

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

AMERICAN IMMIGRATION  
LAWYERS ASSOCIATION  
1331 G Street, NW, Suite 300  
Washington, DC 20005-3142,

Plaintiff,

v.

No. \_\_\_\_\_

UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY  
Office of General Counsel  
20 Massachusetts Avenue, NW  
Washington, DC 20528

and

UNITED STATES CITIZENSHIP AND  
IMMIGRATION SERVICES  
20 Massachusetts Avenue, NW  
Washington, DC 20528,

Defendants.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*, seeking the release of withheld records 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 American Immigration Lawyers Association (“AILA”) seeks declaratory, injunctive, and other appropriate relief with

respect to the unlawful withholding of these records by the United States Department of Homeland Security (“DHS”) and its component the United States Citizenship and Immigration Services (“USCIS”) with oversight responsibility for immigration to the United States.

### **Jurisdiction and Venue**

2. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 552(a)(4)(B). In addition, this Court has jurisdiction pursuant to the APA, 5 U.S.C. §§ 701-706. This Court has jurisdiction to grant declaratory and further necessary or proper relief pursuant to 28 U.S.C. §§ 2201-2202 and Federal Rules of Civil Procedure 57 and 65.

3. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(2) as both plaintiff and defendants are located in the District of Columbia and because a substantial part of the events or omissions giving rise to the claim occurred in the jurisdiction.

### **The Parties**

4. Plaintiff AILA is a national association of over 11,000 attorneys and law professors who practice and teach immigration law. Founded in 1946, AILA is a nonpartisan, not-for-profit organization that provides continuing legal education, information, professional services, and expertise through its 36 chapters and over 50 national committees. AILA member attorneys represent U.S. families seeking permanent residence for close family members, as well as U.S. businesses seeking talent from the global marketplace. AILA members also represent foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis.

5. Defendant DHS is a Department of the Executive Branch of the United States Government and is responsible for enforcing federal immigration laws. DHS has possession and control over the records sought by plaintiff. DHS is an agency within the meaning of 5 U.S.C. § 552(f)(1).

6. Defendant USCIS is a component of DHS and is responsible for the administration of immigration adjudication functions and establishing policies and priorities for immigration services . USCIS has possession and control over the records sought by plaintiff. USCIS is an agency within the meaning of 5 U.S.C. § 552(f)(1).

#### **NATURE OF THE ACTION**

7. 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.

8. 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, a prospective employer must file and have granted a nonimmigrant 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.

9. At a “high level,” the 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>.

10. However, following a September 2008 “H-1B Benefit Fraud & Compliance Assessment” by USCIS, *see* [http://www.uscis.gov/files/nativedocuments/H-1B\\_BFCA\\_20sep08.pdf](http://www.uscis.gov/files/nativedocuments/H-1B_BFCA_20sep08.pdf), 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. At the same time, the tightening of petition processing was accompanied by a near vacuum of publicly available information to guide petitioners on compliance in the new era of heightened scrutiny. Still further, USCIS dramatically increased the frequency of unannounced worksite inspections—expected to reach 25,000 visits in 2010 alone—in connection with H-1B cases.

11. More specifically, as explained in a letter from USCIS Director Alejandro Mayorkas to Senator Charles Grassley dated November 10, 2009, *see* <http://www.nationofimmigrants.com/wp-content/uploads/2009/12/Mayorkas%20letter%20to%20Grassley%20re%20H-1B%20visa%20fraud.pdf>, USCIS issued field guidance to agency adjudicators instructing them to issue RFEs (and Notices 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. Disclosure of this guidance has been sought by AILA and its nondisclosure forms part of the present FOIA dispute.

12. Still further, after the issuance of the “H-1B Benefit Fraud & Compliance Assessment,” USCIS adjudicators also began to use an H-1B Petition Fraud Referral Sheet. On information and belief, content in this document is analogous to content in the “H-1B Benefit Fraud & Compliance Assessment” published in 2008. Disclosure of the H-1B Petition Fraud Referral Sheet has been sought by AILA and its nondisclosure forms part of the present FOIA dispute.

13. 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. 66 Fed. Reg. 15999 (April 8,

2009). 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.

Disclosure of this Compliance Review Worksheet has been sought by AILA and its nondisclosure forms part of the present FOIA dispute.

14. USCIS provided a supporting statement with the Federal Register notice that described the purpose of the Compliance Review Worksheet. *See* <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480953f83>.

The statement explained that, in response to the H-1B Benefit Fraud & Compliance Assessment 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. The statement further explained that the Compliance Review Worksheet would be used by contract personnel who carry out these on-site visits to record the results of their on-site inspections.

15. Another document that has been publicly disclosed on the internet, is related to the ASVVP, and is relevant to the government’s withholding of the Compliance Review Worksheet from disclosure under FOIA is entitled “Compliance Review Report” and subtitled “Job Aid for Employment (H1B – Based).” *See, e.g.*, [http://imminfo.com/Library/employer\\_issues/Compliance%20review%20report.pdf](http://imminfo.com/Library/employer_issues/Compliance%20review%20report.pdf). The

Compliance Review Report is intended to assist site inspectors at worksites by identifying the type of information that USCIS is seeking. On information and belief, the Compliance Review Report that has been publicly available on the internet includes the same or similar information as the Compliance Review Worksheet that forms part of the present dispute.

16. USCIS H-1B worksite visits also have been discussed and described in publicly-circulated documents, such as a “Practice Pointer” posted on AILA’s website. *See, e.g.,* <http://www.immigrateusa.us/content/view/1838/69/>. These documents provide details concerning the questions asked during the worksite inspections and the procedures followed by those conducting the site visits on behalf of USCIS.

17. The reliability and fairness of an adjudication process—especially in an area with such great importance as immigration—can only be evaluated if the procedures and actions of the government agency are transparent. To this end, AILA filed two FOIA requests with USCIS seeking detailed information relating to the current procedures for reviewing and adjudicating H-1B cases. The public interest in these procedures is particularly high because the aforementioned recent measures implemented by USCIS concerning H-1B petitions have caused confusion and concern among U.S. businesses that legitimately depend on temporary foreign workers with specialized knowledge in order to operate successfully. The measures additionally have caused confusion and concern on the part of foreign workers named as beneficiaries on H-1B petitions.

18. The FOIA requests lodged by AILA seek to obtain records of particular importance in educating businesses, foreign workers, the bar, and the public at large concerning compliance with the H-1B rules, regulations, and associated law. This action

concerns the failure of DHS and its component USCIS to release requested records under FOIA.

**PLAINTIFF'S FOIA REQUESTS AND  
DEFENDANTS' FAILURE TO COMPLY WITH FOIA**

**First FOIA Request**

19. By letter dated February 6, 2009, AILA submitted a FOIA request to USCIS in which it requested:

Copies 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.”

*See* Attachment 1.

20. By letter dated March 18, 2009, AILA supplemented its request and additionally requested “a document entitled ‘H-1B Processing Fraud Referral Sheet’.”

*See* Attachment 2.

21. By letter dated March 20, 2009, USCIS and DHS acknowledged receipt of the original request and supplement (collectively, “First FOIA Request”), assigned case number NRC2009007831, but denied the request for expedited processing. *See* Attachment 3.

22. Nearly one year after AILA’s original request, by letter dated January 12, 2010, USCIS and DHS identified six pages of responsive record(s) and denied the First FOIA Request in full pursuant to three exemptions – 5 U.S.C. §§ 552(b)(2) (internal agency rules), (b)(5) (inter- and intra-agency memoranda) and (b)(7)(E) (law enforcement). *See* Attachment 4. Other than citing these FOIA exemptions, USCIS



provided neither any identification of the withheld record(s) nor any explanation as to why the withheld records actually were covered by the asserted exemptions.

23. By letter dated March 11, 2010, AILA filed an administrative appeal of the denial of the First FOIA Request. *See* Attachment 5. In particular, AILA appealed the withholding of the six pages of responsive record(s) from disclosure by USCIS and DHS. AILA also challenged (i) the adequacy of the search for records responsive to the First FOIA Request, (ii) the failure to segregate non-exempt information from allegedly exempt information, and (iii) the alleged applicability of the cited FOIA exemptions to the records sought.

24. AILA has not received any written acknowledgment from USCIS and DHS concerning its administrative appeal with respect to the First FOIA Request.

25. USCIS and DHS have failed to disclose any records in response to the First FOIA Request.

26. Records responsive to the First FOIA Request that should have been disclosed by defendants include, but are not limited to: (1) field guidance to agency adjudicators instructing them to issue Requests for Evidence and (2) an H-1B Petition Fraud Referral Sheet.

27. AILA subsequently sent DHS a letter dated April 27, 2010 in which it reiterated its appeal for the withheld documents in an attempt to have the matter resolved without litigation. *See* Attachment 6.

### **Second FOIA Request**

28. By letter dated April 13, 2009, AILA submitted another FOIA request to USCIS (“Second FOIA Request”) and requested “[t]he Compliance Review Worksheet

mentioned in ‘Comment Request for Compliance Review Worksheet,’ 74 FR 15999 (April 8, 2009),” *see* Attachment 7, a form for use by USCIS contract personnel to record the results of visits to businesses petitioning for H-1B temporary workers.

29. By letter dated June 9, 2009, which assigned the FOIA request case number NRC2009023483, USCIS and DHS denied the Second FOIA Request in full pursuant to two exemptions – 5 U.S.C. §§ 552(b)(2) (internal agency rules) and (b)(7)(E) (law enforcement). *See* Attachment 8. Other than citing these FOIA exemptions, USCIS failed to provide any explanation as to why the withheld record actually was covered by the asserted exemptions.

30. By letter dated August 7, 2009, AILA filed an administrative appeal of the denial of the Second FOIA Request. Attachment 9. In particular, AILA appealed the withholding of the responsive record from disclosure by USCIS and DHS. AILA also challenged the alleged applicability of the cited FOIA exemptions to the record sought.

31. By letter dated February 18, 2010, which assigned the appeal case number APP2009000743, USCIS and DHS denied AILA’s administrative appeal and affirmed the “total denial” decision with respect to the Second FOIA Request. Attachment 10.

32. USCIS and DHS have failed to disclose any records in response to the Second FOIA Request.

33. The record responsive to the Second FOIA Request that should have been disclosed by defendants is the Compliance Review Worksheet.

34. AILA subsequently sent DHS a letter dated April 27, 2010 in which it reiterated its appeal for the withheld documents in an attempt to have the matter resolved without litigation. *See* Attachment 6.

**EXHAUSTION OF ADMINISTRATIVE REMEDIES**

35. USCIS and DHS have failed to comply with the time limits set forth in 5 U.S.C. § 552(a)(6)(A) or extend those time limit provisions pursuant to 5 U.S.C. § 552(a)(6)(B) with respect to the First FOIA Request. Plaintiff AILA has exhausted any and all administrative remedies with respect to USCIS and DHS in connection with the First FOIA Request.

36. Plaintiff AILA has exhausted any and all administrative remedies with respect to USCIS and DHS in connection with the Second FOIA Request.

**First Cause of Action:**  
**Violation of the Freedom of Information Act for  
Failure to Disclose Agency Records Pursuant to the First FOIA Request**

37. Plaintiff repeats and re-alleges paragraphs 1-36 above.

38. Plaintiff AILA has a legal right under FOIA to obtain the agency records requested from defendants DHS and USCIS in the First FOIA Request, and no legal basis exists for defendants' failure to make available the requested records.

39. Defendants' failure to make reasonable efforts to search for responsive records, and wrongful withholding of agency records, sought in plaintiff's First FOIA Request violates FOIA, 5 U.S.C. §§ 552(a)(3)(A), 552(a)(3)(C), and 552(a)(6)(A) as well as the DHS and USCIS regulations promulgated thereunder.

**Second Cause of Action:**  
**Violation of the Freedom of Information Act for  
Failure to Disclose Agency Records Pursuant to the Second FOIA Request**

40. Plaintiff repeats and re-alleges paragraphs 1-39 above.

41. Plaintiff AILA has a legal right under FOIA to obtain the agency record requested from defendants DHS and USCIS in the Second FOIA Request, and no legal basis exists for defendants' failure to make available the requested record.

42. Defendants' wrongful withholding of the agency record sought in plaintiff's Second FOIA Request violates FOIA, 5 U.S.C. §§ 552(a)(3)(A) as well as the DHS and USCIS regulations promulgated thereunder.

**Third Cause of Action:**  
**Violation of the Administrative Procedure Act for**  
**Failure Timely to Respond to Request for Agency Records**

43. Plaintiff repeats and re-alleges paragraphs 1-42 above.

44. Defendants' failure to timely respond to plaintiff's requests for agency records, and defendants' withholding of agency records, constitutes agency action unlawfully withheld and unreasonably delayed, in violation of the APA, 5 U.S.C. §§ 701-06. Defendants' failure to timely respond and withholding each are arbitrary, capricious, an abuse of discretion, not in accordance with law and without observance of procedure required by law, all in violation of the APA.

**REQUESTS FOR RELIEF**

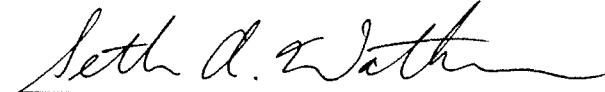
WHEREFORE, plaintiff requests that judgment be entered in its favor and against defendants, and that:

- (a) defendants and any of defendants' agents or other persons, departments, or components acting for, with, by, through or under them be ordered to conduct a reasonable search for records responsive to plaintiff's requests under the Freedom of Information Act;

- (b) defendants and any of defendants' agents or other persons, departments, or components acting for, with, by, through or under them be enjoined and restrained from continuing to withhold information relevant to plaintiff's requests under the Freedom of Information Act and in violation of the APA;
- (c) the Court declare that the requested records are not exempt from disclosure under the Freedom of Information Act and order defendants to disclose the requested records in their entireties and make copies available to plaintiff;
- (d) the Court enter a judgment awarding plaintiff reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412; and
- (e) the Court award all other such relief to plaintiff as this Court deems just, proper and equitable.

Dated: July 20, 2010

Respectfully submitted,



Seth A. Watkins (D.C. Bar # 467470)  
Charles F. Schill (D.C. Bar # 230326)  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036-1795  
Telephone: (202) 429-3000  
Facsimile: (202) 429-3902

Of Counsel:  
Mary Kenney\*  
Emily Creighton\*  
AMERICAN IMMIGRATION COUNCIL  
1331 G Street, NW, Suite 200  
Washington, DC 20005-3141  
Telephone: (202) 507-7500  
Facsimile: (202) 742-5619

\* moving for *pro hac vice* admission

*Attorneys for Plaintiff  
American Immigration  
Lawyers Association*

# **ATTACHMENT 1**



AILA National Office  
Suite 300  
1331 G Street, NW  
Washington, DC 20005

Tel: 202.507.7600  
Fax: 202.783.7853

[www.aila.org](http://www.aila.org)

Jeanne A. Butterfield  
*Executive Director*

Susan D. Quarles  
*Deputy Director, Finance & Administration*

Crystal Williams  
*Deputy Director, Programs*

February 6, 2009

U.S. Citizenship and Immigration Services  
National Records Center, FOIA/PA Office  
P. O. Box 648010  
Lee's Summit, MO 64064-8010

VIA USPS

**Re: FOIA Request Regarding Copies 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.**

Dear Sir/Madam:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the following information is hereby requested<sup>1</sup>: Copies 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.

Founded in 1946, the American Immigration Lawyers Association (AILA) is the national association of over 11,000 attorneys and law professors who practice and teach immigration law. AILA is a nonpartisan, not-for-profit organization that provides its members with

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<sup>1</sup> As an executive department, the United States Citizenship and Immigration Service ("USCIS") is an "agency" of the United States government pursuant to 5 U.S.C. § 552(f)(1) of the FOIA and is therefore subject to the requirements of said Act.

continuing legal education and information. AILA publishes newsletters, magazines, right-to-know documents, and other materials that are disseminated through print and internet media. As such AILA is a "representative of the news media," and fees associated with the processing of this request should therefore be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II). The records requested are not sought for commercial use, and AILA plans to disseminate the information disclosed as a result of this FOIA request through the channels described above.

Pursuant to 5 USC 552(a)(4)(A)(v) please inform us if said charges will exceed \$250.

American Immigration Lawyers Association,  
FOIA ACTION COMMITTEE

by 

Robert Deasy, Esq.

Director, Liaison and Information

American Immigration Lawyers Association

Committee Members:

Eugene J. Flynn, Chair

Lesley Amano

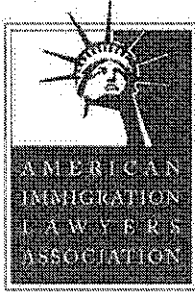
Jill Nagy

John Patrick Pratt

Kip Evan Steinberg



# **ATTACHMENT 2**



March 18, 2009

U.S. Citizenship and Immigration Services  
National Records Center, FOIA/PA Office  
P. O. Box 648010  
Lee's Summit, MO 64064-8010

**VIA USPS**

AILA National Office  
Suite 300  
1331 G Street, NW  
Washington, DC 20005

Tel: 202.507.7600  
Fax: 202.783.7853

www.aila.org

Jeanne A. Butterfield  
*Executive Director*

Susan D. Quarles  
*Deputy Director, Finance & Administration*

Crystal Williams  
*Deputy Director, Programs*

**Re: FOIA Request Regarding Copies 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.**

**NRC 2009007831**

**Supplemental Request and Request to Expedite**

Dear Sir/Madam:

Reference is made to our FOIA request captioned above and assigned tracking number NRC 2009007831. Thank you for your acknowledgement dated February 18, 2009.

By this letter, we supplement our request and ask specifically that a document entitled "H-1B Processing Fraud Referral Sheet" be provided, as well as other documents identified pursuant to our request.

Additionally, we ask you to expedite our request. We have asked the USCIS informally for the materials, and they have declined to produce them. We believe that these materials are of significant interest to the public and to U.S. employers who petition the USCIS for approval of H-1B visa petitions for nonimmigrant workers. We are concerned that the USCIS has distributed a body of guidance, policy and processing materials that contravene established law and policy, and inhibit U.S. employers from receiving approval of H-1B petitions to which they are entitled under prevailing law, regulations and policies.

The need for these materials is all the more urgent due to the upcoming "H-1B filing season," which begins on April 1. Employers seeking to employ nonimmigrants in the H-1B classification who are subject to annual numerical limitations must generally submit their petitions by

April 1 in order to be eligible for consideration in the upcoming fiscal year.

Materials produced will be posted to AILA's website and will be disseminated through other media.

Your consideration in both supplementing our request and in honoring our request to expedite production of the requested materials.

American Immigration Lawyers Association,  
FOIA ACTION COMMITTEE

by 

Robert Deasy, Esq.

Director, Liaison and Information

American Immigration Lawyers Association

Committee Members:

Eugene J. Flynn, Chair

Lesley Amano

Jill Nagy

John Patrick Pratt

Kip Evan Steinberg

# **ATTACHMENT 3**



U.S. Citizenship  
and Immigration  
Services

March 20, 2009

NRC2009007831

Robert Deasy  
American Immigration Lawyers Association  
1331 G Street NW, Suite 300  
Washington, DC 20005

MAR 31 2009

Dear Robert Deasy:

This is in response to your email sent to Ms. Hawkins on March 18, 2009. You have requested to supplement your original request to include a document entitled "H-1B Processing Fraud Referral Sheet" and to have your request expedited.

On the basis of information you provided, we have determined that expedited processing of your request is not warranted. Standards established by the Department of Homeland Security regarding expedited processing are very strict (28 C.F.R. § 16.5(d)) and permit expedited treatment only when the requester demonstrates that:

- a. Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
- b. an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.

In the event you can demonstrate any further showing as to the nature and degree of any of the above categories, submit this additional information to this office for reconsideration.

In the event you wish to appeal this determination, you may write to the USCIS FOIA/PA Appeals Office, 150 Space Center Loop, Suite 500, Lee's Summit, MO 64064-2139, within 60 days of receipt of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

We will respond to your original request and the supplemental document you have requested. If you should have additional questions regarding your request, please contact this office at the address listed above and include your control number.

Sincerely,

T. Diane Cejka  
Director

# **ATTACHMENT 4**



**U.S. Citizenship  
and Immigration  
Services**

January 12, 2010

**NRC2009007831**

Robert Deasy  
American Immigration Lawyers Association  
1331 G Street NW, Suite 300  
Washington, DC 20005

Dear Robert Deasy:

This is in response to your Freedom of Information Act (FOIA) request received in this office on February 18, 2009, regarding all guidance, including but not limited to memoranda, standard operating procedures and templates used for Request for Evidence regarding adjudicating H-1B petitions issued relating to the Benefits Fraud Assessment report to include a copy of the H-1B Fraud Referral Sheet.

We have completed our review of your request and have identified six pages that are responsive. Based on our review, we have determined that your request is being denied in full pursuant to 5 U.S.C. § 552 (b)(2), (b)(5) and (b)(7)(E) of the FOIA.

Freedom of Information Act 5 U.S.C. § 552 (b)(2)

Exemption (b)(2) provides protection for records that would risk circumvention of a legal requirement, such as operating rules, guidelines and manuals of procedures for examiners or adjudicators.

Freedom of Information Act 5 U.S.C. § 552 (b)(5)

Exemption (b)(5) provides protection for inter-agency or intra-agency memorandums or letters, which would not be available by law to a party other than an agency in litigation with the agency. The types of documents and/or information that we have withheld under this exemption may consist of documents containing predecisional information, documents or other memoranda prepared in contemplation of litigation, or confidential communications between attorney and client.

Freedom of Information Act 5 U.S.C. § 552(b)(7)(E)

Exemption (b)(7)(E) provides protection for records or information for law enforcement purposes which 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. The types of documents and/or information that we have withheld could consist of law enforcement systems checks, manuals, checkpoint locations, surveillance techniques, and various other documents.

**NRC2009007831**

Page 2

In the event you wish to appeal this determination, you may write to the USCIS FOIA/PA Appeals Office, 150 Space Center Loop, Suite 500, Lee's Summit, MO 64064-2139, within 60 days of the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

If you should have any additional questions about your request, please direct your inquiries to this office at the above address. You may also call us at 816-350-5570 or fax any correspondence to 816-350-5785.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Cejka", written over a light gray rectangular background.

T. Diane Cejka  
Director



# **ATTACHMENT 5**



AILA National Office  
Suite 300  
1331 G Street, NW  
Washington, DC 20005

Tel: 202.507.7600  
Fax: 202.783.7853

[www.aila.org](http://www.aila.org)

March 11, 2010

USCIS FOIA/PA Appeals Office  
150 Space Center Loop, Suite 500  
Lee's Summit, MO 64064

**Re: NRC2009007831**

**FOIA APPEAL**

To Whom It May Concern;

The American Immigration Lawyers Association submits this appeal of a FOIA denial dated January 12, 2010, under the Freedom of Information Act, 5 U.S.C. § 552(a).

Our initial request was submitted on February 6, 2009. We requested:

Copies of any and all guidance, including but not limited to memoranda, standard operating procedures and templates used for Request for Evidence regarding adjudication of H-1B petitions issued as a result of, in connection with, in light of, or related to the Benefits Fraud Assessment report.

We supplemented our initial request on March 18, 2009, and asked that the "H-1B Processing Fraud Referral Sheet" be included in our request. On January 12, 2010, USCIS denied the FOIA request in full.

The denial is based on three purported exemptions to the FOIA: 1) exemption (b)(2) regarding records that are related solely to the internal personnel rules and practices of an agency, 2) exemption (b)(5) regarding inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than a party in litigation with the agency, and 3) exemption (b)(7)(E) regarding protection of records or information for law enforcement purposes which would disclose techniques and procedures for law enforcement investigations or prosecutions. Other than listing the exemptions that the agency cites authorizing withholding of the material, the denial letter fails to provide a reasoned explanation as to how the cited exemptions apply to the requested information.

On January 26, 2009, President Barack Obama issued a Presidential Memorandum noting the importance of transparency in government. “A democracy requires accountability, and accountability requires transparency.” 74 FR 4685 (January 26, 2009). The memo states that the Freedom of Information Act should be administered with a “clear presumption: in the face of doubt, openness prevails.” Information should not be kept confidential “because of speculative or abstract fears.”

On March 19, 2009, the Attorney General reiterated the principles in the presidential memorandum and issued new FOIA guidelines for all executive agencies. The Attorney General’s memo provides that the “an agency should not withhold information simply because it may do so legally,” and should not withhold “records merely because it can demonstrate, as a technical matter, that the record falls within the scope of a FOIA exemption.” Attorney General, Eric Holder, “Memorandum for Heads of Executive Departments and Agencies,” at 1 (March 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>. Rather, the memo provides that the Department of Justice “will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *Id.* at 2. Finally, the Attorney General’s memo reiterates both the Freedom of information Act as well as DHS regulations regarding FOIA requests and instructs agencies that “whenever an agency determines it cannot make full disclosure of a requested record, it must consider whether it can make a partial disclosure...FOIA requires them to take reasonable steps to segregate and release nonexempt information.” *Id.* at 1; *see also* 5 USC § 552(b); 6 CFR § 5.6(c)(3).

Given the presumption of disclosure under both the Freedom of Information Act, agency regulations, and the President’s and Attorney General’s Memos, we request that you reconsider the denial of this FOIA request and, after carrying out a further search, release the withheld documents and any other documents that may be found. As explained below, the cited exemptions are not applicable to the records we have requested. At a minimum, FOIA compels partial disclosure of segregable sections of the requested information.

#### **I. USCIS Appears Not To Have Carried Out An Adequate Search For Responsive Documents.**

As a threshold matter, we question whether USCIS conducted an exhaustive search for the requested documents. USCIS must carry out a reasonable search for records responsive to the FOIA request. *See Oglesby v. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). It must show that its search was reasonably calculated to uncover relevant documents. *Steinberg*, 23 F.3d at 551 (quoting *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). We requested all guidance on the adjudication of H-1B petitions that was issued as a result of or related to the Benefits Fraud Assessment Report. We subsequently supplemented this request to also include the “H-1B Processing Fraud Referral Sheet.” In response, USCIS identified a mere six pages of documents. Given

the importance of the issue of fraud in the H-1B program to the agency, and its recent stepped-up efforts to investigate potential fraud – including an increase in the number and scope of RFE’s and an increase in site visits – six pages of guidance appears incomplete on its face. We thus appeal the FOIA denial on the issue of whether an adequate search was carried out and request that you search again for any and all documents responsive to this FOIA.

## **II. Disclosure of Information Regarding Implementation of the H-1B Benefits Fraud Assessment Report is Compelled Under FOIA**

The agency may only withhold disclosure of documents that fit under narrow statutory exemptions. The Freedom of Information Act provides the exclusive exemptions to disclosure. 5 USC § 552(d). Unless the government can articulate an exemption in the FOIA, then disclosure is compelled. *Dept. of the Air Force v. Rose*, 425 US 352, 361 (1975). Additionally, courts construe FOIA’s statutory exemptions narrowly in favor of disclosure. See *John Doe Agency v. John Doe Corp*, 493 US 146 (1989). Moreover, an agency must take reasonable steps to segregate and release nonexempt information. 5 USC § 552(b); See 6 CFR § 5.6(c)(3). FOIA contemplates that even where certain information is exempt from disclosure, the agency is compelled to disclose segregable information. At a minimum, the statute requires that the agency identify all documents and materials that fit under the request and explain the general contents of the withheld materials. Finally, the agency has the burden to sustain its action. 5 USC § 552(a)(4)(B).

Here, the agency’s conclusory and blanket denial merely cites alleged exemptions to the FOIA and does not meet its burden in proving that the requested information is exempt under FOIA. Our request covered a wide breadth of information. As already noted, it is surprising that only six pages were identified. Additionally, it is surprising that no information was deemed segregable. Even were a portion of the requested information exempt from disclosure, which has not been satisfactorily demonstrated, much of the requested information does not fit within any of the statutory exemptions to the FOIA.

The agency’s blanket denial fails to meet the statute’s requirements. Because the agency failed to adequately articulate an exemption for the withheld information, failed to meet its burden to sustain its action, and failed to disclose segregable information, the denial is contrary to law.

## **III. The Cited Exemptions to the FOIA Do Not Apply to the Requested Information**

USCIS’ denial of petitioner’s FOIA request is based on three exemptions to the FOIA: 5 USC § 552(b)(2) relating to records that are related solely to the internal personnel rules and practices of an agency, including operating rules, guidelines and manuals of procedures for examiners and adjudicators, disclosure of which would risk circumvention of the law; 5 USC § 552(b)(5) relating to inter-agency or intra-agency memorandums or letters, which would not be available by law to a party other than a party in litigation with the agency; and, 5 USC § 552(b)(7)(E) relating to records or information for law

enforcement purposes which 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.

Exemption (b)(5) is primarily limited to memoranda and letters that would fall into the category of documents containing predecisional information, documents or other memoranda prepared in contemplation of litigation, or confidential communications between attorney and client. Information exempt under (b)(5) is limited to guidance which at the time of creation is not the views of the agency as a group. *Firestone Tire & Rubber Co. v. Coleman*, 432 F. Supp. 1359 (N.D. Ohio 1976). Further, an interpretation of agency statutes, which is followed and considered internally binding policy, has precedential effect, and is not exempted from FOIA disclosure. *Schlefer v. U.S.*, 702 F.2d 233 (D.C. Cir. 1983). In this case, there has been public reference to an agency policy memorandum addressing the issuance of RFEs in light of the Fraud Benefits Assessment report. Moreover, our request included any guidance or training materials used regarding the issuance of RFEs for H-1B petitions. Such memos, by their very nature, are not merely predecisional memos, but represent the views of the agency and standard operating procedures that are considered internally binding policy with precedential effect. Thus they are not exempt under (b)(5).

Exemption (b)(7)(E) requires that 1) the requested material be law enforcement related, and 2) disclosure of the materials risks circumvention of the law. Exemption (b)(2) requires first that the information be predominantly internal. Then, an agency may withhold the material by proving either that (1) disclosure may risk circumvention of the law, or (2) the material relates to trivial administrative matters of no genuine public interest. *Schwanner v. Department of Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990) (internal citations omitted).

In this case, because most of the requested information primarily will be used in the context of adjudicating H-1B petitions (such as, issuing RFEs), it is not primarily law enforcement related. Second, disclosure of the requested information does not risk circumvention of the law; rather, disclosure assists applicants for immigration benefits in determining how best to comply with the Immigration and Nationality Act and agency regulations. Additionally, the information is not solely related to internal procedures. In contrast, the requested information regards procedures for issuing RFEs to individuals for response. Such information is by definition, not solely internal in nature.

Finally, regardless of whether certain materials are exempt, it is highly unlikely that all documents fit under these three categories and warrant a blanket denial. At a minimum, the statute requires that the agency segregate releasable information from exempted information.

Accordingly, the FOIA compels disclosure of the requested guidance.

**1. The Requested Information Relates Primarily to the Adjudicative Process; It Is Not Primarily Law Enforcement Related**

The information requested under the Freedom of Information Act relates to procedures used by the agency in determining whether to issue an RFE in response to a benefits application or petition. The issuance of an RFE arises primarily in the adjudicative process and is a tool to ensure that adequate documentation establishing eligibility for immigration benefits is provided. 8 CFR § 103.2(b)(8)(iii).

The information gathered from RFEs issued will insure that benefits are only granted to applicants and petitioners who are entitled to those benefits. The guidance sought in our FOIA is primarily an adjudicative tool and not a law enforcement tool. Therefore, the denial fails to meet the threshold law enforcement requirement of exemption b(2) and (b)(7)(E) and is not authorized under the statute.

**2. Disclosure of the Requested Information Could Lead to Enhanced Compliance, Rather than Circumvention of the Law**

Disclosure of the requested RFE guidance does not risk circumvention of the law. USCIS' conclusory assertions that it is entitled to withhold guidance on issuing RFEs for law enforcement purposes is not supported by exemptions under FOIA and does not comply with recent Presidential and Attorney General memoranda. In appropriate circumstances, Exemption (b)(7)(E), known as the law enforcement exemption, can serve as a basis for an agency to refuse to release information that "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).

Despite its seemingly broad scope, Exemption (b)(7)(E) does not apply to all claimed law enforcement-related information, but only to information that could reasonably be expected to risk circumvention of the law. 5 U.S.C. 552(b)(7)(E). Additionally, exemption (b)(2) only applies where disclosure of internal procedures would risk circumvention of the law. Here, it is not reasonable that disclosure would lead to circumvention of the law.

Disclosure of guidance for issuance of RFEs will not help individuals avoid fraud investigations or risk circumvention of the law. In contrast, release of the RFE guidance will facilitate efficient preparation of evidence included in a petition filing.

Though the government has an interest in avoiding fraud where benefits are sought, an agency cannot withhold documents based on the mere claim that disclosure could result in circumvention the law by permitting fraud to occur. See *Hawkes v. Internal Revenue Service*, 507 F.2d 418, 483 (6<sup>th</sup> Cir. 1974). In *Hawkes*, the FOIA request sought information from IRS manuals concerning selection of corporate tax returns for audit, based on certain amounts claimed under various categories. *Id.*, at 482. The IRS argued that disclosure would enable those filing returns to commit tax fraud. The court

disagreed, finding that the disclosure would not aid in evasion of the tax laws, because the information did not reveal how to avoid an audit, and any tax return could be audited regardless of whether the information had been revealed or not; to the contrary, disclosure could enhance a company's ability to prepare documentation in the event of an audit. *Id.*, at 484, 485.

Similarly, in *Don Ray Drive-A-Way Co. v. Skinner*, 785 F. Supp. 198, 200 (D.D.C. 1992), a motor carrier company filed a FOIA request for safety rating information from the Federal Highway Administration. The agency characterized the ratings as a tool for investigation and enforcement of safety violations, allowing the agency to "focus its attention on those carriers who are having the most serious safety problems." *Id.*, at 199. Under the system, ratings of "unsatisfactory" could lead to being barred from certain federal programs, though the result could be appealed. *Id.*, at 200. The court held that disclosure would not facilitate circumvention of the law or enable the attainment of undue benefits, reasoning that, on the contrary, disclosure of the information likely would facilitate compliance and understanding of the reason for an unfavorable rating:

The weighting of the various factors is crucial to the carriers' understanding of why they are being assigned particular legal status. Without the information, their right to appeal the agency action is severely impaired, in that they will not know the reason for their rating and hence cannot direct their attack to facts crucial to a successful appeal. A person should not have to guess why he is being punished even if the government ultimately says that the punishment is attributable to one or more of several reasons. . . . Shrouding a process in secrecy and thereby keeping the carriers guessing as to why, when, and where they will be banned from certain activities is not an acceptable solution to the agency's proper concern over severe budgetary restrictions.

*Id.*

Here, as in *Hawkes* and *Don Ray Drive-A-Way Co.*, disclosure of the RFE guidance will not reveal how to avoid an audit or fraud investigation. Criminal or fraud investigations can be initiated regardless of whether a RFE is issued. In contrast, disclosure of the RFE guidance could enhance a company's ability to prepare documentation for a fully supported petition filing.

In the immigration petitioning context, the outcome of an inadequate response to a RFE is a denial of immigration benefits and possible investigation of fraud. Disclosure of the guidance regarding issuance of RFEs itself is not likely to change the outcome: either the petition is approved or it is denied. Exemptions (b)(7)(E) and (b)(2) do not permit shrouding the process in secrecy, refusing to disclose even the most basic information, by hiding behind the banner of "fraud."

### **3. The RFE Guidance Cannot Be Withheld If it Contains Information Already Made Public**

USCIS cannot refuse to disclose guidance regarding issuance of RFEs already made public. See *Allard K. Lowenstein Intern. Human Rights Project v. U.S. Dep't of Homeland Sec.*, 603 F. Supp. 2d 354, 359 (D. Conn. 2009). In *Lowenstein*, the court discussed whether a general outline of operational steps of an immigration enforcement program (Operation Frontline) on a Power Point slide would reveal specific operational techniques or would risk circumvention of the law. *Id.* DHS asserted that disclosure of the records would jeopardize ongoing law enforcement actions. The court ordered DHS to reveal the general outline since a “wealth of information [was] already disclosed to Plaintiffs about this program...if disclosed, would not reveal specific operational techniques or risk circumvention of the law.” *Id.*

AILA anticipates that the requested guidance contains public information. In fact, several items related to H-1B RFE's have been acquired by AILA through DHS personnel releasing them in individual cases. Over the past year, AILA has become aware of an H-1B Onsite Visit questionnaire, and an H-1B Fraud Referral Sheet. These documents were not identified in the denial or released. Additionally, the same information that we requested is specifically referenced in a November 10, 2009, letter from USCIS Director Alejandro Mayorkas to Senator Charles Grassley. The letter from Director Mayorkas identifies an internal memo on the issue: October 31, 2008, Donald Neufeld Acting Associate Director for Domestic Operations, *H-1BAnti-Fraud Initiatives - Internal Guidance and Procedures in Response to Findings Revealed in H-1B Benefit Fraud and Compliance Assessment*. AILA InfoNet Doc. No. 09120161. Accordingly, it is in the public realm that many of this information exists, yet it was not mentioned in the denial.

### **4. There is a Significant Public Interest in Disclosure to Assure Accountability of Government Officials**

AILA's primary interest in the requested guidance is to enhance the integrity of immigration benefit processing. The disclosure of the requested information will contribute significantly to the public's assurance that adjudicators will be accountable for their decisions. See *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1973) (finding that the purpose of the FOIA is to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed”).

USCIS adjudicators implement government policy. To the extent the RFE guidance describes program policy, or policy changes, it should be disclosed. See, *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005). In *NCLR*, advocacy organizations sued the DOJ under FOIA, seeking to compel production of records relating to the Department's position on state and local police enforcement of immigration laws. *NCLR*, 411 F.3d at 352. The DOJ had incorporated memoranda created by the office of legal counsel into its new policy regarding state and local immigration law enforcement authority. *Id.* The Second Circuit ordered the DOJ to disclose the memoranda articulating concerns that the agency policy had changed without



notice, because the information would not threaten future law enforcement actions, and because generalized information about an agency's program policy was not protected by the exemption. *Id.* at 358.

Disclosure of the RFE guidance will help to inform a broad audience. AILA is a national organization whose purpose is to promote public understanding of immigration law and policy and to advocate for fundamental fairness in immigration law. AILA works closely with numerous other nonprofit organizations, including religious organizations, legal service providers, and bar associations. The information we obtain will help us to inform these groups, and the broad audience they serve, about compliance with regulations for immigration benefits, and to assure integrity within the process by adjudicators conducting the issuance of RFEs.

Sincerely,

Robert Deasy  
Director  
Liaison and Information  
American Immigration Lawyers Association

# **ATTACHMENT 6**



AILA National Office  
Suite 300  
1331 G Street, NW  
Washington, DC  
20005-3142

Tel: 202.507.7600  
Fax: 202.783.7853

[www.aila.org](http://www.aila.org)

Crystal Williams  
*Executive Director*

Susan D. Quarles  
*Deputy Executive Director*

April 27, 2010

Catherine M. Papoi, J.D., CIPP/G  
Deputy Chief FOIA Officer  
Director, Disclosure & FOIA  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Drive SW, Building 410  
STOP-0655  
Washington, D.C. 20528-0655

Dear Ms. Papoi:

I write to inform you of three requests for information under the Freedom of Information Act (FOIA) that AILA submitted to agencies within the Department of Homeland Security (DHS) which were denied in full. AILA firmly believes that the agencies' refusal to release any information in response to these FOIA requests violates the law. We plan to file suit under FOIA in the District Court for the District of Columbia in the near future but wanted to give you a chance to resolve the matter first.

The following is a brief summary of each of the FOIA requests. A copy of each request, the agency denial, AILA's appeal, and the agency's response to the appeal (if any) is attached for your information.

**FOIA request #1 (USCIS – NRC 2009007831):** AILA submitted this FOIA request, dated February 6, 2009, to United States Citizenship and Immigration Services (USCIS) in which we requested "Copies 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." By letter dated March 18, 2009, AILA supplemented the original request with a request for an "H-1B Processing Fraud Referral Sheet." The National Record Center assigned number NRC 2009007831 to this request. By letter dated January 12, 2010, USCIS informed AILA that it had identified six pages responsive to the request, but that it was denying our request in full pursuant to 5 U.S.C. §§ 552(b)(2), (b)(5) and (b)(7)(E). AILA filed a timely appeal of this denial on March 11, 2010. This appeal currently remains pending.

**FOIA request #2 (USCIS – NRC 2009023483):** AILA submitted this FOIA request, dated April 13, 2009, to USCIS in which we requested “The Compliance Review Worksheet mentioned in ‘Comment Request for Compliance Review Worksheet,’ 74 FR 15999 (April 8, 2009).” The National Records Center assigned the request the number NRC 2009023483. By letter dated June 9, 2009, USCIS denied this request in full pursuant to 5 U.S.C. §§ 552(b)(2) and (b)(7)(E). AILA filed a timely appeal dated August 7, 2009. USCIS affirmed its previous denial of all information on February 18, 2010.

**FOIA request #3 (ICE – DIS 2-02 OI:MS:ID, 09 FOIA 3292 DLM):** AILA submitted this FOIA request, dated May 8, 2009, to Immigration and Customs Enforcement (ICE) in which we requested “a copy of any guidelines, SOPS or policy memoranda that have been issued by ICE to the field regarding civil fine assessments ... [and] the guidance mentioned by Marcy Forman, Director, Office of Investigations, in testimony before the House Appropriations Committee, Subcommittee on Homeland Security on April 2, 2009 identifies as: ‘ICE has established and distributed to all field offices guidance about the issuance of administrative fines and standardized criteria for the imposition of such fines.’” (sic). By letter dated September 26, 2009, ICE denied the request and informed AILA that it was withholding 88 pages in their entirety pursuant to 5 U.S.C. §§ 552(b)(2) high and (b)(7)(E). AILA filed a timely appeal of this decision by letter dated November 24, 2009. This appeal currently remains pending.

We contend that the requested information is subject to release under FOIA and that the claimed exemptions are not applicable. We have outlined the reasons why the information should be disclosed in each of our administrative appeals. Moreover, even if some information were to be found properly subject to an exemption, USCIS and ICE failed to release portions of the documents that are not protected from disclosure.

We plan to file a lawsuit challenging the denial of these three FOIA requests unless DHS produces the requested records by May 10, 2010.

I look forward to your response to this letter.

Sincerely,

Crystal Williams  
Executive Director  
American Immigration Lawyers Association

Cc:

David Martin  
Principal Deputy General Counsel, Department of Homeland Security

Alejandro Mayorkas  
Director, U.S. Citizenship and Immigration Services

Roxana C. Bacon  
Chief Counsel, U.S. Citizenship and Immigration Services

John Morton  
Assistant Secretary, U.S. Immigration and Customs Enforcement

Beth Gibson  
Senior Counselor to the Assistant Secretary, U.S. Immigration and Customs Enforcement

William H. Holzerland  
Associate Director, Disclosure Policy & FOIA Program Development

# **ATTACHMENT 7**



AILA National Office  
Suite 300  
1331 G Street, NW  
Washington, DC 20005

Tel: 202.507.7600  
Fax: 202.783.7853

[www.aila.org](http://www.aila.org)

Jeanne A. Butterfield  
*Executive Director*

Susan D. Quarles  
*Deputy Director, Finance & Administration*

Crystal Williams  
*Deputy Director, Programs*

April 13, 2009

U.S. Citizenship and Immigration Services  
National Records Center, FOIA/PA Office  
P. O. Box 648010  
Lee's Summit, MO 64064-8010

**VIA USPS**

**Re: FOIA Request Regarding Naturalization Compliance Review Worksheet**

Dear Sir/Madam:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the following information is hereby requested<sup>1</sup>: The Compliance Review Worksheet mentioned in "Comment Request for Compliance Review Worksheet," 74 FR 15999 (April 8, 2009).

Founded in 1946, the American Immigration Lawyers Association (AILA) is the national association of over 10,000 attorneys and law professors who practice and teach immigration law. AILA is a nonpartisan, not-for-profit organization that provides its Members with continuing legal education and information. AILA publishes newsletters, magazines, right-to-know documents, and other materials that are disseminated through print and internet media. As such AILA is a "representative of the news media," and fees associated with the

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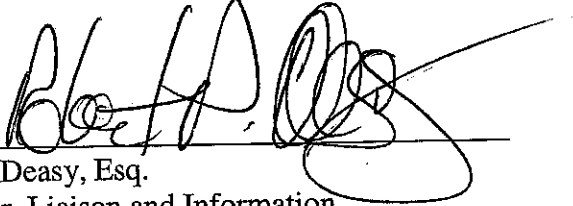
<sup>1</sup> As an executive department, the United States Citizenship and Immigration Service ("USCIS") is an "agency" of the United States government pursuant to 5 U.S.C. § 552(f)(1) of the FOIA and is therefore subject to the requirements of said Act.

processing of this request should therefore be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II). The records requested are not sought for commercial use, and AILA plans to disseminate the information disclosed as a result of this FOIA request through the channels described above.

Pursuant to 5 USC 552(a)(4)(A)(v) please inform us if said charges will exceed \$250.

American Immigration Lawyers Association,  
FOIA ACTION COMMITTEE

by

  
Robert Deasy, Esq.  
Director, Liaison and Information  
American Immigration Lawyers Association

Committee Members:  
Eugene J. Flynn, Chair  
Lesley Amano  
Jill Nagy  
John Patrick Pratt  
Kip Evan Steinberg



# **ATTACHMENT 8**



U.S. Citizenship  
and Immigration  
Services

June 9, 2009

NRC2009023483

Robert Deasy  
C/o AILA  
1331 G Street, NW, Suite 300  
Washington, DC 20005

Dear Robert Deasy:

This is in response to your Freedom of Information Act (FOIA) request received in this office on April 28, 2009, regarding a copy of the Naturalization Compliance Review Worksheet.

We have determined that your request is being denied in full pursuant to 5 U.S.C. §.552 (b)(2) and (b)(7)(e) of the FOIA.

Freedom of Information Act 5 U.S.C. § 552 (b)(2)

Exemption (b)(2) provides protection for records that are related solely to the internal personnel rules and practices of an agency. The types of documents and/or information that we have withheld under this exemption may relate to internal matters of a relatively trivial nature, such as internal personnel rules and practices which could consist of employee identification codes, computer login codes, policies regarding the use of parking facilities and break rooms, employee leave policies and dress codes or internal matters of a more substantial nature, the disclosure of which would risk circumvention of a legal requirement, such as operating rules, guidelines and manuals of procedures for examiners or adjudicators.

Freedom of Information Act 5 U.S.C. § 552(b)(7)(E)

Exemption (b)(7)(E) provides protection for records or information for law enforcement purposes which 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 reasonable be expected to risk circumvention of the law. The types of documents and/or information that we have withheld could consist of law enforcement systems checks, manuals, checkpoint locations, surveillance techniques, and various other documents.

In the event you wish to appeal this determination, you may write to the USCIS FOIA/PA Appeals Office, 150 Space Center Loop, Suite 500, Lee's Summit, MO 64064-2139, within 60 days of the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

If you should have any additional questions about your request, please direct your inquiries to this office at the above address. You may also call us at 816-350-5570 or fax any correspondence to 816-350-5785.

Sincerely,

T. Diane Cejka  
Director

# **ATTACHMENT 9**



AILA National Office  
Suite 300  
1331 G Street, NW  
Washington, DC 20005

Tel: 202.507.5600  
Fax: 202.783.7853

[www.aila.org](http://www.aila.org)

August 7, 2009

USCIS FOIA/PA Appeals Office  
150 Space Center Loop, Suite 500  
Lee's Summit, MO 64064

**Re: NRC2009023483**

**FOIA APPEAL**

To Whom It May Concern;

The American Immigration Lawyers Association submits this appeal of a FOIA denial dated June 9, 2009, under the Freedom of Information Act 5 U.S.C. § 552(a).

On April 8, 2009, The Department of Homeland Security United States Citizenship and Immigration Services published an Information Collection Notice and request for comment on a new "Compliance Review Worksheet" in the Federal Register. 74 Fed. Reg. 15999 (April 8, 2009). The information collection notice, pursuant to the Paperwork Reduction Act, sought public comment on the introduction of a new information collection that the agency intends on using when conducting on-site inspections in conjunction with adjudications for certain immigration benefits.

Despite the solicitation of comments on the Compliance Review Worksheet, USCIS requested that OMB not display the information collection for public view, normally required under 5 CFR § 1320.14. OMB complied with USCIS' request and did not provide the worksheet for public viewing. AILA contacted the USCIS contact person for the information collection notice and requested a copy of the contents of the worksheet but was denied access. Finally, on April 28, 2009, AILA submitted a FOIA request for the compliance review worksheet. On June 9, 2009, USCIS denied the FOIA Request.

The FOIA denial is based on two purported exemptions to the FOIA: 1) exemption (b)(2) regarding records that are related solely to the internal personnel rules and practices of an agency, and 2) exemption (b)(7)(E) regarding protection of records or information for law enforcement purposes which would disclose techniques and procedures for law enforcement investigations or prosecutions. Other than listing the exemptions that the agency cites authorizing withholding of the

material the denial letter fails to provide a reasoned decision as to how the cited exemptions apply to the requested information.

### **Disclosure of the Compliance Review Worksheet is Compelled Under FOIA, and Presidential and Attorney General Memoranda**

The agency's conclusory denial merely cites alleged exemptions to the FOIA and does not meet its burden in proving that the worksheet is exempt under FOIA. Because the compliance review worksheet is primarily an adjudicatory tool, not solely an internal law enforcement tool, disclosure of which would risk circumvention of law, and because there is a high interest in public disclosure of the worksheet, withholding of the worksheet does not fall under any of the exemptions to the FOIA.

The Freedom of Information Act provides the exclusive exemptions to disclosure. 5 USC § 552(d). Unless the government can articulate an exemption in the FOIA then disclosure is compelled. *Dept. of the Air Force v. Rose*, 425 US 352, 361 (1975). Additionally, courts construe FOIA's statutory exemptions narrowly in favor of disclosure. See *John Doe Agency v. John Doe Corp*, 493 US 146 (1989). Finally, the agency has the burden to sustain its action. 5 USC § 552(a)(4)(B).

Five months prior USCIS' denial of petitioner's FOIA request for the Compliance Review Worksheet, President Barack Obama issued a Presidential Memorandum noting the importance of transparency in government. "A democracy requires accountability, and accountability requires transparency." 74 FR 4685 (January 26, 2009). The memo states that the Freedom of Information Act should be administered with a "clear presumption: in the face of doubt, openness prevails." Information should not be kept confidential "because of speculative or abstract fears."

On March 19, 2009, the Attorney General reiterated the principles in the presidential memorandum and issued new FOIA guidelines for all executive agencies. The attorney General's Memo provides that the "an agency should not withhold information simply because it may do so legally," and should not withhold "records merely because it can demonstrate, as a technical matter, that the record falls within the scope of a FOIA exemption." Rather the memo provides that the Department of Justice "will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."

Finally, the Attorney General's memo, reiterates both the Freedom of information Act as well as DHS regulations regarding FOIA requests and instructs agencies that "whenever an agency determine it cannot make full disclosure of a requested record, it must consider whether it can make a partial disclosure...FOIA requires them to take reasonable steps to segregate and release nonexempt information." 5 USC § 552(b); See 6 CFR § 5.6(c)(3)

Given the presumption of disclosure under both the Freedom of Information Act, and the President's and Attorney General's Memos the record compels disclosure of the

Compliance Review Worksheet, which fails to fall under any exemptions to the FOIA. At a minimum, FOIA compels partial disclosure of segregable sections of the worksheet.

### **The Cited Exemptions to the FOIA Do Not Apply to the Compliance Review Worksheet**

USCIS' denial of petitioner's FOIA request is based on two related exemptions to the FOIA: 5 USC § 552(b)(2) relating to records that are related solely to the internal personnel rules and practices of an agency including operating rules, guidelines and manuals of procedures for examiners and adjudicators disclosure of which would risk circumvention of the law; and 5 USC § 552(b)(7)(E) relating to records or information for law enforcement purposes which 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.

Both exemptions share two threshold issues: 1) is the requested material law enforcement related? and 2) would disclosure of the materials risk circumvention of the law? Exemption (b)(2) has an additional requirement before it can shield the government from disclosure. Exemption (b)(2) requires that the information be related solely to internal procedures.

In this case, because the compliance review worksheet will primarily be used in the context of on-site inspections as an adjudicatory tool it is not primarily law enforcement related. Second, disclosure of the worksheet does not risk circumvention of the law, rather, disclosure assists applicants for immigration benefits in determining how best to comply with the Immigration and Nationality Act and agency regulations. Moreover, since most of the questions that will be included in the worksheet will quickly be discovered by the public after multiple on-site visits are completed, withholding of the worksheet serves no compelling government interest. Finally, the worksheet is not solely related to internal procedures. In contrast, the worksheet is an electronic form consisting of questions that contract employees will ask immigration benefits applicants. Such information gathering techniques are by definition, not solely internal in nature. Accordingly, the FOIA compels disclosure of the worksheet.

#### **1. The Requested Form is Primarily an Adjudicatory Tool**

The form requested under the Freedom of Information Act is described in the Supporting statement on file with the information collection notice, Docket # OMB-51 as a Compliance Review Worksheet. Because the Compliance Review Worksheet was not disclosed, the only information available concerning the worksheet is from the federal register notice and the Supporting Statement.

According to the supporting statement, the compliance review worksheet is a form that will be completed electronically and submitted electronically to USCIS. Contract personnel will use the worksheet to collect information to “ensure consistency in reporting information obtained from onsite inspections.” Primarily the worksheet will be used at on-site inspections to collect “facts that would not be available to an adjudicator,” and will help “verify that applicants and petitioner seeking immigration benefits are complying with applicable laws, rules, regulations, and other authorities that govern immigration benefits.” In addition to collecting information regarding eligibility for an immigration benefit, the compliance review worksheet will also be used “when there is an indication of fraud in individual cases or class of cases.”

Moreover, 8 CFR § 214.2(r)(16), relating to inspections evaluations, verifications and compliance reviews, indicates that onsite inspections are one tool the agency uses to verify supporting evidence for a petition for a non-minister religious worker. The regulations further specifies the adjudicatory nature of such compliance reviews by noting that satisfactory completion of on site inspections may be a condition for approval of a petition. The onsite visits mentioned in this part of the regulations is exactly the context in which the compliance review worksheet would be utilized. Therefore, both the regulations and the nature of on-site inspections further support the characterization of the compliance review worksheet as primarily an adjudicatory tool used to verify supporting evidence for petitions and applications during the course of on-site inspections.

The worksheet in conjunction with on-site inspections will serve as an important tool in the adjudication of various immigration benefits applications and will insure that benefits are only granted to applicants who are entitled to those benefits. Moreover, through onsite inspections the worksheet attempts to enhance compliance with various immigration benefit requirements.

## **2. Disclosure of the Compliance Review Worksheet Could Lead to Enhanced Compliance, Rather than Circumvention of the Law.**

USCIS’ conclusory assertions that it is entitled to withhold the Compliance Review Worksheet for law enforcement purposes are not supported by exemptions under FOIA and do not comply with recent Presidential and Attorney General memoranda. In appropriate circumstances, Exemption 7(E), known as the law enforcement exemption, can serve as a basis for an agency to refuse to release information that “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).

Despite its seemingly broad scope, Exemption 7(E) does not apply to all claimed law enforcement-related information, but only to information that could reasonably be expected to risk circumvention of the law. 5 U.S.C. 552(b)(7)(E). Additionally, exemption (b)(2) only applies where disclosure of internal procedures would risk

circumvention of the law. Here, it is not reasonable that disclosure would lead to circumvention of the law.

Without having seen the Compliance Review Worksheet, AILA anticipates that it is a standard form for compiling information (including blanks for basic information, such as names, addresses, lists of persons interviewed, documents reviewed, dates and locations of actions taken, etc.) and for transmitting electronically the information collected during an on-site investigation, primarily where fraud is suspected. Disclosure of the Worksheet will not help to avoid the on-site visit or to assure approval of a petition without an on-site visit. Instead, it could facilitate efficient preparation of evidence for the investigation. Alternatively, disclosure could assuage concerns that the investigation has occurred fairly.

In its Supporting Statement, USCIS justifies the data collection for use of on-site investigations where fraud is suspected.<sup>1</sup> Though the government has an interest in avoiding fraud where benefits are sought, an agency cannot withhold documents based on the mere claim that disclosure could result in circumvention the law by permitting fraud to occur. See *Hawkes v. Internal Revenue Service*, 507 F.2d 418, 483 (6<sup>th</sup> Cir. 1974). In *Hawkes*, the FOIA request sought information from IRS manuals concerning selection of corporate tax returns for audit, based on certain amounts claimed under various categories. *Id.*, at 482. The IRS argued that disclosure would enable those filing returns to commit tax fraud. The court disagreed, finding that the disclosure would not aid in evasion of the tax laws, because the information did not reveal how to avoid an audit, and any tax return could be audited regardless of whether the information had been revealed or not; to the contrary, disclosure could enhance a company's ability to prepare documentation in the event of an audit. *Id.*, at 484, 485.

Similarly, in *Don Ray Drive-A-Way Co. v. Skinner*, 785 F. Supp. 198, 200 (D.D.C. 1992), a motor carrier company filed a FOIA request for safety rating information from the Federal Highway Administration. The agency characterized the ratings as a tool for investigation and enforcement of safety violations, allowing the agency to “focus its attention on those carriers who are having the most serious safety problems.” *Id.*, at 199. Under the system, ratings of “unsatisfactory” could lead to being barred from certain federal programs, though the result could be appealed. *Id.*, at 200. The court held that disclosure would not facilitate circumvention of the law or enable the attainment of

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<sup>1</sup> AILA anticipates that, in addition to using the Compliance Review Worksheet for on-site visits related to fraud investigations, USCIS also will use the form whenever a petitioner requests premium processing of a religious worker petition. Effective July 20, 2009, USCIS agreed to make its 15-day Premium Processing Service available for nonimmigrant religious worker petitions filed by certain R-1 petitioners. However, only those petitioners who have successfully passed an on-site investigation are eligible to use premium processing. Accordingly, all petitioners seeking premium processing must be prepared for an on-site investigation. Disclosure of the form will not enable petitioners to avoid the investigation, but it will enhance efficiency by enabling the petitioner to be prepared for it. Thus, there is a direct and clear connection between the requested information and not only the adjudication process, but the timing of the adjudication, as well.



undue benefits, reasoning that, on the contrary, disclosure of the information likely would facilitate compliance and understanding of the reason for an unfavorable rating:

The weighting of the various factors is crucial to the carriers' understanding of why they are being assigned particular legal status. Without the information, their right to appeal the agency action is severely impaired, in that they will not know the reason for their rating and hence cannot direct their attack to facts crucial to a successful appeal. A person should not have to guess why he is being punished even if the government ultimately says that the punishment is attributable to one or more of several reasons. . . . Shrouding a process in secrecy and thereby keeping the carriers guessing as to why, when, and where they will be banned from certain activities is not an acceptable solution to the agency's proper concern over severe budgetary restrictions.

*Id.*

In the immigration benefits context, with the Compliance Review Worksheet, the outcome of an unfavorable investigation is denial of immigration benefits and possible removal from the United States. Disclosure of the form itself is not likely to change the outcome: either the petition is approved or it is denied. Exemption 7(E) does not permit shrouding the process in secrecy, refusing to disclose even the most basic information, by hiding behind the banner of "fraud."

### **3. The Compliance Review Worksheet Cannot Be Withheld If it Contains Information Already Made Public.**

USCIS cannot refuse to disclose information on the Compliance Review Worksheet already made public. See *Allard K. Lowenstein Intern. Human Rights Project v. U.S. Dep't of Homeland Sec.*, 603 F. Supp. 2d 354, 359 (D. Conn. 2009). In *Lowenstein*, the court discussed whether a general outline of operational steps of an immigration enforcement program (Operation Frontline) on a Power Point slide would reveal specific operational techniques or would risk circumvention of the law. *Id.* DHS asserted that disclosure of the records would jeopardize ongoing law enforcement actions. The court ordered DHS to reveal the general outline since a "wealth of information [was] already disclosed to Plaintiffs about this program...if disclosed, would not reveal specific operational techniques or risk circumvention of the law." *Id.*

AILA anticipates that the Worksheet contains public information. A USCIS standard form with certain information about the religious worker adjudication, Form M-736, Optional Checklist for Nonimmigrant Religious Workers, already is public. Information on the Compliance Review Worksheet related to the M-736 information must be disclosed.

### **4. Because the Compliance Review Worksheet Will be Used by Contractors and Not USCIS Personnel, There is a Significant Public Interest in Disclosure to Assure Accountability.**

AILA's primary interest in the requested documents fits squarely within the purpose that USCIS identified on its Supporting Statement: "to enhance the integrity of immigration benefit processing." USCIS' proposal to have on-site investigations performed by contract personnel, not by agency personnel, itself poses a risk to the integrity of the process. The disclosure of the requested information will contribute significantly to the public's assurance that the contractors will be accountable for the investigations they undertake. *See N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1973) (finding that the purpose of the FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed).

The contractors will be implementing government policy. To the extent the Worksheet describes program policy, or policy changes, it should be disclosed. *See, Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005). In *NCLR*, advocacy organizations sued the DOJ under FOIA, seeking to compel production of records relating to the Department's position on state and local police enforcement of immigration laws. *NCLR*, 411 F.3d at 352. The DOJ had incorporated memoranda created by the office of legal counsel into its new policy regarding state and local immigration law enforcement authority. *Id.* The Second Circuit ordered the DOJ to disclose the memoranda articulating concerns that the agency policy had changed without notice, because the information would not threaten future law enforcement actions, and because generalized information about an agency's program policy was not protected by the exemption. *Id.* at 358.

Disclosure of the Compliance Review Worksheet will help to inform a broad audience. AILA is a national organization whose purpose is to promote public understanding of immigration law and policy and to advocate for fundamental fairness in immigration law. AILA works closely with numerous other nonprofit organizations, including religious organizations, legal service providers, and bar associations. The information we obtain will help us to inform these groups, and the broad audience they serve, about compliance with regulations for immigration benefits, and to assure integrity within the process by contractors and others conducting on-site investigations.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Cc: Associate General Counsel, DHS

Melanie Ann Pusty, Office of Information Policy, Department of Justice

# **ATTACHMENT 10**



U.S. Citizenship  
and Immigration  
Services

February 18, 2010

APP2009000743

Robert Deasy  
AILA National Office  
1331 G Street NW, Suite 300  
Washington, D.C. 20005

Dear Robert Deasy:

Re: NRC2009023483

You appealed the action of the National Records Center regarding your Freedom of Information Act request for a copy of the Naturalization Compliance Review Worksheet, dated April 28, 2009.

After careful consideration of your appeal, we have decided to affirm the initial action taken in this case. It is our understanding that by letter dated June 9, 2009, the National Records Center responded to your request by providing you with a total denial letter. We affirm that decision. We have also determined that this information is not appropriate for discretionary release.

If you are dissatisfied with our action on your appeal, you may seek judicial review in accordance with 5 U.S.C. § 552 (a)(4)(B).

Sincerely,

A handwritten signature in cursive script that reads "Peter D. Gregory".

Peter D. Gregory, Chief  
Commercial & Administrative Law Division  
Department of Homeland Security  
Citizenship and Immigration Services