AILA National Office
Suite 300
1331 G Street, NW
Washington, DC
20005-3142

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

Crystal Williams
Executive Director

Susan D. Quarles
Deputy Executive Director

Testimony of the American Immigration Lawyers Association

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Committee on the Judiciary of the U.S. House of Representatives

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

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

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

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

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

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

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

The DHS Inspector General Report Is Based on Weak Evidence and Research

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

USCIS Has Been Denying Petitions at High Rates

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

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

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

Current Adjudication Practices Hurt American Business and Job Growth

The standards that adjudicators apply to these petitions are not clear to those submitting petitions, and are often not traceable to any current provision of statute or regulation. This

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

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

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

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

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

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

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

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

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

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

Case Examples: Employment-Based Petition Denials

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

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

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

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

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

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

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

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

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

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