UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION LAWYERS ASSOCIATION	)	
Plaintiff,	)	
v.	)	No. 1:10-cv-01224 (EGS)
UNITED STATES DEPARTMENT OF HOMELAND SECURITY *et al.*,	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiff American Immigration Lawyers Association ("AILA") respectfully submits this memorandum of points and authorities in opposition to the motion of defendants United States Department of Homeland Security ("DHS") and United States Citizenship and Immigration Services ("USCIS") for summary judgment and in support of plaintiff's cross-motion for summary judgment.

INTRODUCTION AND SUMMARY

Plaintiff AILA's suit under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeks records from DHS and its component USCIS concerning agency policies and procedures relating to nonimmigrant temporary workers and particularly the adjudication of petitions for their lawful employment in the United States. The issues are whether the defendants have conducted adequate searches in response to the FOIA requests lodged by AILA, whether defendants have identified and released or described in a *Vaughn* Index all responsive documents, and whether the defendants have properly invoked FOIA exemptions (b)(2) and (b)(7)(E) in withholding disclosure of responsive records. In sum, defendants have failed to meet their burden under Fed. R. Civ. P. 56(a) and thus their motion must be denied. Moreover, *plaintiff* has identified responsive records that were neither released nor listed in the *Vaughn* Index. Finally, the eight pages of responsive but only partially released documents must be disclosed in full in view of the availability of their content in the public domain. Thus, plaintiff's cross-motion for summary judgment must be granted.

BACKGROUND

The Immigration and Nationality Act ("INA") § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides for the admission into the United States of temporary workers sought by petitioning employers to perform services in a specialty occupation.

The procedures and restrictions on the admission of so-called "H-1B" workers are set forth in INA § 214, 8 U.S.C. § 1184. Regulations of DHS in 8 C.F.R. § 214(h) and of the Department of Labor in 20 C.F.R. Part 655 implement the statutory authority. U.S. businesses rely on the "H-1B" program, administered by USCIS, to temporarily employ foreign workers—such as scientists, engineers, and computer programmers—in occupations that require theoretical or technical expertise in specialized fields.

In order for a nonimmigrant to come to the United States to lawfully work under an H-1B visa, a prospective employer must file and have granted a nonimmigrant H-1B petition on the individual's behalf. Congress has mandated certain restrictions on eligibility for admission to the United States through H-1B classification as well as set certain caps on the number of foreign workers who may annually seek status through this program.

The basic process by which the government handles the receipt and review of H-1B petitions is generally known. Upon receipt, USCIS creates a file for each original petition and supporting documentation submitted for obtaining H-1B nonimmigrant status. Biographical data, such as name, date of birth, and country of birth, is entered into a case tracking system, and the file is assigned to an adjudicator who determines whether there is adequate information in the file to approve or deny the petition. If sufficient evidence is available, the adjudicator makes a decision and enters the corresponding information into the tracking system. In the case of insufficient evidence, the adjudicator requests additional information from the sponsoring employer by issuing a "Request for Evidence" ("RFE") under 8 C.F.R §103.2(b)(8). *See also* Characteristics of H-1B Specialty Occupation Workers, Fiscal Year 2009 Annual Report, October 1, 2008 -

September 30, 2009, Department of Homeland Security, U.S. Citizenship and Immigration Services, April 15, 2010, Appendix A, p. 21, *available at* http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-09-characteristics.pdf (Exhibit 1)[1].

However, following a September 2008 "H-1B Benefit Fraud & Compliance Assessment" report ("BFCA Report") by USCIS, *see* http://grassley.senate.gov/news/upload/100820082.pdf (Exhibit 2)[2], in which a sampling of cases was found to include instances of fraud or technical violations in connection with the filing of H-1B petitions, USCIS adopted new, more stringent procedures for review and adjudication. The RFE became a primary vehicle by which USCIS sought to obtain substantially more detailed information from a petitioner. *See* Letter from Alejandro N. Mayorkas, Director, USCIS to The Honorable Charles E. Grassley, United States Senate, November 10, 2009, *available at* http://www.nationofimmigrators.com/wp-content/uploads/2009/12/Mayorkas%20letter%20to%20Grassley%20re%20H-1B%20visa%20fraud.pdf (Exhibit 3). Still further, USCIS dramatically increased the frequency of unannounced worksite inspections—which were expected to reach 25,000 visits in 2010 alone—in connection with H-1B cases. *Id.* More specifically, USCIS issued field guidance to agency adjudicators instructing them to issue RFEs (and Notices

[1] Exhibits herein are attached to the Declaration of Seth A. Watkins in Support of Plaintiff's Cross-Motion for Summary Judgment.

[2] The BFCA Report was made publicly available by USCIS on the USCIS website at http://www.uscis.gov/files/nativedocuments/H-1B_BFCA_20sep08.pdf, as of the date of filing the present action. *See* Complaint at ¶ 10. For unknown reasons, this document is no longer posted at this USCIS web address, but is widely available.

of Intent to Deny or Revoke) in cases in which an adjudicator becomes aware of potential violations or non-compliance with the H-1B program. *Id.*

The BFCA Report identified "several primary fraud or technical violation(s) indicators": (1) firms with 25 or fewer employees; (2) firms with an annual gross income of less than $10 million; (3) firms in existence less than 10 years; (4) H-1B petitions filed for accounting, human resources, business analysts, sales, and advertising occupations; and (5) beneficiaries with only bachelor's degrees. BFCA Report at p. 15. After the issuance of the BFCA Report, USCIS adjudicators used an H-1B Petition Fraud Referral Sheet.[3]

On April 8, 2009, USCIS published a notice in the Federal Register announcing its submission of a form entitled "Compliance Review Worksheet" to the Office of Management and Budget ("OMB") for clearance. 74 Fed. Reg. 15999 (April 8, 2009) (Exhibit 4). The notice, which explained that the form would be used to record the results of on-site inspections of businesses, sought comments from the public. Yet the form itself was not attached to the notice or made available to the public for examination. Instead, USCIS provided a "Supporting Statement, Compliance Review Report, OMB Control No. 1615-NEW" in connection with the Federal Register notice that described the purpose of the document.[4] *See*

[3] The *Vaughn* Index accompanying the Declaration of Jill A. Eggleston dated October 29, 2010 and filed by defendants on December 10, 2010 ("Eggleston Decl.) describes the H-1B Petition Fraud Referral Sheet as a "companion document" to a Memorandum from Donald Neufeld dated October 31, 2008 (Exhibit 10).

[4] While the notice in the Federal Register referred to the document as a Compliance Review ***Worksheet***, the Supporting Statement instead called it a Compliance Review ***Report***. It is clear from these related records that the Worksheet and Report are one and the same document. *See also* Eggleston Decl. ¶¶ 26-30.

http://www.regulations.gov/#!documentDetail;D=USCIS-2009-0013-0002 (Exhibit 5). The statement explained that, in response to the BFCA Report and a similar study of fraud in the religious worker context, USCIS established the Administrative Site Visit Verification Program ("ASVVP") to increase the number and enhance the uniformity of on-site visits to businesses applying for visas for foreign workers. The ASVVP utilizes on-site inspections to determine whether the location of employment actually exists, and whether the beneficiary is employed at that location, performing the duties specified, and paid the salary identified in the H-1B petition. *See, e.g.,* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=836d7b8a96aa7210VgnVCM100000082ca60aRCRD&vgnextchannel=66965ddca7977210VgnVCM100000082ca60aRCRD (Exhibit 6). The Supporting Statement in the Federal Register further explained that the Compliance Review Report would be used by contract personnel who carry out these on-site visits to record the results of their on-site inspections.

Instructions in connection with completing the Compliance Review Report (a worksheet) are known and in the public domain. *See, e.g.,* New Developments in Immigration Enforcement and Compliance. Leading Lawyers on Analyzing Recent Enforcement Trends, Collaborating with Government Agencies, and Developing Compliance Programs. Thomson Reuters / Aspatore, 2010, Appendix K, "Compliance Review Report. Job Aid for Employment (H1B) – Based," pp. 278-85 (Sealed Exhibit 7); http://imminfo.com/Library/employer_issues/Compliance%20review%20report.pdf (document bearing the identifier "Updated 12/05/2008") (Sealed Exhibit 8). The instructions describe a worksheet with two parts: "SECTION 1: Administrative Site Visit

(ASV) Information" and "SECTION 2: Site Inspector." The instructions also provide a detailed list of ten questions with an explanation of when an answer to each question should be indicated as yes, no, or not determined as well as what information should be included in a "narrative" accompanying the answer. It is clear that the Compliance Review Report is intended to assist site inspectors at worksites by identifying the type of information that USCIS is seeking.

As a national association of over 11,000 attorneys and law professors who practice and teach immigration law, AILA has open lines of communication with DHS and USCIS. Although AILA sought disclosure of these documents in the course of its regular interactions with defendants, the government instead instructed AILA to follow the FOIA process. *See, e.g.*, Questions and Answers, USCIS American Immigration Lawyers Association (AILA) Meeting, March 19, 2009, at pp. 1-2, *available at* http://www.uscis.gov/files/nativedocuments/aila_aao_qa_19march09.pdf (Exhibit 9). AILA made FOIA requests, only to receive letters of denial. This action followed to compel disclosures in connection with two FOIA requests made by AILA (referred to herein as the First FOIA Request and Second FOIA Request, respectively):

> (1) a request made February 6, 2009 for "[c]opies of any and all guidance, including but not limited to memoranda, standard operating procedures and templates used for Request for Evidence regarding adjudicating H-1B petitions issued as a result of, in connection with, in light of, or related to the Benefits Fraud Assessment report" and supplemented on March 18, 2009, to specifically include "a document entitled 'H-1B Processing Fraud Referral Sheet'";
>
> (2) a request made April 13, 2009 for "[t]he Compliance Review Worksheet mentioned in 'Comment Request for Compliance Review Worksheet,' 74 FR 15999 (April 8, 2009)."

With respect to the first request, the government has alleged (while plaintiff vigorously disputes herein) that

> [t]he USCIS broadly interpreted the February 6 Request as seeking any internal guidance memoranda, operational field manuals, and other instructions to staff focusing on any policy development, implementation, strategic planning, anti-fraud initiatives, or internal procedural aspects associated with the adjudication of H-IB non-immigrant temporary foreign worker visas that had been undertaken since September 2008, the date of the BFCA Report.

Defendants' Statement of Material Facts Not in Genuine Dispute, ¶ 28; *see also* Eggleston Decl., ¶ 13.

On October 27, 2010, subsequent to the filing of AILA's complaint, the government partially released 8 pages of responsive records while claiming FOIA exemptions for significant portions thereof:

- a 4-page memorandum dated October 31, 2008 from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, directed to Field Leadership concerning "H-1B Anti-Fraud Initiatives – Internal Guidance and Procedures in Response to Findings Revealed in H-1B Benefit Fraud and Compliance Assessment," ("Neufeld Memorandum") substantially redacted in view of FOIA Exemption 2 (Exhibit 10);[5]

- a 2-page H-1B Petition Fraud Referral Sheet bearing the identifier "Rev. 08-27-2008, D10" substantially redacted in view of FOIA Exemptions 2 and 7(E) (Exhibit 11);

- a 2-page Compliance Review Report bearing the identifier "Updated 06/19/2009" substantially redacted in view of FOIA exemptions 2 and 7(E) (Exhibit 12).

[5] The government's *Vaughn* Index, Eggleston Decl. Exhibit X, as well as the government's motion only assert Exemption 2 with respect to the Neufeld Memorandum and thus only that exemption is addressed by plaintiff. When the document was produced to plaintiff on October 27, 2010, however, Exemption 7(E) was claimed as well. Plaintiff assumes that this latter claim has been reconsidered and dropped.

The government maintains, and AILA contests, that "USCIS conducted an adequate search for records responsive to the AILA's FOIA Requests and properly withheld information pursuant to Exemptions (b)(2) and (B)(7)(E)." Defendants' Memorandum at 15.

ARGUMENT

DEFENDANTS SHOULD BE DENIED SUMMARY JUDGMENT WHILE PLAINTIFF'S CROSS-MOTION SHOULD BE GRANTED

I. SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted when it can be shown "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a);[6] *Washington Post Co. v. Dep't of Health and Human Services*, 865 F.2d 320, 325 (D.C. Cir. 1989). In a FOIA case, the agency bears the burden of justifying nondisclosure, 5 U.S.C. § 552 (a)(4)(B), and the agency is thus required to submit detailed declarations identifying the documents at issue and explaining why they qualify for the claimed exemptions. *See Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992); *King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987); *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973). Declarations that are conclusory and nonspecific cannot justify an agency's decision to withhold the requested records. *See Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 906 (D.C. Cir. 1999); *Voinche v. FBI*, 940 F. Supp. 323, 327 (D.D.C. 1996), *aff''d,* 1997 U.S. App. LEXIS 19089 (D.C. Cir. June 19, 1997).

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[6] Rule 56 was revised effective December 1, 2010. However, the Advisory Committee note for the 2010 amendments states: "Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged."

The FOIA statute is unique in administrative law in that it places the burden of justifying withholding on the defendant agency and mandates *de novo* judicial review rather than the usual deferential standard of review. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989) ("Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'") (quoting 5 U.S.C. § 552(a)(4)(B)); *see also Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) ("the burden is on the agency to demonstrate, not the requester to disprove, that the materials sought . . . have not been improperly withheld."). Consistent with the Act's dominant policy of disclosure rather than secrecy, the exemptions to FOIA are to be narrowly construed. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

II. DEFENDANTS FAILED TO CONDUCT AN ADEQUATE SEARCH

Defendants have failed to demonstrate, by Declaration or *Vaughn* Index, that their search was adequate and that their withholdings were proper. In addition, Defendants' Declaration and *Vaughn* Index are facially deficient. Still further, substantial countervailing evidence demonstrates that defendants' search was not adequate. Because Defendants' burden under Fed. R. Civ. P. 56 thus has not been met, their cross-motion must be denied.

A. Defendants Failed to Meet Their Burden to Show That They Conducted an Adequate Search.

The government must conduct a reasonable search for records responsive to a FOIA request. *Oglesby v. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). In addition, the

government must demonstrate that its search was reasonably calculated to uncover relevant documents. *Steinberg v. U.S. Dept. of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). To this end, non-conclusory affidavits or declarations that explain the scope and method of an agency's search may be proffered. *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982). This Court recently held that "the affidavit or declaration submitted by the agency . . . must describe *what records* were searched, by *whom*, and through *what processes*." *McKinley v. Federal Deposit Insurance Corporation*, 2010 WL 5209337, *3 (D.D.C. 2010) (emphasis added) (citing *Hussain v. U.S. Dep't of Homeland Security*, 674 F. Supp. 2d 260, 264-65 (D.D.C. 2009)).

In this case, the Declaration of Jill A. Eggleston submitted by Defendants fails to demonstrate that the government's search was adequate. The Declaration generally explains how FOIA requests are handled by the National Records Center (NRC) and the role of each division within USCIS identified as potentially having responsive records. The Declaration, however, does not explain the search methods used by each of the identified USCIS divisions, who conducted the searches within each division, and whether the Declarant, Ms. Eggleston, is personally aware of the search procedures used within each division. The Declaration provides conclusory statements about the search but provides none of the details discussed above:

> After determining that a thorough search had been conducted of all locations where records responsive to Plaintiffs FOIA request could reasonably be expected to be found, and that the most knowledgeable individuals assigned to those locations had been consulted regarding the subject request . . . .

Eggleston Decl. at ¶ 22; *see also* Eggleston Decl. at ¶¶ 15, 18, 19 ("OFO had no responsive documents to contribute to the effort . . . SCOPS had nothing to contribute . . .

No responsive records were found . . ."). Compare, in contrast, the Declaration filed by the same declarant, Jill A. Eggleston, on June 24, 2010 in the *TechServe Alliance v. Napolitano* case (D.D.C. Docket No. 1:10-cv-00353-HHK) (Exhibit 13).[7]

The deficiencies discussed above undermine the "sufficiency" of the declaration. *See McKinley*, 2010 WL 5209337, *4 (citing *Prison Legal News v. Lappin*, 603 F. Supp. 2d 124, 127 (D.D.C. 2009)); and *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007)).

Thus, because Defendants' Declaration is deficient on its face, Defendants have failed to meet their burden to show that they conducted an adequate search.

B. Substantial Countervailing Evidence Demonstrates that Defendants Did Not Conduct an Adequate Search.

Substantial countervailing evidence demonstrates that defendants' Declaration and *Vaughn* Index are facially deficient and that the search was inadequate.

A court may only rely on the government's supporting affidavits when they are "relatively detailed and nonconclusory and submitted in good faith." *Morley v. Central Intelligence Agency*, 508 F.3d 1108, 1116 (D.C. Cir. 2007) (citing *Goland v. CIA*, 607 F.2d 339, 352 (D.C.Cir.1978)). However, "[e]ven if these conditions are met the requester may nonetheless produce *countervailing evidence*, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." *Morley*, 508 F.3d at 1116 (citing *Founding Church of Scientology of Wash., D. C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir.1979)); *see also Perry*, 684 F.2d at 127 ("*[I]n the absence of countervailing evidence or apparent inconsistency of proof*, affidavits that explain in reasonable detail the scope and method

[7] By letter dated August 13, 2010, plaintiff informed the Court that there appears to be at least a partial overlap in the documents sought by the plaintiffs in the present action and the *TechServe* litigation.

of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA.") (emphasis added).

In this case, as discussed above, the government's supporting declaration is not sufficiently detailed and is conclusory. In addition, substantial countervailing evidence demonstrates that Defendants' Declaration and *Vaughn* Index are facially deficient.

1. *Numerous responsive documents were overlooked.*

Defendants' Declaration and *Vaughn* Index identify four responsive documents consisting of eight pages only. An examination of the Declaration and *Vaughn* Index submitted in the *TechServe Alliance v. Napolitano* case (D.D.C. Docket No. 1:10-cv-00353-HHK) (Exhibit 13) reveal numerous other potentially responsive documents to AILA's first FOIA request that allegedly was broadly construed by the government:

- H1-B BFCA Q&A 8/28/08 (identified as Document No. 3 in the *Vaughn* Index of the *TechServe* case). This document appears to include guidance in the form of Q&A which could be used for Request for Evidence regarding adjudicating H-1B petitions issued as a result of, in connection with, in light of, or related to the BFCA Report. Thus, this document appears to be responsive to Plaintiff's First FOIA Request.

- H1-B BFCA Summary (as of 8/28/08) and H1-B BFCA Summary (as of 8/20/08) (identified as Documents Nos. 4 and 5 in the *Vaughn* Index of the *TechServe* case). These documents appear to include guidance which could be used for determining whether a Request for Evidence regarding adjudicating H-1B petitions should be issued and these documents relate to the BFCA Report. Thus, these documents appear to be responsive to plaintiff's First FOIA Request.

- Neufeld Memoranda (identified as Documents Nos. 9-12 in the *Vaughn* Index of the *TechServe* case). These documents were withheld in full but appear, from the description, as guidance documents relating to the BFCA Report so they would be responsive to Plaintiff's First FOIA Request. Each of the Neufeld documents appears to

be seven pages or more. In this case, only one Neufeld memorandum was listed in the *Vaughn* Index and partially released but it is only four pages long. Thus, other responsive Neufeld memoranda are clearly missing from the production.

- Vermont Service Center, I-129 H1B Petitions and Adjudication Guide (identified as Document No. 14 in the *Vaughn* Index of the *TechServe* case) and H-1B Primary Fraud Indicators for Referral, California Service Center (identified as Documents Nos. 18 and 20 in the *Vaughn* Index of the *TechServe* case). While the *Vaughn* Index descriptions of these documents do not mention the BFCA Report, the Neufeld memo which was partially released to Plaintiff in this case specifies that the "Vermont and California Service Centers will implement these changes in the adjudication and fraud referral process associated with H-1B petitions" (see page 1 of Exhibit 10). Given that Document No. 14 is dated March 17, 2009 (no date is provided for Documents Nos. 18 and 20), after the date of the Neufeld memo, it probably implements the process and policy changes relating to the H-1B BFCA which are discussed in the Neufeld memo. Thus, at least Document No. 14 would also be responsive to plaintiff's First FOIA Request.

- Emails dated August, November and December 2008 relating to changes to the fraud referral process (identified as Documents Nos. 17, 21 and 22 in the *Vaughn* Index of the *TechServe* case). The dates and descriptions of these emails suggest that they are related to the BFCA Report and within the scope of plaintiff's First FOIA Request.

Thus, numerous responsive documents have not been disclosed to plaintiff in this case and have not been included in the government's *Vaughn* Index for AILA's first FOIA request. Significantly, some of these documents appear to originate from the same units or divisions which received plaintiff's FOIA requests. For instance, as discussed above, the *Vaughn* Index from the *TechServe* case (Exhibit 13) lists documents from the Vermont and California Service Centers. Yet, the Eggleston Declaration in this case

states that "[n]o responsive records were found at either service center" (Eggleston Dec. at ¶ 19).

This countervailing evidence noted above indicates that Defendants' search was not adequate and the *Vaughn* Index is deficient on its face.

2. *The government failed to identify or produce all pages of the Compliance Review Report.*

Apparently only in response to plaintiff's Second FOIA Request, a 2-page "Compliance Review Report" was produced by the government in significantly redacted form. (Exhibit 12). As described *supra*, however, the government also provides instructions in connection with completing the Compliance Review Report (a worksheet). *See, e.g.,* New Developments in Immigration Enforcement and Compliance. Leading Lawyers on Analyzing Recent Enforcement Trends, Collaborating with Government Agencies, and Developing Compliance Programs. Thomson Reuters / Aspatore, 2010, Appendix K, "Compliance Review Report. Job Aid for Employment (H1B) – Based," pp. 278-85 (Sealed Exhibit 7); http://imminfo.com/Library/employer_issues/Compliance%20review%20report.pdf (document bearing the identifier "Updated 12/05/2008") (Sealed Exhibit 8). Those instructions, available in the public domain, *id.*, describe in detail the content of the worksheet. The Compliance Review Report released by defendants thus is incomplete, as are the government's *Vaughn* indexes. The instruction pages associated with the worksheet should have been disclosed by the government in connection with AILA's FOIA requests.

Moreover, only the version bearing the identifier "Updated 06/19/2009" was produced. No other versions of the Compliance Review Report are identified in the

government's *Vaughn* indexes or produced. Because this record was "updated," an earlier version must exist.

Substantial countervailing evidence therefore demonstrates that Defendants' Declaration and *Vaughn* Index are deficient. And even if Defendants' Declaration is deemed sufficient, the conflicting evidence demonstrates that an adequate search has not been conducted.

III. DEFENDANTS ARE NOT ENTITLED TO THE ASSERTED EXEMPTIONS AND THEIR WITHHOLDINGS ARE NOT JUSTIFIED

A. The Withheld Portions of the Documents Are in the Public Domain.

The redacted contents of the Compliance Review Report, the H-1B Petition Fraud Referral Sheet, and the Neufeld Memorandum are in the public domain and should be released in their entirety.

The public domain doctrine is a recognized defense to a FOIA exemption claim. Under the public domain doctrine, "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999). What constitutes a permanent public record can be determined from the common law. *Id.* ("As a threshold matter, our decisions construing the venerable common-law right to inspect and copy judicial records make it clear that audio tapes enter the public domain once played and received into evidence.").

1. *The Compliance Review Report.*

In this case, the Compliance Review Report instructions are available in the public domain. The instructions have been published by a major legal publishing house: New Developments in Immigration Enforcement and Compliance. Leading Lawyers on Analyzing Recent Enforcement Trends, Collaborating with Government Agencies, and Developing Compliance Programs. Thomson Reuters / Aspatore, 2010, Appendix K, "Compliance Review Report. Job Aid for Employment (H1B) – Based," pp. 278-85 (Sealed Exhibit 7). In addition, the instructions are available on the internet. *See, e.g.,* Complaint at ¶ 15, citing http://imminfo.com/Library/employer_issues/Compliance%20review%20report.pdf (Sealed Exhibit 8).

The detailed content of the instructions appears to directly correspond to the Compliance Review Report (worksheet) produced by defendants in redacted form. *Compare* Exhibit 12 (redacted Compliance Review Report *worksheet* as produced by defendants to plaintiff on October 27, 2010), Sealed Exhibit 7 (Compliance Review Report *instructions* published by Thomson Reuters / Aspatore in 2010, and Sealed Exhibit 8 (Compliance Review Report *instructions* available on the internet at http://imminfo.com/Library/employer_issues/Compliance%20review%20report.pdf). Just like the instructions available in the public domain, the redacted Compliance Review Report produced by defendants is a worksheet with two parts, "SECTION 1: Administrative Site Visit (ASV) Information" and "SECTION 2: Site Inspector," and also includes ten questions (Items 1-10), spaces to indicate yes ("Y"), no ("N"), or not determined ("ND"), as well as spaces to include a "narrative" to be completed for each Item.

Still further, the questions covered in the instructions also correspond to defendants' publicly available description of information to be sought by inspectors during site visits. *See* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=836d7b8a96aa7210VgnVCM100000082ca60aRCRD&vgnextchannel=66965ddca7977210VgnVCM100000082ca60aRCRD (Exhibit 6).[8]

The Compliance Review Report instructions clearly are in the public domain and should have been released pursuant to plaintiff's FOIA requests.[9] Because of the correspondence between the content of the instructions and the content of the worksheet, full release of the worksheet also is appropriate.

2. *The H-1B Petition Fraud Referral Sheet.*

The H-1B Petition Fraud Referral Sheet (Exhibit 11) that was only partially released to plaintiff in this case (see pages 05-06 of the *Vaughn* index) also is fully in the public domain and thus releasable under FOIA. Indeed, the H-1B Petition Fraud Referral Sheet is part of a judicial record and as such, it is in the public domain. See *Cottone*, 193 F.3d at 554 ("Therefore, until destroyed or placed under seal, tapes played in open court and admitted into evidence-no less than the court reporter's transcript, the parties' briefs, and the judge's orders and opinions-remain a part of the public domain.").

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[8] In fact, these are the same questions that immigration officers sought answers to during site inspections carried out as part of the BFCA. *See* BFCA Report at 5-6 (Exhibit 2). USCIS's disclosure of these questions in the BFCA Report further demonstrates that the content of the worksheet is in the public domain.

[9] Publication on the internet constitutes public disclosure. *See, e.g., Religious Technology Center v. Lerma*, 908 F. Supp. 1362, 1368 (E.D. Va. 1995) (even a trade secret made available on the internet "is effectively part of the public domain, impossible to retrieve.").

In particular, the H-1B Petition Fraud Referral Sheet is attached as part of Exhibit A (Sealed Exhibit 15) to a Declaration filed by Jill A. Eggleston on June 24, 2010 in the *TechServe Alliance v. Napolitano* case (D.D.C. Docket No. 1:10-cv-00353-HHK) (Exhibit 13). The government itself in the *TechServe* case, made the H-1B Petition Fraud Referral Sheet a court record. That document has been available to the public through PACER for over six months. The H-1B Petition Fraud Referral Sheet is part of the public domain and must be fully released in response to plaintiff's FOIA request.

3. *The Neufeld Memorandum.*

At least some of the redacted content in the Neufeld Memorandum (see pages 01-04 of the *Vaughn* index) is also in the public domain and releasable under FOIA. For instance, the withheld information appears from the document itself to relate to primary fraud indicators. As described *supra*, the BFCA Report—readily available in the public domain as a result of public release by USCIS[10]—identified "several primary fraud or technical violation(s) indicators": (1) firms with 25 or fewer employees; (2) firms with an annual gross income of less than $10 million; (3) firms in existence less than 10 years; (4) H-1B petitions filed for accounting, human resources, business analysts, sales, and advertising occupations; and (5) beneficiaries with only bachelor's degrees. BFCA Report at p. 15 (Exhibit 2).

The Neufeld Memorandum, dated October 31, 2008, was issued subsequent to the BFCA Report and clearly makes reference to it when introducing the guidance

[10] *See* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=17622 (Exhibit 14).

concerning fraud indicators. Disclosure in the Neufeld Memorandum (Exhibit 10) thus appears to be improperly redacted.

B. Exemption 2 does not apply.

At least some of the withheld material does not qualify for withholding under 5 U.S.C. § 552(b)(2), i.e. FOIA Exemption 2.

Exemption 2 permits the withholding of material "related solely to the internal personnel rules and practices of an agency." For Exemption 2 to be applicable, the material should first fall within the statutory language as a personnel rule or internal practice of the agency. *Schwaner v. Department of Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990). The agency must then disclose the material unless the material relates to trivial administrative matters of no genuine public interest ("low" (b)(2) exemption) or disclosure may risk circumvention of agency regulation ("high" (b)(2) exemption).[11] *Id.*

To make the threshold determination that the material falls within the statutory language, the government must demonstrate that the information is "predominantly internal." *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1112 (D.C. Cir. 2007). Courts have found that information is not predominantly internal if it regulates activities among members of the public or sets standards to be followed by agency personnel in deciding whether to proceed against or take action affecting members of the public." *Robinson v. Att'y Gen. of the United States*, 534 F. Supp. 2d 72, 80 (D.D.C. 2008); *see also Public Citizen, Inc. v. OMB*, 569 F.3d 434, 442 (D.C. Cir. 2009) (finding OMB

[11] Notably, the Supreme Court has granted certiorari in a case that challenges the judicially-created "high (b)(2)" exemption. Petitioners argue that courts have improperly expanded the (b)(2) exemption to encompass materials not related solely to internal employee relations. *Milner v. U.S. Dep't of the Navy*, 575 F.3d 959 (9th Cir. 2009), *cert. granted*, *Milner v. U.S. Dep't of the Navy* (June 28, 2010) (No. 09-1163).

material that had "significant external effects" was not predominantly internal). Courts have repeatedly emphasized that FOIA does not protect against disclosure of this type of "secret law" developed and implemented by an agency. *Public Citizen,* 569 F.3d at 441 (citation omitted).

In this case, the government invoked the "high" (b)(2) exemption to justify withholding portions of the Neufeld Memorandum, the H-1B Petition Fraud Referral Sheet, and the Compliance Review Report. However, the information withheld is meant to regulate activities among members of the public and sets standards to be followed by agency personnel in deciding whether to proceed against or take action affecting members of the public. As such, the withheld content is not predominantly internal.

In addition, at least some of the withheld material does not risk circumvention of agency regulation. For instance, the indicators described in the BFCA Report—which clearly have a bearing on the Neufeld Memorandum and the H-1B Petition Fraud Referral Sheet, relate to gross income of the company, the number of employees, the number of years the company has been in existence, and the occupation of the petitioner. This information does not indicate if and how to circumvent agency regulation. In addition, a potential fraudster cannot easily change the gross income of the company, the number of employees, the number of years the company has been in existence, or the occupation of the petitioner to be outside of the categories at risk and to circumvent agency regulation.

Moreover, to the extent the withheld documents would shed light on criteria used to evaluate employers, disclosure would allow employers to meet agency standards. *See e.g.*, *Don Ray Drive-A-Way Co. v. Skinner*, 785 F. Supp. 198, 199-200 (D.D.C. 1992)

(finding disclosure of safety ratings information by the Federal Highway Administration would not aid in circumvention of the law but would facilitate understanding of and compliance with agency standards).

Still further, courts have rejected justifications for withholding when they fail to sufficiently articulate, with adequate evidentiary support, the potential harm from disclosure. *Maydak v. DOJ*, 362 F. Supp. 2d 316, 322 (D.D.C. 2005), *reconsideration denied*, 579 F. Supp. 2d 105 (D.D.C. 2008). In this case, the government summarily concludes that the withheld information would inform potential fraudsters of fraud "trigger events" and investigatory techniques, or the types of behaviors that trigger closer scrutiny by immigration-enforcement officials such that potential fraudsters could more easily evade detection. As discussed above, not all the withheld information indicates fraud trigger events or can be easily changed.

Thus, at least some of the withheld material does not qualify for withholding under FOIA exemption (b)(2).

C. Exemption 7(E) does not apply.

At least some of the withheld material does not qualify for withholding under 5 U.S.C. § 552(b)(7)(E), i.e. FOIA Exemption 7(E), even though defendants invoked this exemption to allegedly justify withholding portions of the H1-B Petition Fraud Referral Sheet (Exhibit 11) and the Compliance Review Report (Exhibit 12).

Under 5 U.S.C. § 552(b)(7), the government must first establish the records at issue were compiled for law enforcement purposes. In addition, Exemption 7(E) requires a showing that the records

> (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or

> prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

5 U.S.C. § 552(b)(7)(E) (2006). *See also PHE, Inc. v. DOJ*, 983 F.2d 248, 250 (D.C. Cir. 1993) (stating that under Exemption 7(E), agency "must establish that releasing the withheld material would risk circumvention of the law"). However, exemption 7(E) does not protect a technique or procedure that is well known to the public. *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 179 (D.D.C. 2004) (recognizing exemption's protection for techniques "not well-known to the public"); *Goldstein v. Office of Indep. Counsel*, No. 87-2028, 1999 WL 570862, *14 (D.D.C. July 29, 1999) (finding that portions of two documents were improperly withheld, because they did not contain "a secret or an exceptional investigative technique"); *Campbell v. DOJ*, No. 89-3016, 1996 WL 554511, *10 (D.D.C. Sept. 19, 1996) (declaring that Exemption 7(E) applies to "obscure or secret techniques" and refusing to apply it to "basic" techniques), *rev'd & remanded on other grounds*, 164 F.3d 20 (D.C. Cir. 1998).

As discussed above, much of the redacted content of the partially withheld documents is publicly available, having been disclosed by USCIS. Moreover, content of both the Compliance Review Report and the H-1B Petition Fraud Referral Sheet is published widely on the internet and thus known to the public. Furthermore, there are many reports on the internet that describe site visits and the questions that are asked during such visits (which questions are presumably included in the redacted content of the partially withheld documents). *See, e.g.,* http://www.ilw.com/articles/2010,0512-nachman.shtm (Exhibit 16); http://www.usabal.com/tabid/93/mid/530/newsid530/2736/Default.aspx (Exhibit 17); http://www.mvalaw.com/news-publications-76.html (Exhibit 18). Finally, some of these

alleged fraud indicators are known to the public. The publicly available BFCA Report concluded that:

> 1. Firms with 25 or fewer employees have higher rates of fraud or technical violation(s) than larger-sized companies.
>
> 2. Firms with an annual gross income of less than $10 million have higher rates of fraud or technical violation(s) than firms with an annual gross income greater than $10 million.
>
> 3. Firms in existence less than 10 years (i.e., 1995 and after) have higher incidences of fraud or technical violation(s) than those in existence for more than 10 years (i.e., before 1995).
>
> 4. The results indicate that H-1B petitions filed for accounting, human resources, business analysts, sales and advertising occupations are more likely to contain fraud or technical violation(s) than other occupational categories.
>
> 5. Beneficiaries with only bachelor's degrees had higher fraud or technical violation(s) rates than did those with graduate degrees.

BFCA Report at p. 15 (Exhibit 2).

Additionally, and as discussed above with respect to Exemption 2, at least some of the withheld material does not risk circumvention of agency regulation. Indeed, some of information collected relates to the gross income of the company, the number of employees, the number of years the company has been in existence, and the occupation of the petitioner.

Thus, at least some of the withheld material does not qualify for withholding under 5 U.S.C. § 552(b)(7)(E), i.e. FOIA Exemption 7(E).

D. Reasonably segregable information was withheld.

As discussed above, well-known and public information was withheld from disclosure. Such information was discrete and reasonably segregable but nevertheless was not released.

"If a record contains information that is exempt from disclosure, any reasonably segregable information must be released after deleting the exempt portions, unless the nonexempt portions are inextricably intertwined with exempt portions." *McKinley v. Federal Deposit Insurance Corp.*, 2010 WL 5209337, *7 (D.D.C. 2010) (*citing Hussain v. U.S. Dep't of Homeland Security*, 674 F. Supp. 2d 260, 272 (D.D.C. 2009)).

The gross income of a company, the number of employees, the number of years the company has been in existence, and the occupation of the petitioner are well-known fraud indicators. BFCA Report at p. 15 (Exhibit 2). To the extent such content is organized in separate items or separate bullet points—such as in the H-1B Petition Fraud Referral Sheet and the Compliance Review Report—it is discrete and reasonably segregable.

Defendants therefore failed to meet their burden to demonstrate that all reasonably segregable information has been disclosed.

IV. THE APA CLAIM SHOULD NOT BE DISMISSED

Finally, plaintiff's claim under the APA was made due to defendants' failure to timely respond to plaintiff's FOIA requests and withholding of documents in a manner that was arbitrary, capricious, and an abuse of discretion. Dismissal of the APA claim is not appropriate at this time particularly in view of defendant's failure to conduct adequate

searching and failure to identify and/or produce responsive documents or all non-exempt portions thereof.[12]

V. CONCLUSION

Defendants failed to carry their burden of demonstrating that they conducted an adequate search, and that the records identified in the *Vaughn* Indexes are exempt from disclosure. Accordingly, plaintiff respectfully requests that the Court grant its cross-motion for summary judgment and deny Defendants' motion for summary judgment.

Dated: January 14, 2011

Respectfully submitted,

/s/ Seth A. Watkins

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[12] At the time of filing the Complaint in this action on July 20, 2010, defendants had not even acknowledged let alone responded to plaintiff's March 11, 2010 administrative appeal of the denial of the First FOIA Request, in violation of the APA. Defendants finally responded to that appeal by letter dated October 27, 2010. *See* Eggleston Decl., Exhibit W.

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