DEPARTMENT OF HOMELAND SECURITY

Office of Inspector General

USCIS Approval of H-1B Petitions Exceeded 65,000 Cap in Fiscal Year 2005

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Preface

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 by our office as part of our DHS oversight responsibility to promote economy, effectiveness, and efficiency within the department.

This report assesses the processing of H-1B "temporary worker" nonimmigrant visa petitions by DHS in fiscal year 2005 and analyzes the deviation between the statutory ceiling and the actual results. It is based on interviews with employees and officials of relevant agencies and institutions, direct observations of the petition process, and a review of applicable documents.

The recommendations herein have been developed to the best knowledge available to our office, and have been discussed in draft with those responsible for implementation. It is our hope that this report will result in more effective, efficient, and economical operations. We express our appreciation to all of those who contributed to the preparation of this report.

Richard L. Skinner
Inspector General

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Abbreviations

ACWIA	American Competitiveness and Workforce Improvement Act
AC21	American Competitiveness in the 21st Century
CIS	U.S. Citizenship and Immigration Services
CLAIMS	Computer Linked Application Information Management System
DHS	Department of Homeland Security
DO	Office of Domestic Operations, CIS
DOS	Department of State
KCC	Kentucky Consular Center
LAN	Local Area Network
LCA	Labor Condition Application
OIG	Office of Inspector General
OIS	Office of Immigration Statistics
RFE	Request for Evidence

OIG

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Executive Summary

In March 2005, the Office of Inspector General received a letter from Senator Charles Grassley, Chairman of the Senate Finance Committee, and Representative John Hostettler, Chairman of the Subcommittee on Immigration, Border Security and Claims of the House Judiciary Committee. The chairmen requested that we investigate the actions taken by officials of U.S. Citizenship and Immigration Services (CIS) regarding the bureau's provision of H-1B non-immigrant status to more aliens in fiscal year (FY) 2005 than was statutorily authorized. In particular, we were asked to investigate how the over-issuance of H-1B visas occurred and whether it was done in deliberate violation of federal law. In addition, we were asked to make determinations as to what actually transpired and how to prevent an over-issuance from occurring in the future. In response to their request, we reviewed the H-1B petition approval process and the events that led to this over-issuance in FY 2005.

CIS officials at all levels in Washington, DC and at the service centers were aware of and attempted to comply with the statutory limit on the number of persons granted H-1B status. However, CIS had neither the technology nor an operational methodology to ensure compliance with the precise statutory ceiling. Faced with the certainty of issuing either too few or too many approvals, it had been CIS' explicit practice to avoid approving too few. The CIS "business process," of taking all petitions submitted before an announced cut-off date, guarantees that an inexact number of petitions will be approved. The structure of DHS handicaps counting efforts; a complex adjudication process makes the count fluctuate; a complex counting process makes the cap a moving target; and, an unexpected influx of petitions in mid-September 2004 swamped the cap counting process.

Several recent CIS initiatives are designed to prevent a recurrence. We cannot evaluate policies meaningfully that have not yet been tested. However, we believe that they might not be sufficient to accomplish the precision that Congress now requires, and offer two recommendations to improve the methods for processing H-1B petitions.

Background

The H-1B program is one of several "temporary worker" nonimmigrant visa programs. It allows U.S. based companies to employ foreign individuals in the

United States for “specialty occupations” on a temporary basis. There are three subcategories:

- H-1B1 positions - for workers from Chile and Singapore - require that the alien have at least a bachelor’s degree or the equivalent in a specialty field;
- H-1B2 positions - for workers who will perform exceptional services for a project administered by the US Department of Defense (DOD); and,
- H-1B3 positions - for fashion models of national or international acclaim and recognition.

Other temporary worker visa programs are designed to accommodate trainees, intra-company transferees; aliens of extraordinary ability in arts, science, education, business or athletics; internationally recognized athletes and entertainers; and, aliens coming temporarily to participate in an international cultural exchange program. Both the entertainment industry and professional sports employ many temporary workers.

Section 214(g)(1)(A) of the *Immigration and Nationality Act* sets a limit of 65,000 H-1B approvals in FY 2005. The same section of the law defines certain types of H-1B petitions as exceptions to this "cap." Therefore, CIS must determine as it adjudicates each petition whether it is a "cap case" or a "non-cap case." There is no limit on the number of cap-exempt petitions that can be approved. The law requires, as well, that H-1B cases be approved in the order in which they were filed. Section 214(g) is complex; the complete text is attached at Appendix B.

In FY 2005, CIS exceeded the limit and approved more petitions than the law stipulated.[1] Once adjustments were made to the total number involving visa denials and reconsidered exemptions, and after unused numbers set aside earlier to comply with free trade agreements were factored in, the total number of approved FY 2005 "cap cases" turned out to be approximately 71,740 -- significantly over the limit of 65,000. [2]

CIS adjudicators examine many factors before approving an H-1B petition. Both the position that is going to be filled and the worker who will fill it must meet many criteria, all of which are described in the service center operations manual. Petitions that are complete and clearly meet the standards can be quickly approved. Other petitions require correspondence between the service center and the petitioner to resolve unclear or incomplete submissions.

[1] CIS "White Paper" dated April 12, 2005.
[2] CIS-OIG e-mail June 27, 2005.

H-1B petitions, when approved, are used by some beneficiaries to apply for an H-1B visa at an embassy abroad. Other beneficiaries, already lawfully in the United States in some other status (such as "F-1" student) need to change status with CIS. Canadian beneficiaries are reviewed for admission when they arrive at the border, because Canadians are exempt from the visa requirement.

The cap does not limit H-1B visas, as generally is believed, but limits persons granted H-1B status, which complicates the counting process.

Results of Inspection

CIS approved approximately 72,000 H-1B cap cases for FY 2005, exceeding the statutory cap of 65,000. There is no indication that this was done in deliberate violation of federal law. A number of factors led to this outcome.

The traditional CIS business process guarantees imprecision

CIS cannot exactly hit any specific cap number with its current business process. CIS management (and formerly INS) has understood that the final number of cap cases approved would be higher or lower than the exact mandate. CIS makes many efforts to minimize this deviation, but believes that the public is best served by simplicity and transparency in the petition process.

CIS cuts off further receipt of H-1B petitions when it estimates the number of approved petitions is approaching the mandated limit. CIS makes efforts to monitor its H-1B workload, to count the incoming cap cases, and to estimate the likely outcome of the pending work already received but not yet finally adjudicated. These efforts allow CIS to announce a cut-off date after which it will no longer accept petitions so as to end the year close to the cap. All petitions received before the cut-off dates are adjudicated to completion without regard to the cap. CIS managers told us that American employers are entitled to be confident that petitions that meet the legal requirements and are filed in a timely manner will be approved.

We interviewed an official who was involved with the H-1B cap issue in the late '90s at the former INS. She indicated that a perceived failure at that time to "hit the cap" was brought to the attention of the commissioner, and that efforts were undertaken to improve management's ability to approve the maximum number of allowed petitions. Among other initiatives, the form petitioners complete and submit, the Form I-129, was redesigned to better capture information relating to whether a case was exempt from the cap. When INS failed to hit the cap again the following year, outside consultants were engaged to take another look at the process. Alternative petition processing systems have been discussed but dismissed as inferior to the current process.

CIS has considered and rejected a business process that would involve opening and closing the application window repeatedly during the 18-month processing period that can be used each fiscal year.[3] During each closure CIS could adjudicate all pending cases, and evaluate how many more cap cases could be processed. Also, it considered and rejected a model in which it would accept and process cases until the cap is reached, and then mail back the unprocessed overage along with the paid fees. Our visit to the mail room at the California service center, where petitions of all kinds arrive by the truckload several times a day, gave us an appreciation of how difficult such an alternative would be. Also, it might expose CIS managers to significant internal control issues with respect to a potentially large number of fees.

CIS told us it seeks a process that will avoid cutting off further applications too soon before the statutory limit is reached. Businesses in the past have brought legal actions against CIS when they believed CIS over-counted and, therefore, failed to approve the full statutory number of cases.[4]

CIS today continues to believe that any shortfall in petition approvals that would result from an over-counting of cap cases would be a disservice to the American business community. Ironically, in mid-September, 2004 -- at almost the exact moment that CIS was inadvertently going over the FY 2005 cap -- a manager sent an e-mail discussing with her colleagues and subordinates the possibility that there had been a shortfall in FY 2004.[5] She indicated that "there are concerns that perhaps some part of the 'formula' [for predicting eventual approvals] is not correct in that perhaps we did not capture some group of cases that are falling out of the cap usage classification." After mentioning several possible explanations for the inaccuracy of the FY 2004 count, she said: "…[our superiors] want to make sure that we revisit this formula so we can get closer to the target number before we shut off the H-1B cases for FY05."

A fuller description of the adjudication process has been provided in a later section. Such a description is necessary to fully explain the complexities that result in cap cases reclassified as non-cap - or vice versa - during processing. Approved cases can later be revoked, freeing an additional number. Denied petitions can be appealed successfully to a higher level in CIS, consuming a number. Beneficiaries believed to be different persons (and counted twice) can in fact be one person with multiple offers from potential employers. Beneficiaries abroad are sometimes denied their visa - freeing another cap number if they were a cap case and if CIS is informed of the denial. For these and other reasons, the number of already approved cap cases would fluctuate even if CIS temporarily

[3] Petitions can be submitted up to six months before the beginning of each fiscal year, i.e., April 1.
[4] See, for example, Law Office of Azita Mojarad, et al v. Eduardo Aguirre, Case number 1:05CV00038, U.S. District Court for the District of Columbia.
[5] September 15, 2004 e-mail titled "H-1B Cap Counts".

ceased adjudicating pending cases. With the number of petitions already approved and subject to the cap in constant fluctuation, it is almost impossible for CIS to approve any specific number of cap cases.

The organization of DHS handicaps counting efforts

Before DHS was created, the Immigration and Naturalization Service (INS) Office of Immigration Statistics (OIS) played an important role in managing the cap count by providing timely H-1B workload numbers to INS managers. When DHS was formed OIS was not placed within any of the three new fragments of the former INS: Customs and Border Protection, Immigration and Customs Enforcement, or Citizenship and Immigration Services. Instead it was made a component of the DHS Office of Management, one of the five major directorates that report directly to the Secretary. This left CIS responsible to administer a process it could not monitor with sufficient precision on its own.

During the first two years of DHS' existence OIS continued to provide counting assistance to CIS managers. We reviewed correspondence between CIS and OIS and found that the offices cooperated well as they tried to keep an up-to-date count of H-1B activity. Nevertheless, as one interviewee described the situation to us, CIS had the responsibility to manage numbers but no ability to track them, while OIS could track the numbers but did not have responsibility to manage the H-1B program.

Further complicating the relationship, and slowing down the count, was the need to utilize an outside contractor to process the data and generate the count estimates. The inadequacies of the Computer Linked Application Information Management System (CLAIMS) used by CIS will be discussed below, but we found that CIS managers required both the assistance of OIS and the paid services of a contractor to generate the numbers they needed to manage the cap.

A significant improvement was made in December 2004. An expert in H-1B statistics was transferred from OIS to CIS. CIS expects in the future to be able to manage the cap count without depending upon OIS for routine cap counting assistance.

A complex adjudication process makes the cap count fluctuate

H-1B petitions need to be examined, evaluated, and adjudicated. Errors, inconsistencies, and omissions from the file need to be resolved. Denials are subject to administrative appeal. Approvals are subject to later revocation. CIS promises an expedited decision to those who pay a surcharge. Overall, the business processes are stunningly unwieldy.

Petitioning employers file Form I-129, Petition for Nonimmigrant Worker, with one of four CIS service centers at Laguna Niguel, California; St. Albans, Vermont; Dallas, Texas; or Lincoln, Nebraska. Petitions for workers who seek specialty occupations (the bulk of H-1B petitions) must include supporting material that proves eligibility for H-1B status. This evidence includes a Labor Condition Application (LCA) from the Department of Labor and a prevailing wage determination received from either the state workforce agency that has jurisdiction over the geographic area of intended employment or from a survey conducted by an independent authoritative source. Evidence also is required to prove the beneficiary has at least a U.S. baccalaureate, a comparable foreign degree, or education or experience that is equivalent. Required processing fees, state employment licenses, and a contract of employment also must be supplied.

CIS service centers date stamp each petition, deposit the submitted fees, and create a paper file. A corresponding computer record with information about the petition is established in the CLAIMS Local Area Network (LAN).[6] A unique receipt number is generated for each application. The paper files are then sent to the file control unit where they are sorted into "cap" and "non-cap" cases. This sorting is performed to allow for continued processing of "non-cap" cases at the service centers once the annual cap has been reached. Files are then sent to the adjudicators based on local workload requirements. CIS adjudicators review the files (both the paper and electronic versions) and determine whether there is sufficient evidence to determine H-1B status eligibility.

[6] The CLAIMS LAN provides users, including supervisors, with basic automated support for: a) adjudicating cases, b) processing various notices, c) producing supporting documentation (e.g., signature cards) for files supported by the system, and d) administrative functions related to the use of the system in support of the H-1B process. The CLAIMS LAN is a hybrid application, with extensive functionality distributed between the Service Centers and the CLAIMS Mainframe in Dallas, Texas. The LAN-based version of CLAIMS implemented at each Service Center is tightly coupled with a mainframe-based version of the same application. The "local" version of CLAIMS supports end users at each of the Service Centers through four separate systems which are: a) data entry subsystem, b) adjudication subsystem, c) processing support subsystem, and d) automatic data processing system.

Incoming Mail at the California Service Center

Adjudicators will reject a petition if it is incomplete, or lacks appropriate fees or required supplemental material. In such cases, CIS sends a Request for Evidence (RFE) to the petitioner, asking for any additional information required to support the petition. The petitioner must respond within a set period of time or the petition will be considered abandoned and will be denied. If the petitioning employer supplies the requested evidence, the adjudication resumes. Cap cases are required by law to be approved in the order they were filed (see Appendix B - 214(g)(3)), so if the incomplete case is or might be a cap case, a cap number must be assigned to the petition while the RFE is outstanding in case the employer does provide the evidence and the petition is approvable.

A petition can be denied if the adjudicator decides the worker is not eligible for H-1B status. A denial does not necessarily end the petitioning process. The company can file an appeal within thirty days. Appeals and motions are handled by the CIS Administrative Appeals Office, located in Washington DC. As in the event of an RFE, if a case is on appeal a cap number must be held aside so that if the appeal is successful a number will remain available.[7]

[7] The Administrative Appeals Office estimated for us that appeals succeed – petitions at first denied are later approved – approximately 15 % of the time, and that several thousand appeals are submitted each year.

If an adjudicator finds that a worker is eligible, the petition is approved and the petitioning company is sent Form I-797, Notification of Approval. If the beneficiary is in the United States, the alien is adjusted to H-1B status. If the worker is outside of the United States, an I-797 is also sent to the Department of State Kentucky Consular Center (KCC), which notifies the appropriate U.S. embassy abroad. The worker (unless a Canadian citizen) must make an appointment with the embassy and apply for an H-1B visa. Visa law is complex, and it is not uncommon for a beneficiary approved by CIS to be found ineligible to receive a visa by the Department of State. In that event, if the petition was subject to the cap, the cap number can be reassigned for the benefit of another petition.

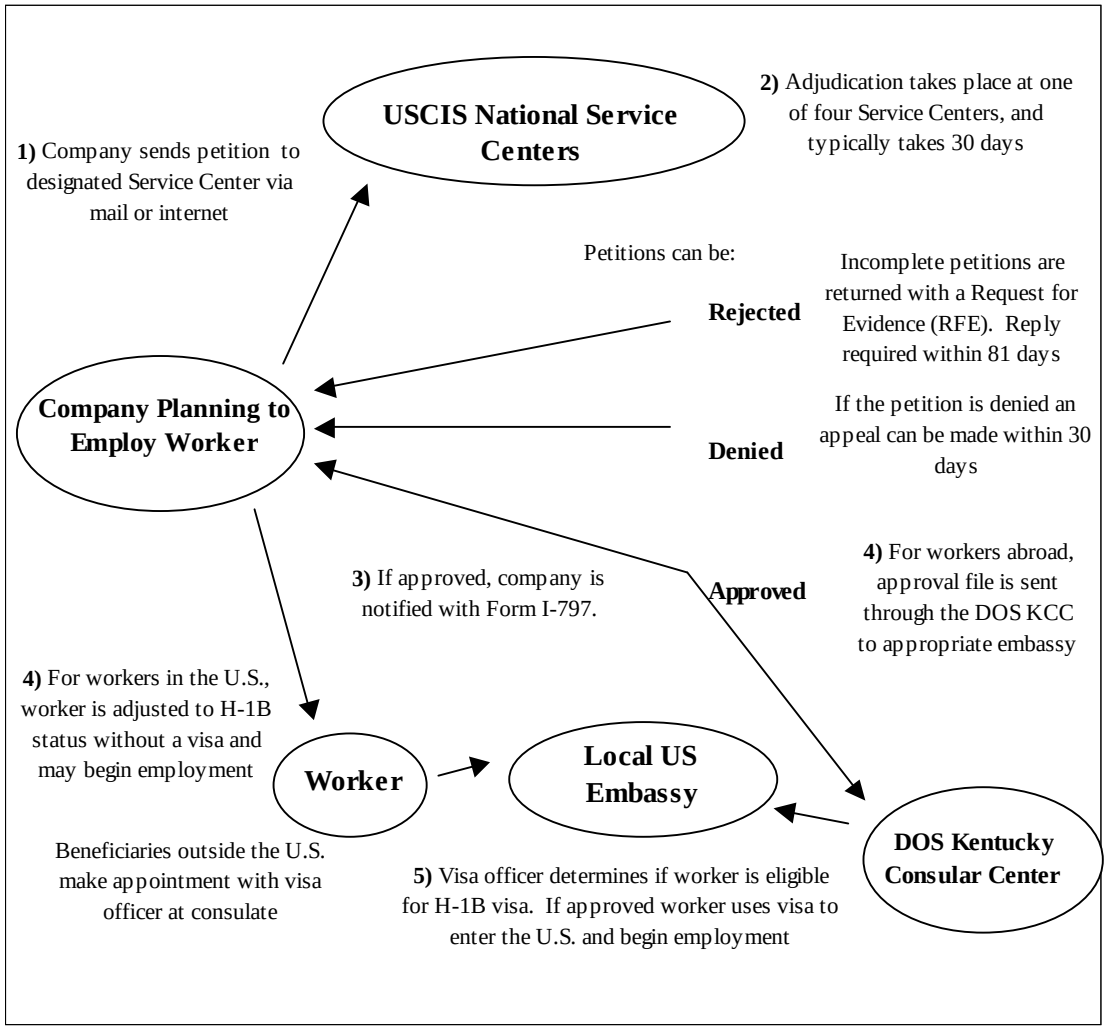

Figure 1 – The H-1B Application Process

The process for adjudicating an H-1B petition can take a CIS service center up to sixty days, though most petitions are processed within thirty days. RFEs for petitioners can slow the process considerably. For an additional fee, petitioning companies can use an expedited service that guarantees adjudication within two weeks. With this expedited service, some approvals are made within hours of the CIS service center receiving a petition.

A complex counting process makes the cap a moving target

In addition to the challenges already discussed, hitting the cap target is made even more difficult by exemptions in the law and by the procedures CIS applies to keep a running total of cap cases approved to date.

Many Legal Variables Affect the Cap

In 1990, Congress amended the *Immigration and Nationality Act* to impose a cap on the numerical limit of aliens who may be granted H-1B status at 65,000 per fiscal year. In 1998, Congress passed the *American Competitiveness and Workforce Improvement Act* (ACWIA), which increased the cap to 115,000 for FY 1999 and FY 2000, and to 107,500 for FY 2001. In 2000, Congress passed the *American Competitiveness in the 21st Century Act* (AC21), which increased the cap to 195,000 for FYs 2001, 2002 and 2003. In FY 2004, the cap returned to 65,000 per year.

Fiscal years begin in October of the previous calendar year, that is, October 1, 2004, through September 31, 2005, is FY 2005. But because petitions may be filed six months before a potential worker's intended start date, a company may file a FY 2005 petition as early as April 1, 2004, for a worker who will begin work on October 1, 2004. The latest a company can file is dependent on whether the congressionally-mandated cap has been reached. If the cap has not been reached for a given fiscal year by the time petitions are accepted for the next fiscal year (April 1), a worker can be applied to either fiscal year.

CIS must make several other adjustments to the cap count during the petition process. For example, multiple petitions may have been submitted for one beneficiary, such as a college senior who is offered employment by more than one company. Each petition will appear to be a separate cap case. If CIS fails to adjust its count, it will incorrectly believe it is using more cap numbers than in fact it is. CLAIMS does not automatically detect multiple petitions for one beneficiary, so the data must be reviewed periodically through a special process.

Another exemption from the cap is for any beneficiary who has been counted against the cap within the last six years (see Appendix B, 214(g)(7)). Eligibility for this exemption is based upon the beneficiary's previous immigration history, which often is not known to the prospective employer completing the petition

form. Therefore, in cases where this exemption applies, it is often not apparent to the adjudicator from the information in the petition. Neither, officials told us, would the CLAIMS LAN indicate to an adjudicator that the same-named beneficiary was also the subject of an earlier petition processed at any of the other three service centers. Determining whether or not 214(g)(7) applies can be particularly difficult for CIS.

In addition, the several other statutory exemptions (see Appendix B, 214(g)(5)) from the cap need to be excluded from the count. These benefit employers who are institutions of higher learning and any affiliated nonprofit entities, and other nonprofit or government research organizations.

The *Chile and Singapore Free Trade Agreements of 2003* reserve 6,800 of the 65,000 H-1B slots for workers from Chile and Singapore (1,400 for Chile and 5,400 for Singapore.) Unused Chile or Singapore numbers – the demand for which so far has been small - are restored to the larger pool of 58,200. This is difficult to implement, however, because a number is not definitively unused until the last day of the fiscal year. The law therefore provides that the unused Free Trade Agreement H-1B numbers have a special 45-day window in the beginning of the following fiscal year to be used against the cap of the just-completed fiscal year. All of the other 58,200 cap numbers belonging to a fiscal year, however, can actually be used up before the fiscal year even begins – during the six-month lead-in period described earlier.

Previously approved cap cases that subsequently are revoked need to be subtracted from the total, as do visa refusals abroad, so that the unused number can be given to another petition. To give an example, in FY 2004 slightly over 500 H-1B visa applications abroad were denied.

When to cut off further receipt of petitions?

The CIS Office of the Associate Director, Domestic Operations (DO) is responsible for enforcement of the annual cap. Cap counting activity is managed by Service Center Operations (SCOPS), a DO component. Within SCOPS the deputy director is responsible for managing the H-1B cap. This responsibility includes "regular monitoring of the volumes of approved and pending petitions subject to the cap and the manner in which USCIS determines the number of pending petitions that will likely result in additional approvals subject to the cap."[8]

With the assistance of OIS, a special process has been developed to monitor H-1B volume. A contractor extracts data from CLAIMS, makes some historically based adjustments to allow for probability of various outcomes, and analyzes the results.

[8] Source: declaration submitted by CIS in the matter of Law Office of Azita Mojarad, et al v. Eduardo Aguirre (see Footnote 5).

Each repetition of this process is called a sweep, and requires about two days. Each sweep requires retrieval of data from all four service centers. In the early part of the year a sweep might be performed once every two weeks, but, as the cap is approached, the frequency increases. DO uses sweep data, along with previous years' trends, to determine a termination date for accepting new petitions.

While the exact formulas are complicated, the process basically works as follows: a known number of cap cases is approved. To this number is added an estimated fraction of the pending work at the service centers – the cases received but not yet adjudicated. An addition is made for an estimated percentage of the cases denied but still on appeal. A subtraction is made for an estimated percentage of cases that will be denied visas. Another adjustment is made for claims to be cap-exempt that later will be determined to be unfounded. Numerous other predictions are factored in, and the result is an estimate of the number of cap cases likely to be approved from all the petitions received – as of two days ago. With this number, and in light of the rate at which new petitions arrive each day, management can estimate when it will suspend processing because of the cap. Once this date is determined, a public announcement to that effect is issued.

One CIS official recently explained the challenge this way in an e-mail memo[9]:

> "Petitions Pending Adjudication -- Unadjudicated or pending petitions present another counting challenge. At any one moment thousands, usually tens of thousands of cap-eligible petitions may be awaiting adjudication. The management of the cap requires predicting the adjudication outcome of these petitions as well as any additional information on exemptions. Some of these pending petitions will be denied and/or become exempt from the cap. However, a decision on when sufficient petitions have been received to satisfy the cap will be made weeks before the cap is actually reached. . . . How close in theory the final cap count is to the statutory limit depends to a large extent on the accuracy of the statistical model used to predict the outcome of the adjudication process of these pending petitions. The statistical model employs assumptions based on the experience of petitions already adjudicated in the same fiscal year. The past is not necessarily an accurate predictor of the future, certainly not if an exact count is required."

In another e-mail, a week later, the same official shared a spreadsheet to illustrate the effect that different assumptions about the outcome of pending cases would have on estimating a correct cut-off date. He said this about the data:

> "Attached is a file showing the daily cap count for the 10-day period beginning September 13. The table illustrates the difficulty of managing the

[9] 3/31/2005 SCOPS e-mail titled "H-1B Cap Counting Issues and Complexities"

cap when such a large number of cap-eligible petitions (between 23,600 and 32,200) are pending adjudication. When the cap was reached depends on what is assumed about the adjudication outcome of these petitions. The FY 2005 cap was apparently reached between September 16th and 22nd. I will endeavor to figure exactly which day it was reached. That will also reveal how (un)reliable the assumptions were. The size of the pending cap is a function of cap-eligible petition inflows and adjudication time. The greater the inflows, and the slower the adjudication process, the faster pending grows. The surge of petitions in September made predicting the date the cap would be reached that much more difficult since adjudications did not match the pace of incoming petitions."

The spreadsheet illustrates that the cap will be projected to be reached on different dates depending on assumptions made about the large body of pending cases. He shows how three different real past outcomes - any one of which might be reasonably considered to be a predictor of future approval rates - yield three different cut-off dates. The three possible projections he uses – that 67, 81, or 90 percent of pending cases which will eventually be approved and found to count against the cap – are based on specific measures of past approvals.

FY 2005 Cap count

Cap count as of	Cap Approved (A)	Cap Pending (B)	Cap Potential (A)+(B)	Cap Estimate #1 (A)+(.67*(B))	Cap Estimate #2 (A)+(.81*(B))	Cap Estimate #3 (A)+(.90*(B))
September 13	38,498	23,612	62,110	54,318	57,624	59,749
September 14	39,185	24,659	63,844	55,707	59,159	61,378
September 15	39,886	25,744	**65,630**	57,134	60,739	63,056
September 16	40,670	27,042	67,712	58,788	62,574	**65,008**
September 17	41,370	28,666	70,036	60,576	64,589	67,169
September 18	41,598	28,727	70,325	60,845	64,867	67,452
September 19	41,669	28,763	70,432	60,940	64,967	67,556
September 20	42,337	30,813	73,150	62,982	**67,296**	70,069
September 21	42,543	30,817	73,360	63,190	67,505	70,278
September 22	44,429	32,187	76,616	**65,994**	70,500	73,397

Figure 2 – CIS E-mail Shows Criticality of Assumptions

What information did CIS have at the time?

We have reviewed the many e-mails in which CIS officials reported the results of each of the sweeps described above. In each status report the sender provided three numbers: the number of cap petitions approved to date; an estimated number of cap cases that would likely be approved from the work already received but not adjudicated; and the total of those two to estimate how close CIS was to reaching the cap.

In the beginning of the fiscal year sweeps were performed less frequently, because there was little cause to believe the cut-off date was approaching. As the sweep data showed higher and higher numbers, the frequency of the sweeps increased to the point that they were executed every week. Table 1 shows the results of the sweeps.

Table 1: Cap-eligible and Cap approved petitions for FY 2005[10]

As of[11]	Cap approvals[12] (A)	Cap-eligible pending adjudication (B)	Potential Cap Total A + B
06-09-04	7,500	11,500	19,000
06-16-04	8,700	13,200	21,900
06-23-04	10,000	14,400	24,400
06-30-04	11,300	15,800	27,100
07-21-04	15,600	18,700	34,300
07-28-04	18,100	18,800	36,900
08-04-04	21,000	19,900	40,000
08-11-04	24,100	19,100	43,200
08-18-04	27,300	18,600	45,900
08-25-04	30,100	19,000	49,100
09-01-04	32,900	20,100	53,000
09-17-04	40,000	27,400	67,400
09-24-04	44,600	31,600	76,200
09-29-04	48,000	32,700	80,700
10-01-04	49,900	33,000	83,200
10-06-04	52,600	33,300	85,900
10-14-04	56,700	29,800	86,500
10-21-04	50,700[13]	26,800	77,500
10-28-04	53,300	24,100	77,400
11-04-04	55,200	22,200	77,400
12-02-04	60,800	16,000	76,800
12-09-04	62,000	14,700	76,700
01-07-05	64,600	11,600	76,000
01-20-05	66,800	8,900	75,700
01-27-05	68,000	7,400	75,400
02-03-05	69,000	6,100	75,100

The second column indicates the number of cap cases that have been approved as of the date of the data sweep. The third column is the calculated estimate of the number of approvable cap cases that will eventually come out of the not-yet-adjudicated cases then pending at the service centers. The fourth column indicates the projected number of cap cases that will be approved once the current pending work is eventually adjudicated.

[10] Source: CIS.
[11] Refers to date extract file was created.
[12] The cutoff date for cap receipts was February 17, 2004.
[13] Adjusted for 8,700 individuals rolled back to FY 2004.

How reliable are CIS estimates?

The bottom portion of the fourth column of Table 1 provides a clear illustration of how difficult it is to estimate the outcome of cases not yet adjudicated, pending an RFE, or on appeal. The data sweep of October 14 showed that CIS was likely to approve 86,500 cap cases. After the receipt of additional cases ceased, adjudicators worked through the backlog, evidence previously requested was received, and appeals were decided. In the weeks that followed, the number of estimated total cases dropped every week but one. The previous estimates about the outcome of these cases proved to be quite inaccurate. By January 7, almost three months after the projected 86,500 number had been set, CIS had not achieved 65,000 approvals. In the final analysis, as we now know, the total of approved cap cases reached just slightly over 72,000.

FY 2005 was not the first time that the cap was exceeded. The cap was also surpassed in FYs 1998, 1999, and 2000:

- In FY 1998, INS approved roughly 19,000 more petitions than the 65,000 allowed. Because the cap was met late in the fiscal year, the excess petitions were counted against the subsequent fiscal year ceiling.
- In FY 1999, the cap was raised to 115,000 but was again exceeded partly because of the rolled-over petitions from FY 1998. After accepting too many petitions over two years in a row, INS contracted for a review of the cap counting process by the consulting firm KPMG.
- In FY 2000, the 115,000 cap was met, and the remainder was counted toward the next fiscal year.

The cap was raised to 195,000 for FYs 2001, 2002 and 2003. It was not exceeded.

In FY 2004, the cap reverted to 65,000. Receipt of petitions was cut-off on February 17, 2004 in anticipation of hitting the cap. Once all the FY 2004 petitions were processed, it was determined that approximately 63,000 cap cases were approved - 2,000 fewer than the statutory limit.

In October 2004, once it was clear that the FY 2005 cap had been exceeded, 2,000 approved cases received between April 1 and September 30, 2004 were "rolled back" and deemed to count towards the FY 2004 cap.

Table 2 shows the cap, the number of cap cases actually approved and the date processing of further cases was cut-off from FY 1998 through FY 2005.

Table 2: Cap, Cap Approvals and the Cut-Off Date			
FY	Cap	Cap Approvals	Cutoff Date
1998	65,000	84,000*	None
1999	115,000	137,000	April 16, 1999
2000	115,000	115,000**	March 21, 2000
2001	195,000	164,000	None
2002	195,000	79,000	None
2003	195,000	78,000	None
2004	65,000	65,000***	February 17, 2004
2005	65,000	72,000	October 1, 2004

* 19,000 were rolled over to FY 1999.
** Some excess petitions were counted towards the FY 2001 cap.
*** 63,000 cases were approved of those received before the February 17, 2004 cut-off. Later, 2,000 cases received between April 1 and September 30, submitted for FY 2005, were rolled back and allocated against FY 2004.

An unexpected influx of petitions swamped the cap counting process

The CIS Press Office provides the public with periodic updates on changes to immigration law, procedures, deadlines and various immigration statistics. Through such announcements, companies are informed when CIS service centers will stop accepting new H-1B cap petitions.

On September 2, 2004, a press release announced that, as of August 18, 2004, CIS had received 45,900 H-1B petitions that would count against the congressionally-mandated cap of 65,000 for fiscal year 2005. The rate petitions arrived at CIS mailrooms accelerated markedly immediately after the press release, as is shown in Figure 3 below[14].

[14] Although H-1B eligibility differs from that for an L-1 intra-company transferee, an examination of CIS data we performed indicated that 1,975 L-1 beneficiaries had H-1B cases pending in FY 2005, too. Beneficiaries soliciting multiple petitions may have increased the H-1B workload.

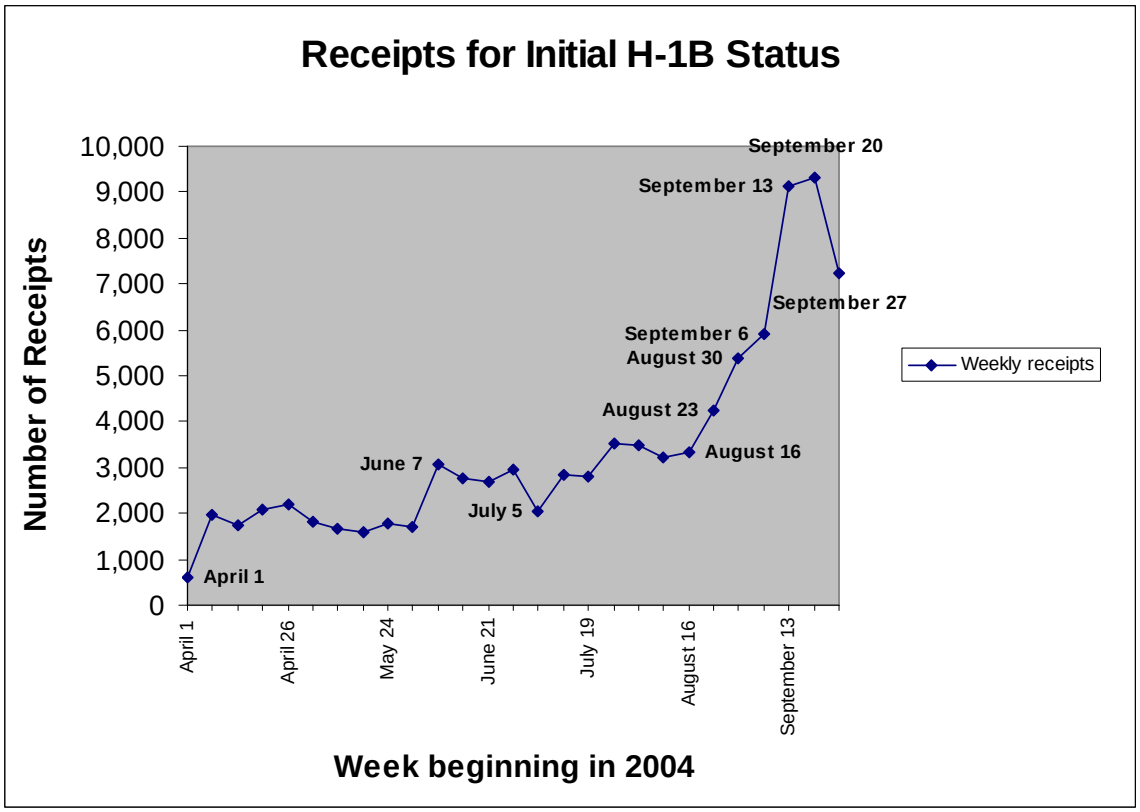

Figure 3 – Number of Petitions Received at Service Centers Each Week
(Source: CIS)

One senior manager we interviewed stated that CIS was surprised by this pattern. Much publicity had surrounded the H-1B cap in the press, and there had been considerable debate on Capitol Hill about the cap levels that best served U.S. economic interests. He said CIS expected a rush of H-1B petitions in April and May. Not only did that not occur, but as the summer season continued there was only a slight rise in the rate at which petitions arrived at service centers. As late as mid-August, he continued, it appeared that the cap might not be met until well into the following calendar year. While the sudden rise in the last week of August and the first week in September can now be viewed as the precursor of a massive surge, it was not recognized as such at the time.

On September 17, 2004, the report on the cap count from the CIS service centers projected enough adjudicated and pending petitions to justify a halting of the new petitions.

FY 2005 is unique in one respect - in previous years the cap was reached late in the fiscal year. Once April 1 arrives, six months before the October 1 start of a new fiscal year, the petition window opens for the coming fiscal year. Petitions

received after April 1 can be allocated in two ways: to the current fiscal year if the cap has not yet been reached, or to the following fiscal year if it has. Cases over the cap in FY 2005 could not be rolled over to the next fiscal year because the cap was reached too early – six months before the FY 2006 processing began on April 1, 2005.

Ceasing acceptance of new petitions took too long

CIS could have closed the window sooner than it did if procedures to do so had been approved in advance. In the event, as soon as it became apparent that receipt of petitions had to be suspended, it was necessary to draft a notice to that effect for the Federal Register, and a press release, and circulate both for clearance and approval. This process was delayed by the need to manage two other related issues at the same time: student visa extensions and Chile-Singapore Free Trade Agreement visa procedures.

We have analyzed most of the e-mail discussions that took place within CIS as the number of approved H-1B petitions approached, and then exceeded, 65,000. This analysis shows that CIS managers were poorly served by the inability of their data systems to produce real-time numbers, by their own incorrect projections, and by perceived lack of clarity in the Chile-Singapore statutory language.

On August 25, 2004, demonstrating all three of these issues at once but working with week-old data, one senior manager wrote to senior colleagues that: "it is not inconceivable that we could exhaust all FY 2005 numbers before fiscal year 05 officially begins. It is more likely that we will need to keep filings open until November 14. . . . The cap for FY 2005 is somewhat complicated. . . . Those restrictions for the use of the unused [Chile-Singapore] numbers include a requirement that the numbers must be used within 45 days of the beginning of the fiscal year (November 14, 2004), and a requirement that the numbers can only be used for petitions filed in the fiscal year that they are used (FY 2005 in this case). I have not sought legal review of that language to ascertain whether there is any flexibility on those provisions, but am including [Office of Chief Counsel] in this transmission to seek … review and advice".

On August 27, 2004, the Office of Immigration Statistics issued a routine cap count e-mail reporting that the sweep two days earlier indicated 30,100 cases approved and 19,000 pending, for a potential total of 49,100. It indicated that the analyst would be out of the office for the next two weeks, too.

The first e-mail that circulated a draft Federal Register Notice concerning a cessation of acceptance of H-1B petitions was dated September 10, 2004.

On September 15, 2004, the OIS analyst circulated the results of the September 1st sweep. This data was two weeks old. It showed approvals at 32,900 and

pending cases at 21,100 for a total of 53,000. Also on September 15, 2004, it was reported that the September 8th sweep attempt had failed due to a large amount of corrupted data.

On September 20, 2004, the OIS analyst circulated the results of the September 17th sweep indicating that the total had exceeded the cap with 40,000 petitions approved and 27,400 pending. He informed the recipients that there had been a dramatic increase in H-1B receipts in the first two weeks of September.

Again on September 20, 2004, senior CIS managers met and decided that adjustments to the count should be made to compensate for 2,000 FY 2004 numbers that had been unused as a result of closing the FY 2004 window a little too soon in February 2004. Also, an adjustment would be made to reuse the 5,700 Chile/Singapore numbers that had been set aside but not used. These two decisions effectively "rolled" 7,700 FY 2005 cases forward into FY 2004.

On September 27, 2004, the OIS analyst circulated the results of the September 24th sweep. It showed approvals at 44,600 and pending cases at 31,600 for a total of 76,200.

Another e-mail concerning the draft Federal Register Notice was sent on September 28, 2004. The author noted that in light of the latest approval numbers "…we probably need to get clearance on the H-1B cap notice for FY 2005 in short order. Please review ASAP and fax signed concurrence sheets to my attention." The draft is nine pages in length and discusses, in addition to the congressional cap, two related issues: the extension of status of students and exchange visitors for whom H-1B petitions had been filed, and the recycling of the unused Chile/Singapore numbers previously set aside.

On September 29, 2004, a senior manager in Service Center Operations sent an e-mail suggesting that CIS cease accepting H-1B petitions subject to the cap on October 1, 2004. The e-mail discussed the latest view of the proper treatment of pending cap cases. CIS knew after each sweep how many H-1B cap cases it had already approved, and it knew how many petitions had been received but not yet finally adjudicated. The number of pending cases that would eventually be approved was estimated in order to assess the total number of cap cases that would be approved. In late September the analyst sought to improve his statistical model. He knew that prior year estimations had not been very precise, so he added new variables to the mix. Based on this finer analysis, he advised CIS managers that the September 24th sweep data should be reinterpreted. Instead of assuming that 31,600 of the pending cases would be approved, his data now suggested that 21,800 would be. If correct, this in turn meant that CIS was likely to approve 66,400 cap cases. When the FY 2004 shortfall and Chile/Singapore adjustments were made the 66,400 number dropped to 57,900, the manager reported.

Also on September 29, 2004, a CIS manager suggested that a draft Federal Register Notice could not possibly be approved in time, and that CIS would need to issue a press release about cutting off further applications on October 1st. According to his e-mail, one of the reasons the Federal Register Notice had not yet been approved was that "issues related to the Chile and Singapore set-asides are still being worked out…."

It then required two more days to obtain all the required CIS, DHS, and other agency clearances before the press release was final. It was issued on October 1, 2004. [15]

Recent CIS initiatives are intended to prevent a recurrence

CIS is concerned that it had neither a technology nor a methodology to adhere to the legislated cap. Managers told us that its FY 2005 failure has been the subject of several discussions with officials at the highest level in DHS. It has initiated two new measures to prevent a recurrence: bi-specialization and last-day randomization.

Bi-specialization

As we described earlier in this report, because H-1B petitions are processed at all four service centers, any effort to collect data requires sweeping four computer systems. Any procedural changes need to be implemented among four workforces, and new policy decisions need to be discussed with four managements. CIS has begun to centralize specific processes at specific service centers to reduce these difficulties. In October 2004, a discussion memorandum was prepared in the CIS Office of Service Center Operations that analyzed the issue and made recommendations for reorganization. The paper acknowledged that previous efforts to "specialize" production had run into resistance due to the concerns of "managers and supervisors that some work is more attractive than other work due to the grade appropriateness and/or the high profile nature of some cases…."

The proponents of increased specialization have made efforts to avoid any negative effect on employee numbers and grade levels. Among the foreseen benefits of increased specialization are: increased quality and consistency of adjudications, improved fraud detection, enhanced customer service, budgetary savings, and improved production management and resource allocation. In the discussion of production management improvements, the memorandum specifically states that bi-specialization will "facilitate management of congressionally mandated numerical caps".

[15] A copy can be found at http://uscis.gov/graphics/publicaffairs/factsheets/H1B_05fnl100104.pdf.

Bi-specialization will be introduced over a two-year period. Each specific CIS product, such as temporary worker visa petitions, will be processed at only two service centers. As a result, each of the centers will have half as many types of products to produce. When we asked why H-1B processing would not be centralized at just one service center, further improving cap management, CIS managers stated that the existing CIS computer systems are neither robust nor redundant, so it would be unwise to give sole responsibility for any product to any one service center for fear that a computer outage at that center would shut down an entire product line.

Last-day Randomization

CIS describes this new procedure in a May 4, 2005, press release:

> For FY 2006 and subsequent fiscal years . . . USCIS will accept and adjudicate properly filed H-1B petitions on a first in, first out basis using projections that indicate the number of petitions necessary to reach the congressionally mandated cap. USCIS will closely monitor that number and notify the public of the "final receipt date" (the date USCIS receives the necessary number of petitions to meet the cap). For petitions received on the "final receipt date," USCIS will apply a computer-generated random selection process. This process will randomly select the exact number of petitions from the day's receipts needed to meet the congressionally mandated cap. USCIS will reject all petitions received on the "final receipt date" not selected through the random process. In the interest of fairness and orderly procedures, if any cap is reached on the first day on which filings can be made, the random selection will include the filings received on that first day AND the following day.[16]

Last-day randomization may not resolve the counting problem. It has the appearance of transparency and fairness. But nothing we observed of the petition approval and counting process gives us confidence that CIS can know in advance the date on which it is likely to approve its 65,000th cap case. Indeed, for all the reasons described in this report, it is unclear even now on exactly which date CIS approved FY 2005 cap case number 65,000.

Conclusions and Recommendations

The number of persons granted immigrant status each year is strictly controlled, whether they are issued visas abroad by DOS, or adjust status in the United States

[16] Press Release, "USCIS Implements H-1B Visa Reform Act Of 2004; Announces New H-1B Procedures For FY 2005 and FY 2006," dated May 4, 2005. Observed at : http://uscis.gov/graphics/publicaffairs/newsrels/H-1B_050504.pdf.

with CIS. In a process very similar to the one described here for H-1B temporary workers, would-be immigrants obtain immigrant status only after their immigrant petitions are approved. Unlike temporary worker petitions, the receipt and processing of immigrant petitions never stops. Petitioners file whenever they choose. Beneficiaries, once approved, go on a virtual "waiting list" and are granted immigrant status only as immigrant "numbers" become available. CIS and DOS coordinate so that the appropriate quantities of immigrant numbers go concurrently to the CIS adjustment process and the DOS visa process.

No more than the statutorily authorized number of beneficiaries should be permitted to achieve H-1B status. Excess beneficiaries should be placed on a waiting list in the order in which they filed and granted status only as numbers become available due to revocations of petitions, correction of counting errors, and visa denials.

We recommend that CIS:

Recommendation 1: Control H-1B status in a manner analogous to that used to control immigrant status. H-1B visas (for overseas beneficiaries) and status (for domestic beneficiaries) should be precisely counted and given to beneficiaries taken in turn from a waiting list of approved petitions.

CIS needs to control the number of certain types of beneficiaries granted temporary worker status. The CLAIMS system does not facilitate this process. A complete examination of the strengths and weaknesses of the CLAIMS system is outside the scope of this report. To simplify the counting of H-1B petitions we recommend that all H-1B petitions be processed at one service center. Bi-specialization has not been implemented yet and therefore cannot fairly be criticized, but it might prove to be a major change that ushers in only minor improvement. It was described to us by a senior CIS manager as a prudent compromise between the benefit of centralization and the risk of computer failure. We were told that if all H-1B petitions were processed at one location, and that LAN went down, then the H-1B process would come to a halt.

In our opinion the processing of H-1B petitions is not inherently time sensitive. A LAN crash at any one of the four service centers would surely be very disruptive, but the halt would likely be brief and the outcome fair to all petitioners.

We recommend that CIS:

Recommendation 2: Centralize processing of H-1B petitions at one service center.

Management Comments and OIG Analysis

We issued our draft report on August 18, 2005, and met with CIS officials on August 30, 2005, to discuss the report. We received CIS' formal written comments, attached at Appendix C, on September 23, 2005. Below is a summary of CIS' responses to the report's recommendations and our analysis of their comments.

Recommendation 1: Control H-1B status in a manner analogous to that used to control immigrant status. H-1B visas (for overseas beneficiaries) and status (for domestic beneficiaries) should be precisely counted and given to beneficiaries taken in turn from a waiting list of approved petitions.

CIS states in their reply that our recommendation could be interpreted in either of two ways, and discusses the difficulties of taking either course. CIS also points out that visa processing times at US embassies vary from one country to another. CIS does not know, at any moment, how many H-1B cap case visas have been issued abroad. Neither does it know, under current procedures, when someone issued such a visa does not use it to enter the United States. CIS points out that Section 214(g)(3) requires H-1B status be granted in the order petitions are filed, and raises the real possibility that parties that consider themselves aggrieved by new cap counting procedures might sue CIS. CIS also raises the possibility that premium process could be construed, in the case of a finite resource such as capped H-1B visas, as "selling" visas. CIS expresses concern for the would-be employers of H-1B beneficiaries if it were to approve petitions slowly to insure no over-issuance. CIS also comments that implementing our recommendation would mean "…even if the petitioner has filed an approvable petition while H-1B numbers are still available, an alien may ultimately be … barred from receiving classification … because the cap has been reached before the petition can be adjudicated." For our part, we continue to believe that Congress intended that outcome when it imposed a specific numerical limit: otherwise eligible beneficiaries would be denied once the cap is reached. None of CIS' comments resolve the fundamental problem: a law is broken when beneficiary number 65,001 obtains H-1B status.

We do not wish to be overly prescriptive, neither do we minimize the challenge of actually implementing what the law requires.

We continue to believe that CIS should serially number petitions as received, adjudicate as many as it believes it needs to adjudicate to end up with at least 65,000 admissions and adjustments, and send approval notices to the first 65,000 beneficiaries. CIS might consider giving beneficiaries 60 days to adjust, arrive, or apply for a visa, after which time their number could be recycled to the next person on the list. While CIS found reasons to object to our suggestions, its

response was short on specifics as to its own ideas on how to improve the overly complicated and unreliable system it has been using.

Within 90 days, CIS should respond with a further proposal for improving the H-1B visa program cap counting.

Recommendation 1 – Unresolved.

Recommendation 2: Centralize processing of H-1B petitions at one service center.

CIS states that we adequately described the technology it uses to monitor and manage progress toward reaching the cap, and agrees with our conclusion that the technology was not effective. CIS also agrees that attempting to manage the H-1B cap counting process at four service centers was not effective. It mentions that H-1B data is now being collected daily from service centers to a central database, and that this data is immediately available to the Washington, DC managers who control the cap. CIS disagrees with our recommendation that H-1B cap cases be processed at only one service center, and prefers two, citing the risks associated with a single point of failure. It states that CIS plans to move H-1B processing from four service centers to two in Fiscal Year 2007.

The improved data collection and dissemination described may improve managers' ability to fine-tune the cap counting system. While we believe the efficiencies of a single center outweigh the risk of failure that CIS asserts requires two, CIS has discretion in the matter. We ask CIS to evaluate the benefit that might be gained from routing H-1B cap case petitions to one service center, and cap-exempt petitions to the second service center. CIS should provide OIG within 90 days a detailed description of the operational plan to consolidate H-1B petitions at the two service centers.

Recommendation 2 – Resolved – open.

Purpose, Scope, and Methodology

The objectives of this review were to assess how CIS exceeded a congressionally-mandated cap on the number of H-1B petitions approvals in fiscal year 2005, as well as the procedures and decisions that may have contributed to the overage. To meet our objective we reviewed records, memoranda, communications including e-mails, and rules and procedures pertinent to the administration of the H-1B program.

We interviewed CIS officials from the Offices of Domestic Operations, Service Center Operations, Fraud Detection and National Security, Chief Counsel. Additionally, we interviewed at the DHS Management Directorate's Office of Immigration Statistics. We observed H-1B petition processing at the California Service Center in Laguna Niguel, California and the Department of State's Kentucky Consular Center in Williamsburg, Kentucky. We conducted fieldwork from April 2005 to June 2005.

This review was conducted under the authority of the *Inspector General Act of 1978*, as amended, and according to the Quality Standards for Inspections issued by the President's Council on Integrity and Efficiency.

Section 214(g) of the Immigration and Nationality Act, as amended

(g)(1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)-

(A) under section 101(a)(15)(H)(i)(b), may not exceed--

(i) 65,000 in each fiscal year before fiscal year 1999;

(ii) 115,000 in fiscal year 1999;

(iii) 115,000 in fiscal year 2000;

(iv) 195,000 in fiscal year 2001;

(v) 195,000 in fiscal year 2002;

(vi) 195,000 in fiscal year 2003 and

(vii) 65,000 in each succeeding fiscal year; or

(B) under section 101(a)(15)(H)(ii)(b) may not exceed 66,000.

(2) The numerical limitations of paragraph (1) shall only apply to principal aliens and not to the spouses or children of such aliens.

(3) Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status. If an alien who was issued a visa or otherwise provided nonimmigrant status and counted against the numerical limitations of paragraph (1) is found to have been issued such visa or otherwise provided such status by fraud or willfully misrepresenting a material fact and such visa or nonimmigrant status is revoked, then one number shall be restored to the total number of aliens who may be issued visas or otherwise provided such status under the numerical limitations of paragraph (1) in the fiscal year in which the petition is revoked, regardless of the fiscal year in which the petition was approved.

(4) In the case of a nonimmigrant described in section 101(a)(15)(H)(i)(b), the period of authorized admission as such a nonimmigrant may not exceed 6 years.

(5) The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) who --

(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or a related or affiliated nonprofit entity;

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or

(C) has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

(6) Any alien who ceases to be employed by an employer described in paragraph (5)(A)shall, if employed as a nonimmigrant alien described in section 101(a)(15)(H)(i)(b), who has not previously been counted toward the numerical limitations contained in paragraph(1)(A), be counted toward those limitations the first time the alien is employed by an employer other than one described in paragraph (5).

(7) Any alien who has already been counted within the 6 years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A)shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.

(8)

(A) The agreements referred to in section 101(a)(15)(H)(i)(b1) are—

(i) The United States-Chile Free Trade Agreement; and

(ii) The United States-Singapore Free Trade Agreement.

(B)

(i) The Secretary of Homeland Security shall establish annual numerical limitations on approvals of initial applications by aliens for admission under section 101(a)(15)(H)(i)(b1).

(ii) The annual numerical limitations described in clause (i) shall not exceed—

(I) 1,400 for nationals of Chile (as defined in article 14.9 of the United States-Chile Free Trade Agreement) for any fiscal year; and

(II) 5,400 for nationals of Singapore (as defined in Annex 1A of the United States-Singapore Free Trade Agreement) for any fiscal year.

(iii) The annual numerical limitations described in clause (i) shall only apply to principal aliens and not to the spouses or children of such aliens.

(iv) The annual numerical limitation described in paragraph (1)(A) is reduced by the amount of the annual numerical limitations established under clause (i). However, if a numerical limitation established under clause (i) has not been exhausted at the end of a given fiscal year, the Secretary of Homeland Security shall adjust upwards the numerical limitation in paragraph (1)(A) for that fiscal year by the amount remaining in the numerical limitation under clause (i). Visas under section 101(a)(15)(H)(i)(b) may be issued pursuant to such adjustment within the first 45 days of the next fiscal year to aliens who had applied for such visas during the fiscal year for which the adjustment was made.

(C) The period of authorized admission as a nonimmigrant under section 101(a)(15)(H)(i)(b1) shall be 1 year, and may be extended, but only in 1-year increments. After every second extension, the next following extension shall not be granted unless the Secretary of Labor had determined and certified to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 212(t)(1) for the purpose of permitting the nonimmigrant to obtain such extension.

(D) The numerical limitation described in paragraph (1)(A) for a fiscal year shall be reduced by one for each alien granted an extension under subparagraph (C) during such year who has obtained 5 or more consecutive prior extensions.

U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529

U.S. Citizenship and Immigration Services

To: Robert L. Ashbaugh
Assistant Inspector General
Inspections and Special Reviews

From: Robert C. Divine
Acting Deputy Director

Date: 9-25-05

Re: Comments on OIG Draft Report: USCIS Approval of H-1B Petitions Exceeded 65,000 in FY 2005

We appreciate the opportunity to review and comment on the subject report. The results of your inspection of the process for counting H-1B petitions against the legislatively mandated cap clearly shows the complexities of the counting process. Your description of the process that we used for the FY 2005 cap is accurate. Further, the lack of real-time data on the status of H-1B petitions received and completed had a significant impact on our ability to effectively monitor workload against the cap. We believe we addressed this more effectively for the FY 2006 cap, which as of August 10, 2005, has already been reached, and therefore do not fully agree with the recommendations made. Below we have addressed each recommendation and our reasons for disagreement:

Recommendation 1. Control H-1B status in a manner analogous to that used to control immigrant status. H-1B visas (for overseas beneficiaries) and status (for domestic beneficiaries) should be precisely counted and given to beneficiaries taken in turn from a waiting list of approved petitions.

By way of background, the Department of State (DOS) is responsible for controlling the number of immigrant visas issued to persons on an annual basis. DOS uses a priority date system (whereby aliens with the earliest filed immigrant visa petitions, depending on the alien's country of chargeability, are first on the queue for immigrant visa numbers). Aliens who seek to become lawful permanent residents may either apply to adjust their status in the U.S. or apply for an immigrant visa from a U.S. consulate abroad. For aliens who seek to adjust status, USCIS requests a visa number from DOS upon final approval of the alien's adjustment application. For aliens who seek immigrant visas abroad, DOS allocates to its consulates the number of requested visas based on anticipated monthly need, which in turn is based on the number of aliens it has scheduled for immigrant visa interviews. An alien is authorized an immigrant visa number (meaning it is actually deducted from the annual limit of visas) only at the time the alien's adjustment of status application is approved or when the alien is granted an

immigrant visa by a U.S. consulate abroad. Any visa numbers allocated to a U.S. consulate in any given month that go unused (e.g., if the alien is refused an immigrant visa or fails to appear for the visa interview) are reported to DOS for tracking purposes. In this sense, DOS does not track actual usage of visa numbers in "real time". Based on the number of remaining immigrant visas available for the particular fiscal year in question and an *estimated* level of demand, DOS determines cutoff dates for visa issuance (meaning that persons who are otherwise eligible to adjust status or for an immigrant visa must wait in the visa queue until an immigrant visa number becomes available). At any given time, cutoff dates can shift back to earlier dates depending on increased or unpredicted demand.

It appears the Office of the Inspector General (OIG) report may be recommending two alternatives to address administration of H-1B cap numbers. The first alternative would be to require that USCIS allocate an H-1B visa number only in the following three cases: (1) for persons seeking a change of status to H-1B in the U.S., at the time USCIS actually approves the H-1B petition (and the procedural benefit of change of status); (2) for persons applying at a U.S. consulate abroad, at the time an H-1B visa is actually issued by DOS, or (3) in the case of persons who do not require an H-1B visa to request admission in such classification (e.g., Canadian citizens), at the time U.S. Customs and Border Protection (CBP) admits an alien in H-1B status. The second alternative would be to require that USCIS assign H-1B aliens a "priority date" based on when their H-1B petition was actually *filed* with USCIS in order to determine the alien's waiting place in line for an H-1B number. The problems and risks with either of these approaches are substantial, and could well outweigh any possible benefit any such approach might offer.

1. Counting when an H-1B number is used.

As to the first alternative, USCIS believes the only way to effectively run an H-1B visa number allocation type process would be to have both DOS and CBP report in *real time* when an H-1B number has actually been used so that USCIS would know exactly how many H-1B numbers had been used on any given date. Such "real time" information exchange, however, is not feasible given current database and similar technical limitations. Even if a real time count were feasible, such a count would not accomplish full use of H-1B visa numbers. An alien who has been issued an H-1B visa abroad may not actually use the immigrant visa to enter the U.S. Full use of all H-1B visa numbers could only be accomplished by a system that tracks in real time all grants of change of status to H-1B and all *admissions* by H-1B aliens into the U.S. and differentiates between initial (cap-counting) admissions and subsequent admissions. While tracking changes of status would be feasible, there is currently no completely accurate method by which to track admissions for cap counting purposes. Adopting DOS' current system for controlling allocation of immigrant visa numbers – based in part on estimated future visa issuance and actual use – therefore would not ensure an adequate H-1B count.

Aside from the logistical and technical difficulties described above, USCIS' allocation of H-1B numbers based on when H-1B status is actually conferred or a visa is issued would violate § 214(g)(3) of the Immigration and Nationality Act, which requires that H-1B visas be issued (or status accorded) in the order in which petitions are filed for such status. Were USCIS to adopt this approach, it could face significant litigation on this issue, as well as other litigation (in the form of mandamus and similar actions) to hasten adjudication of requests for H-1B classification. Moreover, USCIS, in implementing the Congressionally-mandated "premium processing" program, could face unfair public criticism by

appearing to be "selling" H-1B cap numbers to those willing to pay the premium processing fee, which guarantees a speedier adjudication timeframe. While USCIS, consistent with the statute, could drop H-1B petitions from eligibility under the premium processing program, the fact is that such petitioners are among the principal customers the premium processing statute is supposed to benefit. Quite simply, removing this option would be a significant disservice to a large portion of USCIS' customer base and be violative of Congressional intent in establishing the premium processing program.

Moreover, under both premium and normal processing, questions inevitably would arise from aggrieved petitioners as to why one petition was approved faster than another, regardless of whether the processing is done at a single Service Center or multiple Service centers. Similarly, it is foreseeable that many petitioners would protest the issuance of Requests for Evidence (which, by regulation, are used by USCIS to make determinations in unclear cases), claiming that such requests could cause irreparable harm by potentially delaying adjudicating particular H-1B petitions. Despite well-settled law that the burden is on the petitioner to establish eligibility for the benefit sought, with so much riding on the date of approval of a petition, the end result may be to switch the burden, in effect, to USCIS by forcing the agency to justify – possibly in litigation –such variances in processing times.

Further, not only do USCIS petition processing times necessarily vary as part of the normal adjudication process, but DOS H-1B visa processing times also vary. Under a system whereby an alien could not get an H-1B visa number until such time as DOS issued a visa, not only are such aliens at a disadvantage over those who can change status and immediately obtain a visa number, but such persons could be placed at a significant disadvantage vis-à-vis other H-1B visa applicants at different consulates abroad. To explain, there are significant variations in the ability of different overseas consulates to schedule applicants for visa interviews. In countries where visa subscription rates are traditionally high, such as China and India, aliens with approved petitions are likely, for example, to face greater delays in consular processing than persons from countries with low visa subscription rates. This has the potential to disadvantage nationals from certain countries. This does not serve the interests of employers, whose H-1B interests are supposed to be based on the needs of the particular U.S. business and the position to be filled, and not on the nationality of a particular H-1B visa applicant. It also would not be fair to aliens who can face delays in scheduling for H-1B visa interviews through no fault of their own.

2. Counting by date of filing.

The second alternative suggested by OIG would require USCIS to employ a "waiting list" based on priority dates. Under this system, USCIS would need to adjudicate and approve, on a first in first out basis, only the cap number of petitions, and would only be able to adjudicate additional wait-listed petitions when a petition has been withdrawn or finally denied, including appeal. The effect of this strategy would be that USCIS would have to delay the determination of the actual count in a given fiscal year until all cases have been finally decided or approved. Such delay disadvantages the wait-listed U.S. employers seeking to employ an H-1B alien in a particular fiscal year. It also creates uncertainty for U.S. employers with pending petitions since they have no way of knowing whether their petitions will ultimately be approved. For example, in the case of FY 2006 allocation of 65,000 numbers, USCIS might put 72,410 petitions in the cap-eligible pool based upon an estimate of the

total number it may have to ultimately adjudicate to reach the 65,000 cap. USCIS would begin adjudicating the first 65,000 petitions and adjudicate additional petitions only as others are finally denied or withdrawn. USCIS might not have actual figures on total H-1B issuance until it is too late in the fiscal year to timely adjudicate any further H-1B petitions, and therefore be unable to grant admission (or change of status) to the full 65,000 contingent of H-1B petitions in that fiscal year.

A snapshot in late March 2006 of the petitions received for the 65,000 FY 2006 H-1B adjudications, might reveal the following:

Cap-eligible Petitions received (total)	72,410
Approvals	63,000
Incomplete Adjudication	1,650
Denials	4,350
Appeals Pending	1,500
Appeal period not tolled	330
Appeals denied (i.e., final denial)	500[1]
Not Timely Appealed (i.e., final denial)	3,500
Waiting list	3, 410

In this situation, only 4,000 petitions from the waiting list would have been moved forward for adjudication, to replace the 4,000 cases denied on appeal or not timely appealed. All other cases (incomplete adjudication, appeal pending, appeal not tolled) are still in a position where they might be granted. By late March, these petitioners, over 90 percent of whose FY 2006 petitions would be approvable if they had been adjudicated, are already having to prepare to file an FY 2007 petition to be filed on April 1, to the extent the employment relationship has not been terminated due to passage of time as a result of the lack of USCIS action on the petition that may have been filed almost a year ago. Even if USCIS were to hold on to petitions from one year to the next (similar to what DOS does in the immigrant visa context where aliens remain eligible to get an immigrant visa number in future years when they move up the queue), however, H-1B petitions, which are tied to actual job opportunities, are date specific and eventually expire. H-1B petitions contain employment start and end dates and supporting documents, such as Labor Condition Applications, which are only valid for a maximum period of three years. As a practical matter, therefore, there would exist a real possibility that petitions assigned to a waiting list might not have a reasonable likelihood of being adjudicated in a time frame that is useful to the employers and workers. For these reasons, USCIS believes that a waiting list approach will ultimately fail to serve its purpose of ensuring that the full cap number of petitions is meaningfully approved and allocated in a timely fashion.

[1] Under the current Administrative Appeals Office (AAO) processing time of about 18 months for H-1B appeals, this number is unrealistically high, but 500 is used to reflect the progress USCIS would hope the AAO will be able to make in future fiscal years.

3. Current USCIS cap-counting methodology.

Based on USCIS' experience administering the cap in previous years, the agency developed a cap-counting system for FY2006 and future years that ensures accurate counting while providing the best service to the public. The system now used by USCIS enables H-1B petitioners and their prospective employees who file prior to the date USCIS announces as the final receipt date to take some comfort in knowing that, if otherwise eligible, the alien they seek to employ is almost guaranteed of receiving an H-1B number. There are no such guarantees under either of the alternatives suggested by the OIG. For example, under the first alternative, even an alien with an approved petition may ultimately be statutorily barred from receiving classification as an H-1B nonimmigrant because the cap has been reached before he or she is able to obtain a visa or, in the case of aliens not required to have a visa, be admitted without one. Under the second alternative, even if the petitioner has filed an approvable petition while H-1B numbers are still available, an alien may ultimately be statutorily barred from receiving classification as an H-1B nonimmigrant because the cap has been reached before the petition can be adjudicated.

Recommendation 2. Centralize processing of H-1B petitions at one service center.

The report adequately described the technology we used to monitor and manage progress against the annual cap. We agree with the conclusions that our technology was not effective and did not provide timely information on which to manage the process. Further, we agree with the conclusion that attempting to manage the process from four service centers also was not effective, but we cannot agree that moving the full process to one service center is the best approach.

Our plan is to move the H-1B petition adjudication process to two service centers by FY 2007. This should minimize risks associated with a single point of failure that could occur due to system, natural or other unplanned for troubles. In addition, having two service centers responsible for the work allows more flexibility in handling workload fluctuations that could occur with legislative changes. Finally, we are now collecting data on the H-1B petitions through CIS Central Oracle Repository (CISCOR). By accessing CLAIMS 3 data nightly from each Service Center, the CISCOR data is immediately available at headquarters for use in managing and monitoring progress against the cap.

We want to express our appreciation to Doug Ellice and his team for the work they did in this highly critical and complex area. If you have any questions please contact Kathleen Stanley, USCIS Audit Liaison, at 202-272-1982.

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