

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

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

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**PLAINTIFF'S MEMORANDUM IN SUPPORT OF  
ITS MOTION FOR SUMMARY JUDGMENT**

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Plaintiff American Immigration Lawyers Association (“AILA”) respectfully submits this memorandum of points and authorities in support of its 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 defendants United States Department of Homeland Security (“DHS”) and its component United States Citizenship and Immigration Services (“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. Initially, AILA took issue with defendants’ reliance on FOIA exemptions (b)(2) and (b)(7)(E) in withholding disclosure of responsive records, the adequacy of defendants’ searches in response to AILA’s FOIA requests, and defendants’ failure to identify and release or describe in a *Vaughn* Index all responsive documents. After AILA filed its cross-motion for summary judgment on January 14, 2011, in which AILA presented substantial countervailing evidence demonstrating that defendants’ search was not adequate and that their initial agency Declaration and *Vaughn* Index were facially deficient, defendants withdrew their motion for summary judgment and stated:

After having reviewed the American Immigration Lawyers Association’s (“Plaintiff”) cross-motion for summary judgment and opposition to Defendants’ Motion (Dkt. Nos. 13 & 14) (“Plaintiff’s Motion”), Defendants will undertake a renewed search for responsive records and reconsider redactions and claims of FOIA exemptions with respect to records already produced in response to Plaintiff’s FOIA requests.

Consent Motion to Withdraw filed February 24, 2011 (Dkt. No. 19).

On May 9, 2011, defendants supplemented their production with additional responsive records, provided a Supplemental Declaration of Jill A. Eggleston (attached as Exhibit 19), and provided a Supplemental *Vaughn* Index (attached as Exhibit 20). Nevertheless, defendants did not reassess their initial production and redactions, and are still improperly invoking FOIA exemptions in withholding disclosure of responsive records. In particular, defendants continue to withhold, in-part, the H-1B Petition Fraud Referral Sheet and the Compliance Review Report Form (identified in pages 5-8 of the Revised *Vaughn* Index, attached as Exhibit 21). These documents must be disclosed in full in view of the availability of their content in the public domain. In addition, defendants continue to withhold segregable portions of at least the Memorandum dated October 31, 2008 from Donald Neufeld, which are also in the public domain (identified in pages 1-4 of the Revised *Vaughn* Index, attached as Exhibit 21).<sup>1</sup> Furthermore, to the extent defendants' newly-identified documents also include segregable portions which are in the public domain, defendants should be ordered to release such portions. AILA respectfully requests that its motion for summary judgment 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

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<sup>1</sup> In light of the Supreme Court’s *Milner* decision, USCIS withdrew all assertions of FOIA exemption (b)(2). *See* Eggleston Supp. Decl. at 15 n.4 (citing *Milner v. Dep’t of the Navy*, No. 09-1163 (Mar. 7, 2011)).

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)<sup>2</sup>.

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)<sup>3</sup>, 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.nationofimmigrants.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 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.*

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<sup>2</sup> Exhibits herein are attached to the Declaration of Seth A. Watkins in Support of Plaintiff’s Motion for Summary Judgment.

<sup>3</sup> 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](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.



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.<sup>4</sup>

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.<sup>5</sup> *See* <http://www.regulations.gov/#!documentDetail;D=USCIS-2009-0013-0002> (Exhibit 5).

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<sup>4</sup> The *Vaughn* Indexes accompanying the Declarations of Jill A. Eggleston dated October 29, 2010 (“Initial Eggleston Decl.”) and May 6, 2011 (“Supp. Eggleston Decl.”) describe the H-1B Petition Fraud Referral Sheet as a “companion document” to a Memorandum from Donald Neufeld dated October 31, 2008 (Exhibit 10).

<sup>5</sup> 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 Form*. It is clear from these related records that the Worksheet and Report Form are one and the same document. *See also* Initial Eggleston Decl. at ¶¶ 26-30 (filed December 10, 2010 at Dkt. No. 11-5) and Supp. Eggleston Decl. at ¶¶ 30-35 (Exhibit 19).

The statement explained that, in response to the BFCR 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&vgnnextchannel=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 (Exhibit 7); [http://imminfo.com/Library/employer\\_issues/Compliance%20review%20report.pdf](http://imminfo.com/Library/employer_issues/Compliance%20review%20report.pdf) (document bearing the identifier “Updated 12/05/2008”) (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](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-1B non-immigrant temporary foreign worker visas that had been undertaken since September 2008, the date of the BFCR Report.

Defendants' Statement of Material Facts Not in Genuine Dispute, ¶ 28; *see also* Initial 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 (b)(2) (Exhibit 10);
- a 2-page H-1B Petition Fraud Referral Sheet bearing the identifier "Rev. 08-27-2008, D10" substantially redacted in view of FOIA Exemptions (b)(2) and b(7)(E) (Exhibit 11);
- a 2-page Compliance Review Report bearing the identifier "Updated 06/19/2009" substantially redacted in view of FOIA exemptions (b)(2) and b(7)(E) (Exhibit 12).

The October 27, 2010 production was significantly and facially deficient, and after plaintiff AILA filed its cross-motion for summary judgment on January 14, 2011, in which plaintiff AILA presented substantial countervailing evidence demonstrating that

defendants' search was not adequate, defendants withdrew their motion for summary judgment on February 24, 2011.

On May 9, 2011, defendants produced supplemental materials in response to plaintiff's FOIA requests, a Supplemental Declaration of Jill A. Eggleston (attached as Exhibit 19), and a Supplemental *Vaughn* Index (attached as Exhibit 20).

The government fully or partially released 176 pages of responsive records while claiming FOIA exemptions for portions thereof:

- a 7-page document, described as H-1B Primary Fraud Indicators for Referral (Rev. 08-28-08, D12), generated by the California Service Center (CSC), Center Fraud Detection Operations (CFDO), substantially redacted in view of FOIA Exemption b(7)(E) (Exhibit 22);
- a 3-page document, described as H-1B Q&A (8/28/2008) - frequently asked questions and answers to same regarding the H-1B BFCR Report, partially redacted in view of FOIA Exemption b(7)(E) (Exhibit 23);
- a 2-page document, described as H & L Fraud Referral Sheet-document (form) used for referring cases of suspected employment and marriage fraud to FDNS for further inquiry, substantially redacted in view of FOIA Exemption b(7)(E) (Exhibit 24);
- a 7-page document, described as H-1B Primary Fraud Indicators for Referral (Rev. 09-23-08, D14), generated by the California Service Center (CSC), Center Fraud Detection Operations (CFDO), substantially redacted in view of FOIA Exemption b(7)(E) (Exhibit 25);
- a 2-page H-1B BFCR Summary document dated August 28, 2008, released in full (Exhibit 26);
- a 3-page Fraud Referral Sheet, released in full (Exhibit 27);
- a 2-page H-1B Fraud Refusal Notification Report, released in full (Exhibit 28);
- a 8-page Compliance Review Report Instruction Sheet dated July 22, 2009, released in full (Exhibit 29);

- a 2-page ASVVP ALERT #1 - Additional Guidance for Site Inspectors dated July 31, 2009, released in full (Exhibit 30); and
- a 141-page Vermont Service Center - I-129 H1B Petitions Adjudication's Guide, released in full, except for page 48 which appears to be missing and is not otherwise referenced in the Supplemental *Vaughn* Index (Exhibit 31).

In addition, the government withheld certain documents in their entirety on the basis of FOIA Exemptions b(5) and/or b(6). AILA submits that defendants are still improperly invoking FOIA exemptions in withholding disclosure of certain responsive records. Thus, AILA moves for summary judgment that certain records identified in defendants' *Vaughn* Indexes attached as Exhibits X and Z to the Supp. Eggleston Decl., are not exempt from disclosure.

## ARGUMENT

### PLAINTIFF'S SUMMARY JUDGMENT 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);<sup>6</sup> *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

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<sup>6</sup> 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."

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).

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 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 Form (Exhibit 12) and the H-1B Petition Fraud Referral Sheet (Exhibit 11) are in the public domain and should be released in their entirety. In addition, segregable portions of at least the Neufeld Memorandum appear to be in the public domain. Furthermore, to the extent defendants' newly-identified documents also include segregable portions which are in the public domain, defendants should be ordered to release such portions.

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 Form.*

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



(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](http://imminfo.com/Library/employer_issues/Compliance%20review%20report.pdf)

(Exhibit 8). In addition, defendants have admitted that the Compliance Review Report Instruction Sheet (Exhibits 7 and 8) is in the public domain. See Joint Response to Minute Order on Motion to File Exhibits Under Seal (Dkt. No. 16) (“Defendant’s position is that Exhibits 7, 8, and 15 are publicly available and are therefore not appropriately filed under seal.”). Defendants have also released another version of this document in full (Exhibit 29).

The detailed content of the instructions appears to directly correspond to the Compliance Review Report Form produced by defendants in redacted form. *Compare* Exhibit 12 (redacted Compliance Review Report Form as produced by defendants to plaintiff on October 27, 2010), Exhibit 7 (Compliance Review Report *instructions* published by Thomson Reuters / Aspatore in 2010, Exhibit 8 (Compliance Review Report *instructions* available on the internet at [http://imminfo.com/Library/employer\\_issues/Compliance%20review%20report.pdf](http://imminfo.com/Library/employer_issues/Compliance%20review%20report.pdf)), and Exhibit 29 (Compliance Review Report Instruction Sheet dated July 22, 2011). Just like the instructions available in the public domain, the redacted Compliance Review Report Form 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&vgnnextchannel=66965ddca7977210VgnVCM100000082ca60aRCRD> (Exhibit 6).<sup>7</sup>

The Compliance Review Report instructions clearly are in the public domain and should have been released pursuant to plaintiff's FOIA requests.<sup>8</sup> Because of the correspondence between the content of the instructions and the content of the worksheet or form, 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 Revised *Vaughn* Index, attached as Exhibit 21) 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

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<sup>7</sup> In fact, these are the same questions that immigration officers sought answers to during site inspections carried out as part of the BFCR. *See* BFCR Report at 5-6 (Exhibit 2). USCIS's disclosure of these questions in the BFCR Report further demonstrates that the content of the worksheet is in the public domain.

<sup>8</sup> 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.").

reporter's transcript, the parties' briefs, and the judge's orders and opinions-remain a part of the public domain.").

In particular, the H-1B Petition Fraud Referral Sheet is attached as part of Exhibit A (Exhibit 15) to a Declaration signed by Jill A. Eggleston which was filed 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 nearly one year.

Defendants have admitted that the H-1B Petition Fraud Referral Sheet (Exhibit 15) is in the public domain. See Joint Response to Minute Order on Motion to File Exhibits Under Seal (Dkt. No. 16) ("Defendant's position is that Exhibits 7, 8, and 15 are publicly available and are therefore not appropriately filed under seal.").

Thus, the H-1B Petition Fraud Referral Sheet (Exhibit 11) 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 Exhibit 10 and pages 01-04 of the Revised *Vaughn* Index, Exhibit 21) 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<sup>9</sup>—identified "several primary fraud or technical violation(s) indicators": (1) firms with 25 or

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<sup>9</sup> See [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=17622](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=17622) (Exhibit 14).

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. BFCR Report at p. 15 (Exhibit 2).

The Neufeld Memorandum, dated October 31, 2008, was issued subsequent to the BFCR Report and clearly makes reference to it when introducing the guidance concerning fraud indicators. Disclosure in the Neufeld Memorandum (Exhibit 10) thus appears to be improperly redacted.

4. *Newly-Identified Documents.*

To the extent defendants' newly-identified documents (Exhibits 22-25) also include segregable portions which are in the public domain, as discussed above with respect to the Neufeld Memorandum, defendants should be ordered to release such portions.

B. Exemption b(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 b(7)(E), even though defendants invoked this exemption to allegedly justify withholding portions of the Neufeld Memorandum (Exhibit 10), the H1-B Petition Fraud Referral Sheet (Exhibit 11) and the Compliance Review Report Form (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 b(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 b(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 b(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).

In this case, the government invoked FOIA exemption b(7)(E) to justify withholding portions of the Neufeld Memorandum, the H-1B Petition Fraud Referral Sheet, and the Compliance Review Report Form. 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 BFCR 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.

Furthermore, much of the redacted content of the partially withheld documents is publicly available, having been disclosed by USCIS. The content of both the Compliance Review Report Form and the H-1B Petition Fraud Referral Sheet is published widely on the internet and thus known to the public. In addition, 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 BFCR 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).

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).

C. 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.

### **III. CONCLUSION**

Defendants failed to carry their burden of demonstrating that the records identified in the *Vaughn* Indexes are exempt from disclosure. Accordingly, AILA respectfully requests that the Court grant motion for summary judgment.

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Respectfully submitted,

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