



# Department of Homeland Security Office of Inspector General

## Processing of Nonimmigrant Worker Petitions in Support of U.S. Marine Guam Realignment Construction Activities



## Background

In the October 2005 agreement “U.S.-Japan Alliance: Transformation and Realignment for the Future,” the U.S. Government and Government of Japan agreed to realign U.S. and Japanese forces throughout the Pacific. As part of this realignment effort, the two governments agreed to relocate approximately 8,000 U.S. Marines and 9,000 dependents from Okinawa to Guam by 2014. The transfer is expected to cost an estimated \$13 billion and require a substantive upgrade to Guam’s infrastructure. The U.S. Government expects that these infrastructure upgrades will be conducted by contractors employing an estimated 23,000 foreign-born construction workers cumulatively through 2014.

The objective of our audit was to determine whether the U.S. Department of Homeland Security, through its U.S. Citizenship and Immigration Services (USCIS), has the capability to process and adjudicate an adequate number of H-1B and H-2B temporary nonimmigrant worker visa petitions to support construction requirements associated with the Guam Realignment Project.<sup>1</sup> The report does not assess the capabilities of the Department of Labor to process and approve foreign labor certifications or the Department of State to process and issue temporary nonimmigrant worker visas.

The H visa is a nonimmigrant temporary worker classification. The H visa is job and site specific and, once approved, the employee is eligible to work at the job for which that visa was approved. The H visa status may be obtained for up to 6 years for the H-1B visa<sup>2</sup> and up to 3 years for the H-2B visa.

The H-1B is a nonimmigrant visa in the United States under *the Immigration and Nationality Act*, section 101(a)(15)(H). It allows U.S. employers to temporarily employ foreign workers in “specialty” occupations. The regulations define a “specialty occupation” as requiring theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor.<sup>3</sup> H-1B workers must possess at least a bachelor’s degree or its equivalent and state licensure, if required to practice in that field. H-1B work authorization is also strictly limited to employment by the sponsoring employer. The number of H-1B visas issued annually is capped at 65,000.

The H-2B nonagricultural temporary worker program allows U.S. employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs. H-2B petitions can be approved only for nationals of countries that DHS has designated, with

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<sup>1</sup> For the purpose of this report, only the H-1B (specialty worker) and H-2B (nonagricultural temporary/seasonal worker) petitions will be addressed. It is expected that these two visa categories are of high importance for temporary worker visa petitions associated with the Guam Realignment Project, owing to their exemptions from the statutory numerical limits.

<sup>2</sup> Exception: An alien beneficiary in a Department of Defense research and development or coproduction project may be authorized for a 10-year total period of stay.

<sup>3</sup> 8 C.F.R § 214.2(h)(4)(ii)

the concurrence of the Secretary of State.<sup>4</sup> To qualify for H-2B nonimmigrant classification, the employer must provide evidence that:

- The need for the prospective workers is temporary, regardless of whether the underlying job can be described as permanent or temporary;<sup>5</sup>
- There are not sufficient U.S. workers who are able, willing, qualified, and available to do the temporary work; and,
- The employment of H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

More than 14,000 H-2B petitions were adjudicated in fiscal years 2008 and 2009. H-2B petitioners are not required to provide USCIS with the identity and date of birth of visa beneficiaries prior to obtaining visa petition approval. The number of H-2B visas that can be issued annually is capped at 66,000.

## **Results of Review**

USCIS has the personnel, policies and procedures, and infrastructure necessary to process and adjudicate the estimated number of nonimmigrant temporary worker (H-1B and H-2B) visa petitions that will be needed to support the Guam Realignment Project.

We did not assess the capabilities of the Department of Labor to process and approve foreign labor certifications or of the Department of State to conduct the required beneficiary interviews associated with the issuance of temporary worker visas. We are conducting a separate review to determine whether USCIS' policies, processes, and internal controls governing the adjudication of temporary worker visa petitions address fraud and national security risks inherent in the visa adjudication process.

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<sup>4</sup> Effective January 19, 2010, nationals from the following countries are eligible to participate in the H-2B program: Argentina, Australia, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Ethiopia, Guatemala, Honduras, Indonesia, Ireland, Israel, Jamaica, Japan, Lithuania, Mexico, Moldova, the Netherlands, New Zealand, Nicaragua, Norway, Peru, Philippines, Poland, Romania, Serbia, Slovakia, South Africa, South Korea, Turkey, Ukraine, United Kingdom, and Uruguay. See Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Visa Programs, 75 Fed. Reg. 2879, 2880 (January 19, 2010).

<sup>5</sup> The employer's need is considered temporary if it is a one-time occurrence, a seasonal need, a peak-load need, or an intermittent need.

## **USCIS Is Capable of Handling the Expected Increase in H-1B and H-2B Visas**

### **Volume of H-1B and H-2B Visas**

USCIS' history of processing large numbers of H-1B and H-2B visa petitions indicates that it should have little difficulty addressing the relatively small volume of temporary worker petitions expected to be associated with the Guam Realignment Project. For example, between fiscal years 2008 and 2009, USCIS adjudicated more than 891,000<sup>6</sup> temporary worker visa petitions, of which approximately 662,000 (an average of 331,000 petitions annually) were H-1B or H-2B petitions. In contrast, the Guam Realignment Project is not expected to generate more than 23,000 nonimmigrant worker petitions over a 5-year period. Effective January 18, 2009,<sup>7</sup> DHS removed the requirements for H-2B visa petitioners to provide the identity of visa beneficiaries outside the United States, which should further expedite petition processing because adjudicators no longer have to perform time-consuming background checks of visa beneficiaries originating from overseas.

### **Exemptions from Cap Requirements**

To ensure that enough visas are available for nonimmigrant workers to support the Guam Realignment Project, the *Consolidated Natural Resources Act of 2008* (Public Law 110-229) was enacted, exempting H-1B and H-2B nonimmigrant workers slated for Guam from the cap or established limits for H-1B and H-2B visas. In response to this special exemption, USCIS issued Memorandum HQ70/6.2.8, *Numerical Limitation Exemption for H Nonimmigrants Employed in the CNMI and Guam*, January 29, 2010, to update field guidance for its Immigration Services Officers responsible for adjudicating benefit petitions that fit the exemption criteria. Removing the cap limits the risk that an unexpected surge in applications could delay future Guam-related H-1B and H-2B processing and adjudications.

### **USCIS Coordination with the U.S. Department of Defense**

On January 20, 2010, we met with the USCIS designated point of contact for the Guam Realignment Project (Honolulu District Office Director) and other USCIS officials from the Office of Policy and Strategy and the Directorate of Service Center Operations. According to the officials, USCIS has no formal roles or responsibilities pertaining to the project, and officials reported that they have communicated only with the Department of Defense (DOD) to emphasize the need to for a cap exemption. In addition, they

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<sup>6</sup> This number takes into account a variety of temporary worker situations including filing a petition: (1) seeking original H-1B/H-2B status, (2) seeking a change of status from another benefit category to an H-2B or H-1B visa, (3) seeking a time extension(s) for existing H-1B/H-2B visa holders, or (4) H-1B/H-2B beneficiaries seeking authorization to change jobs.

<sup>7</sup> Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers, 73 Fed. Reg. 78104, 78106 (December 19, 2008).

explained that the estimated volume, when compared with regular production, should not be a “heavy lift” and that responsibility for processing and adjudication of these visa petitions has been delegated to the USCIS California Service Center. However, USCIS may enhance the process by contacting DOD to discuss establishing an information-sharing strategy for communicating results on the volume of adjudicated petitions associated with the project, to aid DOD in planning and managing construction efforts.

### **Conclusion**

USCIS has the capability necessary to process and adjudicate all temporary nonimmigrant worker visa petitions needed to meet construction requirements in support of the Guam Realignment Project, barring any unforeseen circumstances or changes in USCIS capacity.

### **Recommendation**

We recommend that the Associate Director, Service Center Operations Directorate:

**Recommendation:** Develop a memorandum of understanding establishing an information-sharing strategy with the U.S. Department of Defense Joint Guam Program Office on the number and type of petitions approved, denied, or pending to aid in their planning and management of Guam Realignment Project construction activities for the out-years.

### **Management Comments and OIG Analysis**

USCIS concurred with the recommendation and agreed that there is a need for a memorandum of understanding to establish an information-sharing strategy with the U.S. Department of Defense Joint Guam Program Office on the number and type of petitions approved, denied, or pending to aid in their planning and management of Guam Realignment Project construction activities for the out-years. We consider this recommendation unresolved and it will remain open until the USCIS provides details and documentation on actions taken so that we can determine whether these actions adequately address the substance of our recommendation. We have included a verbatim copy of the USCIS’ comments in Appendix B.

## **Appendix A**

### **Purpose, Scope, and Methodology**

The objective of our audit was to determine whether the U.S. Department of Homeland Security, through its U.S. Citizenship and Immigration Services (USCIS), has the capability to process and adjudicate an adequate number of H-1B and H-2B temporary nonimmigrant worker visa petitions to support construction requirements associated with the Guam Realignment Project. This report is in response to an inquiry made during a meeting of the Interagency Coordination Group of Inspectors General for Guam Realignment.

To accomplish our objective, we:

- Reviewed the *Consolidated Natural Resources Act of 2008* (Public Law 110-229) to determine guidance applicable to the numerical exemptions for temporary nonimmigrant workers to perform work in Guam;
- Reviewed applicable sections of the Code of Federal Regulations establishing the policies for alien nonimmigrant workers to obtain temporary employment in the United States and its territory under the H-1B and H-2B programs;
- Reviewed USCIS policies and procedures to determine whether adjudication guidance was implemented and in compliance with numerical visa limitation exemption criteria outlined in the *Consolidated Natural Resources Act of 2008*;
- Interviewed USCIS senior accountable officials representing the Office of Policy and Strategy and the directorates of Service Center Operations and Field Operations; and
- Reviewed USCIS production reports to determine the volume of completed adjudications across petition form types and applicable visa classifications. However, we did not test the validity or reliability of the data used for the reports provided.

We performed fieldwork at USCIS facilities in the Washington, DC, area. We conducted our review between January and April 2010 under the authority of the *Inspector General Act of 1978*, as amended. The nature and brevity of this inquiry precluded the use of normal auditing standards. Therefore, it was not conducted according to generally accepted government auditing standards.

We appreciate the cooperation by USCIS management and staff in providing the information and access necessary to accomplish this review.

**Appendix B**  
**Managements Comments to the Draft Letter Report**

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of the Director MS-2000  
Washington, DC 20529-2000



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

OCT 18 2010

**Memorandum**

**TO:** Anne L. Richards  
Assistant Inspector General for Audits

**FROM:** Lauren Kielsmeier *Lauren Kielsmeier*  
Acting Deputy Director, U.S. Citizenship and Immigration Services

**SUBJECT:** Processing of Nonimmigrant Worker Petitions in Support of U.S. Marine Guam  
Realignment Construction Activities

USCIS appreciates the opportunity to review and comment on the subject report and generally agrees with the OIG summary of the issues identified in the report.

**DHS-OIG recommends that the Associate Director, Service Center Operations Directorate:**

**Recommendation:** Develop a memorandum of understanding establishing an information-sharing strategy with the U.S. Department of Defense Joint Guam Program Office on the number and type of petitions approved, denied, or pending to aid in their planning and management of Guam Realignment Project construction activities for the out-years.

**USCIS response:** USCIS concurs and will begin the MOU process with DOD. The Director of USCIS District 26 has the lead responsibility, with support from other USCIS Directorates.

**Appendix C**  
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Realignment Project  
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