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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

June 7, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable Loretta E. Lynch
Attorney General
U.S. Department of Justice
Washington, DC 20530

The Honorable John Kerry
Secretary
Department of State
Washington, DC 20520

The Honorable Jeh Johnson
Secretary
Department of Homeland Security
Washington, DC 20528

The Honorable Thomas Perez
Secretary
Department of Labor
Washington, DC 20210

Dear Attorney General Lynch and Secretaries Johnson, Kerry, and Perez:

I write to express my concern, yet again, about the ongoing abuse of the B visa program that is hurting American workers and destroying the integrity of our immigration system. The B visa category is intended only for foreign visitors coming to the country temporarily for business or pleasure; the law explicitly prohibits coming to the United States as a B visitor “for the purpose of ... performing skilled or unskilled labor.”¹ And yet, despite this clear and unambiguous prohibition, employers seem to be able to evade that prohibition with ease and impunity, and in many cases with the blessing of the Administration.

In April 2011, I wrote to Secretary of State Clinton and Secretary of Homeland Security Napolitano about the abuse of the B visa category. I specifically discussed the ways in which foreign workers were being brought to the United States on B visas to work illegally. I cited as an example the allegations made at that time against Infosys Limited (“Infosys”), which was being investigated by Federal authorities for allegedly bringing foreign workers to the United States on B visas as a means of circumventing the rules and worker protections of the H-1B visa program. In October 2013, the Department of Homeland Security, Department of State, and United States Attorney’s Office for the Eastern District of Texas entered into a settlement agreement with Infosys, as part of which the U.S. Government alleged that Infosys –

¹ Section 101(a)(15)(B), Immigration and Nationality Act. The sorts of activity that constitute permissible “business” activity in B visa status are also extremely limited. See *Karnuth v. United States ex. rel. Albro*, 279 U.S. 231, 243-44 (1929) (observing that “visitor for business” does not include activities essentially constituting “local labor for hire,” especially given congressional intent of the Immigration Act of 1924 “to protect American labor against the influx of foreign labor”); *Matter of Hira*, 11 I&N Dec. 824, 827-30 (BIA 1965, 1966; A.G. 1966); *Matter of Cote*, 17 I&N Dec. 336, 338 (BIA 1980) (an alien need not be considered a “businessperson” to qualify as a business visitor “if the function he performs is a necessary incident to international trade or commerce”).

knowingly and unlawfully used B-1 visa holders to perform skilled labor in order to fill positions in the United States for employment that would otherwise be performed by United States citizens or require legitimate H-1B visa holders, for the purposes of increasing profits, minimizing costs of securing visas, increasing flexibility of employee movement, obtaining an unfair advantage over competitors, and avoiding tax liabilities.”²

Infosys paid a settlement amount of \$34 million, the largest payment ever levied in an immigration case.³

My April 2011 letter also discussed the ways that current State Department policy actually allows foreign workers servicing American client companies to be brought to the United States *legally* on B visas. I referenced in particular the State Department’s “B in lieu of H-1B” policy, according to which a foreign national may come to the United States to work on a B visa, despite the clear statutory prohibition against coming to the United States as a B visitor for the purpose of “performing skilled or unskilled labor,” so long as the foreign worker is employed by a foreign company and coming to work at a U.S. client of that foreign company.⁴ At the time, I pointed out the practices of The Boeing Company, which, according to reports in *The Seattle Times*, was routinely bringing Russian engineers on B visas to work alongside American engineers at its aerospace design facilities in Seattle.

And now the ongoing abuse of the B visa category is once again at the center of scandals attracting widespread press and social media coverage. According to a story that broke in May in the San Diego *Mercury News*, Eisenmann Corporation (“Eisenmann”), a German manufacturer of industrial systems, was hired by Tesla Motors Inc. (“Tesla”) to build a paint shop at one of its automotive manufacturing facilities.⁵ Eisenmann, in turn, contracted ISM Vuzem USA, Inc. (“Vuzem”), a Slovenian company, to do the work.⁶ Vuzem brought a work force of approximately 150 individuals to the United States on B visas to do the construction work.⁷ One of those individuals was Gregor Lesnik, hired as a “supervisor of electrical and mechanical installation” with “specialized knowledge of the Eisenmann equipment and process systems and long experience installing them.”⁸ Lesnik was allegedly injured on the job and brought a lawsuit against Vuzem, Eisenmann and Tesla, “claiming he and scores of other Eastern European workers were brought to the U.S. on questionable visas and paid substandard wages.”⁹ In his complaint, Mr. Lesnik alleges he was paid the equivalent of less than \$5 per hour for his

² Settlement Agreement, Case 4:13-cv-00634 (filed Oct. 30, 2013), available at <https://www.ice.gov/doclib/news/releases/2013/131030plano.pdf>.

³ Indian Corporation Pays Record Amount To Settle Allegations Of Systemic Visa Fraud And Abuse Of Immigration Processes, U.S. Department of Justice, Office of Public Affairs (Oct. 30, 2013), available at <https://www.justice.gov/usao-edtx/pr/indian-corporation-pays-record-amount-settle-allegations-systemic-visa-fraud-and-abuse>.

⁴ 9 FAM 402.2-5(F).

⁵ Louis Hansen, “Tesla contractor launches probe into pay, conditions for foreign workers,” *The Mercury News* (May 18, 2016), available at http://www.mercurynews.com/business/ci_29909810/musk-we-paid-55-an-hour-factory-workers?utm_campaign=Echobox&utm_medium=Social&utm_source=Twitter#link_time=1463625032.

⁶ *Id.*

⁷ *Id.*; Lesnik v. Vuzem, Second Amended Complaint for Damages, Alameda Superior Court no. HG15773484 (Feb. 29, 2016), at par. 48.

⁸ Lesnik v. Vuzem, *supra* note 7, at par. 98.

⁹ *Id.*; Lesnik v. Vuzem, *supra* note 7, at par. 133.

work, about ten times less than the prevailing wage for the type of work he was doing.¹⁰ Tesla CEO Elon Musk and Eisenmann defended their companies' conduct by revealing that contracts between Tesla, Eisenmann, and Vuzem specified a \$55 hourly labor rate.¹¹ Of course, just because the contract specified at \$55/hour rate doesn't mean the Slovenian workers were actually paid \$55/hour.

In May, it also came to light that a U.S. Department of Labor investigation found Bitmicro Networks Inc., a manufacturer of flash storage systems, had been paying some workers \$1.66 an hour, far below the federal minimum wage of \$7.25 an hour and California's minimum wage.¹² According to a press account, the 18 affected workers came from Bitmicro's subsidiary in the Philippines and were brought to Bitmicro's Fremont, California facility from July 21, 2012 to July 20, 2015 *on B-1 visas*.¹³ Bitmicro has reportedly agreed to pay approximately \$161,000 in back wages to the Filipino workers.¹⁴

The only reason the role played by B visas, and the alleged underpayment of such workers, in the Tesla case came to public notice was because of the workplace injury lawsuit brought by Mr. Lesnik; had that suit not been brought we likely would have never known about it. And yet, there are undoubtedly many other American companies using workers in B visa status to perform both high-skill and low-skill work – contrary to the law. In 2013, at the time of the settlement with Infosys, the special agent in charge of U.S. Immigration and Customs Enforcement's Homeland Security Investigations office in North Texas and Oklahoma said "There are other companies we know of that are using these same practices to be on a competitive footing and we are looking at them as well."¹⁵ Michael Eastwood, the assistant district director of the San Jose, California office of the U.S. Department of Labor, recently told *The Mercury News*: "We have concluded that there is widespread abuse of the B-1 visa in the Bay Area."¹⁶ With reference to the worker abuses in the Bitmicro case in particular, Mr. Eastwood said: "We have reason to believe this is unfortunately widespread, with tech companies taking advantage of the system and vulnerability, with overseas workers not likely to complain about the situation."¹⁷

The manner in which the B visa program is being used and the absence of real oversight and enforcement is a shame. Despite a long and undeniable history of abuse of the program to bring foreign workers into the United States under cover as "business visitors," regulations and field governance governing the program have not been updated in years. It's also obvious that investigation of B visa abuses and unauthorized employment of B visa holders is a rock-bottom

¹⁰ Id. See also Lesnik v. Vuzem, supra note 7, at par. 60.

¹¹ Tweet from Elon Musk (@elonmusk) (May 18, 2016; 3:51 p.m.) ("Merc News story about Tesla using \$5/hr labor seems to be missing a digit. Tesla actually paid \$55/hr.")

¹² Wendy Lee, "Bitmicro in Fremont fined for paying workers less than \$2 an hour," SFGATE.com (May 3, 2016), available at <http://www.sfgate.com/business/article/Bitmicro-in-Fremont-fined-for-paying-workers-less-7390909.php>.

¹³ Id.

¹⁴ Id.

¹⁵ Tom Schoenberg et al, "Infosys Settles with U.S. in Visa Probe," Bloomberg Technology (Oct. 31, 2013), available at <http://www.bloomberg.com/news/articles/2013-10-30/infosys-settles-with-u-s-in-visa-fraud-probe>.

¹⁶ "Tesla worker betrayal brings call for action," The Mercury News (May 16, 2016), available at http://www.mercurynews.com/opinion/ci_29899513/mercury-news-editorial-tesla-worker-betrayal-brings-call.

¹⁷ Lee, supra, note 12.

priority for all of your Departments – with the exception of the Department of Labor, which has been doing some good work in uncovering these abuses.

Given the problem such fraud and abuse in the B visa program poses for American workers as well as the foreign workers who are mistreated and underpaid, I request that the Departments respond to the concerns I have raised and the attached questions no later than June 22, 2016. Should you have any question, please contact Kathy Nuebel of my Committee staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman

Attachments

1. Questions
2. Letter from Sen. Charles E. Grassley to the Secretaries of State and Homeland Security, dated April 14, 2011.
3. Response of the Department of State to Letter from Sen. Charles E. Grassley, dated May 13, 2011.
4. Response of the Department of Homeland Security to Letter from Sen. Charles E. Grassley, dated July 18, 2011.
5. Letter from Sen. Charles E. Grassley to the Secretaries of State and Homeland Security, dated April 30, 2012.
6. Response of the Department of State to Letter from Sen. Charles E. Grassley, dated July 13, 2012.
7. Response of the Department of Homeland Security to Letter from Sen. Charles E. Grassley, dated September 20, 2012.

ATTACHMENT 1

QUESTIONS

1. In a letter from the Department of State, dated July 13, 2012, the Department stated that between 2007 and July 13, 2012 “more than 13,000” “B in lieu of H” visas were issued.
 - a. Please provide an update of that total number, with a year-by-year breakdown for the number of “B in lieu of H” visas issued since 2007.
 - b. Are consular officers required to annotate “B in lieu of H” visas? If not, would you consider making such annotations a requirement so that, from now on at least, the Department of State can better track how many such visas are issued?
2. Was the visa issued to Mr. Lesnik, or to any of the workers brought over by Bitmicro, considered a “B in lieu of H” visa – i.e. covered under 9 FAM 402.2-5(F)?
3. Were any of the visas issued to the group of Vuzem workers, or to the Bitmicro workers, *not* considered “B in lieu of H” visas?
4. How many B visas in total were issued to Vuzem workers for the Tesla construction project in question?
5. How many B visas in total were issued to Bitmicro workers in the Philippines between July 21, 2012 and July 20, 2015?
6. Federal regulations at 8 C.F.R. 214.2(b)(5) provide:

Construction workers not admissible. Aliens seeking to enter the country to perform building or construction work, whether on-site or in-plant, are not eligible for classification or admission as B-1 nonimmigrants under section 101(a)(15)(B) of the Act. However, alien nonimmigrants otherwise qualified as B-1 nonimmigrants may be issued visas and may enter for the purpose of supervision or training of others engaged in building or construction work, but not for the purpose of actually performing any such building or construction work themselves.

- a. Was Mr. Lesnik’s B visa application approved, notwithstanding his engagement in construction work, because he was deemed a “supervisor” in the work at the Tesla facility?
- b. How many of the B visas issued to the group of approximately 150 Vuzem workers were for supervisory positions?
- c. If any of the visas issued to the Vuzem workers were *not* for supervisory work, under what possible legal basis were they issued in light of the regulatory prohibition on construction work?
- d. Did any of the Vuzem workers present documentation to the U.S. consular officers adjudicating their visa applications misrepresenting the nature of their prospective activities in the United States?
- e. What is the exact legal justification for the supervisory exemption from the general prohibition on construction work in B visa status at 8 C.F.R. 214.2(b)(5)? Please cite

to specific Board of Immigration Appeals precedent cases and provide a full and detailed legal explanation.

7. The letter I received from the Department of Homeland Security on July 18, 2011, states that B-1 visitors can't work in the United States except for "very limited circumstances," and then cites as examples certain personal or domestic servants. Such servants (e.g. a maid or cook) are authorized to apply for employment authorization under 8 CFR 274a.12(c)(17) if they are accompanying an employer who is in the United States in B, E, F, H, I, J, or L nonimmigrant status. Please provide the exact legal justification for allowing domestic or personal servants to work, potentially for years, in the United States in B visa status. Please cite to specific Board of Immigration Appeals precedent cases and provide a full and detailed legal explanation. I am particularly interested in the legal justification for allowing employment in B status for a personal or domestic servant of an alien in long-term nonimmigrant status, such as an H-1B specialty occupation worker.
8. The Department of State, in its May 13, 2011 response to my April 14, 2011 letter, never answered this question: "What is the legal basis for the State Department's policy known as 'B-1 in lieu of H-1B'?" Please answer the question with a full and detailed legal explanation.
9. I observed in my April 14, 2011 letter that the Immigration and Naturalization Service (INS) in 1993 proposed a regulation to eliminate B-1 in lieu of H citing inconsistency with Congressional intent. This was the discussion from the 1993 proposed rule that I had in mind:

The Service believes that, in light of the numerical restrictions, labor condition requirements, and revised definition of the H-1B category contained in [the Immigration Act of 1990], it would violate Congressional intent to allow admission of an otherwise classifiable H-1B nonimmigrant as a B-1 simply because the alien will not receive any salary or other remuneration from a U.S. source. It is, therefore, the position of the Service that the section of the [Operating Instructions] providing for "B-1 in lieu of H-1" status is now inconsistent with the Congressional intent to control the number of H-1B visas issued, as well as the intent to safeguard the working conditions of United States workers, and should be deleted.

"Nonimmigrant Classes; B Visitor for Business or Pleasure," U.S. Department of Justice, Immigration and Naturalization Service, Proposed Rule, 58 FR 58982, 58982-58983 (Nov. 5, 1993).

- a. Why was the 1993 proposed rule never finalized?
 - b. Does the Department of Homeland Security stand by the assessment of the "B-1 in lieu of H" concept made by its predecessor agency in the 1993 proposed rule?
10. What are the potential sanctions, civil or criminal, that could be imposed on companies for employment of an unauthorized alien (section 274A of the Immigration and Nationality Act)?

11. What are the potential sanctions, civil or criminal, that could be imposed on the foreign workers brought over in B status by companies if they are found to have violated the terms and conditions of their B visa status?
12. How many of the Vuzem workers in question remain in the United States and in what immigration status?
13. How many of the Bitmicro workers in question remain in the United States and in what immigration status?
14. The letter I received from the Department of Homeland Security on July 18, 2011 states: “With regard to the ‘B-1 in lieu of H-1B’ interpretation, DHS will coordinate with the State Department to develop guidance clarifying the scope of activities permissible in the B-1 business visitor classification.” The Department of State states in its letter dated May 13, 2011: “We are working with the Department of Homeland Security (DHS) to consider removing or substantially amending the FAM note that you referenced. ... We are in the process of discussing with DHS removing or substantially modifying the B-1 in lieu of H guidelines, which State first proposed eliminating in a 1993 Federal Register notice. This change requires DHS coordination and may require Federal Register notice, thus it may take some time before ... any change is implemented.” Finally, the Department of Homeland Security stated in its letter dated September 20, 2012: “In coordination with the Department of State, DHS remains actively engaged in the development of guidance clarifying the scope of employment permissible in the B-1 business visitor classification.”

Almost four years have passed since the last of these assurances that B visa guidance was going to be overhauled and yet absolutely *nothing* has been done. In particular, discussions between State and DHS regarding the elimination of “B in lieu of H” were, by the Departments’ own admission, occurring in 2011—*five years ago* – yet, again, nothing has been done, the integrity of the B visa program continues to be degraded, and American workers continue to be injured. Please describe, in detail, what, if anything, has been done since the last exchange of letters in 2011 and 2012 and when, exactly, updated regulatory or field guidance eliminating the “B in lieu of H” provisions and clarifying permissible activities in B status will be published.

15. According to the Infosys Settlement Agreement:
 - (E) Infosys agrees to retain, at its own expense, an independent third-party auditor or auditing firm to review and report on its I-9 compliance. One year from the date this agreement is signed, and for one additional year, the auditor shall analyze a random sample of not less than four percent of Infosys’s existing United States workforce to determine if the I-9 forms associated with the workforce have been completed and maintained in full compliance with the requirements of 8 U.S.C. § 1324a. The independent auditor or auditing firm must submit a signed report to the United States Attorney for the Eastern District of Texas regarding the results

of the analysis within 60 days of the first and second anniversaries of the signing of this Agreement.

- (F) Infosys agrees that it will submit a report to the United States Attorney for the Eastern District of Texas, within 60 days of the first anniversary of the signing of this Agreement describing whether its B-1 visa use policies, standards of conduct, internal controls, and disciplinary procedures have been effective in ensuring compliance with paragraph III.A.3 of this Agreement. Infosys also understands that, for two years after the date of the signing of this Agreement, the United States will review random samples of documents that Infosys has submitted to U.S. Consular officials and other immigration officials in support of its B-1 visa holders to determine whether Infosys remains in compliance with this Agreement.¹⁸
- (a) Please provide me with—
- (i) a copy of the reports described in (E) that have been filed so far; and
 - (ii) the report required in (F) describing the effectiveness of Infosys B-1 visa policies.
- (b) Have any reviews of random samples of documents that Infosys has submitted to consular officers, as described in (F), occurred? If so, what were the results of such reviews? Please send me a copy of any report of such random sample review. If such reviews have not happened, why not?

¹⁸ Settlement Agreement, U.S. v. Infosys Limited, Case 4:13-cv-00634, United States District Court for the Eastern District of Texas (Oct. 30, 2013), par. IV(E)-(F), available at <https://www.ice.gov/doclib/news/releases/2013/131030plano.pdf>.