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US IMMIGRATION & NATIONALITY LAW

STOP THE ASSAULT ON EMPLOYMENT IMMIGRATION TO THE USA

Posted on March 3, 2012 by Cyrus Mehta

At the behest of Senator Grassley (R-IA), the DHS Office of Inspector General recently issue a controversial report, The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Service Officers. I wonder about the intentions of Senator Grassley who put a hold on the Fairness For High Skilled Immigrants Act, which passed the Republican controlled House of Representatives by a landslide on November 29, 2011. More recently, Senator Grassley also put a hold on the Startup Visa Act, which has also received bipartisan support. Is he truly concerned about the integrity of the system or is there a deeper hidden agenda. Mind you, he has also been a foe of immigration from India with his recent opposition to the use of the H-1B and B-1 visas by Indian IT professionals. It is amazing how one Senator, who has only one vote among 100 Senators, can have so much influence over immigration policy. It is time to speak out.The report stems from a pet concern of Senator Grassley, as expressed by Judiciary Committee Chairman Lamar Smith in a February 15, 2012 hearing before the House Subcommittee on Immigration, about whether "senior leaders are putting pressure on employees to approve more visa applications, even if the applications might be fraudulent or the applicant is ineligible."

The Inspector General interviewed 147 managers and staff, received 256 responses to an online survey, and reviewed USCIS policies related to the effort to detect benefit fraud. The report was based on testimonials, not empirical data. The report recommended process improvements, such as instituting more training and collaboration to improve the fraud referral process; developing additional quality assurance or supervisory review procedures to strengthen identification of names and aliases of those seeking an immigration benefit; performing nationwide onsite outreach efforts to discuss the

performance management system with Immigration Service Officers (ISOs); developing standards to permit more time for an ISO's review of case files; revising policy on requests for evidence (RFEs) to clarify the role that the requests play in the adjudication process; and developing a policy to "establish limitations for managers and attorneys when they intervene in the adjudication of specific cases." The report stated that "special treatment of complainants fosters a sense among ISOs that USCIS inappropriately grants benefits in certain cases."

The report noted that "here may be a basis for clarifying adjudication policy for O visa petitions. A low approval rate is not one of them." The Inspector General found that O visa petitions are granted at a high rate. "Quality assurance information we examined demonstrates that excessive O visa approvals are more likely than denials." The report stated, "From January 2008 through March 2011, the California and Vermont service centers approved 40,719 of 44,386 O visa petitions (91.7%). This approval rate exceeds the approval rate for many other nonimmigrant worker petitions. During the same time period, the two centers approved 78.5% of H-1B (specialty occupations) and 76.1% of L-1B (specialized knowledge worker) petitions."

The Inspector General's report noted, however, that: (1) the testimonial evidence shared by interviewees may not represent views shared by other employees; (2) USCIS has taken action to diminish threats to the immigration benefits system; (3) general employee concerns about the impact of production pressure in the quality of ISO decisions "do not mean that systemic problems compromise the ability of USCIS to detect fraud and security threats; (4) "o ISOs presented us with cases where benefits were granted to those who pose terrorist or national security threats"; and (5) "ven those employees who criticized management expressed confidence that USCIS would never compromise national security on a given case."

The report concluded, however, that "ven with the additional security checks and process improvements USCIS has made in the past several years, national security and fraud concerns may require more thorough review of immigration applications and petitions." The OIG noted that "dditional documentation, or further insight gained through more interview questions, would ensure that ISOs have greater confidence before making a decision." Also, the report suggests that "Congress may wish to raise the standard of proof for some or all USCIS benefit issuance decisions."

As an immigration practitioner, the Inspector General's conclusions about applications being granted too easily have no bearing with reality. A filing of an H-1B or L petition, especially in certain industries such as IT consulting, results in a lengthy and detailed RFE asking for every aspect of the job duties, elaborate itineraries and unrealistic work schedules (such as the percentage of time performing each duty) and other unnecessarily and trivial information about the employer and the employment. This is true even if the USCIS has been approving an H-1B petition previously on the exact facts for the very same worker who must be now be on his 10th year in H-1B status. Also, in the case of an H-1B worker in an IT consulting company who is placed at a third party client, the employer has to repeatedly demonstrate that it has a right of control under the Neufeld Memo over this worker's employment even if the employer demonstrated this in great detail when it last filed a request for an H-1B extension.

Senator Grassley, I ask you to put yourself in the shoes of this H-1B worker who has an approved I-140 immigrant visa petition for the green card, but is still waiting endlessly for it, along with his family, only because of the long waits in the EB-2 or EB-3 for India. If you did not put a hold on the Fairness for High Skilled Immigrants Act, this H-1B worker may have received a green card by now or close to receiving one. He now needs to wait nervously each year for an approval, with the fear that the H-1B may be denied this time around even though it got approved under the same facts the year before and the year before that. If the H-1B gets denied this time under some arbitrarily invented heightened scrutiny standard, he and his family will fall out of status and will have to most likely need to leave the US after working in the US legally for 10 years, paying taxes and otherwise contributing to the productivity of his employer and clients. He will also be forced to yank his brilliant children out of school disrupting their lives and causing great turmoil in their young impressionable minds.

If the OIG report becomes USCIS policy, it will kill and stifle a US employer's ability to bring in skilled foreign national workers on H-1B, L-1 and O-1 visas. Despite Senator Grassley placing a hold on the Startup Visa Act, the DHS in August 2011 announced initiatives for entrepreneurs who founded their own startups to be able to have the company file for an H-1B visa on their behalf. This initiative too will get killed because if the government wants to look for fraud for the sake of satisfying certain statistical requirements, it will find it by

shifting the goal posts. Look how many times over the past 10 years the USCIS has redefined what it means by the US equivalent of an Indian bachelor's degree or equivalent education, thus blowing apart I-140 petitions approved after the employer meticulously but unsuccessfully tested the US labor market. Or look how the Neufeld Memo has been aimed against a very successful business model that has served the needs of Fortune 500 US corporations. If we see stricter adjudications, the US will be deprived of the talents and vision of foreign entrepreneurs who have a burning desire to set up startups in the US even in the absence of the Startup Visa Act, which have the potential to do brilliantly well like Google, E-bay or Yahoo.

At the February 15, 2012 Congressional hearing, the testimony of Bo Cooper, former General Counsel of the Immigration and Naturalization Service, is worth noting. Summaries of other witnesses at this Congressional hearing can be found in our forthcoming March 2012 Immigration Update. Mr. Cooper said that USCIS has released official data since the report came out. He noted that recent analysis shows that the data refute concerns "that USCIS may be institutionally biased toward unjustified approvals and that the agency observes policies that would suppress RFE issuance." The data tell the opposite story, he said: "Particularly with respect to the key nonimmigrant categories for foreign professionals, denial rates and RFE rates have risen very sharply in recent years."

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

The data for employees with specialized knowledge in the L-1B program "shows a steep rise in denials and requests for evidence beginning in 2008," he said, noting that the denial rate for L-1B petitions more than tripled in 2008 and is

now at nearly quadruple the pre-2008 rate, at 27 percent in 2011. The RFE rate change is even starker, he said. From 2005 to 2011, the rate soared from 9 percent to 63 percent of L-1B cases.

He also noted that in the L-1A program for managers and executives being transferred within multinational corporations, the RFE rate rose from 10 percent in 2005 to 51 percent in 2011. Denial rates rose 75 percent over five years, from 8 percent in 2007 to 14 percent in 2011. In the H-1B program for professionals in specialty occupations, the denial rate increased from 11 percent in 2007 to 17 percent in 2011. Over a quarter of all H-1B filings generated an RFE in 2011.

Seen in the light of this data, Mr. Cooper said "there is no basis for the concern expressed in the OIG report that USCIS has an institutional bias in favor of approvals or against RFEs." In fact, he said, the data show the opposite trend. Noting that USCIS said in its response to the OIG report that it is reviewing its RFE policy and aims to issue new RFE guidance this year, Mr. Cooper recommended that the new policy reflect "the needs of today's business environment and the innovation economy," and that it be monitored carefully once put into practice.

Finally, the Inspector General's report asks that the standard for adjudicating visa petitions be raised from the "preponderance of evidence standard" to something higher, such as the "clear and convincing evidence" standard or the even higher standard used in criminal proceedings, which is "beyond a reasonable doubt." Under the preponderance of evidence standard, applicants have to demonstrate that the facts in their case are slightly more true than not true. Even though the preponderance of evidence standard requires a lesser degree of proof than the clear and convincing standard, this does not mean that it provides an invitation for fraud. The preponderance of evidence is the common standard used in civil proceedings, and allows the USCIS examiner to fairly evaluate very nebulous criteria while giving the benefit of doubt to the application, for instance, whether an O-1 visa applicant is extraordinary or not or whether an L-1B worker has specialized knowledge. If the applicant provided patently fraudulent documentation, he or she can be charged with the fraud ground of inadmissibility under INA § 212(a)(c)(6) and there also exist tough criminal sanctions. In any event, it does not seem that the USCIS is faithfully adhering to the preponderance of evidence standard even today, and officially raising the bar will surely serve as an invitation for USCIS officials to arbitrarily

deny even more case without fairly weighing the evidence. This would further undermine the ability of US employers to use our employment-based immigration system in an effective and rational manner to benefit them and simultaneously make the US prosper.