**SECRETARY OF LABOR**
**WASHINGTON, D.C. 20210**

APR 2 7 2017

The Honorable Charles E. Grassley
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

Thank you for the letter from you and your colleagues expressing concerns about the adverse effect on American workers caused by employment of foreign workers authorized to work in the United States under H-1B visas. Your letter pointed to a recent episode of the *60 minutes* television program entitled "You're Fired," which aired on Sunday, March 19, 2017. The broadcast interviewed American workers replaced by foreign workers who were authorized to work in the United States pursuant to the H-1B visa program. Your letter requests that the Department of Labor (Department) use its authority to investigate H-1B abuses and provide responses to several questions regarding what actions are being taken by the Department and what tools are needed from Congress to better protect American workers.

The Immigration and Nationality Act (INA) provides very specific statutory limitations governing our review of Labor Condition Applications and our investigation of violations of H-1B rules by employers. Our responses below to the questions posed in your letter reflect the requirements and constraints placed on the Department under the INA. The Department's Office of Inspector General (OIG) conducts investigations involving criminal violations related to the H-1B program. Because the OIG conducts these investigations pursuant to the Inspector General Act of 1978, the OIG is not as restricted as the Secretary under the INA.

1. Has an investigation into the companies highlighted in 60 minutes' "Your Fired," and their abuse of the H-1B visa program been initiated? If not, why not?

   The Department's authority to investigate and enforce the H-1B program may only be exercised consistent with the statutory framework of the INA. The INA specifically limits the circumstances under which investigations may be conducted. Investigations may be conducted if a complaint is received from an aggrieved party that is adversely affected by the employer's noncompliance (*See* 8 U.S.C.1182(n)(2)(A)), or from a credible source that is likely to have knowledge of the employer's employment practices or its compliance with H-1B requirements (*See* 8 U.S.C.1182(n)(2)(G)(ii)). In either case, the Wage and Hour Division (WHD) must find that a reasonable basis exists to believe a violation occurred. Alternatively, an investigation may be initiated when the Secretary of Labor "has reasonable cause to believe that the employer is not in compliance" and personally certifies that reasonable cause exists (*See* 8 U.S.C.1182(n)(2)(G)(i)). Finally, random investigations of willful violators may be conducted (*See* 8 U.S.C.1182(n)(2)(F)). The specificity of these statutory provisions demonstrates that the H-1B provisions of the INA carefully define the Department's authority to conduct investigations.

   The Department places the utmost priority on protecting and enhancing the welfare of the U.S. workforce. We are therefore carefully reviewing all of the information available to

determine whether reasonable cause exists to conduct an investigation. WHD processes all complaints from an aggrieved party or credible source received within 12 months of the occurrence of a violation, and will consider any other information that might justify a Secretary-initiated, or random (based on evidence of willful violations), investigation.

The INA also classifies companies that employ a certain percentage of H-1B workers out of its total workforce as "H-1B dependent employers." 8 U.S.C. 1182(n)(3). The consulting companies typically used by large employers are often H-1B dependent employers. The INA requires H-1B dependent employers to inquire about displacement of U.S. workers prior to providing H-1B workers to a secondary entity, and it can be unlawful for a dependent employer to displace U.S. workers. *See* 8 U.S.C. 1182(n)(1)(F); 8 U.S.C. 1182(n)(1)(E); 8 U.S.C. 1182(n)(2)(E). However, the statute only prohibits H-1B dependent employers from displacing U.S. workers employed by the secondary entity within the statutorily set period beginning 90 days before and ending 90 days after the placement of the H-1B worker with the secondary employer. Moreover, a dependent employer may displace U.S. workers employed by the secondary entity regardless of the timing of the H-1B worker's placement, provided the H-1B replacement (and any other H-1B nonimmigrant the dependent employer sponsors through the replacement's labor condition application) will receive at least $60,000 per year or has attained a relevant master's degree. 8 U.S.C. 1182(n)(1)(E)(ii) & 8 U.S.C. 1182(n)(3)(B). This limitation will have to be carefully considered in determining whether reasonable cause exists for an investigation.

2. Has a review of your policies and procedures under the H-1B program that allows for this kind of abuse been initiated? If so, have you determined loopholes and ambiguities that can be fixed by regulation or other executive action? If not, why not?

   The Department is evaluating existing statutes and regulations to provide rigorous use of all existing authority to initiate H-1B investigations in accordance with the law. The Department is currently considering ways to bring greater transparency to the H-1B program to provide a clearer understanding of the effects of the program on domestic and foreign workers, employers and the public. In situations involving potential discrimination against U.S. workers, WHD has made referrals to the Department of Justice's (DOJ) Immigrant and Employee Rights Section (IER), formerly known as the Office of Special Counsel for Immigration-Related Unfair Employment Practices, which is responsible for enforcing the anti-discrimination provision of the INA. The statute prohibits, among other things, citizenship, immigration status and national origin discrimination in hiring, firing or recruitment or referral for a fee; unfair documentary practices; retaliation and intimidation.

   The Department's authority to review applications and conduct investigations under the H-1B program may only be exercised to the extent authorized by the INA. Under section 212(n)(1)(G) of the INA, Congress provided that "[t]he Secretary of Labor shall review such an [H-1B] application ***only for completeness and obvious inaccuracies***" (emphasis added) within seven days of receiving the employer's application. Therefore, the Department does not have wide latitude to independently verify the authenticity of the information submitted by these employers, and is affirmatively prohibited from considering information from any person or entity contesting an H-1B Labor Condition Application filed by a U.S. employer

prior to issuing a final decision.[1] Thus, the INA generally does not permit the Department to challenge the employer's attestations entered on a Labor Condition Application, nor does the statute otherwise contemplate a comprehensive pre-labor certification review. The Department's implementing regulations at 20 CFR 655.740(a)(2) and procedures for reviewing H-1B applications are consistent with Congress's mandate of an expeditious, attestation-based process in which the Labor Condition Application review is limited to entries on the face of the application that present clearly obvious omissions or inaccuracies.

With respect to foreign workers being paid less than U.S. workers, the INA permits U.S. employers to offer wages to H-1B workers based on a four-tiered prevailing wage structure that accounts for experience, education, and the level of supervision for a given occupation. Since the enactment of the four-tiered wage structure in 2004, a large number of U.S. employers have employed H-1B workers at an entry level or "Tier 1" wage in areas where the "average" wage for all similarly employed American workers in the local area is much higher. Absent a legislative change, the Department lacks the authority to alter the employers' ability to take advantage of the four-tiered prevailing wage structure currently used by employers in H-1B Labor Condition Applications.

3. What steps are you taking, in conjunction with the President and the White House, to initiate necessary administrative action to fix the worst abuses in the H-1B visa program?

   The Department is committed to rigorously using all of its existing authority to initiate investigations of H-1B program violators. This effort to protect U.S. workers requires greater coordination with other federal agencies, including the Departments of Homeland Security and Justice, for additional investigation and, if necessary, prosecution.

   The Department is also considering changes to the Labor Condition Application (the application for a labor certification) for future application cycles. The Labor Condition Application, which is a required part of the H-1B visa application process, may be updated to provide greater transparency for agency personnel, U.S. workers and the general public. WHD is specifically limited by statute as to the nature and the source of information it can use in order to initiate an investigation. WHD is in the process of assessing the complaint intake process to better enable them to capture additional information from a credible source that may be used to initiate an investigation under existing INA authority.

   The Department is also continuing to engage relevant parties on how the program might be improved to provide greater protections for U.S. workers, under existing authorities or through legislative changes.

4. What tools do you need from Congress to better ensure that the H-1B program is used as it was meant to be used, to ensure that American companies have access to foreign workers, when, and only when, there are insufficient American workers to fill those jobs?

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[1] INA §212(n)(1), 8 U.S.C. § 1182(n)(1). In explaining Congressional intent of the language contained in the INA of 1991, Senator Kennedy, Chairman of the Immigration Subcommittee, stated "*[T]he H-1B corrections underscore that enforcement of the program's labor condition application process is complaint driven and that the Department of Labor's responsibility is to check applications they receive 'only for completeness and obvious inaccuracies.*'" 137 Congressional Record S18245 (Nov. 26, 1991).

Congress has a key role to play when it comes to protecting American workers and eliminating fraud from the H-1B visa program. Congress must take legislative steps to provide the Department and other federal agencies involved in the H-1B visa program with the tools it needs to improve and oversee the program. The Department looks forward to working with you and others in Congress to achieve that goal.

The OIG combats fraud, waste, and abuse in all of the Department's programs. As recently as January 2017, the OIG, in conjunction with the U.S. Diplomatic Security Service and U.S. Customs and Border Protection, obtained a guilty plea from a foreign national charged with H-1B visa fraud.

The Inspector General recently testified in front of the House Appropriations Committee and House Committee on Oversight and Government Reform regarding OIG investigations that highlight the H-1B program's susceptibility to significant fraud and abuse. The risk emanates from the Department's statutory requirement to certify H-1B Labor Condition Applications unless they are deemed to be incomplete or obviously inaccurate.

Generally, the abuses of the program investigated by the OIG involve unscrupulous employers, brokers, or attorneys abusing the program for financial gain, often resulting in American workers losing job opportunities and sometimes negatively impacting the working conditions of the visa holders. The OIG has partnered with the DOJ and other law enforcement partners to combat labor trafficking related to programs administered by the Department, particularly Office of Foreign Labor Certification (OFLC) programs like the H-1B program. To that end, the OIG has collaborated with the DOJ on the Anti-trafficking Coordination Team initiative. The OIG also has agents assigned to Homeland Security Investigations Document and Benefit Fraud Task Forces throughout the country. These task forces focus on immigration benefit fraud and they allow the OIG to combat H-1B fraud with their partners at Homeland Security Investigations, Diplomatic Security Service, and U.S. Citizenship and Immigration Services.

Finally, the OIG in conjunction with OFLC, WHD, and the Department of State (State) are working on a memorandum of understanding for State to share its data with OFLC and the OIG via the Department of Homeland Security's VIBE system. In return, OFLC will give State access to their iCERT system.

Thank you for writing and sharing your concerns with us on the important issue. If you have additional questions, please contact the Office of Congressional and Intergovernmental Affairs at (202) 693-4600.

Sincerely,

EDWARD C. HUGLER
Acting Secretary of Labor