United States General Accounting Office

GAO

Report to the Ranking Minority Member, Subcommittee on Criminal Justice, Drug Policy, and Human Resources, Committee on Government Reform, House of Representatives

September 2000

H-1B FOREIGN WORKERS

Better Controls Needed to Help Employers and Protect Workers

GAO/HEHS-00-157

Contents

Abbreviations

ACWIA	American Competitiveness and Workforce Improvement Act
ETA	Employment and Training Administration
FLSA	Fair Labor Standards Act
INS	Immigration and Naturalization Service
IT	information technology
LCA	Labor Condition Application
NSF	National Science Foundation
WHD	Wage and Hour Division

B-283330

September 7, 2000

The Honorable Patsy T. Mink
Ranking Minority Member, Subcommittee on
Criminal Justice, Drug Policy, and Human Resources
Committee on Government Reform
House of Representatives

Dear Ms. Mink:

A strong national economy depends, in part, on employers' ability to hire workers with the necessary skills to perform needed tasks. Without these workers, American businesses may be unable to sustain the economic performance that has improved the quality of life for many Americans. The information technology (IT) industry, in particular, is a driving force behind current and future U.S. economic growth, and the Bureau of Labor Statistics projects that the demand for workers with certain IT skills will double over the next 10 years. Employers in the IT industry have expressed concerns about not being able to fill their many vacancies. To help U.S. employers in IT and other industries fill their needs for highly skilled workers, the H-1B visa program allows employers to temporarily (for up to 6 years) fill needs in specialty occupations with foreign workers. Under the law, H-1B workers must be employed in specialty occupations and have suitable credentials for the job, and their employers must meet certain labor conditions, including paying comparable wages.[1] These requirements are intended to ensure that American workers are not adversely affected.

The number of foreign workers legally authorized to enter the United States annually through the H-1B program has increased substantially—from 65,000 in 1992 to 115,000 in 1999 and 2000. Some believe the limit should be raised even further to address workforce needs, such as for IT workers. However, others question whether enough is being done to increase the skills of American workers so they can fill these vacancies.

[1]Under the H-1B program, specialty occupations are those requiring theoretical and practical application of a body of specialized knowledge and the attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty. These can be in a range of fields from architecture, engineering, and mathematics to medicine, education, theology, and the arts. Comparable wages are those being received by U.S. workers in similar positions in the same area.

Also, some employers are dissatisfied with how the Department of Labor and the Immigration and Naturalization Service (INS) administer the H-1B program.[2] Finally, reports of program misuse—such as employers paying workers less than comparable wages or employees using false credentials—have led to questions about whether the program adequately serves employers or protects workers.

Because of these concerns, you asked us to provide information on the H-1B program's implementation and implications for the American workforce—specifically (1) the jobs that H-1B workers are filling in the United States and the characteristics of those workers, (2) the adequacy of the H-1B visa program's implementation and enforcement, and (3) efforts underway to improve IT skills in the American workforce. To answer these questions, we obtained and independently analyzed newly collected INS data on approved H-1B workers' characteristics; observed and evaluated application processing at several INS and Labor offices around the country; obtained and evaluated available processing data; and discussed the program's history, current operations, and limitations with INS, Labor, State, and National Science Foundation (NSF) officials, employer and employee associations representing numerous IT employees and employers, the IT industry and users of the H-1B program, and 13 individual employers, primarily in the IT industry. We conducted our work in accordance with generally accepted government auditing standards between August 1999 and July 2000. (See app. I for a full discussion of our scope and methodology.)

Results in Brief

Employers have used the H-1B visa program to fill hundreds of thousands of positions in which certain skills, including computer programming, engineering, education, and medicine, were needed quickly. According to INS data, about 60 percent of the positions that new workers were approved to fill in fiscal year 1999 were related to IT. Workers approved for H-1B visas were scheduled to fill positions that offered initial median annual salaries of $45,000. The workers had a median age of about 28 years at the time of approval, and almost half were born in India. About 40 percent of them were already in the United States on another type of visa. Those workers approved for H-1B visas in IT-related occupations differed somewhat from other H-1B workers in that they were less likely to have an

[2]The Department of State also has a role in issuing the visas, as discussed later.

advanced degree, were younger, more likely to be from India, and less likely to be in the United States on another type of visa when approved for the H-1B program.

Despite the H-1B program's success at helping employers bring in highly skilled foreign workers, Labor's limited legal authority to enforce the program's requirements and weaknesses in INS' program administration leave the program vulnerable to abuse. Delays and administrative problems have also led to inefficient service for employers using the program. Under the law, in certifying employers' initial requests for H-1B workers, Labor is limited to ensuring that the employer's application form has no obvious errors or omissions. It does not have the authority to verify whether information provided by employers on labor conditions, such as wages to be paid, is correct. Moreover, some of this same information is reviewed again by INS during its assessment of employer requests for workers. Further, Labor has limited authority to ensure that employers are actually complying with the law's requirements after the H-1B workers are employed in the United States. Unlike under other labor laws it enforces, Labor generally cannot initiate enforcement actions (such as conducting investigations and subpoenaing employer records), even if it believes employers are violating the law. We have included two matters for congressional consideration to address Labor's limited authority under the law. Labor disagreed with our matter concerning the transfer of LCA review to INS, arguing that consideration should be given to making Labor's review more substantive. Unless the Congress decided to authorize a more substantive review, transfer to INS would be more efficient. Labor agreed with our second matter to broaden Labor's enforcement authority for the H-1B program.

INS is responsible for ensuring that H-1B positions are in fact specialty occupations and that workers granted entry are qualified for those positions. Until recently, INS had no national systematic approach for adjudicators to follow to ensure the consistent review of employer petitions. Further, INS staff conducting these reviews continue to lack easy access to specific, case-related information that would help them assess the merit of employers' requests, which can also lead to inconsistent or incorrect approvals of requests. Because existing supervisory review and performance appraisal systems for INS staff reviewing petitions are based largely on the number of requests processed, rather than the quality of the review, staff can be rewarded for timely handling of petitions rather than for careful scrutiny of petitions' merits. As a result, there is not sufficient assurance that INS reviews are adequate for detecting program

noncompliance or abuse. In addition, INS decisions about the priority of H-1B application processing related to other types of petitions handled by INS have resulted in delays of several months to process employers' requests for H-1B workers. Other system weaknesses at INS have contributed to errors in counting the number of visas approved under the H-1B visa program. We make three recommendations designed to enhance the consistency and correctness of INS' H-1B decisions. INS generally did not agree with our recommendations, believing that current program procedures are sufficient to detect noncompliance and abuse. We continue to believe that actions beyond those taken by INS are warranted.

To enhance U.S. workers' ability to fill IT positions, Labor and NSF are working to improve the IT skills of the U.S. workforce. The IT employers we contacted told us that they are also trying to improve U.S. workers' IT skills and identified a variety of short-term methods, such as retraining new or existing employees, to provide U.S. workers with the needed skills. On a longer-term basis, IT employers reported using a variety of programs to encourage U.S. students to pursue IT careers, such as providing computer training and mentoring for students in elementary and secondary schools. Efforts by Labor and NSF, funded through fees paid by employers wishing to use the H-1B program, include training grants and scholarships. These efforts should help increase the number of U.S. workers with IT skills. However, their ultimate effect is unknown because the programs are new, their focus is longer-term, and in some cases, there is a lack of data about what IT skills are needed.

Background

The H-1 nonimmigrant category was created under the Immigration and Nationality Act of 1952 (P.L. 82-414) to assist U.S. employers needing workers temporarily. The Immigration Act of 1990 (P.L. 101-649) amended the law by, among other things, creating the H-1B category for nonimmigrants who are sought to work in specialty occupations, and fashion models "of distinguished merit and ability."[3] Unlike most temporary worker visa categories, H-1B workers can intend both to work temporarily and to immigrate permanently at some future time.

No limit existed on the number of specialty occupation visas that could be granted until 1990. Through the Immigration Act of 1990, the Congress set a

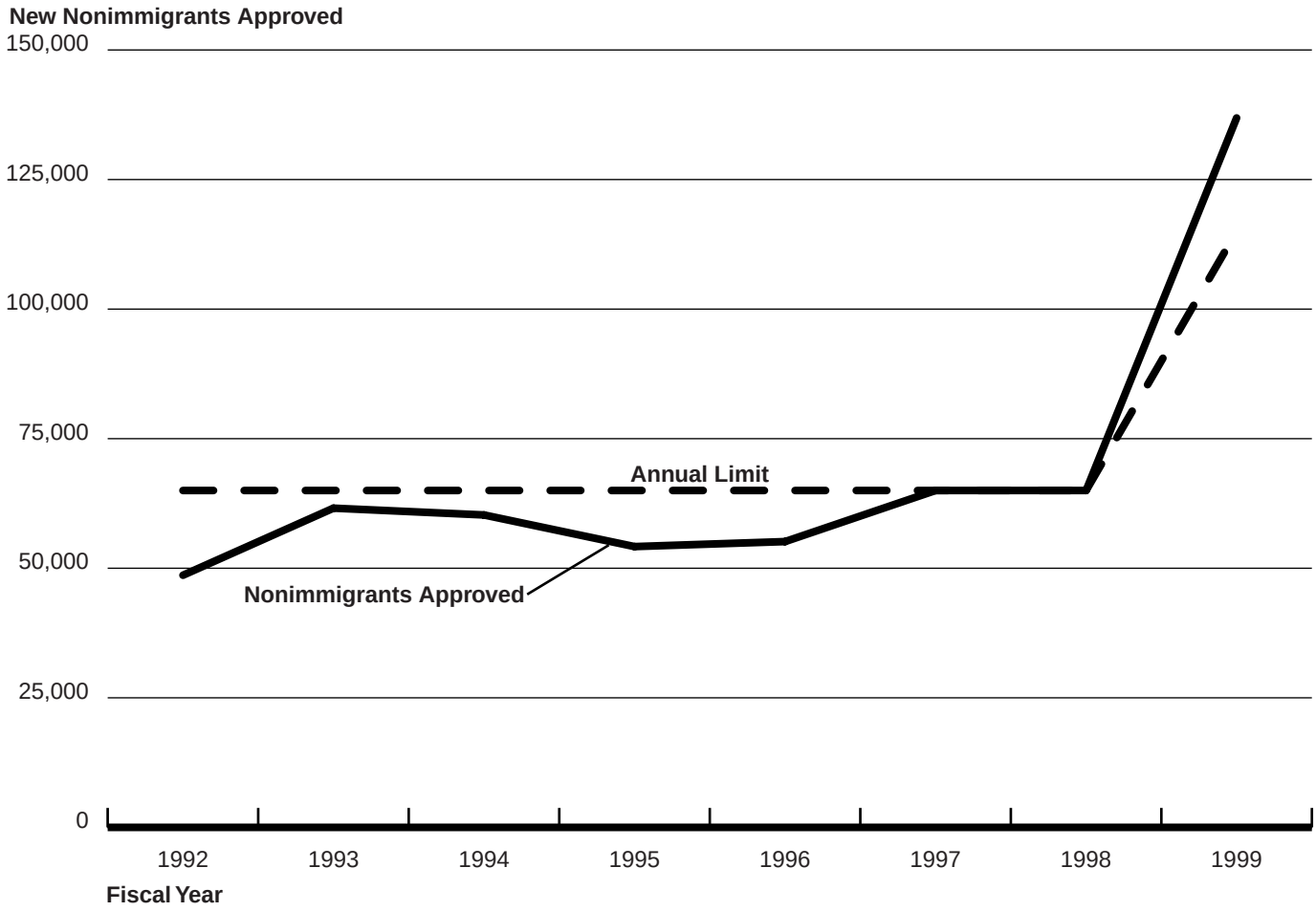
[3]The rest of the report focuses on only the specialty workers.

yearly limit of 65,000 for H-1B visas alone, which took effect in fiscal year 1992. In an effort to help employers access skilled foreign workers and compete internationally, in 1998 the Congress enacted the American Competitiveness and Workforce Improvement Act (P.L. 105-277, Title IV) (ACWIA), which increased the limit to 115,000 for fiscal years 1999 and 2000, and 107,500 for fiscal year 2001. The limit is scheduled to revert to 65,000 in fiscal year 2002. The number of visas approved did not reach the annual limit until fiscal year 1997 (see fig. 1), and exceeded the limit in fiscal year 1999 by more than 20,000.[4] In March 2000, INS stopped accepting new petitions for fiscal year 2000, believing it had received enough to reach the limit. Legislation has been introduced in the Congress to further increase the number of H-1B workers authorized to enter the United States or to eliminate the limitation entirely.[5]

[4]A consulting firm hired by INS estimated that INS approved between 21,888 and 23,385 more visas than were authorized for 1999, due to problems with the computerized tracking system. Because the same system and approach were used to count approvals in previous years, it is unknown whether INS exceeded the authorized amount in previous years.

[5]The following H-1B bills are pending before the Congress: S. 2045, H.R. 3983, and H.R 4227.

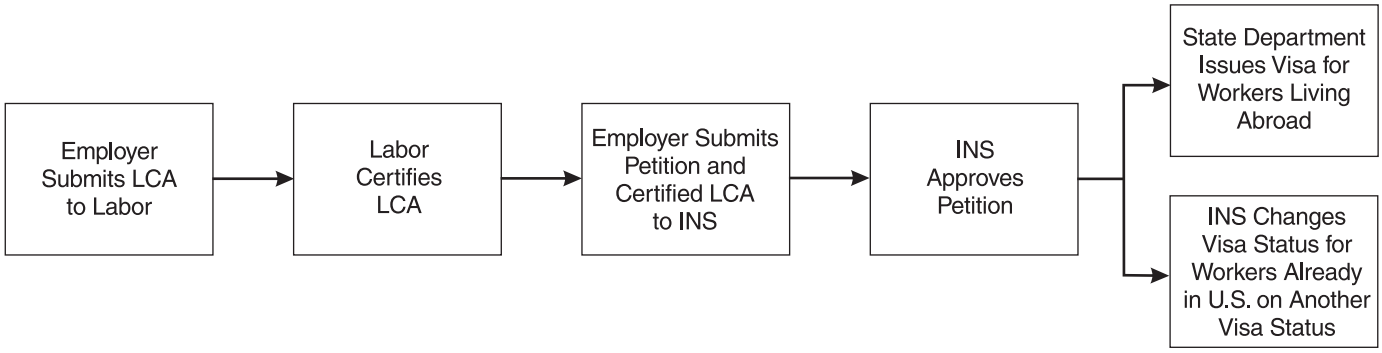
Figure 1: New H-1B Nonimmigrants Approved, Fiscal Year 1992-Fiscal Year 1999



Source: INS.

An employer who wishes to hire an H-1B worker must follow several steps, beginning with the submission of a labor condition application (LCA) to Labor (see fig. 2).[6]

Figure 2: Summary of H-1B Visa Approval Process



Note: At each step of the process, the application/petition could be denied; employers have the ability to resubmit their forms or appeal such decisions.

On the LCA, the employer must identify the number of workers requested and the occupation and location(s) in which they will work, and show the wages that they will receive. The employer must attest that

- the employment of H-1B workers will not adversely affect the working conditions of other workers similarly employed in the area;
- the H-1B workers will be paid wages that are no less than the higher of the actual wage level paid by the employer to all others with similar experience and qualifications for the specific employment or the prevailing wage level for the occupational classification in the area of intended employment;
- no strike, lockout, or work stoppage in the applicable occupational classification was underway at the time the application was prepared;
- a copy of the application will be given to the H-1B worker; and

[6]These procedures are followed whether an employer is requesting a visa for a new worker or a renewal of a worker's existing H-1B visa. The H-1B visa permits the worker to work only for the employer who originally filed the request; if the worker changes employers, the new employer must obtain new approval for the worker. Although there are limits on the number of visas that can be approved each year, there are no limits on the number of LCAs that can be submitted. According to Labor, it received over 300,000 LCAs in fiscal year 1999.

- a copy of the application will be given to the employees' bargaining agent or, if there is no bargaining agent, will be posted for a 10-day period to inform potentially affected workers of the application for an H-1B worker. This helps to inform workers of their right to file complaints if they do not believe the employer is complying with the law.

The employer must maintain public files to support and document the information attested to on the application.

In an effort to protect U.S. workers, ACWIA requires employers who are H-1B dependent (generally those with a workforce consisting of at least 15 percent H-1B workers) to provide additional information and comply with additional requirements regarding recruitment and layoff procedures. These additional requirements, which will not apply to most applications after September 30, 2001, have not gone into effect because, according to a Labor official, implementing regulations are still awaiting organizational approval.

After Labor approves the LCA, the employer then files a petition (referred to as the I-129), along with the approved LCA with INS.[7] The petition is required to contain the necessary information to show that a bona fide job exists and that the prospective H-1B worker has the requisite education and work experience for the position. The employer must file a petition for each H-1B worker. Information provided includes the type of business, the employer's income, the number of employees, and the prospective worker's educational background or work experience. INS staff review the petition and LCA, ensuring that the petition information indicates that the labor conditions on the LCA will be met, that a bona fide job exists for the worker, and that the worker meets the qualifications for the designated specialty occupation. With each petition, the employer submits a filing fee of $110; ACWIA authorized an additional $500 fee to be used for skill grants, scholarships, and other purposes (as discussed later), although some types of employers are exempt from this.

[7]The employer may send the petition to the INS service center with geographic jurisdiction for the work location, or may request, with supporting justification, that one service center have sole jurisdiction for processing all of its petitions, regardless of where the work site is located. There are four INS service centers: Laguna Niguel, California; Lincoln, Nebraska; Dallas, Texas; and St. Albans, Vermont.

If the petition is approved, INS notifies the Department of State to issue a visa for the worker. State's consular officers abroad review these petitions to assess the potential worker's visa eligibility. The consular offices generally interview the potential worker to decide whether to issue a visa, and, if appropriate, do so. If the worker is already in the United States in another visa status (such as a student), the worker applies to INS to change the visa status. Petitions are approved for up to a 3-year period; employers can apply for extensions, but H-1B workers are limited to a 6-year maximum stay.

After the H-1B worker is employed, Labor and INS also have responsibility for ensuring that the employer is complying with program requirements and that both H-1B workers and their American counterparts are receiving the protections guaranteed under the law. Labor's Wage and Hour Division (WHD) is the Labor entity responsible for enforcing a number of labor laws governing wages and working conditions, including the Fair Labor Standards Act (FLSA), which governs minimum wage, child labor, and overtime pay. To assess compliance with FLSA as well as other laws, WHD conducts on-site investigations based on a variety of criteria, obtains records from employers (and may subpoena such records), and may cite and fine an employer for noncompliance. It also surveys particular industries and employers within them to obtain a baseline understanding of compliance, then targets either employers or specific industries for further investigations to address the most serious abuses. For the H-1B program, WHD is responsible for ensuring that H-1B workers are actually working in the occupation listed on the LCA and receiving the promised wages. INS is responsible for detecting visa fraud across all visa categories and conducting investigations based on a number of criteria. INS reviews whether worker qualifications are appropriately represented, the employer has provided a job for the worker, the employer is using the worker in the specialty occupation, and whether the wage promised in the petition is being paid. Enforcement authority includes citing and fining employers, revoking the petition approval, seeking prosecution if criminal statutes are violated, and possibly seeking the removal of aliens if violations are found.

Although employers are not required to prove a shortage of U.S. workers exists in order to recruit H-1B workers, there has been a longstanding debate about whether, in fact, sufficient numbers of U.S. workers with the requisite skills to fill current IT vacancies are available. These debates have led to numerous studies, but definitional and methodological problems in these studies do not permit a conclusion as to the extent of any IT skill shortage. Studies have estimated IT vacancies in the United States from

190,000 to more than 700,000, but some studies define IT workers very broadly whereas others focus on specific IT occupational clusters. Moreover, the studies provide little information about these vacancies, such as how long positions were vacant, whether sufficient wages to attract workers were offered, or whether companies considered jobs filled by contractors as vacancies. We, the Department of Commerce, and the Computer Research Association (under an NSF grant) have reported that more information is needed to characterize the IT labor market and determine the extent of any shortage.[8] In October 2000, NSF plans to report its assessment of labor market needs for IT workers; however, according to an NSF official, the report will provide anecdotal information rather than empirical evidence.

This lack of data has caused some to be concerned about employers' increasing use of the H-1B program. Associations representing U.S. workers believe that IT employers have exaggerated the need for foreign workers, which could lead to a surplus of workers in certain occupations and depress wages for all workers in the long term. Officials representing these associations cite instances in which IT employers have hired younger, temporary foreign workers with narrowly focused skills rather than older U.S. workers who could be retrained. They also note that if, indeed, employers cannot find skilled U.S. workers, they could hire foreign workers through permanent employment-based immigration programs. However, this process requires documentation indicating a particular need for each worker, and can take several years. Moreover, there are limits on the number of such visas that can be granted each year.

The debate has also led to questions about whether enough has been done to identify and train U.S. workers to fill IT vacancies. As a result, various federal efforts have been implemented to improve the IT skill set of workers.[9] As noted above, the most recent legislation required most employers wishing to use the H-1B program to pay a $500 fee that would largely be used to fund two efforts to increase the skill set of American

[8]See *Information Technology: Assessment of the Department of Commerce's Report on Workforce Demand and Supply* (GAO/HEHS-98-106R, Mar. 20, 1998); U.S. Department of Commerce, Office of Technology Policy/Technology Administration, *The Digital Work Force: Building Infotech Skills at the Speed of Innovation* (Washington, D.C.: June 1999); and Peter Freeman and William Aspray, *The Supply of Information Technology Workers in the United States* (Washington, D.C.: Computing Research Association, 1999).

[9]Labor noted that the H-1B fees build upon over $70 million in ongoing efforts since 1998 to train workers in high-tech skills.

workers. The first effort, administered by Labor, provides training through skill grants. The second effort, administered by NSF, funds scholarships through universities to encourage low-income students to enter fields of computer science, engineering, and math. Of the total fees collected from employers wishing to use the H-1B program, Labor will receive 56.3 percent for the technical skill training grants and NSF will receive 28.2 percent for scholarships. The legislation provides other uses for the remaining amounts.[10]

Jobs Filled by and Characteristics of H-1B Workers

In the past, few accurate data have been made available about the jobs filled by and characteristics of workers approved for H-1B visas. However, in 1999, for the first time, INS compiled information on key characteristics such as occupations, wages, degrees earned, and countries of birth from a statistical sample of new H-1B visa approvals.[11] INS has now begun to regularly collect and analyze specific information on new H-1B workers, as well as renewals, as required under ACWIA. It still lacks important information on these workers, however, such as an accurate, unduplicated count of approved H-1B workers who actually enter the United States on an H-1B visa.

Demographics of Workers Approved for H-1B Visas

In 1999, workers approved for H-1B visas were to fill a wide array of specialty occupations. As shown in fig. 3, 59 percent of the visas were for workers slated to work in IT-related occupations, including the large

[10]NSF will receive 4 percent for grants for math, engineering, or science enrichment courses, and 4 percent for systemic reform efforts. Projected funding for these two efforts is relatively small—$3 to $4 million annually for 3 years. Because there is no time limit for expending the funds, NSF may use the funds at a later date when there is a larger amount of funding available for each effort, but has already expended some funds for several small projects. Another 1.5 percent is available for INS to carry out duties related to decreasing the processing time for petitions and to carry out duties under ACWIA. Six percent is available to Labor for decreasing the processing time for LCAs and investigating complaints.

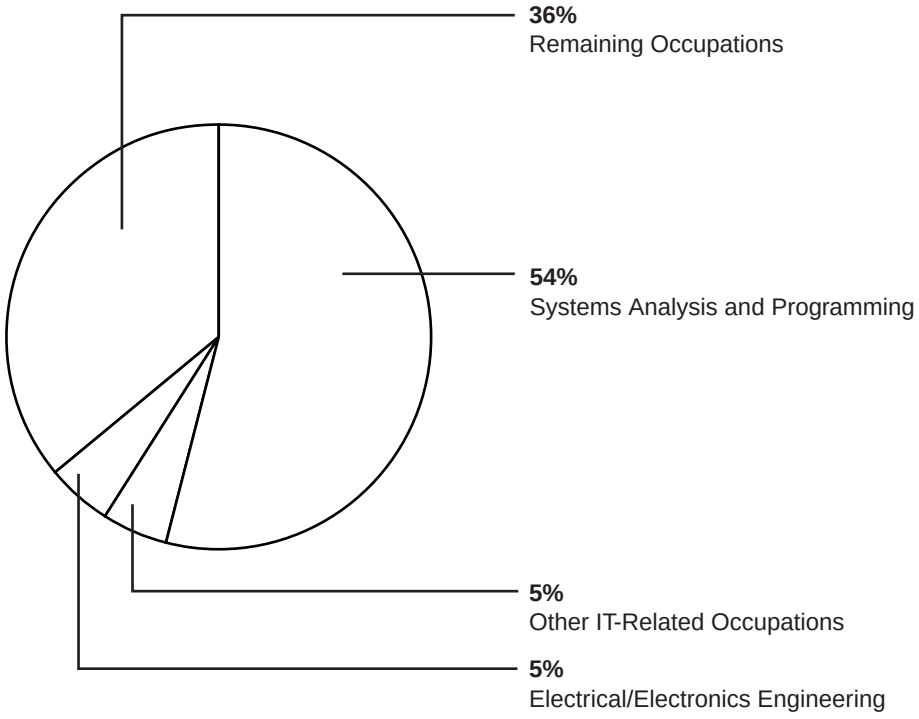
[11]INS randomly sampled visa petitions and supporting documents for workers approved for H-1B status that count against the 1999 limit. Details about the sampling and its results are included in app. 1.

category of systems analysis and programming.[12] Another 5 percent were in electrical or electronics engineering occupations, fields that may also be related to computer development.[13] The remaining visas were for occupations in fields as diverse as college and university education, accounting and auditing, biological sciences, economics, mechanical engineering, medicine, and commercial art. INS has few historical data for comparison, but in fiscal year 1992, about 6,000 H-1B visas were approved for IT-related occupations—many fewer than the approximately 79,000 estimated to have been approved for IT-related occupations in fiscal year 1999.

[12]Because our estimates are based on samples, they are subject to sampling error. Our estimates have a 2 percentage point (or less) confidence interval around each estimate. There is a 95 percent chance that the actual value (whether dollars, ages, or percentage estimates) falls within that interval.

[13]For example, the Institute of Electrical and Electronics Engineers' most recent salary survey data indicated that one-quarter of its members reported their area of technical competency as computer-related, with specialties such as hardware development, software development, and network administration.

Figure 3: Occupations for New H-1B Visas, Fiscal Year 1999



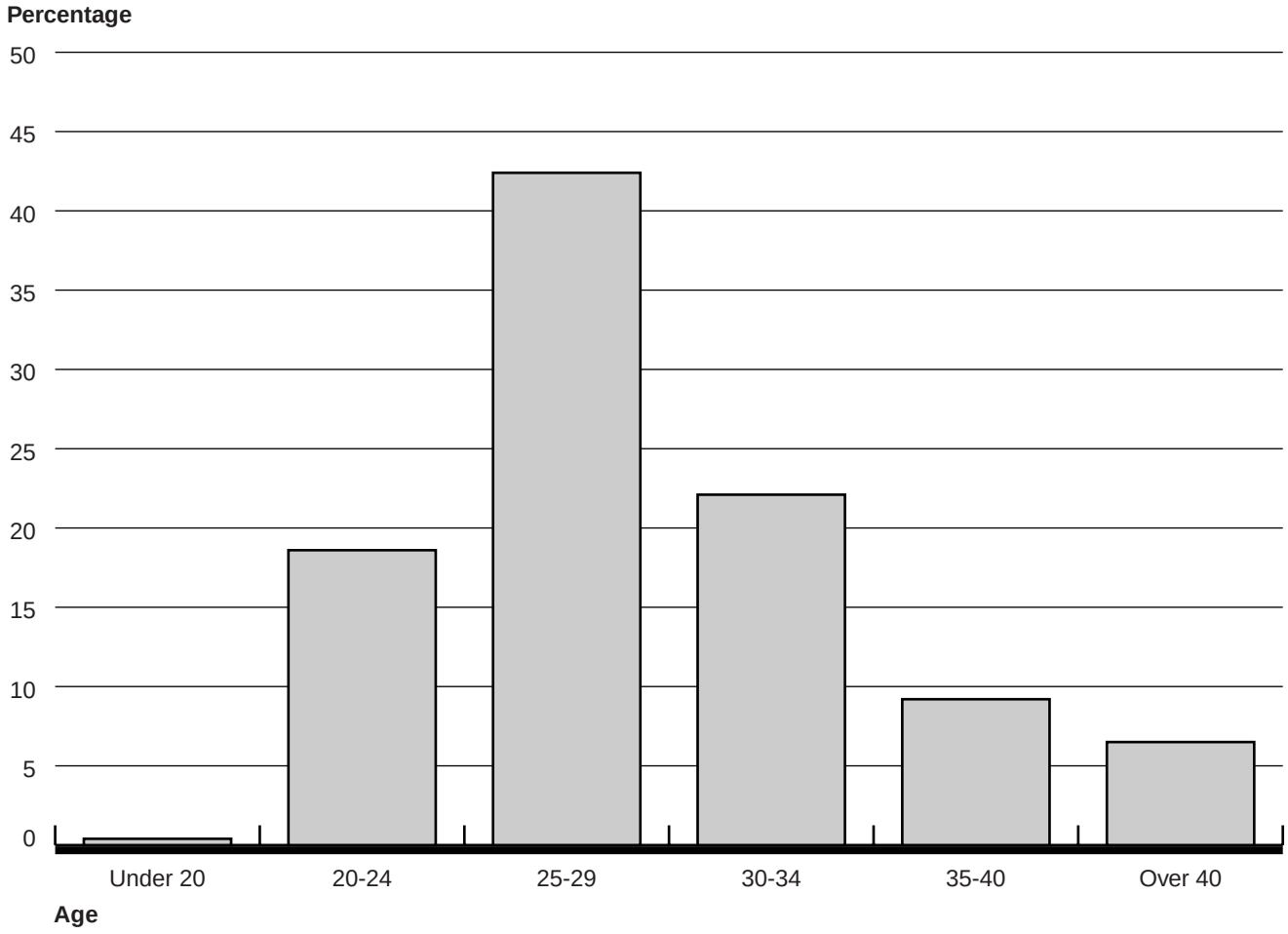
Note: Totals do not equal 100 percent due to rounding.

Source: INS.

The majority—57 percent—of workers approved for new H-1B visas in fiscal year 1999 had earned a bachelor's degree as their highest degree, while 41 percent had attained an advanced degree. The positions they were scheduled to fill offered a median initial annual salary of $45,000. About 35 percent of those workers approved for IT-related occupations had advanced degrees, as compared with 50 percent for those approved for the remaining occupations.

Workers approved for new H-1B visas in 1999 had a median age of 28.3 years (see fig. 4); over 80 percent were younger than 35 years old. Those workers approved for IT-related occupations were younger than their non-IT counterparts—a median age of 27.4 years, compared with 30.2 years.

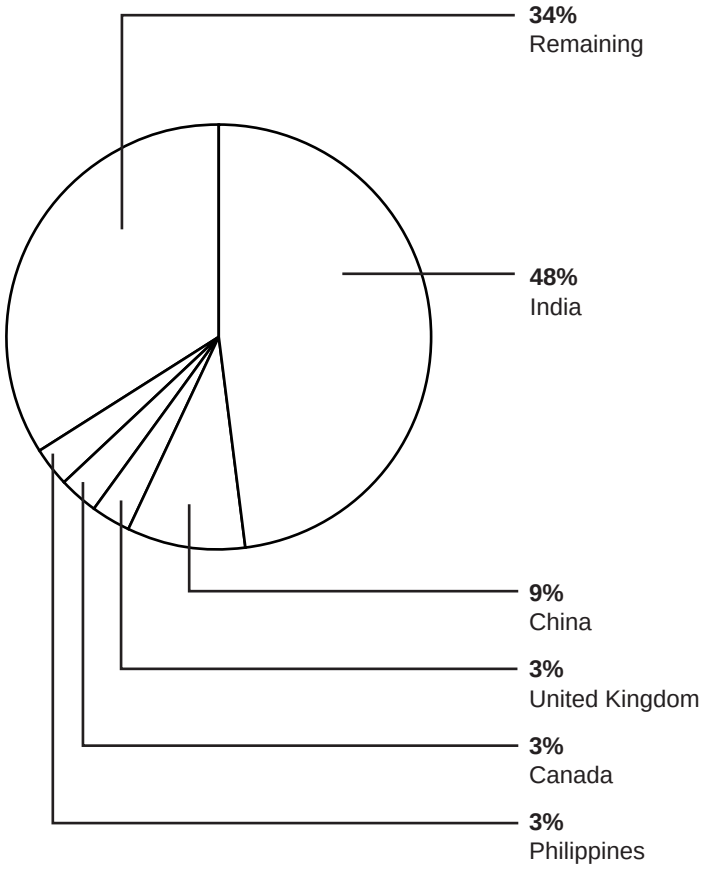
Figure 4: Age Distribution of Workers Approved for H-1B Visas, Fiscal Year 1999



Source: INS.

Almost half of the workers approved for new H-1B visas in fiscal year 1999 were born in India, with the second highest number of workers born in China (see fig. 5). In total, at least 119 countries were represented. Almost three-quarters of the workers approved for IT-related occupations were born in India, compared to 14 percent for those workers approved for non-IT-related occupations.

Figure 5: Countries of Birth for New H-1B Visa Approvals, Fiscal Year 1999



Source: INS.

About 42 percent of those workers approved for H-1B visas in 1999 were already in the United States when their visas were approved. The majority of those here were on student visas, while others were spouses or children of foreign students, visitors, or other types of nonimmigrants. About one-quarter of the workers scheduled to fill IT-related occupations were already in the United States, which indicates that H-1B workers for IT-related occupations are more likely than those in non-IT related occupations to be recruited from outside the country.

Additional Data Collection Is Under Way, But Some Data Are Still Unavailable

As required under ACWIA, INS has been collecting specific data on H-1B visa petition approvals for fiscal year 2000. Although INS had previously obtained some of these data on the petition or supporting documentation (such as workers' country of origin, educational levels, and wages to be paid), it did not routinely analyze all of this information. It is now collecting and analyzing this information in addition to other information, such as the worker's major or primary field of study and the employer's industry code, in an effort to shed light on characteristics of H-1B visa-holders and the jobs they fill in the United States.

Preliminary data from new visa approvals as of February 29, 2000, mirror the 1999 data. For example, nearly 50 percent of the petitions counting against the annual limit—those for new workers—were for IT-related occupations (as compared with 59 percent from 1999). INS also is finding that about 60 percent of approvals not counting against the limit were for IT-related occupations, indicating that workers in computer-related occupations are more likely to extend their stay in the United States, move between companies, or work concurrently for another employer than other H-1B workers.

However, INS is still unable to determine the number of H-1B workers approved in any given year who actually come to the United States. This inability to accurately identify the number of workers who actually enter the country on a particular visa or who stay in the country after their initial term has ended, obtain a visa extension, or obtain permanent residency extends beyond the H-1B program. For example, in 1998, about 13,000 H-1B nonimmigrants became legal permanent residents, but there are no data on how many returned to their home country, or stayed here illegally after their H-1B visas expired.[14] This is because INS has two systems that do not interact with each other—one that tracks the number of visa petitions it approves, and another that tracks nonimmigrants entering the country on visas. Nonimmigrants may enter and leave the country several times during the period of their visa but these entrances are not matched with the year of approval, nor does INS attempt to eliminate repeat entrances in its nonimmigrant system statistics. The Congress recognized the need for better information on nonimmigrants entering and leaving the country and

[14]One estimate of the current H-1B population in the United States is 360,000. See B. Lindsay Lowell, Ph.D., *H-1B Temporary Workers: Estimating the Population* (Washington, D.C.: Georgetown University Institute for the Study of International Migration, Apr. 17, 2000), http:/www.ieeeusa.org/grassroots/immreform/h1breport.pdf (cited Apr. 24, 2000).

in 1996, through the Illegal Immigration Reform and Immigrant Responsibility Act, required INS to develop an automated entry/exit control system that would provide better records on every individual arriving in or departing the United States under a visa. It was anticipated that, by having such records, INS would be able to link individual nonimmigrants with their particular visa category. In June 2000, the Congress extended the full implementation date for this system to December 31, 2005.

Implementation Weaknesses Leave the Program Vulnerable to Abuse and Lead to Inefficient Customer Service

Labor has limited legal authority for questioning an LCA and initiating enforcement actions, such as investigations, to address potential noncompliance. Moreover, INS lacks the necessary program controls to ensure that each petition is correctly reviewed in a timely manner. As a result, the program is vulnerable to abuse—both by employers who do not have bona fide jobs to fill or do not meet required labor conditions, and by potential workers who present false credentials. In addition, employers who meet H-1B requirements may not be able to obtain the H-1B workers they need in a timely manner. Finally, systems weaknesses at INS also lead to INS' difficulty in accurately tracking the number of visas counted against the annual limit.

Labor Has Limited Authority to Question Information on the LCA

Under the law, Labor's Employment and Training Administration (ETA) has 7 days to decide whether to certify the conditions that an employer attests to on the LCA.[15] Because the law permits Labor to review the LCA "only for completeness and obvious inaccuracies," ETA cannot evaluate other types of information, regardless of how questionable it may appear. As a result, ETA approves most LCAs—93 percent in fiscal year 1999 (and, according to a Labor official, many of the LCAs initially rejected were likely resubmitted with changes and then approved). While this part of the H-1B application process was established to require the employer to attest to the existence of various labor conditions, the Congress wanted it to be as quick and efficient as possible by limiting the depth and time frame of Labor's review.

[15]Difficulties meeting the 7-day timeframe led to the development, in 1999, of a facsimile process to speed up LCA processing. Machine malfunctions, and heavy workloads for offices that still processed manually, continued to lead to processing times in excess of 7 days; in February 2000 we found that, in two offices, LCAs were processed in 12 and 13 days. According to Labor, as of May 2000, the facsimile process had matured, and except during malfunctions or maintenance, regional offices are processing the LCAs within the 7-day time period.

However, this statutory limitation means that Labor's certification can do little to ensure that employers are meeting required labor conditions. For example, an employer must certify that no strike, lockout, or work stoppage was under way at the time the LCA was prepared; however, according to ETA officials, even if they find out through other means that a strike is under way, they must approve the LCA. As another example, even though employers may be required to pay H-1B workers a prevailing wage, ETA officials said employers can use almost any source to determine a prevailing wage and ETA does not have the authority to verify the authenticity of the information unless officials can demonstrate that the source is obviously inaccurate on its face. According to ETA officials, even if they know a prevailing wage is incorrect, they must approve the LCA.

Once Labor has certified the LCA, the employer must provide it, along with the petition, to INS. The petition includes some of the same information as the LCA, and, as a part of its review, INS reviews information on both documents (such as the wages to be paid). In that respect, the filing of the LCA with Labor represents an additional step for employers that adds additional effort and at least a week to H-1B processing time.

Labor Has Limited Authority to Initiate Enforcement Actions

Labor's WHD has limited ability to ensure that H-1B employers comply with their legal obligations and H-1B workers and their U.S. counterparts are protected under the law. When authorized to investigate, WHD is responsible, under the H-1B law, for ensuring that workers are receiving the wages promised on the LCA and are working at the occupation and location specified; it can only initiate H-1B-related investigations as a result of one of three factors:

- A complaint is received from an aggrieved person or organization, such as the H-1B worker, an American worker, or the employee bargaining representative. Information that surfaces from ETA's or INS' review of an employer's information on an LCA or INS petition is prohibited under the law from being used as a basis for compliance investigations. WHD receives few complaints—135 in fiscal year 1999—yet about 137,000 H-1B workers were approved that year. A Labor official told us that these workers are reluctant to complain about their working conditions, as they are dependent on employers to enable them to stay in the United States or sponsor their permanent residency.
- WHD obtains information about a particular employer who, within the last 5 years, has been found to have committed a willful failure to meet a condition specified in the LCA or willfully misrepresented a material

fact in the LCA. According to WHD officials, these criteria are very difficult to meet in order to sustain legal challenges by employers and, to date, WHD has only established one employer as a "willful" violator.

- WHD receives specific credible information from a reliable source (other than a complainant) that the employer has failed to meet certain specified 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 employees.[16] The Secretary of Labor must personally certify that these conditions exist. WHD has yet to receive any specific credible information that could justify an investigation under the Secretary's special authority.

These limitations contrast with WHD's enforcement authority under other worker protection laws, in particular, FLSA. As mentioned earlier, under FLSA, WHD can initiate inspections on a variety of criteria to determine potential noncompliance. It can survey industries to obtain a baseline measure of the extent of compliance. It can then use that information to target either employers or specific industries for further investigations, thereby directing its investigation resources to eliminate the greatest program abuses. Further, WHD during investigations can subpoena the necessary records from employers, such as payroll documents, to determine whether employers are paying the appropriate wages. Under the H-1B program, however, WHD has no authority to perform these activities.

In many ways H-1B workers are different from workers covered under FLSA, which affects WHD's ability to use other laws to ensure H-1B workers receive their legal protections. First, FLSA's protections are focused on workers who are lower paid, which H-1B workers generally are not. Second, WHD investigators are more likely to investigate companies that have many lower-paid workers, which are not the typical companies that use H-1B visa workers. Finally, during investigations, WHD investigators would not likely know which employers are H-1B workers because that kind of documentation is not typically available during investigations. However, in a very important way, H-1B workers are very much like workers covered under FLSA; according to a Labor official, H-1B workers may be vulnerable to abuse since their dependency upon their employers may lead to reluctance to complain, not unlike those workers protected under FLSA. As a result, according to WHD officials, the original

[16]The source may not be an officer or employee of Labor unless the information was lawfully obtained while conducting another investigation under this or another act.

assumption that enforcement for H-1B workers could be complaint-driven has not held true.

Although its authority to investigate is limited, there is evidence to believe that program noncompliance under the H-1B program exists. For example, even though there has not been a large number of complaints, WHD is significantly more likely to find violations in H-1B complaint cases than in complaint cases under other laws, according to WHD officials. As shown in table 1, over the last 4 1/2 years, 83 percent of the closed H-1B investigations found violations–compared to about 40 to 60 percent under other labor laws, according to Labor officials, and the amount of back wages owed to H-1B workers has been substantial—over $2 million, or about $3,800 per employee found to have back wages due.

Table 1: H-1B Investigations, Violations, and Back Wages Due

Fiscal year	Investigations completed			Back wages due		
	Total	Violations (number)	Violations (percentage)	Investigations	Amount due (dollars)	Number of employees involved
1996	24	22	92	20	$335,454	36
1997	16	14	88	14	149,458	33
1998	24	20	83	17	365,840	90
1999	32	24	75	19	361,534	206
2000[a]	35	29	83	29	1,168,154	255
Total	131	109	83	99	$2,380,440	620

Source: WHD, Department of Labor.

[a]Through April 30, 2000.

Finally, according to WHD officials, there are increasing instances of program abuse in which workers are brought into the United States to work, but are not employed and receive no pay until jobs are available (often called “benching”). Other violations have included employers withholding wages from employees who have voluntarily left for employment elsewhere. WHD’s investigative findings are corroborated by a 1996 Labor Inspector General report that found 75 percent of the aliens were working for employers who did not adequately document the proper wage on the LCA and, when the actual wage could be determined, 19

percent of the H-1B workers were paid less than the wage specified on the LCA.[17]

Procedures at INS Could Lead to Potential Abuse

INS staff, called adjudicators, review employers' petitions and decide whether to approve the nonimmigrants' H-1B visa classifications. They review the petitions and supporting documentation to determine whether bona fide jobs exist for the H-1B workers—that is, jobs that meet the requirements of a specialty occupation. They also are supposed to determine whether the petition indicates that the qualifications of the prospective H-1B workers meet the statutory requirements—for example, that they have a bachelor's or higher degree (or its equivalent) in the specific specialty. They also compare the information on the petition with that provided on the Labor-certified LCA. During our review, we found that adjudicators did not have a systematic approach for reviewing petitions. INS recently implemented national standard operating procedures with criteria for adjudicators to follow. Adjudicators continue to lack easy access to case-related information that could help them make decisions about the merit of the petitions. We found that the supervisory review and performance appraisal processes give adjudicators incentives to approve petitions. These procedures leave the program susceptible to abuse. We also found that decisions on work priority at the various service centers have led to delays of several months in reviewing employers' H-1B visa petitions.

Until Recently, INS Lacked a National Systematic Approach for Petition Review

Before August 2000, INS had no national systematic approach for how adjudicators at all four INS service centers were to determine whether an employer's request for workers should be approved. Service center officials and adjudicators said that although they initially received national-based training, and there were center-based standard operating procedures, this training or center-based guidance did not provide them the kind of practical information they needed to assess petitions. In interviews with adjudicators and observations of them performing reviews, we found major differences among and within the different centers in how adjudicators decide which petitions to approve.

[17]U.S. Department of Labor Inspector General, *The Department of Labor's Foreign Labor Certification Programs: The System Is Broken and Needs to Be Fixed*, Report No. 06-96-002-03-321 (Washington, D.C.: May 22, 1996).

For example, at one service center, employers were required to provide a report from an independent agency that specializes in evaluating the educational or work credentials of foreign workers; other service centers we visited did not have such a requirement. Moreover, even within the service center that required these reports, one adjudicator said that she would not accept reports from a particular agency, while another adjudicator said that he would accept this agency's reports. Also, an adjudicator at one center said that, because of her experience in the high-technology field, she questions whether certain IT occupations should be considered specialty occupations under the H-1B program, and she would apply this belief to her review of petitions. Adjudicators at other centers accepted these occupations more readily.

We also found a wide range of views among the service centers as to whether and how adjudicators may request additional information from an employer to assess the merit of the petition.[18] Adjudicators at each service center said they were not sure whether the law allowed them to request additional information, especially concerning whether a bona fide job exists and, as a result, were reluctant to do so. However, an adjudicator at one service center said that an adjudicator can request any information he or she believes is necessary to assess whether such jobs exist and has instructed adjudicators on how to obtain this information from employers.

INS headquarters officials said these differences may result from adjudicators' discretion, or from differences in petitions that may not be initially apparent. However, it acknowledged that gains could be made in the efficiency and consistency of reviews and, in August 2000, implemented a 75-page set of national standard operating procedures that established a systematic approach for adjudicators to use when reviewing H-1B petitions. INS officials said that, in conjunction with these new procedures, it conducted national training at all centers on the H-1B program. The standard operating procedures lay out the basic steps that adjudicators should follow when reviewing petitions, and explain the types of documentation that should accompany the petition. The procedures require adjudicators to document why they denied a petition or why they believed additional information was necessary. The implementation of these procedures should help all adjudicators understand what steps they

[18]INS headquarters officials said that adjudicators request additional information on about 15 percent of nonimmigrant worker petitions they review, based on unofficial local service center management reports. (These data are not collected in any of INS' national systems.)

should follow to assess the merit of petitions. However, the procedures do not clearly detail how adjudicators will address several of the issues we identified, such as how an adjudicator will decide on the sufficiency or accuracy of the documentation provided, or the criteria for, or situations under which, an adjudicator should request additional documentation from an employer or deny a petition. Moreover, the procedures do not require any documentation of the process used by adjudicators to approve a petition, which account for the vast majority of petitions reviewed. Without some explanation of those cases that are approved, it is difficult for supervisory reviewers to determine whether adjudicators actually took the appropriate steps when approving petitions. According to INS, the procedures will continue to evolve to address adjudicators' needs.

INS has also begun to compile relevant decisions in H-1B court cases that will help adjudicators make decisions consistent with past, binding cases. While these cases are helpful, service center officials noted that they would like better training on how to use judicial precedents and how to word requests for additional information that would improve adjudicators' effectiveness.

Case-Specific Information That Could Help Adjudicators Is Not Easily Accessible

Adjudicators commented that they do not have easy access to case-specific information developed by other INS officials that would help them better determine whether a petition should be approved. As INS' information systems now operate, information that supports petition denials, such as evidence of a fraudulent employer or falsified worker credentials, is either not available to adjudicators, or not available in a manner that is easily accessible for adjudicators, given the timeframes in which they must review petitions. Information that a petition has been denied is initially only available to adjudicators within the same service center. After a month, it is uploaded to a central system and is available to adjudicators in all centers, but can be accessed only through a complicated, time-consuming process. Even if an adjudicator accesses the information, the reason for the denial is not recorded in the automated file, so the adjudicator cannot readily use the information to assess a petition from the same employer or for the same potential employee. As a result, a petition previously submitted and denied can be approved by another adjudicator, even if the denying adjudicator determined that the employer does not meet H-1B requirements. According to an INS official, in addition to information developed by adjudicators, results of INS investigations of employers already approved for H-1B workers are not readily available to adjudicators on the information system. Adjudicators noted that they are under pressure to adjudicate cases quickly and, unless the information is

accessible on an automated basis, they do not have time to review it. Such information is sometimes available from service center staff who focus on fraud investigations, but adjudicators and fraud staff at the centers explained that because of the fraud staff's many responsibilities and adjudicators' time pressures, adjudicators would not routinely use investigations staff to look into potentially fraudulent petitions.

Officials at INS headquarters acknowledged that adjudicators need timely, accurate, and accessible information in order to properly assess the merit of petitions. These officials said that INS is in the process of stabilizing and upgrading the petition-tracking computer system to correct some other problems and believes that the upgrade could enable them to make better information available on-line for adjudicators.

Supervisory Review and Performance Appraisal Processes Encourage Approvals

The process for assessing adjudicators' performance can give adjudicators an incentive to approve petitions rather than scrutinize them carefully for their merit. Currently, supervisors are required to routinely review only denials and any requests that adjudicators might make for additional information. They generally do not review approvals, which represent about 91 percent of petitions reviewed for all nonimmigrant employment visas. As a result, in order to reduce the amount of supervisory review, an adjudicator may approve petitions rather than deny them. Further, according to service center officials, INS' current performance appraisal system for adjudicators is based on the number of petitions reviewed, not the quality of the review. They said that staff who process the greatest number of petitions are generally rewarded over those who tend to assess petitions more critically and, therefore, review fewer petitions in a given time period. They added that while adjudicators understand that their responsibility is to carefully review petitions, the performance appraisal system provides disincentives to deny a petition or request additional information because of the additional time it will take to reach a decision. INS headquarters officials explained that the absence of a quality measure in performance appraisals reflects the difficulty of implementing a reasonable measure, not an encouragement of production over quality. INS officials said that, at various times, INS has experimented with including a quality measure in the adjudicator performance work plan but the various approaches have had significant drawbacks.

Implications of Inadequate INS Adjudication

The combination of the lack of guidance in particular areas, difficulties in accessing case-related information, and the performance assessment procedures have left the program vulnerable to program noncompliance and abuse by potentially allowing H-1B petitions that do not meet

requirements to be approved. There is evidence that some employers and workers have tried to abuse the program. INS investigators following up after petitions have been approved have found a number of instances of program fraud in the program. For example, INS has found workers brought to the United States under the program who worked in occupations that did not qualify as H-1B occupations; it has also identified employers who have created shell corporations and created false credentials and documents for aliens who were not eligible for H-1B employment. In 1998 and 1999, INS referred petitions to the State consular post in Chennai, India, if they had certain fraud indicators, such as a degree from a university often used in forged degrees. State found that of the 3,247 petitions referred through March 31, 1999, close to 45 percent of claims made on these petitions were of questionable validity and 21 percent of the work experience claims made to INS were fraudulent.[19]

In addition to eliminating potential program noncompliance or fraud, INS' review of petitions needs to be effective for several other reasons. First, INS typically does not verify whether the workers it approves actually work in the jobs for which it approved the petitions and, according to INS officials, detection of visa fraud after petitions have been approved is not an investigative priority because limited special agent resources are, of necessity, primarily devoted to criminal activities. Second, the State Department's consular offices are generally required to interview each applicant, but can waive this requirement when the consular office is satisfied (based on a review of the application) that the applicant qualifies for a visa. It relies on INS to ensure that petition information related to U.S. employers is correct. One State Department foreign officer said he assumes that Labor and INS, respectively, have satisfied themselves on these issues before approving the LCAs and petitions. Third, we believe that because the number of visas that may be issued for H-1B workers each year is limited, there should be procedures in place to ensure that these visas are granted judiciously and correctly so that those eligible for the program have access to the limited visas.

The procedures can also lead to inconsistent reviews across and within service centers that frustrate employers and prospective workers alike. One adjudicator told us that she had denied a petition, and when the

[19]This effort involved INS service center staff screening petitions for H-1B visas slated for issuance from the Chennai post, the most heavily used consular post. State staff at the post then attempted to validate the prospective workers' work experience or credentials.

employer resubmitted it without modifications, another adjudicator at the same center approved it.

INS' Prioritization Decisions Lead to Delays for H-1B Processing

Before February 2000, INS had an established time frame of 30 days within which adjudicators should start their review of H-1B petitions.[20] At that time INS increased the time frame to initiate H-1B petition review to 60 days. According to INS officials, the revision in processing times was an effort to balance priorities and workloads at the service centers. At that time, processing times on other types of petitions, which make up the majority of petitions INS reviews, had grown to a year or more.[21]

As a result of this decision, at one service center we found petitions waiting in a file room for 2 months or more before being distributed to adjudicators for review. Moreover, we found in April 2000 that the four centers were exceeding the 60-day time frame, taking anywhere from 45 to 70 days to start reviewing petitions. According to INS headquarters officials, however, as of August 2000, the service centers were generally taking 60 days or less to process petitions.

Although INS' decision was made to address greater priorities, it nonetheless has led to delays for employers using the H-1B program, and, according to employers, has affected their ability to staff projects when workers are needed. Employers said that, although the time it takes to hire an H-1B worker varies, the LCA and INS petition process can exceed 4 months.

Systems Problems at INS Led to Inaccurate H-1B Visa Count

In 1999, INS discovered that it had approved more than the allowable number of H-1B visas for fiscal year 1999. Recognizing the need to determine the extent of the overage, INS engaged KPMG Consulting, LLC, to estimate the number of H-1B petitions approved by INS that applied to the 1999 limit, document the current H-1B petition-processing environment, and identify potential improvements to the process. KPMG found that INS approved between 136,888 and 138,385 petitions—well over

[20]This time frame represents the time between when the petition arrives at the service center and when an adjudicator actually begins reviewing it. Some petitions are decided on immediately; others take longer because they are investigated further or the adjudicator requests more information.

[21]According to INS, of the 2.5 million petitions and applications it processes each year, about 500,000 are for nonimmigrant workers.

the limit of 115,000. KPMG also found that the computer system that tracks the H-1B petitions was not designed to count petitions against the annual limit. It found that the computer system needs the capability to accumulate accurate and current H-1B information, identify individuals who submit multiple petitions with slight variations in biographical data and count them only once against the cap, and, in general, support the generation of an accurate and timely H-1B count. KPMG made a series of recommendations to INS to improve the accuracy of the count, and INS is in the process of analyzing and incorporating these suggestions.

Efforts Are Under Way To Improve IT Skills of U.S. Workforce

Labor and NSF have taken several steps to improve the IT skills of the U.S. workforce, as have IT employers. Labor and NSF's efforts have recently provided millions of dollars in grants to institutions to train workers or provide scholarships, respectively, to increase the number of American workers with IT skills. While these efforts may over time help increase the number of American workers with IT skills, their ultimate effect is unknown given their recent start, their long-term focus and, in some cases, the lack of data on specific IT skills needed. In the short term, some employers say they train existing workers or new employees, while in the long term, they reported that they are encouraging students to pursue IT careers.

Labor Has Provided $41.5 Million in Skill Grants

In February 2000, Labor provided $12.4 million to nine grantees to train employed and unemployed workers for high-skill occupations that are in demand. In July 2000, Labor announced the second of three rounds of demonstration grants and awarded $29.1 million to 12 grantees for training American workers for high-skill jobs in areas where companies are facing labor shortages.[22] ACWIA, which mandated the skill grants, did not specify what occupations the skill grants should target. As a result, Labor used as a proxy those occupations for which employers requested H-1B workers. Given that accurate data on H-1B approvals did not exist at that time, in its August 16, 1999, *Federal Register* notice, Labor provided a list of the occupations requested on LCAs from October 1, 1998, to May 31, 1999. The LCA data showed health care and IT as the two industries most frequently using the H-1B program. Labor officials noted that the actual number of

[22]More funds are available; ACWIA permits these funds to remain available until expended. Labor estimated nearly $80 million in fees received through the H-1B visa program would be available to invest in high-skill training in 2000.

occupations shown by LCA data was flawed because, for example, some openings certified on the LCAs for anticipated employment do not actually get filled.[23] Moreover, Labor's criteria for assessing the merits of each proposal were based largely on characteristics of typical job training program quality factors, such as service delivery strategy, target population, and outcomes. Of the possible total points, 20 percent were assigned for local needs for the first round and 15 percent were assigned for the second round.

Despite these limitations, Labor's first round of 2-year grants was focused, with one exception, on training in IT-related occupations (see app. II for a listing of the grants). As a result, the grants are likely to contribute U.S. workers with IT skills to the workforce. For those grants awarded under the first round, grant recipients plan to train about 3,000 people in IT-related skills. Under the second round of grants, most were also focused on IT training; recipients plan to train about 2,500 in IT-related skills. However, given remaining questions about the number and type of workers needed, whether individuals will have the skills that employers need is unknown.

NSF's Scholarships Are in Initial Stages

In its first round of scholarship grant awards, NSF provided about $22.5 million to 114 academic institutions so that each institution could provide approximately 40 scholarships per year over a 2-year period of up to $2,500 to low-income, academically talented students to help them pursue associate, baccalaureate, or graduate-level degrees in fields such as computer science, engineering, or mathematics (see app. II for examples of these grants).[24] NSF also plans to award $25 million in the second round of awards[25] and $24 million in another round of awards in 2001.[26]

[23]Labor included the same LCA data in the March 29, 2000, grant solicitation for the second round of grants, even though INS by that time had developed data on occupations for approved H-1B visa petitions. A Labor official said they were aware of the new data but had not adequately investigated it in time to include it in the grant solicitation.

[24]Institutions were allowed to retain 9 percent of the grant for administrative and academic support.

[25]Proposals for the fiscal year 2000 funds were due to NSF by August 3, 2000.

[26]NSF, and several other agencies, receive additional funds to develop math and science curriculums for elementary and secondary students, intended to improve students' skills needed in the future workforce. For information on these other efforts, see *Math and Science Education: Comprehensive Information About Federally Funded Materials Not Available* (GAO/HEHS-00-110, July 12, 2000).

According to NSF officials, NSF sought to fund those projects that best tied the school's academic standards to the workplace by helping students make the transition from school to work. Applicants were judged for

- an infrastructure designed to help scholarship recipients graduate (including, for example, academic support and mentoring);
- a management and administration plan that is effective and clearly articulated, which includes verification of scholarship candidates' eligibility and evaluation of program outcomes; and
- an education program of high quality, having external accreditation and academic courses of study that are well defined, current, and intellectually rigorous.

NSF officials believe the scholarships will lead to long-term outcomes such as

- improving education for students in the stated disciplines,
- increasing retention of students to degree achievement,
- improving professional development and employment and/or further higher education placement of participating students, and
- strengthening partnerships between institutions of higher education and related employment sectors.

Given the long-term nature of the scholarships, it is difficult to know precisely how many workers they will add to the U.S. IT workforce. First, the actual amount of the individual scholarships is relatively small so that these funds alone may not be sufficient to pay education costs. According to NSF officials, the scholarships provide strong incentives to institutions to retain and prepare students for IT-related occupations. It will be important for the academic institutions to combine financial resources from a number of sources to ensure that these scholarships make a difference. Second, it is difficult to predict whether scholarship recipients will actually enter IT-related occupations, because recipients' choice of majors does not always correspond with their actual employment several years later. NSF officials acknowledge that these individuals may not enter

the IT field, and also that students from other academic backgrounds may enter IT occupations.

Employers Use a Variety of Methods to Improve IT Skills in the Short Term

IT employers we contacted said they have several choices to fill their many IT vacancies in the short term—they can retrain existing workers, train new workers, or recruit workers from the outside with the necessary skills. For example, one employer retrained its workers whose jobs were being eliminated, such as retraining a hardware engineer to be a software engineer. According to the employer, the program costs about $3,500 per worker for 3 months of training. Other employers established tuition reimbursement programs to encourage their employees to obtain or improve skills, and offered annual stipends, part-time employment, and full tuition and fees while workers pursued a master's or doctoral degree in an IT-related field. Other employers maintained skill inventory databases and required employees to develop individual development plans in order to update or obtain IT-related skills.[27]

Several employers said they train newly hired employees—even recent college graduates—in order to give them the necessary IT skills, at a cost two employers estimated to be about $10,000 for each new employee. Because of high turnover, training for new workers is a potentially costly option, and employers may be reluctant to provide training at significant cost for fear that, once employees have received this training, they will leave. Consequently, when employers do provide training, they may ask employees to agree to stay for a period of time in exchange for the training provided—in one case, it was for 1 year.

According to employers, the ideal short-term solution for filling IT occupations is to obtain IT workers who already have the necessary skills. To do this, employers use a variety of traditional recruiting strategies, such as on-campus college recruiting and participation in job fairs. Employers also use less-traditional recruiting strategies. For example, they said a great deal of hiring occurs now over the Internet; employers either post job vacancies and applicants respond, or employers recruit from web sites where job seekers post resumes. Another method is "cold calling;" a recruiter at a relatively small business noted that he sometimes calls a company that he knows has the type of talent he needs and attempts to recruit workers who answer the phone. Finally, employers also take advantage of contract workers; a large employer that had over 300 contract personnel from over 100 contract labor agencies reported that the company

[27]Approaches to attracting and retaining skilled information management professionals are discussed in *Executive Guide: Maximizing the Success of Chief Information Officers—Learning from Leading Organizations* (GAO/AIMD-00-83, March 2000).

ensures that all such contracts provide the option of eventually hiring the workers directly.

However, IT employers we interviewed said that they cannot always find U.S. workers with the necessary skills to fill all IT vacancies; as a result, they may actively seek workers through the H-1B program. Employers may find H-1B workers through their usual recruiting efforts, because workers who may be already employed in the United States or on a student visa best meet the employers' needs. The H-1B program offers a number of benefits, including that workers will start their jobs with the requisite skills, and also that if the H-1B worker is good, employers can sponsor the worker for permanent U. S. residency. All of the employers we interviewed sponsored at least some of their H-1B workers for permanent residency.[28] These IT employers, however, also said that there were disadvantages to using the H-1B program, as it can cost over $2,000, including attorney and filing fees, to obtain a worker with an H-1B visa, and it may take as long as 4 or 5 months before a visa is approved.

Employers Are Undertaking Long-Term Efforts to Encourage IT Careers

Employers are also making some effort to improve the IT skills of American workers over the long term. These efforts are predominately focused on encouraging students to pursue careers that may be IT-related. For example, several of the employers we contacted said they worked with universities to improve the skills needed in the IT industry. One employer reviewed university curriculums and served on panels and partnerships intended to improve IT skills. Other employers provided mentors to students, computer assistance, or computer equipment to elementary and secondary schools. To assist in improving math and science curriculums, one employer funded a program whereby local universities would work with four school districts to help children stay in school and go to college. For the participating universities, the employer provided scholarships and internships for minority students majoring in engineering and computer science. This particular program will cost $2.5 million over a 4-year period.

[28]Although an employer may sponsor an H-1B worker for permanent residency, this does not guarantee permanent residency. With increasing numbers of H-1B workers, the annual numerical limitations on employment-based immigration and per-country ceilings mean that growing queues and waiting periods face H-1B workers seeking permanent residency in the United States.

Conclusions

The H-1B visa program has helped employers fill specialty occupations on a temporary basis; in fiscal year 1999 alone, over 130,000 individuals were approved to work in the United States on an H-1B visa. The significant growth in the number of such workers authorized to enter the country indicates that the program is an important tool for hiring workers in specialty occupations, especially IT-related occupations. However, as the program currently operates, the goals of preventing abuse of the program and providing efficient services to employers and workers are not being achieved. Limited by the law, Labor's review of the LCA is perfunctory and adds little assurance that labor conditions employers attest to actually exist. Furthermore, the requirement that employers first file the LCA with Labor before filing the same information with INS represents an extra, time-consuming step that adds to H-1B processing time. Expanding Labor's authority to question information on the LCA would provide additional assurance that labor conditions are being met; however, this would likely increase processing time substantially and the Congress has demonstrated its desire that this process be handled quickly by establishing a short time frame and limiting Labor's review. If the Congress wants to retain the minimal review, it could consider eliminating altogether the separate filing of the LCA with Labor and assigning the LCA review solely to INS. Because Labor cannot now independently verify whether labor conditions will be met, no current protections would be lost if INS were to subsume this process. Moreover, because INS reviews much of the information on the LCA as a part of its petition review, there would not be any additional resource needs for INS adjudicators to perform this function. Finally, eliminating one review step may also shorten the total approval time for H-1B workers, thereby increasing employers' ability to get the workers they need in a timely manner.[29]

Limitations governing Labor's ability to enforce H-1B requirements for employers who have H-1B workers restrict Labor's ability to adequately detect program noncompliance or abuse. Currently, unlike other labor laws it is responsible for enforcing, Labor is able to initiate investigations to

[29]There is a precedent for such streamlining. In 1997, we found similar problems on another visa program—that for agricultural guest workers. We found that INS was merely "rubber-stamping" visa applications, which burdened the employer with additional paperwork and added time to the visa application process. We recommended for that program that INS' role be subsumed by Labor, which was performing the more substantive review; this change was proposed in the *Federal Register* in 1999. See *H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers* (GAO/HEHS-98-20, Dec. 31, 1997).

address potential only if narrowly restricted circumstances are met. It has no authority to subpoena records during an investigation to identify whether employers are complying with the law, and it cannot conduct a baseline survey to obtain a true understanding of employer compliance with the H-1B program. Yet, Labor Inspector General reviews and other available evidence suggests that program noncompliance or abuse by employers, after the H-1B workers have been placed, exists and may be more prevalent than under other laws where Labor has broader enforcement authority.

Finally, existing INS procedures do not give adequate assurance that program noncompliance is being detected. INS' recent efforts to implement procedures to standardize adjudicators' review steps are a positive step. However, INS must continue to implement and revise the procedures and conduct training to address the concerns raised by adjudicators, such as when and how they can request additional documentation from employers. Additionally, there is no requirement that adjudicators document their adherence to procedures or how they exercised their discretion in assessing the sufficiency of documentation when petitions are approved. The lack of easy access by adjudicators to case-related information, as well as supervisory and performance appraisal procedures that could discourage adjudicators from denying petitions, can lead to incorrect approvals of employer petitions.

INS' efforts to upgrade its data systems and analyze and incorporate KPMG's suggestions should prove beneficial to the entire H-1B visa process, but the ultimate effectiveness of such computer upgrades and revisions will be limited if INS does not include easy access by adjudicators to the case-specific information they need to accurately assess the merit of petitions. Finally, even with these improvements, unless INS has a supervisory review and performance appraisal system based, at least in part, on quality rather than quantity of review, it is not clear whether adjudicators will have any incentive to carefully scrutinize the merit of petitions.

The federal government and employers are making efforts to improve the IT skill set of U.S. workers. While these efforts may help increase the number of workers with IT skills, it is too early for two reasons to evaluate whether the skill grants or the scholarships being funded by H-1B fees will reduce the demand for H-1B workers. First, there continues to be a wide range of views on the extent of need for IT workers and the kinds of skills that are most important. Second, education and training programs, by their

nature, can be long-term remedies to labor needs. To be successful, these programs will have to continually adjust their focus to the changing skill needs of the rapidly growing IT industry. Better information now available on the kinds of positions that H-1B workers are filling should help to target their efforts.

Matters for Congressional Consideration

Given the limited nature of Labor's review of LCAs, the Congress should consider streamlining the H-1B approval process by eliminating the separate requirement that employers first submit an LCA to Labor for certification. Instead, the Congress could require employers to submit an LCA and the I-129 petition simultaneously to INS, which will continue to review and evaluate the information contained on both the LCA and the petition.

If the Congress wished to broaden Labor's enforcement authority and improve its ability to enforce relevant provisions in the H-1B law, it could consider, at a minimum, giving Labor's WHD subpoena power to obtain employers' records during investigations under the H-1B program. It could also consider allowing Labor to perform baseline evaluations to determine the extent of employers' compliance with H-1B requirements and conduct subsequent targeted efforts to address suspected noncompliance or abuse.

Recommendations

To improve INS' ability to prevent H-1B visa abuse and better serve customers, we recommend that the Attorney General direct the Commissioner of INS to take the following steps:

- expand upon INS' current efforts to standardize H-1B adjudication procedures by (1) providing practical guidance to help adjudicators assess the adequacy or sufficiency of documentation and determine when and how to request additional documentation from employers, and (2) having adjudicators document adherence to standard procedures when reviewing petitions;
- provide easy access to case-specific information for adjudicators when reviewing petitions as a part of the current upgrade of its computer system; and
- enhance existing supervisory review and performance appraisal systems so that adjudicators are held accountable for the correct assessment of petitions as well as for the quantity of reviews they complete.

Agency Comments

The Departments of Labor and State, INS, and NSF commented on a draft of this report (see apps. III-VI, respectively). Only Labor and INS provided comments concerning our matters for congressional consideration or recommendations.

Labor did not agree with our matter for congressional consideration concerning the transfer of the LCA review; instead, it stated that consideration should be given to how to improve the substantive nature of the LCA review in a way that has minimal impact on timely processing. If the Congress expands the LCA review, we agree that Labor is the most appropriate agency to perform a more substantive review. However, unless the Congress chooses to require a more substantive review, we believe it would be more efficient to have the review done only once, by INS.

Labor agreed with our second matter for consideration to provide it broader authority to enforce the H-1B program's requirements. Labor said that it has long urged the Congress to reconsider and expand the narrow limits on its enforcement authority.

INS said it was taking a number of actions to ensure consistent adjudicator reviews, make information more accessible to adjudicators, and experiment with measuring quality. However, it did not agree with our overall conclusions or our recommendations to improve the consistency and correctness of its H-1B decisions. Regarding our first recommendation concerning guidance to help adjudicators assess the adequacy of information and request additional documentation, INS agreed in principle with standardizing the procedures used by adjudicators to review petitions. However, it said its recently implemented procedures are sufficient to address our recommendation. We agree that these procedures should help adjudicators understand the steps they should follow to assess the merit of petitions. However, it is too early to tell whether the procedures as they currently exist will be sufficient to address the areas we identified where adjudicators were uncertain about how to exercise their discretion. INS also said that our recommendation to have adjudicators document their adherence to standard procedures would detrimentally affect timely processing if extended to approval cases. We acknowledge that an onerous requirement could affect processing time, but believe that there are simpler ways for adjudicators to demonstrate their adherence to standard procedures. For example, a checklist with space for adjudicators to note areas of concern and briefly indicate how they address those concerns would provide a decision trail for a reviewer. Without some documentation

about how cases are decided it is more difficult for supervisors to assess whether approval decisions were correct. Such decisions constitute the vast majority of decisions and we believe it is important that INS supervisors assess both approvals and denials to assure that the adjudication process is operating effectively.

INS also disagreed with our recommendation to provide adjudicators with easy access to case-specific information. INS said that adjudicators already have access to information they need, such as laws, legal precedents, or information obtained by investigators. However, in general, laws or precedents are not specific to the case an adjudicator is reviewing because they do not involve the same employers, workers, schools, or occupations. Also, we found that communications between adjudicators and investigative staff at the service centers may not be as routine or efficient as INS headquarters envisioned. Furthermore, petition denial information is available only to adjudicators in the same service center for 30 days, after which the information is available nationally, but is not easily accessible, and does not provide adjudicators the basis for the denial. Both adjudicators and investigative staff said that unless the information is automated and potential problems are flagged, adjudicators will not take advantage of such information. INS did state, however, that the upgrades to its computer systems will enhance access to some of this information.

INS said it values both the quality and timeliness of decisions by adjudicators, but disagreed with our recommendation to enhance existing supervisory review and performance appraisal systems so that adjudicators are held accountable for the correct assessment of petitions as well as for the quantity of reviews they complete. INS said that adding a quality review process to its appraisal system would place an impossible burden on supervisors because they would need to take statistically valid samples for each adjudicator. Moreover, according to INS, the employee-to-supervisor ratio has changed from six employees per supervisor to as many as 15 employees per supervisor, while petition decisions have significantly increased. We disagree with INS' view that adding a quality review would necessarily be unduly burdensome. As discussed, we believe that INS' current supervisory review and appraisal process emphasizes the quantity of reviews over the quality, and that more balance is needed between the two objectives. Headquarters officials said that service centers are, in fact, already using a variety of techniques to check the quality of adjudication. Although we did not observe these efforts at the service centers we visited, INS said that efforts range from teams randomly selecting cases and determining the permissible range of decisions before providing the cases

to an adjudicator, to supervisors reviewing a random sample of 10 cases for each adjudicator. Moreover, supervisors already review denials and requests for additional information. All of these efforts indicate that service centers have found a need for some type of quality review and are implementing some mechanisms. We believe efforts such as these need to be established agency-wide so that quality of adjudication receives the proper degree of attention.

All four agencies provided technical comments, which we incorporated as appropriate.

We are sending copies of this report to the Honorable Alexis M. Herman, Secretary of Labor; the Honorable Janet Reno, Attorney General; the Honorable Doris Meissner, Commissioner, Immigration and Naturalization Service; the Honorable Madeleine Albright, Secretary of State; the Honorable Dr. Rita R. Colwell, Director, National Science Foundation; and other interested parties. We will also make copies available to others upon request.

If you or your staff have any questions about this report, please call me on (202) 512-7215. Other GAO contacts and staff acknowledgments are listed in app. VII.

Marnie S. Shaul

Associate Director
Education, Workforce, and
Income Security Issues

Scope and Methodology

Characteristics of H-1B Workers

To obtain information on the jobs H-1B workers are filling in the United States and the workers' characteristics, we relied primarily on data collected and supplied by the Immigration and Naturalization Service (INS)—most of it from a sample of petitions filed for fiscal year 1999. INS randomly sampled 1,100 petitions processed at each of the four service centers from a universe of petitions approved during the period from May 11, 1998, through July 31, 1999, and projected the results to the universe of 134,411 H-1B petitions approved during that time, weighting them to reflect the variations in numbers of petitions processed among the four centers. The universe included only applications for new employment (not renewals or changes of employers)—those that potentially would have been recorded against the fiscal year 1999 limit. INS employees reviewed the petitions in the sample and accompanying documents at the INS records center in Harrisonburg, Virginia, and recorded data from those files. We analyzed these data further to, for example, make comparisons between information technology (IT) and non-IT workers. INS also provided results from an analysis of all petitions approved for work beginning during the first 5 months of fiscal year 2000. We did not independently verify the data collected by INS in either the 1999 sample or the 2000 data. However, we did compare the results of our analysis of the INS data with information published by INS.

H-1B Visa Program Implementation and Enforcement

To assess the adequacy of the H-1B visa program's implementation and enforcement, we interviewed officials at the headquarters offices of Labor, INS, and State to understand the policies and procedures of the program. To understand how employers and nonimmigrants must proceed through H-1B visa approval, we visited three of INS' four service centers (in Laguna Niguel, California; Dallas, Texas; and St. Albans, Vermont) and three Labor regional offices (in San Francisco, California; Boston, Massachusetts; and Dallas, Texas), contacted officials at the fourth INS service center (in Lincoln, Nebraska), and obtained information electronically from eight State consular offices with high H-1B visa workloads. We discussed how prevailing wage rates are calculated with an official at one state employment service agency. In addition, we obtained views on H-1B procedures from IT employers who use the program, and met with associations representing American employer and employee groups, including representatives from higher education.

Efforts to Improve IT Skills in the American Workforce

To identify and obtain information about efforts under way to improve IT skills in the American workforce, we met with officials at the National Science Foundation and Labor to obtain information on the training and scholarship programs funded with H-1B visa fees. We also contacted 13 employers nationwide, representing companies that significantly invest in software development or provide IT services, and one university. These employers were selected judgmentally based on several factors and included employers who employed H-1B workers, geographic representation, and different company sizes. We also contacted associations such as the Information Technology Association of America, the National Association of Manufacturers, and the American Immigration Lawyers Association. In addition, we contacted groups representing employees such as the AFL-CIO and other unions, and the Institute of Electrical and Electronics Engineers, Inc.

Labor's Technical Skill Grants and Examples of NSF Grants Awarded

The technical skill grants that Labor awarded as of February 2000 are listed in table 2 below.

Table 2: Labor's Technical Skill Grants Awarded, February 2000

Awardees	Award amount	Project emphasis and target group
Regional Employment Board of Hampden County, Inc., Springfield, Mass.	$1.5 million	Create a sustainable network of training providers to train and upgrade the technical skills of 130 employed and 80 unemployed individuals for highly skilled jobs in the information and telecommunications technology industry.
NOVA Private Industry Council, Sunnyvale, Calif.	$1.3 million	Bring together a consortium of partners to provide high-level technical skills training over 2 years to 200 individuals from the poorest neighborhoods in the Silicon Valley with predominantly Hispanic, African-American, and Pacific Islander populations. The grant will also target low-income, multiethnic adults and older youth (18-24), dislocated workers, and incumbent workers.
Pima County Community Services Department, Tucson, Ariz.	$1.5 million	Build on a project to provide training to a wide range of participants in five "H-1B technical skill areas" that are in short supply in Pima County: health, IT (up to 180 participants), education, electrical and electronics, and accounting and management. The grantee is committed to training single parents and women, with a focus on nontraditional fields for women.
The City of Chicago, Ill.	$1.5 million	Develop an information technology worker training model that meets the needs of business and includes both entry into the IT industry and paths to career advancement. About 425 employees of participating companies will be selected, based upon prerequisite training and job performance, to train for H-1B designated positions, with 200 openings created through promotion and training.

(Continued From Previous Page)

Awardees	Award amount	Project emphasis and target group
Seattle-King County Private Industry Council, Seattle, Wash.	$1.5 million	Develop new building blocks for IT training, geared to several target populations at various stages on the career ladder, and provide training for up to 500 people. Target groups for training are unemployed workers who require additional skills to gain employment in IT professions and currently employed workers who wish to advance in their professions or change career paths.
The Workplace, Inc., Bridgeport, Conn.	$1.5 million	As a partner with two employers, provide IT-related skills training to about 540 workers. Target population includes both unemployed and employed workers.
Philadelphia Workforce Development Corp., Inc., Philadelphia, Pa.	$0.6 million	Address needs of area employers for nurses at all levels and especially for the highest-skilled nurses—registered nurses (50) and licensed practical nurses (30). In addition, 200 will be trained as nurses' aides. Training will target incumbent workers, low-wage workers, younger workers, and the unemployed.
New Hampshire Job Training Council, Concord, N.H.	$1.5 million	Implement job training and career development program to increase companies' ability to find and retain skilled workers in the state. One important innovation is the use of a newly developed bachelor's degree program in information sciences. The grant will target up to 320 unemployed and incumbent workers around the state.
Prince George's Workforce Services Corp., Landover, Md.	$1.5 million	Recruit, assess, train, and place 588 participants into jobs in the telecommunications and IT fields. Employed and incumbent workers in the East Bay area of Northern California and the Washington, D.C., metropolitan area will be targeted, with emphasis on a nontraditional information technology workforce which includes minorities, women, and handicapped workers.

Examples of Grants Provided by NSF to Academic Institutions

Rensselaer Polytechnical Institute plans to provide scholarship opportunities to 40 participants, and has the goal of providing sufficient support services to graduate 95 percent of these participants and implement a series of workshops to engage participants in research and community service activities relevant to their degree program.

Houston Community College in Texas plans to provide scholarships, curriculum enrichment, student support services, and summer internships. It will recruit 40 students into an Associate of Science and Associate of Applied Science scholarship program and has a goal of retaining at least 75 percent of the participants until they complete a degree and transfer to a higher degree program.

The University of Texas at El Paso plans to offer scholarships to 22 upper-division undergraduate students in computer science, engineering, and mathematics; 11 master's level students in those programs; and 11 doctoral students in computer engineering, environmental science and engineering, and materials science and engineering who are at the dissertation-writing stage of their graduate careers. These students will also receive mentoring from faculty who combine outstanding teaching with research programs funded through federal, state, and corporate sources.

Comments From the Department of Labor

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington, D.C. 20210

AUG 28 2000

Ms. Marnie S. Shaul
Associate Director,
Education, Workforce, and
Income Security Issues
Health, Education, and
Human Services Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Ms. Shaul:

Thank you for the opportunity to review and provide comments on the draft General Accounting Office report, H-1B Foreign Workers: Better Controls Needed to Ensure the Program Helps Employers and Protects Workers. Our comments follow. We have also annotated technical and editorial changes and corrections directly on the draft report; these have been transmitted to you under separate cover.

Now on p. 9

Page 7, 1st full paragraph (***"No limit existed on the number of H-1B visas . . . ."***) – In discussing the annual limit on H-1B visas, we think it would help to provide additional context through reference to ETA's increasing H-1B workload. The statutory cap is on the number of new H-1B visas or status adjustments that may be granted each year. However, there is no such cap on the number of labor condition applications that may be filed with and certified by the Department. As a result, ETA has continued to receive hundreds of thousands of H-1B LCAs each year – just over 300,000 in FY 1999 alone. This represents a workload increase of about 25 percent over FY 1998 levels; 60 percent over FY 1997 levels; and, the workload has more than doubled since FY 1996. Based on the actual volume received to date, projections for FY 2000 are that we will receive nearly 400,000 LCAs.

Now on p. 9

Page 9, 5th bullet point (***"public files will be maintained ...."***) – This point indicates that the employer must attest that a copy of the application has been provided to potentially affected workers to inform them that the application has been filed. You may wish to indicate that one of the purposes of the notice is to inform potentially aggrieved workers of their right to file a complaint if they believe there has been a misrepresentation of a material fact in the application and/or a failure to comply with the terms of the application. The requirement to provide such notice was intended to play a critical role in effectuating Congressional intent that enforcement of the H-1B program's terms and conditions be complaint-driven.

Working for America's Workforce

Now on p. 11

Page 10, last paragraph (*"After the H-1B worker is employed...."*) - The statement that the Wage and Hour Division is responsible for "...ensuring that H-1B workers are actually working...." may be read to imply that the visa status of H-1B workers is a Department of Labor concern when, in fact, this authority lies with the INS. You might revise this sentence to read "*...ensuring that H-1B workers are actually working in the occupation listed on the labor condition application....*"

Now on p. 12

Page 12, footnote 10 – The Department suggests adding the following detail in the footnote:

> *"In FY 2000, the Department of Labor will invest about $80 million from fees received through the H-1B visa program. This investment builds on the Department's initiatives addressing high-tech skills shortages, including $40.2 million in June 2000 to strengthen regional partnerships; $15.2 million in March 2000 for regional skills consortium building; $9.57 million in June 1999 to train dislocated workers in computer and electronics manufacturing; and, in June 1998, $7.5 million to eleven organizations to train dislocated workers in information technology skills."*

Now on p. 20

Page 18, 2nd paragraph (*"However, this limitation means . . . ."*) - The statement attributed to ETA officials that employers can use almost any source to determine a prevailing wage and ETA cannot question the validity of that information in the LCA review is not entirely accurate. Specific criteria pertaining to what are and are not acceptable sources of prevailing wage information are prescribed by §655.731(b)(iii)(B) and (C). ETA's role in assessing a cited prevailing wage source (other than a SESA, for which a regulatory safe harbor from a finding of a wage violation is provided) is to determine whether the source is "obviously inaccurate" on its face. We suggest that the sentence should read: *"Even though employers are required to pay H-1B workers the prevailing wage, ETA does not have the authority to verify the authenticity of a cited prevailing wage source, only to reject the application if the cited source is obviously inaccurate on its face – i.e., obviously not a source that conforms with the regulatory criteria governing alternative wage data."*

Now on p. 19

Page 18, footnote 15 – It should be noted that, on March 2, 2000, the Secretary of Labor certified to the Congress – in accordance with the provisions of Section 414(b)(6) of the American Competitiveness and Workforce Improvement Act of 1998 – that the Department of Labor substantially complied with the requirements of Section 212(n)(1) of the Immigration and Nationality Act relating to the Department's certification of employers' H-1B Labor Condition Applications within seven days of their filing dates. It also should be noted that the "LCA Fax-Back" system has matured and – except during maintenance periods, and occasional system malfunctions – LCAs received electronically are being processed in three to four days. As of May 2000, all regional reports indicate that all LCAs were processed within the seven day time limit.

Now on p. 21

Page 20, 2nd paragraph (*"Despite their similarities…."*) – This paragraph seems to suggest that it is the different nature of H-1B workers (or occupations) that accounts for the reason that Wage and Hour has much more narrowly restricted enforcement authority under the H-1B program than under the other worker protections laws (even other parts of the INA) which it is responsible for enforcing. We do not believe this to be the case.

Wage and Hour has unrestricted enforcement authority that affects similar classes of workers – for example, under the Family and Medical Leave Act and the Employee Polygraph Protection Act. Even under the Fair Labor Standards Act, the majority – about 70 percent – of enforcement actions are complaint-based and most typically involve issues relating to failure to pay proper overtime, often to relatively well-paid workers (rather than minimum wage workers).

We believe, rather, that the anomalous existing statutory restrictions on Wage and Hour's enforcement authority and discretion was originally based on the assumptions – which, in our view, have not proven accurate – that the enforcement regimen could be complaint-driven, and that there were (and are) few impediments to complaints being lodged.

Now on pp. 29-30

Pages 27-28, Section entitled, *"EFFORTS ARE UNDERWAY TO IMPROVE IT SKILLS OF U.S. WORKFORCE"* – The Department thinks it would be appropriate to provide context by offering a broader view of Departmental efforts to respond to the new skills demands of the U.S. economy, and provide updated information for consideration, as follows:

> *"The United States is enjoying the strongest economy in a generation. Employers cross the nation – in a wide variety of industries – say that they cannot find a sufficient number of qualified, highly-skilled workers. Soaring demand for technology-related workers in particular has been highly publicized. American workers need to acquire new skills so that they can take advantage of the employment opportunities the new economy is creating."*
>
> *"The Department of Labor has launched a skills shortage initiative to help address employers' needs for skilled workers and the workforce development needs of job seekers. The Department of Labor partners with employers, labor, educators, community-based organizations, and local communities in implementation of the Workforce Investment Act, H-1B Technical Skills Training Grants, the Minority Colleges and Universities Workforce Partnerships Program, and other programs to assure that training meets employer and worker needs."*
>
> *"First, the bipartisan Workforce Investment Act (WIA) of 1998 provides a fundamentally new framework for a workforce preparation system designed to meet the needs of workers and employers. The WIA gives new responsibilities to local business-led Workforce Investment Boards to design and oversee job training and employment programs at the local level where the needs of*

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customers are best understood. For FY2000, WIA investments in training for American workers totaled nearly $5.4 billion."

"Second, the Department has established the H-1B Technical Skills Training Grant Program authorized under the American Competitiveness and Workforce Improvement Act (ACWIA) of 1998, which provides that over half of the employer H-1B application fee be used to finance a H-1B Technical Skill Training Grant Program. This training program is designed to help American workers – both employed and unemployed – acquire the requisite skills in occupations that are in demand, particularly in the information technology and health care industries. These training grants provide funds to consortia of business, labor, community-based organizations and local Workforce Investment Boards. To date, the Department of Labor has awarded 21 grants totaling $41 million through two rounds of competition. It announced a third round of competitions for an estimated $45 million on August 1, 2000, with applications due on September 19."

"Finally, the Department recently initiated the Minority College and Universities Workforce Partnerships and Training Strategies to Address Skills Shortages Demonstration Program. This program – also announced August 1 – is to prepare and support minority colleges and universities in their role as workforce development partners to respond to employers' identified skill shortages. In addition to the development of partnership grant applications, grant opportunities are available to provide training in response to employer-identified skills shortages. The Department held information sessions to provide potential applicants and program partners with information about the skills shortage initiative and a basic understanding of the agency's expectations about completing applications for these available grants."

"The skills shortage initiative builds on previous ETA investments including: the dislocated worker technology demonstration; the individual training account demonstration grant awards; and, the regional skills consortium-building and partnership training/system-building demonstration awards. These efforts are to strengthen linkages between employers experiencing skill shortages in specific occupations and the workforce investment system."

Now on p. 33

Page 31, last paragraph (*"However, IT employers we interviewed ...."*) – The draft report states that "*... if the H-1B worker is good, employers can sponsor the H-1B worker for permanent U.S. residency.*" Of course, an employer can – and many do – sponsor a qualified foreign worker for permanent U.S. residency without first employing the individual as a temporary H-1B worker. However, as the Department has frequently pointed out, the H-1B program is often used as a try-out probationary employment period, even for foreign students previously hired and converted to H-1B visas, at least in part because the worker is legally bound to the sponsoring employer while in H-1B visa status and not able to move freely in the labor market (as a permanent resident would be).

Thus, a significant benefit to the sponsoring employer is that the H-1B worker does not have freedom in the labor market and is dependent on the employer to remain and work in the U.S., and, perhaps, eventually be sponsored for permanent resident status. Finally, the next sentence ("*All of the employers we interviewed....*") may be read to imply that all of the interviewed employers sponsored all of their H-1B workers for permanent residency. We would expect this to be potentially misleading, especially to potential H-1B workers to whom this promise is often made as a lure to employment even though the prospective employer has no intent to follow through on the promise (and, even if the employer does follow through on the promise, sponsorship does not guarantee that a permanent residency visa will be available for the worker).

Now on p. 34

Page 33, 1st partial paragraph, 3rd sentence (*"Because Labor cannot now independently verify....."*) – Under current law, the purpose of ETA's review of LCAs is to ensure that the required information has been provided, that the employer has checked the appropriate boxes, and that the employer signed the form. When reviewing the application it is not possible to verify that certain of the labor conditions **will be** met, only that the employer has attested that they intend to meet them. Congress intended – in fact, required – that that employers' attestation promises would enable a speedy application review while maintaining connection to the labor market through prevailing wage requirements and enabling enforcement pursuant to complaints about misrepresentation or breaches of promises. This paragraph implies that, although the current law requires a review that appears perfunctory, Congress would not even consider changing the nature of this review, and, therefore, the function should be moved to INS.

The draft report characterizes Labor's LCA process as an "extra, time-consuming step" as further reason for its transfer to INS. Although streamlining government services is a laudatory goal, saving employers three to seven days on their processing time is not a very compelling reason to disconnect the H-1B program from the workforce system that handles all other employment-based foreign workers **and** all public employment and training programs for U.S. workers. The Department does not support the idea of transferring the H-1B LCA adjudication process to INS. Rather, consideration should be given to how to improve the substantive nature of the LCA review in a way that has minimal impact on timely processing.

Now on p. 36

Page 34, last paragraph, 4th sentence ("Second, education and training programs....") – The Department suggests that the sentence be revised as follows: *"Second, education and, to a lesser extent, training programs are, by nature, long-term remedies to labor needs."*

Now on p. 36

Page 35, 1st paragraph (*"Given the limited nature of Labor's review. . . ."*) – The Department disagrees with and does not support moving the H-1B LCA process to the INS for the following reasons, more fully described below:

- It is important to maintain the connection between the H-1B program and the workforce system to alert DOL of short-term skill shortages to assist them in developing longer term strategies for developing workforce training programs.

- The Department serves a vital role in addressing weaknesses in the labor market.
- No meaningful reduction in processing time for employers will result.
- INS may have to assume regulatory authority to define prevailing wage standards and other employer obligations for this program instead of the Department, which has the relevant labor market and worker protection standards expertise.
- Consideration should rather be given to improving the review process by addressing specific weaknesses that have been identified that likely lead to abuse in the program.

The Department of Labor brings experienced, knowledgeable staff and capable, developed administrative and delivery systems to this activity, and has invested much to develop and improve the H-1B system. There are data and information links between H-1B processing and training programs that assist DOL in addressing short-term skill shortages and developing longer term approaches to help U.S. workers qualify for H-1B related high-skill, high-wage jobs. In passing the American Competitiveness and Workplace Improvement Act of 1998 (ACWIA), Congress strengthened the Employment and Training Administration's (ETA) responsibilities under the H-1B program. This would suggest that Congress intended that ETA would continue to have jurisdiction over the processing of H-1B applications.

In enacting the Workforce Investment Act in 1998 (WIA), it was the intent of Congress to implement a national workforce system that would provide workers with the information, advice, job assistance, income maintenance and training they would need to get and keep good jobs, and provide employers with skilled workers. As the economy has become stronger and labor markets tighten, demand for foreign labor has grown in all employment-based immigrant and nonimmigrant categories. It is vital to link the increasing demand for certain skills to the local Workforce Investment Boards which have just been put in place and are charged with overseeing local workforce areas. Since the H-1B program responds to high-skill shortages and is the fastest growing of all the Department's immigration-related programs, it would not be good policy to discontinue its connection to the workforce system that makes decisions around public job training funds. In processing applications for these temporary programs the Department is provided specific and timely data on gaps in the supply and demand for workers that, properly utilized, provides valuable information for the "connectivity" of policy, planning and delivery of workforce programs.

In addition, this proposed transfer would (at least) create ambiguity as to which agency – the Department of Labor or INS – would have the authority to prescribe the substantive standards for the H-1B employer's obligations under the LCA, and the authority to provide interpretations and compliance assistance to H-1B employers and interest groups.

The statute does not specify the agency which has regulatory authority over these matters. At present, since the Secretary of Labor is the only administrative authority mentioned, Labor exercises this authority and, through regulations, sets the standards which are the basis for Labor's interpretation and enforcement. If the statute were amended to make INS responsible for receiving and certifying the labor condition applications, it could be argued that INS – rather than Labor – has the authority to define the employer obligations that are embodied in the LCA, which are then enforced by the Department. At a minimum, it might be argued that INS should be the agency which create the application form and also defines related issues such as: the definition of the term "place of employment"; the circumstances in which H-1B workers may work temporarily at job sites not listed on the LCA; and, the circumstances in which the employer must file a new LCA (*e.g.*, changes in the employers corporate structure, etc.). While INS lacks expertise in worker protection standards, the Department has both the expertise and the statutorily prescribed responsibility to bring such expertise to bear on the H-1B employers' LCA obligations.

Now on p. 36

Page 35, 2nd paragraph (*"If the Congress wished to broaden Labor's enforcement authority ...."*) – The Department has long urged that the Congress reconsider and expand the narrow limits on its enforcement authority, and concurs with GAO that this matter merits Congressional consideration.

If there are any questions regarding these comments, please do not hesitate to contact us.

Sincerely,

Bernard E. Anderson
Assistant Secretary for
Employment Standards

for Raymond L. Bramucci
Assistant Secretary for
Employment and Training

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Comments From the Department of State

United States Department of State

Washington, D.C. 20520

Ms. Marlene Shaul
Associate Director
Education Workforce and Income Security
U.S. General Accounting Office
Room 5940
441 G Street, N.W.
Washington, D.C. 20548

Dear Ms.Shaul;

I appreciate the opportunity to respond on behalf of the Bureau of Consular Affairs, Department of State, about the H-1B report prepared by GAO.

While the report focused on the adjudication and processing of the Department of Labor's LCA and the INS' petition, very little is stated about the visa process. Thus, our comments are limited.

Now on p. 10

On page 28, reference is made to the fact that State does not interview all H-1B visa applicants. All visa applications are reviewed by consular officers. At some consular posts all applicants are interviewed due to the potential for fraud. Other posts may have "drop boxes" or similar mail in type systems by which applicants submit their applications to the consular post. Each of these applications is reviewed and the consular officer either issues the visa based upon such review or calls the applicant in for an interview. Thus, there is a systematic process to review all applications. While the interview is generally required, it is waived in those cases in which a consular officer is satisfied upon review of the application that the applicant qualifies for the visa. The visa process by necessity relies on INS and DOL performing their responsibilities competently.

Now on p. 27

Also, on page 28 the percentages stated may not be accurate. The 45% rate appears to relate to the percentage of cases that INS finds dubious. Of those investigated under this special project, 21% had confirmed fraudulent work experience. Attached is a brief explanation of the project.

From the visa processing perspective, a change in the law would be helpful. If INS or DOL had the authority to revoke or invalidate petitions or LCAs for misrepresentations of salary and other working conditions, consular officers could then return petitions for revocation on these grounds. This could further improve the quality control of the program, as well as free up precious numbers. Furthermore, the imposition of sanctions on business entities which knowingly engaged in such behavior would additionally lend credibility to the program. Such sanctions could include fines and, more importantly, restrictions on filing H-1B petitions in the future.

I hope you find these comments helpful.

Sincerely,

Stephen K. Fischel
Director, Legislation, Regulations and
Advisory Assistance

Comments From the Immigration and Naturalization Service

U.S. Department of Justice
Immigration and Naturalization Service

HQISD 70/29.2

Office of the Deputy Commissioner

425 I Street NW
Washington, DC 20536

August 25, 2000

Ms. Marnie S. Shaul
Associate Director
Education, Workforce, and Income
Security Issues
Health, Education, and Human Services
Division
United States General Accounting Office
Washington, DC 20548

Dear Ms. Shaul:

Thank you for allowing the Immigration and Naturalization Service (INS) the opportunity to review and provide comments on the draft General Accounting Office (GAO) report, H-1B Foreign Workers: Better Controls Needed to Ensure the Program Helps Employers and Protects Workers.

The GAO was asked to provide information on, among other issues, the adequacy of the H-1B visa program's implementation and enforcement. After reviewing the program, the GAO concluded that procedures at INS could lead to potential abuse of the H-1B program. The INS questions GAO's overall conclusions and addresses each of GAO's three main recommendations below:

GAO recommends that INS expand upon current efforts to standardize H-1B adjudication procedures by (1) providing practical guidance to help adjudicators assess the adequacy or sufficiency of documentation and determine when and how to request additional documentation from employers and (2) having adjudicators document adherence to standard procedures when reviewing petitions.

The INS supports the goal of ensuring consistent adjudication processing of H-1B petitions among Service Centers and adjudicators. To this end, the INS has already taken steps to ensure consistent processing. The most significant step is the recent development and

implementation of a national standard operating procedure for the H-1B program. The H-1B standard operating procedure contains a section that directly addresses requests for additional evidence. Importantly, this section defines the documentary requirements for the H-1B program, with specific reference to statute, regulation, and other policy documents, and instructs adjudicators to request additional documentary evidence when these requirements are not satisfied. In addition, a checklist to help adjudicators identify unmet documentary requirements is included with the standard operating procedure.

The INS followed up on implementation of the standard operating procedure with a national training program on the H-1B Standard Operating Procedures. In addition, INS anticipates that the national standard operating procedure will be a living document that will be constantly revised in response to the expressed needs of the Service Centers and adjudications staff.

While agreeing in principle with the GAO's recommendation to standardize procedures, the INS is concerned that the recommendation suggests that the INS expand its guidance on documentary requirements and requests for evidence beyond what has already been provided in the H-1B standard operating procedure. While providing additional guidance to adjudicators on these subjects could give the appearance of encouraging consistent decisions, it could also restrict adjudicator discretion, thereby limiting the ability of adjudicators to request additional evidence in order to detect fraud, ensure that a proffered job actually exists, or ensure that a job is in a specialty occupation. Such limits on adjudicator discretion might ensure greater consistency, but would not improve the quality of an adjudicator's review of an H-1B petition.

GAO recommends that INS provide easy access to case-specific information for adjudicators when reviewing petitions as a part of the current upgrade of its computer system.

Adjudicators currently have access to program and case-specific information needed to make legally correct decisions on H-1B petitions. This information includes law, regulations, precedent decisions, intelligence bulletins, data collected and maintained by operations units, systems data, and processing manuals.

The INS has also acknowledged the need to upgrade its current case tracking system to better manage the H-1B workload. An upgrade currently underway will improve adjudicator access to system data on H-1B specific employers and employees.

In addition to the effort to upgrade its system, the INS would like to strengthen its ability to collect and coordinate case-specific information for the H-1B program by increasing the number of intelligence officers at the Service Centers and improving its ability to share data with other agencies, particularly the Department of State. These efforts would significantly improve INS' ability to detect fraudulent petitions during the adjudication process, before an individual enters the United States based on an approved H-1B petition. The INS has included funding for these efforts in its FY 2001 budget request.

GAO recommends that INS enhance existing supervisory review and performance appraisal systems so that adjudicators are held accountable for the correct assessment of petitions as well as for the quantity of reviews they complete.

The INS believes that ensuring quality adjudication is a critical goal for the H-1B program and has continued its emphasis on detecting fraud. However, INS strongly objects to a recommendation that would require it to achieve this goal by including a quality measure in its supervisory review and performance appraisal processes. Implementing in a statistically meaningful way supervisory reviews for individual employees as a quality measurement would place an impossible burden on supervisors and seriously threaten overall Service Center productivity. At various times, the INS has experimented with including a quality measure in the adjudicator performance work plan. Service Centers have used a weighted point system (i.e., point value production goals with more points assigned for more complex decisions such as denials) to evaluate adjudicator productivity or used sampling techniques to have supervisors randomly review decisions. However, the approaches that have been tried to include a quality measure in the performance work plan have significant drawbacks. The weighted point system allows more time for complex decisions, but does not provide a measurement for the correctness of the decision. The supervisory review system presents an insurmountable resource problem. In order for a supervisory review to have statistical validity, a very large percentage of decisions per employee must be reviewed for each program on which the employee works. Depending on the size of the program, a supervisor could have to review nearly all employee decisions to have a statistically valid sample. This fact, combined with an employee to supervisor ratio that has increased from 6 employees per supervisor to as many as 15 employees per supervisor and a Service Center workload that has increased from approximately 2.5 million decisions in FY 1999 to approximately the same number of decisions in just the first three quarters of FY 2000, would mean placing an impossible burden on supervisors and seriously threatening Service Center productivity.

Given the enormous workloads and limited resources at the Service Centers and the need for timely and judicious processing, the INS relies on a variety of techniques to ensure the quality of adjudications. These techniques include end product review of adjudicator decisions and mandatory random supervisory reviews of adjudicator decisions. The INS is concerned that in making the recommendation to amend performance appraisal systems to hold adjudicators accountable for correct decisions, the GAO did not fully appreciate the resource burden that including a quality measure in its supervisory review and performance appraisal processes would place on the INS.

In addition to its three recommendations, the GAO concludes that INS prioritization decisions lead to processing delays. This conclusion appears to be based on an INS management decision to establish a 60-day processing standard for all Service Centers. The decision to increase the processing time goal to 60 days was based on the need to balance priorities and workloads at the Service Centers. In FY 1999, the INS completed approximately 500,000 petitions for nonimmigrant workers (Form I-129), approximately the same number of such petitions that the INS completed in the first three quarters of FY 2000. For each of these time periods, the Service Centers completed a total volume of approximately 2.5 million applications and petitions. Long processing times for other programs that are part of the Service Center workload can, as with the H-1B program, negatively impact U.S. businesses awaiting employees and individuals awaiting re-union with close family members. At the time of the decision in February 2000, processing times for certain of these other programs had grown to a year or more. In order for the Service Centers to reduce these processing times, it was necessary to allow for increases in processing

times for certain other programs, including H-1B petitions. In light of the overall workload and the percentage represented by the H-1B program, INS believes the 60-day processing goal is a reasonable and achievable time period to initiate review of H-1B petitions, and is currently meeting that goal in each of the four Service Centers.

Finally, while we have responded to the report's major recommendations above, please find enclosed INS' final set of technical and editorial comments, including those on the matters for Congressional consideration. If you have any questions regarding our comments, please to not hesitate to contact us.

Thank you for the opportunity to share our views. We look forward to working with you and Members of Congress on addressing issues relating to the final report.

Sincerely,

Mary Ann Wyrsch
Deputy Commissioner

Enclosures

Comments From the National Science Foundation

NATIONAL SCIENCE FOUNDATION
4201 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22230

OFFICE OF THE
ASSISTANT DIRECTOR
FOR EDUCATION AND
HUMAN RESOURCES

August 14, 2000

Ms. Marnie S. Shaul
Associate Director
Education, Workforce, and Income Security Issues
Government Accounting Office
Washington, DC 20548

Dear Ms. Shaul:

I am writing on behalf of the Director, Dr. Rita Colwell, to acknowledge receipt by the National Science Foundation (NSF) of the draft report, "H-1B Foreign Workers: Better Controls Needed to Ensure the Program Helps Employers and Protects Workers" (GAO/HEHS-00-157). We appreciate the opportunity to review the draft and provide commentary before it is issued in final form. In reviewing the Report, we have focused on material relevant to NSF's activities.

NSF is investing most of the funds that it receives from the H1B Visa fees in the new Computer Science, Engineering and Mathematics Scholarships (CSEMS) Program. The draft report contains little direct reference to the CSEMS Program. There is an introductory note (page 6), and text describing the program activity (pages 29-30), with Appendix II (page 40) containing brief "nuggets" providing three samples of current awards. There are cautionary comments about the benefits of the program's outcomes (pages 30, 34), but no mention of our evaluation plans to assess outcomes and possibly subsequently revise/improve the program in response. Since this is NSF's first venture into providing scholarships, we believe that doing an evaluation as soon as possible is very important.

Now on p. 30

Suggested revisions or concerns regarding the CSEMS-related text beginning on page 29 are:

- The administrative allowance on grants is actually about **9%** of the total grant award (10% of the scholarship total, to which it is then added, forming the grant award total).
- The final figures for the award pool are: **114** grant awards, totaling **$22.49** million; each award provides approximately **40 scholarships per year over a two-year grant period** [the actual total number of scholarships to be awarded over two years is about 8,100].

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Ms. Marnie S. Shaul 2

Overall, we find the report very interesting and are grateful for the opportunity to see it prior to publication. Interactions between GAO staff and NSF staff in this matter have been extremely positive.

Sincerely,

Judith S. Sunley

Judith S. Sunley
Assistant Director (Interim)

GAO Contacts and Staff Acknowledgments

GAO Contacts

Lori Rectanus, (202) 512-9847

Carol L. Patey, (617) 565-7575

Staff Acknowledgments

In addition to those named above, Betty S. Clark, J. William Hansbury, Jr., Lawrence J. Horinko, John G. Smale, Jr., and Joan K. Vogel made important contributions to this report.

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