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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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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 Immigration 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.

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