Department of Homeland Security

Office of Inspector General

USCIS Controls To Ensure Employers Sponsoring H-1B and L-1 Employees Pay Applicable Border Security Fee

OIG-14-36

February 2014

OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

February 12, 2014

MEMORANDUM FOR: Don Neufeld
Associate Director, Service Center Operations
U.S. Citizenship and Immigration Services

FROM: Frank W. Deffer
Assistant Inspector General
Office of Information Technology Audits

SUBJECT: *USCIS Controls To Ensure Employers Sponsoring H-1B and L-1 Employees Pay Applicable Border Security Fee*

Attached for your action is our final report, *USCIS Controls To Ensure Employers Sponsoring H-1B and L-1 Employees Pay Applicable Border Security Fee*. We incorporated the formal comments from the United States Citizenship and Immigration Services in the final report.

The report contains five recommendations aimed at improving procedures to verify employers pay the appropriate fees for H-1B and L-1 petitions. Your office generally concurred with all recommendations. The Office of Inspector General considers recommendations 2, 3, and 4 open and unresolved. As prescribed by the *Department of Homeland Security Directive 077-01, Follow-Up and Resolutions for Office of Inspector General Report Recommendations*, within 90 days of the date of this memorandum, please provide our office with a written response that includes your (1) agreement or disagreement, (2) corrective action plan, and (3) target completion date for each recommendation. Also, please include contact information for responsible parties and any other supporting documentation necessary to inform us about the current status of the recommendation.

Based on information provided in your response to the draft report, USCIS announced quality-based Performance Plan and Appraisals on October 29, 2013, for all USCIS employees beginning FY 2014. These actions fulfill the spirit of recommendation #5, and therefore, we consider recommendation #5 closed. Further, we consider recommendation #1 open and resolved. Once your office has fully implemented the recommendations, please submit a formal closeout request to us within 30 days so that we may close the recommendations. The request should be accompanied by evidence of completion of agreed-upon corrective actions.

Please email a signed PDF copy of all responses and closeout requests to OIGITAuditsFollowup@oig.dhs.gov.

Consistent with our responsibility under the *Inspector General Act*, we will provide copies of our report to appropriate congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the report on our website for public dissemination.

Please call me with any questions, or your staff may contact Tuyet-Quan Thai, Director, at (425) 582-7861.

Attachment

Table of Contents

Appendixes

Abbreviations

ACWIA	*American Competitiveness and Workforce Improvement Act*
ADIS	Arrival Departure Information System
CLAIMS3	Computer Linked Application Information Management System
D&B	Dun and Bradstreet
DHS	Department of Homeland Security
DOL	Department of Labor
ELIS	Electronic Immigration System
FY	fiscal year
GAO	Government Accountability Office
ISO	Immigration Services Officer
OIG	Office of Inspector General
PCQS	Person Centric Query System
PL	Public Law
USCIS	United States Citizenship and Immigration Services
VIBE	Validation Instrument for Business Enterprises

Executive Summary

The United States Citizenship and Immigration Services (USCIS) is one of the agencies within the Department of Homeland Security (DHS) that oversee lawful immigration to the United States. Its responsibilities include collecting, processing, and adjudicating visa petitions, including those submitted by employers seeking permission to employ foreigners temporarily as nonimmigrant workers in the United States. Section 402 of Public Law 111-230, as amended by Public Law 111-347, requires that employers pay a border security fee of up to $2,250 per petition if they have 50 or more employees in the United States, and if their workforce consists of 50 percent or more H-1B or L-1 nonimmigrant workers.

We audited USCIS' foreign worker petition process to determine whether employers comply with the requirements of Public Law 111-230. Our objectives were to: 1) validate that the border security fees were paid when required, and 2) assess USCIS controls to verify that employers accurately disclosed information on the number and composition of their employees when petitioning for foreign workers.

Based on our review of 203 petitions for foreign workers, we determined that employers typically adhered to the requirements of Public Law 111-230 and paid the fee when required. However, 3 percent of the random petitions and 21 percent of the petitions we selected judgmentally based on select characteristics contained errors that we believe could be prevented if USCIS made improvements to its fee collection. USCIS needs to implement processes to scrutinize information employers provide to ensure they pay the proper fees. Some Immigration Services Officers already verify information employers provide regarding their workforce to ensure that the proper fees are collected; however, this practice is inconsistent across USCIS as there is no requirement that officers do so. Without verification, an employer's declaration is typically the sole basis for determining whether the employer is required to pay the border security fee.

We recommend that USCIS electronically capture employer information regarding the number of employees for analysis and comparison. We also recommend that USCIS implement procedures to identify employers who pay fees inconsistently, expand the use of readily available resources to assess the reasonableness of employer-provided information, and conduct further analysis to determine whether an average of 30 minutes is the appropriate amount of time to adjudicate H-1B and L-1 petitions. USCIS generally concurred with these recommendations.

Background

Section 402 of Public Law (PL) 111-230, as amended by PL 111-347, requires that employers petitioning for temporary foreign workers pay a border security fee when they meet certain criteria. Employers who employ 50 or more employees in the United States, of which more than 50 percent are in an H-1B and L-1 nonimmigrant visa status (50/50 criterion), are subject to the fee. The H-1B visa program enables U.S. employers to hire foreign workers meeting specific qualifications to work in the United States.[1] The L-1 visa program allows multinational employers to transfer executives with specialized knowledge to work temporarily or to establish an affiliated office in the United States.[2]

Employers who meet the 50/50 criterion are subject to the border security fee of $2,000 for H-1B or $2,250 for L-1 petitions. This amount is in addition to a basic petition fee of $325 and other fees calculated based on company size and/or type of petition.[3] The border security fee applies to petitions for initial employment and petitions to change employers filed between August 13, 2010, and October 1, 2015. The fee does not apply to extensions by the same employer for the same employee. USCIS collects and deposits the fee in the General Fund of the Treasury. According to USCIS, from September 2010 through May 24, 2013, over $250 million in border security fees had been collected.

To petition for a nonimmigrant foreign worker, employers complete a Petition for a Nonimmigrant Worker (Form I-129) and declare the number of employees working in the United States.[4] Employers also answer yes or no on whether: 1) they have 50 or more employees, and 2) 50 percent of those employees are in H-1B or L-1 nonimmigrant status. USCIS calculates the required border security fee based on these yes or no answers.

[1] The H-1B visa classification enables companies to hire foreign workers for work in specialty occupations on a temporary basis. A specialty occupation is defined as one requiring theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree or higher in the specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.
[2] The L-1 visa classification allows a multinational employer to transfer executives, managers, or employees with specialized knowledge to work temporarily in the United States for a qualifying organization. This classification also enables a multinational company to send such employees to the United States to open or be employed in a new office.
[3] Certain H-1B and L visa petitions also have to pay a $500 Fraud Prevention and Detection Fee. H-1B petitions may also be subject to the *American Competitiveness and Workforce Improvement Act* (ACWIA) fee based on the number of full-time equivalent employees in the United States. Employers with 25 or fewer employees pay $750 and employers with more than 25 pay $1,500.
[4] Form I-129 consists of the basic petition, individual supplements relating to specific classifications, and the H-1B Data Collection and Filing Fee exemption supplement.

During adjudication, USCIS Immigration Services Officers (ISOs) have access to the Validation Instrument for Business Enterprises (VIBE). VIBE was implemented in June 2010 to consolidate information from a wide variety of sources into one single, convenient web portal containing data that can help ISOs assess a petitioner's eligibility. Data in VIBE comes from Dun and Bradstreet (D&B), Department of Labor (DOL), Immigration and Customs Enforcement and other law enforcement agencies, and USCIS' Computer Linked Application Information Management System (CLAIMS3).[5] Publicly available data from D&B ranges from a validation of the employer's existence to information on the number of employees and the employer's financial standing. VIBE also contains information on whether the employer has been debarred from participation in the H-1B program, the number of previously filed petitions, and the existence of previous or ongoing investigations.

We designed our audit to determine whether employers are following the requirements of PL 111-230. Our objectives were to: 1) validate that the border security fees were paid when required, and 2) assess USCIS controls to verify that employers accurately disclosed information on the number and composition of their employees when petitioning for foreign workers. [6]

Results of Audit

Sample Testing Showed Inaccurate Payment in Random and Judgmental Transactions Reviewed

Our review of 203 petitions revealed that employers typically adhered to the requirements of PL 111-230 and paid the border security fee when required. However, 3 percent of our random sample of petitions and 21 percent of our judgmental sample contained errors that we believe could be prevented if USCIS made improvements to its fee collection processes.[7] Currently, USCIS procedures do not require that ISOs verify the reasonableness of employer-declared information against existing internal sources. USCIS also does not capture electronically the number of employees or other workforce information. Implementing procedures to capture and validate readily available data provided

[5] D&B is an independent service provider; CLAIMS3 is a case management application used by USCIS to track the adjudication of applications and petitions for immigration benefits and services except those related to asylum and naturalization.
[6] While our audit focused on the border security fee, we tested whether the employer paid all applicable fees as some fees were paid separately while others were paid in aggregate or in a lump sum.
[7] Using CLAIMS3 data, we selected a judgmental sample based on select characteristics, such as petitions for which employers had paid different fees for the same type of petition.

by employers on their workforce could reduce the number of errors and help USCIS collect the correct fees.

We tested 165 petitions selected at random from the population of approved H-1B and L-1 initial and change of employer petitions filed during fiscal year (FY) 2012 where the border security fee was not paid.[8] We also tested an additional 38 petitions chosen judgmentally based on select characteristics. Testing included: 1) examination of H-1B and L-1 petitions and supporting documentation, 2) assessment of publicly available business entity data, 3) review of USCIS' Person Centric Query System (PCQS) which contains data on adjudicated petitions from USCIS and on approved visas from the Department of State, 4) analysis of international arrivals and departures data of H-1B and L-1 employees in Custom and Border Protection's Arrival Departure Information System (ADIS), and 5) assessment of the accuracy of the border security fee. Table 1 shows the results of our tests.

Table 1. Results of Transaction Testing

Type	Random	Judgmental
Number of transactions in population	132,061	
Amount of potential border fees	$264,122,000	
Number of transactions tested	165	38
Number of border security fee errors	5	8
Error rate in transactions tested	3.03%	21.05%

Source: Office of Inspector General (OIG) review and analysis of USCIS immigration files, DHS systems, and Department of State data.

The errors we identified consist of instances where employers provided incorrect information and as a result did not pay the border security fee. Our review of the case files and independent verification with D&B and other sources showed that: 1) employers provided incorrect information and did not pay the fee, 2) employers paid the fees but did not check the proper box—and USCIS inadvertently returned the fee, or 3) OIG believed that a request for evidence was warranted. Table 2 provides these additional details on our testing. [9]

[8] During testing, we narrowed our random sample from a larger original sample of 361 petitions filed during fiscal years 2011 and 2012 to testing only 165 petitions out of 132,061 filed during fiscal year 2012. This is because we determined during testing that USCIS did not record the border security fee consistently when the law first went into effect. As a result, the error rate in the random sample we tested is not projectable to the population. See appendix A for additional information.

[9] Some employers paid the fees required by PL 111-230 as part of a lump-sum payment that did not itemize for the various fees. Consequently, we also reviewed accuracy of other fees as appropriate. We identified three errors related to other fees that we did not report as part of our sample results.

Table 2. Summary of Findings

Number of Petitions	Remarks
190	Border security fee was not required or was paid when required.
11	Proper fees were not paid. For example: • Employers submitted multiple petitions on the same day, declaring they did not meet the criteria for paying the border security fee. Some ISOs issued a request for evidence, but others did not. USCIS recovered fees on some petitions, but not on others that we reviewed where the ISO had not sent a request for evidence. • USCIS received the proper fee, but returned it as not needed due to errors on the petition. For example, one employer submitted the border security fee but did not check the box indicating this employer had more than 50 percent H-1B and L-1 employees.
2	The petition contained inadequate evidence, and a request for evidence should have been issued. For example: • One employer employed more than half of its workers in H-1B or L-1 status, but declared 49 employees, one person less than needed for the fee to apply.

Source: OIG review and analysis of USCIS immigration files, DHS systems, and Department of State data.

As shown in table 2, some errors occurred despite USCIS having all of the information present on the Form I-129. As previously mentioned, employers are asked to declare the number of employees comprising their workforce. However, USCIS' system does not have a field to capture this information electronically so that it can be compared to other information in the petition. For example, in one petition we reviewed, an employer submitted a border security fee and claimed over 150 employees in the United States on page 5 of Form I-129 but this same employer marked on page 17 that it did not have 50 or more employees in the United States. USCIS returned the fee to the employer in error. If USCIS had manually reviewed information provided on pages 5 and 17, USCIS could have issued a request for evidence to recollect the fees. ISOs who reviewed the files at our request agreed that this employer was subject to and should have paid the border security fee.

If USCIS electronically captured the number of employees and other data relevant to fees, USCIS could more easily identify discrepancies. Currently, USCIS does not electronically record workforce information submitted by the

employer, such as the number of employees and the composition of foreign workers. If this information is captured, USCIS could leverage its electronic data to identify employers who claim more than 50 employees on Form I-129 and then declare fewer than 50 employees on the supplement. USCIS could also perform analysis to identify employers who declare workforce data inconsistently over time and either issue a request for evidence or take other actions as necessary. Such information can help USCIS ensure the accuracy of border fee collections and avoid returning fees that employers accurately remit.

As shown in table 1, 8 of 38 petitions (21 percent) we selected judgmentally did not include the PL 111-230 fee when they should have. A majority of these errors (5 of 8) were found when we determined, as a result of data mining, that petitions from the same employers submitted within a few days of each other were sometimes accompanied by the border security fee, and other times were not. Upon further examination, we concluded that in all instances, the employer had submitted petitions claiming fewer than 50 employees or less than 50 percent of their workforce in H-1B or L-1 status. As a result of these declarations, the employers did not submit the border security fee. Subsequent to a USCIS request for evidence, the employer changed the declaration and paid the fee. We found that USCIS does not have a process in place to review petitions submitted by these employers to determine whether other petitions were also accompanied by erroneous fees. If USCIS could identify all petitions submitted by employers who paid the border fee after a request for evidence had been issued, USCIS could collect on these past errors, and ensure that similar errors do not occur in the future.

During our testing, we also found errors in other required fees.[10] For example, one research organization declared itself as a government entity and therefore exempt from the *American Competitiveness and Workforce Improvement Act* (ACWIA) fee. This entity was actually a private research organization that was subject to the ACWIA fee of $1,500 per petition.[11] Between August 13, 2010, and October 1, 2014, USCIS did not collect over $67,000 in ACWIA fees for 45 petitions. Since FY 2007, USCIS did not collect from this entity at least $200,000 in ACWIA fees for 144 petitions.

[10] As discussed previously, during the period covered by our audit, some employers submitted payments for the PL 111-230 fee separately while others paid all applicable I-129 fees in a lump sum. In order for us to test the validity of PL 111-230 fees, we also have to determine whether other applicable fees were paid.

[11] Some entities such as certain nonprofit organizations and institutes of higher education are exempt from the ACWIA fee. However, this entity declared thousands of employees on the Form I-129 and should have paid $1,500 per petition.

Improved Processes To Verify Employer Information May Reduce Uncollected Fees

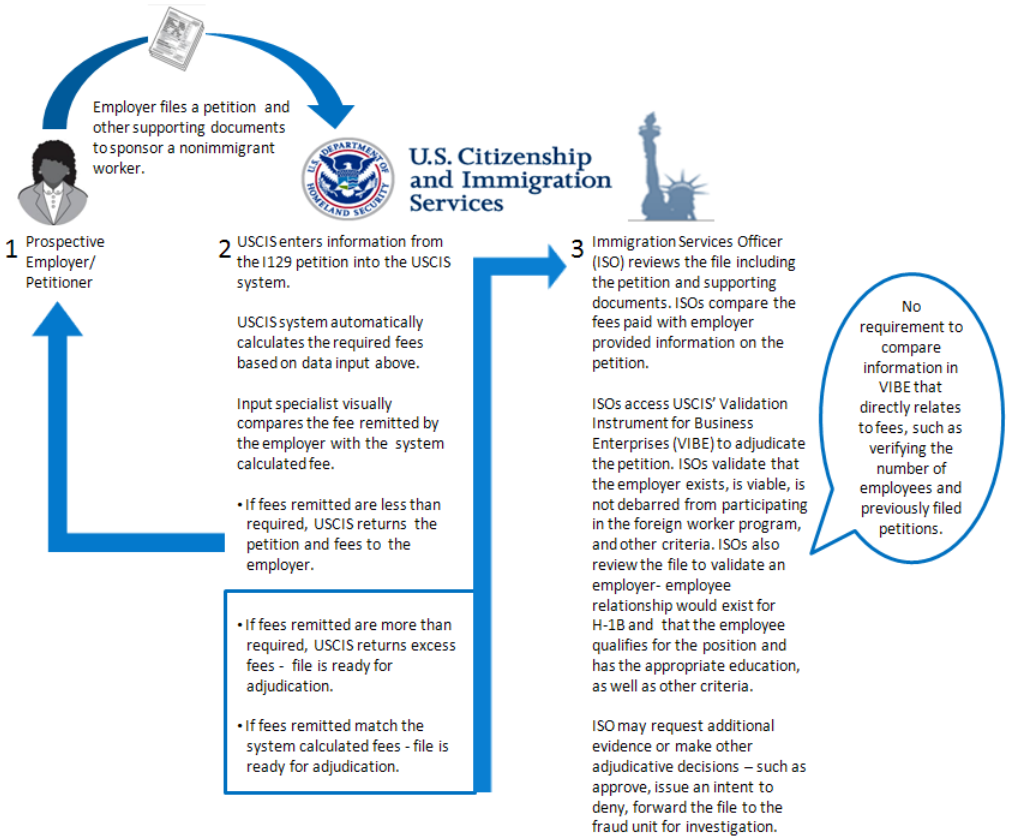
USCIS can improve its processes to validate information employers provide to ensure they pay the proper fees. USCIS has implemented a web-based system containing extensive workforce information, but does not require ISOs to use this system to determine whether the proper fee has been paid. Some ISOs and their managers cited regulations and time pressure as barriers that prevented them from undertaking more extensive validation of employer data. Without validation, an employer's self-declaration is typically the sole basis for determining whether an employer is required to pay the border security fee.

Independent Verification of Border Security Fees

Current USCIS procedures require that intake technicians and ISOs verify that the fee the employer remits matches the employer-provided responses to questions on the petition regarding the size and composition of the employer's workforce. However, USCIS procedures do not require ISOs to go further in their reviews and use other data sources, both external and internal, to determine whether an employer is required to pay the border security fee. Of the 14 ISOs we interviewed, only one reported leveraging this information in reviewing the petition.

The USCIS intake process involves an operator manually entering the data from Form I-129 into USCIS' processing system. The Form I-129 petition contains questions about whether: 1) the employer employs more than 50 employees, and 2) the workforce consists of 50 percent or more individuals in H-1B and L status. As part of the data entry process, the operator verifies that the fee the employer submits matches the fees calculated by the system. Petitions and excess fees may be returned to the sender if the amount paid does not agree with the amount required, as a result of the employers' answers to the two questions. During the adjudication process, ISOs once again compare the information on the Form I-129 petition with the remittance to ensure the submitted fee is consistent with what the employer declared. Figure 1 depicts the general process for collecting and reviewing employer petitions and fees.

Figure 1. General Process for Collecting and Reviewing H-1B and L-1 Petitions and Fees



Source: DHS analysis of agency procedures.

As shown in figure 1, ISOs access VIBE during adjudication to help determine the petitioner's eligibility. VIBE contains information on the employer's financial viability, the number of employees, the number of previously filed Form I-129 petitions, and whether the employer had been debarred by DOL from participation in the nonimmigrant worker program.[12] However, USCIS does not require that ISOs use information in VIBE to validate employer information related to fees. The ISOs and managers we interviewed generally agreed that

[12] Debarment is the responsibility of DOL. If an employer is debarred, USCIS cannot approve an employer's immigrant and nonimmigrant worker petitions.

VIBE contains valuable information, but said that using VIBE to verify all information provided by an employer can be time consuming.

Generally, USCIS procedures focus on the use of VIBE for adjudication decisions. To adjudicate a Form I-129 petition, ISOs use VIBE to determine whether the petitioner had been debarred or committed fraud and to assess an employer's financial viability. An ISO is instructed to take actions if VIBE indicates that financial viability is in question; for example, the employer does not exist or is not active. In these instances, ISOs must review the VIBE finding against information already provided in the case file and/or issue a request for evidence to give the petitioner an opportunity to rebut information in VIBE. However, USCIS officials warn ISOs to use the data in VIBE judiciously when reviewing the number of employees and previously filed petitions.

VIBE contains two pieces of information that could be compared against the employer' declaration to help an ISO assess whether the employer submitted the proper fees: the number of employees and the number of previously filed Form I-129 petitions. According to ISOs and managers, because they are not required to do so, few ISOs regularly rely on VIBE to help assess the accuracy of the border security fee.

One ISO who regularly leverages VIBE information stated that he uses VIBE as a reasonableness check to validate that proper fees are paid. That ISO typically:

- Compares the number of employees on Form I-129 to D&B-provided data;
- If the number of employees is close to or over 50, performs a reasonableness check of fees;
  - Checks in VIBE to determine how many petitions the employers had submitted in the previous 12−36 months;
  - Determines the reasonableness between the number of employees declared on Form I-129 and the number of previously filed petitions;
  - Factors in other considerations, including the fact that not all petitions are approved, and not all approved petitions resulted in employees being on board; and
- Issues a request for evidence after consideration of all these factors if it appears the fee submitted is questionable.

According to this ISO, in a number of instances, the employer subsequently submitted the border security fee when questioned about the number of workers and composition of workforce.

For example, one case file we reviewed showed that an ISO issued a request for evidence to an employer who submitted 72 petitions in the previous 12 months but declared only 39 employees. Subsequently, the company paid the border security fee. In contrast, requests for evidence were not issued to companies that declared 49 employees, yet submitted as many as 111 petitions in the previous 12 months. ISOs we talked to cited a number of reasons why a request for evidence may not have been issued. Specifically, ISOs told us that although they can identify the number of previously approved petitions in VIBE, it is difficult to determine whether: 1) the individual came to the United States and took the position, and 2) the employee is still working for that employer. These same ISOs told us that this would require assessing a number of other systems, and there generally was not enough time during the course of adjudication to do so. A few ISOs said that they probably would have issued a request for evidence in this situation requiring the employer certify that the numbers were accurate and that the fees were not required. However, with no procedural requirement to validate information related to fees, ISOs generally take the information employers provide regarding the number of employees and composition of their workforce at face value and do not question the information further.

The ISO who regularly leverages VIBE information related to fees informed us that this process is time consuming and involves juggling a number of facts that can be conflicting at times. Other ISOs and managers told us that because of the extra time involved, most ISOs adhered to existing procedures, which do not require validation of fees using the data in VIBE. Without fully leveraging available tools, while accepting employer supplied information without verification, USCIS may lose the opportunity to identify and collect fees from employers who underreport the number or type of employees to avoid paying the proper fee.

Preponderance of Evidence Standards and Time Pressures Limit the Use of External Data

USCIS procedures require that ISOs use the "preponderance of evidence" standard in adjudicating petitions. USCIS officials we interviewed defined a preponderance of evidence as 51 percent confidence (or more likely than not) that the information in the case file is reliable. Most ISOs we spoke to said they generally relied on their adjudication experience when applying the preponderance of evidence standard. In addition, time pressures set by USCIS performance measures to adjudicate quickly and USCIS' own procedures, which require that ISOs validate specific information generally, restrict ISOs' ability to fully leverage external data. As a result, according to USCIS officials, ISOs

generally follow procedures and verify the required information, which does not include independent verification that the proper fees were paid.

According to the *Adjudicator's Field Manual*, petitioners must establish that they are eligible for the benefit(s) sought. ISOs are required to use the "preponderance of the evidence" standard of proof when making adjudicative decisions. The *Adjudicator's Field Manual* states that even if the ISO has some doubt, the petitioner will have satisfied the standard of proof if the petitioner submits relevant, probative, and credible evidence that leads the ISO to believe that the claim is "probably true" or "more likely than not." Most ISOs we spoke to said they rely on their adjudication experience. Some ISOs and their managers said that they believe the preponderance of evidence standard limits how much external data ISOs may use in making decisions.

However, past evidence of fraud in the foreign worker program indicates a need for validation of data the employer provides. Office of Management and Budget Circular A-123 states that Federal managers must assess risks in a program and carefully consider the appropriate balance between controls and risk. Past Government Accountability Office (GAO) and OIG audits, and USCIS' own *Benefit Fraud Assessment Reports* have identified extensive fraud in the H-1B and L-1 programs.[13] Without leveraging external data, ISOs will be hampered in their ability to identify inaccuracies in data provided by the petitioner with respect to fees and other information.

The extent an ISO can use external data is also hindered by the amount of time ISOs have, only 30 minutes in general, to complete each petition.[14] To make a decision, they have to process and verify an extensive amount of data in the petition to determine whether: 1) the employer exists, 2) a qualifying position exists, 3) a genuine employer-employee relationship exists or will exist for H-1B employees or a qualifying relationship with the foreign employer for L-1 employees, and 4) the employee qualifies for the position offered. Some ISOs feel that they do not have the time to spend on independently verifying the accuracy of all employer-provided data.

[13] DHS OIG, *The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers*, (OIG-12-24), January 2012.
GAO*, Immigration Benefits- Additional Controls and a Sanctions Strategy Could Enhance DHS's Ability to Control Benefit Fraud*, (GAO-06-259), March 2006.
[14] Specifically, ISOs at one service center told us they have to adjudicate 1.7 new H-1B petitions or 2.2 renewals in one hour.

Recommendations

We recommend that the Associate Director, Service Center Operations:

Recommendation #1:

Develop a method to capture electronically employers' information related to the number of employees and composition of their workforce to facilitate USCIS data analysis in comparing employer information from one petition to another.

Recommendation #2:

Implement procedures to compare the number of employees listed on Form I-129 against employer responses regarding their workforce.

Recommendation #3:

Perform periodic reviews to identify employers who submit different fees for the same type of petitions.

Recommendation #4:

Expand the use of data in VIBE to assess the reasonableness of employer-declared data on the number and composition of employees.

Recommendation #5:

Conduct an analysis to determine the appropriate amount of time needed to adjudicate H-1B and L-1 petitions to include verification of submitted fees.

Management Comments and OIG Analysis

We obtained written comments on a draft of this report from the Acting Deputy Director of USCIS. We have included a copy of the comments in their entirety in appendix B. We also obtained technical comments to the draft report, which we incorporated into the final report, where appropriate.

USCIS generally agreed with our recommendations and acknowledged that the draft report identified measures which USCIS can take to further enhance the program's overall effectiveness. Specifically, USCIS concurred with four of five recommendations and had incorporated changes, subsequent to our audit field work, that fulfills the intent of the remaining recommendation. A summary and

response to each recommendation follows. USCIS also cited case law to show, except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought. USCIS further stated that the law governing the fees associated with H-1B and L-1 petitions does not set a higher standard of proof, and therefore, preponderance of evidence is the appropriate legal standard. However, as stated in this report, USCIS does not have procedures that require ISOs validate that proper fees were paid during adjudication. Past evidence of fraud in the foreign worker program confirms the need to validate the information employers provide. Without validation, an employer's self-declaration is typically the sole basis for determining whether an employer is required to pay the border security fee.

USCIS Comments to Recommendation #1: USCIS concurs with this recommendation. USCIS plans to begin gathering data regarding visa requirements for inclusion of certain Form I-129 nonimmigrant classifications in its Electronic Immigration System (ELIS) in late 2015. Once implemented, each data field on the Form I-129 will be captured electronically when an employer files a petition through ELIS. In the interim, USCIS will begin the process of modifying CLAIMS3 to capture the number of employees reported by the petitioner on Form I-129. USCIS expects this process to be completed by the end of FY 2014.

OIG Analysis: The actions USCIS proposes satisfy the intent of the recommendation. PL 111-230 is scheduled to sunset October 1, 2015. However, once USCIS captures the number of employees electronically, USCIS can use the information to validate the reasonableness of other fees. Specifically, USCIS could further enhance its program effectiveness by using the electronically captured information to verify that the ACWIA fee is reasonable since this fee is also based on number of employees and employer declarations. This recommendation is considered resolved, but will remain open until USCIS provides documentation that the planned corrective actions are completed.

USCIS Comments to Recommendation #2: USCIS concurred with this recommendation. USCIS will develop a procedure for comparing employer responses on the Form I-129 and information provided in the appropriate supplements. USCIS will provide further details on developing and implementing this procedure in its corrective action plan.

OIG Analysis: The actions USCIS proposes should resolve this recommendation. However, more detail of the implementation timeline and procedures are necessary. This recommendation will remain open and unresolved until we have

more information on the corrective action plan and documentation confirming implementation of this procedure.

USCIS Comments to Recommendation #3: USCIS concurred with this recommendation. USCIS will develop a process for utilizing the comment feature in VIBE so that an ISO can flag an employer who initially indicates that it is not subject to the additional fee in PL 111-230, but later submits the fee in response to a Request for Evidence. The additional information will assist ISOs when assessing the employee attestations on subsequent H-1B and L-1 petitions. Although USCIS already has a quality assurance review process for H-1B and L1 petitions that check that the petitioner paid the appropriate fees, USCIS will evaluate whether additional lines of inquiry on fee payment, particularly the PL 111-230 fee, need to be included in its quality assurance review process.

OIG Analysis: The actions USCIS proposes should resolve this recommendation. However, a detailed corrective action plan and timeline are necessary. This recommendation will remain open and unresolved until USCIS provides a corrective action plan, timeline, and documentation confirming that a process has been developed to share comments about the employer; or that other quality assurance review procedures have been implemented to identify employers paying different fees for the same type of petitions.

USCIS Comments to Recommendation #4: USCIS concurred with this recommendation. USCIS noted that the employee counts in VIBE are not always representative of the employees a petitioner should count in determining whether the employer is required to pay the PL 111-230 fee. However, USCIS agreed that the information in VIBE regarding the number of Form I-129 H-1B and L-1 petitions that an employer had filed over a certain period of time can be compared with the employee data reported on Form I-129. USCIS will develop guidance to require ISOs to compare the data on approved petitions to the employee count on the form. ISOs will be instructed to issue a request for evidence in cases where there is a significant discrepancy between the information reported on the petition and the approval data tracked in VIBE.

OIG Analysis: The actions USCIS proposes should resolve this recommendation. This recommendation will remain open and unresolved until USCIS provides a corrective action plan with a timeline and USCIS provides OIG evidence that procedures have been developed and implemented.

USCIS Comments to Recommendation #5: USCIS did not concur with this recommendation. In FY 2014, USCIS developed new Performance Plan and Appraisal templates that no longer contain production metrics for individual

employees. Specifically, on October 29, 2013, the USCIS Director announced the new Performance Plan and Appraisals as part of the *Quality Workplace Initiative*, highlighting the removal of quantitative metrics and reinforcing the goal for Performance Plan and Appraisals to be "focused on the quality of our work, centered on our mission, and designed to foster teamwork and collaboration." USCIS has issued the revised Performance Plan and Appraisals to its ISOs for the current rating period. Given this change in Performance Plan and Appraisals, USCIS requests that the OIG close recommendation #5.

OIG Analysis: On October 29, 2013, USCIS announced their new Performance Plan and Appraisals as part of their *Quality Workplace Initiative* highlighting the removal of quantitative metrics. The new focus is on quality of work, mission, and teamwork and collaboration for all USCIS employees beginning FY 2014. The performance initiative satisfies the intent of recommendation #5. OIG considers recommendation #5 resolved and closed.

Appendix A
Objectives, Scope, and Methodology

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*. This is one of a series of audit, inspection, and special reports prepared as part of our oversight responsibilities to promote economy, efficiency, and effectiveness within the Department.

This audit was initiated as part of OIG's 2013 Annual Performance Plan. We designed our audit to: 1) validate that the border security fees were paid when required, and 2) assess USCIS controls to verify that employers accurately disclose information on the composition of their workforce when petitioning for H-1B or L-1 workers. We interviewed USCIS officials from Service Center Operations, and the California and Vermont Service Centers, regarding the receipt and adjudication process related to Form I-129. We reviewed relevant criteria, policies, and procedures and conducted a walkthrough of the Form I-129 petition process for H-1B and L-1 status visas.

We selected from CLAIMS3 a statistical sample of 361 transactions using a 95 percent confidence level with a +/- 2 percent expected deviation rate from a population of 298,071 approved H-1B and L-1 initial and change of employer petitions with no border security fee. During testing, we found that USCIS did not consistently capture border security fees in CLAIMS3 during the first year the fee was implemented. Instead, USCIS used spreadsheets and other means of recording this information outside CLAIMS3. Consequently, the statistical sample of 361 contained instances where the fee was collected but not recorded. Subsequently, we restructured our original sample to exclude from our population all transactions from August 14, 2010, through FY 2011 to account for this anomaly. As a result, we narrowed our testing to a sample of 165 FY 2012 transactions (out of a population of 132,061 transactions with a potential unpaid fee of over $260 million). In addition, we tested 38 transactions we selected based on specific characteristics. Because USCIS did not consistently capture the border security fee, the sample error rate of 3.03 percent cannot be projected to the entire population.[15]

We tested our transactions by comparing employer-declared information with publicly available business profile sites as well as the ADIS and USCIS' PCQS containing visa

[15] USCIS could have collected an additional $7.6 million in uncollected fees if we project the sample results based on 361 transactions and the population of 298,071 approved H-1B and L-1 initial and change of employer petitions filed from August 14, 2010, through FY 2012. The rate of uncollected fees would likely be higher had USCIS used CLAIMS3 to document remittance of the border fees from the date the fees were enacted.

information from the Department of State. Petitions failed our validity test because: 1) the employer did not pay the proper fee, or 2) USCIS and OIG disagreed on whether a request for evidence should have been issued asking for evidence that the proper fee was paid.

We conducted this performance audit between March 2013 and September 2013 pursuant to the *Inspector General Act of 1978*, as amended, and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based upon our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based upon our audit objectives.

We appreciate the cooperation by USCIS management and staff in providing the information and access necessary to accomplish this review.

Appendix B
Management Comments to the Draft Report

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Deputy Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

Memorandum 11/6/14

TO: Frank Deffer
Assistant Inspector General, Office of Information Technology Audits

FROM: Rendell L. Jones
Acting Deputy Director

SUBJECT: Office of Inspector General Draft Report: *USCIS Controls to Ensure Employers Sponsoring H-1B and L-1 Employees Pay Applicable Border Security Fee (OIG-13-082-ITA-USCIS) – FOUO*

U.S. Citizenship and Immigration Services (USCIS) thanks the Office of Inspector General (OIG) for the opportunity to review and comment on its draft report on businesses paying applicable border security fees.

Determining whether an employer is subject to the additional fee mandated by Public Law (Pub. L.) 111-230 can be complex, as an employer must account for all employees currently in the United States at the time of filing the specific H-1B or L-1 petition. According to the draft report, the OIG found that employers typically paid appropriate border fees as required by Pub. L. 111-230. The draft report identifies measures which USCIS can take to further enhance the program's overall effectiveness. USCIS generally concurs with these recommendations.

Recommendation 1: Develop a method to capture electronically employers' information related to the number of employees and composition of their workforce to facilitate USCIS data analysis in comparing employer information from one petition to another.

USCIS response: USCIS concurs with this recommendation. USCIS plans to begin gathering data regarding visa requirements for inclusion of certain Form I-129 nonimmigrant classifications in our Electronic Immigration System (ELIS) in late 2015. Once implemented, each data field on the Form I-129 will be captured electronically when an employer files a petition through ELIS. In the interim, USCIS will begin the process of modifying the Computer Linked Application Information Management System 3 to capture the number of employees reported by the petitioner on Form I-129. USCIS expects this process to be completed by the end of Fiscal Year (FY) 2014.

Recommendation 2: Implement procedures to compare the number of employees listed on Form I-129 against employer responses regarding their workforce.

www.uscis.gov

USCIS response: USCIS concurs with this recommendation. USCIS will develop a procedure for comparing employer responses on the Form I-129 and information provided in the appropriate supplements. USCIS will provide further details on developing and implementing this procedure in its corrective action plan.

Recommendation 3: Perform periodic follow-up reviews to identify employers who submit different fees for the same type of petition.

USCIS response: USCIS concurs with this recommendation. USCIS will develop a process for utilizing the comment feature in the Validation Instrument for Business Enterprises (VIBE) so that an Immigration Service Officer (ISO) can flag an employer who initially indicates that it is not subject to the additional fee in Pub. L. 111-230, but later submits the fee in response to a Request for Evidence (RFE). The additional information will assist ISOs when assessing the employee attestations on subsequent H-1B and L-1 petitions.

In addition, the Service Center Operations Directorate conducts regular Quality Assurance (QA) reviews on H-1B, L-1A and L-1B petitions. A QA review for H-1B petitions began on October 1, 2013, and concluded on December 31, 2013, and the next QA review on H-1B petitions is currently scheduled for October 1, 2014, through December 31, 2014. The next QA review for L-1A and L-1B petitions is scheduled for May 1, 2014, through July 31, 2014. Although QA officers already check to ensure that the petitioner paid all appropriate fees (including the fee mandated by Pub. L. 111-230), USCIS will evaluate whether additional lines of inquiry on fee payment, particularly the Pub. L. 111-230 fee, need to be included during the QA process.

Recommendation 4: Expand the use of data in VIBE to assess the reasonableness of employer-declared data on the number and composition of their employees.

USCIS response: USCIS concurs with this recommendation. It should be noted that the employee count provided in VIBE does not necessarily reflect the number of employees a petitioner should count when determining whether it is required to pay the additional fee, as it may include employee counts for additional related entities. This is especially true in instances where a specific U.S. employer is a branch of a larger foreign corporation. In those cases, VIBE may display an employee count that includes employees in other countries.

However, information in VIBE regarding the number of approved Form I-129 H-1B and L-1 petitions that an employer has filed over a certain period of time can be compared with the employee data reported by the employer on Form I-129. USCIS will develop guidance to require ISOs to compare the data on approved petitions to the employee count on the form. ISOs will be instructed to issue an RFE in cases where there is a significant discrepancy between the information reported on the petition and the approval data tracked in VIBE.

Recommendation 5: Conduct an analysis to determine the appropriate amount of time needed to adjudicate H-1B and L-1 petitions to include verification of submitted fees.

USCIS response: USCIS does not concur with this recommendation. This recommendation is based on interviews with ISOs in which they stated they were held to specific production metrics. However, for FY 2014, USCIS developed new Performance Plan and Appraisal (PPA) templates that no longer contain production metrics for individual employees. This negates the need to conduct an analysis to determine the appropriate amount of time needed to adjudicate H-1B and L-1 petitions.

On October 22, 2013, USCIS and American Federation of Government Employees (the designated representative of all bargaining unit employees at USCIS) signed a Memorandum of Agreement outlining the implementation of quality-based PPAs for all USCIS employees during FY 2014 and beyond. On October 29, 2013, the USCIS Director announced the new PPAs as part of the Quality Workplace Initiative, highlighting the removal of quantitative metrics and reinforcing the goal for PPAs to be "focused on the quality of our work, centered on our mission, and designed to foster teamwork and collaboration." USCIS has issued the revised PPAs to its ISOs for the current rating period.

Given this change in PPAs, USCIS respectfully requests that the OIG either remove Recommendation 5 from the audit report or consider it closed because of the actions taken by USCIS.

Use of the Preponderance of Evidence Standard

In the draft report, the OIG notes that "USCIS *procedures* (*emphasis added)* generally require that ISOs use the "preponderance of evidence" standard in adjudicating petitions." It should be noted that except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought. See, e.g., Matter of Chawathe, 25 I&N Dec. 369 (AAO 2010); see also, Matter of Martinez, 21 I&N Dec. 1035, 1036 (BIA 1997) (noting that the petitioner must prove eligibility by a preponderance of evidence in visa petition proceedings); Matter of Soo Hoo, 11 I&N Dec. 151, 152 (BIA 1965) (finding that the petitioner had not established eligibility by a preponderance of the evidence because the submitted evidence was not credible); cf. Matter of Patel, 19 I&N Dec. 774, 782-3 (BIA 1988) (noting that section 204(a)(2)(A) of the Act, 8 U.S.C. § 1154(a)(2)(A) (Supp. IV 1986), requires a higher standard of clear and convincing evidence to rebut the presumption of a fraudulent prior marriage).

The law governing the fees associated with H-1B and L-1 petitions does not set a higher standard of proof and therefore preponderance of the evidence is the appropriate legal standard.

Appendix C
Major Contributors to This Report

Tuyet-Quan Thai, Director
Beverly Burke, Forensic Audit Manager
Josh Wilshere, Forensic Auditor

Appendix D
Report Distribution

Department of Homeland Security

Secretary
Deputy Secretary
Chief of Staff
Deputy Chief of Staff
General Counsel
Executive Secretary
Director, GAO/OIG Liaison Office
Assistant Secretary for Office of Policy
Assistant Secretary for Office of Public Affairs
Assistant Secretary for Office of Legislative Affairs
Chief Privacy Officer

U.S Citizenship and Immigration Services

Acting Director
Acting Chief of Staff
Audit Liaison

Office of Management and Budget

Chief, Homeland Security Branch
DHS OIG Budget Examiner

Congress

Congressional Oversight and Appropriations Committees, as appropriate

ADDITIONAL INFORMATION

To view this and any of our other reports, please visit our website at: www.oig.dhs.gov.

For further information or questions, please contact Office of Inspector General (OIG) Office of Public Affairs at: DHS-OIG.OfficePublicAffairs@oig.dhs.gov, or follow us on Twitter at: @dhsoig."

OIG HOTLINE

To expedite the reporting of alleged fraud, waste, abuse or mismanagement, or any other kinds of criminal or noncriminal misconduct relative to Department of Homeland Security (DHS) programs and operations, please visit our website at www.oig.dhs.gov and click on the red tab titled "Hotline" to report. You will be directed to complete and submit an automated DHS OIG Investigative Referral Submission Form. Submission through our website ensures that your complaint will be promptly received and reviewed by DHS OIG.

Should you be unable to access our website, you may submit your complaint in writing to:

Department of Homeland Security
Office of Inspector General, Mail Stop 0305
Attention: Office of Investigations Hotline
245 Murray Drive, SW
Washington, DC 20528-0305

You may also call 1(800) 323-8603 or fax the complaint directly to us at (202) 254-4297.

The OIG seeks to protect the identity of each writer and caller.