigration and Nationality Act (INA). Responsibilities for H-1B within the Department of Labor are divided between two agencies, the Employment Training Administration (ETA) and the Wage and Hour Division (WHD) of the Employment Standards Administration (ESA). I am joined today at this hearing by Mr. Bill Carlson, who is Administrator of the Office of Foreign Labor Certification within ETA.

The mission of the WHD is to promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation's workforce. WHD is responsible for administering and enforcing some of our nation's most comprehensive labor laws, including the minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act (FLSA); the Family and Medical Leave Act; the Migrant and Seasonal Agricultural Worker Protection Act; the prevailing wage requirements of the Davis-Bacon Act and the Service Contract Act; and the worker protections provided in several temporary visa programs.

The Government Accountability Office (GAO) recently issued a report outlining WHD's responsibilities under the H-1B statute. GAO made no formal recommendations for WHD, however, GAO raised two issues for Congress to consider that would have a direct effect on WHD. GAO recommended that Congress consider (1) eliminating the restriction on using application and petition information submitted by employers as the basis for initiating an investigation, and (2) directing Homeland

Security to provide Labor with information received during its adjudication process that may indicate an employer is not fulfilling its H-1B responsibilities. If Congress implements GAO's recommendations, the result will be an increase in H-1B enforcement for WHD. We fully support this outcome and therefore agree with GAO's recommendations. Moreover, we believe consideration should be given to additional changes to the program to further enhance WHD's ability to reduce fraud, enforce employer's obligations, and protect H-1B and U.S. workers.

The H-1B statutory provision that we will discuss today appears in Section 212(n) of the INA (8 U.S.C. 1182(n)). This section outlines the H-1B Labor Condition Application process and the related labor enforcement requirements. The program was initiated in 1990 and the statute has been amended a number of times. The first major revision was pursuant to the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) and the most recent was pursuant to the H-1B Reform Act of 2004, which re-enacted a number of provisions that had sunset and made other changes to the law.

II. OVERVIEW

The H-1B statute establishes an annual ceiling on the number of workers issued H-1B visas. This ceiling is currently set at 65,000. As you know, the FY 2007 cap has already been reached. The INA defines the scope of eligible occupations, specifies the qualifications for H-1B status, requires an employer to file a Labor Condition Application (LCA), which establishes conditions of employment, and establishes an enforcement system to determine compliance with the LCA requirement.

The H-1B program requires the coordination of multiple federal agencies. The Department of Labor's ETA approves the LCA, the Department of Homeland Security (DHS) approves the H-1B visa classification, and the Department of State (DOS) issues the visa. WHD enforces the worker protection provisions. In addition, the Department's Office of the Inspector General (OIG), has investigative authority with respect to certain types of fraud within the H-1B program, such as false statements. The OIG issued audit reports on H-1B in 1996 and 2003.

WHD recognizes that its enforcement of the H-1B program is important to not only protect the integrity of the program, but also to ensure that similarly employed U.S. workers are not adversely affected by the H-1B workers' presence.

A filing fee, in addition to the base fee for a petition to classify an alien as an H1-B, is charged to most employers. Qualifying educational establishments and research organizations are excluded. This fee is $750 for employers with 25 or fewer full time equivalent workers and $1,500 for employers with more than 25 workers. An additional $500 anti-fraud fee is assessed on most H-1B employers. Restrictions on the use of the proceeds from the anti-fraud fee will be discussed later in this testimony.

III. THE APPLICATION PROCESS

Every employer is required to submit a completed LCA to ETA. The LCA outlines the wages, duties, and working conditions of the job. The employer must sign the LCA. By signing the LCA the employer attests that the "facts" specified on the LCA are true and accurate. The employer must accurately specify the following information:

- Employer Information (firm name, employer identification number (EIN), address, phone);
- Rate of Pay (amount, salary/hourly, full/part time);
- Period of employment;
- Occupation information (number of H-1Bs sought, their occupation code, and job titles);
- Work locations (including additional or subsequent locations); and
- Prevailing Wage (amount, source, date of rate) for all work locations listed.

The statutory language mandates that ETA limit its review of LCAs to ensure that they are complete, not obviously inaccurate, and that the employer has not been debarred. In accordance with those requirements, ETA does not determine the validity of the information submitted on the LCA. ETA is mandated by the statute to complete the processing of an LCA within seven (7) days.

The WHD enforces the provisions of the LCA. Some of the provisions, such as the employer information, wages, period of employment, job classification, work locations, and prevailing wage data, represent "material facts." An employer that knowingly provides incorrect information on the LCA or shows reckless disregard for the truth of the information has committed a willful misrepresentation. For purposes of

H-1B enforcement, WHD considers a willful misrepresentation as fraud and will cite a violation and will assess penalties.

On the LCA the employer must agree to abide by (or "comply with") the following Labor Condition Statements:

- Wages: The employer will pay the higher of the actual or prevailing rate, which includes offering benefits on the same basis as offered to U.S. workers. The actual wage is based on the employer's own pay scale or system. The prevailing wage rate must be no less than the minimum wage required by Federal, State, or local law. The prevailing wage is typically the weighted average of wages paid to similarly employed individuals in the area of intended employment.
- Working Conditions: The employer will provide working conditions (including hours, shifts, vacations, and seniority based benefits) which will not adversely affect similarly employed U.S. workers.
- Strike, Lockout or Work Stoppage: There is no strike or lockout in the same occupational classification on the LCA at the place of employment. These provisions also require that:
  - ETA will be notified if a strike/lockout occurs; and
  - No H-1B will be placed at a site with a strike/lockout.
- Notification of the LCA filing to the union or workers by:
  - Posting a copy of the LCA for 10 days at 2 conspicuous locations at the place of employment; or
  - Posting a copy of the LCA electronically.

In addition to the above Labor Condition Statements, an H-1B Dependent Employer or Willful Violator must agree to the following recruitment and non-displacement of U.S. workers provisions:

- An employer will make good faith efforts to recruit U.S. workers;
- An employer will offer the job to an equally or better qualified U.S. applicant (enforced by Department of Justice);
- An employer will not displace a similarly employed U.S. worker within 90 days before or after an H-1B visa petition is filed; and
- An employer must inquire of a secondary employer whether an H-1B worker placed with the secondary employer will displace a similarly employed U.S. worker.

An H-1B Dependent Employer is defined under the statute by a specific formula. As a general matter, an employer that has 15% or more of its workforce employed as H-1B workers is an H-1B Dependent Employer.

An H-1B Willful Violator is defined as an employer who, in a final agency action, was determined to have committed a willful failure or a willful misrepresentation of a material fact after October 21, 1998, and within 5 years of the filing of the LCA.

IV. Compliance

Compliance with the H-1B provisions requires an employer to abide by the provisions of the LCA. One of the most basic provisions is an employer's responsibility to pay the H-1B worker properly.

An employer's obligation to pay an H-1B worker commences on the earliest of the following events:

- The H-1B worker "enters into employment" with the sponsoring employer, which occurs when the worker first makes him/herself available for work or otherwise comes under the control of the employer, such as reporting for orientation or studying for a licensing exam;
- No later than thirty (30) days after the H-1B worker is first admitted into the U.S. pursuant to the H-1B petition, whether or not the H-1B worker has "entered into employment";
- No later than sixty (60) days after the date the H-1B worker becomes eligible to work for the employer (the approval date found on the United States Citizenship and Immigration Service (USCIS) Notice of Action, Form I-797), whether or not the H-1B worker has "entered into employment"; or
- For an H-1B worker already in the United States, on the date of the filing of the Petition for a Nonimmigrant Worker (including the Forms I-129, the H Classification Supplement, and the H1-B Data Collection and Filing Fee Exemption Supplement) by the sponsoring employer under the H-1B portability provisions.

The employer is obligated to pay the required wage rate for all non-productive time caused by:

- conditions related to employment;
- lack of work;
- lack of permit;
- studying for licensing exam; or
- employer-required training.

If the non-productive time is the result of a decision by the employer, the full required wage rate must be paid. A worker cannot be "benched" by the employer without receiving the required wage rate.

If the H-1B worker is not available to work for reasons unrelated to employment, such as voluntary absence for pleasure or an absence due to illness, then the employer is not required to pay. If the non-productive time is the result of a decision, made freely by the worker and without coercion by the employer, the required wage rate need not be paid unless it is payment under a required benefit plan—for example, paid vacation or sick leave.

Full-time workers must be paid the full amount of the required wage rate and part-time workers must be paid for at least the number of hours indicated on the petition for a nonimmigrant worker filed with USCIS (I-129) and referenced on the LCA. If the I-129 indicates a range of hours, the worker must be paid for the average number of hours normally worked.

The employer's wage obligation ceases only after a bona fide termination of employment. Once such termination takes place, the employer is required to notify USCIS that the employment relationship is canceled. A worker may not be terminated and then re-hired under the same petition. The employer is liable for the reasonable costs of the return transportation for the H-1B worker if the employer prematurely terminates the employment.

"Wages" are specifically defined in the regulations. The required wage must be paid to the worker, cash in hand, free and clear, when due, and no less often than monthly. Deductions which reduce the worker's wage to below the required wage rate may be taken only if they are required by law (i.e. taxes), are reasonable/customary (i.e. insurance, savings, or retirement) or are authorized by a collective bargaining agreement. The deductions must be voluntarily authorized in writing by the worker, and be principally for the benefit of the worker. They may not exceed the fair market value or actual cost of a provided benefit (lodging, transportation, goods, for example) or the garnishment limits. Deductions may not be taken to recoup an employer's business expense, as a penalty for early cessation of employment, to recover the USCIS petition filing fees, to cover any additional costs incurred in the petition process or to recover the $500 Anti-Fraud Fee.

An H-1B worker may not be assessed a penalty if he or she ceases employment with the employer before the contract period ends. The employer may, however, seek liquidated damages from the H-1B worker to recoup damages caused by the worker's early departure. The employer may not withhold the last paycheck of the H-1B worker to recover the liquidated damages.

H-1B Dependent or Willful Violator employers are prohibited from terminating a U.S. worker in an equivalent position 90 days before and after the filing of the H-1B petition. In addition, if an H-1B Dependent or Willful Violator employer intends to place the H-1B worker with a secondary employer, then the H-1B employer must inquire from the secondary employer whether the secondary employer has terminated, or intends to terminate, a U.S. worker from an essentially equivalent job 90 days before or after the placement of the H-1B worker.

As I have noted, an H-1B Dependent or Willful Violator employer has additional responsibilities dealing with recruitment and hiring. The H-1B Dependent or Willful Violator employer must take good faith steps to recruit U.S. workers before an LCA or petition is filed. The recruitment must be done using "industry wide" standards; i.e. recruitment standards common or prevailing in the industry. An employer's recruitment methods must include, at a minimum, internal and external recruitment and at least some active recruitment. If a better or equally qualified U.S. worker applies for the job, then the employer must offer the job to the U.S. worker.

The additional provisions for H-1B Dependent or Willful Violator employers do not apply to "exempt" H-1B workers. An H-1B worker may be considered an "exempt" worker if he or she makes at least $60,000 a year; or has the equivalent of a master's degree or higher in a specialty related to the H-1B employment.

Finally, no employer may retaliate against any current, former, or prospective worker for asserting H-1B rights or cooperating in H-1B enforcement. This anti-dis-

crimination requirement includes intimidation, threats, restraint, coercion, blacklisting, discharge or any other form of discrimination.

V. RECORDS

The employer must make the LCA and supporting documentation available to the public within one working day of the filing. A public access file must be available to anyone who requests it. It must be maintained at the employer's principal place of business in the U.S., or at the place of employment. The access file must include, for example, the LCA, wage rate documentation, actual wage system, and the summary of employee benefits.

In addition to the information which must be available in the public access file, during a WHD investigation the agency may require for inspection a complete petition package, payroll and basic records, such as name, address, social security number, occupation of workers, benefit plans, and a record of dependency determination.

VI. ENFORCEMENT

WHD has the following four types of H-1B enforcement authority (the latter two were added to the INA in 2005 and were similar to authority that had sunset in 2003):

Aggrieved Party

The WHD may conduct an investigation pursuant to a complaint received from an aggrieved party, if there is reasonable cause to believe a violation occurred. An aggrieved party is a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the LCA. Also, the WHD has consistently defined an aggrieved party to include the State Department. In order for WHD to accept the complaint, the aggrieved party must allege a violation of the H-1B program that occurred within 12 months of the complaint. When WHD receives a complaint from an aggrieved party indicating a violation of the H-1B program, which occurred within 12 months of the alleged violation, an investigation must be conducted and a determination issued. All investigations prior to April 2006 were conducted pursuant to this enforcement authority.

Willful Violator

The WHD may reinvestigate an employer that previously has been determined by the Labor Department to have committed a willful failure to meet a condition specified on the LCA or willfully misrepresented a material fact in the LCA within the last five years. WHD maintains a list of these willful violators, available on the WHD Web page located at *http://www.dol.gov/esa/regs/compliance/whd/FactSheet62/whdfs62S.htm.* In FY2006, WHD will conduct investigations under this authority for the first time. It is important to note that most employers that have committed a willful violation were subject to a civil monetary penalty (CMP) and debarment. It has been WHD's experience that in many instances these employers are no longer in business, making it difficult to utilize this authority.

Credible Source

The WHD may conduct an investigation based on credible information from a known source, if the information provides reasonable cause to believe that the employer has willfully failed to meet certain LCA conditions, has engaged in a pattern or practice of failures to meet such conditions, or has committed a substantial failure to meet such conditions that affects multiple workers. This information must be received within 12 months after the date of the alleged violation. This use of this authority, however, has two explicit statutory limitations; specifically the information:

(1) Must originate from a source other than an employee of the Department of Labor or be "lawfully obtained by the Secretary of Labor in the course of lawfully conducting another Department of Labor investigation under this Act (INA) or any other Act;" and

(2) May not include information submitted by the employer to DOL or DHS as part of the H-1B process.

Secretary's Certification

The WHD may initiate an investigation if the Secretary of Labor personally certifies that there is reasonable cause to believe that a violation has occurred and personally approves commencement of an investigation. This authority may be exercised only for reasons other than completeness of the LCA and obvious inaccuracies by the employer.

VII. DETERMINATION OF FINDINGS

When the investigation is complete, WHD issues a determination letter offering the employer and interested parties an opportunity to appeal the findings. The employer or interested party has 15 days from the date of the letter to appeal the determination and request an administrative hearing. The violations cited may include a misrepresentation of a material fact, a failure to meet an LCA condition, or a failure to comply with the regulations. There are 16 separate violations listed in the regulations at 20 CFR 655.805(a), which are classified by the WHD as a simple failure, a substantial failure, or a willful failure. The level of gravity of the violation affects whether CMPs will be assessed and their amount, and whether the employer may be debarred and for how long.

The H-1B Visa Reform Act of 2004 amended the law to preclude the WHD from finding a violation for a "technical" or "procedural" failure, if there was a good faith attempt to comply, the employer corrects the failure within 10 business days after DOL or another enforcement agency has explained the failure, and there is no pattern or practice of willful violations. WHD will carefully evaluate the employer's intent to comply when making decisions concerning this defense. It is important that an employer realize that immediate correction of the violation is the most important factor to this defense.

The H-1B Visa Reform Act of 2004 also provided that an employer found to have violated the prevailing wage requirements during the course of an investigation will not be assessed fines or penalties if the employer can establish that the manner in which the wage was calculated was consistent with industry standards and practices.

If a violation is found by WHD, then the employer will be required to remedy the violation. Remedies may include the payment of back wages or fringe benefits, the assessment of CMPs, a recommendation to USCIS that the employer be debarred, and other actions deemed appropriate to achieve compliance with the H-1B program requirements.

The determination letter issued by WHD will list both the specific violations and the remedies for those violations. Employers must abide by the determined remedy and comply with H-1B provisions in the future.

VIII. DIRECTED ENFORCEMENT AUTHORITY

As mentioned above, WHD has four distinct and limited enforcement authorities: aggrieved party, willful violator, credible source, and the Secretary's certification. This is the only program WHD administers and enforces that has such restrictions on its enforcement authority.

Prior to April 2006, WHD's H-1B enforcement was essentially a complaint-based program. Previously, WHD did not have a specific program to reinvestigate past willful violators. Our experience showed that, of the few employers that were found to be willful violators, many chose to go out of business subsequent to their debarment (approximately 50% in FY 2006), and thus, could not be reinvestigated. The current list of willful violators is approximately 50 employers nationwide. In April 2006, as acknowledged by the GAO report, WHD began the process of randomly reinvestigating willful violators.

As noted above, the credible information source investigation (added to the INA in 2005) relies on someone other than a DOL/ETA or DHS employee coming forward with information suggesting that an employer has committed a willful failure, a pattern or practice of failures, or has substantially failed to meet a condition of the LCA which affects multiple workers. To date, no person has been able to present enough information to warrant opening an investigation under this authority.

Finally, the Secretary's authority (added to the INA in 2005) requires the Secretary to personally certify that she believes reasonable cause exists for an investigation. Again, the authority is limited to cases that involve violations other than incompleteness or obvious inaccuracies by the employer. This authority has never been exercised.

GAO suggests that Congress consider (1) eliminating the restriction on using application and petition information submitted by employers as the basis for initiating an investigation, and (2) directing Homeland Security to provide Labor with information received during its adjudication process that may indicate an employer is not fulfilling its H-1B responsibilities. We believe that these changes would increase WHD's enforcement ability, but we defer to DHS as to whether it is necessary or appropriate statutorily to direct DHS to provide this information to DOL. Although we support GAO's recommendations, it should be recognized that GAO's suggestions would maintain the current four distinct, yet limited, enforcement authority provisions. Congress may want to consider instead, replacing this complex mixture of en-

forcement authorities with a broad grant of authority similar to that found in the FLSA. The FLSA authorizes the WHD to "investigate such facts, conditions, practices or matters as . . . necessary or appropriate to determine whether" a violation has occurred.

IX. ANTI-FRAUD FEE

As previously mentioned, the anti-fraud fee is $500 per petition. The $500 is divided equally between DOL, DHS, and DOS. WHD's portion of this fee totals approximately $30 million annually. However, the statute limits DOL use of this money only to enforcement of INA Section 212(n) (describing H-1B). Without unrestricted investigative authority, the Department estimates that it will continue to spend approximately $4.0 million annually for H-1B enforcement. If Congress changes the statute to include broader H-1B investigative authority, it would be reasonable to expect WHD to significantly increase current H-1B enforcement activities.

WHD takes very seriously its responsibility to enforce the H-1B program's requirements. Over the last three years, WHD averaged between 130 and 170 completed H-1B cases per year. Approximately 75 percent of all complaints resulted in a violation. In FY 2005 alone, WHD collected over $3.3 million for more than 500 workers. Among the violations found in FY2005, there were 20 in which the agency determined that an employer misrepresented a material fact.

As for how WHD spends these funds, WHD determines the amount to offset with H-1B funds each quarter based on the percentage of H-1B enforcement time compared to total enforcement time. For example, if 2 percent of enforcement time is H-1B related during the first quarter, then WHD offsets 2 percent of our obligations from the first quarter with H-1B funds.

Recently, WHD increased its H-1B compliance assistance and educational activities. It currently is conducting a nationwide H-1B training program for WHD investigators and managers, as well as attorneys in the Office of the Solicitor. The training will result in greater enforcement, heightened awareness of fraud and an increase in H-1B compliance assistance activity, all of which should result in additional complaints for WHD to investigate and incidences of fraud to report to other authorities. In preparation for this training, WHD recently released on its Website 26 H-1B Fact Sheets, which are part of the larger compliance assistance program. The program includes the recently issued H-1B chapter for WHD's Field Operations Handbook, H-1B worker rights cards, a PowerPoint presentation, seminars to the public, and a series of H-1B press releases. In addition, WHD is an active member of the Immigration Benefit Fraud Working Group, which includes other Federal departments, such as the DOS and DHS.

Even if Congress were to expand WHD's H-1B enforcement authority as GAO recommends, given current statutory language limiting the use of the funds solely to H-1B enforcement, we would expect a surplus of H-1B fee money. The Department believes a modification in INA Section 286(v)(2)(C) would provide greater flexibility to fully utilize the anti-fraud money. Such a change in the statutory language would help to supplement overall enforcement activity to further combat fraud and protect American workers. The effect of the language that the Department proposes, along with similar improvements to the fraud fee provision proposed by DOS and DHS with respect to their shares of the fraud fee, would maintain a strong and viable H-1B enforcement and compliance assistance program while, at the same time, strengthening enforcement programs and activities that focus on low-wage industries likely to employ foreign workers.

Mr. Chairman, that concludes my statement and I will be pleased to respond to questions from the Members of the Subcommittee.

Mr. HOSTETTLER. Mr. Miano, am I pronouncing that correctly?

Mr. MIANO. Yes, you are.

TESTIMONY OF JOHN M. MIANO, DIRECTOR, PROGRAMMERS GUILD

Mr. MIANO. Thank you, Mr. Chairman and Members of the Committee.

I have been following the H-1B visa program closely for 12 years now, and what has struck me the most over these years is how little protection is given to U.S. workers and how little has been done to fix the problems.

The only real protection for U.S. workers in the H-1B program is the annual quota. The quota serves the important function of limiting the amount of damage the H-1B program can cause U.S. workers.

These are some of the problems that I see with the H-1B visa program. The most odious of these is the use of H-1B workers to directly replace U.S. workers, often with employers requiring U.S. workers to train their foreign replacements to collect severance. This Committee passed a bill in 1978 to ban this practice. Unfortunately, the provision appeared before it came to the floor for a vote.

Employers replacing third parties have no liability whatsoever under the law, so the practice continues. The prevailing wage requirements in the H-1B program is simply ineffective. There is no way the prevailing wage requirements can protect U.S. workers when employers are allowed to use wage claims that do not reflect the actual prevailing wage in the industry.

There is poor data collection, sharing and reporting. We have no idea how many H-1B workers are in the country, what they are doing or even how many H-1B visas are being approved each year.

There is no active monitoring of the H-1B program. There is no mechanism of auditing or following up on suspicious activity, and there is no limit to the number of H-1B visas a single employer may have. In the computer industry the majority of H-1B visas are going to contract labor companies or body shops. Instead of filling jobs where Americans cannot be found, these workers are in direct competition with U.S. workers for actual employment.

However, the biggest problem with the H-1B program is that it has been designed to inhibit enforcement the bizarre restrictions imposed upon the Department of Labor that I have noted in my written statement, ensure the law cannot be enforced. Quite simply, the Department of Labor has an impossible task.

However, even where the Department of Labor has the power to investigate, they do not seem to be eager to do so. Recently I submitted a complaint against one of the largest users of H-1B visas, alleging that it was not complying with a requirement to recruit U.S. workers in good faith. As evidence of this, I submitted 130 job postings from the company that stated only H-1B workers could apply or that they preferred H-1B workers.

Department of Labor's response to this complaint was that they could not investigate, because this was insufficient evidence of a violation. If 130 job postings telling U.S. workers not to apply is insufficient evidence to investigate whether a company is not meeting the good faith recruitment requirement, what is?

For a number of the largest H-1B-dependent employers, I can find no evidence of them recruiting in the U.S. whatever. I cannot even imagine what kind of evidence the Department of Labor would require in order to investigate one of these companies.

Over the past year, I have seen a dramatic change in the way employers approach the H-1B program. Abuse that used to go on behind the scenes now takes place out in the open. Apparently word has gotten out that there is no H-1B enforcement.

For example, people in the computer industry have always known that there are companies that simply do not hire Americans for technical positions, and that these companies rely entirely on

visa programs for staffing. However, this practice used to take place mainly under the table.

In previous years I never found more than a small number of ads asking only for H-1B workers where the employers slipped up and documented their illicit recruiting practices. In the past 6 weeks, I have found over 1,500 ads requesting H-1B workers only from 350 employers.

There are now Web sites that are virtually visa bazaars; companies don't advertise jobs, they advertise visas. The H-1B program allows people to start a company in their basement and import H-1B workers. The 2003 LCA data contains a few of these cottage industry H-1B operations, while the 2005 data shows many of them up and running.

In addition, this year I have found a large number of H-1B employers that have never filed an LCA before, so the practice clearly is growing. I suspect that many of these basement visa operations are simply selling visas, and that the H-1B workers disappear once they arrive in the U.S.

Having examined the available data on the H-1B visa program very closely, and seeing the absurdities that it contains, I am not surprised at all that the annual quota is being consumed before the start of the fiscal year. With the current state of enforcement, the quota is all that stands between the H-1B program and total chaos.

I have included a number of recommendations in my written statement, and I would be happy to answer any questions. Thank you.

Mr. HOSTETTLER. Thank you, Mr. Miano.

[The prepared statement of Mr. Miano follows:]

Testimony of John Miano
Immigration and Claims Subcommittee of the House Judiciary Committee

"Is the Department of Labor Doing Enough to Protect U.S. Workers?"

June 22, 2006

Summary

The only real protection for U.S. workers that exists in the H-1B visa program is the annual quota. The quota provides the marginal protection of limiting the amount of damage the H-1B program can cause to the U.S. workforce.

The most significant reason U.S. Workers have little protection from H-1B abuse is the structure H-1B program itself:

1. Restrictions on enforcement
2. Poor collecting, reporting and sharing of data.
3. The business importing and contracting out H-1B guest workers.
4. Many practices that reasonable people would consider abusive are permitted under the law.

H-1B employers have learned they have little risk of engaging in abuses practices and apparently no longer see need to conceal them.

Restrictions on Enforcement

The statutes governing the H-1B program include bizarre restrictions on the Department of Labor that are intended to ensure the law does not get enforced. These include:

- 8 U.S.C. § 1182 (n)(1)(G)(ii) Limits the approval process for Labor Condition Applications to Checking the form is filled out.
- 8 U.S.C. § 1182 (n)(2)(G)(i) Requires the personal approval of the Secretary of Labor to launch an investigation.
- 8 U.S.C. § 1182 (n)(2)(G)(iii) Prohibits investigations when the source of information is an employee of the Department of Labor.
- 8 U.S.C. § 1182 (n)(2)(G)(vii) Limits the sections that may be investigated.

As the system is set up now, the H-1B program relies entirely upon the H-1B workers themselves to complain about violations of the law. The statutes should state something to the effect, "The Department of Labor has the *authority to enforce* all provisions of the H-1B program."

Data Issues

The state of data collection and reporting in the H-1B program is such that the most basic questions about the program cannot be answered:

- How many new H-1B visas are approved each year?

- How many H-1B workers are in the country?
- What companies are employing H-1B workers and how many workers does each have?

The answer is, "No one knows."

With regard to the first question, the problem is a lack of data sharing. Presumably, USCIS has this information but it refuses to share or make public its data on visas actually issued. I urge Congress to make the data related to H-1B applications available in the same manner as the Labor Condition Application (LCA) data is now.

As to the number of H-1B workers in the county, there is simply no way to know under the current system. Once someone enters the country on an H-1B visa, the paper trail effectively ends. There is no requirement that employers file an annual report on the status of their H-1B guest workers. The H-1B disclosure data makes me suspect (see below) that a substantial number of people come to the U.S. on H-1B visas and simply disappear, not actually working for the company that sponsors them.

I find it disturbing that the Senate has passed legislation (Comprehensive Immigration Reform Act of 2006) to increase the size of the H-1B program when the Senate has no idea how large the program is already. This Senate bill is claimed to increase the annual number of H-1B visa from 65,000 to 115,000 when the current annual figure is probably close to 100,000 already. I estimate the Senate bill will immediately raise the H-1B numbers to about 175,000 and contains two provisions that will effectively remove all limits in the near future.

While I am on the topic of the Senate bill, I point out that it contains no reforms whatsoever to the H-1B program. It just makes the numbers bigger. This is particularly ironic considering this legislation is being billed as, not just "Immigration Reform" but rather, "Comprehensive Immigration Reform".

The H-1B Business

One unintended result of the H-1B program was the creation of the business of importing workers on H-1B visas ("H-1B Bodyshops"). In theory, the H-1B program is supposed to fill jobs where employers cannot find U.S. workers. In practice what has been created is a system of companies that simply import guest workers. Such companies may contract out guest workers to other companies; they may serve simply as "paper" employers as shown in many job postings; or they may simply serve as a conduit for illegal immigration. The H-1B program is set up so that nearly anyone can set up a corporation in their basement and start sponsoring guest workers.

As long as companies can place their guest workers with other companies it is impossible to have such a visa program operate rationally. Such subcontracting arrangements make it impracticable to:

- Protect the U.S. workers at companies that contract for foreign labor through third parties.
- Monitor where H-1B workers are or whether they are working at all.

Most importantly, this system of contract labor puts H-1B guest workers in direct competition with U.S. workers for jobs.

The LCA disclosure data suggests that contract labor suppliers import the vast majority of H-1B computer professionals (over 2/3rds). The percentage of H-1B workers actually going to U.S. "high-tech" companies appears to be very small.

The use of contract labor is widespread in the computer industry. One change that has taken place over recent years is that very few companies now advertise for contract labor directly. Instead they employ "preferred vendor lists" to announce openings for contract labor. Companies that restrict their preferred vendors lists to "H-1B Bodyshops" effectively exclude U.S. workers from their positions.

The Need for Auditing

There is no effective way to monitor any program like H-1B without auditing. There needs to be a mechanism in place that allows the organization in charge of enforcement of the H-1B program to examine data, note patterns of suspicious activity, and conduct audits.

Sources of Information on Abuse

For those of us who follow the computer industry closely, it is not hard to find evidence of H-1B abuse. Signs of such abuse can be found:

- In Job Advertisements
- On Discussion boards for H-1B workers.
- In the U.S. and foreign press
- The H-1B Disclosure Data
- And the in the daily lives of computer professionals.

The types of abuse one encounters include:

- Direct Displacement of U.S. workers by foreign guest workers.
- "Benching" – Non-payment of wages during times of inactivity.
- False information on Labor Condition Applications
- Not paying wages according to labor certification
- Employers discriminating against U.S. workers.
- H-1B dependent employers not making a good faith effort to recruit U.S. workers
- Wages below the actual prevailing wage on labor certifications
- Low wages

I would like to direct your attention to some specific information that suggests violations of the law and warrants possible investigation, yet never gets acted upon.

Statements of H-1B Workers Themselves

The best place to get an idea of the types of violations going on in the H-1B program is to examine the discussion boards for H-1B workers. There are many of them on the Internet, including USENET and Yahoo! Here are some extracts all taken from the discussion forum at boards.immigrationportal.com and yahoo.com

> The old company has done lot of things against law..like not paying employees during bench, transferring technical approved labor to marketing people etc etc. !!

> My girl friend came to US in June, 2001 through a software company on H1 visa. Soon after she reached here, that company told her they can't pay her until they find a client/project for her. They even refused to pay bench salary…

> The employer seems to be selling off pre-approved LC to people and making money out of it. They earned good enough money out my work on client projects and had no problem then. Also, he kept me on bench w/o any pay for almost a month which I know is not legal...

> I got married on 25th Jan. What concerns me is that during 2002 I was on bench for 4 months and my W2's show less salary than what is projected in LCA.

> I am planning to quit my employer 3 months after my I-485 approval i.e in July 2005 and join a new company.The reason is that I would be coming on bench in July and my employer pays me half salary on bench.So I hope this reason would be sufficient enough to leave my employer to justify 5 yrs down the line when I go for US citizenship.

> I may try to transfer my H1B after I get few pay stubs from them. But, there was an agreement that I may have to work for them for couple of years. Can I show the reason, that my employer didn't pay for bench period , so I am transfering my H1B?

> I have been taken for a ride by a company called everest consulting located in NJ. they owe me some salary for benchtime and some more for when I was on project. Apart from this they have also encashed a bank gurantee of 100000(1 lakh INR) that they took from me in case i leave before one year.

> I am Ajay from delhi, I got the offer for USA Based Company for H1B, they want Rs. 65,000 RS for deposit which supposed to re-fund.

Such comments are typical rather than exceptional. It took me 15 minutes to find these. I stopped when I had a full page worth.

Displacement of U.S. Workers

This is an example from the U.S. media. U.S. Workers at Bank of American have to train their foreign replacements in order to collect severance pay, David Lazarus, "BofA: Train your replacement, or no severance pay for you", San Francisco Chronicle, June 9, 2006, p. D-1. The companies involved were Tata and Infosys, two of the largest users of H-1B visas.

I assume that Congress did not intended for situations like this to occur. Are the non-displacement provisions of 8 U.S.C. § 1182 (n)(2)(E) being complied with in a situation like this? If so, what means are being used to circumvent them?

Currently, H-1B dependent employer supplying contract labor must inquire whether the labor will displace U.S. workers and must have no knowledge that the contract labor will displace U.S. workers. The current non-displacement provisions are useless as a practical matter. First of all they only apply to H-1B-dependent employers. Most importantly, the system of protection is backwards. In contract labor situations, the statute places the burden of the marginal protections with the supplier of H-1B labor rather than the employer of the displaced workers. The employer is the party most likely to be aware of and able to prevent the displacement of U.S. workers, so much so that in nearly all cases I am aware of, the employer required the displaced U.S. workers to train their guest worker replacements in order to collect severance pay. Finally, the statute promotes willful ignorance. There is no penalty for an employer that gives a false response to the required inquiry.

Although I am aware of many cases where H-1B workers have displaced U.S. workers, I know of no case where an enforcement action has been brought under this provision. Should such an action be brought, I suspect that the parties involved will claim that U.S. workers were not displaced but rather there was some form of an "outsourcing" arrangement.

H-1B Wages

I have addressed the problem of the prevailing wage system for H-1B workers previously so I will only mention it here again briefly. Employer prevailing wage claims on LCAs are extemely low compared to the wages actually paid to U.S. workers. The wages to be paid to H-1B workers on LCA are also extremely low compared to U.S. wages.

Those are just the overall wages for H-1B workers. In many cases the wages being reported on LCAs are simply ludicrous (e.g. $21,000 for a computer programmer in Beverly Hills).

My examination of wages has been limited to those in computer programming occupations. EE Times did a similar analysis for wages of H-1B engineers and got with similar results, Roman, David, "H-1B pay drags down all salaries", EE Times, June 19, 2006.

In the prevailing wage area, Congress has made enforcement of the law impossible. This is not only due to the restrictions placed on the DoL but also the wide latitude given to employers. By allowing employers to choose the prevailing wage using nearly any source, in most cases it is impossible to verify whether the prevailing wage claim is even

the published value because the DoL may not have access to the source of the prevailing wage claim. Even when the wage source is available, in most cases I have examined using non-government sources for the prevailing wage, it is impracticable to tell what job classification the employer actually used to make claim.

Are H-1B workers employed at the location or in the occupation they are certified for?

Here is an example of how the data in the H-1B LCA disclosure data suggests suspicious behavior in the H-1B program. Table 1 ranks cities by the number of LCAs for computer programming workers that specify them as the work location.

Rank	City	LCAs
1	New York, NY	5,632
2	San Jose, CA	2,297
3	Edison, NJ	2,276
4	Houston, TX	2,157
5	Atlanta, GA	2,087
6	Redmond, WA	2,044
7	Chicago, IL	1,944
8	Dallas, TX	1,713
9	Irving, TX	1,513
10	Newark, NJ	1,477
11	Santa Clara, CA	1,393
12	Iselin, NJ	1,223
13	Jersey City, NJ	1,169
14	Los Angeles, CA	1,145
15	San Diego, CA	1,128
16	San Francisco, CA	1,053
17	Boston, MA	1,020
18	Reston, VA	981
19	Austin, TX	951
20	Fremont, CA	950

Table 1. LCAs for Computer Programming Workers by Work Location, FY 2005

New York, the nation's largest city is not surprisingly at the top. San Jose, in Silicon Valley, is not a surprising second. However, more LCAs were filed with the work location Edison NJ (pop. 97,687), Iselin NJ (pop. 16,698), Newark NJ (pop. 273,546), and Jersey City NJ (pop. 240,055) than for Los Angeles CA (pop. 3,694,820)

Let me take this analysis to the next step. Since the data for actual H-1B visas issued is not available, I present a qualitative (as opposed to quantitative) analysis of what is happening in NJ.

According to the H-1B disclosure data, 7,500 LCAs were filed for computer programming occupations that specified NJ as the work location in FY 2003. On average, there are about 3 LCAs for each H-1B visa. That ratio suggests that these LCAs translate into about 2,500 H-1B programmers coming to NJ.

In contrast, during the three-year period from 2002 to 2005 New Jersey gained a total of 1,830 computer programming and mathematical jobs according to the BLS. (From the LCA disclosure data alone, one cannot tell if or when a particular LCA got translated into

a visa. Therefore, I have used a three-year window because we can be certain that any visas resulting from LCAs filed in FY 2003 would fall within it.) Using the most conservative of qualitative comparisons, there are simply more H-1B programmers coming to NJ than there are jobs.

The number of LCAs for computer programmers in New Jersey for FY 2004 and FY 2005 were 12,800 and 15,700 (about 9,000 more workers). If the actual data for H-1B visas were available, it is likely we would find that there are 4 to 5 H-1B programmers who are supposed to be in NJ for every new programming job.

I have to conclude that many H-1B NJ programmers are either not working in NJ or they are not working as programmers. We have documented cases of shell employers that were simply selling H-1B visas to foreign workers so they could get into the country and disappear, see for example Martin, John P., "Feds seize millions from man held in illegal immigrant scheme", Newark Star-Ledger, Jan. 14, 2006, p. 1.

New Jersey is not unique in having such a high LCA to jobs ratio. The LCA disclosure data suggests several states, including California, Illinois, Maine, George, and New York, have more H-1B programmers coming in than there are new programming jobs. Several states have an influx of H-1B programmers while they are actually losing programming jobs.

Multiple Employers at the Same Address

Here is another example of something that raises suspicion within the LCA disclosure data. One frequently finds multiple employers using the same address. To illustrate, at 402 Main St. Suite 100 in Metuchen NJ there are two employers that have filed LCAs for 19 "Programmer/Analysts" in FY 2005

- This is the address of The UPS Store # 4260

Eleven employers, all located at 200 Centennial Ave., Suite 200, Piscataway NJ, collectively filed over 250 LCAs in FY 2005

- This is the address of a branch of Regus Virtual Offices (www.regus.com).

Obviously there are no H-1B workers working at these locations. So where are they?

These are not isolated examples. There are many more in NJ alone and I have found similar arrangements all over the country.

Employers Operating Out of Residences

From the LCA disclosure data one can find many H-1B employers operating out of residences.

This apartment complex in Bloomfield NJ houses a company that filed LCAs for 8 computer programmers.

This condominium complex in Montvale NJ houses two companies that filed LCAs for 5 computer professionals.

This building is the apartment complex is known as "The Towers" in Passaic NJ. It houses an employer that filed LCAs for 8 computer programmers.

For all of these "employers", one has to wonder how many H-1B visas they actually got and where the workers actually are.

Job Advertisements that Suggest Abuse

For this example, I rely on a job posting from DICE.COM (id # 10121605, April 26, 2006). The job title is "H1-B Trf., Immediate Green Card at no cost (90/10 Billing Split)" The job description states:

> Either you have a project in hand or you find your own project and take home 90% of your billing rate you want our Sales team to secure a project for you then you take home 80% of billing. We will sponsor H1 , H1 Transfer or Greencard processing. We also offer great benefits.

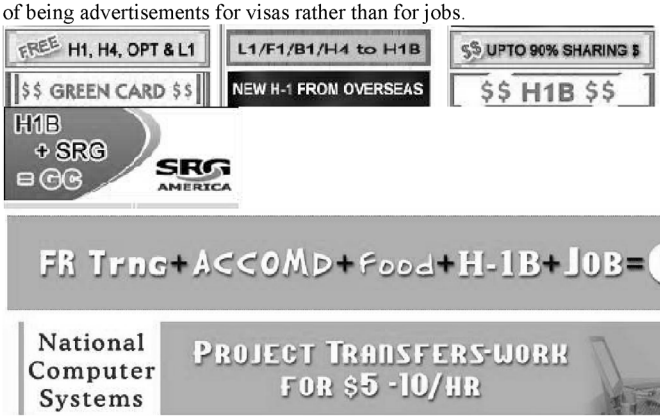
The 90/10 – 80/20 split arrangement is common in postings soliciting H-1B workers. The large number of postings stating such an arrangement suggests many H-1B workers:

1. Are not being paid according to labor certification.
2. Have no real employment unless they find it themselves.
3. Have an "employer" on paper only.
4. Are not paid when the H-1B worker is not actively billing.

In this case, the posting excludes U.S. workers. Sometimes these postings will include citizens and permanent residents in their eligibility lists to avoid charges of discrimination. However, even with such inclusive language, postings with this type of split arrangement are clearly intended only for H-1B workers because U.S. workers who secure their own projects have no need for an "employer" to take 10% of the billing rate.

"Job" Advertisements for visas

Below are some frames from animated "job" advertisements. They give every appearance of being advertisements for visas rather than for jobs.



This is the complete text from a job posting from the same site. Again, the advertisement is for visas and "green cards" rather than for work and it gives a split arrangement for pay. The "job" advertisement specifies no job requirements other than "experienced IT Consultants". The lack of skill requirements is typical in H-1B job ads and is in stark contrast to the extensive laundry list of job requirements that is customary for U.S. IT workers to overcome to get a job.

Keep 90% of bill rate for H1b transfers. {Company Name} Inc is a fastest growing product development and IT Consulting firm with offices in Sunnyvale, California and Wilmington, Delware.

- *We are constantly looking for experienced IT Consultants.*
- *H1B Transfers/ H4/L1/L2/B1*
- *Get 90% Billing (If you are on project and join our company with project)*
- *Get 80% Billing (If you want our Marketing team to find a project for you)*
- *Sponsor your H1, H1 Transfer and Greencard in EB2*
- *Immediate start on Green Card (PERM) Processing from California/Delaware's office.*
- *Excellent Marketing/sales Team*
- *Placements at Top-Notch Fortune 500 Companies*
- *Training/Accommodation*
- *We also offer great benefits*
- *100% Placement*
- *No Contract & No Bond*
- *Training: Both Weekend and Weekdays classes available.*
- *Assistance in resume preparation*
- *Assistance in Interview preparation.*
- *Please call us to discuss about the opportunity as well as the*
- *Immigration process in detail. You can reach us anytime @ {Telephone Numbers}*

Students/OPT:

- *Get FREE TRAINING, FREE ACCOMODATION, FREE H1B*
- *PROCESSING.*
- *We train you in ERP/ Business Analyst/ Data warehousing fileds.*
- *100% Placement*
- *Excellent Marketing/sales Team*
- *Placements at Top-Notch Fortune 500 Companies*
- *We also offer great benefits*
- *Training: Both Weekend and Weekdays classes available.*
- *Assistance in resume preparation*
- *Assistance in Interview preparation.*
- *We pay excellent Salary.*
- *Immediate start on Green Card (PERM) Processing*
- *Please call us to discuss about the opportunity as well as the immigration process in detail. You can reach us anytime @ {Telephone Numbers}*

An important feature in this job posting that is extremely common in visa-only advertisements is the inclusion of training as part of the package. Considering that

employers say they need H-1B workers because U.S. workers do not have the right skills, I find it ironic how many H-1B job postings include training programs.

U.S. Workers Need Not Apply

While it has always been well known in the computer industry that certain companies hired exclusively computer professionals on visas, it was a practice that was generally kept hidden. U.S. workers know the big names in the business and do not apply to them. The "H-1B only" companies knew that if they actually got an application from a U.S. worker it was part of an effort at barristry and the action taken should be well documented.

Occasionally, a company would slip up and set down its visa-only recruitment practices in job postings. These companies tended to be small "H-1B bodyshops". During the early part of this decade the Programmers Guild filed about 2 to 3 discrimination complaints a year for this type of violation.

Recently, the practice of open recruitment of workers on visas has exploded. In the past six weeks I have collected over 1,500 advertisements from over 350 employers specifying guest workers to the exclusion of U.S. Workers. Here are some examples from advertisements that explicitly exclude U.S. workers that have been posted to job boards, such as MONSTER and DICE in the past six weeks:

> We are looking for candidates with the following background :
> * BS / MS final semester students on OPT
> * Candidates on H1 willing to transfer H1 to us

> Title: H1B -From India-Multiple positions
> Job description: We require candidates for H1B from North india.

> Requirements: CANDIDATES HOLDING H-1B VISA OR LOOKING FOR H-1 VISA REPLY ASAP.

> We are currently recruiting Graduates who are on OPT or have applied for the same to join and be a part of our growing organization.

> Now we are in the process of sponsoring H1 Visas for those who are currently in India, Malaysia and Singapore and who are looking out for career opportunities in the United States.

> H4 /OPT AND H1 TRANSFERS ONLY

> Job description: We have 5 open H1B positions that we are currently recruiting for.

> We are a full time marketing company of H1B & OPT Consultants.

Job Title: for H1 (Visa) : Oracle 10G DBA with RAC and Cloning (from India only)
Looking for consultants who has experience with INDIAN Fortune IT Companies
We offer H1B services for L1 Visa Holders and new H1B for the right candidates in India…
Job Title: JOB COUPLED WITH H1 VISA

I attribute the sharp rise in visa-only job advertisements to employers realizing that there is little enforcement in the H-1B program.

The DoL's Handling of Complaints

Up to now, I have presented evidence of abuse of the H-1B program that goes on out in the open for all to see where no action is taken. For this type of evidence, I have to conclude that the DoL does not have the power to investigate due to limitations imposed by Congress; erroneously believes it does not have to power to investigate; or simply does nothing because of institutional inertia. So now I would like to turn to what happens when abuse is proactively brought to the attention of the DoL.

The Programmers Guild has had good success in filing discrimination complaints with the Office of Special Counsel for Immigration Related Discrimination. The problem with such complaints is that the penalties for violation are insignificant and it is difficult to show damages. Specifically, who has been damaged and in what amount when an employer has effectively told all U.S. Workers not to apply?

A new problem has cropped up in that the volume of companies engaging in open discrimination against U.S. workers in favor of workers on visas has become so great that I believe it exceeds the Office of Special Counsel's ability to process them.

Since nearly all of the employers engaging in this open discrimination against U.S. workers are H-1B Dependent Employers, I decided to test the efficacy of the "good faith" recruitment requirement. I have collected 165 job posting from iGate Mastech, one of the largest users of the H-1B visa program. These are quotes extracted from these job postings:

- We provide GC Sponsorship and we do prefer H1B holders who may be interested in working with IGATE."
- Only looking for H - 1B visas and should be willing to transfer
- Looking for a Strong .Net Developer with the following skill sets, only H-1 B holder apply, and should be willing to transfer H - 1B .
- Only H-1s Apply , and should be willing to transfer H - 1 B
- Only H1 visa transfers - please do not waste your time, we (sic)

After examining these job postings, my conclusion was the company was not recruiting U.S. Workers in good faith. Quite the contrary, their job postings gave every appearance that they were actively discouraging U.S. workers from applying. In this particular case I had a huge number of examples of discriminatory job postings.

On behalf of the Programmers Guild, I filed a complaint with the Wage and Hour division, alleging that iGate was not complying with the requirement to require U.S. workers in "Good Faith". As evidence, I submitted copies of 130 job postings from the company containing statements that would discourage any reasonable U.S. Worker not engaged in barristry from applying.

The response to this complaint from the Wage and Hour Division was, "You have not submitted sufficient evidence to show that there has been a violation of the H1B regulations we enforce."

This experience suggests to me that the Department of Labor is not eager to take on investigations of H-1B violations that are brought to its attention, even in the cases where it has the power to do so.

The problem for U.S. workers is even worse when there are no advertisements. There are a number of the largest H-1B dependent employers for whom I have never been able to find a job posting on the of the major job boards. I am at a loss as to how the "good faith" recruitment requirement can be enforced in cases there is no public evidence of hiring at all. Given Labor's response when there the company's actions were flagrant and easy to document, I cannot imagine action being taken against an H-1B dependent company that simply does not advertise jobs in the U.S.

Conclusion

Clearly not enough is being done to protect U.S. workers from abuse in the H-1B visa program. However, I would like to point out that while the data collected and made available on the H-1B program is woefully inadequate to monitor what is going on, the data we have for H-1B is better than what is available for other guest worker programs, such as L-1. That is saying a lot in this day of national security concerns where, even in the H-1B program, there is no tracking of foreign workers once they arrive in the country.

There are many people selling guest worker programs as a panacea for the national security concerns over the number of people who are in this country illegally. The inadequate monitoring of the H-1B (and the even worse monitoring of other guest worker programs should serve) should call into question the wisdom of such proposals. If we cannot tell how many H-1B workers are even in the county, transforming illegal aliens into guest workers will not enhance security. Common sense dictates that we get the existing guest worker programs under control before we add new ones. So far the calls for more guest workers programs have not created a sense of urgency for fixing the ones we have now.

Finally, I point out the need for improved monitoring of other guest workers programs in order to protect U.S. workers. We tend to address the H-1B program in isolation from other immigration programs but often H-1B is used in conjunction with other programs. To illustrate:

1. In the cases where I have seen the direct displacement of U.S. workers by H-1B workers, the foreign replacement workers have been on multiple types of visas, including L-1B and B-1 (and we are likely to see TN and E-3 added to that list in the future). If an H-1B dependent employer uses 2 H-1B workers and 7 L-1B

workers to replace 6 U.S. workers, has the non-displacement provision been violated?

2. If an H-1B dependent employer only recruits people with OPT or CPT status with the intention of transferring them to H-1B status, has it circumvented the "good faith" recruitment requirement of the H-1B program?

Recommendations

I make the following recommendations to address U.S. Worker protection issues in the H-1B program:

1. Remove all restrictions on enforcement of the law in the H-1B program.
2. Prohibit the displacement of U.S. workers by guest workers and make the employer, not the guest worker supplier, responsible.
3. Reform the prevailing wage system.
    a. Remove the limitations on the LCA approval process.
    b. Require the use of a standard, government-supplied prevailing wage source.
    c. Require guest worker wages to be at a percentile higher than the median (e.g 65th or 75th) for the occupation and location.
4. Collect and make better data available on the H-1B program. Specifically:
    a. Make the data on visa applications held by USCIS public as the current LCA disclosure data is.
    b. Require annual reports from employers, including an annual fee per visa, on wages paid and the status of all guest workers they employ. The annual fee should be paid until the employer demonstrates the worker has left the country, transferred to another employer or changed immigration status.
5. Enact similar monitoring and data sharing for other guest worker programs as well.
6. Prohibit the contracting of guest workers to other employers. Employers needing guest workers should apply for them themselves and take responsibility for them. Guest workers should be restricted to working in facilities controlled by their employer of record in the visa process.
7. Create a private cause of action to allow affected individuals to enforce the law when the government refuses to do so.
8. Limit the number of guest workers an employer may have to a percentage of U.S. employees (e.g. 5%).
9. Institute auditing and spot inspections.

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Mr. HOSTETTLER. Ms. Avendano.

TESTIMONY OF ANA AVENDANO, ASSOCIATE GENERAL COUNSEL AND DIRECTOR, IMMIGRANT WORKER PROGRAM, AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS

Ms. AVENDANO. Thank you, Mr. Chairman, Members of the Committee. On behalf of the 9 million working men and women who are members of AFL-CIO-affiliated unions, I would like to thank you for the opportunity to speak with you about this critically important question: Is the Labor Department doing enough to protect U.S. workers?

As is set out in more detail in my statement, the answer is, unfortunately, a resounding no. We are deeply concerned about the DOL's failure to adequately enforce workplace laws. That failure harms all workers in the Nation, and continues to cause downward pressure on workplace standards across the country and across the economy.

It is very telling that we heard this morning that the Department of Labor's failure to enforce the H-1B protections have allowed employers to pay less than otherwise required by law in at least 3,200 jobs in the high-tech industry.

The Federal Government's ruling and enforcement of worker protections is particularly important in the context of guest worker programs; that is, programs that allow employers to import foreign workers in temporary status into certain jobs into the economy, like the H-1B program and its unskilled worker counterpart, the H-2B program. Workers who are imported into our economy under those programs are at a great disadvantage, because, by the very nature of the programs, those workers rely on their employers not only for their jobs, but also for their own immigration status. Exploitation of workers in temporary worker programs like the H-1B and H-2B and L visa programs is thus made that much more easier because if workers complain that they are not being paid what the law requires, or they are not being paid at all, as is the case in many H-1B instances, they not only risk losing their jobs, but they also risk either having to leave the country or remain here unlawfully.

Now, that kind of exploitation harms all workers in our Nation, because workers in the industry, H-1, that are covered by the H-1B program and the other guest worker programs don't labor in isolation. Temporary foreign workers work alongside their U.S.-born counterparts in high-tech industries, and as teachers and engineers and nurses under H-1B visas, and alongside U.S.-born hotel workers, landscapers, service workers under H-2B visas.

When employers have a system, a legitimatized system, to import workers, exploitable workers, and thus lower working conditions for those workers, they are essentially lowering standards for all workers in those very important and critical sectors of our economy.

It seems clear that the Federal Government is moving in exactly the wrong direction in protecting U.S. workers in this context. Instead of reinforcing mechanisms that would ensure employers don't import foreign workers in order to depress wages and other labor

standards, the Government is moving toward a simple attestation program, essentially that DOL wants to abandon the small, or at least the way it's exercising it, insignificant role that it has today.

The labor certification process, flawed as it is, is the last remaining protection that U.S. workers have for two important reasons. One, it's designed to make sure that the Government agencies that most understand local labor markets actually are the ones that are doing the application, so there is technical expertise that again provides protection for U.S. workers.

Most importantly, labor certification, the process acts as a gatekeeper to make sure that there are no violations of the system before the workers are even imported. That is critical, because there are very few remedies after the fact both for the U.S. workers that are potentially displaced by the employers who are importing foreign workers to replace those workers and for the foreign workers themselves.

Now, the issue of guarding against abuses in guest worker programs is particularly important right now, given that the Senate has adopted an immigration reform proposal that significantly increases the number of foreign visas available to employers and abandons the long-standing national policy of only allowing workers to fulfill seasonal or temporary labor shortages. Indeed the Senate bill creates a whole new class of temporary workers, the H-2C workers, and significantly increases the number of H-1B visas to employers.

Whatever concerns we now have about the lack of enforcement of labor standards in temporary worker programs are sure to be magnified when the new hundreds of thousands of temporary workers are imported into our economy.

In conclusion, Mr. Chairman, in response to the Ranking Member's question of what should we do, what are we to do for American workers, the best thing we can do is to protect U.S. working standards so that workers can earn a decent wage, work in dignity and under decent conditions, and not continue to foster systems like the H-1B program that simply provide employers with a steady supply of exploitable workers. Thank you.

Mr. HOSTETTLER. Thank you, Ms. Avendano.

[The prepared statement of Ms. Avendano follows:]

PREPARED STATEMENT OF ANA AVENDANO

Chairman Hostettler, Ranking Member Jackson Lee and Members of the Committee, thank you for the opportunity to address the critically important question: is the Labor Department Doing Enough to Protect U.S Workers? As I will explain in more detail shortly, the answer is a resounding, NO.

The AFL-CIO is a voluntary federation of 53 national and international labor unions. Our affiliates represent more than nine million working men and women of every race and ethnicity and from every walk of life. We are teachers and truck drivers, musicians and miners, engineers, landscapers, nurses, electricians, and more.

We are deeply concerned about the Department of Labor's (DOL) failures to adequately enforce workplace laws, including the protections afforded under the H1-B and other temporary foreign worker programs. I understand that the focus of this hearing is on the way that the DOL reviews and enforces Labor Condition Applications for H1-B visas, and I will address that issue specifically later in my testimony. The DOL's failures go well beyond that specific issue. In fact, the failures are systematic, to the detriment of all workers in our nation, and have caused—and continue to cause—downward pressure on workplace standards across the country and across the economy.

When the DOL fails to enforce any of the statutes under its jurisdiction, all workers suffer. Nowhere is that more evident today than in the Gulf region, where workers involved in the post Katrina reconstruction—both foreign born and US—are being cheated out of their wages by major US companies and forced to work in substandard, unhealthy and unsafe conditions.

In February, a group of worker advocates, including the AFL-CIO met with DOL representatives here in Washington, DC to raise concerns about the ongoing labor and employment violations occurring in the Gulf region. The worker advocates painted a clear picture of unscrupulous contractors, rampant labor violations and sheer lawlessness in the Gulf region. Prior to the meeting, the advocates provided DOL a list of very basic questions including how many wage claims arising from the post-Katrina reconstruction effort had been filed, the processing time for claims, and various questions concerning DOL outreach efforts to workers. The DOL was unable to respond to any of those questions. The DOL's lack of concern for working conditions in the Gulf was, frankly, appalling.

The DOL's failure to take seriously its law enforcement function in the Gulf region has left workers with no alternative but to rely on private enforcement that is through lawsuits. The Southern Poverty Law Center has filed two class action suits on behalf of thousands of workers in the Gulf who have not been paid at all, or not paid the minimum wage or overtime. But as the Center itself recognizes, "lawsuits alone will not stop the widespread exploitation of workers that is going on in New Orleans. . . . The people working in New Orleans to rebuild its schools, hospitals and university buildings need and deserve the protection of the federal government."

The federal government's involvement is particularly important in the enforcement of protections in the context of foreign temporary worker programs, like the H1B program and its unskilled worker counterpart, the H2B program. Workers who are imported into our economy under those programs are at a great disadvantage because, by the very nature of the programs, those workers rely on their employers not only for their jobs, but also for their immigration status. Exploitation of workers in the H1B and H2B programs is thus easier, because if workers complain that they are not being paid what the law requires, or expose other employer violations of law, they not only risk losing their job, but also risk either having to leave the country or remain here unlawfully.

That kind of exploitation harms all workers, including US workers. The temporary foreign workers who are being cheated of their wages do not labor in isolation. They work along side their US-born counterparts in the high technology industry and as teachers and engineers (under H1B visas), and along-side US-born hotel workers, landscapers and service workers (under H2B visas). When employers are able to exploit one class of workers, that exploitation lowers the floor for all workers.

The poultry industry provides a perfect example. Roughly half of poultry workers today are African American, and the others Latino, mostly immigrant. In 2000, the DOL conducted an industry-wide survey of compliance with wage and hour laws. That survey concluded that the industry as a whole was one hundred percent out of compliance with wage and hour laws. Clearly, the African American poultry workers suffered as much as their immigrant counterparts.

That type of government compliance effort—that is, industry-wide investigations that do not rely on individual worker complaints—is a key part of a robust and meaningful monitoring system. And it is one that is of particular importance in the context of foreign temporary worker programs. Unfortunately, it is not one from which US workers can currently benefit because the DOL has essentially abandoned that key tool. We have been unable to locate any industry-wide targeted compliance efforts under the current Administration.

It seems clear that the federal government is moving in exactly the wrong direction. Instead of reinforcing mechanisms that would ensure that employers do not import foreign workers in order to depress wages and other labor standards, the government is moving toward simple attestation programs, where the DOL has no significant role, if any at all.

The labor certification process—as flawed as is it—is the last remaining protection that US workers have. That process is designed to ensure that the government agencies with the most expertise on local labor markets and with the greatest ability to find available US workers and determine how employers could recruit job applicants—the State Workforce Agencies—act as the gatekeepers for the temporary foreign worker programs. The certification process is also designed to prevent various harms before the fact, rather than after-the-fact, since there are few, if any adequate remedies available after the fact for those who bear the harm caused by abuses of temporary foreign worker programs. In addition, the inadequacy of after-the-fact enforcement mechanisms mean that there are few disincentives for employ-

ers to violate their labor law obligations. An attestation process completely removes the DOL or the SWAs as the independent gatekeeper, thus opening up the foreign temporary workers programs for further employer abuse, subjecting the foreign temporary workers to further exploitation, depriving US workers of gainful employment, and degrading wages and working conditions within the domestic labor market.

We fully agree with Congresswoman Sheila Jackson Lee's concerns that the current requirements may not be enough to protect US workers, even if enforced adequately. We believe that more attestations are not the answer. The attestation structure—in and of itself—fails to meet the essential gatekeeper function.

The DOL has the statutory responsibility for ensuring that employers do not abuse guestworker programs. Because of the exploitative nature of those programs, the DOL should be using every tool available and seeking to make current tools—like the labor certification process—stronger, not weakening it by abandoning its role to an employer attestation process.

The issue of guarding against abuses in guestworker programs is of particular importance now, given that the Senate has adopted an immigration reform proposal that significantly increases the number of foreign visas available to employers, and abandons the long standing national policy of only allowing employers to import workers to fill seasonal or temporary labor shortages. Indeed, the Senate bill creates a whole new class of temporary foreign workers, the H2C workers, in addition to increasing the number of H1B workers that employers are able to import. Whatever concerns we have now about the lack of enforcement of labor standards in temporary worker programs are sure to be magnified when the new hundreds of thousands of temporary workers are imported into our economy.

These concerns are real and long-standing. The United States has spent years studying and experimenting with guestworker programs, and the resounding conclusion is that guestworker programs are bad public policy. The "Jordan Commission," for example, which was created by the 1986 Immigration Reform and Control Act to study the nation's immigration system squarely rejected the notion that guestworker programs should be expanded. In its 1997 final report, that Commission specifically warned that such an expansion would be a "grievous mistake," because such programs have depressed wages, because the guestworkers "often are more exploitable than a lawful U.S. worker, particularly when an employer threatens deportation if workers complain about wages or working conditions," and because "guestworker programs also fail to reduce unauthorized migration" [in that] "they tend to encourage and exacerbate illegal movements that persist long after the guest programs end."[1]

In conclusion, we fully agree that we must significantly increase the mechanism for ensuring compliance with labor standards. Increased attestations alone are not the answer. We must also ensure that the DOL does not abandon its traditional oversight role and the gatekeeper role that it has exercised through the labor certification process.

Targeted wage and hour investigations in the high technology industry, which is known to hire the most H1B workers, are essential and should be conducted immediately. The data from these investigations will allow Congress to meaningfully assess whether the H1B labor inspection mechanism is adequate to protect both US workers and the foreign workers who labor in those programs.

Thank you and I look forward to your questions.

Mr. HOSTETTLER. At this time we will turn to questions from Members of the Subcommittee. First of all, Dr. Nilsen, you note in your testimony that the Labor Department probably certified even more LCAs erroneously, but because your review was narrow—I think you refer to it as cursory in your oral statement—only a small portion were uncovered.

Can you elaborate on the scope and nature of the other potential problems and errors in the LCA process?

Mr. NILSEN. In particular, I was referring to the review of the employer identification number where an error in that field is not

[1] *See* U.S. Commission on Immigration Reform, *Becoming an American: Immigration and Immigration Policy,* U.S. Commission on Immigration Reform, 1997. An earlier well known Commission—the Select Commission on Immigration and Refugee Policy (SCIRP)—chaired by Rev. Theodore Hesburgh had reached the same conclusions. *See,* National Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest: Final Report.* National Commission on Immigration and Refugee Policy, 1981.

seen by Labor as an obvious inaccuracy. So they just make sure all the fields are filled in with the number. We just took a look, there's a two-number prefix, and we know there are only certain numbers that are valid. So many of those were, in fact, valid.

There are many other checks that could be done, and while I don't know the extent to which they would reveal erroneous numbers, but certainly they are in the permanent Labor certification program. Labor takes the employer's identification number and checks it against a database to make sure it's a valid employer.

There's a relatively low-cost exercise that they can do, but because they see this as a verification process, they feel it goes beyond the scope of their current authority. So there are many other checks like this that they can do, likewise looking at the programming and finding out why the prevailing wage information on those 3,200 applications got through their data checks.

Mr. HOSTETTLER. Can you just elaborate quickly on the difference between the verification, why the verification process is not necessarily a grounds for investigation?

Mr. NILSEN. Labor, in its view of what it has the authority to do, is just to make sure that the information is completely filled in, but that it's beyond the scope of their responsibility to actually make sure that the information is accurate.

Mr. HOSTETTLER. Would there be——

Mr. NILSEN. I believe that would be a legislative change that would have to occur.

Mr. HOSTETTLER. Is there a reason why that is—is there a statute as to why they cannot use that? Or is it just their regulation, that they don't need to do that, they don't have to do that?

Mr. NILSEN. As I understand it, it's a legislative requirement. But perhaps Labor could elaborate on that.

Mr. HOSTETTLER. How about that? Is there specific preclusion from using that?

Mr. ROBINSON. Yes, Mr. Chairman, there is. The statute, as we talked about four mechanisms to initiate an investigation, we refer to one of those as a credible source rule, but the statute explicitly prohibits us from getting information from ETA, in this instance, or the Homeland Security. So we cannot use that information as the basis to initiate an investigation.

Mr. HOSTETTLER. Very good, that is helpful. Go ahead.

Mr. ROBINSON. Excuse me, Mr. Chairman. As to your earlier point, and Mr. Carlson could give you some more information, and we would be glad to put that in writing if you would like, or if you wanted to hear from him, but as far as ETA's responsibility under the certifying or checking the accuracy, they do not have, under the statute, the authority to go beyond, as Dr. Nilsen mentioned, go beyond what is presented on the information to actually do some verification. So they don't have that statutory authority to do that. The statute is, again, sort of very explicit in that area.

We would be glad to, if you wish, get you some additional information in writing.

Mr. HOSTETTLER. Thank you, sir. That is very helpful.

Mr. Robinson, when a complaint is filed, how is it investigated, and has the Labor Department done outreach to H-1B and American high-tech workers to let them know how to file complaints?

Mr. ROBINSON. Yes, sir. The complaint process is just like any other process. We would take a complaint. We have a procedure where we investigate, do fact-finding, do interviews. So we do have a process take we would go through.

We follow that, and I think it's table 4 in the GAO report shows we have an increasing track record of increasing complaints and processing and recovery of back wages, as well as helping employees.

We do educational events, if you will, outreach, with employers and employee groups, so we do try to educate the H-1B community as to the requirements as well as follow up with our enforcement activities, yes, sir.

Mr. HOSTETTLER. One more thing. What about Americans, high-tech—American citizens, high-tech workers that are American citizens?

Mr. ROBINSON. I can—I can't give you any examples. If you like, I could maybe try to do that and perhaps put something in writing for you to give you some information there.

Mr. HOSTETTLER. That would be helpful.

Mr. ROBINSON. The type of outreach that we have done in that area.

Thank you. My time at this point has expired.

The Chair now recognizes the gentleman from Texas Mr. Smith for questions.

Mr. SMITH. Thank you, Mr. Chairman.

Dr. Nilsen, as I recall reading in some of your materials, the proportion of H-1B visas that go to individuals who we might call high-tech workers, those connected to the computer industry, really is only about a third of the total number. Is that roughly accurate?

Mr. NILSEN. Yes, I believe that's correct. It certainly is the largest component. It's probably closer to 40 percent.

Mr. SMITH. Let's assume that it is 40 percent of the H-1B visas go to the high-tech workers. I just have to say, and I know this is outside the purview of our hearing today, but I am looking at some of the other occupations and individuals who receive the H-1B visas, and they include accountants, chefs, dieticians, hotel management and interior designers.

I am not sure I am convinced, nor am I convinced that the other individuals in America who might be working in those occupations are convinced, that we need more people in those particular areas. That is something I realize is a policy question for Congress to decide. But, at the same time, I am not convinced that a case has been made in those areas.

Mr. Robinson, I wanted to direct a couple of questions to you, particularly in regard to H-1B-dependent companies.

Mr. ROBINSON. Yes.

Mr. SMITH. When the original legislation was written, I was involved in a compromise that ended up focusing on those H-1B-dependent companies. I am just wondering how many investigations the Department of Labor has conducted in regard to the H-1B-dependent organizations.

Mr. ROBINSON. Congressman, I can't answer that question. I can check our database and see how many of our investigations have focused on H-1B-dependent——

Mr. SMITH. Do you know whether it's a significant number or not? Can you just give me an idea?

Mr. ROBINSON. I am afraid I am unable to do that. I just don't know, but I can get you that information. Sorry.

Mr. SMITH. In that case let me ask you if H-1B companies were advertising for H-1B-only job applicants, would that be a possible violation of the two attestations that the employers have to make? The two attestations, of course, being that you have to advertise for an American worker first, and that if you can't find an American worker, that you can replace that worker with a foreign worker.

So my question is if someone were advertising for an H-1B-only applicant, wouldn't that imply it had to be a foreign worker as opposed to being an American worker?

Mr. ROBINSON. Congressman, you are correct about the two additional attestations that the H-1B-dependent employer must satisfy.

There is an exception, and I think this might go a little bit toward testimony as well. For an H-1B employee who is earning $60,000 or more in annual wages or has a master's degree or higher, that attestation of recruiting and hiring does not apply. So it is quite possible in the instance that was mentioned earlier in checking the LCAs, we found that these people were exempt H-1B workers from that recruit and hire.

Mr. SMITH. That's correct. So we are talking about individuals who earn less than that. Do you still feel if you were advertising——

Mr. ROBINSON. Oh, if they were earning less than that? That would probably be something we want to pursue and do some fact-finding.

Mr. SMITH. If you would, within a week, if you could get back to me on the number of H-1B investigations you have conducted and what the results of those investigations were; and also whether any of the attestations were violated, and, if so, which ones. That would be good.

Mr. ROBINSON. Yes, sir.

Mr. SMITH. Dr. Nilsen, do you have anything else to add to my concern about those attestations being violated by H-1B-dependent companies?

Mr. NILSEN. No, I don't have anything to add on that question at that point.

Mr. SMITH. One other thing for you, Dr. Nilsen. Did you notice in your investigation that there was any particular occupation that seemed to—in which you found more fraud than another occupation?

Mr. NILSEN. No. We didn't do that kind of analysis that broke it down by occupation.

Mr. SMITH. So it was across the board.

Mr. NILSEN. Yes. We didn't actually look at specific occupations and find which ones were more likely.

Mr. SMITH. You have no knowledge of that either, then?

Mr. NILSEN. No.

Mr. SMITH. Thank you.

Thank you, Mr. Chairman.

Mr. HOSTETTLER. Thank you.

The Chair recognizes the gentlewoman from Texas, the Ranking Member, for 5 minutes.

The gentlewoman yields to the gentleman from Texas Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. I don't know, the gentlewoman from Texas may still be shocked that I agreed with her earlier. But anyway, pardon my ignorance, but that's the way I learned. And some people thought I was a decent judge, but that is because I didn't mind asking questions and exposing my ignorance.

But I was just wondering, and it may be, Dr. Nilsen, we will start with you, but if somebody could take me step by step through the process that the U.S. Government goes through, you know, from what you know, from whether its immigration, DOL, whoever, once you get an application from someone wanting an H-1B visa, what do we do?

Mr. NILSEN. I am happy to take you through that. It was complex to us, too.

In our report on page 10, we just have a little graphic takes you through that, where the application is filed electronically with Labor.

Mr. GOHMERT. That is great. I am just seeing this report.

Mr. NILSEN. It was just issued today.

Mr. GOHMERT. Okay. Maybe that is why I hadn't seen it.

Mr. NILSEN. Yes. In the back on page 32, in fact, is a copy of the Labor condition application that they file with Labor. This identifies the company, the kinds of workers, and each application is for a particular occupational series. It lists the wages they are going to be paying, what the prevailing wage is, et cetera.

Then once that gets approved by Labor, and, as I indicated, that is a matter of minutes, it's an electronic process, make sure all the data is there, it gets forwarded then to the Department of Homeland Security.

Mr. GOHMERT. The deep abyss. Okay.

Mr. NILSEN. Along with—and we also have the next appendix, shows the petition that goes along with the application that gets filed with the LCA.

That gets investigated, adjudicated by Department of Homeland Security. Once that has been approved, then they check against the caps, et cetera. Then it would be forwarded to the State Department for a visa to be issued for an individual.

Mr. GOHMERT. Just looking at figure 1 of page 10, in the review of the H-1B visa process, it explains, submit the application electronically. ETA approves the application within 7 days if complete. You say that's the process that takes minutes.

Normally then the employer submits a H-1B petition, okay, and the CIS—and the CIS adjudicate and approve the petition. I guess it's kind of like when Steve Martin says, I am going to write a book and tell people how to have $1 million and not pay taxes. Okay, first get $1 million and then just don't pay taxes. I mean, it's like, okay, but I am curious about what the process is by the Government. You got Labor, maybe approved within minutes. You said that can be done on line.

Mr. NILSEN. Yes.

Mr. GOHMERT. We may need to get you all to help Homeland Security with their computers so that they can do those kinds of things. But what is it that CIS does between those last three, four and five boxes?

Mr. NILSEN. They look at the application.

Mr. GOHMERT. Okay. That takes several days to read that probably.

Mr. NILSEN. Verify that is an occupation that qualifies.

Mr. GOHMERT. But how do they do that, just by looking at it, and their training and knowledge?

Mr. NILSEN. This is actually a hands-on process by Homeland Security, CIS, where they go through and they actually do checking of the information. Anything that comes——

Mr. GOHMERT. But how do they check that information? That is what I am trying to get to, and I realize my time has expired. If I could just finish this line.

Mr. HOSTETTLER. Without objection, the gentleman is recognized for another minute.

Mr. GOHMERT. Thank you, Mr. Chairman.

Mr. NILSEN. If they see anything that raises a question, they will talk to the employer to get additional information. They make sure it's a specialty occupation, and they verify the worker qualifications, for example, if they need a higher level of degree, bachelor's or master's in engineering, making sure that the documentation is there that verifies that this is, in fact,correct, that this person qualifies under those conditions.

Mr. GOHMERT. Okay. So they review, though, what's there.

Mr. NILSEN. What's there, and they will contact the employer who filed the petition if there are any questions.

Mr. GOHMERT. I guess that's what I was getting to. They look at the documentation, and if somebody has got somebody else to say, this is what's needed, whether it's true or not—and I don't want to shock your conscience, but I found as a judge, chief justice, and now it's been absolutely confirmed here in Congress, people will lie to you. It just happens. So I guess I'm wondering what kind of outside verification there is.

Mr. NILSEN. They're supposed to provide certified transcripts from universities;, not just a copy but a certified transcript, for example, that documents that they have the training that they purport that they have in a particular field.

Mr. GOHMERT. But how about for the certification that this is exactly what's needed for this position?

Mr. NILSEN. They look at the occupational series that's listed, and look at the—you know, if it's in the computer field that it's a relevant occupation for a relevant degree for that occupational series.

Mr. GOHMERT. And so I was surprised to see the list my colleague had here that lists things like chiropractor, and I frankly didn't realize there was such a huge shortage of chiropractors here that we were having to bring them in from other places. I know some chiropractors that are struggling that didn't realize that either. Anyway, I guess you have a list of what's required in order to be a legitimate chiropractor in the U.S., correct?

Mr. NILSEN. I would presume they do.

Mr. GOHMERT. Okay. That's where we get in trouble.

Mr. NILSEN. And it is basically a paper review of the documentation provided.

Mr. GOHMERT. All right. I realize I have vastly exceeded my time, and I appreciate the Chairman's indulgence. Thank you.

Mr. HOSTETTLER. Thank the gentleman. The Chair recognizes the gentlelady from Texas, the Ranking Member, for 5 minutes.

Mr. JACKSON LEE. Thank you. Dr. Nilsen, thank you for your report. My question to you, in your assessment, do you believe this program can be reformed?

Mr. NILSEN. I guess I would have to say yes. Anything can be reformed. I think if you're going to ask can additional work be done to improve the verification process of the application, certainly much more can be done. But Labor, or whoever, would have to be given the authority to do verification and share the information and do a relevant investigation process in order to improve it. Right now, as we've been saying, the LCA process is very cursory, the review process that Labor does. The fact that Homeland Security and Labor cannot share information for purposes——

Ms. JACKSON LEE. Is that in the legislative framework—are you suggesting they can do it in a regulatory framework or they need legislative framework?

Mr. NILSEN. They need legislative authority.

Ms. JACKSON LEE. What can they do presently? One of the concerns is how energetic the Department of Labor is in terms of the attestation. You make the point that between January 2002 to September 2005, 9,563 applications and 99.5 percent were certified. Is there not an administrative fix or sort of an in-depth review that might be given?

Mr. NILSEN. Certainly. But under current legislative authority, there's only a little bit more I think that Labor can do. Certainly the work that we did defined the 3,200 erroneous wage levels and the erroneous employer identification numbers; Labor can do that now. There's something broken in their software that doesn't do that match properly, and they don't look at the employer identification numbers to actually verify that they're in a relevant series. They then could get some additional information to match and make sure that information is relevant. But beyond that, they are limited statutorily.

Ms. JACKSON LEE. Well, I always like to be a problem-solver and I think that Labor owes us at least a performance of excellence under the present legislative structure, and they can do what you just said.

Mr. NILSEN. Yes.

Ms. JACKSON LEE. And one of the reasons, of course, is that we see the conflicting voices here. There is a great need for H-1B visas in a number of our professions, particularly our software, high-tech, Internet highway, if you will, constituencies; and it matches up or clashes, if you will, against those who argue that we need to increase the number of engineers and software specialists and others here in the United States, which I hope we can do by using our training dollars in the right way. But I don't think we should leave this hearing without Labor acknowledging present failures under the present legislative process or system, and they should do

something about it. Can they do something about it at least as what you have just indicated?

Mr. NILSEN. In our opinion, yes, they can. In our report, they did take issue with even the modest steps we've proposed, however.

Ms. JACKSON LEE. I thank you for that.

Ms. Avendano, let me thank you for your presence here today. You mentioned in your statement that the attestation structure in and of itself fails to meet the essential gatekeeper function. Can you give us some options that we can utilize?

Ms. AVENDANO. Certainly. Thank you, Congresswoman. I think it is clear the role, the independent oversight role that the Department of Labor should play should be strengthened and not weakened through an attestation program. That role is important for two reasons. One, because the importance of relying on the State recourse agencies who have the knowledge of, who have the technical expertise, who understand local labor markets, to be able to determine whether employers are gaming the system from the gitgo is essential. And also it is the Department of Labor who plays that gatekeeper role to, ensure again on the national level, that employers aren't using this program for the intent of undermining working standards. If that role is abandoned, then all we are left with is after-the-fact mechanisms and remedies, which don't provide adequate protections for the U.S. workers.

Ms. JACKSON LEE. So you want the Labor Department to do what?

Ms. AVENDANO. One thing that the Labor Department can do right now is to conduct targeted wage-and-hour investigations into the high-tech industry and particularly in the occupations that are highlighted in the GAO report: computer systems analyst and programming occupations. Many of these programmers who will laboring under H-1B visas are not being paid at all, and those employers are not just violating labor certification conditions but also the Fair Labor Standards Act. There is no reason why the Department of Labor cannot conduct a targeted investigation into an entire industry, granted this Administration hasn't done that. The last targeted industry that we've seen was of the poultry industry in the year 2000. When that survey concluded, that industry as a whole was 100 percent——

Ms. JACKSON LEE. So you don't want to extinguish H-1B. You want to make it true to what it is supposed to do, which is to provide the staffing for industries or positions which we cannot find or have no source of an American worker. Is that the sense of it?

Ms. AVENDANO. I respectfully—the question really—there's two separate questions. One is that the H-1B program, as a guest worker program, as a mechanism that has provided employers with a constant supply of exploitable workers, is a bad thing and should be limited in scope, and it should have much more regulatory authority. To mitigate the damage of this program, much more needs to be done to protect both U.S. workers and the foreign workers who labor in these programs.

Ms. JACKSON LEE. I got you. Mr. Robinson can you do better?

Mr. ROBINSON. Thank you Congresswoman. Yes. Let me just say two quick things. First of all, ETA is very concerned about the incorrect approval of applications with low prevailing wages. They

don't exactly know today why this occurred. ETA is checking its system as to why it occurred. We're investigating it. We'll be running simulations to determine the cause, and fully intend to correct any problems that are found. ETA joins you in wanting to have this corrected and will be shooting for the goal of being 100 percent accurate all the time. And so ETA does want this to occur.

As far as the other comment about targeted investigations, we've talked a little bit here today about our authority, and under the H-1B statutory framework, Department of Labor does not have the authority to conduct targeted investigations.

Ms. JACKSON LEE. I do understand that. As I close, let me just say we have these conflicting interests that I think are important interests. The supplementing of a profession that needs H-1B visas and the protecting of both the H-1B visa worker and the American worker and providing opportunities for American workers. What we want—at least what I'm saying to you now within this framework as we leave you to go vote—that DOL needs to do better than it has done. GAO has laid out a number of recommendations, two of which—two important ones are legislative. I want you to do what you can do in the course of your present framework.

Mr. ROBINSON. Understood. And we'll do that.

Ms. JACKSON LEE. With that, Mr. Chairman, I yield back. Thank you very much. I thank the witnesses.

Mr. HOSTETTLER. I thank the gentlelady.

At this time the Chair will ask one question before we part—before we go to vote. The title of the hearing today is, "Is The Labor Department Doing Enough to Protect U.S. Workers?" and we've heard very good testimony today as to that.

But Mr. Miano, you have done a fairly significant study on the impact of the H-1B program on especially the IT industry. And let me just end the hearing by asking a question not so much about the Labor Department, but as the program is currently constituted, does the program—even if the Department of Labor did everything right and used all of its authority that it is granted today to execute the law and enforce the law—does the H-1B program even give them that adequately to protect American high-tech workers?

Mr. MIANO. No, Mr. Chairman, not at all. The restrictions on the Department of Labor are so extreme that the types of complaints that they can handle are just at the fringes. I mean, they just can kind of pick at little things. They cannot address the heart—the big issues in this system.

Mr. HOSTETTLER. Very good. Very good. And we yield time to Mr. Gohmert from Texas.

Mr. GOHMERT. Just a very quick question. I know we have to go vote. But I continue to want to know more about what's done before these visas are granted. And when I see that accountants, chefs, chiropractors, dieticians, fashion designers, hotel managers, interior designers, journalists—journalists?—medical records librarians, ministers, show room managers, social workers—we don't have enough social workers to be hired in this country?

Anyway, I'm just curious, when you see an application—when people at CIS or Labor see an application like this—and I was going there before—but what assurance is there that there really aren't enough people in America that don't want to be social work-

ers or don't want to be librarians or don't want to be hotel managers? I get the impression that they don't call the AFL-CIO to see if they have any workers available to see if they'd like to fill these positions and meet the requirements.

I'm just curious, rather than looking at, you know, a document on its face, seeing our list—yes, it meets the requirements—is there any investigation at all to see if there are workers available that would fill this position? That's my question.

Mr. MIANO. I would like to answer. You know, the lawyer's best friend is an ambiguous law, and the problem that you have in this program is that the eligibility requirement is so vague, specialty occupation, that it's basically a packaging by lawyers, whoever you can fit into that, and so you get that. You can add into that restaurant hostesses. My favorite from this one this year was called—specialty occupation was the job title, and the employer in the contacts job title listed as retired.

Mr. ROBINSON. Mr. Chairman, could I also interject? We talked a little earlier about the H-1B-dependent employer which does have that hire—recruit and hire attestation, but there is no corresponding attestation for the normal H-1B employer, someone who's not a willful violator or an H-1B-dependent employer. So that—it only applies to a small segment, if you will, of the H-1B employer.

Mr. GOHMERT. So as long as you haven't been caught being a problem before, you can keep going.

Mr. ROBINSON. And you don't meet the definition of H-1B dependent as to the occupations, I believe, but the Department of Homeland Security is the agency that actually sets what those specialty occupations are.

Mr. GOHMERT. You've been most enlightening. Thank you very much.

Mr. HOSTETTLER. I thank the gentleman. And it was the reason for my last question that we will—this Subcommittee will continue to investigate the H-1B program on some more fundamental grounds as to how the program can better be crafted and the Department of Labor and others can be given better tools to ultimately provide for, first of all, the protection of American workers and, to the extent that there may be a demand for further workers, then to provide those for the various industries. But our obligation here first of all in the Congress is to protect American citizens and their ability to work.

I want to thank the panel for your very helpful input today. It has been enlightening, as my colleague has suggested, and you have added greatly to the record. All Members will have 5 legislative days to make additions to the record. The business before the Subcommittee being complete, without objection, we are adjourned.

[Whereupon, at 3:18 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE REPORT ON "H-1B VISA PROGRAM: LABOR COULD IMPROVE ITS OVERSIGHT AND INCREASE INFORMATION SHARING WITH HOMELAND SECURITY," SUBMITTED BY THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

United States Government Accountability Office

GAO

Report to Congressional Requesters

June 2006

H-1B VISA PROGRAM

Labor Could Improve Its Oversight and Increase Information Sharing with Homeland Security

GAO

Accountability * Integrity * Reliability

GAO-06-720

June 2006

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Accountability•Integrity•Reliability

Highlights

Highlights of GAO-06-720, a report to congressional requesters

H-1B VISA PROGRAM

Labor Could Improve Its Oversight and Increase Information Sharing with Homeland Security

Why GAO Did This Study

The H-1B visa program assists U.S. employers in temporarily filling certain occupations with highly-skilled foreign workers. There is considerable interest regarding how Labor, along with Homeland Security and Justice, is enforcing the requirements of the program. This report describes: (1) how Labor carries out its H-1B program responsibilities; and (2) how Labor works with other agencies involved in the H-1B program. We interviewed officials and analyzed data from all three agencies.

What GAO Recommends

The Congress should consider eliminating the restriction on Labor using information from Homeland Security to initiate an investigation and directing Homeland Security and Labor to share information on employers that may not be fulfilling program requirements. GAO also recommends that Labor improve its checks of employers' applications and that Homeland Security's U.S. Citizenship and Immigration Services (USCIS) include Labor's application case number in its new information technology system. Homeland Security agreed with our recommendations. Labor questioned whether more stringent checks were necessary and believes Congress intentionally limited Labor's role and placed program integrity with USCIS. We believe there are cost-effective methods that Labor could use to check the applications more stringently that would enhance the integrity of the H-1B process.

www.gao.gov/cgi-bin/getrpt?GAO-06-720.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Sigurd R. Nilsen at (202) 512-7215 or nilsens@gao.gov.

What GAO Found

While Labor's H-1B authority is limited in scope, the agency could improve its oversight of employers' compliance with program requirements. Labor's review of employers' applications to hire H-1B workers is timely, but lacks quality assurance controls and may overlook some inaccuracies. From January 2002 through September 2005, Labor electronically reviewed more than 960,000 applications and certified almost all of them. About one-third of the applications were for workers in computer systems analysis and programming occupations. By statute, Labor's review of the applications is limited to searching for missing information or obvious inaccuracies and it does this through automated data checks. However, our analysis of Labor's data found certified applications with inaccurate information that could have been identified by more stringent checks. Although the overall percentage was small, we found 3,229 applications that were certified even though the wage rate on the application was lower than the prevailing wage for that occupation. Additionally, approximately 1,000 certified applications contained erroneous employer identification numbers, which raises questions about the validity of the applications. In its enforcement efforts, Labor's Wage and Hour Division (WHD) investigates complaints made against H-1B employers. From fiscal year 2000 through fiscal year 2005, Labor reported an increase in the number of H-1B complaints and violations, and a corresponding increase in the number of employer penalties. In fiscal year 2000 Labor required employers to pay back wages totaling $1.2 million to 226 H-1B workers; by fiscal year 2005, back wage penalties had increased to $5.2 million for 604 workers. Program changes, such as a higher visa cap in some years, could have been a contributing factor. In April 2006, WHD began the process of randomly investigating willful violators of the program's requirements.

Labor, Homeland Security, and Justice all have responsibilities under the H-1B program, but Labor and Homeland Security could better address the challenges they face in sharing information. Homeland Security reviews Labor's certified application but cannot easily verify whether employers submitted petitions for more workers than originally requested on the application because USCIS's database cannot match each petition to Labor's application case number. Also, during the process of reviewing petitions, staff may find evidence that employers are not meeting their H-1B obligations. For example, Homeland Security may find that a worker's income on the W-2 is less than the wage quoted on the original application. Homeland Security may deny the petition if an employer is unable to explain the discrepancy, but it does not have a formal process for reporting the discrepancy to Labor. Additionally, current law precludes the Wage and Hour Division from using this information to initiate an investigation of the employer. Labor also shares enforcement responsibilities with Justice, which pursues charges filed by U.S. workers who allege they were displaced by an H-1B worker. From 2000 through 2005, Justice found discriminatory conduct in 6 out of the 97 investigations closed and assessed $7,200 in penalties.

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Abbreviations

ACWIA	American Competitiveness and Workforce Improvement Act of 1998
ALJ	Administrative Law Judge
DHS	Department of Homeland Security
EIN	Employer Identification Number
ETA	Employment and Training Administration
ESA	Employment Standards Administration
INA	Immigration and Nationality Act
LCA	Labor Condition Application
OSC	Office of Special Counsel
USCIS	U.S. Citizenship and Immigration Services
WHD	Wage and Hour Division
WHISARD	Wage and Hour Investigative Support and Reporting Database

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United States Government Accountability Office
Washington, DC 20548

June 22, 2006

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
House of Representatives

The Honorable John N. Hostettler
Chairman
The Honorable Sheila Jackson Lee
Ranking Minority Member
Subcommittee on Immigration, Border Security and Claims
Committee on the Judiciary
House of Representatives

The Honorable Lamar Smith
House of Representatives

Each year employers in the United States generally request more highly skilled foreign workers than are able to come into the country under law. The H-1B nonimmigrant visa program was established to assist U.S. employers in temporarily filling certain positions with these workers. Currently, the number of foreign workers authorized to enter the United States annually through the H-1B program is 65,000, but in previous years the cap has been as high as 195,000. The Congress is currently considering legislation to overhaul U.S. immigration policy, which could have an impact on the cap in future years.

To ensure that U.S. workers are not adversely affected by the hiring of H-1B workers, all employers must attest to meeting certain labor conditions, such as notifying all employees of the intention to hire H-1B workers and offering their H-1B workers the same benefits as U.S. workers. These conditions are designed to protect both the jobs of domestic workers and the rights and working conditions for foreign temporary workers. The Departments of Labor (Labor), Homeland Security (Homeland Security), and Justice (Justice) each have specifically defined responsibilities during certain stages of the H-1B visa process, which range from reviewing and approving an employer's request to hire an H-1B worker, to investigating complaints from both U.S. and foreign workers regarding employers' non-compliance with H-1B program requirements. The Department of State also has a role in the process,

specifically, to issue the visa. These responsibilities help ensure that employers comply with the requirements of the program.

However, there has been considerable interest regarding how Labor, in conjunction with the other agencies, is ensuring that employers comply with the requirements of the H-1B program. To better understand this process, you asked us to describe: (1) how Labor carries out its H-1B program responsibilities and (2) how Labor works with other agencies involved in the H-1B program.

To understand the H-1B certification, adjudication, and enforcement processes and the responsibilities of each agency involved, we hosted a joint meeting with officials from Labor, Homeland Security's U.S. Citizenship and Immigration Services (USCIS), and Justice. We also reviewed laws and regulations pertaining to the H-1B program. To obtain information on the characteristics of employers who filed Labor Condition Applications (applications) and the positions they sought to fill with H-1B workers, we analyzed Labor's Efile H-1B Disclosure Data from January 2002 through September 2005.

To analyze the number and type of H-1B complaints received by Labor's Wage and Hour Division (WHD) and the outcomes of the associated investigations, we received a data extract from WHD's Wage and Hour Investigative Support and Reporting Database (WHISARD). We also interviewed WHD officials on the complaint and investigation process, the appeal process, educational outreach to improve employer compliance, and the WHD resources used to process and investigate complaints.

To determine the number and type of H-1B petitions submitted by employers and adjudicated by USCIS, we analyzed service center data from the Computer Linked Application Information Management System, Version 3.0 (CLAIMS 3) database from fiscal years 2000 through 2005. We conducted site visits to two USCIS service centers, including the one that processes the most H-1B visa petitions.

To determine the type of violations and the process for investigations of U.S. worker displacement violations we interviewed Justice officials. We reviewed complaint and investigation data from Justice. We reviewed and analyzed summary reports provided by Justice on the number of employers investigated from 2000 through 2005 and the outcomes of those investigations.

To assess the reliability of the data from Labor, Homeland Security, and Justice, we (1) reviewed existing documentation related to the data sources, (2) tested the data for completeness and accuracy, and (3) interviewed knowledgeable agency officials about the data. We determined that the data were sufficiently reliable for the purposes of this report. (See app. I for a more thorough discussion of our scope and methodology.)

We conducted our work between August 2005 and May 2006 in accordance with generally accepted government auditing standards.

Results in Brief

While Labor's H-1B authority is limited in scope, the agency could improve its oversight of employers' compliance with program requirements. Labor's review of employers' applications to hire H-1B workers is timely, but lacks quality assurance controls and may overlook some inaccuracies. From January 2002 through September 2005, Labor's Employment and Training Administration electronically reviewed more than 960,000 applications and certified almost all of them. Approximately one-third of the applications were for workers in computer system analysis and programming occupations, with the next most frequent request, for college and university education workers, at 7 percent. About 30 percent of the positions were located in either California or New York. By statute, Labor's review of the applications is limited to searching for missing information or obvious inaccuracies and it does this through certain data checks. However, in our analysis of Labor's data we found certified applications with inaccurate information that could have been identified by more stringent checks. Although the overall percentage was small, we found 3,229 applications that were certified even though the wage rate on the application was lower than the prevailing wage for that occupation in the specific location. In addition, during this time period, approximately 1,000 certified applications contained employer identification numbers with improper prefix codes, which raises questions about the validity of the applications. In its enforcement efforts, WHD investigates complaints made against H-1B employers. From fiscal year 2000 through fiscal year 2005, Labor reported an increase in the number of H-1B complaints and violations, and a corresponding increase in the number of employer penalties. In fiscal year 2000, Labor required employers to pay back wages totaling $1.2 million to 226 H-1B workers; by fiscal year 2005, back wage penalties had increased to $5.2 million for 604 workers. However, program changes, such as a higher visa cap in some years, could have been a factor in the increase. In April 2006, WHD began the process of randomly

investigating employers who have willfully violated the program's requirements. Labor uses education as its primary method of promoting compliance with the H-1B program. For example, Labor conducts compliance assistance programs and posts guidance on its website. To educate workers about their rights, Labor is coordinating with the Department of State to provide worker information cards with the H-1B visas.

Labor, Homeland Security, and Justice all have responsibilities under the H-1B program, but Labor and Homeland Security could better address the challenges they face in sharing information between the agencies. After Labor certifies an application for a specific number of workers, the employer submits it, along with an H-1B petition for each worker, to USCIS. USCIS reviews this information but lacks the ability to easily verify whether employers submitted petitions for more workers than they originally requested because its system does not match each petition to Labor's application case number. Additionally, during the process of reviewing H-1B petitions, USCIS staff told us they may find evidence that employers are not meeting their obligations. Specifically, USCIS may find that a worker's income on the W-2—which may be used as supporting documentation to extend an H-1B worker's stay in the United States—is less than the wage quoted on the original application. Because an employer is not allowed to pay a lower wage than that which was quoted on the original application, USCIS may deny the petition if an employer is unable to explain the discrepancy. However, USCIS does not have a formal process for reporting the discrepancy to Labor. Additionally, current law precludes the Wage and Hour Division from using this information to initiate an investigation of the employer. Labor also shares enforcement responsibilities with Justice, which pursues charges filed by U.S. workers who allege that they were not hired or were displaced so that an H-1B worker could be hired instead. Justice may assess penalties if it finds that an employer hired an H-1B worker over a better-qualified U.S. worker. From 2000 through 2005, Justice found discriminatory conduct in 6 out of the 97 investigations closed, and assessed a total of $7,200 in penalties in 3 of the 6 cases, all in 2003.

To enhance employer compliance with the H-1B program and protect the rights of U.S. and H-1B workers, Congress should consider: (1) eliminating the restriction on using application and petition information submitted by employers as the basis for initiating an investigation, and (2) directing Homeland Security to provide Labor with information received during the

adjudication process that may indicate an employer is not fulfilling its H-1B responsibilities.

To strengthen oversight of employers' applications to hire H-1B workers, we recommend that Labor improve its procedures for checking completeness and obvious inaccuracies, including developing more stringent, cost effective methods of checking for wage inaccuracies and invalid employer identification numbers.

To ensure employers are complying with program requirements, we recommend that as USCIS transforms its information technology system, the Labor application case number be included in the new system, so that adjudicators are able to quickly and independently ensure that employers are not requesting more H-1B workers than were originally approved on their application to Labor.

The agencies gave us technical comments and Homeland Security agreed with our recommendations. Labor questioned whether more stringent checks were necessary and believes Congress intentionally limited Labor's role and placed program integrity with USCIS.

We believe there are cost-effective methods that Labor could use to check the applications more stringently that would enhance the integrity of the H-1B process.

Background

The H-1B program was created by the Immigration Act of 1990, which amended the Immigration and Nationality Act (INA).[1] The H-1B visa category was created to enable U.S. employers to hire temporary workers as needed in specialty occupations, or those that require theoretical and practical application of a body of highly specialized knowledge. It also requires a bachelor's or higher degree (or its equivalent) in the specific occupation as a minimum requirement for entry into the occupation in the United States.[2] The Immigration Act of 1990 capped the number of H-1B visas at 65,000 per fiscal year.

[1] The H-1 nonimmigrant category was created under the Immigration and Nationality Act of 1952 to assist U.S. employers needing workers temporarily. Nonimmigrants are foreign nationals who come to the United States on a temporary basis and for a specific purpose, such as to attain education and work.

[2] Fashion models of distinguished merit and ability also qualify for H-1B visas and do not need to meet the definition of specialty occupation.

Since the creation of the H-1B program, the number of H-1B visas permitted each fiscal year has changed several times. Congress passed the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), which increased the limit to 115,000 for fiscal years 1999 and 2000. In 2000, Congress passed the American Competitiveness in the Twenty-First Century Act, which raised the limit to 195,000 for fiscal year 2001 and maintained that level through fiscal years 2002 and 2003. The number of H-1B visas reverted back to 65,000 thereafter.[3] An H-1B visa generally is valid for 3 years of employment and is renewable for an additional 3 years.

Filing an application with Labor's Employment and Training Administration is the employer's first step in hiring an H-1B worker,[4] and Labor is responsible for either certifying or denying the employer's application within 7 days (see app. II for the Labor Condition Application). By law, it may only review applications for omissions and obvious inaccuracies. Labor has no authority to verify the authenticity of the information. Employers must include on the application information such as their name, address, rate of pay and work location for the H-1B worker, and employer identification number. All employers are also required to make four attestations on the application as to:

1. Wages: The employer will pay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for nonproductive time caused by a decision made by the employer; and offer nonimmigrants benefits on the same basis as U.S. workers.

2. Working conditions: The employment of H-1B nonimmigrants will not adversely affect the working conditions of U.S. workers similarly employed.

3. Strike, lockout, or work stoppage: No strike or lockout exists in the occupational classification at the place of employment.

[3] However, under the H-1B Visa Reform Act of 2004, some H-1B workers—such as those being hired by institutions of higher education, nonprofit or government research organizations, or those with a master's or higher degree from a U.S. institution—may be exempt from the annual cap.

[4] Employers can submit applications to Labor up to 6 months prior to the H-1B worker's intended employment date.

4. Notification: The employer has notified employees at the place of employment of the intent to employ H-1B workers.

Certain employers are required to make three additional attestations on their application. These additional attestations apply to H-1B employers who: (1) are H-1B dependent, that is, generally those whose workforce is comprised of 15 percent or more H-1B nonimmigrant employees; or (2) are found by Labor to have committed either a willful failure to meet H-1B program requirements or misrepresented a material fact in an application during the previous 5 years. These employers are required to additionally attest that: (1) they did not displace a U.S. worker within the period of 90 days before and 90 days after filing a petition for an H-1B worker; (2) they took good faith steps prior to filing the H-1B application to recruit U.S. workers and that they offered the job to a U.S. applicant who was equally or better qualified than an H-1B worker; and (3) prior to placing the H-1B worker with another employer, they inquired and have no knowledge as to that employer's action or intent to displace a U.S. worker within the 90 days before and 90 days after the placement of the H-1B worker with that employer.[5]

After Labor certifies an application, the employer must submit to USCIS an H-1B petition for each worker it wishes to hire (see App. III for the H-1B petition and supplement). On March 1, 2003, Homeland Security took over all functions and authorities of Justice's Immigration and Naturalization Service under the Homeland Security Act of 2002 and the Homeland Security Reorganization Plan of November 25, 2002. Employers submit to Homeland Security the application, petition, and supporting documentation along with the appropriate fees. When Congress passed ACWIA in 1998, it imposed a filing fee of $500 on H-1B petitions. In 2000, Congress passed legislation to increase the amount of filing fees to $1,000 then increased the amount again to $1,500 in 2004.[6] Along with a $1,500 filing fee, an employer must also submit a $500 fraud prevention

[5] These additional requirements first applied from January 19, 2001—September 30, 2003. However, the provision requiring these attestations sunsetted, or expired, and was not reinstituted until March 8, 2005. Consequently, from October 1, 2003, to March 7, 2005, H-1B dependent employers and willful violator employers were not required to make the additional attestations, and, in effect, were able to hire H-1B workers even if they displaced U.S. workers and did not make efforts to recruit U.S. workers.

[6] Pub. L. No. 106-311 (Oct. 17, 2000); The H-1B Visa Reform Act of 2004, Pub. L. No. 108-147 (Dec. 8, 2004).

and detection fee to Homeland Security.[7] Information on the petition must indicate the wages that will be paid to the H-1B worker, the location of the position and the worker's qualifications. Through a process known as adjudication, Homeland Security reviews the documents for certain criteria, such as whether the petition is accompanied by a certified application from Labor, whether the employer is eligible to employ an H-1B worker, whether the position is a specialty occupation, and whether the prospective H-1B worker is qualified for the position.

The Wage and Hour Division of Labor's Employment Standards Administration performs investigative and enforcement functions to determine whether an employer has complied with its attestations on the application. An aggrieved individual or entity[8] or certain non-aggrieved parties may file a complaint with Labor that an employer violated a requirement of the H-1B program. To conduct an investigation, the Administrator must have reasonable cause to believe that an employer did not comply with or misrepresented information on its application. Employers who violate any of the attestations on the application may be subject to civil money penalties or administrative remedy, such as paying back wages to H-1B workers or debarment, which disqualifies an employer from participating in the H-1B program for a specified period of time. Employers, the person who filed the complaint, or other interested parties who disagree with the findings of the investigation then have 15 days to appeal by requesting an administrative hearing.

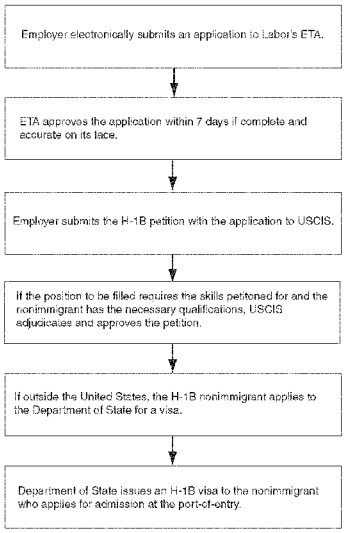
The Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) of the Department of Justice also has some enforcement responsibility. Under statutory authority created by the Immigration Reform and Control Act of 1986, OSC pursues charges of citizenship discrimination brought by U.S. workers who allege that an employer preferred to hire an H-1B worker.

[7] The H-1B Visa Reform Act of 2004, Pub. L. No. 108-447 (Dec. 8, 2004).

[8] An aggrieved individual can be an H-1B worker, a U.S. worker, or a bargaining representative for workers; an aggrieved entity can be another federal agency, such as the Department of State, or a competitor who is adversely affected by the employer's alleged non-compliance with the application.

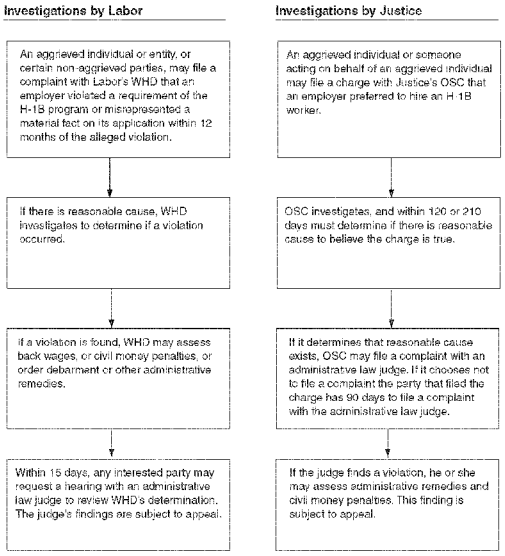
Figure 1 gives an overview of the H-1B visa process. The figure highlights the major steps that an employer takes when hiring an H-1B worker. Figure 2 highlights the process for investigations when a violation has been alleged.

Figure 1: An Overview of the H-1B Visa Process



Sources: GAO analysis based on information obtained from Labor, Homeland Security, and Justice, and 20 C.F.R. § 655.700(b).

Figure 2: H-1B Investigatory Process



Sources: GAO analysis based on information obtained from Labor, Homeland Security, and Justice; and 20 C.F.R. Part 655, Subpart I and 8 U.S.C. § 1324b.

Labor Has Limited H-1B Authority, but the Agency Could Improve Its Oversight of Employers' Compliance with Program Requirements

Labor's H-1B authority is limited in scope, but the agency could improve its oversight of employers' compliance with program requirements. While Labor's review of employers' applications to hire H-1B workers is timely, it lacks quality assurance controls and may overlook some inaccuracies, such as applications containing employer identification numbers with invalid prefix codes. Labor's Wage and Hour Division investigates complaints made against H-1B employers and keeps a database of employers with prior violations. Labor has the authority to conduct random investigations of some of these employers and began doing so in April 2006. Labor uses education as the primary method of promoting compliance with the H-1B program. In addition to conducting compliance assistance programs for employers, it also coordinates with the Department of State to provide H-1B workers with information about their employee rights.

Labor's Review of Employers' Requests Is Fast, but May Overlook Some Inaccuracies

Labor has reduced the time it takes to certify employers' applications by reviewing them electronically and subjecting them to data checks. Labor increased the percentage of applications reviewed within the required seven days from 56 percent in fiscal year 2001 to 100 percent in fiscal year 2005. As of January 2006, all applications must be submitted electronically[9] and Labor's website informs employers that it will certify or deny applications within minutes based on the information entered. Our analysis of Labor's data found that of the 960,563 applications that Labor electronically reviewed from January 2002 through September 2005,[10] 99.5 percent were certified, as shown in table 1. Not all applications continue through the process and result in H-1B visas—employers can withdraw their applications, petitions can be denied, or the visa may not be issued. Therefore, Labor officials told us the number of applications submitted represents employers' interest in the H-1B program rather than the actual number of H-1B visas that are issued.

[9] Special mail application filing procedures are available for employers without Internet access or with physical disabilities.

[10] Our analysis included applications filed electronically from January 14, 2002, through September 30, 2005, except for five applications with a decision date of October 2, 2005.

Table 1: Labor Condition Applications Electronically Reviewed from 2002 through 2005

Fiscal year[a]	Total number of applications	Applications certified[b]	Percentage certified	Applications denied[b]	Percentage denied
2002	123,060	122,305	99.4	755	0.6
2003	221,262	220,234	99.5	1,026	0.5
2004	308,470	306,645	99.4	1,040	0.3
2005	307,771	306,927	99.7	844	0.3

Source: GAO analysis of Department of Labor data.

[a]Represents data from January 2002 through September 2005, with the exception of five applications that were reviewed by Labor on October 2, 2005.

[b]Number of applications certified and denied may not equal the total number of applications because some applications were not recorded as either certified or denied.

In addition to agreeing to certain attestations on the application, employers must provide information about themselves, such as address and employer identification number, as well as information about each position they are seeking to fill, the time period they will need the worker, the prevailing wage and location for the position, the wage the worker will be paid, and the number of workers they want to hire. On the applications submitted electronically from January 2002 through September 2005, approximately 90 percent of employers requested only one worker even though they are allowed to request multiple workers for the same occupation on an application. Approximately one-third of the applications were for workers in computer system analysis and programming occupations, with the next most frequent request, for college and university education workers, at 7 percent. About 30 percent of the positions were located in either California or New York.[11] See appendix IV for more information on H-1B workers.

Labor's review of the application is limited by law to identifying omissions or obvious inaccuracies. Labor will not certify an application if the employer has failed to check all the necessary boxes or not filled in required information such as wage rate, prevailing wage or period of intended employment. Labor's system will also deny an application if it contains obvious inaccuracies. In addition to checks to ensure that data

[11] Does not include additional or subsequent work locations.

fields have the correct number of digits or are numerical when required, Labor has defined obvious inaccuracies as when an employer:

- files an application after being debarred, or disqualified, from participating in the H-1B program;
- submits an application more than 6 months before the beginning date of the period of employment;
- identifies multiple occupations on a single application;
- states a wage rate that is below the Fair Labor Standards Act minimum wage;
- identifies a wage rate that is below the prevailing wage on the application; and
- identifies a wage range where the bottom of the range is lower than the prevailing wage on the application.

Despite these checks, Labor's system does not consistently identify all obvious inaccuracies. For example, although the overall percentage was small, we found 3,229 applications that were certified even though the wage rate on the application was lower than the prevailing wage for that occupation in the specific location. Table 2 shows the wage rates and corresponding prevailing wages from a sample of applications Labor incorrectly certified because the wage rate was not equal to or greater than the prevailing wage.

Table 2: Wage Rates and Prevailing Wages from a Sample of Labor Condition Applications That Were Incorrectly Certified

Sample applications	Application wage rate	Application prevailing wage	Application certification status
Application 1 FY 2002	$60,163 per year	$83,833 per year	Certified
Application 2 FY 2003	$37,784 per year	$52,876 per year	Certified
Application 3 FY 2004	$32,000 per year	$35,000 per year	Certified
Application 4 FY 2005	$55,000 per year	$75,000 per year	Certified

Source: GAO analysis of Department of Labor data.

Additionally, Labor does not identify other errors that may be obvious. Specifically, Labor told us its system reviews an application's employer

identification number[12] to ensure it has the correct number of digits and that the number does not appear on the list of employers who are ineligible to participate in the H-1B program. However, our analysis of Labor's data found that Labor's review may not identify numbers that are erroneous. For example, we found 993 certified applications with invalid employer identification number prefixes. While an invalid employer identification number could indicate a fraudulent application, Labor does not consider it an obvious inaccuracy. Officials told us that in other programs, such as the permanent employment program, Labor matches the application's employer identification number to a database with valid employer identification numbers; however, they do not formally do this with H-1B applications because it is an attestation process, not a verification process.

According to Labor, most of the process of reviewing applications is automated—the primary reason an analyst will review an application is if the employer's prevailing wage source is not recognized by Labor's database. The analyst reviews the source of the prevailing wage provided by the employer just to ensure the source meets Labor's criteria, not to verify that the prevailing wage is correct. The employer may obtain a prevailing wage from a state workforce agency, a collective bargaining agreement, or another source, such as a private employment survey. If the employer uses a private employment survey and the analyst finds the survey meets Labor's criteria—such as having been conducted in the last 2 years and using a statistically valid methodology to collect the data—the survey will be added to Labor's database and used to approve future applications. Officials also told us that analysts review from three to five applications per day. In an effort to promote consistency in prevailing wage determinations, Labor has issued guidance for its state workforce agencies as well as for employers using surveys. Labor officials told us they always advise employers to obtain prevailing wage rates from the state workforce agency, but they also said that because the application is an attestation process, employers are responsible for doing the required analysis to determine the prevailing wage and maintaining the proper documentation to support the prevailing wage provided on the application.

[12] The employer identification number is used by the Internal Revenue Service to identify taxpayers who are required to file business tax returns. The number has nine digits and is issued in the XX-XXXXXXX format.

We and others have previously reported that Labor's review of the labor condition application is limited and provides little assurance that employers are fulfilling their H-1B responsibilities. In 2000, given Labor's limited review of the application, we suggested Congress consider streamlining the H-1B approval process by requiring employers to submit the application directly to the Immigration and Naturalization Service, now the USCIS.[13] Similarly, in 2003, Labor's Inspector General reported that either Labor should have authority to verify the accuracy of the application information or employers should file their applications directly to USCIS.[14] While Labor officials told us they frequently review the application process to determine where improvements can be made, they rely on a system of data checks rather than a formal quality assurance process because of the factual nature of the form and the number of applications received. Additionally, they said if they conducted a more in-depth review of the applications, they could overreach their legal authority and increase the processing time for applications. Officials also said the integrity of the H-1B program is ensured through enforcement and by the fact that there is actual review by staff when the employer submits the paperwork to USCIS.

Labor Investigates Complaints and Has Begun the Process of Randomly Investigating Previous Violators

Labor enforces H-1B program requirements primarily by investigating complaints filed against employers. H-1B workers or certain others with knowledge of an employer's practices who believe an employer has violated program requirements can file a complaint with Labor's Wage and Hour Division, which received 1,026 complaints from fiscal year 2000 through fiscal year 2005. If the complaint meets certain criteria—such as being filed within 12 months of the violation—Labor said it notifies the employer of the investigation and requests information, including payroll records, prevailing wage determinations, and Labor's certified applications. Labor also interviews the employer and workers, checks its violations database to determine if the employer has any previous violations, and assesses the employer's compliance with all H-1B program requirements. As a result, an investigation may result in more than one violation. Once the investigation is complete, Labor told us it meets with

[13] GAO, *H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers*, GAO/HEHS-00-157 (Washington, D.C.: September 2000).

[14] Department of Labor, Office of Inspector General, *Overview and Assessment of Vulnerabilities in the Department of Labor's Alien Labor Certification Programs*, 06-03-007-03-321 (Washington, D.C.: September 2003).

the employer to explain the findings and follows up with a letter to the employer listing violations and penalties, such as payment of back wages due to H-1B workers who were not paid the required wage, civil money penalties, debarment, or other administrative remedies (see table 3).

Table 3: Possible Penalties for Violations of the H-1B Program

Violation/penalties	Back wages	Civil money penalties	Debarment period
Failure to meet certain attestations or misrepresentation of fact in an application	Due to employees not paid the required wage	Not to exceed $1,000 per violation	For at least 1 year
Willful failure to meet attestations or a willful misrepresentation of fact in an application	Due to employees not paid the required wage	Not to exceed $5,000 per violation	For at least 2 years
Willful failure to meet attestations or a willful misrepresentation of fact in an application that resulted in the displacement of a U.S. worker either 90 days before or after hiring an H-1B worker	Due to employees not paid the required wage	Not to exceed $35,000 per violation	For at least 3 years

Source: GAO analysis of 8 U.S.C. § 1182(n)(2)(C).

While the number of H-1B complaints and violations has increased from fiscal year 2000 through fiscal year 2005, the overall numbers remain small and may have been affected by changes to the program. As shown in table 4, our analysis of Labor's data found the number of complaints increased from 117 in fiscal year 2000 to 173 in fiscal year 2005. The number of cases with violations more than doubled over the same period. The most common violation was not paying H-1B workers the required wage. With the increase in violations, the amount of penalties also increased. In fiscal year 2000, 226 H-1B workers were found to be due back wages of $1.2 million, by fiscal year 2005 the number had increased to 604 workers with back wages due of $5.2 million. In addition to the payment of back wages, employers were required to pay civil money penalties of more than $400,000 over the same period.

Table 4: H-1B Complaints, Violations, Back Wages Due, and Fines Assessed

Fiscal year	Number of complaints	Number of cases with violations	Amount of back wages due (millions)	Number of employees due back wages	Civil money penalties assessed	H-1B fiscal year cap
2000	117	93	$1.2	226	$21,000	115,000
2001	192	67	0.6	135	17,750	195,000
2002	238	210	3.8	830	48,350	195,000
2003	148	264	4.0	552	136,890	195,000
2004	158	271	4.2	390	114,125	65,000
2005	173	217	5.2	604	103,350	65,000
Total	**1,026**	**1,122**	**$19.0**	**2,737**	**$441,465**	

Source: GAO analysis of Department of Labor, Wage and Hour Division data, the American Competitiveness and Workforce Improvement Act of 1996, and the American Competitiveness in the Twenty-First Century Act of 2000.

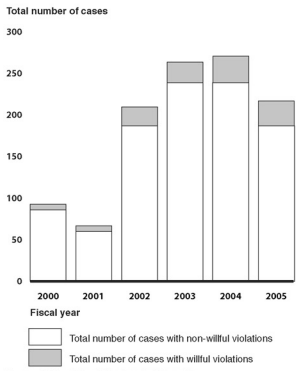
From fiscal year 2002 through fiscal year 2005, Labor requested over 50 debarment periods from Homeland Security for employers that committed certain violations—for example, willfully failing to pay an H-1B worker the required wage—that resulted in their being disqualified from participating in the H-1B program for a specified period of time.[15] Labor officials told us it is difficult to attribute changes in complaints and violations to any specific cause because of multiple legislative changes to the program, such as the temporary increase in the number of H-1B workers allowed to enter the country and the additional attestations for certain employers that expired and then were reinstated.

In addition to investigating complaints, Labor's Wage and Hour Division has recently begun randomly investigating employers who have willfully violated the program's requirements. Labor has had the statutory authority to conduct random investigations of these employers since 1998. Under this authority, Labor can subject employers on a case-by-case basis to random investigations up to 5 years from the date the employer first willfully violated the requirements of the H-1B program or willfully misrepresented a material fact in the labor condition application. Officials told us that the WHD did not schedule random H-1B investigations of willful violators until recently because, by definition, such employers are debarred from employing H-1B workers for a fixed number of years (they

[15] Homeland Security does not have a record of the number of debarment requests received in fiscal years 2000 and 2001. Labor does not have a record of its number of debarment requests for fiscal year 2000.

often go out of business due to the debarment), the number of such employers is very small (the total didn't reach 50 nationwide until late in fiscal year 2005) and trained H-1B investigators have heavy case loads. However, Labor said that it will initiate random investigations nationwide in fiscal year 2006. Labor has an existing database that it plans to use for targeting employers for investigations. The database contains information about employers who have previously violated their obligations under the H-1B program, including the types of violations and the penalties that were assessed. Although cases with willful violations represent a small number of all cases with violations, they have increased from 8 percent in fiscal year 2000 to 14 percent in fiscal year 2005. (See fig. 3) Officials said that they now have 59 cases on which they can follow-up to determine if the employer has committed another violation. Labor said that, in addition to initiating random investigations of willful violators nationwide, it will set up a system to track the data in its database and train its employees in fiscal year 2006. In April 2006, Labor sent a letter to its regional offices directing them each to initiate an investigation of at least one case prior to September 30, 2006.

Figure 3: Willful and Nonwillful Violations from Fiscal Year 2000 through Fiscal Year 2005



Sources: GAO analysis of Department of Labor data.

Labor Relies Primarily on Education to Promote Employer Compliance

Labor uses education as the primary method of promoting employer compliance with the H-1B program. For example, Labor conducts compliance assistance programs, posts guidance on its website, and explains employers' obligations under the law during complaint investigations.

Labor held a total of 6 H-1B compliance assistance programs for H-1B employers from fiscal year 2000 through fiscal year 2005. Typically, compliance assistance programs are conducted by Labor's district offices based upon requests by employers, employer associations, or employee groups. For example, in fiscal year 2002, Labor gave two presentations in Massachusetts, attended by 290 participants, mostly attorneys. In addition, Labor presented at two continuing education events for attorneys in Los Angeles and New Jersey in fiscal year 2004. Labor also holds seminars in response to requests for compliance information from employer associations and discusses compliance with H-1B program requirements

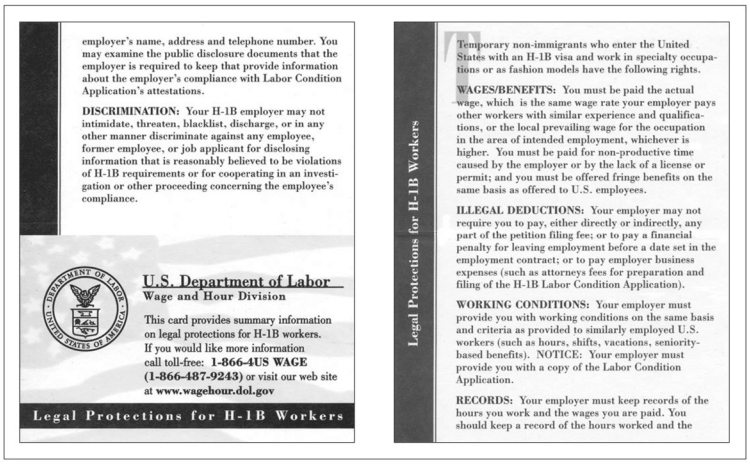
with companies that do not have pending lawsuits related to the H-1B program.

Labor provides information to employers through its website, such as employer guidance and fact sheets that describe employer responsibilities and employee rights under the H-1B program. Some of the fact sheets have not been updated since the program was amended by the H-1B Visa Reform Act in 2004, but officials told us they have developed 26 new fact sheets that will be made available on the agency's website this fiscal year. Labor also publicizes violation cases by issuing press releases on its website, particularly when it debars an employer. Labor officials told us that the purpose of the press releases is to show that there are consequences for not complying with the law.

Labor takes the opportunity to explain employer obligations under the law during its investigations of complaints filed against H-1B employers. At the beginning, an investigator sends the employer the regulations that pertain to the H-1B program and, during the investigation, highlights the law and regulations that are relevant to the case. The investigator also answers any questions the employer may have. At a final conference, Labor tells the employer which parts of the law the employer violated. Additionally, Labor always asks the employer it is investigating how it plans to change to come into compliance with the program.

Labor is working with the Department of State to provide information cards to H-1B workers about their employment rights. Workers receive the information cards with their visas. Labor also distributes the cards to employers so that they are aware of an H-1B worker's rights. The cards include information on employees' rights regarding wages and benefits, illegal deductions, working conditions, records, and discrimination. (See fig. 4.)

Figure 4: H-1B Worker Information Card



employer's name, address and telephone number. You may examine the public disclosure documents that the employer is required to keep that provide information about the employer's compliance with Labor Condition Application's attestations.

DISCRIMINATION: Your H-1B employer may not intimidate, threaten, blacklist, discharge, or in any other manner discriminate against any employee, former employee, or job applicant for disclosing information that is reasonably believed to be violations of H-1B requirements or for cooperating in an investigation or other proceeding concerning the employee's compliance.

U.S. Department of Labor
Wage and Hour Division

This card provides summary information on legal protections for H-1B workers. If you would like more information call toll-free: **1-866-4US WAGE (1-866-487-9243)** or visit our web site at **www.wagehour.dol.gov**

Legal Protections for H-1B Workers

Legal Protections for H-1B Workers

Temporary non-immigrants who enter the United States with an H-1B visa and work in specialty occupations or as fashion models have the following rights.

WAGES/BENEFITS: You must be paid the actual wage, which is the same wage rate your employer pays other workers with similar experience and qualifications, or the local prevailing wage for the occupation in the area of intended employment, whichever is higher. You must be paid for non-productive time caused by the employer or by the lack of a license or permit; and you must be offered fringe benefits on the same basis as offered to U.S. employees.

ILLEGAL DEDUCTIONS: Your employer may not require you to pay, either directly or indirectly, any part of the petition filing fee; or to pay a financial penalty for leaving employment before a date set in the employment contract; or to pay employer business expenses (such as attorneys fees for preparation and filing of the H-1B Labor Condition Application).

WORKING CONDITIONS: Your employer must provide you with working conditions on the same basis and criteria as provided to similarly employed U.S. workers (such as hours, shifts, vacations, seniority-based benefits). NOTICE: Your employer must provide you with a copy of the Labor Condition Application.

RECORDS: Your employer must keep records of the hours you work and the wages you are paid. You should keep a record of the hours worked and the

Source: Department of Labor.

Homeland Security and Justice also provide information to employers in a variety of ways such as publishing newsletters, responding to written inquiries from employers and their counsel, informational bulletins, answering questions for employers who call, and providing information on their websites. Homeland Security publishes informational bulletins for employers seeking to hire foreign workers. The Department also uses its website to advise the public of any changes in the H-1B program regarding filing fees or eligibility resulting from changes in the law. Justice engages in educational activities through public service announcements aimed at employers, workers, and the general public. The agency also trains employers, and works with other federal agencies to coordinate education programs for employers. Justice also has a telephone intervention hotline

for U.S. workers and H-1B employers to call when disputes arise. Justice uses the hotline to quickly address questions and to resolve problems. In addition, Justice answers e-mails, issues guidance, and provides information on its website.

Labor and Homeland Security Face Challenges Sharing Information

Labor, Homeland Security, and Justice all have responsibilities under the H-1B program, but Labor and Homeland Security could better address the challenges they face in sharing information. After Labor certifies an application, Homeland Security's USCIS reviews the information but cannot easily verify how many times the employer has used the application. Also, USCIS staff told us that, during their review, they may find evidence that employers are not meeting their H-1B obligations. However, current law precludes the Wage and Hour Division from using this information to initiate an investigation of the employer. In addition to Homeland Security, Labor also shares enforcement responsibilities with Justice, which pursues charges filed by U.S. workers who allege that they were not hired, or were displaced, so that an H-1B worker could be hired instead. From 2000 through 2005, Justice entered six out-of-court settlements to remedy violations and assessed $7,200 in penalties.

Labor and Homeland Security Coordinate to Process Employers' Requests to Hire H-1B Workers, but Do Not Use Certain Information to Investigate Possible Violations

Homeland Security's USCIS reviews Labor's certified application as part of the adjudication process; however, it lacks the ability to easily verify whether employers have submitted petitions for more workers than originally requested on the application. Labor can certify applications for multiple workers and, therefore, employers can use one application in support of more than one petition. However, USCIS' data system, CLAIMS 3, does not match each petition to its corresponding application because the system does not include a field for the unique number Labor assigns each application. As a result, USCIS cannot easily verify how many times the employer has used a given application or which petitions were supported by which application, potentially allowing employers to use the application for more workers than they were certified to hire. USCIS staff told us that when employers do not provide the names of the other H-1B workers approved using the same certified application, the adjudicator may request it from the employer. USCIS staff also told us that a letter is sent to the employer requesting the information and the employer has approximately 12 weeks to respond. Consequently, a request for information requires staff time and slows down the adjudication process. While USCIS told us it has attempted to add Labor's application case number to its database, it has not been able to because of the system's

memory limitations. USCIS told us it is currently transforming its information technology system; however, it will be several years before the new system is operational.

During the process of reviewing employers' petitions, USCIS may find evidence the employer is not meeting the requirements of the H-1B program, but current law precludes the Wage and Hour Division from using this information to initiate an investigation of the employer.[16] For example, to extend an H-1B worker's stay in the United States, an employer may submit a petition with the worker's W-2 form[17] as supporting documentation. USCIS staff told us they have reviewed petitions where the wage on the W-2 form was less than the wage the employer indicated it would pay on the original Labor application. In these cases, USCIS asks the employer to explain the wage discrepancy. If the employer has a legitimate explanation and documentation—for example the worker was on some type of extended leave—the petition may be approved. However, if the employer is unable to adequately explain the discrepancy, USCIS said it may deny the petition but generally does not report these employers to Labor for investigation. USCIS does not have a formal process for reporting the discrepancy to Labor. According to officials from Labor, it does not consider Homeland Security to be an aggrieved party; therefore, Labor would not initiate an investigation based on information received from, or a complaint filed by, Homeland Security.

Labor and Homeland Security also coordinate when employers have committed violations resulting in debarment. After Labor's Wage and Hour Division determines that an employer has committed a debarrable offense—such as willfully not paying an H-1B worker the required wage—Labor notifies USCIS, which in turn provides dates for the period of time that it will automatically deny petitions from the employer. Labor's Wage and Hour Division then sends a letter informing the employer that it is ineligible to sponsor workers for the H-1B program for that period of time. A copy of the letter is sent to Labor's Employment and Training Administration so that it will not certify any applications from the employer for the same period.

[16]Under the INA, as amended, information submitted by an employer for purposes of securing the employment of an H-1B nonimmigrant is prohibited from being considered a receipt of information for purposes of initiating an investigation based on a credible source under the INA. 8 U.S.C. § 1182(n)(2)(G).

[17]The W-2 form is the Internal Revenue Service's wage and tax statement.

Both Labor and USCIS officials said they are working to improve communication between the two agencies. For example, Labor, Homeland Security, and the State Department convened a multi-agency fraud working group, which met in March 2006, to discuss strategies for dealing with fraud in the H and L visa programs.[18]

Justice Handles U.S. Workers' Cases

Justice pursues charges filed by U.S. workers who allege that an H-1B worker was hired in their place. The Immigration and Nationality Act, as amended, gives U.S. workers the right to file a charge against an employer when they believe an employer preferred to hire an H-1B visa holder. When a charge has been filed, Justice's Office of Special Counsel opens an investigation for 120 or 210 days, as determined by statute. Charges may be resolved through a complaint before an administrative law judge, an out of court settlement, or a dismissal for lack of reasonable cause to believe a violation has occurred. Between 2000 and 2005, no cases were heard in court by an administrative law judge. Most of the 101 investigations started by Justice from 2000 through 2005 were found to be incomplete, withdrawn, untimely, dismissed, or investigated without finding reasonable cause for a violation. If Justice finds that an employer hired an H-1B worker instead of a U.S. worker, Justice may assess penalties, impose debarment, or seek administrative remedies such as back wages. Justice may assess penalties on cases settled out of court if it finds that an employer hired an H-1B worker over a better-qualified U.S. worker. From 2000 through 2005, Justice found discriminatory conduct in 6 out of the 97 investigations closed. Justice assessed a total of $7,200 in penalties in three of the six cases, all in 2003.[19]

[18] The H visa program also includes categories for other types of temporary workers, including agricultural workers (H-2A) and non-agricultural (H-2B) workers. The L visa program allows companies to transfer employees into the United States.

[19] In the three cases where penalties were assessed, employers advertised for only H-1B workers for various IT positions. Upon receiving notice of the charges, the employers immediately agreed not to post discriminatory advertising in the future and to take steps to recruit U.S. workers (as well as permanent and temporary residents, refugees, and asylees). In these cases, minimum penalties were imposed because there were no identifiable victims and by law, penalties are capped at $2,200 per violation or individual. In the three cases where penalties were not assessed, discrimination against U.S. workers appeared to be inadvertent, not intentional.

Conclusion

U.S. employers continue to request high numbers of foreign temporary workers under the H-1B nonimmigrant visa program. Labor, along with Homeland Security and Justice, must address the desires of U.S. employers for skilled foreign workers as well as ensure the program's integrity and protect both domestic and foreign workers. Labor's authority to review the Labor Condition Application is restricted to looking for completeness and obvious inaccuracies, but it could improve its oversight of employers' compliance with program requirements. Additionally, USCIS may find information in the materials submitted by an H-1B employer that indicates the employer is not complying with program requirements. However, current law restricts Labor from using such evidence to initiate an investigation of the employer. USCIS also has an opportunity to improve its oversight of employers' petitions to hire H-1B workers by matching information from its petition database with Labor's application case numbers to detect whether employers are requesting more H-1B workers than they were originally certified to hire. As Congress deliberates changes to U.S. immigration policy, ensuring that employers are in compliance with the program's requirements that protect both domestic and H-1B workers is essential.

Matter for Congressional Consideration

To increase employer compliance with the H-1B program and protect the rights of U.S. and H-1B workers, Congress should consider (1) eliminating the restriction on using application and petition information submitted by employers as the basis for initiating an investigation, and (2) directing Homeland Security to provide Labor with information received during the adjudication process that may indicate an employer is not fulfilling its H-1B responsibilities.

Recommendations for Executive Action

To strengthen oversight of employers' applications to hire H-1B workers, we recommend that Labor improve its procedures for checking completeness and obvious inaccuracies, including developing more stringent, cost-effective methods of checking for wage inaccuracies and invalid employer identification numbers.

To ensure employers are complying with program requirements, we recommend that as USCIS transforms its information technology system, the Labor application case number be included in the new system, so that adjudicators are able to quickly and independently ensure that employers are not requesting more H-1B workers than were originally approved on their application to Labor.

Agency Comments and Our Evaluation

We provided a draft of this report to the Departments of Labor, Homeland Security, and Justice for their review and comments. Each agency provided technical comments, which we incorporated as appropriate. Justice did not have formal comments on our report.

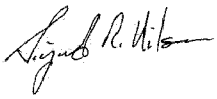
Homeland Security agreed with our recommendations and stated that USCIS intends to include Labor's application case number in its new information technology system.

Labor questioned whether our recommendation for more stringent measures is supported by the magnitude of the error rate that was found, as well as whether the benefits of instituting such measures would equal or exceed the added costs of implementing them. In addition, Labor said that Congress intentionally limited the scope of Labor's application review in order to place the focus for achieving program integrity on USCIS.

We believe that Labor is at risk of certifying H-1B applications that contain more errors than were found in the scope of our review. For example, we checked only for employer identification numbers with invalid prefix codes, and did not look for other combinations of invalid numbers or data. Therefore, we do not know the true magnitude of the error rate in the certification process. We continue to believe there are cost-effective methods that Labor could use to check the applications more stringently that would enhance the integrity of the H-1B process.

We are sending copies of this report to the Secretary of Labor, the Secretary of Homeland Security, the Attorney General, relevant congressional committees, and others who are interested. Copies will also be made available to others upon request. The report will be available on GAO's web site at http://www.gao.gov.

If you or your staff have any questions about this report please contact me on (202) 512-7215 or nilsens@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix VII.



Sigurd R. Nilsen
Director, Education, Workforce
and Income Security Issues

Appendix I: Scope and Methodology

To understand the H-1B certification, adjudication, and enforcement processes and the responsibilities of each agency involved, we hosted a joint meeting with officials from the Departments of Labor, Homeland Security U.S. Citizen and Immigration Services (USCIS), and Justice. We also reviewed laws and regulations related to the H-1B program.

To obtain information on the characteristics of employers who filed Labor Condition Applications (applications) and the positions they sought to fill with H-1B workers, we analyzed the Efile H-1B Disclosure Data from the Employment and Training Administration (ETA) of the Department of Labor. These data included all the applications filed electronically from January 2002 through September 2005.[1] We analyzed the data from a total of 960,563 applications to determine (1) the number that had been certified or denied, (2) the employers who requested the most workers, (3) the most frequently requested occupation codes, (4) the locations of the H-1B positions, (5) the source of the prevailing wage used by employers, and (6) how many applications were certified with invalid employer identification number prefixes when compared with a list of valid prefix codes obtained from the Internal Revenue Service. We also analyzed how prevailing wages compared to actual wage rates. The H-1B Visa Reform Act, which was passed on December 8, 2004, requires employers to pay H-1B workers at least 100 percent of the prevailing wage for each specific occupation and location. Prior to the enactment of this law, Labor's regulations permitted employers to pay actual wages that were only 95 percent of the prevailing wage. Accordingly, to ensure we did not incorrectly identify any applications as erroneously certified during the time between the passage of the H-1B Visa Reform Act and Labor's implementation of the new 100 percent requirement, our analysis only identified those cases where the actual wage rate was less than 95 percent of the prevailing wage.

Additionally, we interviewed officials from ETA regarding the application approval process, including the circumstances under which applications are reviewed by an analyst for discrepancies, how prevailing wage sources are determined to be legitimate, and the ETA resources that are used to process and review applications. Additionally, we accessed the application online system to determine when the employer would receive error

[1] Our analysis included applications filed electronically from January 14, 2002, through September 30, 2005, with the exception of five applications that were reviewed by Labor on October 2, 2005.

notices when filling out the application. We conducted a data reliability assessment of the H-1B Disclosure Data by testing for completeness and accuracy, reviewing documentation, and interviewing knowledgeable officials. We found it to be sufficiently reliable for our purposes.

To analyze the number and type of H-1B complaints received by Labor's Wage and Hour Division (WHD) and the outcomes of the associated investigations, we received a data extract from WHD's Wage and Hour Investigative Support and Reporting Database (WHISARD). From fiscal years 2000 through 2005, we analyzed the number of H-1B complaints, violations, and the penalties assessed including the number of employees due back wages, the amount of back wages due, civil money penalties, the most common violation, and the trend in the number of willful violations as a percentage of all violations. We also interviewed WHD officials on the complaint and investigation process, the appeal process, educational outreach to improve employer compliance, and the WHD resources used to process and investigate complaints. We conducted a data reliability assessment of the WHISARD data by testing for completeness and accuracy, reviewing documentation, and interviewing knowledgeable officials. We found it to be sufficiently reliable for our purposes.

To determine the number of employers who had been debarred, or disqualified from participating in the H-1B program for a specified period of time, we requested that WHD officials provide the number of times per fiscal year from 2000 through 2005 that they sent a letter to USCIS requesting a debarment period. We also requested that USCIS provide the number of request letters it had received from WHD.

To determine the number and type of H-1B petitions submitted by employers and adjudicated by the Department of Homeland Security US Citizenship and Immigration Service, we analyzed service center data from the Computer Linked Application Information Management System, Version 3.0 (CLAIMS 3) database from fiscal years 2000 through 2005. We analyzed (1) the number of petitions approved or denied; (2) the basis for the classification of the worker, such as whether the petition was for a new H-1B employee or for a continuation of a worker's stay; (3) the employer's requested action; (4) the educational level of the H-1B workers; (5) the number of H-1B workers requested on each petition; and (6) the occupation codes requested. Additionally, we conducted a data reliability assessment of selected variables by testing for completeness and accuracy, reviewing documentation, and interviewing knowledgeable officials. We reported on the variables that we found to be reliable enough

for our purposes. To understand the policies and procedures of the program, we interviewed officials at USCIS headquarters. To understand the petition adjudication process, we conducted site visits at the USCIS Service Centers in Saint Albans, Vermont, and Laguna Niguel, California. According to USCIS, from October 2004 through December 2005 these service centers combined processed 63 percent of the H-1B petitions. To obtain context and facilitate our understanding of the electronic CLAIMS 3 data, we requested to review a non-probability sample of 48 petition files representing a variety of H-1B adjudication processes. During our site visits, we reviewed those that were available.

To determine the type of violations and the process for investigations of U.S. worker displacement allegations we interviewed Department of Justice officials. We analyzed a summary report provided by Justice of the number of employers investigated from 2000 through 2005 and the outcomes of those cases. To determine the number and outcomes of investigations, and the types and amounts of penalties assessed on employers, we obtained documentation from Justice.

Appendix II: Department of Labor Labor Condition Application

Labor Condition Application for Nonimmigrant Workers

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035
OMB Approval: 1205-0310
Expiration Date: 11/30/2005

A. Program Designation *You must choose one:*
- ○ H-1B
- ○ H-1B1 Chile
- ○ H-1B1 Singapore
- ○ E-3 Australia

B. Employer's Information *If you want the application returned by mail, leave the Return Fax Number blank.*

1. Return Fax Number ( ) -
2. Employer's Name
3. Employer's Address (Number and Street)
4. Employer's City — State — Zip/Postal Code
5. Employer's EIN Number -
6. Employer's Phone Number ( ) - — Extension

C. Rate of Pay

1. Wage Rate (or Rate From) (Required): $
2. Rate Up To (Optional): $
3. Rate is Per: ○ Year ○ Week ○ Month ○ Hour ○ 2 Weeks
4. Is this position part-time? ○ Yes ○ No

Please Note: Part-time hours worked by nonimmigrant(s) will be in the range of hours stated on the USCIS Form(s) I-129.

D. Period of Employment and Occupation Information *Please Note: The Date Information MUST be in MM/DD/YYYY format*

1. Begin Date / /
2. End Date / /
3. Occupational Code
4. Number of Nonimmigrant Workers
5. Job Title

E. Information Relating to Work Location for the Nonimmigrant Worker(s) This section is REQUIRED

Do NOT write "Same As Above". This section MUST be filled out.

1. City — State
2. Prevailing Wage $
3. Year Source Published
4. Wage Source: ○ OES ○ Collective Bargaining Agreement ○ Other
5. Wage is Per: ○ Year ○ Week ○ Month ○ Hour ○ 2 Weeks

If OTHER is chosen as the Wage Source, Numbers 5 and 6 in this section MUST be filled out.

6. Other Wage Source

Page Check — If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 4 digit number that is repeated on all 3 pages.

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Form ETA 9035 - Page 1 of 3

Labor Condition Application for Nonimmigrant Workers

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035
OMB Approval: 1205-0310
Expiration Date: 11-30-2008

E. Subsection A: Information for Additional or Subsequent Work Location

This Section should be completed only if filing for more than 1 work location.

1. City: ____ State: ____

2. Prevailing Wage: $ ____

3. Wage is Per: ○ Year ○ Week ○ Month ○ Hour ○ Weeks

4. Wage Source: ○ OES ○ Collective Bargaining Agreement ○ Other

If OTHER is chosen as the Wage Source, Numbers 5 and 6 in this section MUST be filled out.

5. Year Source Published: ____

6. Other Wage Source: ____

F. Employer Labor Condition Statements

Please Note: In order for your application to be processed, you MUST read section E of the Labor Condition Application cover pages under the heading "Employer Labor Condition Statements" and agree to all 4 labor condition statements summarized below:

(1) Wages: Pay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time. Offer nonimmigrants benefits on the same basis as U.S. workers.

(2) Working Conditions: Provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed.

(3) Strike, Lockout, or Work Stoppage: No strike or lockout in the occupational classification at the place of employment.

(4) Notice: Notice to union or to workers at the place of employment. A copy of this form to the nonimmigrant worker(s).

I have read and agree to Employer Labor Condition Statements 1, 2, 3, and 4 as set forth in Section E of the Labor Condition Application Cover Pages. ○ Yes ○ No

F-1. Additional Employer Labor Condition Statements - H-1B Employers Only

Please Note: In order for an application regarding H-1B nonimmigrants to be processed, you MUST read Section F-1 - Subsections 1 and 2 of the Labor Condition Application cover pages under the heading "Additional Employer Labor Condition Statements" and choose one of the 3 alternatives (A, B, or C) listed below in Subsection 1. If you mark Alternative B, you MUST read Section F-1 - Subsection 2 of the cover pages under the heading "Additional Employer Labor Condition Statements" and indicate your agreement to all 3 additional statements summarized below in Subsection 2.

1. Subsection 1

Choose ONE of the following 3 alternatives:

A ○ Employer is not H-1B dependent and is not a willful violator.

B ○ Employer is H-1B dependent and/or a willful violator.

C ○ Employer is H-1B dependent and/or a willful violator BUT will use this application ONLY to support H-1B petitions for exempt nonimmigrants.

2. Subsection 2

If Alternative B in Subsection 1 is marked, the following Additional Labor Condition Statements are applicable:

A. Displacement: Non-displacement of the U.S. workers in employer's work force;

B. Secondary Displacement: Non displacement of U.S. workers in another employer's work forces; and

C. Recruitment and Hiring: Recruitment of U.S. workers and hiring of U.S. worker applicant(s) who are equally or better qualified than the H-1B nonimmigrant(s).

I have read and agree to Additional Labor Condition Statements 1 A, B, and C. ○ Yes ○ No

Page Link: ____

If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 5 digit number that is repeated on all 3 pages.

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Form ETA 9035 - Page 2 of 3

Labor Condition Application for Nonimmigrant Workers

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035
OMB Approval: 1205-0310
Expiration Date: 11-30-2008

G. Public Disclosure Information
You must choose one of the two options listed in this Section.

1. Public disclosure information will be kept at: ○ Employer's principal place of business
○ Place of employment

H. Declaration of Employer
By signing this form, I, on behalf of the employer, attest that the information and labor condition statements provided are true and accurate; that I have read the sections E, F, and I-1 of the cover pages (Form ETA 9035CP), and that I agree to comply with the Labor Condition Statements as set forth in the cover pages and with the Department of Labor regulations (20 CFR part 655, Subparts H and I). I agree to make this application, supporting documentation, and other records available to officials of the Department of Labor upon request during any investigation under the Immigration and Nationality Act.

1. First Name of Hiring or Other Designated Official MI
2. Last Name of Hiring or Other Designated Official
3. Hiring or Other Designated Official Title
4. Signature - Do NOT let signature extend beyond the box
5. Date Signed / /

Making fraudulent representations on this Form can lead to civil or criminal action under 18 U.S.C. 1001, 18 U.S.C. 1546, or other provisions of law.

I. Contact Information

1. Contact First Name MI
2. Contact Last Name
3. Contact Phone Number ( ) - Extension

J. U.S. Government Agency Use Only

By virtue of my signature below, I hereby acknowledge this application certified for

Date Starting and Date Ending

Signature and Title of Authorized DOL Official ETA Case Number Date

The Department of Labor is not the guarantor of the accuracy, truthfulness, or adequacy of a certified labor condition application.

K. Complaints

Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division, U.S. Department of Labor. Complaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with: US Department of Justice ? Office of the Special Counsel for Immigration-Related Unfair Employment Practices ? 950 Pennsylvania Ave. NW ? Washington, DC ? 20530.

Page Link

If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 6 digit number that is repeated on all 3 pages.

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Form ETA 9035 - Page 3 of 3

Appendix III: Department of Homeland Security USCIS Petition for a Nonimmigrant Worker and H-Classification Supplement

OMB No 1615-0009; Expires 08/31/08

Department of Homeland Security
U.S. Citizenship and Immigration Services

I-129, Petition for a Nonimmigrant Worker

START HERE - Please type or print in black ink.

Part 1. Information about the employer filing this petition. *(If the employer is an individual, complete Number 1. Organizations should complete Number 2.)*

1. Family Name (Last Name) — Given Name (First Name)
Full Middle Name — Telephone No. w/Area Code ( )
2. Company or Organization — Telephone No. w/Area Code ( )
Mailing Address (Street Number and Name) — Suite #
C/O: (In Care Of)
City — State/Province
Country — Zip/Postal Code — E-Mail Address (If Any)
Federal Employer Identification # — U.S. Social Security # — Individual Tax #

Part 2. Information about this petition. *(See instructions for fee information.)*

1. **Requested Nonimmigrant Classification.** *(Write classification symbol.)*
2. **Basis for Classification** (Check one):
   a. ☐ New employment.
   b. ☐ Continuation of previously approved employment without change with the same employer.
   c. ☐ Change in previously approved employment.
   d. ☐ Concurrent employment.
   e. ☐ Change of employer.
   f. ☐ Amended petition.
3. If you checked Box 2b, 2c, 2d, 2e, or 2f, give the petition receipt number.
4. **Prior Petition.** If the beneficiary is in the U.S. as a nonimmigrant and is applying to change and/or extend his or her status, give the prior petition or application receipt #:
5. **Requested Action** *(Check one)*:
   a. ☐ Notify the office in Part 4 so the person(s) can obtain a visa or be admitted. (NOT if a petition is not required for an E-1, E-3 or R visa).
   b. ☐ Change the person(s)' status and extend their stay since the person(s) are all now in the U.S. in another status *(see instructions for limitations)*. This is available only where you check "New Employment" in Item 2, above.
   c. ☐ Extend the stay of the person(s) since they now hold this status.
   d. ☐ Amend the stay of the person(s) since they now hold this status.
   e. ☐ Extend the status of a nonimmigrant classification based on a Free Trade Agreement. *(See Free Trade Supplement for TN and H1B1 to Form I-129)*.
   f. ☐ Change status to a nonimmigrant classification based on a Free Trade Agreement. *(See Free Trade Supplement for TN and H1B1 to Form I-129)*.
6. **Total number of workers in petition** *(See instructions regarding to when more than one worker can be included)*:

For USCIS Use Only

Received	Receipt
Done	
Date	
Resubmitted	
Date	
Date	
Relocated Sent	
Date	
Date	
Relocated Rec'd	
Date	
Date	
☐ Petitioner Interviewed On	
☐ Beneficiary Interviewed On	

Class
6 of Workers
Priority Number
Validity Dates: From ____ To ____

☐ **Classification Approved.**
☐ Consulate/DOE/PFI Notified
At ____
☐ Extension Granted
☐ COS/Extension Granted

Partial Approval *(explain)*

Action Block

To Be Completed by
☐ *Attorney or Representative*, if any. Fill in box if G-28 is attached to represent the applicant.
ATTY State License #

Form I-129 (Rev. 08/31/05)N (Now, paper edition may be used until 08/30/06. Current filers may use prior electronic edition until 09/08/06)

Appendix III: Department of Homeland Security USCIS Petition for a Nonimmigrant Worker and H-Classification Supplement

Part 3. Information about the person(s) you are filing for. *Complete the blocks below. Use the continuation sheet to name each person included in this petition.*

1. If an Entertainment Group, Give the Group Name

Family Name *(Last Name)* | Given Name *(First Name)* | Full Middle Name

All Other Names Used *(include maiden name and names from all previous marriages)*

Date of Birth *(mm/dd/yyyy)* | U.S. Social Security # *(if any)* | A # *(if any)*

Country of Birth | Province of Birth | Country of Citizenship

2. If in the United States, Complete the Following:

Date of Last Arrival *(mm/dd/yyyy)* | I-94 # *(Arrival/Departure Document)* | Current Nonimmigrant Status

Date Status Expires *(mm/dd/yyyy)* | Passport Number | Date Passport Issued *(mm/dd/yyyy)* | Date Passport Expires *(mm/dd/yyyy)*

Current U.S. Address

Part 4. Processing Information.

1. If the person named in **Part 3** is outside the United States or a requested extension of stay or change of status cannot be granted, give the U.S. consulate or inspection facility you want notified if this petition is approved.

Type of Office *(Check one)*: ☐ Consulate ☐ Pre-flight inspection ☐ Port of Entry

Office Address *(City)* | U.S. State or Foreign Country

Person's Foreign Address

2. Does each person in this petition have a valid passport?

☐ Not required to have passport ☐ No - explain on separate paper ☐ Yes

3. Are you filing any other petitions with this one? ☐ No ☐ Yes - How many?

4. Are applications for replacement/initial I-94s being filed with this petition? ☐ No ☐ Yes - How many?

5. Are applications by dependents being filed with this petition? ☐ No ☐ Yes - How many?

6. Is any person in this petition in removal proceedings? ☐ No ☐ Yes - explain on separate paper

Form I-129 (Rev. 03/17/03)N (Prior paper editions may be used until 04/30/05. Certain E-filers may use prior electronic editions until 09/30/05) Page 2

Part 4. Processing Information. *(Continued)*

7. Have you ever filed an immigrant petition for any person in this petition? ☐ No ☐ Yes - explain on separate paper

8. If you indicated you were filing a new petition in **Part 2**, within the past seven years has any person in this petition:
   a. Ever been given the classification you are now requesting? ☐ No ☐ Yes - explain on separate paper
   b. Ever been denied the classification you are now requesting? ☐ No ☐ Yes - explain on separate paper

9. Have you ever previously filed a petition for this person? ☐ No ☐ Yes - explain on separate paper

10. If you are filing for an entertainment group, has any person in this petition not been with the group for at least one year? ☐ No ☐ Yes - explain on separate paper

Part 5. Basic information about the proposed employment and employer. *Attach the supplement relating to the classification you are requesting.*

1. Job Title
2. Nontechnical Job Description
3. LCA Case Number
4. NAICS Code
5. Address where the person(s) will work if different from address in **Part 1**. *(Street number and name, city/town, state, zip code)*
6. Is this a full-time position?
   ☐ No - Hours per week: ☐ Yes - Wages per week or per year:
7. Other Compensation *(Explain)*
8. Dates of intended employment *(mm/dd/yyyy)*:
   From: To:
9. Type of Petitioner - *Check one:*
   ☐ U.S. citizen or permanent resident ☐ Organization ☐ Other - explain on separate paper
10. Type of Business
11. Year Established
12. Current Number of Employees
13. Gross Annual Income
14. Net Annual Income

Form I-129 (Rev. 03/17/05)N (Prior paper editions may be used until 04/30/05. Certain E-filers may use prior electronic editions until 09/30/05) Page 3

Part 6. Signature. *Read the information on penalties in the instructions before completing this section.*

I certify, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it is all true and correct. If filing this on behalf of an organization, I certify that I am empowered to do so by that organization. If this petition is to extend a prior petition, I certify that the proposed employment is under the same terms and conditions as stated in the prior approved petition. I authorize the release of any information from my records, or from the petitioning organization's records that the U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit being sought.

Signature | **Daytime Phone Number** *(Area/Country Code)* ( )

Print Name | **Date** *(mm/dd/yyyy)* ( )

NOTE: If you do not completely fill out this form and the required supplement, or fail to submit required documents listed in the instructions, the person(s) filed for may not be found eligible for the requested benefit and this petition may be denied.

Part 7. Signature of person preparing form, if other than above.

I declare that I prepared this petition at the request of the above person and it is based on all information of which I have any knowledge.

Signature | **Daytime Phone Number** *(Area/Country Code)* ( )

Print Name | **Date** *(mm/dd/yyyy)*

Firm Name and Address

Form I-129 (Rev. 03/17/05)N (Prior paper editions may be used until 04/30/05. Certain E-filers may use prior electronic editions until 09/30/05) Page 4

Appendix III: Department of Homeland Security USCIS Petition for a Nonimmigrant Worker and H-Classification Supplement

Department of Homeland Security
U.S. Citizenship and Immigration Services

OMB No. 1615-0009

H Classification Supplement to Form I-129

1. Name of person or organization filing petition:

2. Name of person or total number of workers or trainees you are filing for:

3. List the alien's and any dependent family member's prior periods of stay in H classification in the United States for the last six years. Be sure to list only those periods in which the alien and/or family members were actually in the United States in an H classification. **NOTE:** Submit photocopies of Forms I-94, I-797 and/or other USCIS issued documents noting these periods of stay in the H classification. If more space is needed, attach an additional sheet(s). (If applying for H-2A/H-2B classification skip this item.)

Subject's Name	Period of Stay *(mm/dd/yyyy)*	Subject's Name	Period of Stay *(mm/dd/yyyy)*
	From: To:		From: To:
	From: To:		From: To:

4. Classification sought *(Check one)*:

- ☐ H-1B1 Specialty occupation
- ☐ H-1B1 Trade agreement with Chile or Singapore
- ☐ H-1B2 Exceptional services relating to a cooperative research and development project administered by the U.S. Department of Defense (DOD)
- ☐ H-1B3 Fashion model of national or international acclaim
- ☐ H-1C Registered nurse
- ☐ H-2A Agricultural worker
- ☐ H-2B Non-agricultural worker
- ☐ H-3 Trainee
- ☐ H-3 Special education exchange visitor program

Section 1. Complete this section if filing for H-1B classification.

1. Describe the proposed duties

2. Alien's present occupation and summary of prior work experience

Statement for H-1B specialty occupations only:

By filing this petition, I agree to the terms of the labor condition application for the duration of the alien's authorized period of stay for H-1B employment.

Petitioner's Signature	Print or Type Name	Date *(mm/dd/yyyy)*

Statement for H-1B specialty occupations and U.S. Department of Defense projects:

As an authorized official of the employer, I certify that the employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized stay.

Signature of Authorized Official of Employer	Print or Type Name	Date *(mm/dd/yyyy)*

Statement for H-1B U.S. Department of Defense projects only:

I certify that the alien will be working on a cooperative research and development project or a co-production project under a reciprocal government-to-government agreement administered by the U.S. Department of Defense.

DOD Project Manager's Signature	Print or Type Name	Date *(mm/dd/yyyy)*

Form I-129 Supplement H (Rev. 03/17/05)N (Prior paper editions may be used until 04/30/05. Certain E-filers may use prior electronic editions until 09/30/05)

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Appendix III: Department of Homeland Security USCIS Petition for a Nonimmigrant Worker and H-Classification Supplement

Section 2. Complete this section if filing for H-2A or H-2B classification.

1. Employment is: *(Check one)*

a. ☐ Seasonal
b. ☐ Peakload
c. ☐ Intermittent
d. ☐ One-time occurence

2. Temporary need is: *(Check one)*

a. ☐ Unpredictable
b. ☐ Periodic
c. ☐ Recurrent annually

3. Explain your temporary need for the alien's services *(attach a separate sheet(s) paper if additional space is needed)*.

Section 3. Complete this section if filing for H-2A classification.

The petitioner and each employer consent to allow government access to the site where the labor is being performed for the purpose of determining compliance with H-2A requirements. The petitioner further agrees to notify USCIS in the manner and within the time frame specified if an H-2A worker absconds, or if the authorized employment ends more than five days before the relating certification document expires, and pay liquidated damages of ten dollars ($10.00) for each instance where it cannot demonstrate compliance with this notification requirement. The petitioner agrees also to pay liquidated damages of two hundred dollars ($200.00) for each instance where it cannot be demonstrated that the H-2A worker either departed the United States or obtained authorized status during the period of admission or within five days of early termination, whichever comes first.

The petitioner must execute **Part A**. If the petitioner is the employer's agent, the employer must execute **Part B**. If there are joint employers, they must each execute **Part C**.

Part A. Petitioner:

By filing this petition, I agree to the conditions of H-2A employment and agree to the notice requirements and limited liabilities defined in 8 CFR 214.2(h)(5)(v).

Petitioner's Signature	Print or Type Name	Date *(mm/dd/yyyy)*

Part B. Employer who is not the petitioner:

I certify that I have authorized the party filing this petition to act as my agent in this regard. I assume full responsibility for all representations made by this agent on my behalf and agree to the conditions of H-2A eligibility.

Employer's Signature	Print or Type Name	Date *(mm/dd/yyyy)*

Form I-129 Supplement H (Rev. 03/17/03)N (Prior paper editions may be used until 04/30/05.
Certain E-filers may use prior electronic editions until 09/30/05)

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Part C. Joint Employers:

I agree to the conditions of H-2A eligibility.

Joint Employer's Signature(s)	Print or Type Name	Date *(mm/dd/yyyy)*
Joint Employer's Signature(s)	**Print or Type Name**	**Date** *(mm/dd/yyyy)*
Joint Employer's Signature(s)	**Print or Type Name**	**Date** *(mm/dd/yyyy)*
Joint Employer's Signature(s)	**Print or Type Name**	**Date** *(mm/dd/yyyy)*

Section 4. Complete this section if filing for H-3 classification.

1. If you answer "yes" to any of the following questions, attach a full explanation.

a. Is the training you intend to provide, or similar training, available in the alien's country?	☐ No	☐ Yes
b. Will the training benefit the alien in pursuing a career abroad?	☐ No	☐ Yes
c. Does the training involve productive employment incidental to training?	☐ No	☐ Yes
d. Does the alien already have skills related to the training?	☐ No	☐ Yes
e. Is this training an effort to overcome a labor shortage?	☐ No	☐ Yes
f. Do you intend to employ the alien abroad at the end of this training?	☐ No	☐ Yes

2. If you do not intend to employ this person abroad at the end of this training, explain why you wish to incur the cost of providing this training and your expected return from this training.

Form I-129 Supplement H (Rev. 03/17/05)N (Prior paper editions may be used until 04/30/05.
Certain E-filers may use prior electronic editions until 09/30/05)

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Appendix IV: Data Tables

The following tables provide additional information on analyses conducted on the application data from the Department of Labor's Efile H-1B Disclosure Database and the petition data from USCIS's Computer Linked Application Information Management System, Version 3.0.[1]

A. Analyses on the application data obtained from the Department of Labor's Efile H-1B Disclosure Data:

Table 5: Companies Electronically Filing Applications for the Most H-1B Workers from January 2002 to September 2005

Company	Number of workers requested
1	187,337
2	39,569
3	29,353
4	20,062
5	20,039
6	19,791
7	18,523
8	18,446
9	17,200
10	16,717

Source: GAO analysis of Department of Labor data.

Table 6: Prevailing Wage Sources Used by Employers on Labor Condition Applications

Fiscal year[a]	State workforce agency	Collective bargaining agreement	Other
2002	24%	2%	74%
2003	21%	2%	77%
2004	18%	1%	80%
2005	16%	2%	82%

Source: GAO analysis of Department of Labor data.

[a]January 2002 through September 2005.

[b]Other sources of prevailing wages used by employers include the Department of Labor's Occupational Employment Statistics Survey and private employment surveys.

[1] Values may not total to 100 percent due to rounding.

B. Analyses on the H-1B petition data obtained from USCIS's Computer Linked Application Information Management System Version 3.0 (CLAIMS 3):

Table 7: Number of H-1B Petitions Approved and Denied

Fiscal year	Total petitions	Petitions approved[a]	Percentage approved	Petitions denied[a]	Percentage denied
2000	293,857	284,845	97	9,012	3
2001	329,972	316,894	96	13,078	4
2002	209,746	199,410	95	10,336	5
2003	225,768	216,225	96	9,543	4
2004	307,466	294,544	96	12,922	4
2005	258,142	253,450	98	4,692	2
Total	**1,624,951**	**1,565,368**	**96**	**59,583**	**4**

Source: GAO analysis of Department of Homeland Security data.

[a]Petitions were included in the fiscal year based on the date they were received by USCIS.

Table 8: Basis for Workers' H-1B Classification

Fiscal year	New employment	Continued employment with same employer	Change in employment	New concurrent employment[a]	Change of employer[b]	Amended petition[b]
2000	71%	15%	13%	0.8%	N/A	N/A
2001	73%	15%	12%	0.7%	N/A	N/A
2002	66%	21%	12%	0.9%	N/A	N/A
2003	60%	29%	11%	0.8%	N/A	N/A
2004	64%	27%	8%	0.7%	N/A	N/A
2005	55%	31%	6%	0.6%	6%	0.6%

Source: GAO analysis of Department of Homeland Security data.

Note: N/A=not applicable.

[a]Concurrent employment is when an H-1B worker is employed by multiple employers with overlapping approved dates of employment.

[b]The change of employer and amended petition categories were not on the Form I-129 H-1B petition until March 2005.

Table 9: Employers' Requested Action on Petitions for H-1B Workers

Fiscal year	Notify the office[1]	Change and extend status	Extend the worker's stay	Amend the worker's stay
2000	32%	24%	44%	0.4%
2001	33%	27%	41%	0.1%
2002	18%	34%	48%	0.2%
2003	20%	29%	52%	0.1%
2004	26%	27%	47%	0%
2005	21%	23%	54%	1.6%

Source: GAO analysis of Department of Homeland Security data.

[1]Employers check 'notify the office' to indicate whether the petition approval should be sent to a consulate, a port of entry, or preflight inspection.

Table 10: Workers' Education Level on H-1B Petitions

Fiscal year[1]	Less than a Bachelor's degree	Bachelor's degree	Master's degree	Professional degree	Doctorate degree
2003	2%	50%	30%	6%	12%
2004	1%	50%	34%	5%	10%
2005	1%	44%	37%	5%	12%

Source: GAO analysis of Department of Homeland Security data.

[1]We did not report on fiscal year 2000 through fiscal year 2002 because of missing data.

Table 11: Top Five Occupation Codes Requested on H-1B Petitions, FY 2000 through FY 2005

	Occupational code title	Occupation code	Number of times requested on petitions
1	Occupations in Systems Analysis and Programming	030	674,805
2	Occupations in College and University Education	090	94,685
3	Accountants, Auditors, and Related Occupations	160	68,256
4	Electrical/Electronics Engineering Occupations	003	65,974
5	Other Computer Related Occupations	039	58,429

Source: GAO analysis of Department of Homeland Security data.

Appendix V: Comments from the Department of Labor

U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, D.C. 20210

JUN 19 2006

Mr. Sigurd R. Nilsen
Director
Education, Workforce and Income Security Issues
U.S. Government Accountability Office
441 G Street, NW
Washington, D.C. 20548

Dear Mr. Nilsen:

Thank you for the opportunity to comment on the draft Government Accountability Office (GAO) report titled, "H-1B Visa Program: Labor Could Improve Its Oversight and Increase Information Sharing with Homeland Security," GAO-06-720. We have appreciated the opportunity to contribute information to the report as well as the opportunity to discuss our experiences in continuously improving the management of the H-1B program within the confines of the authority granted to us by law.

In this regard, our comments focus primarily on the GAO recommendation for executive action that suggests that Labor should improve its procedures for checking completeness and obvious inaccuracies (in H-1B Labor Condition Applications, or LCAs), including developing more stringent, cost effective methods of checking for wage inaccuracies and invalid employer identification numbers. This recommendation is based on findings that illustrate that over a period of approximately three years, from January 2002 through September 2005, Labor has processed 960,000 LCAs, of which 3,229 were certified even though they displayed incorrect prevailing wage information, and 1,000 were considered "suspect" because of questionable employer identification numbers (EIN).

The period covered by the GAO's review of LCAs was one of increasing demand by U.S. employers for H-1B workers. During this period of increasing activity, Labor introduced technology-based solutions to handling an increased workload to assure adherence to the statutory requirement to certify or deny an LCA within seven (7) days. Notwithstanding this increased workload, as the GAO points out the error rate for the LCAs they reviewed was low.

We would underscore the fact that the error rate was *extremely* low compared to the universe of applications processed, i.e., about three-tenths of one percent for LCAs where wage information errors were found and one-tenth of one percent where suspect EINs were identified. This error rate, by most standards, does not signal a significant program weakness. While Labor will continue to work toward achieving a zero error rate, we note that there is some question as to whether GAO's recommendation for more stringent measures to achieve a lower (or zero) incidence of error is supported by the magnitude of

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the error rate that was found. It is unclear whether the added benefits of instituting more stringent measures would equal or exceed the added costs of implementing them.

This cost-benefit question is a key for Labor given our view that Congress intentionally limited the scope of our Departmental review of LCAs because they wanted to place the focus for achieving program integrity on the U.S. Citizenship and Immigration Services' more in-depth review of the petitions filed for each non-immigrant worker. The LCA, and its limited review by Labor, was intended to establish an attestation of compliance with the program's wage and labor standards that would support a subsequent USCIS enforcement effort. Labor believes that the current procedure followed for reviewing LCAs is serving that purpose at a reasonable cost and in a manner that does not invite abuse of the program. Any initiative to strengthen the integrity framework for the H-1B program should be approached strategically by focusing on comprehensive improvements in the administration of the program, without undue emphasis on only one aspect of the program.

We appreciate the insights that the report has provided on the Department of Labor's role in the H-1B program. If you would like additional information, please don't hesitate to call me at (202) 693-2700.

Sincerely,

Emily Stover DeRocco

Appendix VI: Comments from the Department of Homeland Security

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

June 19, 2006

Mr. Sigurd R. Nilsen
Director
Education, Workforce and Income Security Issues
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Nilsen:

RE: Draft Report GAO-06-720, H-1B Visa Program: Labor Could Improve Its Oversight and Increase Information Sharing with Homeland Security (GAO Job Code 130515)

The Department of Homeland Security (DHS) appreciates the opportunity to review and comment on the draft report. To ensure employers are complying with program requirements, the Government Accountability Office (GAO) recommends that as DHS' U.S. Citizenship and Immigration Services (USCIS) transforms its information technology system(s), the Department of Labor (Labor) application case number be included. This will allow adjudicators to quickly and independently ensure that employers are not requesting more H-1B workers than were originally approved on their application to Labor. We agree with the recommendation. The USCIS intends, as it develops a technology solution to support a transformed business process, to capture the Labor Condition Application case number. This data coupled with an account-based view of employers' immigration filings will facilitate the detection and deterrence of abuse or accounting errors by employers with respect to the number of applicants supported by a single Labor Condition Application.

We have some comments on your suggestion to Congress that it consider legislation requiring that DHS provide Labor with information regarding employers' failures to comply with certain H-1B requirements and that Labor use that information as a basis to begin an investigation. We agree that the matter merits Congressional consideration. Although USCIS does not currently have a standard process for referring information on whether an employer is fulfilling its responsibilities, USCIS does refer information to Labor on an informal basis. However, as the report indicates, Labor's legal ability to use that information is uncertain. USCIS has explored and continues to explore procedures for referring wage and hour violations to Labor.

www.dhs.gov

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We are providing technical comments to your office under separate cover.

Sincerely,

Steven J. Pecinovsky
Director
Departmental GAO/OIG Liaison Office

MMcP

Appendix VII: GAO Contact and Staff Acknowledgments

GAO Contact

Sigurd R. Nilsen, Director, 202-512-7215, nilsens@gao.gov

Acknowledgments

Alicia Puente Cackley, Assistant Director; Gretta L. Goodwin, Senior Economist; Amy J. Anderson, Senior Analyst; and Pawnee Davis, Analyst, made significant contributions to all phases of this report. In addition, William J. Schneider, Intern, assisted with data collection and analysis; Sheila R. McCoy provided legal assistance; Luann M. Moy provided methodological assistance; Susan F. Baker, Cynthia L. Grant, Lynn M. Milan, and Melinda L. Cordero provided data analysis; and Rachael C. Valliere, Communications Analyst, assisted in report development.

Related GAO Products

Homeland Security: Better Management Practices Could Enhance DHS's Ability to Allocate Investigative Resources. GAO-06-462T. Washington, D.C.: March 28, 2006.

Immigration Benefits: Additional Controls and a Sanctions Strategy Could Enhance DHS's Ability to Control Benefit Fraud. GAO-06-259. Washington, D.C.: March 10, 2006.

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Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts. GAO-05-813. Washington, D.C.: August 31, 2005.

Department of Homeland Security, U.S. Citizenship and Immigration Services: Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004. GAO-05-705R. Washington, D.C.: May 18, 2005.

Homeland Security: Some Progress Made, but Many Challenges Remain on U.S. Visitor and Immigrant Status Indicator Technology Program. GAO-05-202. Washington, DC: February 23, 2005.

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RESPONSE TO POST-HEARING QUESTIONS FROM ALFRED B. ROBINSON, JR., ACTING DIRECTOR, WAGE AND HOUR ADMINISTRATION, EMPLOYMENT STANDARDS ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

QUESTIONS FOR THE RECORD
WAGE AND HOUR DIVISION
EMPLOYMENT STANDARDS ADMINISTRATION
U.S. DEPARTMENT OF LABOR

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

JUNE 22, 2006 HEARING
"IS THE DEPARTMENT OF LABOR DOING ENOUGH TO PROTECT U.S. WORKERS?"

1. **The number of H1B investigations Labor has conducted and the results of those investigations.**

Fiscal Year	Cases	Back Wages	Employees	Violations
3rd Quarter FY 2006	98	$2,520,265	529	740
FY 2005	131	$3,300,978	517	750
FY 2004	153	$3,070,660	288	582

2. **List the attestations which were violated.**

Please see attached charts.

3. **Outline how DOL's wage and hour division is limited by statute in its ability to get information from the Employment Training Administration.**

While section 212(n)(2)(G)**(ii)** [emphasis added] of the INA specifically provides the Wage and Hour Division (WHD) authority for "credible source" investigations in the absence of bona-fide aggrieved party complaint, another provision of the INA explicitly bans DOL "credible source" investigations based on information secured by ETA or DHS during the processing of H-1B petitions. Specifically, section 212(n)(2)(G)(v) of the INA states that "[t]he receipt by the Secretary of Labor of information submitted by an employer to the Attorney General [now DHS] or the Secretary of Labor [ETA] for purposes of securing the employment of a nonimmigrant described in section 101(a)(15)(H)(i)(b) shall not be considered a receipt of information for purposes of clause **(ii)**." [emphasis added]. Further, section 212(n)(2)(G)(iv) states " [a]ny investigation initiated or approved by the Secretary of Labor under clause **(ii)** shall be based on information that satisfies the requirements of such clause and that—(I) originates from a source other than an officer or employee of the Department of Labor; or (II) was lawfully obtained by the Secretary of Labor in the course of lawfully conducting another Department of Labor investigation . . . ."

[emphasis added]. These provisions have been substantively the same since enactment of the American Competitiveness and Workforce Improvement Act of 1998. Consequently, under the plain language of the statute, WHD cannot open an H-1B investigation based on information collected by ETA during the labor condition application process.

4. Examples where DOL has done H-1B outreach to American high-tech workers.

All H-1B outreach conducted by WHD includes detailed explanations of protections granted similarly-employed U.S. workers who are potentially adversely affected by the employment of these nonimmigrant workers. WHD publicizes significant enforcement cases in local newspapers to act as a deterrent to other H-1B employers, as well as providing general information for American workers. In addition, WHD maintains information about the program on the Department's website. In FY 2006, WHD disseminated 26 Fact Sheets describing various aspects of the program.

Further, the H-1B Visa Program allows employers to hire temporary foreign workers in specialty occupations, such as those requiring at least a bachelor's degree in engineering, mathematics, medicine, education, or science. The FY 2005 Consolidated Appropriations Act established Grants for Employment in High Growth Industries funded by fees from employers submitting H-1B applications. One-half of the $1,500 fee levied on employers is to be used for such grants and are used to support the Department of Labor's High Growth Job Training Initiative and the Workforce Innovation in Regional Economic Development (WIRED) initiative.

"H-1B VIOLATIONS REPORT" SUBMITTED BY THE U.S. DEPARTMENT OF LABOR IN RESPONSE TO REQUEST FROM THE HONORABLE LAMAR S. SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

H1B Violations Report

10/01/2003 - 09/30/2004

excluding dropped cases

National

	Number of Cases	Number of Violations
Employer failed to comply with the provisions of subpart H or I by failing to - provide LCA to worker	1	1
Employer nonsubstantially failed to - provide LCA to worker	5	7
Employer non-willfully failed to - other	17	47
Employer non-willfully failed to - pay the required wage by failing to pay the actual wage	40	73
Employer non-willfully failed to - pay the required wage by failing to pay the prevailing wage	54	186
Employer substantially failed to - provide LCA to worker	1	2
Willfully failed to - other	7	17
Willfully failed to - pay the required wage by failing to pay the actual wage	8	38
Willfully failed to - pay the required wage by failing to pay the prevailing wage	17	86
Willfully failed to - provide the working conditions	1	5
Employer failed to comply with the provisions of subpart H or I by failing to - cooperation	3	3
Employer failed to comply with the provisions of subpart H or I by failing to - determine the prevailing wage	2	2
Employer failed to comply with the provisions of subpart H or I by failing to - other	9	9
Employer failed to comply with the provisions of subpart H or I by failing to - provide notice of the filing of the LCA by posting the notice	3	3
Employer failed to make records available pertaining to - actual wage documentation	4	4
Employer failed to make records available pertaining to - LCA	5	5
Employer failed to make records available pertaining to - notification documentation	4	4
Employer failed to make records available pertaining to - other	7	7
Employer failed to make records available pertaining to - prevailing wage documentation	1	1
Employer failed to make records available pertaining to - wage rates	2	2
Employer failed to retain documentation pertaining to - actual wage documentation	6	6

H1B Violations Report

10/01/2003 - 09/30/2004

excluding dropped cases

	Number of Cases	Number of Violation
Employer failed to retain documentation pertaining to - LCA	3	3
Employer failed to retain documentation pertaining to - notification documentation	5	5
Employer failed to retain documentation pertaining to - other	3	3
Employer failed to retain documentation pertaining to - payroll records	1	1
Employer failed to retain documentation pertaining to - prevailing wage documentation	2	2
Employer failed to retain documentation pertaining to - wage rates	5	5
Employer nonsubstantially failed to - be specific on the LCA as to the employment conditions of the H1Bs	1	1
Employer nonsubstantially failed to - be specific on the LCA as to the rate of pay	2	2
Employer nonsubstantially failed to - other	7	7
Employer nonsubstantially failed to - provide notice of the filing of the LCA by posting notice	17	17
Employer substantially failed to - other	5	5
Employer substantially failed to - provide notice of the filing of the LCA by posting the notice	8	8
Filed a labor condition application with ETA which misrepresents a material fact - occupational title	3	3
Filed a labor condition application with ETA which misrepresents a material fact - other	3	3
Filed a labor condition application with ETA which misrepresents a material fact - place(s) of intended employment	2	2
Filed a labor condition application with ETA which misrepresents a material fact - prevailing wage	1	1
Filed a labor condition application with ETA which misrepresents a material fact - prevailing wage source	2	2
Filed a labor condition application with ETA which misrepresents a material fact - rate of pay	4	4

H1B Violations Report

10/01/2004 - 09/30/2005

excluding dropped cases

National

	Number of Cases	Number of Violations
Employer failed to comply with the provisions of subpart H or I by failing to - intimidation/restraining	3	19
Employer nonsubstantially failed to - provide LCA to worker	2	3
Employer non-willfully failed to - other	14	20
Employer non-willfully failed to - pay the required wage by failing to pay the actual wage	24	341
Employer non-willfully failed to - pay the required wage by failing to pay the prevailing wage	39	141
Employer non-willfully failed to - provide the working conditions	2	2
Employer substantially failed to - provide LCA to worker	1	1
Willfully failed to - other	4	5
Willfully failed to - pay the required wage by failing to pay the actual wage	8	75
Willfully failed to - pay the required wage by failing to pay the prevailing wage	18	42
Employer failed to comply with the provisions of subpart H or I by failing to - cooperation	3	3
Employer failed to comply with the provisions of subpart H or I by failing to - determine the prevailing wage	5	5
Employer failed to comply with the provisions of subpart H or I by failing to - other	4	4
Employer failed to make records available pertaining to - actual wage documentation	3	3
Employer failed to make records available pertaining to - LCA	4	4
Employer failed to make records available pertaining to - notification documentation	2	2
Employer failed to make records available pertaining to - other	2	2
Employer failed to make records available pertaining to - prevailing wage documentation	1	1
Employer failed to make records available pertaining to - wage rates	1	1
Employer failed to retain documentation pertaining to - actual wage documentation	3	3
Employer failed to retain documentation pertaining to - LCA	3	3
Employer failed to retain documentation pertaining to - notification documentation	4	4

H1B Violations Report

10/01/2004 - 09/30/2005

excluding dropped cases

	Number of Cases	Number of Violations
Employer failed to retain documentation pertaining to - other	1	1
Employer failed to retain documentation pertaining to - payroll records	5	5
Employer failed to retain documentation pertaining to - prevailing wage documentation	9	9
Employer failed to retain documentation pertaining to - wage rates	3	3
Employer nonsubstantially failed to - be specific on the LCA as to the rate of pay	2	2
Employer nonsubstantially failed to - other	9	9
Employer nonsubstantially failed to - provide notice of the filing of the LCA by posting notice	11	11
Employer substantially failed to - be specific on the LCA as to the job title	2	2
Employer substantially failed to - other	1	1
Employer substantially failed to - provide notice of the filing of the LCA by posting the notice	3	3
Filed a labor condition application with ETA which misrepresents a material fact - employers' Declaration pertaining to record's availability	2	2
Filed a labor condition application with ETA which misrepresents a material fact - occupational title	2	2
Filed a labor condition application with ETA which misrepresents a material fact - other	3	3
Filed a labor condition application with ETA which misrepresents a material fact - place(s) of intended employment	4	3
Filed a labor condition application with ETA which misrepresents a material fact - prevailing wage	7	7
Filed a labor condition application with ETA which misrepresents a material fact - prevailing wage source	1	1
Filed a labor condition application with ETA which misrepresents a material fact - rate of pay	2	2

H1B Violations Report

10/01/2005 - 06/30/2006

excluding dropped cases

National

	Number of Cases	Number of Violations
Employer failed to comply with the provisions of subpart H or I by failing to - provide LCA to worker	1	1
Employer nonsubstantially failed to - provide LCA to worker	1	1
Employer non-willfully failed to - other	7	44
Employer non-willfully failed to - pay the required wage by failing to pay the actual wage	21	93
Employer non-willfully failed to - pay the required wage by failing to pay the prevailing wage	44	432
Willfully failed to - pay the required wage by failing to pay the actual wage	5	64
Willfully failed to - pay the required wage by failing to pay the prevailing wage	8	10
Employer failed to comply with the provisions of subpart H or I by failing to - be specific on the LCA as to employment conditions of the H1Bs	1	1
Employer failed to comply with the provisions of subpart H or I by failing to - be specific on the LCA as to the rate of pay	1	1
Employer failed to comply with the provisions of subpart H or I by failing to - cooperation	4	4
Employer failed to comply with the provisions of subpart H or I by failing to - other	7	7
Employer failed to comply with the provisions of subpart H or I by failing to - provide notice of the filing of the LCA by posting the notice	2	2
Employer failed to make records available pertaining to - actual wage documentation	5	5
Employer failed to make records available pertaining to - LCA	1	1
Employer failed to make records available pertaining to - notification documentation	2	2
Employer failed to make records available pertaining to - other	4	4
Employer failed to make records available pertaining to - prevailing wage documentation	3	3
Employer failed to make records available pertaining to - wage rates	1	1
Employer failed to retain documentation pertaining to - actual wage documentation	3	3
Employer failed to retain documentation pertaining to - LCA	1	1
Employer failed to retain documentation pertaining to - notification documentation	3	3

H1B Violations Report

10/01/2005 - 06/30/2006

excluding dropped cases

	Number of Cases	Number of Violations
Employer failed to retain documentation pertaining to - other	2	2
Employer failed to retain documentation pertaining to - payroll records	4	4
Employer failed to retain documentation pertaining to - prevailing wage documentation	6	6
Employer failed to retain documentation pertaining to - wage rates	1	1
Employer nonsubstantially failed to - be specific on the LCA as to the rate of pay	2	2
Employer nonsubstantially failed to - other	5	5
Employer nonsubstantially failed to - provide notice of the filing of the LCA by posting notice	14	14
Employer substantially failed to - be specific on the LCA as to the job title	1	1
Employer substantially failed to - other	3	3
Employer substantially failed to - provide notice of the filing of the LCA by posting the notice	5	5
Filed a labor condition application with ETA which misrepresents a material fact - occupational title	2	2
Filed a labor condition application with ETA which misrepresents a material fact - other	1	1
Filed a labor condition application with ETA which misrepresents a material fact - place(s) of intended employment	4	4
Filed a labor condition application with ETA which misrepresents a material fact - prevailing wage	3	3
Filed a labor condition application with ETA which misrepresents a material fact - prevailing wage source	1	1
Filed a labor condition application with ETA which misrepresents a material fact - rate of pay	3	3