

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

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TECHSERVE ALLIANCE, F/K/A NATIONAL  
ASSOCIATION OF COMPUTER  
CONSULTANT BUSINESSES,

Plaintiff,

v.

JANET NAPOLITANO, Secretary,  
U.S. Department of Homeland Security, *et al.*,

Defendants.

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Civil Action No. 10-0353 (HHK)

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiff TechServe Alliance, f/k/a National Association of Computer Consultant Businesses, brings this action against Defendants Janet Napolitano, Secretary, U.S. Department of Homeland Security, and Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services ("USCIS") (together, "Defendants"), under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, challenging USCIS's response to a FOIA request that Plaintiff submitted by letter dated April 15, 2009.

As of the date of this filing, USCIS has satisfied all of its obligations with respect to Plaintiff's above-referenced FOIA request. USCIS has conducted an adequate search for responsive records and has produced to Plaintiff all of the responsive records to which Plaintiff is entitled. Additionally, USCIS has referred 42 pages of documents to the U.S. Department of Labor, which, too, has produced to Plaintiff all of the responsive records to which Plaintiff is entitled. As there are no material facts in dispute, Defendants respectfully move this Court pursuant to Federal Rule of Civil Procedure 56 for summary judgment as to all claims asserted in

this action. Defendants respectfully submit that the attached memorandum of points and authorities, supporting declaration and exhibits thereto establish that Defendants are entitled to the relief they are seeking.

Date: June 24, 2010

Respectfully submitted,

RONALD C. MACHEN JR., D.C. Bar #447889  
United States Attorney  
for the District of Columbia

RUDOLPH CONTRERAS, D.C. Bar #434122  
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Civil Action No. 10-0353 (HHK)

**DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE**

Pursuant to Local Civil Rule 7(h), Defendants Janet Napolitano, Secretary, U.S. Department of Homeland Security, and Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services ("USCIS") (together, "Defendants") respectfully submit this Statement of Material Facts Not in Genuine Dispute.

1. USCIS oversees lawful immigration to the United States and is charged with disseminating accurate and useful information regarding immigration issues, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of the U.S. immigration system. Declaration of Jill A. Eggleston ("Eggleston Decl.") ¶ 7. Among its responsibilities, USCIS processes H-1B temporary visa petitions filed by U.S. employers seeking to hire nonimmigrant alien workers on a temporary basis. *Id.*

2. Through its Fraud Detection and National Security Division ("FDNS"), USCIS engages in significant anti-immigration fraud activities. *Id.* ¶ 36. FDNS collaborates with law

enforcement agencies within DHS, such as U.S. Immigration and Customs Enforcement (“ICE”), and outside DHS, including various United States Attorney’s Offices throughout the country, on efforts to detect, investigate, apprehend, and deter immigration fraud. *Id.*

3. By letter dated April 15, 2009, Mark B. Roberts, CEO of the National Association of Computer Consultant Businesses (former name of Plaintiff TechServe Alliance), submitted a FOIA request to USCIS seeking records relating to H-1B petitions and related policies. *See id.* ¶ 8 & Ex. A.

4. The National Records Center (“NRC”), which processes FOIA requests submitted to USCIS, assigned Plaintiff’s request to its Significant Interest Team for processing. *See id.* ¶¶ 10-11.

5. NRC determined that relevant documents were reasonably likely to be located at the USCIS’s National Security and Records Verification Directorate (“NSRV”), Service Center Operations (“SCOPS”), and the Office of Policy and Strategy (“OPS”) based upon the functions and roles played by these offices. *Id.* ¶¶ 11-15.

6. NSRV determined that any responsive documents would be located within FDNS because FDNS was the only division that handled immigration fraud matters. *Id.* ¶ 16.

7. Immigration Officer Charles Pratt of the Fraud Detection Branch, the resident subject matter expert for employment fraud in the FDNS Fraud Detection Branch, discussed the request with his first- and second-line supervisors and also contacted relevant offices within USCIS and FDNS to ask for any documentation that appropriately addressed the request. *Id.* ¶ 17. Mr. Pratt searched the HQFDNS shared computer drive, as well as his own personal computer drive and hard copy files, for responsive records. *Id.*

8. Within SCOPS, adjudications officer April Padilla determined that the SCOPS Center Fraud Detection Operations (“CFDO”) offices located at each of the four Service Centers might have responsive documents and accordingly forwarded the request to the CFDOs for a search of their records. *Id.* ¶ 18. Ms. Padilla also forwarded the request to Carol Williams, a SCOPS HQ adjudications officer who worked on H-1B matters. *Id.* Ms. Williams searched SCOPS HQ records for any documents, including hard copy and electronic documents, responsive to the FOIA request. *Id.*

9. Upon her understanding that the Agency’s Office of Field Operations (“OFO”) might have responsive documents related to the Adjudicator’s Field Manual (“AFM”), Ms. Holt forwarded the FOIA request to OFO and was advised to speak with Roger Pitcairn, the point person for all AFM updates. *Id.* ¶ 19.

10. OPS indicated that it did not have any responsive records because the subject matter of Plaintiff’s FOIA request fell outside its purview, as operational matters of this nature would be handled by SCOPS and FDNS. *Id.* ¶ 22.

11. NRC reviewed all potentially responsive documents that had been compiled and identified 1,052 pages as responsive to the request. *Id.* ¶ 25.

12. Ms. Holt reviewed each of the 1,052 pages of responsive documents and determined which information was exempt from disclosure pursuant to the FOIA exemptions set forth at 5 U.S.C. § 552(b). *Id.*

13. In making this determination, Ms. Holt considered whether any information could be segregated and released. *Id.* ¶ 26.

14. Ms. Holt determined that 286 pages could be released in full and 71 pages could be released in part. *Id.* 621 pages were withheld in full only after a line-by-line review and

determination that there were no reasonably segregable portions of these documents that were appropriate for release. *Id.*

15. NRC initially referred 74 pages to another agency, DHS, Office of Inspector General (“OIG”), for its direct response to the requester. *Id.* ¶ 27 & Ex. C. Upon further discussions with the DHS, OIG FOIA office, the NRC determined that this referral should have been handled as a consultation and subsequently requested that the 74 pages be returned to the NRC for processing. *Id.* ¶ 31.

16. By letter dated March 30, 2010, the Agency disclosed 357 pages of responsive, non-exempt information to Plaintiff. *Id.* ¶ 28 & Ex. D.

17. On March 31, 2010, SCOPS indicated that it had located documents relating to communications with the Department of Labor regarding H-1B policies. *Id.* ¶ 29. From this additional set of documents, the NRC identified 48 responsive pages and referred 42 of the 48 pages to DOL for direct response to Plaintiff. *Id.* ¶¶ 29-30.

18. Of the six pages that were not referred to DOL, NRC determined that two pages would be released in full and three pages could be released in part. *Id.* ¶ 29. Only one page was withheld in full after a line-by-line review and determination that there were no reasonably segregable portions of the document appropriate for release. *Id.*

19. On April 5, 2010, the Agency made a supplemental release of five pages of responsive, non-exempt documents. *Id.* ¶ 30 & Ex. F.

20. NRC completed its processing of the 74-page document initially referred to DHS, OIG and determined that this document was a draft that was exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5). *Id.* ¶ 31.

21. By letter dated June 23, 2010, USCIS informed the requester that a final version of the document was publicly available and additionally released six pages in full that had originally been withheld pursuant to 5 U.S.C. § 552(b)(2). *Id.* ¶ 31 & Ex. G.

22. USCIS withheld under Exemption 2 internal Agency guides, operating manuals, memoranda, referral forms, e-mails, and other documents related to the adjudication of applications for immigration benefits, generally, and to the detection, investigation, apprehension, and deterrence of immigration fraud, specifically. *Id.* ¶¶ 35-36.

23. USCIS withheld under Exemption 7(E) (in conjunction with Exemption 2) documents related to the detection, investigation, apprehension, and deterrence of immigration fraud. *Id.* ¶ 36

24. USCIS withheld under Exemption 5 draft guides, operating manuals, memoranda, reports, e-mails, and other documents reflecting inter- or intra-agency communications related to legal or immigration policy-related matters. *Id.* ¶ 38.

25. USCIS withheld under Exemption 6 contact information for a number of USCIS employees, and the names and/or contact information for a former employee and a third party. *Id.* ¶ 40.

26. DOL processed and released all 42 pages referred by USCIS. Declaration of Brian Pasternak (“Pasternak Decl.”) ¶ 6; *see also* Ex. 1.

27. DOL applied redactions pursuant to the deliberative process privilege under Exemption 5 to eight emails and redactions pursuant to Exemption 7(A) to one email. Pasternak Decl. ¶ 6 & Ex. A.

28. The Office of Foreign Labor Certification within the Employment and Training Administration (“ETA”) at DOL is responsible for administering labor certification applications

filed by U.S. employers seeking to employ foreign workers. *Id.* ¶ 18. In order to ensure that a prospective employer's participation is lawful and not intended to circumvent the immigration laws, DOL will investigate instances of fraud in the H-1B program. *Id.*

Date: June 24, 2010

Respectfully submitted,

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United States Attorney  
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Civil Action No. 10-0353 (HHK)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiff TechServe Alliance, f/k/a National Association of Computer Consultant Businesses, brings this action against Defendants Janet Napolitano, Secretary, U.S. Department of Homeland Security, and Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services ("USCIS" or "Agency") (together, "Defendants"), under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, challenging USCIS's response to a FOIA request that Plaintiff submitted by letter dated April 15, 2009.

As of the date of this filing, USCIS has satisfied all of its obligations with respect to Plaintiff's FOIA request seeking records pertaining to H-1B visa petitions and related policies. USCIS has conducted an adequate search for responsive records and has produced to Plaintiff all of the responsive, nonexempt records to which Plaintiff is entitled. As the Declaration of Jill A. Eggleston and the accompanying *Vaughn* Index demonstrate, USCIS's withholdings and claims of exemptions with respect to responsive records were entirely appropriate. Moreover, USCIS referred 42 pages of responsive records to the U.S. Department of Labor ("DOL"), which, too,

has produced to Plaintiff all of the responsive, non-exempt records to which Plaintiff is entitled. As there are no material facts in dispute, USCIS is entitled to summary judgment with respect to all claims that have been asserted in this action.

### **BACKGROUND**

#### **I. USCIS’S ROLE IN OVERSEEING LAWFUL IMMIGRATION TO THE UNITED STATES**

As the agency that oversees lawful immigration to the United States, USCIS is charged with disseminating accurate and useful information regarding immigration issues, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of the U.S. immigration system. Declaration of Jill A. Eggleston (“Eggleston Decl.”) ¶ 7. Among its responsibilities, USCIS processes H-1B temporary visa petitions filed by U.S. employers seeking to hire nonimmigrant alien workers on a temporary basis. *Id.* Through its Fraud Detection and National Security Division (“FDNS”), USCIS engages in significant anti-immigration fraud activities. *Id.* ¶ 36. FDNS collaborates with law enforcement agencies within DHS, such as U.S. Immigration and Customs Enforcement (“ICE”), and outside DHS, including various United States Attorney’s Offices throughout the country, on efforts to detect, investigate, apprehend, and deter immigration fraud. *Id.*

#### **II. PLAINTIFF’S FOIA REQUEST**

Plaintiff, TechServe Alliance (formerly known as the National Association of Computer Consultant Businesses (“NACCB”)), purports to be an association of information technology (“IT”) staffing, IT solutions, and IT consulting firms who petition for H-1B visas on behalf of prospective and current employees. Compl. ¶ 3.

By letter dated April 15, 2009, Mark B. Roberts, CEO of NACCB, submitted a FOIA request to USCIS seeking the following records:

- document entitled “H-1B Petitions, Fraud Referral Sheet”;
- policies, strategies, or priorities of USCIS with respect to the processing of H-1B nonimmigrant petitions;
- revisions, modifications, edits, or other changes in Chapter 31.3 of the USCIS Adjudicator’s Field Manual (“AFM”) entitled “H-1B Classification and Documentary Requirements” or any predecessor manual;
- memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, interpreting the term “itinerary” found in 8 C.F.R. 214.2(h)(2)(i)(B) as it relates to the H-1B Nonimmigrant classification, HQ 70/6.2.8 (December 29, 1995), and any subsequent revisions, updates, or modifications thereof;
- Interoffice Memorandum, Donald Neufield, Acting Associate Director, Domestic Operations, *Removal of the Standard Request for Evidence Processing Timeframe Final Rule*, 8 C.F.R. 103.2(b), *Significant Revision to the Adjudicator’s Field Manual (AFM) Chapters 10.5(a), (b); New Appendix 10-9* (AFM Update AD07-05), HQ 70/11, 70/12, AFM Update AD7-05, June 1, 2007, and any subsequent revisions, updates, or modifications thereof;
- memorandum from the INS Associate Commissioner for Examinations dated November 13, 1995, file HQ 21 4h-c. pertaining to USCIS requirements for H-1B visa petitioners;
- memorandum from William Yates, Associate Director, Operations, USCIS, dated February 16, 2005, entitled *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*; and any subsequent revisions, updates, or modifications thereof; and
- communications with DOL or the Department of State concerning the processing of H-1B visa applications.

See Eggleston Decl. ¶ 8 & Ex. A.

### **III. USCIS’S SEARCH FOR AND DISCLOSURE OF RECORDS RESPONSIVE TO PLAINTIFF’S FOIA REQUEST**

#### **A. USCIS’s Search for Responsive Records**

The National Records Center (“NRC”), which processes FOIA requests submitted to USCIS, received Plaintiff’s FOIA request on April 21, 2009. Eggleston Decl. ¶ 9. In accordance with its normal operating procedures, the NRC acknowledged receipt of the FOIA request by

letter dated April 22, 2009, advising the requester that requests were processed in the order of receipt and assigning control number NRC2009022434 to this request. *See id.* & Ex. B. Due to the broad nature of Plaintiff's request, NRC assigned the request to its Significant Interest Team for processing. *See id.* ¶¶ 10-11. Upon review of Plaintiff's FOIA request, Cynthia Holt, a paralegal on the Significant Interest Team, determined that relevant documents were reasonably likely to be located at the USCIS's National Security and Records Verification Directorate ("NSRV"), Service Center Operations ("SCOPS"), and the Office of Policy and Strategy ("OPS") based upon her understanding of the roles played by these offices. *Id.* ¶¶ 11-15.

NSRV determined that any responsive documents would be located within FDNS because FDNS was the only division that handled immigration fraud matters. *Id.* ¶ 16. FDNS assigned the FOIA request to Immigration Officer Charles Pratt of the Fraud Detection Branch, as Mr. Pratt was the resident subject matter expert for employment fraud in the Fraud Detection Branch. *Id.* Mr. Pratt discussed the request with his first- and second-line supervisors and also contacted relevant offices within USCIS and FDNS to ask for any documentation that appropriately addressed the request. *Id.* ¶ 17. In addition, Mr. Pratt searched the HQFDNS shared computer drive, as well as his own personal computer drive and hard copy files, for responsive records. *Id.* On or about May 12, 2009, FDNS forwarded all responsive documents in its possession to Ms. Holt. *Id.*

Within SCOPS, Plaintiff's FOIA request was handled by adjudications officer April Padilla. *Id.* ¶ 18. After reviewing the request and discussing it with Mr. Pratt, Ms. Padilla determined that the SCOPS Center Fraud Detection Operations ("CFDO") offices located at each of the four Service Centers might have responsive documents and accordingly forwarded the request to the CFDOs for a search of their records. *Id.* Ms. Padilla also forwarded the request to

Carol Williams, a SCOPS HQ adjudications officer who worked on H-1B matters. *Id.* Ms. Williams was tasked to search SCOPS HQ records for any documents, including hard copy and electronic documents, responsive to the FOIA request. *Id.* SCOPS located responsive documents and on or about May 29, 2009, forwarded all responsive documents to Ms. Holt. *Id.*

SCOPS also informed Ms. Holt that the Agency's Office of Field Operations ("OFO") might have responsive documents related to the Adjudicator's Field Manual ("AFM"), the third category of requested documents. *Id.* ¶ 19. Ms. Holt forwarded the FOIA request to Craig Howie of the OFO. *Id.* On May 8, 2009, Mr. Howie advised Ms. Holt that Roger Pitcairn, an officer with the Domestic Operations Directorate's ("DOMO's") Regulation and Product Management Division, was the point person for all AFM updates. *Id.* On March 22, 2010, Ms. Holt also followed up with Mr. Pitcairn to determine whether OFO had any responsive records. *Id.* ¶ 21. Mr. Pitcairn identified responsive records that had already been provided by other offices. *Id.*

Finally, upon completing its search, OPS indicated that it did not have any responsive records. *Id.* ¶ 22. OPS confirmed that the subject matter of Plaintiff's FOIA request fell outside its purview, as operational matters of this nature would be handled by SCOPS and FDNS. *Id.*

#### **B. USCIS's Disclosure of Responsive Records**

NRC reviewed all potentially responsive documents that had been compiled and identified 1,052 pages as responsive to the request. *Id.* ¶ 25. Ms. Holt reviewed each of the 1,052 pages of responsive documents and determined which information was exempt from disclosure pursuant to the FOIA exemptions set forth at 5 U.S.C. § 552(b). *Id.* In making this determination, Ms. Holt considered whether any information could be segregated and released. *Id.* ¶ 26. Ultimately, Ms. Holt determined that 286 pages could be released in full and 71 pages

could be released in part. *Id.* 621 pages were withheld in full only after a line-by-line review and determination that there were no reasonably segregable portions of these documents that were appropriate for release. *Id.* Additionally, although NRC initially referred 74 pages to another agency, DHS, Office of Inspector General (“OIG”), for its direct response to the requester, *id.* ¶ 27 & Ex. C, upon further discussions with the DHS, OIG FOIA office, the NRC determined that this referral should have been handled as a consultation and subsequently requested that the 74 pages be returned to the NRC for processing, *id.* ¶ 31.

By letter dated March 30, 2010, the Agency disclosed 357 pages of responsive, non-exempt information to Plaintiff. *Id.* ¶ 28 & Ex. D. On March 31, 2010, SCOPS confirmed that it did not have documents relating to communications with State, but that it had located documents relating to communications with DOL. *Id.* ¶ 29. From this additional set of documents, which was assigned control number NRC2010019940, the NRC identified 48 responsive pages and referred 42 of the 48 pages to DOL for direct response to Plaintiff. *Id.* ¶¶ 29-30. Of the six pages that were not referred to DOL, NRC determined that two pages would be released in full and three pages could be released in part. *Id.* ¶ 29. Only one page was withheld in full after a line-by-line review and determination that there were no reasonably segregable portions of the document appropriate for release. *Id.* On April 5, 2010, the Agency made a supplemental release of five pages of responsive, non-exempt documents. *Id.* ¶ 30 & Ex. F.

Thereafter, the NRC completed its processing of the 74-page document initially referred to DHS, OIG and determined that this document was a draft that was exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5). *Id.* ¶ 31. FDNS conducted a further search in an attempt to locate the final version of the draft document, but was unable to locate it. *Id.* By letter dated June 23, 2010, USCIS informed the requester that a final version of the document was publicly

available and additionally released six pages in full that had originally been withheld pursuant to 5 U.S.C. § 552(b)(2). *Id.* ¶ 31 & Ex. G.

**C. USCIS's Withholdings Pursuant to Exemptions 2, 5, 6 and 7(E)**

As indicated in the *Vaughn* Index attached as Exhibit H to the Eggleston Declaration, USCIS redacted or withheld information exempt from disclosure pursuant to FOIA Exemptions 2, 5, 6, and 7(E). Eggleston Decl. ¶ 33 & Ex. H. Specifically, USCIS withheld under Exemption high (b)(2) (in conjunction with Exemption 7(E) as to a subset of documents) internal Agency guides, operating manuals, memoranda, referral forms, e-mails, and other documents related to the adjudication of applications for immigration benefits, generally, and to the detection, investigation, apprehension, and deterrence of immigration fraud, specifically. *Id.* ¶¶ 35-36. USCIS withheld under Exemption 5 draft guides, operating manuals, memoranda, reports, e-mails, and other documents reflecting inter- or intra-agency communications related to legal or immigration policy-related matters. *Id.* ¶ 38. Finally, USCIS withheld under Exemption 6 contact information for a number of USCIS employees, and the names and/or contact information for a former employee and a third party. *Id.* ¶ 40.

**IV. DOL'S RELEASE OF ALL RESPONSIVE, NON-EXEMPT RECORDS REFERRED BY USCIS**

In the course of its search for documents responsive to Plaintiff's request, USCIS located 42 pages that had originated with DOL and referred these pages to DOL for direct response to Plaintiff. *See* Eggleston Decl. ¶ 30 & Ex. E; Pasternak Decl. ¶ 5. DOL has processed and released all 42 pages referred by USCIS. Pasternak Decl. ¶ 6; Ex. 1. DOL applied redactions pursuant to the deliberative process privilege under Exemption 5 to eight emails and redactions pursuant to Exemption 7(A) to one email. Pasternak Decl. ¶ 6 & Ex. A.

### **LEGAL STANDARD**

Summary judgment is appropriate when the pleadings and evidence “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 248. A genuine issue of material fact is one that “might affect the outcome of the suit under the governing law.” *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party “may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 248.

FOIA cases are typically and appropriately decided on motions for summary judgment. *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) (“CREW”); *Wheeler v. Dep’t of Justice*, 403 F. Supp. 2d 1, 5-8 (D.D.C. 2005). An agency may be entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records and each responsive record that it has located either has been produced to the plaintiff or is exempt from disclosure. *See Weisberg v. Dep’t of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations. *See McGehee v. C.I.A.*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert denied*, 415 U.S. 977 (1974); *Wheeler*, 403 F. Supp. 2d at 6. “[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe ‘the documents and the justifications for



nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *CREW*, 478 F. Supp. 2d at 80 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). Here, USCIS has submitted the Declaration of Jill Eggleston and DOL has submitted the Declaration of Brian Pasternak, both of which are reasonably detailed and accompanied by supporting *Vaughn* indices, to explain and justify the agencies’ responses to Plaintiff’s FOIA request.

### **ARGUMENT**

#### **I. USCIS PROPERLY RELEASED ALL RESPONSIVE, NON-EXEMPT RECORDS IN RESPONSE TO PLAINTIFF’S FOIA REQUEST**

The FOIA requires that an agency release all records responsive to a properly submitted request unless such records are protected from disclosure by one or more of the Act’s nine exemptions. 5 U.S.C. § 552(b); *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). Once the court determines that an agency has released all nonexempt material, it has no further judicial function to perform under the FOIA and the FOIA claim is moot. *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982); *Muhammad v. U.S. Customs & Border Prot.*, 559 F. Supp.2d 5, 7-8 (D.D.C. 2008). As demonstrated below, USCIS conducted an adequate search for records responsive to Plaintiff’s FOIA request and properly withheld information pursuant to Exemptions 2, 5, 6, and 7(E).

##### **A. USCIS Conducted a Search Reasonably Calculated to Uncover All Relevant Documents in Response to Plaintiff’s FOIA Request**

Under the FOIA, an agency must undertake a search that is “reasonably calculated to uncover all relevant documents.” *Weisberg v. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). An agency’s search for records is adequate if it was “reasonably calculated to uncover all

relevant documents.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (internal quotation marks omitted); see *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (“[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.”). A search is not inadequate merely because it failed to “uncover[] every document extant.” *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). Rather, a search is inadequate only if the agency fails to “show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents.” *Oglesby*, 920 F.2d at 68. Once an agency demonstrates the adequacy of its search, the agency’s position can be rebutted “only by showing that the agency’s search was not made in good faith.” *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993). Hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of an agency’s search. *Oglesby*, 920 F.2d at 67 n.13. “Agency affidavits enjoy a presumption of good faith that withstands purely speculative claims about the existence and discoverability of other documents.” *Chamberlain v. U.S. Dep’t of Justice*, 957 F. Supp. 292, 294 (D.D.C. 1997), *aff’d*, 124 F.3d 1309 (D.C. Cir. 1997).

Here, the Declaration of Jill A. Eggleston establishes that USCIS’s search method was reasonably calculated to uncover all records in its possession responsive to Plaintiff’s FOIA request. As stated above, Plaintiff’s FOIA request sought records pertaining to H-1B visa petitions and related agency policies. Upon review of Plaintiff’s FOIA request, the Agency forwarded the request to the National Security and Records Verification Directorate, Service Center Operations, and Office of Policy and Strategy to search their records for responsive documents. Eggleston Decl. ¶¶ 11, 15. At the time this FOIA request was processed, the mission of NSRV was to ensure the security and integrity of the U.S. immigration system by

developing capabilities, techniques and initiatives that focus on national security issues, providing automated status verification information to Federal, States, and private sector customers, maintaining immigration records-based information, and detecting and combating immigration fraud. *Id.* ¶ 12. The division within NSRV tasked with immigration fraud matters was the Fraud Detection and National Security Division (“FDNS”), which itself was comprised of the Fraud Detection Branch, National Security Branch, Intelligence Branch, and Mission Support Branch. *Id.* ¶¶ 12, 16. Also at the time this request was processed, SCOPS was a part of DOMO, which was charged with ensuring that immigration information and benefits decisions were provided to domestic customers in a timely and accurate manner. *Id.* ¶ 14. SCOPS performed this mission at the four USCIS service centers located throughout the United States. *Id.* Finally, OPS is a Headquarters program office tasked with developing national immigration policy recommendations, coordinating regulations development and management, performing research, evaluation and analysis on immigration issues, and serving as liaison on immigration policy issues with DHS headquarters and sister agencies. *Id.* ¶ 13.

NSRV determined that any responsive documents would be located within FDNS, the only division within NSRV that handled immigration fraud matters. *Id.* ¶ 16. FDNS assigned the request to Immigration Officer Charles Pratt of the Fraud Detection Branch. *Id.* Mr. Pratt was the resident subject matter expert for employment fraud in the Fraud Detection Branch, and had worked on H-1B/employment fraud issues since joining FDNS in August 2004. *Id.* Mr. Pratt discussed the request with his first- and second-line supervisors and also contacted various other offices within USCIS to ask for any documentation that appropriately addressed the request. *Id.* ¶ 17. Specifically, Mr. Pratt contacted the SCOPS California and Vermont Service Centers, which had been adjudicating H-1B filings since 2005, for any responsive documents.

*Id.* In addition, Mr. Pratt searched the HQFDNS shared computer drive, as well as his own personal computer drive and hard copy files, and inquired with FDNS Intelligence and National Security branches, for responsive records. *Id.*

Within SCOPS, adjudications officer April Padilla determined that the SCOPS Center Fraud Detection Operations (“CFDO”) offices located at each of the four Service Centers might have responsive documents and accordingly forwarded the request to the CFDOs for a search of their records. *Id.* ¶ 18. Ms. Padilla also forwarded the request to Carol Williams, a SCOPS HQ adjudications officer who worked on H-1B matters. *Id.* Ms. Williams was tasked to search SCOPS HQ records for any documents, including hard copy and electronic documents, responsive to the FOIA request. *Id.* SCOPS located responsive documents and on or about May 29, 2009, forwarded all responsive documents to Ms. Holt. *Id.*

SCOPS also informed Ms. Holt that OFO, another DOMO component, might have responsive documents related to the Adjudicator’s Field Manual. *Id.* ¶ 19. Ms. Holt forwarded the FOIA request to Craig Howie of OFO. *Id.* On May 8, 2009, Mr. Howie advised Ms. Holt that Roger Pitcairn, an officer with DOMO’s Regulation and Product Management Division, was the point person for all AFM updates. *Id.* When Ms. Holt followed up with Mr. Pitcairn, she determined that all responsive records identified by Mr. Pitcairn had already been provided by other offices. *Id.* ¶ 21.

Finally, on March 22, 2010, when request NRC2009022434 came due for processing, Ms. Holt advised OPS that she did not have any record of receiving a response to her initial query. *Id.* ¶ 20. OPS indicated that it did not have any responsive records. *Id.* ¶ 22. OPS had searched its electronic shared drive containing the electronic files and folders of office work product, but did not locate any files or folders relating to H-1B visas and the fraud referral sheet.

*Id.* OPS had also searched its internal website and consulted with the OPS Chief, Business and Foreign Workers Division as part of its efforts to locate responsive records. *Id.* OPS confirmed that the subject matter of Plaintiff's FOIA request fell outside its purview, as operational matters of this nature would be handled by SCOPS and FDNS. *Id.*

As demonstrated above, USCIS plainly conducted an adequate search for records in response to Plaintiff's FOIA request. *See Oglesby*, 920 F.2d at 68 (holding that a search need only "us[e] methods which can be reasonably expected to produce the information requested"). In searching NSRV, SCOPS, and OPS, as well as the SCOPS CFDOs located at each of the four Service Centers and OFO, "[t]he Agency searched all of the locations where information responsive to Plaintiff's request would reasonably be expected to be located and conferred with individuals who were reasonably expected to possess information responsive to Plaintiff's request." Eggleston Decl. ¶ 24. The fact that OFO's search of its files yielded records that had already been uncovered further bolsters the adequacy and completeness of USCIS's search. Moreover, although the subject matter of Plaintiff's request fell outside the purview of OPS, OPS confirmed that the H-1B-related policies sought by Plaintiff's request would be handled by SCOPS and FDNS. *See id.* ¶ 22. In light of the above, USCIS conducted an adequate search of records.

#### **B. USCIS Properly Asserted Exemption 5**

FOIA Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Thus, documents that would ordinarily be privileged in the civil discovery context are protected from public disclosure. *See Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 148-149 (1975) (Exemption 5 protects documents that would be privileged as

deliberative process, attorney-client communications, and attorney work product); *Martin v. Office of Special Counsel, Merit Sys. Protection Bd.*, 819 F.2d 1181, 1184-87 (D.C. Cir. 1987). In particular, the purpose of the deliberative process privilege is to “prevent injury to the quality of agency decisions.” *Sears*, 421 U.S. at 151. The privilege applies regardless of whether the deliberations involve attorneys or litigation is anticipated. It covers documents “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,” *id.* at 150, as well as “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer than the policy of the agency,” *CREW*, 478 F. Supp. 2d at 81 (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). It also protects factual materials that are closely intertwined with opinions, recommendations, and deliberations. *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1538-1539 (D.C. Cir. 1993).

To qualify for protection under the deliberative process privilege, information must be “both predecisional and deliberative.” *Id.* at 1537. A document is pre-decisional if “it was generated before the adoption of an agency policy.” *Coastal States*, 617 F.2d at 866. A document is deliberative if “it reflects the give-and-take of the consultative process.” *Id.* The U.S. Supreme Court has emphasized that whether a document is pre-decisional does not depend on the agency’s ability to identify a specific decision for which the document was prepared. *Sears*, 421 U.S. at 151 n.18; *see also Schell v. HHS*, 843 F.2d 933, 941 (6th Cir. 1988) (“When specific advice is provided, . . . it is no less pre-decisional because it is accepted or rejected in silence, or perhaps simply incorporated into the thinking of superiors for future use.”). Rather, the deliberative process privilege applies as long as the document is generated as part of a continuing process of agency decision-making.

Here, the documents for which USCIS claimed Exemption 5 protection and withheld in full include:

- draft summaries prepared for internal use describing the methodologies and key findings of the Benefit Fraud and Compliance Assessment (“BFCA”) conducted regarding the Agency’s H-1B program and draft report and memoranda providing guidance on process and policy changes to be undertaken in response to the BFCA report to reduce fraud and improve the integrity of the H-1B program, *see Vaughn* Index Nos. 5, 8, 9, 10, 11, 12;
- draft documents reflecting recommendations and next steps for the Agency with regard to the H-1B specialty occupation visa program, *see Vaughn* Index Nos. 6, 7;
- draft document entitled “Department of Homeland Security, Office of Inspector General, Review of the USCIS Benefit Fraud Referral Process (Redacted),” dated October 2007, *see Vaughn* Index No. 15;
- draft documents prepared as internal guides for the Agency’s service centers as to standard operating rules, procedures, and guidelines for the processing of Form I-129, Nonimmigrant Petition for Alien Worker, *see Vaughn* Index Nos. 13, 23; and
- internal e-mail communications between Agency officials regarding changes to the processing of fraud matters involving the H-1B program and the development of new processes, *see Vaughn* Index Nos. 17, 21, 22.

Additionally, USCIS claimed Exemption 5 protection to withhold in full or in part inter- and intra-agency communications between and amongst USCIS and DOL employees reflecting predecisional and deliberative discussions relating to the Labor Condition Application certification process that forms part of the H-1B program. *See Vaughn* Index Nos. 35, 37, 41, 42, 44, 46, 52, 53.

As described in detail on the *Vaughn* index attached as Exhibit H to the Eggleston Declaration, each record withheld pursuant to the deliberative process privilege is a draft report, memoranda, operating manuals, or deliberative communication generated in the course of internal Agency discussions regarding USCIS policy, statement, and internal guidance on the processing of H-1B petitions. Eggleston Decl. ¶ 38. The evolving iterations of documents and

memoranda contain the current opinions of the drafters; they do not reflect the settled decisions of the Agency as to what information should be included in the final documents and are thus predecisional. *See Goodrich Corp. v. E.P.A.*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (“As a general matter, ‘drafts’ of documents are exempt from disclosure under the deliberative process privilege.”). Moreover, the withheld records reflect USCIS’s internal deliberations regarding the H-1B program, the Benefit Fraud and Compliance Assessment, and efforts to develop and formulate process and policy changes to be undertaken in response to the BFCA report to reduce fraud and improve the integrity of the H-1B program, and therefore fall within the scope of the deliberative process privilege. *See Sears*, 421 U.S. at 150; *Mapother*, 3 F.3d at 1538-39 (“When a summary of factual material on the public record is prepared by the staff of an agency administrator, for his use in making a complex decision, such a summary is part of the deliberative process, and is exempt from disclosure under Exemption 5.”); *CREW*, 478 F. Supp. 2d at 83 (holding that documents containing internal discussions regarding actions that an agency should take in response to a media article qualified for protection under the deliberative process privilege). Thus, because the withheld documents reflect “advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,” they were properly withheld pursuant to Exemption 5.

### **C. USCIS Properly Asserted Exemption “High” (b)(2)**

FOIA Exemption 2 protects from disclosure information that is “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552(b)(2). The information need not be actual rules or practices; agencies can also invoke Exemption 2 for matters related to rules and practices. *See Dep’t of the Air Force v. Rose*, 425 U.S. 352, 369-70 (1976). Courts have interpreted this statutory provision to encompass two different categories of information:



(1) internal agency matters so routine or trivial that they are “of no genuine public interest” (referred to as “low (b)(2)” information); and (2) internal agency matters that, if disclosed, “may risk circumvention” of the law (referred to as “high (b)(2)” information). *See Schiller v. N.L.R.B.*, 964 F.2d 1205, 1207 (D.C. Cir. 1992); *Nat’l Treasury Employees Union v. U.S. Customs Serv.*, 802 F.2d 525, 528-30 (D.C. Cir. 1986); *Judicial Watch, Inc. v. Dep’t of Commerce*, 337 F. Supp. 2d 146, 165 (D.D.C. 2004). As an initial matter, an agency may withhold information under Exemption 2 if the information is “used for predominantly internal purposes.” *Crooker v. ATF*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (*en banc*). If this threshold test is met, an agency may withhold the material “by proving that either [1] disclosure may risk circumvention of agency regulation, or [2] the material relates to trivial administrative matters of no genuine public interest.” *Schiller*, 964 F.2d at 1207.

Here, USCIS invoked Exemption 2 (in conjunction with Exemption 7(E) with respect to a subset of documents) to protect “high” (b)(2) information, specifically, internal Agency documents relating to fraud detection policies that, if released, could circumvent USCIS policies and practices in investigating allegations of immigration fraud by prospective employers. *See Eggleston Decl.* ¶ 35. Specifically, the documents for which USCIS claimed high (b)(2) protection include:

- documents containing potential fraud indicators applicable to different types of petitions/applications for immigration benefits used by Agency personnel to refer cases of potential immigration fraud to FDNS or CDFOs and documents reflecting the processing of fraud referral cases, *see Vaughn* Index Nos. 1, 2, 16, 17, 18, 19, 20, 28;
- documents prepared for internal use regarding and in response to the Agency’s Benefit Fraud and Compliance Assessment conducted to assess fraud vulnerabilities and customer compliance with regard to the H-1B program, and documents identifying various fraud indicators related to H-1B petitions, *see Vaughn* Index Nos. 3, 4, 5, 9, 10, 11, 12, 27, 32;

- draft documents serving as an internal guide for the Agency's service centers as to standard operating rules, procedures, and guidelines for the processing of Form I-129, Nonimmigrant Petition for Alien Worker, *see* Vaughn Index Nos. 13, 14, 23, 26, 29, 30, 31;
- internal e-mail communications between Agency officials discussing changes to the processing of fraud matters involving the H-1B program and containing information regarding fraud detection efforts, *see* Vaughn Index Nos. 21, 22; and
- inter- and intra-agency memoranda providing internal guidance on determining the eligibility of certain applicants for immigration benefits for adjustment of their immigration status, *see* Vaughn Index Nos. 24, 25.

Disclosure of the above information would plainly risk circumvention of the law. These internal Agency documents pertain to the adjudication of applications for immigration benefits and, in many instances, to immigration fraud detection, investigation, apprehension, and deterrence efforts. Eggleston Decl. ¶ 35. These documents were intended to provide guidance to Agency personnel on the adjudication of applications for immigration benefits and/or the detection and combating of immigration fraud. *Id.* In particular, when a potential immigration fraud matter is referred to FDNS or CDFO, the referring Agency office must complete a fraud detection form specifying the fraud indicators that triggered the referral. *See, e.g., Vaughn Index Nos. 1 & 2.* Further, in connection with the BFCa undertaking, the Agency compiled a listing of the various fraud indicators related to H-1B petitions that were identified pursuant to the BFCa and proposed regulatory and processing changes to bolster the integrity of the H-1B program. *See, e.g., Vaughn Index Nos. 3, 4, 9, 24.*

Consequently, if individuals seeking to improperly or fraudulently procure immigration benefits should learn the specifics of agency procedures on adjudicating immigration benefits or detecting immigration fraud, they could and certainly would tailor their applications and conduct in such a way as to minimize or altogether evade detection. Eggleston Decl. ¶ 35. The disclosure of this information would threaten the integrity of the H-1B program and could

present serious national security and homeland security-related concerns. *Id.* In light of the potential harms identified by the Agency, the above information was therefore properly withheld pursuant to the high (b)(2) exemption. *See Judicial Watch*, 337 F. Supp. 2d at 165 (observing that information is properly withheld under the high (b)(2) exemption where “disclosure will benefit those attempting to violate the law and avoid detection”) (internal quotation marks omitted).

**D. USCIS Properly Asserted Exemption 7(E)**

As a threshold matter, FOIA Exemption 7 protects from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such records or information” would result in one of six enumerated harms. *See* 5 U.S.C. § 522(b)(7)(A)-(F). The threshold requirement for invoking Exemption 7 -- that the withheld information was “compiled for law enforcement purposes” -- is readily satisfied here. *See Tax Analysts v. I.R.S.*, 294 F.3d 71, 77 (D.C. Cir. 2002) (noting that, in assessing whether the threshold requirement of 5 U.S.C. § 552(b)(7) is satisfied, “the FOIA makes no distinction between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions”). As the Eggleston Declaration establishes, USCIS engages in significant activities through its FDNS unit to detect and combat immigration fraud. Eggleston Decl. ¶ 36. Specifically, FDNS collaborates with ICE and United States Attorney’s Offices throughout the country on efforts to detect, investigate, apprehend, and deter immigration fraud. *Id.*

Here, USCIS redacted or withheld information pursuant to FOIA Exemption (b)(7)(E), which permits an agency to withhold information compiled for law enforcement purposes if its release “would disclose techniques and procedures for law enforcement investigations or

prosecutions.” 5 U.S.C. § 552(b)(7)(E). Specifically, the documents for which USCIS invoked Exemption 7(E) protection (in conjunction with high (b)(2)) include:

- documents containing potential fraud indicators applicable to different types of petitions/applications for immigration benefits used by Agency personnel to refer cases of potential immigration fraud to FDNS or CDFOs and the processing of fraud referral cases, *see Vaughn* Index Nos. 1, 2, 16, 18, 19, 20;
- documents prepared for internal use regarding and in response to the Agency’s Benefit Fraud and Compliance Assessment conducted to assess fraud vulnerabilities and customer compliance with regard to the H-1B program, and documents identifying various fraud indicators related to H-1B petitions, *see Vaughn* Index Nos. 3, 4, 5, 27;

The records withheld by USCIS pursuant to Exemption 7(E) were compiled for law enforcement purposes and reflect the techniques, guidance, and other information used by FDNS and other Agency personnel in combating immigration fraud. Eggleston Decl. ¶ 36. Specifically, these documents identify the various fraud indicators that immigration officers have been trained to identify on H-1B petition that, if released, would disclose the Agency’s techniques and procedures for ferreting out applications that seek to improperly or fraudulently procure immigration benefits. *Id.* The records pertaining to fraud referral indicators thus fall within the category of investigatory and prosecutorial guidelines and procedures that courts have found to be protected under Exemption 7(E). *See Tax Analysts*, 294 F.3d at 79 (holding that an agency may seek to block the disclosure of internal agency materials relating to “guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions, even when the materials have not been compiled in the course of a specific investigation”); *PHE, Inc. v. Dep’t of Justice*, 983 F.2d 248, 250-51 (D.C. Cir. 1993) (holding that portions of a FBI manual describing patterns of violations, investigative techniques, and sources of information available to investigators were protected by Exemption 7(E)).

Moreover, the protected information need not detail the law enforcement technique or procedure (although the fraud referral indicators certainly satisfy this showing), but may also shed light on an agency's "internal assessment of the usefulness of various well-known techniques and procedures" (as the BFCA evaluation of the Agency's fraud vulnerabilities accomplish). *See Am. Civil Liberties Union v. Dep't of Justice*, No. 08-1157 (JR), 2010 WL 1140868, at \*4 (D.D.C. Mar. 26, 2010) (concluding that the agency properly invoked Exemption 7(E) to redact information that would reveal the limitations of a particular law enforcement technique and uses of this technique for purposes that were not readily obvious); *Span v. Dep't of Justice*, No. 08-2183 (HHK), 2010 WL 1007858, at \*7 (D.D.C. Mar. 22, 2010). On this record, USCIS's invocation of Exemption 7(E) to withhold the above records was proper.

#### **E. USCIS Properly Asserted Exemption 6**

FOIA Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The term "similar files" includes any "'Government records on an individual which can be identified as applying to that individual.'" *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982) (quoting H.R. Rep. No. 1497, 89th Cong., 2nd Sess., 11 (1966), U.S.C.A.N. 1966, p. 2428). Thus, Exemption 6 applies whenever disclosure would constitute a clearly unwarranted invasion of personal privacy. *Id.* In assessing the applicability of Exemption 6, courts weigh the privacy interests in nondisclosure against the public interests in disclosure. *See Beck v. Dep't of Justice*, 997 F.2d 1489, 1491 (D.C. Cir. 1993). The public interest served by the release of private information is "the preservation of 'the citizens' right to be informed about what their government is up to.'" *Beck v. Dep't of Justice*, 997 F.2d 1489, 1492 (D.C. Cir. 1993) (quoting *Dep't of Justice v. Reporters Comm. for*

*Freedom of the Press*, 489 U.S. 749, 773 (1989)). “Information that ‘reveals little or nothing about an agency’s own conduct’ does not further the statutory purpose.” *Id.*

Here, USCIS invoked Exemption 6 to protect contact information for a number of USCIS employees and the names and contact information for one former USCIS employee and a third party whose personal information was reflected in the responsive documents. *See* Eggleston Decl. ¶ 40. Specifically, USCIS invoked Exemption 6 to protect portions of documents containing contact information (e-mail addresses, telephone, fax contact information) of Agency employees. *See Vaughn* Index Nos. 6, 18, 20, 25, 26, 31, 33-37, 41-43, 46-53. USCIS determined that release of contact information pertaining to its employees, a former employee, and a third party would not substantially further any public interest, as it would reveal little about the Agency’s conduct. *See* Eggleston Decl. ¶ 39. Indeed, courts have held that while there may be limited public interest in obtaining the identifying information of the Federal employees at issue, disclosure would not shed any light on the workings of an agency. *Canaday v. U.S. Citizenship & Immigration Servs.*, 545 F. Supp. 2d 113, 118 (D.D.C. 2008); *Bast v. FBI*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (held that government employees do not surrender all rights to personal privacy when they accept public appointment). Thus, the redactions appearing on the records cited above were properly applied pursuant to Exemption 6.

#### **F. USCIS Complied With FOIA’s Segregability Requirement**

Under the FOIA, if a record contains information exempt from disclosure, any “reasonably segregable,” non-exempt information must be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they are “inextricably intertwined with exempt portions.” *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). To establish that all reasonably segregable,

non-exempt information has been disclosed, an agency need only show “with ‘reasonable specificity’” that the information it has withheld cannot be further segregated. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. Dep’t of Justice*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). Where non-exempt information could be segregated from exempt information, USCIS segregated and disclosed the non-exempt information. Eggleston Decl. ¶ 26. USCIS has established, with reasonable specificity, that responsive documents were redacted in part or withheld in full after a line-by-line review and determination that there were no reasonably segregable portions of documents appropriate for release. *Id.* ¶¶ 26, 29. Notably, the records withheld in full pursuant to the deliberative process privilege were draft memoranda and documents that were predecisional in nature reflecting inter- or intra-agency communications pertaining to legal or policy-related immigration matters, with any non-exempt portions being inextricably intertwined with exempt portions. *Id.* USCIS therefore complied with its duty to segregate exempt from non-exempt information.

## **II. DOL PROPERLY PROCESSED THE 42 PAGES REFERRED BY USCIS, RELEASED ALL REASONABLY SEGREGABLE PORTIONS OF RESPONSIVE RECORDS, AND PROPERLY ASSERTED FOIA EXEMPTIONS 5 AND 7(A)**

In the course of its search for documents responsive to Plaintiff's FOIA request, USCIS discovered 42 pages that had originated with DOL and accordingly referred these pages to DOL for processing and a direct response to Plaintiff. *See* Eggleston Decl. ¶ 30; Pasternak Decl. ¶ 5. In instances where a referral is made, a court must determine whether the referral resulted in the improper withholding of documents. *Peralta v. United States Attorney's Office*, 136 F.3d 169, 175 (D.C. Cir. 1998); *Maydak v. United States Dep’t of Justice*, 254 F. Supp. 2d 23, 40 (D.D.C. 2003). Here, DOL has processed and, on June 24, 2010, released all 42 pages referred by USCIS. Pasternak Decl. ¶ 6; Ex. 1. DOL applied redactions pursuant to the deliberative process

privilege under Exemption 5 to eight emails and redactions pursuant to Exemption 7(A) on one email. *See* Pasternak Decl. ¶ 6 & Ex. A. As set forth below, DOL properly withheld information pursuant to Exemptions 5 and 7(A).

#### **A. DOL Properly Asserted Exemption 5**

As stated above, FOIA Exemption 5 protects from disclosure documents “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,” *Sears*, 421 U.S. at 150, as well as “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer than the policy of the agency,” *CREW*, 478 F. Supp. 2d at 81 (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

Here, as described in detail on the *Vaughn* index attached as Exhibit A to the Pasternak Declaration, DOL invoked the deliberative process privilege to redact portions of eight e-mails that reflect inter- and intra-agency deliberations regarding the following topics:

- the Employment and Training Administration’s (“ETA’s”) internal procedures for handling Labor Condition Application (“LCA”) certifications, Pasternak Decl. Ex. A, item 1;
- the development of H-1B Form 9035, *id.*, item 2;
- policies concerning the repayment of TARP funds, *id.*, items 3 & 4;
- procedures for calculating LCA processing times, *id.*, item 5;
- recommendations concerning ETA procedures for dealing with fraud in the H-1B program to assist DOL in formulating guidelines and procedures for fraud detection, *id.*, item 6; and
- recommendations and opinions addressing potential problems with identifying H-1B debarments, *id.*, item 8.



Each of the above records contains opinions, recommendations and deliberations provided to assist the agency in formulating policies with regarding to the processing of LCAs as part of the H-1B program and the development of guidelines and procedures to detect fraud in the H-1B program. Pasternak Decl. ¶¶ 7-16. As such, DOL properly withheld this information pursuant to Exemption 5.

**B. DOL Properly Asserted Exemption 7(A)**

FOIA Exemption 7(A) protects from disclosure records compiled for law enforcement purposes where disclosure “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). To justify its redactions under Exemption 7(A), DOL must show that: “(1) a law enforcement proceeding is pending or prospective; and (2) release of the information could reasonably be expected to cause some articulable harm.” *Goodrich*, 593 F. Supp. 2d at 193 (quoting *Manna v. Dep’t of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995)). DOL readily satisfies the showings necessary to withhold the information under Exemption 7(A).

As the Pasternak Declaration attests, the Office of Foreign Labor Certification (“OFLC”) within ETA is responsible for administering labor certification applications filed by U.S. employers seeking to employ foreign workers. Pasternak Decl. ¶ 18. An approved labor certification application is a necessary prerequisite to a prospective employer’s participation in the H-1B program. *Id.* In order to ensure that a prospective employer’s participation is lawful and not intended to circumvent the immigration laws, DOL will investigate instances of fraud in the H-1B program. *Id.* Here, DOL invoked Exemption 7(A) to redact portions of one email referring to pending investigation(s) by ETA into potential H-1B fraud. *Id.* ¶ 19 & Ex. A, item 7. Disclosure of the redacted material would interfere with the ongoing enforcement activity by revealing the nature, scope, and/or source of the investigation, and reveal ETA’s evaluation of

the acquired evidence. *Id.* ¶ 20. These articulated harms are precisely the kinds of harms that courts routinely find sufficient to justify the withholding of records under Exemption 7(A). *See Boyd v. Dep't of Justice*, 475 F.3d 381, 386 (D.C. Cir. 2007) (approving the withholding of records under exemption 7(A) where the release of the records “could reasonably be expected to reveal to the targets [of the government’s investigation] the size, scope and direction of the investigation, and allow them to destroy or alter evidence, . . . and take other actions to frustrate the government’s case” (internal quotation marks, brackets and citation omitted)); *Alyeska Pipeline Serv. Co. v. E.P.A.*, 856 F.2d 309, 312 (D.C. Cir. 1988) (observing that Exemption 7(A) is properly invoked where the disclosure of information could “allow for the destruction or alteration of relevant evidence,” and “chill future investigations by discouraging witnesses from providing information”); *Goodrich Corp.*, 593 F. Supp. 2d at 193-94 (“Exemption 7(A) protects from disclosure information that would permit the target of an investigation to destroy relevant evidence or fabricate [evidence]. The exemption also seeks to prevent the target of an investigation from intimidating witnesses who might otherwise cooperate with an ongoing investigation.”). DOL thus properly applied Exemption 7(A) to redact information regarding pending investigation(s) from one email.

### **C. DOL Complied With FOIA’s Segregability Requirement**

As stated above, *see supra* Part I.F, FOIA compels an agency to disclose any “reasonably segregable,” non-exempt information from a record that contains information exempt from disclosure. 5 U.S.C. § 552(b). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show “with ‘reasonable specificity’” that the information it has withheld cannot be further segregated. *Armstrong*, 97 F.3d at 578-79. Here, DOL released all 42 pages that had been referred by USCIS, applying redactions to eight

pages to exempt information pursuant to Exemption 5 and redactions to one page to exempt information pursuant to Exemption 7(A). Pasternak Decl. ¶ 6. DOL did not withhold any records in full. *Id.* Further, the accompanying *Vaughn* index provides a detailed description of the nature of information contained in the redacted documents and establishes that the agency withheld only the exempt portions of these records. DOL therefore complied with its duty to segregate exempt from non-exempt information.

### **CONCLUSION**

For the reasons set forth above, Defendants respectfully request that this Court grant their motion for summary judgment as to all claims in this case.

Date: June 24, 2010

Respectfully submitted,

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

TECHSERVE ALLIANCE, F/K/A NATIONAL  
ASSOCIATION OF COMPUTER  
CONSULTANT BUSINESSES,

Plaintiff,

V.

JANET NAPOLITANO, Secretary,  
U.S. Department of Homeland Security, *et al.*,

Defendants.

Civil Action No. 10-0353 (HHK)

**[PROPOSED] ORDER**

UPON CONSIDERATION of the Defendants' Motion for Summary Judgment, supporting memorandum, any opposition and replies thereto, and for good cause shown, it is hereby

ORDERED that Defendants' motion is GRANTED, and it is

FURTHER ORDERED that judgment is awarded to Defendants as to all claims asserted in the above-captioned action.

SO ORDERED.

Date

Hon. Henry H. Kennedy  
United States District Judge