

UNDERSTANDING L-1 VISAS AND THE RECENT OIG REPORT

EXECUTIVE SUMMARY

A recent report by the Department of Homeland Security Office of Inspector General (OIG) has led some to call for further restrictions on L-1 visas, which companies use to transfer key personnel into the United States. The report itself is mild and calls only for possible legislative action to clarify certain aspects of the law.

Among the findings of this NFAP Policy Brief:

- No evidence exists that L-1 visas are being widely used to circumvent restrictions on H-1B visas for skilled professionals. "L-1 visa issuance . . . has abated in recent years," notes the OIG report, with approved petitions declining by more than 20 percent between 2000 and 2005. "Another possible indication that L-1s are not widely used as alternatives to the H-1B is that in fiscal year 2004 the congressional numerical limit on H-1B status was significantly reduced, but no increase in L receipts or approvals was observed," according to the Office of Inspector General report.¹
- Claims of widespread displacement appear to be exaggerated. The OIG report concluded, "While many of the claims that appear in the media about L-1 workers displacing American workers and testimony may have merit, they do not seem to represent a significant national trend."² Given the scrutiny allotted to this issue, if there were many more cases of U.S. workers alleged to have been displaced involving L-1 visas, then such cases would have come to light.
- The Office of Inspector General failed to talk to any companies or their attorneys about adjudication of L-1 visas. If the OIG had done so, it would have found that rather than being too lenient, companies are frustrated by denials of L-1 visa petitions for seemingly capricious reasons due to adjudicators' poor understanding of international business or technology. Jobs and an economic competitive edge are lost when international personnel cannot transfer into the United States.

To address incidents reported in the media in 2003 and 2004, Congress tightened restrictions on L-1 visas less than 16 months ago and called for an interagency task force to recommend any further measures that may be needed. The best course would be to wait for that task force's work, with the caveat that members of task forces and commissions are known to feel a need to make recommendations to justify the body's existence and their time spent.

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To balance concerns about fraud with allowing in individuals vital to the competitiveness of U.S. companies the best approach is improved training and developing greater expertise at the U.S. Citizenship and Immigration Services (USCIS), such as by designating specific adjudicators to handle L-1 cases. Pre-certifying companies may also help to concentrate resources on other potentially problematic employers. The solution to a possible lack of expertise in a government agency should never be enacting restrictive legislation more likely to punish legitimate users than anyone seriously intent on committing fraud.

BACKGROUND

L visas have been around since 1970 to allow U.S. companies to transfer executives, managers and personnel with specialized knowledge from their overseas operations into the United States to work. To qualify, L-1 beneficiaries must have worked abroad for the employer for at least one continuous year (within a three-year period) prior to a petition being filed.³ This would prevent, for example, someone being hired overseas and immediately being sent to work in the United States. Also, based on USCIS regulations, an executive or manager is limited to seven years, while an individual with specialized knowledge can stay for five years.

The U.S. Citizenship and Immigration Services divides intracompany transferees into two categories: L-1A and L-1B. "An L-1A is an alien coming temporarily to perform services in a managerial or executive capacity. An L-1B is an alien coming temporarily to perform services that entail specialized knowledge. Specialized knowledge is a special knowledge of the employer's product or its application in international markets or an advanced level of knowledge of the employer's processes and procedures."⁴

The process to obtain an individual L-1 visa is as follows: "To receive an L-1 visa, a petition (Form I-129) must be filed with USCIS on behalf of the worker by a sponsoring firm. An L-1 petition, when approved, is used by the beneficiary to apply for an L-1 visa if abroad, or to change status if already in the United States. . . . USCIS adjudicators examine many factors before approving an L-1 petition. Both the position that is going to be filled and the worker who will be hired must meet many criteria. Petitions that are complete and clearly meet the standards can be promptly approved. Other petitions require correspondence – a Request For Evidence (RFE) – between the service center and the petitioner to resolve unclear or incomplete submissions."⁵ Eligible employers can file "blanket" petitions that do not require the additional step of USCIS processing.

NO EVIDENCE L-1 VISAS USED TO CIRCUMVENT H-1B VISA RULES

An area of controversy regarding L-1 visas is whether they are used in place of H-1B visas, which in some ways are more restrictive and have often become unavailable to companies due to reduced annual numerical caps. The evidence indicates L-1 visas are not utilized instead of H-1Bs. One reason is that an H-1B is normally used for a new hire, while an L-1 must have worked for a company for at least one year continuously.

Second, as the OIG report observes, "L-1 visa issuance . . . has abated in recent years."⁶ In 2000, the Immigration and Naturalization Service (INS) approved close to 60,000 petitions. Between 2002 and 2005, the number of approved petitions hovered between 46,000 and 41,000 a year, a decline of more than 20 percent since 2000.⁷ "Another possible indication that L-1s are not widely used as alternatives to the H-1B is that in fiscal year 2004 the congressional numerical limit on H-1B status was significantly reduced, but no increase in L receipts or approvals was observed," according to the Office of Inspector General report.⁸

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NO EVIDENCE OF WIDESPREAD ABUSE

In 2003 and 2004, critics of L-1 visas gained mileage from a few cases of alleged displacement of U.S. workers that were the source of sympathetic media coverage and even Congressional hearings.⁹ However, there is little evidence this reflects a wider trend, even if the facts as presented in these instances were correct – and the U.S. companies involved dispute the media's coverage of these cases. Given the fervor and organizational skills of critics, it is clear nearly every new incident involving L-1 visas would be publicly trumpeted as another example that must be acted upon. The OIG report concluded, "While many of the claims that appear in the media about L-1 workers displacing American workers and testimony may have merit, they do not seem to represent a significant national trend."¹⁰

News stories about alleged abuses of L-1 visas predated the "L-1 Visa and H-1B Visa Reform Act," which passed Congress in November 2004. The legislation was targeted at addressing the types of situations raised in media reports on L-1 visas.

While nobody wishes anyone to lose a job, it is a common phenomenon in America, and one that cannot be blamed on L-1s or any other visa category. As Dallas Federal Reserve Bank economist W. Michael Cox and his colleague Richard Alm have explained, "New Bureau of Labor Statistics data covering the past decade show that job losses seem as common as sport utility vehicles on the highways. Annual job loss ranged from a low of 27 million in 1993 to a high of 35.4 million in 2001. Even in 2000, when the unemployment rate hit its lowest point of the 1990's expansion, 33 million jobs were eliminated." Cox and Alm further note, "The flip side is that, according to the labor bureau's figures, annual job gains ranged from 29.6 million in 1993 to 35.6 million in 1999. Day in and day out, workers quit their jobs or get fired, then move on to new positions. Companies start up, fail, downsize, upsize and fill the vacancies of those who left..."¹¹

The point is that it is not possible for Congress to legislate the results of large numbers of economic transactions in America and attempts to do so are likely to do far more harm than good.

QUESTIONS ABOUT THE SCOPE AND METHODOLOGY OF OIG REPORT

Even given its relatively modest recommendations, legitimate questions can be raised about the scope and methodology of the OIG report. The report elicited comments from USCIS adjudicators and consular officers indicating that sometimes they did not understand the material before them. "USCIS adjudicators said that without a more restrictive and more precise definition of 'specialized knowledge,' their denials tended to be subjective. Subjective decisions, they said, are more easily appealed. Because of their desire to do their jobs correctly, successful appeals are seen as a kind of failure that they strive to avoid. They were therefore inclined to approve ambiguous petitions rather than denying them." In addition, adjudicators told the OIG "[T]hat because many petitions were for employment in the rapidly evolving high technology sector, they did not have sufficient technical expertise to determine whether the beneficiary's knowledge is specialized or general. And the petitions often contain highly technical language that is not readily comprehensible to an adjudicator."¹²

The OIG report missed a golden opportunity to query managers at the U.S. Citizenship and Immigration Services as to why they did not foster greater expertise inside the agency. In the private sector, "I don't understand this" is rarely considered an adequate response to challenging material. Training and spe-

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cialization is the response in the private sector and should be in the public sector as well. Members of Congress also would never be satisfied with staff complaining something was too hard to understand, nor would many Congressional staff even think to offer such an explanation to their boss.

For this reason policy makers should find suspect the OIG's recommendation that the L Visa Interagency Task Force, established by legislation passed in November 2004, should seek "legislative clarification" of the term "specialized knowledge." The solution to a lack of expertise in a government agency should never be enacting restrictive legislation more likely to punish legitimate users than anyone seriously intent on committing fraud.

The other recommendations in the OIG report involve administrative measures that USCIS and the State Department can evaluate as to their efficacy. In fact, the OIG agreed with the State Department's Bureau of Consular Affairs that the OIG recommendation to combat fraud by stationing USCIS agents abroad would be duplicative and inefficient. "Consular Affairs advised that its fraud prevention officers investigate L visa fraud already . . . the field is getting crowded and inefficiencies and redundancies will occur. We fully agree with Consular Affairs that this redundancy of functions may become wasteful in the future."¹³

Noting the infusion of new resources to combat fraud, the OIG notes, "USCIS plans to establish a standard mechanism to request overseas verification of pending H and L petitions by Department of State officers in the related countries. State, for its part, plans to use its one-third share of the new \$500 Fraud Prevention and Detection Fee to expand its anti-fraud staffing abroad. They would be able to verify education, experience, relationships, and other information provided in support of H and L petitions. This initiative will, if implemented, reduce successful L petition fraud."¹⁴

It makes little sense for Congress to become involved in making new laws to micromanage the administration of L-1 visa issuance, such is implied in the OIG report's recommendation that "legislative clarification" be considered as to the "criteria and proof" required for a foreign company seeking to use an L petition to open a new office in the United States. Such micromanagement rarely leads to positive results.

This type of fuzzy thinking in the OIG report has bothered experienced attorneys. Austin Fragomen, partner, Fragomen Del Rey, critiqued the OIG report as follows: "I read the report and found it to be very poorly done. Blanket petitions are the normal vehicle of L applicants from India. [Blanket petitions do not go through USCIS adjudicators.] The U.S. consular offices in India, for example, have worked closely together to adopt rigid standards to minimize fraud, including personal interviews of every applicant that involve very specific questioning of the nature of specialized knowledge or management responsibilities. The L's filed with USCIS are really not difficult and there are standard RFE's [Requests For Evidence] eliciting detailed explanations and documentation of the same issues – culminating with a consular interview. Moreover, any company that regularly deploys personnel to the United States establishes a relationship with the consular office and familiarizes the staff with the characteristics of staffing within that employer. Educational credentials are verified by the consular staff regularly."¹⁵

An analysis of the OIG report by Bo Cooper, former General Counsel of the INS and an attorney with Paul, Hastings, Janofsky & Walker, took issue with the OIG report's characterization of fraud: "Based almost exclusively on the face value of unsubstantiated concerns expressed by government adjudicators and consular officers, the OIG report draws vague conclusions that the program is 'vulnerable' to fraud

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and abuse. The report offers no statistical or other meaningful analysis of whether there actually is abuse. Nor does it offer a single illustrative real-life instance of fraud or abuse. Instead, there is mere innuendo about 'abuse that appears to be occurring,' based on unexplored and unsubstantiated concerns from adjudicators. I agree that vigilance against fraud is critical, but this just isn't the sort of analysis that policy recommendations ought to be based on."¹⁶

Ironically, the Office of Inspector General failed to talk to any companies or their attorneys about adjudication of L-1 visas. If the OIG had done so, it would have found that rather than being too lenient, companies are frustrated by denials of L-1 visa petitions for seemingly capricious reasons due to adjudicators' poor understanding of international business or technology.

A human resources specialist at one high tech company explained how when the firm sent in applications for L-1 petitions for six professionals to work on a project, five of the virtually identical applications were approved and one was denied, illustrating how different adjudicators can make different decisions with the same information in front of them. The application for the 6th individual was approved on appeal – two years later.¹⁷

Bo Cooper notes, "Because it evaluated only one side, the OIG concluded that the specialized knowledge visa category is 'so broadly defined that adjudicators believe that they have little choice but to approve almost all petitions.' This would come as a big surprise to users of the L-1B program. They are used to having petitions rejected for incorrect or unclear reasons, or being subjected to repeated requests for additional supporting evidence, or having to make costly and repeated trips to consulates overseas in order to satisfy skeptical consular officials that they are entitled to a visa."¹⁸

The American Council on International Personnel (ACIP), a trade group representing major U.S. employers, also found several problems with the OIG report. For example, it noted that while it may make sense for small businesses to provide quarterly wage reports to illustrate their need for the transfer of a particular manager, requesting such reports on employers with thousands of employees would be burdensome. ACIP also questioned the methodology of the OIG's "survey" of adjudicators in the report, which involved only one USCIS service center. "The OIG's results may have been different had it interviewed adjudicators from other service centers where our members often complain about arbitrary Requests For Evidence or denials." ACIP and other employer groups have recommended establishing "a pre-certification of large, multinational companies [that] would allow DHS to focus resources on less established companies with less easily verifiable information."¹⁹

Companies consider L-1 visas important to competitiveness and job creation in the United States. In testimony on behalf of the trade group the Global Personnel Alliance before the Senate Subcommittee on Immigration and Border Security, attorney Daryl R. Buffenstein provided several examples of U.S. jobs connected to the entry of L-1 visa holders. He described an airline with 58,000 American employees that used the skills of an L-1 visa holder from its U.K. office – a pricing analyst – to enable the company to better compete in European markets. A leading animal health company in the Southeastern part of the United States used an L-1B visa holder to support the livelihood of 600 American workers employed in research and manufacturing of vaccines. "His knowledge of manufacturing and techniques and research parameters developed abroad . . . allows the company to manufacture these vaccines in the United States, rather than manufacturing them in Europe, thus creating jobs here." A European company used employees transferred on L-1 visas to better utilize a recently acquired manufacturing facility in Utah.

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"By introducing new digital signage technologies from its overseas operations through the medium of a few L-1 visa holders, the company is hopeful that this facility can as much as triple its employment numbers to a workforce of up to 300 in the next two to three years," testified Buffenstein.²⁰

QUESTIONS ABOUT "VULNERABILITIES"

Following the publication of the OIG report, a press release issued from the office of Senator Chuck Grassley (R-IA) stated, "The report, released today, found several vulnerabilities and areas that could easily be exploited to the downfall of national security and American workers. . . . We can't have companies bypass the H-1B visas just to get around protections intended to help American workers."²¹

The press release overstates the findings of the OIG report. The OIG does not mention national security threats. If the implication is that a terrorist could enter on an L-1 visa, then there are many easier ways to enter the United States without the scrutiny that an applicant for an L-1 visa would endure. In addition, as noted earlier, the OIG concluded that little evidence exists that L-1 visas are being used in place of H-1B visas, noting that L-1 usage did not increase in FY 2004 when the H-1B cap declined to 65,000 a year (from 195,000 in FY 2003).

LITTLE NEED FOR FURTHER LEGISLATIVE ACTION

The federal government should make reasonable efforts to combat fraud. However, if the only interest one has is to reduce fraud, then changing the law so that few companies could use L-1 visas would accomplish this – but at significant cost. Severely restricting L-1 visas makes little sense as a solution to combating perceived fraud, since it would encourage more U.S. and foreign companies to expand outside – rather than inside – the United States. The ability to transfer personnel is essential to companies. Denying visas to legitimate personnel in a quest to ring out any and all possible fraud harms innovation and job creation in the United States, a fact not acknowledged in the OIG report.

Congress tightened restrictions on L-1 visas less than 16 months ago, passing the "L-1 Visa and H-1B Visa Reform Act" as part of omnibus legislation on November 20, 2004. That legislation responded to perceived abuses by clarifying that an individual who enters based on "specialized knowledge" cannot be placed at another company's worksite if he or she is supervised by that company or it is a "work for hire" arrangement. The legislation also extended, for all L-1 visa holders, to one year the length of time an individual must be working continuously with the company before being transferred to the United States. (See Appendix.)

As noted earlier, the legislation also created a \$500 fee employers must pay to fund anti-fraud efforts related to L-1 visas.

The "L-1 Visa and H-1B Visa Reform Act" created an interagency task force, made up of representatives of executive branch agencies, to recommend possible further measures that may be needed. The best course would be to await that task force's work, with the caveat that members of task forces and commissions are known to feel a need to make recommendations to justify the body's existence and their time spent.

Former INS General Counsel Bo Cooper noted, "In its very thoughtful response to the report, U.S. Citizen-

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ship and Immigration Services emphasized the measures already in place to control against fraud. USCIS stated further that it did not agree that any legislative recommendations regarding the L-1 visa program are necessary or appropriate.¹²²

Rather than enacting more legislation in this area, Congress should encourage executive branch agencies to adopt reasonable administrative measures to address the issue of potential fraud. USCIS and the State Department should adopt widely accepted principles of risk management by, for example, pre-certifying regular users of L-1 visas, particularly larger companies, so more resources could be devoted to potentially problematic cases. This would involve greater upfront investigation of established users, similar in concept to DHS's "trusted traveler" program. Moreover, USCIS should foster greater expertise and specialization in this area through training and by designating specific adjudicators to handle L-1 cases.

Reasonable administrative measures are the best approach to balance concerns about fraud with allowing individuals vital to the competitiveness of U.S. companies in the global marketplace.

UNDERSTANDING L-1 VISAS AND THE RECENT OIG REPORT**APPENDIX****TEXT OF THE L-1 VISA AND H-1B VISA REFORM ACT**

Below is the L-1 visa portion of the L-1 Visa and H-1B Visa Reform Act, which passed Congress on November 20, 2004 as part of H.R. 4818. To combat fraud the legislation also established a \$500 "anti-fraud" fee on L-1 visas and petitions.

TITLE IV--VISA REFORM**SEC. 1. SHORT TITLE.**

This title may be cited as the "L-1 Visa and H-1B Visa Reform Act".

Subtitle A--L-1 Visa Reform**SEC. 11. SHORT TITLE.**

This subtitle may be cited as the "L-1 Visa (Intracompany Transferee) Reform Act of 2004".

SEC. 12. NONIMMIGRANT L-1 VISA CATEGORY.

(a) IN GENERAL.--Section 214(c)(2) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(2)) is amended by adding at the end the following:

"(F) An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 101(a)(15)(L) if--

"(i) the alien will be controlled and supervised principally by such unaffiliated employer; or

"(ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary."

(b) APPLICABILITY.--The amendment made by subsection (a) shall apply to petitions filed on or after the effective date of this subtitle, whether for initial, extended, or amended classification.

SEC. 13. REQUIREMENT FOR PRIOR CONTINUOUS EMPLOYMENT FOR CERTAIN INTRACOMPANY TRANSFEREES.

(a) IN GENERAL.--Section 214(c)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(2)(A)) is amended by striking the last sentence (relating to reduction of the 1-year period of continuous employment abroad to 6 months).

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(b) APPLICABILITY.--The amendment made by subsection (a) shall apply only to petitions for initial classification filed on or after the effective date of this subtitle.

SEC. 14. MAINTENANCE OF STATISTICS BY THE DEPARTMENT OF HOMELAND SECURITY.

(a) IN GENERAL.--The Department of Homeland Security shall maintain statistics regarding petitions filed, approved, extended, and amended with respect to nonimmigrants described in section 101(a)(15)(L) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(L)), including the number of such nonimmigrants who are classified on the basis of specialized knowledge and the number of nonimmigrants who are classified on the basis of specialized knowledge in order to work primarily at offsite locations.

(b) APPLICABILITY.--Subsection (a) shall apply to petitions filed on or after the effective date of this subtitle.

SEC. 15. INSPECTOR GENERAL REPORT ON L VISA PROGRAM.

Not later than 6 months after the date of enactment of this Act, the Inspector General of the Department of Homeland Security shall, consistent with the authority granted the Department under section 428 of the Homeland Security Act of 2002 (6 U.S.C. 236), examine and report to the Committees on the Judiciary of the House of Representatives and the Senate on the vulnerabilities and potential abuses in the visa program carried out under section 214(c) of the Immigration and Nationality Act (8 U.S.C. 1184(c)) with respect to nonimmigrants described in section 101(a)(15)(L) of such Act (8 U.S.C. 1101(a)(15)(L)).

SEC. 16. ESTABLISHMENT OF TASK FORCE.

(a) ESTABLISHMENT.--Not later than 6 months after the date of enactment of this Act, there shall be established an L Visa Interagency Task Force that consists of representatives from the Department of Homeland Security, the Department of Justice, and the Department of State. The Secretaries of each Department and each relevant bureau of the Department of Homeland Security shall appoint designees to the L Visa Interagency Task Force. The L Visa Interagency Task Force shall consult with other agencies deemed appropriate.

(b) REPORT.--Not later than 6 months after the submission of the report by the Inspector General of the Department of Homeland Security in accordance with section 6, the L Visa Interagency Task Force shall report to the Committees on the Judiciary of the House of Representatives and the Senate on the efforts to implement the recommendations set forth by the Inspector General's report. The L Visa Interagency Task Force shall note specific areas of agreement and disagreement, and make recommendations to Congress on the findings of the Task Force, including any suggestions for legislation. The Task Force shall also review other additional issues as may be raised by the Inspector General's report or by the Task Force's own deliberations regarding the policies and purposes of the visa program relative to national goals and transnational commerce.

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END NOTES

¹ *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program*, Office of Inspector General, Department of Homeland Security, January 2006, p. 11-12.

² *Ibid.*, p. 11.

³ *Ibid.*, p. 3.

⁴ *Ibid.*, p. 3.

⁵ *Ibid.*, p. 3.

⁶ *Ibid.*, pp. 11-12.

⁷ *Ibid.*, p. 4.

⁸ *Ibid.*, p. 11-12.

⁹ Hearing before the Senate Committee on the Judiciary Subcommittee on Immigration and Border Security, July 29, 2003.

¹⁰ OIG report, p. 11.0

¹¹ W. Michael Cox and Richard Alm, "The Great Job Machine," *The New York Times*, November 7, 2003.

¹² OIG report, p. 11.

¹³ *Ibid.*, p. 17.

¹⁴ *Ibid.*, p. 16.

¹⁵ E-mail communication with NFAP.

¹⁶ E-mail communication with NFAP.

¹⁷ E-mail communication with NFAP.

¹⁸ E-mail communication with NFAP.

¹⁹ "Summary of DHS Inspector General's Report on Vulnerabilities and Potential Abuses of the L-1 Visa Program," American Council on International Personnel, February 10, 2006. Available at www.acip.com. Note that L "blanket" petitions are available that enable companies to seek L-1 visas for their employees directly at consulates without first filing with USCIS. However, each consulate can decide whether or not it will issue visas under a blanket petition based on its own criteria. A pre-certification program can help address that. To be eligible for filing blanket petitions a company must have 1,000 employees, \$25 million in U.S. sales, or have filed 10 L-1 petitions in the previous year. A well-designed pre-certification program should be open to small, medium, and large employers.

²⁰ Statement of Daryl R. Buffenstein on Behalf of the Global Personnel Alliance, "The L-1 Visa and American Interests in the 21st Century Global Economy," Hearing before the Senate Committee on Judiciary Subcommittee on Immigration and Border Security, July 29, 2003.

²¹ "Grassley: L Visa Loopholes Need To Be Close," Office of Senator Chuck Grassley, February 9, 2006.

²² E-mail communication with NFAP.

UNDERSTANDING L-1 VISAS AND THE RECENT OIG REPORT**ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY**

Started in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Va. The focus of the research is on trade, immigration, and other issues of national importance. NFAP Executive Director Stuart Anderson served as Staff Director of the Senate Immigration Subcommittee, working for Senators Spencer Abraham and Sam Brownback, and as head of policy and counselor to the Commissioner of the Immigration and Naturalization Service. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, Rep. Guy Vander Jagt (ret.) and other prominent individuals.