United States Senate
WASHINGTON, DC 20510

January 31, 2011

The Honorable Janet Napolitano
Secretary
Department of Homeland Security
Washington D.C. 20528

Dear Secretary Napolitano:

Recently the Government Accountability Office released a report to Congress about the H-1B visa program entitled, "Reforms are Needed to Minimize the Risks and Costs of Current Program." This report details the processes by which employers bring in foreign workers and describes the shortcomings in enforcement authority provided to the Executive Branch to make sure the program is not abused. The report also verifies what we have argued for years – that loopholes in the program have resulted in adverse affects for American and foreign workers.

We are committed to restoring integrity to the H-1B visa program, and have appreciated your attention to making sure fraud and abuse are better addressed and that American workers are our first priority. However, many problems remain and more must be done, legislatively and administratively, to combat H-1B fraud and abuse. We would appreciate your insight into several issues that were raised in the GAO report.

1. Inconsistencies in the Adjudication Process: The GAO cited complaints from employers about inconsistencies in the adjudication process. For example, one company claimed that one of the Department's processing centers handles H-1B petitions "more efficiently" than the other. We understand some immigration attorneys and business executives are concerned about "Requests for Evidence (RFE)," but we believe RFEs are an important anti-fraud tool. How is your Department ensuring that petitions are processed consistently while continuing to make sure that adjudicators are given flexibility to issue RFEs and make decisions based on the evidence they have or do not have?

2. Data Limitations: The GAO found that U.S. Citizenship and Immigration Services (USCIS) is still unable to track the number of H-1B applications it approves under the statutory cap. We were very disappointed to learn that this problem persists years after it was first brought to light. In 2005, the agency exceeded the 65,000 annual cap by about 7,000 petitions. USCIS claims that since then it has made several changes to better control the number of visas issued. Nonetheless, the GAO stated that agency officials "concede they still cannot precisely count, in an ongoing manner, petitions accepted under the cap." Congress intentionally set a cap for the program, and we expect the agency to abide by that statute.

a. How many applications subject to the cap have been approved in each year, from Fiscal Year 2005 to the present? In which years, if any, has DHS approved more petitions than permitted by the statutory cap?
b. According to GAO, DHS officials "noted that as long as the process of submitting and adjudicating H-1B petitions remains the same, they are unlikely to be able to provide a precise count of petitions accepted under the cap." Why does the existing process prevent DHS from accurately counting approved H-1B petitions?
c. Aside from eliminating the exemptions provided in section 214(g) of the Immigration and Nationality Act, what steps can Congress and your Department take to make sure you do not violate the law by exceeding the statutory cap?

GAO also concluded that DHS "cannot readily determine how many H-1B workers are currently in the United States or how many stay after their visas expire." We are deeply troubled that DHS has no idea how many H-1B visaholders are working in the United States at a time when millions of Americans are unemployed. GAO explained the consequences: "Lack of information on the total H-1B workforce makes it impossible to understand the long-term impact of the program and leaves the program vulnerable to fraud and abuse – a known issue in this program."

d. Why is DHS unable to count the number of H-1B workers in the United States and how many overstay their visas? What is being done to remedy this problem?

3. Optional Practical Training: Optional Practical Training (OPT) was beyond the scope of the GAO's report. It is our understanding that OPT was created to give foreign students a chance to learn more about their area of study before returning to their home country. It is our understanding that this training was meant to complement foreign students' studies, not act as a bridge to permanent residency or a temporary worker visa. However, in 2008, the Department changed the OPT rules to allow certain students to remain in the United States for 29 months rather than 12 months. We are concerned that employers could use OPT to circumvent statutory worker protections and DHS oversight. For example, there is no requirement that OPT students be paid the prevailing wage. Please provide answers to the following questions related to OPT:

a. What guidance has DHS given to colleges and universities with regard to approving OPT, and what restrictions, if any, are placed on an educational institution to verify an OPT applicant's request and offer of employment? Please provide any relevant documentation, including any written guidance that your Department has provided to higher education institutions.
b. When DHS issued the OPT extension, it said, "ICE and USCIS estimate that approximately 12,000 [individuals] will take advantage of the STEM extension." How many OPT applications have been approved in each of the last five years? How many OPT beneficiaries have taken advantage of the STEM extension in each of the last five years? How many OPT applications have been denied in each of the last five years? Please include the names of the schools in which OPT beneficiaries have been enrolled, the entities that have employed them, and any other relevant data to better help us understand how the program is being used.

c. Is the Department considering, during this economic downturn, revising the rule to revert back to the 12-month limit that was in place before the OPT/STEM regulatory change in 2008? If not, why not?
d. Is the Department considering adding any safeguards (including, but not limited to, wage or recruitment requirements) to the OPT program to make sure American students and workers are better protected?

4. Streamlining the Application Process: In discussing how the visa application process could be streamlined, the GAO noted that the Department of Homeland Security is "currently preparing a proposed rule, which is being reviewed and considered within the agency, to allow employers to submit requests for H-1B slots before submitting an LCA." LCAs, or Labor Condition Applications, were intended by Congress to ensure that visa holders were provided proper wage rates and working conditions. We are interested in learning more about your proposed rule, and would like assurance that a change in the application process will not result in bypassing the LCA requirement. We are also glad that your Department does not concur with the GAO recommendation to "establish a system whereby businesses with a strong track-record of compliance with H-1B regulations may use a streamlined process." We agree that current law does not allow you to exempt petitioners from compliance with H-1B evidentiary requirements.

5. Immigration Yields: According to GAO, 30 of 31 companies they interviewed said they sponsored some of their H-1B employees. However, Professor Ron Hira, a leading expert on outsourcing, analyzed DHS data and concluded that:

> "Most of the top users of both the H-1B and L-1 visa programs sponsor very few, if any, of their workers for permanent residence. … Rather than attracting the 'best and the brightest' for permanent immigration, as many have claimed, the programs have increasingly been used for temporary labor mobility to transfer work overseas and to take advantage of cheaper guest-worker labor."

Does DHS track the number of H-1B visa holders who become legal permanent residents? If not, why not?

6. Fraud Detection: GAO concluded that the H-1B program is "vulnerable to fraud and abuse." We commend the Fraud Detection and National Security Directorate for its efforts to combat H-1B fraud. In DHS's response to the GAO report, you mentioned the Validation Instrument for Business Enterprise (VIBE), a new anti-fraud tool. FDNS briefed our staff on VIBE last year and it is our understanding that it is ready to launch.

a. When will VIBE be operational?
b. Will VIBE be used for all H-1B petitions?

We are also concerned about fraud in the L-1 visa program. Some employers told the GAO that they use the L-1 visa to hire foreign workers when they are unable to obtain H-1B visas. Last year, FDNS told our staff that the Benefit Fraud and Compliance Assessment (BFCA) for the L-1 visa program was on hold while the BFCA methodology

was reassessed. We believe the BFCA is an important anti-fraud tool, as demonstrated by the H-1B BFCA, which found high levels of H-1B fraud. We urge you to move forward with the L-1 BFCA as soon as possible.

c. Why has the L-1 BFCA been delayed?
d. When will the L-1 BFCA be finalized and provided to Congress?

We appreciate your consideration of our views and look forward to hearing from you as soon as possible.

Sincerely,

Charles E. Grassley
United States Senator

Richard J. Durbin
United States Senator