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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

August 15, 2018

VIA ELECTRONIC SUBMISSION

The Honorable L. Francis Cissna
Director
U.S. Citizenship and Immigration Services
20 Massachusetts Ave NW
Washington, D.C. 20529

Dear Director Cissna:

Last year I sent a letter to then-Secretary Kelly expressing concerns I had about potential malfeasance in applications for O visas.[1] Given the Department of Homeland Security's ("DHS") tighter restrictions on H-1B visas, I was—and remain—concerned there may be a corresponding increase of O visa applications as a work-around for H-1B restrictions. Specifically, I warned of the potential for increased fraud, error, and abuse – particularly in the petition process, which relies heavily on documentation submitted by the applicant. These concerns are magnified because the O-1 visa is easily exploitable; it has no maximum limit on extensions, lacks any numeric cap, and attracts certain powerful business interests.

As you know, an alien may qualify for an O visa if she "has extraordinary ability in the sciences, arts, education, business, or athletics" or a "demonstrated record of extraordinary achievement" in "motion picture and television productions."[2] O visa issuances have tripled in the last decade, from just over 30,000 in 2006, to 83,000 entries in 2014, and to just shy of 100,000

[1] *See* Letter from Charles E. Grassley to John Kelly, Secretary, Department of Homeland Security (July 17, 2017), available at https://www.grassley.senate.gov/sites/default/files/constituents/2017-07-17%20CEG%20to%20DHS%20%28potential%20O%20visa%20abuse%29.pdf.
[2] Immigrations and Nationality Act (INA) § 101(a)(15)(O)(i).

in 2016.[3] [4] Given the validity period of up to three years, nearly 300,000 recipients of O visas may be working in the United States.

Recent reports show that PassRight, a Santa Monica-based software company, has created a program that provides H-1B applicants with a workaround to the Administration's tighter restrictions by funneling that applicant pool into the uncapped O-1 visa category.[5] According to the company, the "'O-1 is the new H-1B' program, PassRight is creating an innovative way for U.S. companies to recruit foreign talent."[6] The software program provides an "automated screening process" service that completes about 80 percent of the application. PassRight then connects applicants with a talent agency that sponsors qualified workers and places them in companies.[7]

The creation of this new software is concerning. This is magnified by Silicon Valley's use of the O-1 program to "fill the gap" for workers who were not granted H-1B visas.[8] Silicon Valley tech companies use the O-1 visa to hire engineers and other STEM workers from abroad because the program is uncapped, and is seen as an alternative to the strict rules and limits of the H-1B visa, which is used for skilled workers in specialty fields.[9] One immigration attorney, who has worked on behalf of O-1 applicants, admits that the "increase in the past decade in O-1 visas is likely a result of tech workers who didn't get lucky in the annual H-1B lottery," and that the program is "filling the gap."[10] Plainly worded, Silicon Valley companies have discovered that the uncapped and less-scrutinized O-1 visa is an easier pathway than the numerically limited H-1B program.

The O visa category was specifically created to cover activity that falls outside the scope of H-1B. As the State Department's Foreign Affairs Manual indicates "[m]any such aliens were previously classified as H-1B nonimmigrants. Since the H-1B classification was not designed to address these classes of activities, Congress determined that they should be separated from that classification and treated independently." An alien seeking an O visa must first petition the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS), submitting documentation of her outstanding achievement. If the petition is approved, the alien may apply to the Department of State, Bureau of Consular Affairs to obtain a visa, but the primary evaluation of the alien's "extraordinary" qualification is performed by your agency staff and is based upon documents submitted by the petitioner.

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[3] *See* Kumar, Bhaswar, *Are you 'extraordinary'? If so you can get around Trump's H-1B order*, Bus. Standard (July 3, 2017) *available at* http://www.business-standard.com/article/current-affairs/are-you-extraordinary-if-so-you-can-get-around-trump-s-h-1b-order-117070300555_1.html [hereinafter Business Standard].
[4] *See* Campbell, Alexia Fernández, *The Visa for People Officially Deemed "Extraordinary"*, The Atlantic (July 27, 2016) *available at* https://www.theatlantic.com/business/archive/2016/07/the-visa-for-people-officially-deemed-extraordinary/493130/ [hereinafter The Atlantic].
[5] *See* Baron, Ethan, *H-1B Workaround? Bay Area firm offers automated visa process to foreign tech workers*, The Mercury News (June 30, 2018) *available at* https://www.mercurynews.com/2018/06/29/h-1b-workaround-bay-area-firm-offers-automated-visa-process-to-foreign-tech-workers/ [hereinafter Mercury News].
[6] *See id*.
[7] *See* Mercury News.
[8] *See* Study International, *Forget the H-1B. Use the 'genius visa' for foreign talents instead.* (July 3, 2018) *available at* https://www.studyinternational.com/news/h-1b-o1-work-visa-us-america/ [hereinafter Study International].
[9] *See* The Atlantic.
[10] *See id*.

Accordingly, I am requesting answers to the following questions by no later than September 15, 2018:

1. What steps has USCIS taken to combat potential fraud in O-1 visa applications?

2. What modifications in the requests for evidence (RFE) process is USCIS considering, given the rise of automated application systems?

3. What is USCIS doing to ensure that as restrictions tighten on a capped visa program, applicants are not simply shifting to a different and uncapped visa program – one for which they would not otherwise qualify?

Thank you in advance for your cooperation with this request. If you have questions, please contact Aakash Singh or Katherine Nikas of my Committee staff at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
Senate Committee on the Judiciary

Cc: The Honorable Michael R. Pompeo
Secretary
U.S. Department of State

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

U.S. Citizenship and Immigration Services

October 22, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

Thank you for your August 15, 2018 letter expressing your concerns regarding the potential for increased fraud, error, and abuse in the O visa program.

U.S. Citizenship and Immigration Services (USCIS) shares your interest in ensuring that the O visa program is administered with the greatest integrity. Please find enclosed responses to your questions. Also enclosed is O visa data which USCIS originally provided to you in its December 22, 2017 response to your July 17, 2017 letter. The data has been updated for fiscal year 2018.

Thank you again for your letter and interest in this important issue. Should you require any additional assistance, please have your staff contact the USCIS office of Legislative and Intergovernmental Affairs at (202) 272-1940.

Respectfully,

L. Francis Cissna
Director

Enclosures

U.S. Citizenship and Immigration Services Response to Chairman Grassley's August 15, 2018 Letter

1. **What steps has USCIS taken to combat potential fraud in O-1 visa applications?**

   USCIS adjudicates each petition on its own merits ensuring that all documentation is reviewed and any material discrepancies or deficiencies are properly addressed by the petitioner. USCIS employees who are assigned to adjudicate O-1 petitions are trained to review the documentary evidence within the file and perform required system and security checks. If concerns pertaining to potential fraud arise during the adjudication, such as the validity of the evidentiary documents, the case will be referred to the local fraud unit for further investigation.

   USCIS uses information obtained through verification to assess compliance with the law and determine eligibility for the classification sought. In the course of investigation, the USCIS fraud unit employees contact a variety of people to verify information and documentary evidence that includes, but is not limited to: petitioners, beneficiaries, employers, officials of labor and consulting organizations, authors of recommendation and peer letters, officials of award agencies, and officials of magazines (editors). These contacts are typically done via email or through telephonic interview. A review of public records and open source information may also be conducted. USCIS may also conduct unannounced physical site inspections of work locations and interviews.

   Finally, effective September 14, 2018, USCIS began accepting copies of negative consultation letters that have been issued by labor unions to organizations who file petitions seeking O-1 visa classification. A copy of the press release can be found at: www.uscis.gov/news/alerts/uscis-now-accepting-copies-negative-o-visa-consultations-directly-labor-unions. A consultation letter from a U.S. peer group, labor organization and/or management organization is generally required for petitions in the O-1 visa classification. Typically, a petitioner submits the necessary O-1 visa consultation with the petition, and that process requirement remains unchanged. The labor unions, however, will now be able to send a copy of a negative consultation letter directly to USCIS so that it can be compared to the consultation letter submitted to USCIS by the petitioner to ensure no alterations have been made to the original letter. Ultimately, the goal is to increase the integrity of the O-1 visa classification and to ensure the consistent and proper adjudication of O-1 petitions. After 6 months, USCIS will analyze the data collected to assess the value of this new process and potentially identify additional areas for improvement in the consultation process.

2. **What modifications in the requests for evidence (RFE) process is USCIS considering, given the rise of automated application systems?**

   Because USCIS determines eligibility on a case-by-case basis after full review of the petition and supporting documentation, the use of an automated application system that captures applicant information required to complete the petition does not impact the current RFE process. Therefore, at this time, USCIS does not have plans to modify the process.

USCIS will continue to review each petition and supporting documents, on a case-by-case basis, and apply the proper laws, regulations, policy, and evidentiary standards in determining whether an O-1 beneficiary has extraordinary ability or achievement and whether all other O-1 requirements are met. This is true regardless of the manner in which the petition is prepared or whether a particular program was used to assist with the preparation of the petition.

In all cases, the Immigration Services Officer will perform appropriate systems and securities checks and review the evidence to determine if the petitioner has established through relevant, probative, and credible evidence, that the beneficiary is eligible for the classification sought. When USCIS identifies material deficiencies or inconsistencies in the record, a RFE or Notice of Intent to Deny may be issues to request submission of additional evidence and/or clarification of any inconsistencies or deficiencies.

3. **What is USCIS doing to ensure that as restrictions tighten on a capped visa program, applicants are not simply shifting to a different and uncapped visa program – one for which they would not otherwise qualify?**

USCIS is aware that various factors, such as annual numerical limitations on certain nonimmigrant categories, may lead to individuals seeking a less appropriate classification. In all cases, USCIS carefully reviews the petition and supporting evidence to determine if the burden of proof has been established.

USCIS is aware that unscrupulous petitioners might attempt to submit fraudulent evidence to establish eligibility. USCIS officers carefully review all evidence and refer suspicious cases for further analysis if it appears that fraud may be involved.

As previously indicated, USCIS has implemented a program to reduce the potential for fraud related to negative consultation letters issued by labor unions and is exploring other ways to further mitigate the potential for fraud in the O-1 classification.

U.S. Citizenship and Immigration Services
Updated O-Visa Data for Chairman Grassley

1. **Please provide the number of approved O visa petitions by subcategory (O-1 A, O-1B, O-2, and O-3), for the last 5+ years (FY 2013-FY 2018).**

U.S. Citizenship and Immigration Services I-129, Petition for a Nonimmigrant Worker Class Preference of O-1, O-1A, O-1B, O-2 Approvals Fiscal Year 2013 - 2018					
Fiscal Year	**O-1[1]**	**O-1A**	**O-1B**	**O-2**	**Grand Total**
2013*	2,516	2,601	11,056	1,538	17,711
2014*	1,287	3,143	11,995	1,595	18,020
2015*	2,092	3,498	11,469	1,589	18,648
2016*	2,052	4,484	13,487	1,913	21,936
2017**	1,980	4,991	14,719	2,066	23,756
2018**	2,758	4,744	12,974	2,016	22,492
Grand Total	**12,685**	**23,461**	**75,700**	**10,717**	**122,563**

*Per data pulled on July 20, 2017, consistent with the data previously provided.
**Per data pulled on September 27, 2018, to reflect updated data for FY 2017 and FY 2018.

Please note that multiple beneficiaries may be included on the same O-2 petition if they are assisting the same O-1 for the same events or performances, during the same period of time, and in the same location. See 8 C.F.R. 214.2(o)(2)(iv)(F). As such, the number of O-2 petition approvals may not directly correspond with the number of O-2 visas or individuals admitted to the United States in O-2 status. It should also be noted that data pertaining to O-3 nonimmigrants are not included in the table above since O-3 classification and visa issuance is not obtained by filing a visa petition.

[1] The classification sought by a petitioner on behalf of an individual is provided in a hand-written field on the Form I-129. Therefore, the classification for some petitions has been data entered as O-1 consistent with the data field on the form as entered by the petitioner, rather than the specific classification subset (i.e., O-1A or O-1B).

2.a. Of approved petitions, please provide the number of approved applicants who remain in the United States, to the best of your ability to determine.

Number of Individuals Currently in the United States Based on Entry as an O-1 or O-2 Nonimmigrant Fiscal Year 2013 - 2018					
Fiscal Year of Entry	**O-1[2]**	**O-1A**	**O-1B**	**O-2**	**Grand Total**
2013	332	29	62	76	499
2014	373	42	93	90	598
2015	598	84	134	111	927
2016	1,018	110	216	161	1,505
2017	2,196	129	248	323	2,896
2018	19,153	166	237	2,181	21,737
Grand Total	**23,670**	**560**	**990**	**2,942**	**28,162**

Please note that the above data has been provided to USCIS by U.S. Customs and Border Protection.

[2] Please note that the classification has been data entered as O-1 for most of these individuals rather than the specific classification subset (i.e., O-1A or O-1B) due to how this data is collected on entry to the United States. As a result, the number of individuals in the United States as an "O-1" in the above chart appears to be far greater than petitions approved for "O-1" (as shown in the chart in Question 1), and the number of individuals here as an "O-1A" or "O-1B" appears to be much less than the number of petitions approved for "O-1A" or "O-1B" (as shown in the chart in Question 1). Please note also that the number of approved O visa petitions does not necessarily equate to the number of individuals currently in the United States in an O nonimmigrant status. Some beneficiaries of an O visa petition approval may have never entered the United States based on the petition approval, whereas others may have entered and subsequently departed. Lastly, given the nature of the O classification and the short-term duration of the events or activities typically associated with the classification, many of the O-1s in the country would have entered in the latest fiscal year.