**CHAMBER OF COMMERCE**
OF THE
**UNITED STATES OF AMERICA**
1615 H STREET, N.W.
WASHINGTON, D.C. 20062

**RANDEL K. JOHNSON**
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION, &
EMPLOYEE BENEFITS

**AMY M. NICE**
EXECUTIVE DIRECTOR
IMMIGRATION POLICY

February 14, 2012

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

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

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

Dear Chairman Gallegly and Ranking Member Lofgren:

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

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

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

## STATISTICAL WEAKNESSES IN IG REPORT

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

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

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

## COMPANY EXPERIENCES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## CONCLUSION

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

We thank you for your consideration of these views.

Sincerely,

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

Amy M. Nice
Executive Director
Immigration Policy