



December 13, 2004

By email: prakash.khatri@dhs.gov

Hon. Prakash Khatri
Ombudsman
Office of the Ombudsman
U.S. Citizenship & Immigration Services
Department of Homeland Security
Washington, DC 20528

Re: End the Government's Immigration Bias against America's Small Businesses

Dear Mr. Khatri:

This is the third in a series of open letters outlining suggested changes in the practices of United States Citizenship & Immigration Services (USCIS). My letters to you are intended to put a flashlight on the behavior of USCIS - an agency that all too often remains mired in the worst practices of legacy INS. I write this time to ask that you examine and remedy several practices at the USCIS Regional Service Centers (RSCs) that hurt America's entrepreneurs and small businesses.

My first letter (accessible at <http://www.nationofimmigrators.com>) asked you to encourage USCIS adjudicators to adopt a fair-minded approach to decision-making and refrain from usurping the fraud-detection mission of the Bureau of Immigration & Customs Enforcement. The letter resurrected the long-forgotten wisdom of a legacy INS Regional Commissioner who maintained that only a tiny fraction of applicants and petitioners are out to cheat the government and that a USCIS preoccupation with malevolent customers only hurts the law-abiding supermajority and adds unnecessarily to the growing backlogs.

The second letter (available at <http://www.nationofimmigrators.com>) asked that you pressure USCIS to reduce its other, less-visible backlog, namely, the growing list of unpublished regulations. My second letter urged you to pressure the agency to fulfill the mandate of Congress by providing the public with a clear, full understanding of how the government interprets and applies immigration statutes when it decides whether to grant or refuse applications for immigration benefits.

This third letter asks you to intervene and cause USCIS to halt its unannounced practice of applying different, more-demanding, and wholly unlawful standards of eligibility for immigration benefits to America's small businesses than the agency applies to large companies. Before you conclude that this writer is making exaggerated or unfounded claims, consider the following, painfully-apparent attributes of the agency's animus against small businesses:



- The agency's customary methods for denying immigration benefits (the prohibitions in statutes, regulations and formal policy memoranda) are not the RSC adjudicators' tools of choice in refusing benefits requests by small businesses. Rather, the CAOs (Center Adjudications Officers), Supervisory CAOs, the Directors of the RSCs (Regional Service Centers) and their AAO (Administrative Appeals Office) colleagues recurrently deny cases by using the following lawless and illogical stratagems:
 - "Your business lacks the ability to pay the sponsored wage" -- Never mind that the business has regularly paid the alien and its other workers on time, that the parent company, the shareholders or an accommodating creditor or guarantor have assured funding sources and the payment of wages, or that unspent tax-based accounting adjustments such as depreciation (which involve only bookkeeping entries and no current outlay of funds) provide an ample pool of money for payment of wages;
 - "Your business is too small to justify hiring a [fill in the occupation] as a professional worker" - The implicit message here is that when the business grows larger and the quota re-opens, USCIS may allow the hiring of an H-1B worker. It matters not that centralized economic planning (whereby bureaucrats make all critical business decisions) has been repudiated since the fall of the Soviet Union, or that no federal statute or policy bars small businesses from using the employment-based immigration laws to increase the bottom line;
 - "The Labor Department's Occupational Outlook Handbook says the job at your company doesn't require a degree" - With this woodenly applied rationale, many petitioning firms are prevented from securing the services of an H-1B even though precedent decisions recognize that occupations are ever-evolving, other legitimate evidence shows the need for a degree, or the petitioner insists on using degreed workers in complex jobs to achieve the business mission;



- “Your employee is no function manager because he/she performs the function” - USCIS adjudicators conveniently “forget” that Congress has declared the size and phase of development of the business to be factors to consider when determining L-1 eligibility as a manager and that function management is an express statutory alternative to personnel management as a basis for L-1A classification. They also forget the law of business reality that functions don’t manage themselves or produce profits without human intervention;
 - “Oops, we goofed before; so now close up shop and head for the border” - Apparently, the government’s word cannot be trusted or relied on to build and maintain a business. Never mind that the business is prosperous, USCIS makes employers say farewell to American workers as pink slips are distributed and the business is sold at fire-sale prices. Petitioners must also tell customers to find other purveyors of goods or services because the business never should have been allowed to serve them and must vamoose beyond the border;
 - “Is This Job Portable? – Fuggedaboutit!” A variant of the previous “we-goofed” stratagem, an H-1B visa holder, though unshackled from involuntary restraints on career changes by Congress’s portability enactment, can still have the new employer’s petition denied despite sponsorship in the identical specialty occupation;
 - “You may appeal; but even if you win, you lose” - A Pyrrhic victory is all the small employer can hope to expect if the AAO months later ultimately sustains the appeal. The employer and nonimmigrant worker face a Hobson’s choice: The alien either opts to violate status and incur unlawful-presence penalties or surrenders and leaves the country while the petitioner tries to secure due process by awaiting a desultory decision and, regrettably all too often, a cursory and poorly-reasoned, boilerplate affirmance from the AAO.
- This is an undeclared, stealth attack on a small business. USCIS Director Eduardo Aguirre has issued no formal pronouncement urging adjudicators to treat small businesses like enemy combatants.



- This is an assault with many casualties. Immigration lawyers who represent small businesses, investors and entrepreneurs report that their clients are being taken down more frequently than ever before with an unprecedented number of unwarranted Requests for Evidence (“RFEs”), Notices of Intent to Deny (“NOIDs”), Notices of Decision (“NODs”) denying outright previously-approved and newly-filed cases, and Notices of Intent to Revoke (“NIRs”) approved petitions.
- This is a decentralized attack. Command and control decisions are not made by USCIS Headquarters in Washington. Instead, the agency’s lower-ranking officers – its CAOs and Supervisory CAOs – are collaborating with an Amen Chorus of RSC Directors and the Administrative Appeals Office (“AAO”) in the bushwhacking of America’s small business owners.

These are but a few examples of the USCIS’s current campaign against small businesses, both long-established and newly emerging. The unannounced assault is troubling for many reasons. Nothing in the Immigration and Nationality Act, the Code of Federal Regulations or any policy pronouncement of Congress or the Executive Branch justifies the disparate treatment and damaging impact on small businesses. Indeed, the immigration laws undoubtedly are, and must remain, business-size neutral.

As economists, politicians and the Small Business Administration repeatedly tell us, small businesses are an essential component of the American economy, often the harbinger of economic rebound when larger business concerns are still downsizing or offshoring jobs. See, e.g., the Small Business Administration Office of Advocacy’s March, 2004 publication “Small Business Resources for Faculty, Students, and Researchers: Answers to Frequently Asked Questions,” accessible at www.sba.gov; and The National Federation of Independent Businesses’s Small Business Policy Guide, Ch. 3, available at www.nfib.org.

Just because the government is inhospitable to small businesses, “[w]hy should the country care?” asks Ted Turner, well-known entrepreneur who built CNN from an improbable notion to a leading cable news giant. He provides a compelling answer:

“When you lose small businesses, you lose big ideas. People who own their own businesses are their own bosses. They are independent thinkers. They know they can't compete by imitating the big guys; they have to innovate. So they are less obsessed with earnings than they are with ideas. They're willing to take risks. When, on my initiative, Turner Communications (now Turner Broadcasting) bought its first TV station, which at the time was losing \$50,000 a month, my board strongly objected. When TBS bought its second station, which was in even worse shape than the first, our accountant quit in protest. . . .



“For a corporation to launch a new idea, you have to get the backing of executives who are obsessed with quarterly earnings and afraid of being fired for an idea that fails. They often prefer to sit on the sidelines waiting to buy the businesses or imitate the models of the risk-takers who succeed. . . .

“That's an understandable approach for a corporation -- but for a society, it's like overfishing the oceans. When the smaller businesses are gone, where will the new ideas come from?” (*The Washington Post*, May 30, 2003.)

Mr. Khatri, I implore you. Please heed the words of President Bush:

“To accelerate the momentum of this economy and to keep creating jobs, we must take practical measures to help our job creators, the entrepreneurs and the small business owners.”
Presidential Press Conference, Nov. 4, 2004, accessible at
<http://www.whitehouse.gov/news/releases/2004/11/20041104-5.html>

Help stop the immigration assault on small businesses. Mount a peace-keeping mission and bring the many injustices visited on American's small businesses to an immediate end.

Sincerely,

A handwritten signature in black ink, appearing to read 'Angelo Paparelli', written in a cursive style.

Angelo A. Paparelli