

# An Analysis of the USCIS H-1b Benefit Fraud and Compliance Assessment

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In September of 2008, the USCIS quietly released a comprehensive H-1b Benefit Fraud and Compliance Assessment. A copy of the full report can be found at <http://grassley.senate.gov/private/upload/100820081-3.pdf>.

The reaction following its release has been as predictable as a Keith Olberman political rant. Senator Grassley, in what could only be described as an audition for the Bill O'Reilly show, decried that the report "highlights rampant fraud" and claimed that delays in the issuance of the report have led the USCIS to simply "rubber stamp fraudulent applications." The Americans for Legal Immigration fanned the flames once again calling for the type of reform that Senators Grassley and Durbin had proposed in 2007, which by virtually all accounts would have completely dismantled the H-1b and L programs.

The economic evidence is clear; the H-1b and L-1 programs provide a clear economic benefit to the U.S. marketplace and allow the U.S. to compete on the world market stage. Reduction or elimination of the programs will simply lead to further outsourcing of jobs overseas as recently evidenced by the Microsoft relocation to Canada. However, an analysis of the economic impact of the H-1b program is outside the scope of this article. This article will focus on the findings contained in the assessment.

The study reviewed 246 H-1b cases, identifying 33 instances of fraud and 18 instances of technical violations. In total, 21% of the cases examined were found to contain some type of error. If there truly is fraud in 1 of every 5 cases, as Senator Grassley claims, then his comment of rampant abuse may be an understatement. However, there may be more to the story. (Wink, wink) First, it is important to read the USCIS methodology and definitions contained in the full report carefully. Included among the 51 instances are circumstances in which “there was no evidence of willful fraud, but, there was evidence the employer or beneficiary had failed to comply with all laws and regulations.” This standard is very broad. As are most regulations, the USCIS and DOL regulations are subject to different interpretations and it may be possible that some of the claimed violations have in fact a claimed legal basis. Secondly, a careful review of the claimed errors reveals some unanswered questions, which may affect the findings. The following errors were reported:

1. In 28 cases, the employee was working at a location not found on the original Labor Condition Application. This was by far the most prevalent complaint however, it is the scenario which also carries with it the greatest opportunity for there to be a plausible explanation other than fraud or violation. For example, there was either no investigation or no reporting of whether any of the beneficiaries were being placed pursuant to the DOL’s short-term placement rules. There was also no disclosure as to whether a new Labor Condition Application had been filed with the DOL subsequent to the filing of the original petition. This practice may demonstrate compliance and has significant support in the legal community. More significantly, there was no finding of whether or not the change in location was done to circumvent the prevailing wage rules i.e. original disclosed location as Tupelo, Miss. but, the actual work-site is New York City, a clear case of evil-doing or whether the wage being paid at the undisclosed

2. In 14 of the cases, the beneficiaries were found to be paid below the required wage. By extrapolation, one would reach the conclusion that 5% of H-1b workers are being underpaid. This finding, if anything, shows a need for more DOL enforcement. Congress has chosen to craft the H-1b legislation in such a way that the DOL is responsible for investigating issues involving wage violations. The fact is that annual reports of LCA audits conducted by the DOL have never shown widespread underpayment of H-1b workers.
  
3. In 10 cases, fraudulent documents were discovered. The fraudulent documents ranged from diplomas and transcripts to work experience letters. This represents 4% of the reviewed files. Of particular interest was that instances of “forged signatures and contents in the documents were false” were items listed under this category. There was, however, no specific indication as to the extent of these items. In other words, if my resume claimed that I graduated with a 3.8 when in fact, I graduated with a 3.1, my resume certainly contains false information but, very few would argue that such a false claim rises to the level of fraud or at least, not the type of academic fraud that would keep me from one day being the Vice President. Did resume “puffing” create a finding of a fraudulent document?
  
4. In 7 cases, there was found to be no actual job offer. Several of these cases involved clear fraud i.e. a fake business, but in several the findings were less than clear; e.g. merely allegations that the business did not have enough revenue to support the hiring of a new employee.

5. In 6 cases, the USCIS found that the job duties differed significantly from the duties listed on the petition. Once again, several of these were very clear i.e. a business development manager working in a Laundromat but in others, there were no details provided.
6. In 6 cases, the USCIS declined to conduct the research because of an ongoing ICE investigation. Whether there were any H-1b abuses was never determined nonetheless, they were assumed to exist.
7. In 3 cases, the USCIS determined that the beneficiaries had fallen out of status by either entering the US with an H-1b visa after being terminated or had begun employment prior to a proper AC21 filing. Although these type of issues are routinely detected by the USCIS during the adjudication of subsequent petitions, there was no information given as to whether that had in fact occurred in these particular instances.
8. In 3 cases, it was determined that the beneficiary had paid filing fees clearly required to be paid by the employer.

There can be no doubt that the USCIS, after a significant expenditure of time and effort, determined the obvious; there are certain instances of fraud and violations in the H-1b program. I would venture to go out on a limb and hypothesize that other government programs i.e. tax, welfare, Social Security, unemployment, political fundraising, and the list could go on, contain a certain amount of fraud or violations. That statement is not meant to diminish the findings, the study itself, or to indicate a belief that we should simply accept a certain amount of fraud. Fraud in the H-1b program is serious and steps should be taken to combat it. The enforcement of law is essential to an orderly system. Nonetheless, these finding should not be read as an indictment of the entire H-1b program.

Overall, the findings will be read through our own individual lens and we will each reach our own conclusion of either alarm or status quo. One thing that I think both camps can agree on is that the majority of U.S. employers hiring H-1b workers intend to do it legally. These employers need to be encouraged and supported and those that do not, need to be punished. Reports of this type that highlight certain instances of fraud and violations should be used for educational purposes and should be widely distributed among the employer and immigrant communities. There must be a clear message from the USCIS and the DOL that infractions will be dealt with appropriately.

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