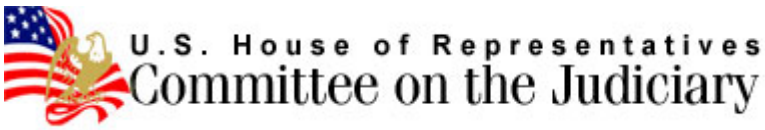

STATEMENT OF
ALFRED B. ROBINSON, JR.
ACTING ADMINISTRATOR
WAGE AND HOUR DIVISION
EMPLOYMENT STANDARDS ADMINISTRATION
U.S. DEPARTMENT OF LABOR

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

HEARING ENTITLED:
"IS THE DEPARTMENT OF LABOR DOING ENOUGH TO PROTECT U.S. WORKERS?"

JUNE 22, 2006

I. Introduction

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today to discuss the H-1B labor provisions of the Immigration and Nationality Act (INA). Responsibilities for H-1B within the Department of Labor are divided between two agencies, the Employment Training Administration (ETA) and the Wage and Hour Division (WHD) of the Employment Standards Administration (ESA). I am joined today at this hearing by Mr. Bill Carlson, who is Administrator of the Office of Foreign Labor Certification within ETA.

The mission of the WHD is to promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation's workforce. WHD is responsible for administering and enforcing some of our nation's most comprehensive labor laws, including the minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act (FLSA); the Family and Medical Leave Act; the Migrant and Seasonal Agricultural Worker Protection Act; the prevailing wage requirements of the Davis-Bacon Act and the Service Contract Act; and the worker protections provided in several temporary visa

programs.

The Government Accountability Office (GAO) recently issued a report outlining WHD's responsibilities under the H-1B statute. GAO made no formal recommendations for WHD, however, GAO raised two issues for Congress to consider that would have a direct effect on WHD. GAO recommended that Congress consider (1) eliminating the restriction on using application and petition information submitted by employers as the basis for initiating an investigation, and (2) directing Homeland Security to provide Labor with information received during its adjudication process that may indicate an employer is not fulfilling its H-1B responsibilities. If Congress implements GAO's recommendations, the result will be an increase in H-1B enforcement for WHD. We fully support this outcome and therefore agree with GAO's recommendations. Moreover, we believe consideration should be given to additional changes to the program to further enhance WHD's ability to reduce fraud, enforce employer's obligations, and protect H-1B and U.S. workers.

The H-1B statutory provision that we will discuss today appears in Section 212(n) of the INA (8 U.S.C. 1182(n)). This section outlines the H-1B Labor Condition Application process and the related labor enforcement requirements. The program was initiated in 1990 and the statute has been amended a number of times. The first major revision was pursuant to the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) and the most recent was pursuant to the H-1B Reform Act of 2004, which re-enacted a number of provisions that had sunset and made other changes to the law.

II. Overview

The H-1B statute establishes an annual ceiling on the number of workers issued H-1B visas. This ceiling is currently set at 65,000. As you know, the FY 2007 cap has already been reached. The INA defines the scope of eligible occupations, specifies the qualifications for H-1B status, requires an employer to file a Labor Condition Application (LCA), which establishes conditions of employment, and establishes an enforcement system to determine compliance with the LCA requirement.

The H-1B program requires the coordination of multiple federal agencies. The Department of Labor's ETA approves the LCA, the Department of Homeland Security (DHS) approves the H-1B visa classification, and the Department of State (DOS) issues the visa. WHD enforces the worker protection provisions. In addition, the Department's Office of the Inspector General (OIG), has investigative authority with respect to certain types of fraud within the H-1B program, such as false statements. The OIG issued audit reports on H-1B in 1996 and 2003.

WHD recognizes that its enforcement of the H-1B program is important to not only protect the integrity of the program, but also to ensure that similarly employed U.S. workers are not adversely affected by the H-1B workers' presence.

A filing fee, in addition to the base fee for a petition to classify an alien as an H1-B, is charged to most employers. Qualifying educational establishments and research organizations are excluded. This fee is $750 for employers with 25 or fewer full time equivalent workers and $1,500 for employers with more than 25 workers. An additional $500 anti-fraud fee is assessed on most H-1B employers. Restrictions on the use of the proceeds from the anti-fraud fee will be discussed later in this testimony.

III. The Application Process

Every employer is required to submit a completed LCA to ETA. The LCA outlines the wages, duties, and working conditions of the job. The employer must sign the LCA. By signing the LCA the employer attests that the "facts" specified on the LCA are true and accurate. The employer must accurately specify the following information:

• Employer Information (firm name, employer identification number (EIN), address, phone);

• Rate of Pay (amount, salary/hourly, full/part time);

• Period of employment;

• Occupation information (number of H-1Bs sought, their occupation code, and job titles);

• Work locations (including additional or subsequent locations); and

• Prevailing Wage (amount, source, date of rate) for all work locations listed.

The statutory language mandates that ETA limit its review of LCAs to ensure that they are complete, not obviously inaccurate, and that the employer has not been debarred. In accordance with those requirements, ETA does not determine the validity of the information submitted on the LCA. ETA is mandated by the statute to complete the processing of an LCA within seven (7) days.

The WHD enforces the provisions of the LCA. Some of the provisions, such as the employer information, wages, period of employment, job classification, work locations, and prevailing wage data, represent "material facts." An employer that knowingly provides incorrect information on the LCA or shows reckless

disregard for the truth of the information has committed a willful misrepresentation. For purposes of H-1B enforcement, WHD considers a willful misrepresentation as fraud and will cite a violation and will assess penalties.

On the LCA the employer must agree to abide by (or "comply with") the following Labor Condition Statements:

• Wages: The employer will pay the higher of the actual or prevailing rate, which includes offering benefits on the same basis as offered to U.S. workers. The actual wage is based on the employer's own pay scale or system. The prevailing wage rate must be no less than the minimum wage required by Federal, State, or local law. The prevailing wage is typically the weighted average of wages paid to similarly employed individuals in the area of intended employment.

• Working Conditions: The employer will provide working conditions (including hours, shifts, vacations, and seniority based benefits) which will not adversely affect similarly employed U.S. workers.

• Strike, Lockout or Work Stoppage: There is no strike or lockout in the same occupational classification on the LCA at the place of employment. These provisions also require that:

? ETA will be notified if a strike/lockout occurs; and
? No H-1B will be placed at a site with a strike/lockout.

• Notification of the LCA filing to the union or workers by:
? Posting a copy of the LCA for 10 days at 2 conspicuous locations at the place of employment; or
? Posting a copy of the LCA electronically.

In addition to the above Labor Condition Statements, an H-1B Dependent Employer or Willful Violator must agree to the following recruitment and non-displacement of U.S. workers provisions:

• An employer will make good faith efforts to recruit U.S. workers;

• An employer will offer the job to an equally or better qualified U.S. applicant (enforced by Department of Justice);

• An employer will not displace a similarly employed U.S. worker within 90 days before or after an H-1B visa petition is filed; and

• An employer must inquire of a secondary employer whether an H-1B worker placed with the secondary employer will displace a similarly employed U.S. worker.

An H-1B Dependent Employer is defined under the statute by a specific formula. As a general matter, an employer that has 15% or more of its workforce employed as H-1B workers is an H-1B Dependent Employer.

An H-1B Willful Violator is defined as an employer who, in a final agency action, was determined to have committed a willful failure or a willful misrepresentation of a material fact after October 21, 1998, and within 5 years of the filing of the LCA.

IV. Compliance

Compliance with the H-1B provisions requires an employer to abide by the provisions of the LCA. One of the most basic provisions is an employer's responsibility to pay the H-1B worker properly.

An employer's obligation to pay an H-1B worker commences on the earliest of the following events:

• The H-1B worker "enters into employment" with the sponsoring employer, which occurs when the worker first makes him/herself available for work or otherwise comes under the control of the employer, such as reporting for orientation or studying for a licensing exam;

• No later than thirty (30) days after the H-1B worker is first admitted into the U.S. pursuant to the H-1B petition, whether or not the H-1B worker has "entered into employment";

• No later than sixty (60) days after the date the H-1B worker becomes eligible to work for the employer (the approval date found on the United States Citizenship and Immigration Service (USCIS) Notice of Action, Form I-797), whether or not the H-1B worker has "entered into employment"; or

• For an H-1B worker already in the United States, on the date of the filing of the Petition for a Nonimmigrant Worker (including the Forms I-129, the H Classification Supplement, and the H1-B Data Collection and Filing Fee Exemption Supplement) by the sponsoring employer under the H-1B portability provisions.

The employer is obligated to pay the required wage rate for all non-productive time caused by:

• conditions related to employment;

• lack of work;

• lack of permit;

• studying for licensing exam; or

• employer-required training.

If the non-productive time is the result of a decision by the employer, the full required wage rate must be paid. A worker cannot be "benched" by the employer without receiving the required wage rate.

If the H-1B worker is not available to work for reasons unrelated to employment, such as voluntary absence for pleasure or an absence due to illness, then the employer is not required to pay. If the non-productive time is the result of a decision, made freely by the worker and without coercion by the employer, the required wage rate need not be paid unless it is payment under a required benefit plan – for example, paid vacation or sick leave.

Full-time workers must be paid the full amount of the required wage rate and part-time workers must be paid for at least the number of hours indicated on the petition for a nonimmigrant worker filed with USCIS (I-129) and referenced on the LCA. If the I-129 indicates a range of hours, the worker must be paid for the average number of hours normally worked.

The employer's wage obligation ceases only after a bona fide termination of employment. Once such termination takes place, the employer is required to notify USCIS that the employment relationship is canceled. A worker may not be terminated and then re-hired under the same petition. The employer is liable for the reasonable costs of the return transportation for the H-1B worker if the employer prematurely terminates the employment.

"Wages" are specifically defined in the regulations. The required wage must be paid to the worker, cash in hand, free and clear, when due, and no less often than monthly. Deductions which reduce the worker's wage to below the required wage rate may be taken only if they are required by law (i.e. taxes), are reasonable/customary (i.e. insurance, savings, or retirement) or are authorized by a collective bargaining agreement. The deductions must be voluntarily authorized in writing by the worker, and be principally for the benefit of the worker. They may not exceed the fair market value or actual cost of a provided benefit (lodging, transportation, goods, for example) or the garnishment limits. Deductions may not be taken to recoup an employer's business expense, as a penalty for early cessation of employment, to recover the USCIS petition filing fees, to cover any additional costs incurred in the petition process or to recover the $500 Anti-Fraud Fee.

An H-1B worker may not be assessed a penalty if he or she ceases employment with the employer before the contract period ends. The employer may, however, seek liquidated damages from the H-1B worker to recoup damages caused by the worker's early departure. The employer may not withhold the last paycheck of the H-1B worker to recover the liquidated damages.

H-1B Dependent or Willful Violator employers are prohibited from terminating a U.S. worker in an equivalent position 90 days before and after the filing of the H-1B petition. In addition, if an H-1B Dependent or Willful Violator employer intends to place the H-1B worker with a secondary employer, then the H-1B employer must inquire from the secondary employer whether the secondary employer has terminated, or intends to terminate, a U.S. worker from an essentially equivalent job 90 days before or after the placement of the H-1B worker.

As I have noted, an H-1B Dependent or Willful Violator employer has additional responsibilities dealing with recruitment and hiring. The H-1B Dependent or Willful Violator employer must take good faith steps to recruit U.S. workers before an LCA or petition is filed. The recruitment must be done using "industry wide" standards; i.e. recruitment standards common or prevailing in the industry. An employer's recruitment methods must include, at a minimum, internal and external recruitment and at least some active recruitment. If a better or equally qualified U.S. worker applies for the job, then the employer must offer the job to the U.S. worker.

The additional provisions for H-1B Dependent or Willful Violator employers do not apply to "exempt" H-1B workers. An H-1B worker may be considered an "exempt" worker if he or she makes at least $60,000 a year; or has the equivalent of a master's degree or higher in a specialty related to the H-1B employment.

Finally, no employer may retaliate against any current, former, or prospective worker for asserting H-1B rights or cooperating in H-1B enforcement. This anti-discrimination requirement includes intimidation, threats, restraint, coercion, blacklisting, discharge or any other form of discrimination.

V. Records

The employer must make the LCA and supporting documentation available to the public within one working day of the filing. A public access file must be available to anyone who requests it. It must be maintained at the employer's principal place of business in the U.S., or at the place of employment. The access file must include, for example, the LCA, wage rate documentation, actual wage system, and the summary of employee benefits.

In addition to the information which must be available in the public access file,

during a WHD investigation the agency may require for inspection a complete petition package, payroll and basic records, such as name, address, social security number, occupation of workers, benefit plans, and a record of dependency determination.

VI. Enforcement

WHD has the following four types of H-1B enforcement authority (the latter two were added to the INA in 2005 and were similar to authority that had sunset in 2003):

Aggrieved Party

The WHD may conduct an investigation pursuant to a complaint received from an aggrieved party, if there is reasonable cause to believe a violation occurred. An aggrieved party is a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the LCA. Also, the WHD has consistently defined an aggrieved party to include the State Department. In order for WHD to accept the complaint, the aggrieved party must allege a violation of the H-1B program that occurred within 12 months of the complaint. When WHD receives a complaint from an aggrieved party indicating a violation of the H-1B program, which occurred within 12 months of the alleged violation, an investigation must be conducted and a determination issued. All investigations prior to April 2006 were conducted pursuant to this enforcement authority.

Willful Violator

The WHD may reinvestigate an employer that previously has been determined by the Labor Department to have committed a willful failure to meet a condition specified on the LCA or willfully misrepresented a material fact in the LCA within the last five years. WHD maintains a list of these willful violators, available on the WHD Web page located at http://www.dol.gov/esa/regs/compliance/whd/FactSheet62/whdfs62S.htm. In FY2006, WHD will conduct investigations under this authority for the first time. It is important to note that most employers that have committed a willful violation were subject to a civil monetary penalty (CMP) and debarment. It has been WHD's experience that in many instances these employers are no longer in business, making it difficult to utilize this authority.

Credible Source

The WHD may conduct an investigation based on credible information from a known source, if the information provides reasonable cause to believe that the employer has willfully failed to meet certain LCA conditions, has engaged in a

pattern or practice of failures to meet such conditions, or has committed a substantial failure to meet such conditions that affects multiple workers. This information must be received within 12 months after the date of the alleged violation. This use of this authority, however, has two explicit statutory limitations; specifically the information:

(1) Must originate from a source other than an employee of the Department of Labor or be "lawfully obtained by the Secretary of Labor in the course of lawfully conducting another Department of Labor investigation under this Act (INA) or any other Act;" and

(2) May not include information submitted by the employer to DOL or DHS as part of the H-1B process.

Secretary's Certification

The WHD may initiate an investigation if the Secretary of Labor personally certifies that there is reasonable cause to believe that a violation has occurred and personally approves commencement of an investigation. This authority may be exercised only for reasons other than completeness of the LCA and obvious inaccuracies by the employer.

VII. Determination of Findings

When the investigation is complete, WHD issues a determination letter offering the employer and interested parties an opportunity to appeal the findings. The employer or interested party has 15 days from the date of the letter to appeal the determination and request an administrative hearing. The violations cited may include a misrepresentation of a material fact, a failure to meet an LCA condition, or a failure to comply with the regulations. There are 16 separate violations listed in the regulations at 20 CFR 655.805(a), which are classified by the WHD as a simple failure, a substantial failure, or a willful failure. The level of gravity of the violation affects whether CMPs will be assessed and their amount, and whether the employer may be debarred and for how long.

The H-1B Visa Reform Act of 2004 amended the law to preclude the WHD from finding a violation for a "technical" or "procedural" failure, if there was a good faith attempt to comply, the employer corrects the failure within 10 business days after DOL or another enforcement agency has explained the failure, and there is no pattern or practice of willful violations. WHD will carefully evaluate the employer's intent to comply when making decisions concerning this defense. It is important that an employer realize that immediate correction of the violation is the most important factor to this defense.

The H-1B Visa Reform Act of 2004 also provided that an employer found to

have violated the prevailing wage requirements during the course of an investigation will not be assessed fines or penalties if the employer can establish that the manner in which the wage was calculated was consistent with industry standards and practices.

If a violation is found by WHD, then the employer will be required to remedy the violation. Remedies may include the payment of back wages or fringe benefits, the assessment of CMPs, a recommendation to USCIS that the employer be debarred, and other actions deemed appropriate to achieve compliance with the H-1B program requirements.

The determination letter issued by WHD will list both the specific violations and the remedies for those violations. Employers must abide by the determined remedy and comply with H-1B provisions in the future.

VIII. Directed Enforcement Authority

As mentioned above, WHD has four distinct and limited enforcement authorities: aggrieved party, willful violator, credible source, and the Secretary's certification. This is the only program WHD administers and enforces that has such restrictions on its enforcement authority.

Prior to April 2006, WHD's H-1B enforcement was essentially a complaint-based program. Previously, WHD did not have a specific program to reinvestigate past willful violators. Our experience showed that, of the few employers that were found to be willful violators, many chose to go out of business subsequent to their debarment (approximately 50% in FY 2006), and thus, could not be reinvestigated. The current list of willful violators is approximately 50 employers nationwide. In April 2006, as acknowledged by the GAO report, WHD began the process of randomly reinvestigating willful violators.

As noted above, the credible information source investigation (added to the INA in 2005) relies on someone other than a DOL/ETA or DHS employee coming forward with information suggesting that an employer has committed a willful failure, a pattern or practice of failures, or has substantially failed to meet a condition of the LCA which affects multiple workers. To date, no person has been able to present enough information to warrant opening an investigation under this authority.

Finally, the Secretary's authority (added to the INA in 2005) requires the Secretary to personally certify that she believes reasonable cause exists for an investigation. Again, the authority is limited to cases that involve violations other than incompleteness or obvious inaccuracies by the employer. This authority has never been exercised.

GAO suggests that Congress consider (1) eliminating the restriction on using application and petition information submitted by employers as the basis for initiating an investigation, and (2) directing Homeland Security to provide Labor with information received during its adjudication process that may indicate an employer is not fulfilling its H-1B responsibilities. We believe that these changes would increase WHD's enforcement ability, but we defer to DHS as to whether it is necessary or appropriate statutorily to direct DHS to provide this information to DOL. Although we support GAO's recommendations, it should be recognized that GAO's suggestions would maintain the current four distinct, yet limited, enforcement authority provisions. Congress may want to consider instead, replacing this complex mixture of enforcement authorities with a broad grant of authority similar to that found in the FLSA. The FLSA authorizes the WHD to "investigate such facts, conditions, practices or matters as . . . necessary or appropriate to determine whether" a violation has occurred.

IX. Anti-Fraud Fee

As previously mentioned, the anti-fraud fee is $500 per petition. The $500 is divided equally between DOL, DHS, and DOS. WHD's portion of this fee totals approximately $30 million annually. However, the statute limits DOL use of this money only to enforcement of INA Section 212(n) (describing H-1B). Without unrestricted investigative authority, the Department estimates that it will continue to spend approximately $4.0 million annually for H-1B enforcement. If Congress changes the statute to include broader H-1B investigative authority, it would be reasonable to expect WHD to significantly increase current H-1B enforcement activities.

WHD takes very seriously its responsibility to enforce the H-1B program's requirements. Over the last three years, WHD averaged between 130 and 170 completed H-1B cases per year. Approximately 75 percent of all complaints resulted in a violation. In FY 2005 alone, WHD collected over $3.3 million for more than 500 workers. Among the violations found in FY2005, there were 20 in which the agency determined that an employer misrepresented a material fact.

As for how WHD spends these funds, WHD determines the amount to offset with H-1B funds each quarter based on the percentage of H-1B enforcement time compared to total enforcement time. For example, if 2 percent of enforcement time is H-1B related during the first quarter, then WHD offsets 2 percent of our obligations from the first quarter with H-1B funds.

Recently, WHD increased its H-1B compliance assistance and educational activities. It currently is conducting a nationwide H-1B training program for WHD investigators and managers, as well as attorneys in the Office of the Solicitor. The training will result in greater enforcement, heightened awareness

of fraud and an increase in H-1B compliance assistance activity, all of which should result in additional complaints for WHD to investigate and incidences of fraud to report to other authorities. In preparation for this training, WHD recently released on its Website 26 H-1B Fact Sheets, which are part of the larger compliance assistance program. The program includes the recently issued H-1B chapter for WHD's Field Operations Handbook, H-1B worker rights cards, a PowerPoint presentation, seminars to the public, and a series of H-1B press releases. In addition, WHD is an active member of the Immigration Benefit Fraud Working Group, which includes other Federal departments, such as the DOS and DHS.

Even if Congress were to expand WHD's H-1B enforcement authority as GAO recommends, given current statutory language limiting the use of the funds solely to H-1B enforcement, we would expect a surplus of H-1B fee money. The Department believes a modification in INA Section 286(v)(2)(C) would provide greater flexibility to fully utilize the anti-fraud money. Such a change in the statutory language would help to supplement overall enforcement activity to further combat fraud and protect American workers. The effect of the language that the Department proposes, along with similar improvements to the fraud fee provision proposed by DOS and DHS with respect to their shares of the fraud fee, would maintain a strong and viable H-1B enforcement and compliance assistance program while, at the same time, strengthening enforcement programs and activities that focus on low-wage industries likely to employ foreign workers.

Mr. Chairman, that concludes my statement and I will be pleased to respond to questions from the Members of the Subcommittee.