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**TAINTED LOVE, CRAB PICKERS, AND OPPORTUNITIES
FOR FRAUD: A COMPARATIVE ANALYSIS OF
DETERRENCE MECHANISMS IN USCIS**

by

Mildred Perdomo

December 2020

Thesis Advisor:
Second Reader:

Carolyn C. Halladay
Cristiana Matei

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Mildred Perdomo
Congressional Liaison Specialist, U.S. Citizenship and Immigration Services,
Department of Homeland Security
BA, University of Puerto Rico – Rio Piedras Campus, 1994
JD, Tulane University, 1999

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December 2020**

Approved by: Carolyn C. Halladay
Advisor

Cristiana Matei
Second Reader

Erik J. Dahl
Associate Professor, Department of National Security Affairs

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ABSTRACT

The marriage immigration benefits programs and the H-2B visa program for temporary nonagricultural workers are programs that, amid fraud or abuse, could lead to nefarious actors gaining access to the United States and posing a threat to homeland security. This thesis explores the strengths and weaknesses of fraud deterrence processes in these visa programs, seeking to understand how U.S. Citizenship and Immigration Services (USCIS) can better combat abuse and prevent national security risks. The purpose of this qualitative research was to compare these two programs and explore strengths and weaknesses of their deterrence mechanisms through the Fraud Detection and National Security Directorate (FDNS). This thesis reviews and compares the legal frameworks of these visa programs, their fraud and security risk detection and prevention mechanisms, various reports issued by government agencies, media reports, and case studies through interviews with FDNS officers at USCIS. This thesis finds that the H-2B visa program has better fraud and national security risk detection and prevention mechanisms than the marriage programs have and provides recommendations for improvements in the following distinct core areas: legal framework, notification requirements and site visits, and interagency collaboration. The results of this thesis are meaningful for academics and practitioners because they provide real-world policy recommendations to improve deterrence mechanisms at USCIS FDNS.

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LIST OF ACRONYMS AND ABBREVIATIONS

ASVVP	Administrative Site Visit and Verification Program
CBP	Customs and Border Protection
DBFTF	Document and Benefit Fraud Task Forces
DHS	Department of Homeland Security
DOL	Department of Labor
DOS	Department of State
EB-5	employment-based fifth-preference (visa)
FDNS	Fraud Detection and National Security Directorate
GAO	Government Accountability Office
HSI	Homeland Security Investigations
IMB	international marriage broker/brokerage
ICE	Immigration and Customs Enforcement
IMBRA	International Marriage Broker Regulation Act
INA	Immigration and Naturalization Act
LSC	Legal Services Corporation
OIG	Office of Inspector General
USCIS	U.S. Citizenship and Immigration Services
VAWA	Violence Against Women Act Reauthorization Bill of 2005

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EXECUTIVE SUMMARY

Immigration fraud is frequent in the U.S. immigration system and presents a risk to national security.¹ According to the U.S. Citizenship and Immigration Services' *2019–2021 Strategic Plan*, the second strategic goal is to “safeguard the homeland by deterring, detecting, and addressing vulnerabilities in the immigration system.”² Immigration fraud is one of those vulnerabilities. For example, the marriage immigration benefits programs and the H-2B visa program for temporary non-agricultural workers amid fraud or abuse could lead to nefarious actors gaining access to the United States and posing a threat to U.S. security.

The process for obtaining admission to the United States through these programs is thorough, but loopholes in the process might be exploited by those actors.³ For instance, improper vetting in the country of origin or even the United States through the marriage immigration benefits programs may offer illegitimate applicants a path to lawful permanent U.S. residence. The H-2B visa program may permit U.S. employers to bring aliens to the United States for employment in temporary nonagricultural jobs.⁴ This latter program does not allow an alien to gain permanent U.S. residence, at least immediately, but it does offer a proverbial foot in the door.⁵ Thus, visa fraud is not a victimless crime. The authorities can do more to prevent fraud in these programs.

¹ Ruth Ellen Wasem, *Immigration Fraud: Policies, Investigations and Issues*, CRS Report No. RL34007 (Washington, DC: Congressional Research Service, 2007), 1, <https://trac.syr.edu/immigration/library/P1866.pdf>.

² Citizenship and Immigration Services, *2019–2021 Strategic Plan* (Washington, DC: Citizenship and Immigration Services, 2019), 10, https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Budget%2C%20Planning%20and%20Performance/USCIS_Strategic_Plan_2019-2021.pdf.

³ B. R. Konda, *Immigration Fraud: Fixing Loopholes in Immigration Law* (Sheridan, WY: Freedom View Publishing, 2018).

⁴ “H-2B Temporary Non-Agricultural Workers,” Citizenship and Immigration Services, last modified May 29, 2020, <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers>.

⁵ Adam E. Rothwell, *Legal U.S. Immigration: Truth, Fraud and the American Way* (Booklocker, 2008), 126–136, <https://assets.booklocker.com/pdfs/3450s.pdf>.

This thesis aims to explore whether U.S. Citizenship and Immigration Services (USCIS) can be better positioned to combat abuse and prevent national security risks based on the strengths and weaknesses of fraud deterrence processes in the marriage immigration benefit programs and the H-2B visa program for temporary non-agricultural workers. This qualitative approach compares these two programs, focusing on the deterrence mechanisms currently used by the Fraud Detection and National Security Directorate (FDNS) under USCIS.

This project was limited to the marriage fraud and the H-2B visa programs because they were readily comparable. The researcher utilized a combination of primary and secondary sources. The primary sources involved interviews with two FDNS officers, one specializing in marriage fraud, the other in the H-2B visa program. In addition, this thesis reviews and compares the legal frameworks of these visa programs; their fraud and national security risk detection and prevention mechanisms; various reports issued by the U.S. Government Accountability Office, the Department of Homeland Security's Office of the Inspector General, and the Congressional Research Service about these programs; and related media reports about fraud and national security risks.

This thesis also examines these programs in the context of the criminalization of immigration fraud and national security risks. An important component of this research project is a review of the main legal theories behind the concepts of *deterrence* and *prevention*. Drawing from these comparisons, this thesis makes recommendations for improving the deterrence mechanisms currently in place at FDNS. The researcher chose this focus because scholars and practitioners are currently studying these two programs individually but not in relation to each other.

This research project offers a set of recommendations or best practices for improving the fraud deterrence processes at FDNS. In other words, by comparing both visa programs, a blueprint for further success developed. In terms of these visa programs, *success* means granting the right benefit to the right applicant. On the other hand, *failure* means granting an immigration benefit to a nefarious actor who could pose a security risk. This thesis finds that the H-2B visa program has better fraud and national security risk detection and prevention mechanisms than the marriage programs, and those stronger

controls can be replicated in the latter. This research also provides recommendations for the following core areas of the marriage visa programs: improving the legal framework of the Green Card for the fiancé(e) of a U.S. citizen, or K-1, visa program; increasing the use of site visits in meritorious cases; and improving interagency collaboration between USCIS and sister agencies such as the Department of State, Immigration and Customs Enforcement, and Customs and Border Protection.

The results of this thesis are meaningful for academics and practitioners, providing the legal background to build better deterrence processes as well as real-world recommendations to improve deterrence mechanisms at FDNS. This research can help FDNS deter fraud more effectively and prevent national security risks in immigration processing. While this study addresses only the marriage fraud programs and the H-2B visa program at USCIS, future research will be needed to test the recommendations in other visa programs and other agencies within the Department of Homeland Security.

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I. INTRODUCTION

This thesis examines current practices at U.S. Citizenship and Immigration Services (USCIS) in terms of fraud and security-risk prevention and detection in the marriage immigration benefits programs and the H-2B visa program for temporary non-agricultural workers. Specifically, this research compares the strengths and weaknesses of both visa programs in the areas of fraud and abuse, and other crimes such as human trafficking. It also applies the strengths of the H-2B visa program to the weaknesses of the marriage fraud programs, offering a series of recommendations that are relatively easy to implement in the following areas: financial and time investment, legal framework, notification requirements, use of site visits, and interagency collaboration.

The U.S. Immigration Act of 1965 aimed to facilitate family reunification while drawing a pool of skilled immigrants for the labor needs of the nation.¹ Unfortunately, an unintended side effect has been a certain degree of marriage fraud. For instance, possibly as many as one-fourth of foreign citizens who acquire legal immigration status in the United States obtain it by marrying a legal permanent resident or an American citizen; of these cases, 5 percent to 15 percent may be fraudulent.² In the context of the H-2B Temporary Non-Agricultural Visa program, the goal is to balance the labor needs of American companies while protecting American workers. However, some experts claim that a significant portion of guest workers in the United States overstay their visas after expiration.³ An estimated 31 percent to 57 percent of the illegal population in the United States are guest workers.⁴

The process for obtaining admission to the United States under the marriage immigration benefits programs and the H-2B visa program is thorough, but weaknesses in

¹ Zachary Siechen, "Immigration Fraud," in *Immigration and Migration: In Context*, ed. Thomas Riggs (Farmington Hills, MI: Gale, 2018), 425.

² Siechen, 426.

³ Matthew Pincus, "An Examination of Immigration and the Threat to American National Security" (master's thesis, Johns Hopkins University, 2014), 24–25, <https://jscholarship.library.jhu.edu/handle/1774.2/37208>.

⁴ Pincus, 24–25.

the process might be exploited by fraudsters and other nefarious actors.⁵ For instance, improper vetting, triggered by the presentation of fraudulent documents to the authorities in the country of origin or even the United States through the marriage immigration benefits programs, may offer illegitimate applicants a path to lawful permanent U.S. residence. The H-2B visa program may permit U.S. employers to bring aliens to the United States for employment in temporary nonagricultural jobs.⁶ This latter program does not allow an alien to gain permanent U.S. residence, at least immediately, but it does offer a proverbial foot in the door.⁷ Such shortcomings beg the question of whether the authorities can do more to prevent fraud in these programs.

The United States continues to struggle with the challenges of combating immigration fraud and preventing national security risks. Immigration and Customs Enforcement (ICE) reveals the link between immigration fraud and national security risks: immigration fraud, whether benefit or document fraud, can be exploited by criminals or terrorists to gain admission to the United States.⁸ Thus, immigration fraud is a serious concern for several agencies in the United States. Apart from deterring and preventing immigration fraud and security risks, the USCIS works with other agencies to ensure that those involved in fraud are punished appropriately. However, to accomplish this goal, USCIS must rely on existing mechanisms while using scarce resources.

A. RESEARCH QUESTION

Based on the strengths and weaknesses of fraud deterrence processes in the marriage immigration benefit programs and the H-2B visa program for temporary non-

⁵ B. R. Konda, *Immigration Fraud: Fixing Loopholes in Immigration Law* (Sheridan, WY: Freedom View Publishing, 2018).

⁶ “H-2B Temporary Non-Agricultural Workers,” Citizenship and Immigration Services, last modified May 29, 2020, <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers>.

⁷ Adam E. Rothwell, *Legal U.S. Immigration: Truth, Fraud and the American Way* (Booklocker, 2008), 126–136, <https://assets.booklocker.com/pdfs/3450s.pdf>.

⁸ “Identity and Benefit Fraud,” Immigration and Customs Enforcement, last modified December 4, 2019, <https://www.ice.gov/identity-benefit-fraud>.

agricultural workers, how can U.S. Citizenship and Immigration Services better combat abuse in these programs to prevent national security risks?

B. LITERATURE REVIEW

The purpose of this literature review is to explore the academic debates on whether proper fraud detection and the laws prohibiting fraud act as a deterrent, thereby lessening the risks that visa fraud, in this case, pose to the country. Deterrence theory in the context of criminal law is not a new concept. Zimring and Hawkins explain that deterrence theory has been a part of establishing judicial, political, and administrative policy since the beginning of criminal law.⁹ Furthermore, Andenaes explains that the use of criminal law sends “messages” to society.¹⁰ For instance, ICE’s website devotes an entire section to the penalties associated with marriage fraud, sending a strong message to society that immigration fraud is a crime with serious consequences. These authors and the authorities seem to concur on the value of alerting and reminding society about the consequences of engaging in criminal activities related to immigration.

The criminalization of fraud in the context of the marriage benefits programs and the H-2B visa program may prove an effective tool in deterring further fraud and criminal acts. Although experts on this topic have adopted different schools of thought about the efficacy of criminalizing immigration fraud, criminal law is an effective tool to protect the homeland from fraud and security risks in the context of these programs. However, before engaging in this discussion, it is beneficial to review the difference between *deterrence* and *prevention*. As Andenaes describes, special prevention or deterrence is synonymous with the punishment received by an individual after committing a crime while general prevention refers to the threat of punishment for society as a whole.¹¹ For this thesis, both definitions are significant. USCIS has an interest in assisting the criminal justice system in

⁹ Franklin E. Zimring and Gordon J. Hawkins, *Deterrence: The Legal Threat in Crime Control*, Studies in Crime and Justice (Chicago: University of Chicago Press, 1973), 1.

¹⁰ Johannes Andenaes, *Punishment and Deterrence* (Ann Arbor: University of Michigan, 1974), 34.

¹¹ Andenaes, 34.

successfully prosecuting individuals who have committed immigration fraud and sending the message to society that individuals will be punished if they engage in fraud.

Deterrence is crucial to discouraging individuals from engaging in illegal activities.¹² Experts seem to agree on the advantages of using deterrence theory to create public policy, beyond the context of immigration law. For Kahan, one of the advantages is that it allows citizens with diverse backgrounds and opinions to agree on controversial policies.¹³ For this expert, deterrence creates the illusion that citizens on both sides of any controversial debate are being civil to each other.¹⁴ In this way, Kahan implies that these citizens are withholding their true opinions or sentiments. Abrams claims that a cost-benefit analysis of deterrence leads to better decisions about the use of imprisonment because it involves the use of exact numbers to make those decisions.¹⁵ In this example, high incarceration rates cost the taxpayers money while depriving citizens of their freedom; at the same time, if the punishment is not severe, the “victims” absorb the costs.¹⁶ Gabison asserts that deterrence is useful in decreasing crimes through “specific or general deterrence.”¹⁷ For Gabison, *specific deterrence* acts as a warning to one individual that he will be punished in the future if he continues to engage in illegal activities.¹⁸ On the other hand, *general deterrence* is a warning to all individuals that they will be punished for violating the law.¹⁹ These scholars seem to agree that using deterrence in creating public policy has some advantages.

¹² Haley Hrymak, “A Bad Deal: British Columbia’s Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers,” *Manitoba Law Journal* 41, no. 4 (2018), <https://www.canlii.org/en/commentary/journals/16/829/>.

¹³ Dan M. Kahan, “The Secret Ambition of Deterrence,” *Harvard Law Review* 113, no. 2 (December 1999), <https://doi.org/10.2307/1342330>.

¹⁴ Kahan, 413–500.

¹⁵ David S. Abrams, “The Prisoner’s Dilemma: A Cost-Benefit Approach to Incarceration,” *Iowa Law Review* 98 (2013): 968, <http://dx.doi.org/10.2139/ssrn.2109703>.

¹⁶ Abrams.

¹⁷ Garry A. Gabison, “Public Enforcement of Private Right,” *Florida Coastal Law Review* 18, no. 2 (Spring 2017): 215, <https://www.fcsl.edu/userfiles/files/SP17%20-%20Gabison.pdf>.

¹⁸ Gabison.

¹⁹ Gabison.

Legal scholars question the effectiveness of using the criminal system—the punishment threat—in trying to prevent offenders from recidivating.²⁰ For Crump, better mechanisms, such as early detection, may have a more significant deterrence effect.²¹ Similarly, Legomsky suggests that applying criminal law principles to immigration law might be insufficient.²² Other scholars, including Stevenson, claim that the classic approach to deterrence—using the punishment threat along with the detection threat—is impractical as well.²³ As Stevenson admonishes, ignorance of the law does not justify breaking it.²⁴ However, for this author, potential violators’ ignorance of the law’s nuances may force them to comply.²⁵ Moreover, for Keller, judging effective immigration policy requires determining whether using the criminal system to regulate it works as intended.²⁶

Several scholars disagree. Eagly, for instance, indicates that the criminal justice system and the civil immigration system operate as an intertwined regulatory bureaucracy while having an effect on both immigration and criminal law procedures.²⁷ Gibson asserts that the administrative system, meaning inter-agency task forces, including Fraud Detection and the National Security Directorate (FDNS), is better able to handle immigration fraud than the criminal system.²⁸ Other scholars oppose this view. For instance, Asllani argues that the administrative system is not ideal for addressing

²⁰ David Crump, “Deterrence,” *St. Mary’s Law Journal* 49, no. 2 (2018): 317–362, Lexis.

²¹ Crump.

²² Stephen H. Legomsky, “The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms,” *Washington and Lee Law Review* 64, no. 2 (Spring 2007): 469–530, Lexis.

²³ Dru Stevenson, “Toward a New Theory of Notice and Deterrence,” *Cardozo Law Review* 26, no. 1 (2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=901321.

²⁴ Stevenson.

²⁵ Stevenson.

²⁶ Doug Keller, “Re-thinking Illegal Entry and Re-entry,” *Loyola University Chicago Law Journal* 44 (2012), <http://dx.doi.org/10.2139/ssrn.1884354>.

²⁷ Ingrid V. Eagly, “Prosecuting Immigration,” *Northwestern University Law Review* 104, no. 4 (Fall 2010), <https://ssrn.com/abstract=1710182>.

²⁸ Beth N. Gibson, “Large Scale Immigration Benefit Fraud: Prosecution Tips and Resources,” *Immigration Legal Initiatives* 56, no. 6 (November 2008): 12–19, <https://www.justice.gov/sites/default/files/usao/legacy/2008/12/01/usab5606.pdf>.

immigration fraud.²⁹ In the context of marriage fraud, this author claims that FDNS should be eliminated altogether because it is an inefficient step toward fraud detection and resolution.³⁰ In sum, this group of scholars reach no consensus on whether the administrative system is an effective tool for fraud detection.

Other deterrence theories might have an impact on immigration law. For example, Kostritsky claims that traditional contract law concepts can be applied to deter illegal behavior in the context of immigration law.³¹ An employer who is motivated to violate the law by hiring illegal aliens will continue to do so if he or she can profit, using one's superior position and status to exploit loopholes in the law.³² For example, if the employer knows he will not be punished because of the nonenforcement rule, he might still choose to hire the illegal aliens and use the nonenforcement rule as a defense, but only if an alien actually files a lawsuit to recover wages.³³ On the other hand, due to his inferior bargaining position, only with enforcement of the contract does the alien experience a windfall.³⁴ Thus, for this author, deterring those with greater incentive to violate the law in the future has the highest priority.³⁵ Other scholars, particularly Blum, agree with Kostritsky, stating that these disincentives are ineffective when any prospective wrongdoer has information about them but still breaks the law.³⁶ These scholars seem to agree that the courts should focus deterrence toward those with superior bargaining power when enforcing contract law in the context of immigration. Nevertheless, this literature review limits the application of *criminal law* solely to immigration law.

²⁹ George S. Asllani, "Dissecting Marriage Fraud as a True Immigration Crime," *Laws* 5, no. 1 (March 2016), <https://doi.org/10.3390/laws5010008>.

³⁰ Asllani.

³¹ Juliet P. Kostritsky, "Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory," *Iowa Law Review* 74 (1988), <https://ssrn.com/abstract=923577>.

³² Kostritsky.

³³ Kostritsky, 150.

³⁴ Kostritsky.

³⁵ Kostritsky.

³⁶ Brian A. Blum, "Equity's Leaded Feet in a Contest of Scoundrels: The Assertion of the in Pari Delicto Defense against a Lawbreaking Plaintiff and Innocents Successors," *Hofstra Law Review* 44, no. 3 (2016): 815, https://www.hofstralawreview.org/wp-content/uploads/2016/05/CC.2.Blum_.pdf.

The debates about the intersection of criminal and immigration law become evident in a series of policy documents discussing the national security implications of visa fraud. By implementing corrective actions to address those deficiencies and attempting to transform them into strengths, authorities have historically addressed such flaws in the fraud and national security risk detection and prevention mechanisms in the immigration system. The findings of these reports apply to the marriage visa programs and the H-2B visa program. For instance, a 2008 Department of Homeland Security (DHS) Office of the Inspector General (OIG) report addresses the strengths and weaknesses of USCIS's efforts to detect and prevent fraud in adjudicating all types of immigration benefits. The report praises both USCIS and ICE for creating mechanisms to detect and prevent fraud.³⁷ Although the OIG highlights several strengths in the efforts by USCIS and FDNS to comply with their responsibilities, the report also establishes significant deficiencies and proffers specific recommendations to address them.³⁸

For example, among other suggestions, the OIG recommends improving the referral policy from USCIS to ICE and reducing the accumulated backlog of security checks.³⁹ Thus, the OIG has found that despite the progress made by USCIS/FDNS, several areas show substantial room for improvement. The report provides specific policy recommendations to improve fraud detection and prevention at USCIS based on those deficiencies. For instance, the report recommends streamlining the referral process from immigration officers to FDNS and from FDNS to ICE.⁴⁰ In terms of quality assurance and training, the report proposes improvements to the site visit program and better data analysis.⁴¹ Finally, these weaknesses that the OIG examined in 2008 are significant because they indicate the early warning signs of deficiencies in fraud and security risk prevention and deterrence mechanisms of USCIS, and attempts by the authorities to correct

³⁷ Department of Homeland Security, Office of Inspector General, *Review of the USCIS Benefit Fraud Referral Process*, redacted and revised, OIG-08-09 (Washington, DC: Department of Homeland Security, 2008), 8, https://www.oig.dhs.gov/assets/Mgmt/OIGr_08-09_Apr08.pdf.

³⁸ Department of Homeland Security, Office of Inspector General, 8.

³⁹ Department of Homeland Security, Office of Inspector General, 8.

⁴⁰ Department of Homeland Security, Office of Inspector General, 17.

⁴¹ Department of Homeland Security, Office of Inspector General, 17.

those deficiencies. These recommendations may appear simplistic to the layperson, but they are substantial to the practitioner.

Other OIG reports addressing the mechanisms used by FDNS in other immigration programs have identified similar deficiencies. Although the reports discussed in the following paragraphs do not pertain directly to the marriage programs, nor the H-2B visa program, they still reveal significant lessons that apply to these visa programs. A 2012 OIG report reveals significant gaps in interagency cooperation, training, and fraud detection mechanisms at FDNS. The report pinpoints a persistent lack of communication between immigration services officers adjudicating cases and FDNS officers.⁴² The same report recommends additional training and greater cooperation between immigration services officers and immigration officers across the entire agency.⁴³

Furthermore, the report recommends the implementation of better fraud detection mechanisms to determine whether gaps in security and criminal background checks affect applicants.⁴⁴ Similarly, a 2016 statement from Rebecca Gambler before the House of Representatives on employment-based fifth-preference (EB-5) visas, through the Immigrant Investor Program, highlights the need for USCIS to work better with other interagency partners to identify fraud risk.⁴⁵ Although the Gambler's statement applies broadly, this thesis demonstrates that the same gaps in fraud detection mechanisms also exist in the marriage programs and, to a lesser degree, in the H-2B visa program. Those deficiencies or gaps may lead to loopholes that could prevent the effective adjudication of applications and petitions in the marriage visa programs.

⁴² Department of Homeland Security, Office of Inspector General, *The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers*, OIG-12-24 (Washington, DC: Department of Homeland Security, 2012), 10, https://www.oig.dhs.gov/assets/Mgmt/OIG_12-24_Jan12.pdf.

⁴³ Department of Homeland Security, Office of Inspector General, 10.

⁴⁴ Department of Homeland Security, Office of Inspector General, 11.

⁴⁵ Rebecca Gambler, *Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits*, GAO-16-431T (Washington, DC: Government Accountability Office, February 11, 2016), <https://www.gao.gov/products/GAO-16-431T>.

Similarly, a 2019 Government Accountability Office (GAO) report makes specific recommendations for USCIS to improve its efforts in implementing fraud prevention controls in the Violence Against Women Act (VAWA) program.⁴⁶ For instance, the GAO recommends, among other suggestions, establishing a fraud risk profile for the program and implementing better data analytics.⁴⁷ Thus, the 2019 GAO report identifies several deficiencies or weaknesses in the fraud detection and prevention process that FDNS uses in the VAWA program and provides specific recommendations to address these gaps.

One of the overarching areas for improvement for USCIS in the VAWA program is training for both immigration and FDNS officers as a tool to foster better preventive initiatives in the program.⁴⁸ The GAO found that adjudicators did receive general training when first hired, but they did not receive tailored anti-fraud training for the program, at least before fiscal year 2019.⁴⁹ Furthermore, adjudicators lacked training for addressing novel fraud schemes.⁵⁰ Likewise, the GAO further revealed that the marriage programs, along with the employment-based benefit programs, generate a volume of electronic data that could be used for analysis.⁵¹ Nonetheless, “USCIS has limited resources, and the agency deploys its data analytics resources strategically across immigration benefit programs.”⁵² Thus, USCIS would need additional funding to comply with these recommendations, including expanding its use of data analytics.

C. PERSONAL CONSIDERATIONS

Criminal law and immigration law fascinated me as a college student and in law school. In addition, my professional and personal experiences further deepened my interest

⁴⁶ Rebecca Gambler and Rebecca Shea, *Immigration Benefits: Additional Actions Needed to Address Fraud Risks in Program for Foreign National Victims of Domestic Abuse*, GAO-19-676 (Washington, DC: Government Accountability Office, September 30, 2019), 37, <https://www.gao.gov/products/GAO-19-676>.

⁴⁷ Gambler and Shea, 37.

⁴⁸ Gambler and Shea, 20.

⁴⁹ Gambler and Shea, 21.

⁵⁰ Gambler and Shea, 21.

⁵¹ Gambler and Shea, 22.

⁵² Gambler and Shea, 22.

in these topics. In 2004, I started my career with USCIS as an asylum officer. I will never forget that as a novice asylum officer, I interviewed an applicant and granted her the asylum benefit after a thorough interview was completed. However, a few days later, to my dismay, we received information that the applicant had been accused of being an intelligence agent for a foreign government. I blamed myself for not recognizing the signs before granting her the benefit. In retrospect, I realize that I was doing my best to evaluate the applicant based on the information and the techniques available to me at the time. Thanks to strong interagency cooperation, we later received the information we needed to proceed with caution in the adjudication of the case. After further evaluation and supervisory review, this applicant did not receive asylum in the United States. Employees in my agency are trained to collaborate with other agencies, such as ICE, Customs and Border Protection (CBP), and the Department of State (DOS), to detect fraud and threats to national security. However, I learned quickly that even though my agency is proactive in preventing fraud and national security risks, ample room for improvement still exists.

My personal story is also relevant, as both criminal and immigration law shaped my arrival to this nation as a child. I was born in Cuba under the regime of Fidel Castro. My family opposed his dictatorship, and although we managed to survive there, we always feared reprisal. In 1979, we tried leaving the island nation by gaining access to the Embassy of Peru in Havana. Our hope was to request political asylum in Peru. I was eight years old, and my sister was a teenager. We arrived by bus, an image that is still vivid in my mind. Upon arrival, my parents realized that agents working for the Cuban government and disguised as civilians were attacking those trying to escape. My parents decided that it was too risky to leave in this manner, carrying two children with them, so we returned to our house. By the time we reached it, the Defense Committee had been alerted about our departure. My parents were interrogated, but they successfully argued that we had taken that bus to visit some relatives near the embassy.

In 1980, my family and I left Cuba through the Mariel boatlift, and our relatives in the United States were able to sponsor us. We arrived at the port of Mariel (in Havana) after receiving an “exit permit” from the Cuban government. This permit was official confirmation that the Cuban government had allowed us to leave the country, after taking

possession of our house and the rest of our belongings. My uncle from New York City arrived at the port in hopes of transporting us to Key West. At that point, President Carter and Fidel Castro had reached an agreement about the exodus.⁵³ In his shrimp boat called the *Rosa B. Murray*, my uncle arrived at the port and waited days before the Cuban government let us leave. He had paid the Cuban government \$11,000 for 11 family members remaining in Cuba, but the government released only five (my parents, my sister, my grandfather, and me). The rest of the passengers were replaced with political prisoners, common criminals, psychiatric patients, and others.⁵⁴

Eventually, other members of my extended family left the island as well. An uncle, aunt, and cousin (a one-year-old child) witnessed their small boat sinking but were rescued by the U.S. Coast Guard in time to avoid a tragedy. During the exodus, 125,000 Cubans left the Island.⁵⁵ Eventually, the American government declared the actions by the Cuban government an “act of war,” and the Mariel boatlift ended.⁵⁶ Documentation on the Cuban refugees with criminal pasts who arrived at Key West during the Mariel boatlift varies. According to Capó, more than 80 percent of the individuals who arrived in the United States during the Mariel boatlift did not have a criminal past.⁵⁷ Nonetheless, he went on to warn that even today, some describe the Mariel boatlift as demonstrating how dangerous it could be to lack strong immigration controls.⁵⁸ These circumstances prevailed at the time of our arrival in the United States.

My family and I arrived in Key West on May 25, 1980. Upon arrival, my family and I were transported on a military plane to a base in Pennsylvania for vetting and processing. The United States did its best to process and vet immigrants due to national

⁵³ “Castro Announces Mariel Boatlift, Allowing Cubans to Emigrate to U.S.,” History, last modified April 16, 2020, <https://www.history.com/this-day-in-history/castro-announces-mariel-boatlift>.

⁵⁴ History.

⁵⁵ Andrew Glass, “Castro Launches Mariel Boatlift, April 20, 1980,” Politico, April 20, 2018, <https://www.politico.com/story/2018/04/20/castro-launches-mariel-boatlift-april-20-1980-528819>.

⁵⁶ History, “Fidel Castro Announces Mariel Boatlift.”

⁵⁷ Julio Capó Jr., “The White House Used This Moment as Proof the U.S. Should Cut Immigration. Its Real History Is More Complicated,” *Time*, August 4, 2017, <https://time.com/4888381/immigration-act-mariel-boatlift-history/>.

⁵⁸ Capó.

security risks. As a child, I could never have imagined that while in law school as a student-attorney, I would represent many of the criminal aliens who arrived during the Mariel boatlift and were in federal detention, before the legacy U.S. Immigration and Naturalization Service parole board. I could never have imagined that I would end up working for USCIS, processing and vetting asylum seekers, refugees, and applicants from all over the world. My family and I were so grateful for receiving protection in the United States that we vowed to do all we could to become proud citizens of this nation. Those early experiences were fundamental as I grew up and became my motivation to become a professional in public service, dedicated to protecting the nation. These experiences also spurred my interest in fraud and national security risk detection and prevention.

D. RESEARCH DESIGN

This qualitative research aims to explore the strengths and weaknesses of deterrence mechanisms at USCIS in the marriage visa programs and the H-2B visa program. This thesis compares these two programs, focusing on the deterrence mechanisms that are currently used by FDNS under USCIS. It reviews the legal frameworks of these two visa programs to examine them in the context of the criminalization of immigration fraud and the national security risks posed by immigration visa fraud. Drawing from these comparisons, I make recommendations to improve the deterrence mechanisms currently in place at FDNS. I chose this focus because scholars and practitioners currently study these two programs individually, but not in relation to each other.

First, I reviewed national security risk implications concerning the marriage visa programs and the H-2B visa program. I chose legal literature because of its relevance to the study of immigration fraud. This step allowed me to explore how different legal scholars have addressed the threats to the homeland vis-à-vis these two visa programs, as well as provide the necessary data for gap analysis. A central part of this thesis explores the findings of a July 2015 report issued by the GAO titled *A Framework for Managing Fraud Risks in Federal Programs*, which discusses leading practices that could be used by

agencies involved in managing fraud risks.⁵⁹ This thesis also discusses a September 2019 GAO report titled *Immigration Benefits: Additional Actions Needed to Address Fraud Risks in Program for Foreign National Victims of Domestic Abuse*.⁶⁰ The principles and main concepts of the 2015 and 2019 GAO reports can be easily used by the FDNS program to address fraud and security risks in the marriage and the H-2B visa programs. Finally, I applied these core principles to distinct areas in the FDNS H-2B program and the marriage programs: financial and time investment, legal framework, notification requirements, use of site visits, and interagency collaboration.

My data and sources of evidence are a combination of primary sources—through interviews with FDNS officers, one officer specializing in marriage fraud and the other in the H-2B visa program at USCIS—and open-source documents such as the various reports published by the GAO, the DHS OIG, and the Congressional Research Service regarding the aforementioned programs. This thesis also used secondary sources such as reports published by the media regarding these two visa programs.

In this comparison of both visa programs, a blueprint for further success emerged. In terms of these visa programs, *success* means granting the right benefit to the right applicant. On the other hand, *failure* means granting an immigration benefit to a nefarious actor who could pose a security risk. The results of this thesis are meant to help academics and practitioners by providing the legal background to build better deterrence processes, as well as real-world recommendations to improve deterrence mechanisms at FDNS. This research can help FDNS deter fraud more effectively and prevent national security risks in immigration processing. Future research will be needed to test the recommendations in other visa programs and with other agencies within DHS.

⁵⁹ Steve Lord, *A Framework for Managing Fraud Risks in Federal Programs*, GAO-15-593SP (Washington, DC: Government Accountability Office, 2015), <https://www.gao.gov/products/GAO-15-593SP>.

⁶⁰ Gambler and Shea, *Immigration Benefits*.

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II. TAINTED LOVE: THE MARRIAGE IMMIGRATION BENEFITS PROGRAMS

Every year, applicants from every corner of the world obtain either a Green Card or naturalized citizenship in the United States through the so-called marriage programs. This chapter discusses two such programs, the Green Card through marriage to a U.S. citizen or legal permanent resident and the Green Card for the fiancé(e) of a U.S. citizen. The first section of this chapter provides a description and overview of the legal frameworks of the marriage programs. The second section addresses the multiple challenges, or weaknesses, related to detecting and preventing marriage fraud and national security risks within the law, as described in reports by the DHS OIG and Congress, and identifies potential loopholes in the mechanisms used by the USCIS FDNS to detect fraud and security risks. It also examines the connection between fraud, national security risks, and human costs. The third section examines the various legal and practical detection measures, or strengths of these programs, used by authorities to fight immigration fraud and security risks. Both the second and third sections present the findings of an interview conducted with an immigration officer who has extensive expertise in the marriage visa programs. During the interview, this immigration officer addressed the weaknesses and strengths of current practices at USCIS aimed at detecting and preventing fraud and security risks in the marriage visa programs.⁶¹

This chapter finds that the marriage visa programs exhibit several strengths and weaknesses and that the authorities are aware of existing deficiencies. Some of the existing deficiencies in the marriage visa programs lead to fraud, abuse of the petitioner or the beneficiary, and other crimes. The authorities have been proactive in attempting to address deficiencies, but significant challenges remain. Although the H-2B visa program also exhibits deficiencies, the program features several strengths that could be adapted and applied to the marriage visa programs.

⁶¹ A determination request was submitted to the Naval Postgraduate School's Institutional Review Board (IRB) on March 21, 2020. The IRB reviewed the request and determined on March 24, 2020, that no further IRB review and approval was required.

A. DESCRIPTION AND OVERVIEW

The following section examines the primary marriage visa programs used by foreign citizens to acquire a Green Card or naturalization in the United States, along with the legal requirements. It also presents the review process utilized by USCIS to address fraud and security risks, along with the remedies or mechanisms it uses to enforce the law once fraud or a security risk has been discovered.

1. Programs and Requirements

With the Green Card program through marriage to a U.S. citizen or legal permanent resident, after meeting other eligibility requirements, the spouse of a U.S. citizen or a legal permanent resident can become a lawful permanent resident, obtain a Green Card, and after a period of time, become a naturalized U.S. citizen.⁶² The foreign citizen may choose to continue living in the United States as a legal permanent resident or file for naturalization at the prescribed time.

In the case of a foreign citizen obtaining a Green Card after marriage to a U.S. citizen or legal permanent resident, the marriage could have taken place either in the United States or overseas.⁶³ However, before applying to obtain the Green Card, other requirements must be met. For instance, the foreign citizen must prove that neither of the spouses is married to another person; that one is married to a U.S. citizen or lawful permanent resident; that the union is a bona fide marriage (the couple intends to establish a life together); and that the couple is legally married (the marriage is recognized by the authorities in the state or country where they were married).⁶⁴ Also, the length of the marriage is not important, except that a foreign citizen who is married for less than two years at the time when he or she becomes a legal permanent resident will receive a

⁶² “Green Card for Immediate Relatives of U.S. Citizen,” Citizenship and Immigration Services, last modified June 16, 2020, <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-immediate-relatives-of-us-citizen>.

⁶³ Ilona Bray, *Fiancé & Marriage Visas: A Couple’s Guide to U.S. Immigration*, 10th ed. (Pleasanton, CA: Nolo, 2019), 30–35.

⁶⁴ Bray, 31.

conditional residency and must wait two years before receiving permanent residency.⁶⁵ Although the law imposes several requirements before the foreign citizen may obtain the Green Card, the process is straightforward.

If the foreign citizen is already living in the United States and he or she has entered the country legally, he or she may remain in the United States and submit Form I-485, the Application to Register Permanent Residence or Adjust Status, with USCIS.⁶⁶ The foreign citizen may also leave the United States to avoid overstaying a visa and apply for a Green Card and immigrant visa at the appropriate U.S. consulate overseas.⁶⁷ However, if the foreign citizen has entered the country illegally, he or she must apply for a waiver, but then the process to obtain a Green Card could be difficult.⁶⁸ Also, if the foreign citizen is located overseas, the alien qualifies as an immediate relative, so a visa and Green Card are available after the foreign citizen has completed the application process.⁶⁹ Finally, in cases where the foreign citizen is married to a legal permanent resident, he or she cannot obtain a Green Card immediately.⁷⁰ In this case, the foreign citizen qualifies as a preference relative, for whom there are green card quotas each year.⁷¹ The legal permanent resident spouse should place the foreign citizen on a waiting list for the Green Card, and the foreign citizen must wait for his or her turn to obtain a Green Card.⁷² Thus, marriage to a U.S. citizen or a legal permanent resident may be an expedient way to obtain legal status in the United States, but the law imposes strict requirements that favor marriage to a U.S. citizen over marriage to a legal permanent resident.

The other program is the Green Card for the fiancé(e) of a U.S. citizen, or K-1 visa. The process for the K-1 visa also features strict requirements, with added layers of

⁶⁵ Bray, 154.

⁶⁶ Bray, 233.

⁶⁷ Bray, 233.

⁶⁸ Bray, 236.

⁶⁹ Bray, 110.

⁷⁰ Bray, 262.

⁷¹ Bray, 262.

⁷² Bray, 262.

complexity. Under the K-1 visa, a U.S. citizen files a petition—Form I-129F, the Petition for Alien Fiancé(e)—on behalf of the alien for the purpose of marriage, normally with the intended spouse still in his or her country of residence.⁷³ During the process of approval for this petition, the couple must show evidence to USCIS that they have met in person (or they qualify for an exception); proof that the couple intends to get married; and proof that they can marry under the law (for instance, presenting evidence of a divorce decree if applicable).⁷⁴ After arrival to the United States as a nonimmigrant, the alien fiancé(e) must marry the petitioner within 90 days; only after the marriage can the alien apply to become a lawful permanent resident or obtain a Green Card.⁷⁵ If the alien does not marry the U.S. citizen within 90 days for any reason, then the foreign citizen may become an illegal alien in the United States.⁷⁶ Thus, the foreign citizen may be at risk of being penalized under immigration law if he or she remains in the United States beyond the 90-day window without marrying the U.S. citizen. The law specifies no limitations on the number of Green Cards available after these marriages or of applicants who may obtain the K-1 visa.⁷⁷ These benefits are granted to the foreign citizen because U.S. law classifies a spouse as an immediate family member.⁷⁸ Both programs provide significant benefits for the foreign citizen including the ability to live or work anywhere in the United States.

The central theme of family reunification permeates the laws associated with immigration benefits, including marriage to a U.S. citizen or a permanent legal resident. Rae indicates that Congress enacted certain provisions in immigration laws to reunite veterans with their spouses (classified as aliens at the time).⁷⁹ As summarized by Armas,

⁷³ “Visas for Fiancé(e)s of U.S. Citizens,” Citizenship and Immigration Services, last modified March 23, 2018, <https://www.uscis.gov/family/family-us-citizens/visas-fiancees-us-citizens>.

⁷⁴ Bray, *Fiancé & Marriage Visas*, 76–78.

⁷⁵ Citizenship and Immigration Services, “Visas for Fiancé(e)s of U.S. Citizens.”

⁷⁶ Rothwell, *Legal U.S. Immigration*, 106.

⁷⁷ Bray, *Fiancé & Marriage Visas*, 56.

⁷⁸ “US Family Reunification,” United Nations High Commissioner for Refugees, accessed May 31, 2020, <https://www.unhcr.org/en-us/us-family-reunification.html>.

⁷⁹ Karen L. Rae, “Alienating Sham Marriages for Tougher Immigration Penalties: Congress Enacts the Marriage Fraud Act Comment,” *Pepperdine Law Review* 15, no. 2 (1988): 182.

the War Brides Act of 1945 was designed to permit spouses of war veterans to reunite with their families quickly.⁸⁰ Indeed, the immigration system in the United States favors family reunification over other considerations.⁸¹ Although immigration law attempts to preserve family unity through the marriage benefit programs, the authorities are charged with combating fraud in these programs while the courts are charged with evaluating what constitutes a fraudulent marriage.

Armas summarizes some key concepts used by the courts to make determinations about fraudulent marriages.⁸² As described by Armas, the U.S. Supreme Court decision in the *Lutwak* defines a fraudulent marriage within the scope of the War Brides Act if the couple has entered into the marriage with the sole purpose of circumventing immigration laws and intending not to establish a life together.⁸³ The law, however, does not define what constitutes a legitimate marriage in the immigration system of the United States. Armas explains that according to the Supreme Court, marriage is a fundamental right, and the government can only infringe on that right with a genuine purpose—which includes thwarting fraudulent marriage visas.⁸⁴ On the other hand, Virga argues that in practice, the goal of family reunification in immigration law means that some individuals manage to violate the law by engaging in fraudulent marriages—and the system quietly accommodates them.⁸⁵ Therefore, the concept of family reunification, held out as the most important aspect of the marriage programs without any regard for context, could be a weakness frequently exploited by those attempting to defraud the government.

⁸⁰ Marcel De Armas, “For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases within the Scope of the Constitution,” *American University Journal of Gender, Social Policy & the Law* 15, no. 4 (2007): 749.

⁸¹ Armas, 744.

⁸² Armas, 751.

⁸³ According to Armas, some courts use the evade-the-law test to determine whether the couple married to skirt immigration laws. Other courts utilize the “establish-a-life” test to assess whether the couple intended to create a life together when they entered into marriage. See Armas, “For Richer or Poorer or Any Other Reason,” 751.

⁸⁴ Armas, 749–50.

⁸⁵ Michael Virga, “Marrying Up: The Unsettled Law of Immigration Marriage Fraud and the Need for Uniform Statutory Guidelines,” *St. John’s Law Review* 88, no. 4 (Winter 2014): 1137–38.

The authorities have reacted to these debates by providing some basic definitions of what constitutes a fraudulent marriage. Immigration law provides specific definitions of what constitutes a *sham marriage*, namely one used to circumvent immigration law in the United States.⁸⁶ According to case law, a sham marriage is one created to defraud the U.S. government because the couple never intended to create a life together at the time of the union.⁸⁷ U.S. law deems marriage to a U.S. citizen with the sole purpose of obtaining legal immigration status or citizenship in the United States unlawful.⁸⁸ After the *Lutwak* case, according to Armas, circuit courts started applying different definitions of marriage in immigration law.⁸⁹ In 1986, Congress enacted 8 U.S.C. § 1325(c), which made entering into a marriage with the intention of evading immigration law a federal crime.⁹⁰ If found guilty, the foreign citizen could be punished with a fine, imprisonment, or both.⁹¹ Also, the U.S. citizen or legal permanent resident could confront criminal prosecution, imprisonment, or fines.⁹² Thus, in the context of the marriage programs, the law provides for an avenue for family reunification, but the law also sets limits to prevent fraud and security risks.

Table 1 details the steps that a foreign citizen must follow in obtaining a Green Card after marriage to a U.S. citizen or legal permanent resident.

⁸⁶ Procedure for Granting Immigrant Status, 8 U.S.C. § 1154 (2012), <https://www.govinfo.gov/app/details/USCODE-2011-title8/USCODE-2011-title8-chap12-subchapII-partI-sec1154>.

⁸⁷ *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975).

⁸⁸ Naturalization, Citizenship or Alien Registry, 18 U.S.C. § 1015(a) (2000), <https://www.law.cornell.edu/uscode/text/18/1015>.

⁸⁹ Armas, “For Richer or Poorer or Any Other Reason,” 751.

⁹⁰ Virga, “Marrying Up,” 1138.

⁹¹ Bray, *Fiancé & Marriage Visas*, 10.

⁹² Bray, 10.

Table 1. Green Card Process through Marriage to a U.S. Citizen or Legal Permanent Resident⁹³

Step 1	After the marriage, the U.S. citizen or legal permanent resident (the petitioner) submits Form I-130, the Petition for Alien Relative, to USCIS to establish the relationship between the petitioner and the beneficiary (the alien).
Step 2	The alien submits to USCIS Form I-485, the Application to Register Permanent Residence or Adjust Status; Form I-864, the Affidavit of Support; Form I-765, the Application for Employment Authorization; and Form I-131, the Application for Travel Document.
Step 3	After receiving an Application Support Center appointment from USCIS, the alien attends his or her biometrics services appointment to provide fingerprints, photographs, and signature.
Step 4	The alien interviews with an immigration officer at a USCIS field office, and background security checks are conducted at various points during the adjudication of the application.
Step 5	The alien receives the decision from USCIS (approval or denial).

The process starts with the filing of Form I-130, the Petition for Alien Relative (step 1), and culminates in a final approval or denial notice issued by USCIS. At various points during this process, USCIS performs a variety of mandatory background security checks. As shown in Table 1, the process to obtain a Green Card through marriage to a U.S. citizen or legal permanent resident is not complicated, but it requires frequent contact with USCIS.

Table 2 shows the similar process for a foreign citizen attempting to obtain a Green Card after becoming engaged to a U.S. citizen. For the K-1 visa process, as with the Green Card process through marriage to a U.S. citizen or legal permanent resident, the couple must interact with the authorities on a frequent basis. However, under this category, the foreign citizen interacts with several additional agencies, including the consular office in his or her country of origin for an interview and CBP for inspection at the port of entry, adding another layer of scrutiny by the authorities.

⁹³ Adapted from Citizenship and Immigration Services, “Green Card for Immediate Relatives.”

Table 2. Green Card Process for the Fiancé(e) of a U.S. Citizen
(K-1 Visa)⁹⁴

Step 1	The U.S. citizen submits Form I-129F, the Petition for Alien Fiancé(e), on behalf of the alien, and USCIS approves the petition.
Step 2	The petition is transferred to the U.S. Embassy or Consulate (part of the DOS) where the alien is residing.
Step 3	A consular officer interviews the applicant in the country of origin while background security checks are conducted by the DOS.
Step 4	The Applicant travels to the United States, and CBP conducts an interview and security checks.
Step 5	The alien must marry the U.S. citizen within 90 days.
Step 6	The alien submits Form I-485, the Application to Register Permanent Residence or Adjust Status, with USCIS.
Step 7	The alien interviews with a USCIS immigration officer, and background security checks are conducted at various points during the adjudication of the application.
Step 8	The alien receives a decision from USCIS (approval or denial).

The process starts once the U.S. citizen files Form I-129F, the Petition for Alien Fiancé(e), with USCIS and culminates in USCIS issuing an approval or denial. Both programs require applicants to pay substantial amounts of money (each form involved in the process includes fees payable to the government) and reveal considerable personal information to the authorities. Finally, any petitioner or beneficiary found guilty of fraud may face penalties under the law.

2. Review and Remedies

Generally, once an applicant submits a petition or application for an immigration benefit with USCIS, an immigration officer reviews the application or petition and conducts any appropriate interviews.⁹⁵ If the immigration officer suspects fraud or a national security risk, he or she refers the case to FDNS for further processing.⁹⁶ FDNS

⁹⁴ Adapted from Citizenship and Immigration Services, “Visas for Fiancé(e)s of U.S. Citizens.”

⁹⁵ Department of Homeland Security, Office of Inspector General, *Review of the USCIS Benefit Fraud Referral Process*, 3.

⁹⁶ Department of Homeland Security, Office of Inspector General, 3.

has various areas of responsibility, including assessing whether the alien presents a national security risk, evaluating fraud, and collaborating with ICE in meritorious cases.⁹⁷ An important part of this process is that immigration officers can refer a case to FDNS only when they pinpoint an “articulable fraud.”⁹⁸ The adjudicator may suspect fraud after evaluating concrete evidence, such as the applicant’s demeanor, contradictory statements on material facts, boilerplate applications, or the presentation of fraudulent documents to the authorities.⁹⁹ Also, although these are highly subjective factors, the adjudicators are trained to refer cases to FDNS only if they can establish valid reasons for the referral.

USCIS is the agency within DHS responsible for adjudicating immigration benefits, including marriage benefits, while the Office of Investigations, affiliated with ICE, is responsible for conducting criminal investigations of immigration fraud and facilitating prosecution by the United States Attorney’s Office.¹⁰⁰ Apart from prosecution, once USCIS establishes fraud, the agency may issue a *notice to appear*, which means the applicant must appear before an immigration judge in removal proceedings.¹⁰¹ By law, if an applicant attempts to reenter the United States after the judge issues a removal order, without first obtaining a waiver, he or she is engaging in an activity defined as an aggravated felony.¹⁰² In addition, after a removal order has been issued by the judge, USCIS has the authority to bar future applications or to apply administrative penalties.¹⁰³ Thus, the authorities use different mechanisms to enforce the law once fraud or a security risk has been discovered.

For instance, making false statements or presenting fraudulent documents during an immigration proceeding can constitute the basis for prosecuting marriage fraud. Section 1015(a) of Title 18 of the *U.S. Code* criminalizes false statements under oath in an

⁹⁷ Department of Homeland Security, Office of Inspector General, 3.

⁹⁸ Department of Homeland Security, Office of Inspector General, 3.

⁹⁹ Department of Homeland Security, Office of Inspector General, 3.

¹⁰⁰ Department of Homeland Security, Office of Inspector General, 2.

¹⁰¹ Department of Homeland Security, Office of Inspector General, 2.

¹⁰² Department of Homeland Security, Office of Inspector General, 2.

¹⁰³ Department of Homeland Security, Office of Inspector General, 2.

immigration proceeding.¹⁰⁴ For example, a prosecutor may prove marriage fraud by presenting fraudulent documents filed with USCIS, the DOS, or other agencies.¹⁰⁵ In addition, proving marriage fraud involves comparing what is in the Alien File (A-File) with the results of a criminal investigation.¹⁰⁶ These documents often form a paper trail showing that the alien has previously been removed from the United States.¹⁰⁷ Such a finding may indicate that the alien has a criminal history that could affect his or her chances of obtaining legal status in the United States. Agencies involved in immigration proceedings in the United States, either at the domestic level or overseas, must be careful in documenting the interactions between the alien and the authorities.

Table 3 presents the process utilized by USCIS once an immigration officer suspects fraud or security risk.

Table 3. General Fraud Referral Process for Applications and Petitions Submitted with USCIS¹⁰⁸

Step 1	The applicant submits a petition or application for an immigration benefit with USCIS.
Step 2	An immigration officer reviews the application or petition and conducts necessary interviews.
Step 3	If the immigration officer suspects fraud/national security risks, the officer refers the case to FDNS, after pinpointing an articulable fraud.
Step 4	FDNS evaluates the case and either accepts or declines the referral. If the referral is declined, the application or petition returns to the immigration officer for adjudication completion. If FDNS accepts the referral, the case is referred to ICE.
Step 5	Homeland Security Investigations under ICE works with other agencies to further investigate and cooperate with the U.S. Attorney’s Office to prosecute any offenders.

¹⁰⁴ Naturalization, Citizenship or Alien Registry, 18 U.S.C. § 1015(a) (2000).

¹⁰⁵ Sebastian Kielmanovich, “Using the Alien File in the Prosecution of Immigration Crimes,” *United States Attorneys’ Bulletin* 65, no. 4 (July 2017): 11–16.

¹⁰⁶ Kielmanovich.

¹⁰⁷ Kielmanovich.

¹⁰⁸ Adapted from Department of Homeland Security, Office of Inspector General, *Review of the USCIS Benefit Fraud Referral Process*, 2–3; Gambler and Shea, *Immigration Benefits*.

The immigration officer is charged with reviewing any applications or petitions submitted by the applicants and conducting required interviews. The immigration officer acts as a gatekeeper as he or she must carefully examine each case and refer any meritorious cases to FDNS. In situations where fraud or security risks are found, the process may lead to an ICE referral, an investigation by that agency, and prosecution.

B. WEAKNESSES OF THE MARRIAGE VISA PROGRAMS

In order to examine the weaknesses and strengths of the marriage visa programs, an interview was conducted with Shanda Annello, a supervisory immigration services officer at the USCIS Albuquerque Field Office and former FDNS officer specializing in marriage fraud at the USCIS New Orleans Field Office. Officer Annello was asked the question: “What are the known strengths and weaknesses of the FDNS program in terms of the marriage visa programs?” In addition, this section explores existing weaknesses as discussed in government and media reports.

1. Fraud and Abuse

USCIS’s available fraud and national security risk detection mechanisms may be insufficient to prevent fraud and national security risks. For instance, verifying whether the couple has entered into a legitimate marriage involves interviewing each spouse separately to validate the information provided in filing an application with USCIS.¹⁰⁹ However, according to Rae, because couples may be coached to prepare for the interview with the immigration officer, they might manipulate the process and obtain an immigration benefit through fraud.¹¹⁰ During her interview, Officer Annello indicated that in some cases, the “spouses” might be friends who have a preexisting relationship. Because the spouses know a great deal of information about one another already due to their friendship, it might be challenging for the immigration officer to discover the fraud scheme.¹¹¹ In other cases, a good Samaritan might agree to defraud the government.

¹⁰⁹ Rae, “Alienating Sham Marriages,” 190.

¹¹⁰ Rae, 190.

¹¹¹ Shanda Annello, interview, May 21, 2020.

A factor to be considered is the involvement of U.S. citizens and even professionals in some of the illegal activities leading to marriage fraud. In the past, joint investigations conducted by USCIS and other agencies discovered extensive “notario fraud” in immigrant communities.¹¹² The American Bar Association defines notario fraud as “individuals who represent themselves as qualified to offer legal advice or services concerning immigration and other matters of law, who have no such qualification and routinely victimize members of immigration communities.”¹¹³ Although this scam can occur in the context of any immigration petition or application, due to the intimate nature of entering into a marriage, the consequences may be dire if the victim being targeted is either the beneficiary or the petitioner in a marriage fraud scheme. Although USCIS and other agencies make every effort to report legal representatives involved in marriage fraud, the financial incentives associated with schemes to defraud the government may be stronger than existing deterrents.¹¹⁴ The involvement of legal representatives found to be complicit in fraudulent marriage schemes demonstrates the gravity of marriage fraud, and is another weakness in the marriage visa programs.

In some cases, substantial amounts of money are involved—paying money to those involved in preparing the aliens for the interview—and marriage fraud may act as a magnet for individuals willing to defraud the government.¹¹⁵ Virga explains that some U.S. citizens participate in these schemes after receiving payment from “the alien spouse.”¹¹⁶ For instance, as recently as July 2020, a grand jury indicted two men charged with involvement in marriage fraud.¹¹⁷ In this case, a criminal organization created a fraud scheme to wed foreign nationals to former active duty and current service members in the

¹¹² Joshua Daley Paulin, “Fraudulent Marriages in Immigration Cases,” *GPSolo* 27, no. 1 (2010): 40–43.

¹¹³ “About Notario Fraud,” American Bar Association, July 19, 2018, https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fight-notario-fraud/about_notario_fraud/.

¹¹⁴ American Bar Association.

¹¹⁵ Rae, “Alienating Sham Marriages,” 190.

¹¹⁶ Virga, “Marrying Up,” 1142.

¹¹⁷ Harm Venhuizen, “One Soldier, One Civilian Indicted in Case of Military Marriage Fraud Ring at Fort Bragg,” *Military Times*, July 29, 2020, <https://www.militarytimes.com/news/your-army/2020/07/28/one-soldier-one-civilian-indicted-in-case-of-military-marriage-fraud-ring-at-fort-bragg/>.

Fort Bragg area.¹¹⁸ An investigation by the authorities uncovered a string of fraudulent marriages whereby foreign citizens obtained legal status while the soldiers collected money under the basic allowance for housing while living off base.¹¹⁹ If the perpetrators had been successful in their fraud scheme, one might fear a situation in which a potential terrorist or criminal would have access to living on a military base in the United States, or its vicinity.

Officer Annelo explained that one challenge in detecting marriage fraud might be cultural differences.¹²⁰ In some cultures, the concept of dating is significantly different from Western societies. For example, due to religious traditions, it might be that the spouses have only met in person on a few occasions.¹²¹ This practice may be normal in some cultures, and the authorities in the United States attempt to be respectful of other customs, recognizing that in most cases, the couple applying for an immigration benefit are legitimate spouses. On the other hand, the authorities must be mindful of the possibility that some couples could use these cultural differences as a tool for defrauding the government.

Officer Annelo emphasized the need to improve communication between FDNS officers across the nation and between FDNS officers and their counterparts in other agencies—including ICE and consular officers working for the DOS—in an effort to fight fraud.¹²² She explained that because each USCIS field office is located in a different geographic location across the nation, each office serves a specific population from certain nationalities and ethnic groups.¹²³ Thus, FDNS officers acquire different expertise according to their location, but this type of specialized knowledge is not necessarily shared across field offices.¹²⁴ In addition, FDNS maintains communications with its ICE

¹¹⁸ Venhuizen.

¹¹⁹ Venhuizen.

¹²⁰ Annelo, interview.

¹²¹ Annelo.

¹²² Annelo.

¹²³ Annelo.

¹²⁴ Annelo.

counterparts. However, those communications are limited to monthly meetings.¹²⁵ Furthermore, FDNS officers seldomly interact with the consular officers working the same cases, other than reviewing the information added by the officers to the existing USCIS/DOS databases.¹²⁶ Finally, interactions between FDNS officers and ICE agents only occur once a formal criminal investigation has begun.¹²⁷

A significant weakness in the marriage visa programs is the potential for human cost or abuse. For instance, Anderson explores several cases of women who married U.S. citizens and obtained immigration status in the United States as conditional residents yet remained in abusive relationships to maintain legal status.¹²⁸ Anderson explains that female abuse in this context occurs among all nationalities.¹²⁹ More urgently, Pat Eng, founder of the New York Asian Women’s Center, explains that the abusive spouse typically uses the threat of deportation to continue abusing the victim.¹³⁰ As Anderson has specified, the conditional resident status caveat was created to fight marital fraud but might have a troubling consequence for battered women.¹³¹ The documented cases of some foreign citizens being forced to remain in these abusive relationships to protect their legal status show another weakness in the marriage visa programs.

Deficiencies or weaknesses in fraud and national security risk detection that occur in the context of the K-1 visa, the Green Card for fiancé(e)s of U.S. citizens, have been discussed in hearings before Congress, touching on the issue of human cost. For instance, in March 2017, the Committee on the Judiciary conducted a hearing about K-1 visa

¹²⁵ Annello.

¹²⁶ Annello.

¹²⁷ Annello.

¹²⁸ Michelle J. Anderson, “A License to Abuse: The Impact of Conditional Status on Female Immigrants,” *Yale Law Journal* 102, no. 6 (1993): 1401–1402, <https://doi.org/10.2307/796973>.

¹²⁹ Anderson.

¹³⁰ Anderson, 1402.

¹³¹ Anderson.

fraud.¹³² One of the witnesses to the hearing was Elena Maria Lopez, a victim of marriage fraud, who described how after her wedding to a foreign citizen, she realized that he had been using her to obtain a Green Card.¹³³ After his fraud scheme became evident, he became violent and even threatened to kill her if she attempted to contact the authorities.¹³⁴ In this case, it appears the beneficiary embraced criminal behavior after his arrival to the United States, presenting a danger to his new spouse and exposing her to abuse.

Some women arrive in the United States legally through the international marriage brokerage (IMB) industry, and once they are on American soil, they are abused by their new spouses. “Mail-order brides” and the IMB industry exist in this gap of the program.¹³⁵ The Tahirih Justice Center provides a description of the IMB industry, explaining that these online companies match male clients with women located overseas for a prospective marriage.¹³⁶ However, while the male clients pay substantial fees to these companies, the industry exposes these vulnerable women to potential abuse.¹³⁷ Lindee affirms this finding.¹³⁸ These at-risk women may be lured into marriages with American men with promises of a better life, or even real romance, without suspecting potential domestic abuse once they arrive to the United States.

On the other hand, marriage fraud may lead to suffering for the petitioner. For example, in 2018, NBC investigated how some American citizens have become the victims

¹³² Homeland Security Digital Library, comp., *Vows for Visas: Investigating K-1 Fiancé Fraud: Compilation of Testimonies before the Judiciary Committee*, Senate, 115th Cong., 1st sess. (Monterey, CA: Naval Postgraduate School, 2017), 3, HSDL.

¹³³ Homeland Security Digital Library, 6.

¹³⁴ Homeland Security Digital Library, 6.

¹³⁵ Kirsten M. Lindee, “Love, Honor, or Control: Domestic Violence, Trafficking, and the Question of How to Regulate the Mail-Order Bride Industry,” *Columbia Journal of Gender and Law* 16, no. 2 (2007): 552, <https://doi.org/10.7916/cjgl.v16i2.2545>.

¹³⁶ “International Marriage Brokers,” Tahirih Justice Center, accessed May 31, 2020, <https://www.tahirih.org/what-we-do/policy-advocacy/international-marriage-brokers/>.

¹³⁷ Tahirih Justice Center.

¹³⁸ Lindee, “Love, Honor, or Control,” 554.

of marriage fraud.¹³⁹ According to NBC, some unscrupulous foreign citizens have been willing to use legal loopholes to remain in the United States after abandoning their American-citizen spouses.¹⁴⁰ The news report recounts the story of “Tony” and his Russian bride, “Natalia,” a Russian woman who, shortly after their marriage, left him for a previous boyfriend, only to come back to Tony later.¹⁴¹ According to NBC, Tony’s “love story” became a nightmare when Natalia started provoking him in an effort to make him lose his temper.¹⁴² Tony claims that Natalia was trying to obtain a visa—by claiming domestic abuse—to stay in the United States.¹⁴³ In this case, it appears the beneficiary was aware of existing laws that could offer her legal status in the United States, if she managed to fabricate a domestic abuse case against her new spouse.

2. Other Crimes

In the same way, marriage fraud also becomes entangled with other types of crimes, for example, human trafficking. In some cases, a U.S. citizen files a K-1 visa application for an individual located overseas, and after his or her arrival to the United States, the foreign spouse becomes the victim of physical, emotional, or sexual abuse.¹⁴⁴ According to a 2016 DHS OIG report, more than half of human traffickers used fiancé(e) and work visas to smuggle victims into the United States.¹⁴⁵ The lack of access to law enforcement and the legal community poses a significant barrier for the victims seeking assistance.¹⁴⁶ Malevolent actors’ ability to use legitimate mechanisms to profit from human trafficking also signals a significant weakness in the marriage programs.

¹³⁹ Jodie Fleischer, Rick Yarborough, and Steve Jones, “Americans Say Immigrants Duped Them into Marriage, Then Claimed Abuse to Stay in US,” NBC Washington, February 13, 2018, <https://www.nbc.washington.com/news/local/americans-say-immigrants-duped-them-into-marriage-then-claimed-abuse-to-stay-in-us/149456/>.

¹⁴⁰ Fleischer, Yarborough, and Jones.

¹⁴¹ Fleischer, Yarborough, and Jones.

¹⁴² Fleischer, Yarborough, and Jones.

¹⁴³ Fleischer, Yarborough, and Jones.

¹⁴⁴ Homeland Security Digital Library, *Vows for Visas*, 12.

¹⁴⁵ Homeland Security Digital Library, 40.

¹⁴⁶ Homeland Security Digital Library, 13.

In other cases, criminal organizations may use marriage fraud to hide their activities.¹⁴⁷ For instance, Hickman describes an East-African smuggling network in which a criminal organization used various nations—Mexico, Belize, and Brazil, among others—in its plan to profit through fraud.¹⁴⁸ Marriage fraud was a key element in its attempt to defraud the American government. In this case, the Department of Justice discovered that one of the criminals involved in the ring had acquired legal permanent status in Belize through marriage fraud.¹⁴⁹ Although the marriage fraud occurred in another country, a criminal investigation caused Belize to revoke the citizenship of the offender; after the United States secured an arrest warrant, Belize expelled him to the United States.¹⁵⁰ Thus, a single discovery of marriage fraud led to the successful prosecution of the criminal ring and the prevention of further violations in the United States. In this case, the authorities successfully stopped the criminals from succeeding. However, the smugglers’ success in carrying out such an elaborate international scheme raises the question of the effectiveness of current mechanisms of fraud detection presently.

C. STRENGTHS OF FRAUD AND NATIONAL SECURITY RISK DETECTION MEASURES

The strengths of the marriage programs, in terms of fraud and national security risk detection and prevention, appear in the following categories: existing legislation aimed at protecting victims of abuse, the conditional residency requirement for marriages that are less than two years old, and strong interagency cooperation throughout the process of obtaining legal status through marriage to a U.S. citizen or a legal permanent resident. This section explores how the authorities use these strengths to protect the integrity of the immigration system in the United States.

¹⁴⁷ Gregory C. Nevano, “HSI’s Public Safety Unit: Combatting Immigration Document and Benefit Fraud,” *United States Attorneys’ Bulletin* 65, no. 4 (July 2017): 107.

¹⁴⁸ Danielle Hickman, “Combatting Transnational Smuggling Organizations: An Introductory Overview,” *United States Attorneys’ Bulletin* 65, no. 4 (July 2017): 93.

¹⁴⁹ Hickman, 93–96.

¹⁵⁰ Hickman.

1. Protection for Victims of Abuse in the Marriage Visa Programs

One strength in the marriage visa programs is existing legislation to address abuse through such aspects as the VAWA program. VAWA is a federal statute that allows an applicant to obtain a Green Card if he or she has been the victim of battery or extreme cruelty committed by a U.S. citizen or legal permanent resident spouse or former spouse, among other relatives.¹⁵¹ Under the Act, the applicant may “self-petition” by filing Form I-360, the Petition for Amerasian, Widow(er), or Special Immigrant, without the knowledge or consent of the abusive family member.¹⁵² This legislation attempts to provide protection for alleged victims while delineating specific requirements to receive such protection. For example, the applicant must show that the marriage was entered in good faith as well as provide documentation, including police records and health care visits, related to the alleged abuse.¹⁵³ Another requirement is that the victim must show that he or she has good moral character, meaning that the victim has not been convicted of crimes involving theft, fraud, or burglary, for example.¹⁵⁴ A foreign national trying to obtain approval under VAWA must also demonstrate that he or she is residing or has resided with the abusive relative during the relationship.¹⁵⁵ The authorities are proactive in attempting to protect victims of abuse while ensuring that these allegations are not bogus claims.

Another program worth mentioning is the International Marriage Broker Regulation Act (IMBRA), devised in response to known abuses. In July 2003, Senator Cantwell presented IMBRA, which eventually adjoined the VAWA Reauthorization Bill of 2005.¹⁵⁶ By imposing additional requirements for the IMB industry, IMBRA has addressed the issue of abuse in these cases. For instance, IMBRA requires the U.S.

¹⁵¹ “Green Card for VAWA Self-Petitioner,” Citizenship and Immigration Services, last modified June 16, 2020, <https://www.uscis.gov/green-card/green-card-vawa-self-petitioner>.

¹⁵² Citizenship and Immigration Services.

¹⁵³ Petitions for Relatives, Widows and Widowers, and Abused Spouses and Children, 8 CFR § 204.2(i)(1)(iv) (2015), <https://www.govinfo.gov/content/pkg/CFR-2015-title8-vol1/pdf/CFR-2015-title8-vol1-sec204-2.pdf>; Konda, *Immigration Fraud*, 72.

¹⁵⁴ Konda, 72.

¹⁵⁵ Gambler and Shea, *Immigration Benefits*, 5.

¹⁵⁶ Lindee, “Love, Honor, or Control,” 555.

government to provide foreign fiancé(e)s and spouses attempting to immigrate to the United States with information to prevent abuse from their spouses.¹⁵⁷ IMBRA mandates that a pamphlet explaining services and the law, for victims of abuse, be distributed widely.¹⁵⁸ In addition, the Act compels the U.S. government to provide the alien with a copy of the visa sponsorship application, along with a copy of the criminal background check that USCIS must perform for vetting of the sponsor.¹⁵⁹ Finally, under IMBRA, the company must provide the alien with information retrieved from state and federal sex offender public registries, and it prohibits these companies from engaging in business with aliens who are under 18 years of age.¹⁶⁰ These mandates constitute significant protection for these vulnerable women.

Both VAWA and IMBRA are steps in the right direction. However, in the case of VAWA, even though the requirements for filing an application under the Act may be straightforward, significant gaps in national security persist in this program. A September 2019 report to congressional requesters from the GAO concluded that because obtaining protection under VAWA means acquiring substantial benefits, adjudicators need to be aware of the possibility of approving a fraudulent claim and its effect on the integrity of the program as a whole.¹⁶¹ After an extensive review of the VAWA program, this report issues four recommendations for USCIS: to conduct routine fraud risk assessments, establish a fraud risk profile, implement an anti-fraud strategy, and develop better data analytics capabilities.¹⁶² Once again, although the authorities have taken substantial steps to remedy existing deficiencies in the marriage visa programs, extensive challenges still remain.

¹⁵⁷ Citizenship and Immigration Services, *Information on the Legal Rights Available to Immigrant Victims of Domestic Violence in the United States and Facts about Immigrating on a Marriage-Based Visa* (Washington, DC: Citizenship and Immigration Services, 2011), <https://www.uscis.gov/sites/default/files/document/brochures/IMBRA%20Pamphlet%20Final%2001-07-2011%20for%20Web%20Posting.pdf>.

¹⁵⁸ Citizenship and Immigration Services.

¹⁵⁹ Citizenship and Immigration Services.

¹⁶⁰ Citizenship and Immigration Services.

¹⁶¹ Gambler and Shea, *Immigration Benefits*, 37.

¹⁶² Gambler and Shea, 37.

2. Conditional Residency

Immigration law is used to protect the family institution, while punishing both petitioners and beneficiaries attempting to defraud the government. To help manage this balance, as Virga describes, Congress passed the Immigration Marriage Fraud Amendments of 1986, which aimed to punish and deter marriage fraud in immigration.¹⁶³ Of significant interest, this legislation created the conditional residency status for aliens who seek immigration preference after marrying a U.S. citizen or permanent legal resident.¹⁶⁴ The amendments established penalties for violations that are applicable to both the petitioner and the beneficiary.¹⁶⁵ On its website, USCIS explains that an alien will receive conditional permanent residency if the marriage was less than two years old on the day the alien obtains permanent residence.¹⁶⁶ Furthermore, conditional residency exists because the alien is charged with proving to the authorities that he or she did not enter into the marriage to evade immigration laws in the United States.¹⁶⁷ Armas further explains that the main objective of the conditional residency requirement is to promote family reunification while detecting fraudulent marriages.¹⁶⁸ Although the conditional residency requirement is not infallible, it can be an obstacle for couples attempting to defraud the government.

As clarified by Armas, conditional permanent residency provides a mechanism that USCIS can use to examine whether the couple had the intent to start a life as a married couple.¹⁶⁹ For Armas, the conditional permanent residency mechanism is valuable because the law strives to prevent permanent residents and U.S. citizens from entering into

¹⁶³ Virga, “Marrying Up,” 1144.

¹⁶⁴ Virga, 1144.

¹⁶⁵ Virga, 1144.

¹⁶⁶ “Removing Conditions on Permanent Residence Based on Marriage,” Citizenship and Immigration Services, last modified September 17, 2020, <https://www.uscis.gov/green-card/after-we-grant-your-green-card/conditional-permanent-residence/remove-conditions-on-permanent-residence-based-on-marriage>.

¹⁶⁷ Citizenship and Immigration Services.

¹⁶⁸ Armas, “For Richer or Poorer or Any Other Reason,” 761–62.

¹⁶⁹ Armas, 762.

fraudulent marriages, in exchange for financial compensation, more than once every other year.¹⁷⁰ This author also asserts that the waiting period of two years permits the couple to gather sufficient evidence to prove to the authorities that they married because they intended to start a life together.¹⁷¹ In principle, a genuine couple could more easily gather the evidence needed to prove their intention.¹⁷² Armas also claims that the two-year conditional residency period and the “establish-a-life” test are powerful marriage fraud deterrents, because of the time investment needed to obtain immigration status.¹⁷³ Thus, this conditional status of the marriage visa program is more a strength than a weakness because it allows the authorities to identify fraud before granting a permanent immigration benefit to the foreign citizen.

3. A Robust Interagency

The strong relationship between ICE and USCIS/FDNS represents another strength of the national security risk detection mechanism because immigration officers and FDNS officers actively refer cases to ICE Homeland Security Investigations (HSI) for criminal investigation by a Document and Benefit Fraud Task Force (DBFTF).¹⁷⁴ The process of referring a case from USCIS to FDNS is a thorough one, and an important part of the process reviews individual backgrounds and checks for security risks.¹⁷⁵ The background checks are important because they may reveal the petitioner’s criminal past, if there is any.¹⁷⁶ The DBFTF also assists in the prosecution of large organizations involved in immigration fraud.¹⁷⁷ For instance, in March 2020, the Los Angeles DBFTF, in coordination with USCIS FDNS, the Diplomatic Security Service under the DOS, and

¹⁷⁰ Armas, 763.

¹⁷¹ Armas, 763.

¹⁷² Armas, 763.

¹⁷³ Armas, 751, 763.

¹⁷⁴ Homeland Security Digital Library, *Vows for Visas*, 24–25.

¹⁷⁵ Homeland Security Digital Library, 29–30.

¹⁷⁶ Homeland Security Digital Library, 30.

¹⁷⁷ Homeland Security Digital Library, 24.

other agencies, initiated a marriage fraud investigation that lasted three years.¹⁷⁸ The investigation led to the discovery of a marriage fraud scheme involving foreign citizens in the San Gabriel Valley area of California.¹⁷⁹ The aliens had paid substantial amounts of money to U.S. citizens, entered into sham marriages, and aimed to obtain legal permanent residency by defrauding the government.¹⁸⁰ This large-scale undercover investigation led to the prosecution of this group of individuals.¹⁸¹ In this case, the investigation was successful because several agencies worked together over an extended period to uncover and prosecute this group of offenders.

Interagency cooperation significantly extends the reach of USCIS. In the case of the K-1 visa, the first step requires the U.S. citizen to file Form I-129F, the Petition for Alien Fiancé(e), on behalf of the alien.¹⁸² After USCIS approves the petition, the DOS starts processing the visa, and the petition is transferred to the U.S. embassy or consulate where the alien is residing.¹⁸³ At that point, the DOS conducts background checks on the applicant while a consular officer conducts the visa application interview in the country of origin.¹⁸⁴ Once the visa is approved, the applicant will seek admission at a port of entry, where CBP will conduct an interview as well, apart from doing additional security checks.¹⁸⁵ Finally, USCIS performs additional background checks during the rest of the adjudication of each case.¹⁸⁶ The last part of the process involves an interview with an immigration officer with USCIS, after the alien has filed an application for a Green Card;

¹⁷⁸ “2 Los Angeles-Area Residents Arrested by ICE HSI in Marriage Fraud Scheme; 2 Alleged ‘Beneficiaries’ Also Arrested,” Immigration and Customs Enforcement, March 12, 2020, <https://www.ice.gov/news/releases/2-los-angeles-area-residents-arrested-ice-hsi-marriage-fraud-scheme-2-alleged>.

¹⁷⁹ Immigration and Customs Enforcement.

¹⁸⁰ Immigration and Customs Enforcement.

¹⁸¹ Immigration and Customs Enforcement.

¹⁸² “Nonimmigrant Visa for a Fiancé(e) (K-1),” Department of State, Bureau of Consular Affairs, accessed August 26, 2020, <https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration/nonimmigrant-visa-for-a-fiance-k-1.html#4>.

¹⁸³ Department of State, Bureau of Consular Affairs.

¹⁸⁴ Homeland Security Digital Library, *Vows for Visas*, 30.

¹⁸⁵ Homeland Security Digital Library, 30.

¹⁸⁶ Homeland Security Digital Library, 31.

during this interview, the officer must ensure that the statements made to the agency by the petitioner and the beneficiary are congruent or credible.¹⁸⁷ In this way, interagency checks provide tiered protection against marriage fraud.

In addition, if a case is referred to FDNS, the FDNS officer may proceed with additional background checks, an investigation, and coordination with law enforcement.¹⁸⁸ Finally, USCIS officers may be involved in assisting the U.S. Attorney's Office during prosecution.¹⁸⁹ Thus, the process of finalizing the visa process in the marriage programs is extensive and involves substantial multi-agency coordination. Although ICE leads the DBFTFs, it also works with other agencies, such as USCIS/FDNS, the Diplomatic Security Service, the Department of Labor (DOL) OIG, the Postal Inspection Service, and state and local law enforcement units.¹⁹⁰ This strong collaboration in the processing of K-1 visas among several agencies in the United States and overseas works to defend against marriage fraud.

Officer Anello affirms that USCIS does a thorough job once a site visit has been scheduled for specific cases.¹⁹¹ USCIS also relies on a cadre of immigration officers and FDNS officers dedicated to interviewing applicants to perform database searches to uncover possible marriage fraud and to carefully review the latest fraud indicators provided by consular officers.¹⁹² Notably, the administrative investigations conducted by FDNS may include compliance reviews, interviews, site visits, and requests for evidence.¹⁹³ Thus, the marriage programs do incorporate several layers of internal review to detect fraud and security risks, requiring close collaboration between immigration officers and FDNS officers.

¹⁸⁷ Homeland Security Digital Library, 31.

¹⁸⁸ Homeland Security Digital Library, 31.

¹⁸⁹ Homeland Security Digital Library, 31.

¹⁹⁰ Homeland Security Digital Library, 24.

¹⁹¹ Anello, interview.

¹⁹² Anello.

¹⁹³ "Fraud Detection and National Security Directorate," Citizenship and Immigration Services, last modified March 13, 2020, <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security-directorate>.

A marriage fraud ring discovered in Houston through interagency cooperation in 2019 exemplifies the strength of the detection system in place. In this case, the investigation discovered a large-scale scheme involving multiple fraudulent marriages, after a USCIS immigration officer alerted the authorities to the scheme.¹⁹⁴ According to a May 2019 news release, Ashley Yen Nguyen, a.k.a. Duyen, headed a criminal organization operating in Vietnam and Texas.¹⁹⁵ The “spouses” entered these marriages through a financial arrangement.¹⁹⁶ The would-be spouse, the beneficiary, paid a substantial amount of money to Duyen to obtain lawful permanent residency in the United States.¹⁹⁷ Duyen also recruited U.S. citizens to pose as petitioners in exchange for money.¹⁹⁸ An investigation by several agencies, including USCIS, resulted in a 206-count indictment involving 50 people.¹⁹⁹ Strong collaboration among several agencies made the success of this operation possible.²⁰⁰ It sent a strong signal to the community that the authorities are serious about combating marriage fraud, which acts as a deterrent. As this case reveals, strong interagency cooperation can facilitate the successful prosecution of those involved in a fraud scheme.

¹⁹⁴ “Nearly 100 Charged in Massive Marriage Fraud Scheme,” Citizenship and Immigration Services, May 14, 2019, <https://www.uscis.gov/news/news-releases/nearly-100-charged-in-massive-marriage-fraud-scheme>.

¹⁹⁵ Citizenship and Immigration Services.

¹⁹⁶ Citizenship and Immigration Services.

¹⁹⁷ Citizenship and Immigration Services.

¹⁹⁸ Citizenship and Immigration Services.

¹⁹⁹ Citizenship and Immigration Services.

²⁰⁰ Citizenship and Immigration Services.

III. CRAB PICKERS: THE H-2B VISA PROGRAM FOR TEMPORARY NON-AGRICULTURAL WORKERS

While the marriage visa programs attempt to balance family reunification with fraud prevention and detection, the H-2B visa program aims to protect the rights of the American worker while providing guest workers to satisfy the needs of the American marketplace. This chapter provides a general overview of the legal foundation of the H-2B visa program and explores any possible gaps in fraud and national security risk prevention and detection that could result from these petitions. This chapter also explores the strengths and weaknesses of the H-2B program, as evaluated by an FDNS officer specializing in the program at USCIS. This officer answered the question: “What are the known strengths and weaknesses of the FDNS program in terms of the H-2B visa program?”

This chapter finds that the guest worker programs are highly regulated, in an effort by the authorities to discourage workers from remaining in the country after the authorized stay and from becoming undocumented aliens in the United States. Although the H-2B program has some effective fraud detection mechanisms, in some cases, corrupt employers exploit its weaknesses with impunity.

A. DESCRIPTION AND OVERVIEW

The H-2B program provides for temporary or “seasonal” admission of certain foreign workers to the United States when unemployed U.S. citizen workers are not available.²⁰¹ As explained by Rothwell, American employers may hire guest workers under the H-2B program when there is an intermittent, peak-load, seasonal, or one-time need.²⁰² Notably, several types of businesses use this program to hire workers for jobs that do not require a college degree.²⁰³ According to the Congressional Research Service, common occupations under this category include amusement park workers, landscapers,

²⁰¹ Andorra Bruno, *The H-2B Visa and the Statutory Cap*, CRS Report No. R44306 (Washington, DC: Congressional Research Service, 2020), 1, <https://crsreports.congress.gov/product/pdf/R/R44306/10>.

²⁰² Rothwell, *Legal U.S. Immigration*, 34.

²⁰³ Rothwell, 34.

and housekeepers.²⁰⁴ Other typical jobs include working for welding companies or as ski instructors at ski resorts.²⁰⁵ However, jobs that need H-2B guest workers may vary by region.²⁰⁶ For instance, in Maryland, employers in the crab industry hire Mexican workers under the H-2B visa program to separate crab meat from the shells.²⁰⁷ One of the main characteristics of the H-2B program is that the guest workers are hired only to address the needs of the American marketplace for a specified period.

1. Programs and Requirements

Congress created the H-2B program in conjunction with the *Bracero* (manual laborer) program.²⁰⁸ In 1943, the government's Bracero program brought Mexican workers legally to the United States to work in the agricultural sector during the country's war-induced labor shortages.²⁰⁹ Currently, the U.S. immigration system uses two programs for bringing guest workers, one dedicated to the agricultural sector through the H-2A visa program, the other for temporary nonagricultural labor through the H-2B visa program.²¹⁰ The H-2A and the H-2B visa programs serve different purposes, but both address the needs of American employers.

Pincus explains that the H-2B visa program was established under the Immigration and Nationality Act (INA) of 1952.²¹¹ In 1986, the Immigration Reform and Control Act amended INA and created the current H-2A and H-2B programs.²¹² Additionally, the Act implemented employer sanctions for hiring illegal workers and created E-Verify, an

²⁰⁴ Bruno, *The H-2B Visa and the Statutory Cap*, 1.

²⁰⁵ Rothwell, *Legal U.S. Immigration*, 35.

²⁰⁶ Rothwell, 34.

²⁰⁷ Rothwell, 34.

²⁰⁸ Jacob Wedemeyer, "Of Policies, Procedures, and Packing Sheds: Agricultural Incidents of Employer Abuse of the H-2B Nonagricultural Guestworker Visa," *Journal of Gender, Race & Justice* 10, no. 1 (2006): 144.

²⁰⁹ Wedemeyer, 144-45.

²¹⁰ Pincus, "Immigration and the Threat to American National Security," 16.

²¹¹ Pincus, 16.

²¹² Pincus, 16.

employment eligibility verification system.²¹³ Several agencies within DHS administer the H-2B program; both the DOL and DHS oversee it.²¹⁴ Also, bringing the workers to the United States is the result of collaboration between different agencies: the DOS, DHS, and DOL.²¹⁵ An important part of the program is that the DOL must find that “there are not sufficient U.S. workers who are qualified and available to perform the work and that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed.”²¹⁶ In theory, multiple agencies work together to protect the American workforce from unfair competition, while protecting guest workers from unfair labor practices and abuse.

2. Review and Remedies

For the H-2B program, the first step for the employer is to complete the Labor Condition Application process with the DOL to obtain a wage certification.²¹⁷ This process must be completed before submitting any petitions to USCIS.²¹⁸ As explained by Rothwell, part of the Labor Condition Application process mandates that the employer advertise these jobs on American soil, making sure that permanent residents and U.S. citizens have the opportunity to apply for these positions.²¹⁹ The process aims to protect the interests of American workers by providing them with an opportunity to apply for these positions and requiring the employers to offer minimum levels of benefits and wages.²²⁰ In addition, the program mandates that employers in the H-2B program compensate guest workers at the uppermost range of prevailing local, state, or federal minimum wages.²²¹

²¹³ Pincus, 16.

²¹⁴ Bruno, *The H-2B Visa and the Statutory Cap*, 1.

²¹⁵ Bruno, 1.

²¹⁶ Bruno, 1.

²¹⁷ Rothwell, *Legal U.S. Immigration*, 35.

²¹⁸ Rothwell, 35.

²¹⁹ Rothwell, 35.

²²⁰ Andorra Bruno, *H-2A and H-2B Temporary Worker Visas: Policy and Related Issues*, CRS Report No. R44849 (Washington, DC: Congressional Research Service, 2020), 4, <https://fas.org/sgp/crs/homesec/R44849.pdf>.

²²¹ Bruno, 15.

American workers are offered minimum levels of benefits and wages while guest workers are promised the high end of the prevailing wage—attracting guest workers to fill labor shortages in the United States when American workers are unwilling or unable to accept jobs in these positions. Also, the employers must pay for visas, transportation costs, and workers’ compensation insurance.²²² Finally, the employers must guarantee that the workers will receive wages for three-fourths of the period of the contract.²²³ Thus, the H-2B program has embedded restrictions regarding how companies may use the program to fulfill their hiring needs, while remaining compliant with the law.

The law lists exceptions for caps, acceptable occupations, and participating countries, but these change annually.²²⁴ The H-2B program is subject to an annual numerical cap that can change from one year to another.²²⁵ Under INA, the number of persons who may receive the H-2B status in a fiscal year may not exceed 66,000.²²⁶ As explained by Bruno, each year, USCIS has the responsibility of accepting sufficient H-2B petition numbers after making an estimate of how many visas will be needed to provide sufficient workers for American companies.²²⁷ In recent years, as noted by Bruno, the demand for these guest workers has been substantial, and the authorities proceeded to make supplementary visas available.²²⁸ In this way, the law attempts to regulate the program while remaining flexible enough to respond to possible changes in the American marketplace.

At every step of the process for approval of these visas, the H-2B program regulations attempt to prevent guest workers from remaining in the United States after their authorized stay. For instance, a significant characteristic of the H-2B program is that the

²²² Bruno, 16.

²²³ Bruno, 16.

²²⁴ Bruno, 16.

²²⁵ Bruno, *The H-2B Visa and the Statutory Cap*.

²²⁶ Bruno, 1.

²²⁷ Bruno, *H-2A and H-2B Temporary Worker Visas*, 23.

²²⁸ Bruno, *The H-2B Visa and the Statutory Cap*, 1.

guest worker may not remain in the country more than three consecutive years.²²⁹ Also, if the guest worker has already spent three years in the country, he or she cannot seek an extension of stay.²³⁰ Furthermore, the guest worker may only be readmitted to the United States under the H-2B program when he or she has remained outside the country for three months.²³¹ These regulations are in place to ensure that employers and guest workers use these visas only for temporary purposes.

Table 4 provides an overview of the process that employers must follow when bringing guest workers to the United States.

Table 4. H-2B Visa Process for Temporary Non-agricultural Workers²³²

Step 1	The employer files a Labor Condition Application with the DOL to obtain a wage certification.
Step 2	The petitioner submits Form I-129, the Petition for a Nonimmigrant Worker, with USCIS.
Step 3	Workers located outside the United States apply for an H-2B visa with the DOS at a U.S. embassy or consulate abroad.
Step 4	Workers seek admission to the United States with CBP at a U.S. port of entry.

Given the extensive requirements to obtain visas for guest workers, it might be surprising that some employers engage in fraud. The H-2B program requires frequent interactions between employers, guest workers, and the authorities. In addition, the employers pay substantial amounts of money and spend considerable effort in obtaining approval for these visas. Finally, if found guilty of fraud, the employer faces penalties under the law.

²²⁹ Bruno, 19.

²³⁰ Bruno, 3.

²³¹ Bruno, 3.

²³² Adapted from “H-2B Temporary Non-Agricultural Workers: H-2B Program Process,” Citizenship and Immigration Services, last modified May 29, 2020, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers>.”

B. WEAKNESSES OF THE H-2B VISA PROGRAM

This section explores the main deficiencies in the H-2B program and how those weaknesses may expose the authorities to fraud, while revealing the potential for guest worker abuse at the hands of some employers and recruiters.

1. Fraud and Abuse

In some instances, employers defraud the government, hoping to make a profit. In other cases, some employers commit fraud in the H-2B visa program to abuse their workers in a variety of ways, representing a significant weakness in the program. Pincus claims that most academics fail to address the human cost of the guest worker programs when examining new policies.²³³ Similar to cases of abuse with the marriage visa programs, exploitation of guest workers while on American soil could also be interpreted as a threat to the homeland. For example, some guest workers are subjected to wage theft or are forced to pay illegal fees to their employers. In other cases, the employers transport the workers to areas of the country not listed on their petitions. The workers are often afraid to report these abuses for fear of losing their jobs or inviting other forms of retaliation. Furthermore, the H-2B program may lead to other forms of crime, such as human trafficking, when guest workers are subjected to forced labor. Finally, the lack of oversight by the government of overseas recruiters and debarred U.S. employers exposes another weakness.

The relative impunity with which some employers use false documentation to defraud the government is yet another weakness in the program. For instance, in one case, a construction company in Louisiana obtained \$1.8 million after engaging in a fraudulent scheme to bring a group of 87 Indian nationals to the United States illegally.²³⁴ This company submitted fraudulent documents to federal agencies to obtain approval of the H-2B visas, but they never employed these workers.²³⁵ Eventually, the employers were

²³³ Pincus, "Immigration and the Threat to American National Security," 19.

²³⁴ Gregory Kutz, *H-2B Visa Program: Closed Civil and Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse*, GAO-10-1053 (Washington, DC: Government Accountability Office, 2010), 8, <https://www.gao.gov/assets/320/310640.pdf>.

²³⁵ Kutz, 8.

indicted on federal criminal charges, ranging from money laundering to inducing and encouraging illegal immigration.²³⁶ Once again, even though the authorities investigated and prosecuted these offenders, the initial success of the scheme exposes a weakness in the H-2B program. In other cases, employers have submitted fraudulent documentation to the DOS, DOL, and USCIS to hire more employees than needed.²³⁷ Eventually, in the vast majority of cases, the authorities prosecuted the employers and imposed sanctions.²³⁸ Nonetheless, the employers' ability to defraud the government for a time exposes weaknesses in the H-2B visa program that the authorities still need to address.

Most concerning is the potential for abuse—the human cost—in the H-2B program. A common type of abuse inflicted on guest workers arriving to the United States under the H-2B visa program is wage theft. Rathod expands on this theme, saying the H-2B program fails to provide sufficient wage protections for the workers and exposes them to exploitation.²³⁹ The program, Rathod argues, ties the H-2B workers to one sole employer, and the employer controls the immigration status and employment of the guest workers.²⁴⁰ Thus, in some cases, the H-2B workers must either accept abusive labor practices or leave the United States.²⁴¹ For Rathod, although the H-2B regulations may allow for the remote possibility of changing employers, the overall process for doing so is complicated, and most H-2B workers do not have the resources to complete that process without additional assistance.²⁴² Lack of access to legal resources may cause some guest workers to remain in these abusive labor relationships.

Several reports have documented the range of guest worker abuse. According to a report by the Southern Poverty Law Center, a group of guest workers from Mexico,

²³⁶ Kutz, 8.

²³⁷ Kutz, 4.

²³⁸ Kutz, 4.

²³⁹ Jayesh Rathod, "A Season of Change: Reforming the H-2B Guest Worker Program," *Clearinghouse Review Journal of Poverty Law and Policy* (May–June 2011): 20.

²⁴⁰ Rathod, 22.

²⁴¹ Rathod, 22.

²⁴² Rathod, 22.

expecting to be employed in forestry in Arkansas, had their passports confiscated by their employer.²⁴³ Then, the workers ended up in Louisiana paying a bribe for the return of their legal documentation and working long hours picking sweet potatoes without sufficient compensation.²⁴⁴ A GAO report confirms these abuses: excessive overtime, no breaks, and wage theft.²⁴⁵ As exemplified by these cases, guest workers are lured into accepting job offers in the United States with better wages than those available in their home countries, but employers may exploit them, forcing the workers to labor for extended periods without adequate compensation.

Similarly, some employers impose fees on guest workers who are illegal. For example, the aforementioned GAO report details a scheme devised by a labor broker, an immigration attorney, and a group of hospitality employers operating in Virginia.²⁴⁶ Among other crimes, the employers imposed excessive fees on H-2B workers to obtain their visas and exorbitant rent for residences that were overcrowded and unsanitary.²⁴⁷ Eventually, the authorities filed federal criminal charges against these offenders.²⁴⁸ Similarly, a 2015 GAO report mentions that in other cases, workers have taken out high-interest loans to pay illegal fees for passports and transportation.²⁴⁹ Additionally, after obtaining these loans, some workers have found themselves in a situation of debt bondage, which experts agree may lead to human trafficking.²⁵⁰ In these cases, the guest workers arrive to the United States expecting better working conditions, only to be exploited.

Wedemeyer describes one case in which a group of logging workers were forced by employers to use their vehicles or houses as collateral in exchange for receiving visas

²⁴³ Pincus, “Immigration and the Threat to American National Security,” 20.

²⁴⁴ Pincus, 20.

²⁴⁵ Kutz, *H-2B Visa Program*, 7.

²⁴⁶ Kutz, 8.

²⁴⁷ Kutz, 8.

²⁴⁸ Kutz, 8.

²⁴⁹ Andrew Sherrill, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*, GAO-15-154 (Washington, DC: Government Accountability Office, 2015), 30, <https://www.gao.gov/assets/690/684985.pdf>.

²⁵⁰ Sherrill, 30.

and being hired.²⁵¹ Consequently, if the workers refused to complete their contracts, the workers risked losing their possessions.²⁵² Wedemeyer presents another case in which an employer promised workers the prevailing wage but paid them a lesser amount.²⁵³ In yet another case, an employer charged workers for transportation and inadequate housing.²⁵⁴ When the workers complained, the employer transported them to an isolated area in Mississippi and left them there without transportation, money, or food.²⁵⁵ These cases are examples of the outrageous abuses that some guest workers are forced to endure.

Some guest workers find it nearly impossible to report abuse to the authorities.²⁵⁶ Because the H-2A and H-2B programs are designed to ensure that workers work only for the petitioner of their visas, many workers are afraid of reporting abuse out of fear of losing their jobs and inviting retaliation.²⁵⁷ According to the 2015 GAO report, some workers are unwilling to testify in court and human trafficking victims are often reluctant to cooperate with the authorities because they fear reprisal from employers.²⁵⁸ In the worst-case scenario, workers may be threatened by the employer with deportation or even violence against their families in their countries of origin.²⁵⁹ During his interview, Officer Quant echoed this point, maintaining that many guest workers refrain from reporting abuse for fear of losing their jobs.²⁶⁰ Under these circumstances of total dependency of guest workers on employers for their subsistence, it might be difficult for the authorities to investigate instances of abuse.

²⁵¹ Wedemeyer, “Of Policies, Procedures, and Packing Sheds,” 166.

²⁵² Wedemeyer, 166.

²⁵³ Wedemeyer, 166.

²⁵⁴ Wedemeyer, 166.

²⁵⁵ Wedemeyer, 166.

²⁵⁶ Sherrill, *H-2A and H-2B Visa Programs*, 37.

²⁵⁷ Sherrill, 37.

²⁵⁸ Sherrill, 54–55.

²⁵⁹ Sherrill, 54–55.

²⁶⁰ Hernando Quant, interview, April 1, 2020.

2. Other Crimes

One type of abuse in the H-2B program is the potential for human trafficking. As described by DHS, human trafficking includes forced labor, when victims are forced to work without financial compensation or for very little pay.²⁶¹ In 2019, a group of senators—Democrats and Republicans—denounced the issue of abuse in the H-2B visa program.²⁶² According to these politicians, the H-2B program often leads to human trafficking and other forms of abuse.²⁶³ Similarly, the 2010 GAO report discusses, among other cases, a hotel in South Dakota that employed H-2B workers but threatened them with physical abuse and isolated them from the community.²⁶⁴ Eventually, the hotel owners—a married couple—were found guilty on nine different counts after a federal criminal suit was filed.²⁶⁵ Thus, the H-2B program may lead to situations in which the guest workers are forced to accept sub-human labor conditions in exchange for a temporary job.

Along the same line, some criminal employers or organizers may transport workers to areas of the country that were not listed on their original petitions. In January 2019, the Office of Investigations–Labor Racketeering and Fraud under the DOL OIG issued an investigatory advisory report regarding the H-2B program.²⁶⁶ The report indicates that a typical violation of the terms of employment includes employing the workers outside the

²⁶¹ “What Is Human Trafficking?,” Blue Campaign, accessed September 3, 2020, <https://www.dhs.gov/sites/default/files/images/blue-campaign/infographic/what-is-human-trafficking-infographic-english.pdf>.

²⁶² “Senators Raise Concerns Over H-2B Visa Abuses That Enable Exploitation,” U.S. Congress, Senate Committee on the Judiciary, April 10, 2019, <https://www.judiciary.senate.gov/press/dem/releases/senators-raise-concerns-over-h-2b-visa-abuses-that-enable-exploitation>.

²⁶³ U.S. Congress, Senate Committee on the Judiciary.

²⁶⁴ Kutz, *H-2B Visa Program*, 6.

²⁶⁵ Kutz, 6.

²⁶⁶ Department of Labor, Office of Inspector General, *Recommendations for Enhancing Forms Used for H-2B Non-Agricultural Temporary Workers*, Report No. 50–19–001–03–321 (Washington, DC: Department of Labor, 2019), 1, <https://www.oig.dol.gov/public/reports/oa/viewpdf.php?r=50-19-001-03-321&y=2019>.

authorized location.²⁶⁷ Such a change significantly violates the law because the guest workers consent only to work in areas of the country listed on their petitions. Also, this practice is an infringement on the rights of American workers because the employers do not publicly announce these jobs in the United States, as required by law.

3. Lack of Oversight of Recruiters and Debarred Employers

Potential abuses and crimes are not strictly a stateside matter; overseas recruiters also lack significant oversight mechanisms. Rathod claims that another flaw in the H-2B program is the lack of control over the recruiters involved in the process of finding workers overseas.²⁶⁸ For instance, even though it is illegal to charge guest workers with recruitment fees, some recruiters engage in the practice of asking for a fee for their services.²⁶⁹ In other cases, recruiters charge fees to the workers after promising a visa and a job that is nonexistent.²⁷⁰ Also, some recruiters promise free housing, but in reality, the workers have to pay rent once they arrive in the United States.²⁷¹ On other occasions, the workers are promised more money while committing to working less hours, but in reality, the opposite is true.²⁷² These abuses may be difficult to investigate and prosecute as some of these recruiters are located overseas, outside the jurisdiction of U.S. authorities. Officer Quant also emphasizes that significant fraud occurs outside the jurisdiction of U.S. law enforcement, thus limiting fraud and security risk detection.²⁷³

This situation is exacerbated by the lack of interagency collaboration in identifying employers that have been subject to debarment by the authorities. One challenge is that the DOL cannot legally issue a temporary labor certification to any employer “who has been

²⁶⁷ Department of Labor, Office of Inspector General, 2. Addressing deficiencies in the processes used by the Department of Labor to address fraud and security risk is beyond the scope of this thesis, but the finding about the transportation of guest workers to areas of the country not listed on their original petitions is worth mentioning.

²⁶⁸ Rathod, “A Season of Change,” 23.

²⁶⁹ Rathod, 23.

²⁷⁰ Sherrill, *H-2A and H-2B Visa Programs*, 31.

²⁷¹ Sherrill, 32.

²⁷² Sherrill, 32.

²⁷³ Quant, interview.

debarred under the H-2A or H-2B programs.”²⁷⁴ However, these employers often create new companies and submit new applications to hire workers.²⁷⁵ Another challenge is that the DOL is unable to share all of the information available about debarred employers with the DOS and DHS, although these agencies are also charged with screening for debarred employers.²⁷⁶ Thus, the act of debarring an employer might be an exercise in futility because these employers can reinvent themselves and file more applications in the future, without the fear of being caught.

4. Political Influence

Officer Quant states that Congress recognizes the importance of the H-2B program because companies rely heavily on guest workers. Companies notify their congressional representatives quickly if there is an issue with the filing of those petitions, including cases of fraud.²⁷⁷ Officer Quant explains that the H-2B program may be politically sensitive.²⁷⁸ Any issue with the H-2B petition process often results in a congressional inquiry, which makes conducting a full investigation challenging.²⁷⁹ This weakness is compounded by the fact that the H-2B program draws strong opposition and strong support, and is subject to political influence. As already discussed elsewhere, the jury is out in terms of support of or opposition to the H-2B program in the wake of the COVID-19 pandemic. For instance, the Center for Immigration Studies has stated that President Trump has undermined the value of American workers through past visa increases for the H-2B program, while the Economic Policy Institute argues that workers who come to the United States under the program are working for a lesser wage than American workers, and they can be

²⁷⁴ Sherrill, *H-2A and H-2B Visa Programs*, 40.

²⁷⁵ Sherrill, 41.

²⁷⁶ Sherrill, 41.

²⁷⁷ Quant, interview.

²⁷⁸ Quant.

²⁷⁹ Quant.

exploited.²⁸⁰ Finally, because legislators in the United States are unable to reach an agreement regarding the guest worker program, it might be easier for nefarious actors to exploit the program's weaknesses to commit fraud.

Even though the H-2B visa program may have better fraud and national security risk controls than other visa programs, the program is not without controversy. Some politicians and their supporters enthusiastically approve of the guest worker programs. Bruno states that some advocates of the programs are in favor of creating new forms of temporary worker programs, including a path to legal permanent residency, arguing that these programs are making the United States safer.²⁸¹ These enthusiasts claim that guest worker programs are effective because the authorities can learn about the identities of persons in the country while allowing homeland security personnel to concentrate on combating terrorist threats elsewhere.²⁸² On the other hand, opponents emphasize the perils of awarding permanent or temporary legal status to violators of the law in the United States.²⁸³ As the H-2B program seems to ignite strong reactions on both side of the political aisle, it might be difficult for legislators to agree on substantial reform to the program.

As described by Bruno, on March 20, 2020, the DOS announced that the Trump administration was suspending visa services at all U.S. embassies and consulates, as a response to COVID-19.²⁸⁴ In June 2020, President Trump issued an executive order suspending new visas for foreign workers, citing a need to preserve jobs for Americans

²⁸⁰ Heather Long, "Trump Administration Nearly Doubles H-2B Guest Visa Program, Which Brings Many Mexican Workers," *Washington Post*, April 6, 2019, <https://www.washingtonpost.com/business/2019/04/06/trump-administration-nearly-doubles-h-b-guest-visa-program-which-brings-many-mexican-workers/>; Daniel Costa, "The H-2B Temporary Foreign Worker Program: Examining the Effects on Americans' Job Opportunities and Wages," Economic Policy Institute, June 8, 2016. <https://www.epi.org/publication/the-h-2b-temporary-foreign-worker-program-examining-the-effects-on-americans-job-opportunities-and-wages/>.

²⁸¹ Andorra Bruno, *Immigration: Policy Considerations Related to Guest Worker Programs*, CRS Report No. RL32044 (Washington, DC: Congressional Research Service, 2004), 25–26, <https://www.everycrsreport.com/reports/RL32044.html>.

²⁸² Bruno, 25–26.

²⁸³ Bruno, 26.

²⁸⁴ Bruno, *H-2A and H-2B Temporary Worker Visas*, 1.

during the pandemic.²⁸⁵ A *New York Times* article reported that one of the visa categories affected by the order was the H-2B visa program.²⁸⁶ At that time, a variety of companies alleged that this executive order would negatively affect the American economy.²⁸⁷ Previously, in May 2020, a group of Republican senators had asked Trump not to restrict the work visas of guest workers.²⁸⁸ For these senators, the guest worker programs are essential to the economic vitality of the nation. On the other hand, some have praised the new executive order. Julia Gelatt, at the Migration Policy Institute, argues that due to the dire economic situation, more American workers will be willing to accept jobs that have been reserved traditionally for H-2B guest workers.²⁸⁹ Furthermore, Camarota, from the Center for Immigration Studies, argues that the use of guest worker programs during times of economic turmoil should be avoided.²⁹⁰ It is evident that politicians on both sides of the political spectrum are polarized regarding the H-2B visa program.

5. Limited Timeframe for Fraud Investigations, Remote Locations, and Failure to Prosecute

As indicated by Officer Quant, H-2B petitions have a validity period of less than one year, and the immigration officers must adjudicate the petitions quickly.²⁹¹ However, the process of finding, investigating, and acting on fraud during that limited timeframe is difficult.²⁹² Finally, as described by Quant, some worksites for the H-2A/H-2B programs

²⁸⁵ Gillian Friedman, “Companies Criticize Visa Suspensions, but Impact May Be Muted for Now,” *New York Times*, June 23, 2020, <https://www.nytimes.com/2020/06/23/business/economy/visa-suspensions-companies-react.html>.

²⁸⁶ Friedman.

²⁸⁷ Friedman.

²⁸⁸ J. Edward Moreno, “GOP Senators Urge Trump Not to Restrict Guest Worker Visas,” *The Hill*, May 27, 2020, <https://thehill.com/homenews/senate/499788-gop-senators-urge-trump-not-to-restrict-guest-worker-visas>.

²⁸⁹ Friedman, “Companies Criticize Visa Suspension.”

²⁹⁰ Steven A. Camarota, “Why Trump Must Suspend Temporary Worker Programs,” *Washington Times*, May 27, 2020, <https://www.washingtontimes.com/news/2020/may/27/why-the-president-must-suspend-temporary-worker-pr/>.

²⁹¹ Quant, interview.

²⁹² Quant.

are located far from the urban centers where USCIS field offices are situated.²⁹³ As a result, the fraud site visits necessary to verify compliance with regulations are difficult to perform.²⁹⁴ Thus, the remote location of some worksites, along with the pressure of processing these petitions within a limited timeframe, may contribute to improper processing in some cases.

Pincus argues that an effective guest worker program, in terms of the protection of the workers' human rights, depends on the willingness of law enforcement agencies to prosecute any employer that violates those rights.²⁹⁵ Every time the authorities fail to investigate and prosecute employers that violate the human rights of guest workers constitutes an integral failure of the U.S. immigration system. To illustrate, for the 2010 GAO report, the author reviewed a series of cases, across 29 states, in which employers and recruiters in the H-2B program were involved in abuse and fraud.²⁹⁶ The report recounts the H-2B program investigation from April to September 2010 through a series of site visits and case studies, ultimately finding that while the study "cannot be projected to the entire population of H-2B employers and recruiters," the results illustrate the potential for abuse in the H-2B program.²⁹⁷ The results of this GAO study demonstrate the types of abuse found in the H-2B program and confirm the findings of this chapter.

C. STRENGTHS OF FRAUD AND NATIONAL SECURITY RISK DETECTION MEASURES

Some experts assert that the H-2B visa program has stronger controls for fraud and national security risks than other visa programs. Indeed, Rothwell claims that this visa program features less fraud than other visa categories.²⁹⁸ This section explores the reasons

²⁹³ Quant.

²⁹⁴ Quant.

²⁹⁵ Pincus, "Immigration and the Threat to American National Security," 21.

²⁹⁶ Kutz, *H-2B Visa Program*, 4.

²⁹⁷ Kutz, 2.

²⁹⁸ Rothwell, *Legal U.S. Immigration*, 35.

this program presents less fraud or fewer national security risks, with the goal of replicating those stronger controls in other visa programs.

1. Family Reunification

Keeping families of H-2B guest workers together might be perceived as a strength in the program. Currently, the H-2B visa program provides for the admission of spouses and minor children of workers to stay together in the United States.²⁹⁹ In this way, the H-2B visa program has inherent mechanisms to protect these workers, as they are able to keep their families together while working here. Nonetheless, the policy decision to allow workers to bring their immediate family members to the United States carries significant controversy. Some argue that this policy creates an incentive for the guest workers to remain in the United States after the end of the authorized stay.³⁰⁰ According to Bruno, past initiatives by legislators to create new guest worker programs have prohibited family members from accompanying the guest worker to the United States.³⁰¹ If such new provisions were codified in law, the H-2B visa program could lead to a situation in which workers would be separated from their families for long periods.

2. Financial and Time Investment

The H-2B visa program has another important characteristic: the financial and time investment by the company to hire these workers. Rothwell explains that the H-2B program requires the employer to incur substantial costs, and the company may end up paying thousands of dollars to obtain sufficient guest workers.³⁰² Furthermore, the application process for an H-2B visa may take six months or longer for the American company and the petitioner to complete, while investing considerable effort.³⁰³ Thus, the owners may be

²⁹⁹ Bruno, *H-2A and H-2B Temporary Worker Visas*, 17.

³⁰⁰ Bruno, 17.

³⁰¹ Bruno, 17.

³⁰² Rothwell, *Legal U.S. Immigration*, 36.

³⁰³ Rothwell, 35.

apprehensive to incur additional expenses by committing fraud and facing potential financial penalties for illegal activities.

The H-2B visa program has stronger fraud detection mechanisms than the marriage programs have, partly because the petitioner is a company, and the stakeholders may be afraid of fraud accusations, public exposure, and irreparable damage to their reputations in the community where they are doing business. Thus, it might be difficult for a corrupt company to engage in fraud using the H-2B program. Furthermore, the company, depending on its size, has many levels of internal review, such as accountants, lawyers, the stakeholders, and the corporate board. It might be too risky for the owner or the majority owner to be involved in fraud without being exposed—because even a disgruntled employee could expose a fraud scheme to the public and the media.

3. Notification Requirements

As previously discussed, a significant characteristic of the H-2B program is that the visa is granted for a limited time.³⁰⁴ Thus, the limited duration these workers can remain in the United States, and the constant need for interaction with the authorities to keep them on American soil, may work as an effective fraud prevention mechanism. Furthermore, the H-2B program has other embedded strong controls. According to Bruno, INA places specific requirements on H-2B employers; for instance, it requires an employer to pay for the workers' transportation expenses—even to return to their country of origin if the employer terminates them before the end of their period of authorized admission.³⁰⁵ The imposition of these expenses on the employer acts as a guarantee that the employer will remain compliant with existing regulations.

Bruno explains that the H-2A and H-2B programs feature notification requirements, meaning that by DHS regulations, the petitioner must notify DHS within two business days if a worker fails to report to work, is terminated prior to completion, or

³⁰⁴ Rothwell, 35.

³⁰⁵ Bruno, *H-2A and H-2B Temporary Worker Visas*, 8.

absconds from the place of work, or when the work is completed at an earlier time.³⁰⁶ Furthermore, the main purpose of the notification requirements is to allow DHS a certain degree of oversight of guest workers while they remain in the country, and to take action if DHS makes a determination that the workers are in violation of immigration law.³⁰⁷ Thus, inherent in the H-2B program are enforcement controls that help prevent these workers from remaining in the United States beyond a specified time, as the employer must verify that the workers are reporting to the worksite.

4. Fraud Prevention and Detection Fees, Enforcement Provisions, and Audits

Bruno explains that under current regulations, DHS imposes fraud prevention and detection fees on H-2B employers.³⁰⁸ According to Bruno, these fees are dedicated to preventing and detecting fraud in the adjudication of immigration benefits.³⁰⁹ In terms of preventing fraud and national security risks, the H-2B program has an essential element for compliance: sufficient funding. Another important feature in the H-2B visa program, as described by Bruno, is a provision that allows the secretary of homeland security to ensure that employers comply with regulations—as DHS has the authority to deny petitions or impose administrative sanctions for cases in which the employer engages in fraud or fails to comply with the conditions of the H-2B program.³¹⁰

In addition, Pincus argues that the guest worker visas, both the H-2A and H-2B programs, do not pose major risks to the national security of the United States, other than the risk of these workers remaining in the country illegally after their visas expire.³¹¹ Once again, the H-2B program has mechanisms in place to ensure that the employer complies with the law. Also, a characteristic of the H-2B program is that the DOL has the authority

³⁰⁶ Bruno, 24–25.

³⁰⁷ Bruno, 24–25.

³⁰⁸ Bruno, 8.

³⁰⁹ Bruno, 29.

³¹⁰ Bruno, 17.

³¹¹ Pincus, “Immigration and the Threat to American National Security,” 42.

to perform application audits to verify that employers have complied with the terms listed on their applications.³¹² During some audits, the DOL may find information that triggers an investigation by DHS or other agencies.³¹³ Also, because these audits are public knowledge, they might act as a deterrent for employers thinking about committing fraud.

5. Interagency Collaboration, Fraud Reporting, and Prevention Mechanisms

Officer Quant explains that the H-2B program features solid collaboration between the DOS, DOL, and USCIS.³¹⁴ Quant also clarifies that the H-2B program is characterized by streamlined processing. For example, most H-2A petitions for temporary agricultural workers are adjudicated in less than 24 hours from the time an adjudicating officer receives them. As Officer Quant emphasizes, speed is necessary for the H-2A program because farms depend on the H-2A workers. As a result, most H-2B petitions are also processed quickly because companies rely on H-2B workers.³¹⁵ In this context, strong cooperation between all agencies is required to provide the needed workers for the American labor market expediently.

In addition, the process of reporting fraud in the H-2B program is relatively easy.³¹⁶ USCIS provides an online tip form to assist any person—including H-2B or American workers—who wants to report abuse or fraud.³¹⁷ USCIS has a dedicated website for reporting fraud in the H-2B program, and according to this website, persons using the online form to report fraud or abuse may remain anonymous if they so choose.³¹⁸

³¹² Cindy Brown Barnes, *H-2B Visas: Additional Steps Needed to Meet Employers' Hiring Needs and Protect U.S. Workers*, GAO-20-230 (Washington, DC: Government Accountability Office, 2020), 7, <https://www.gao.gov/assets/710/705639.pdf>.

³¹³ Barnes, 8.

³¹⁴ Quant, interview.

³¹⁵ Donald Neufeld, "Updated Procedures for H-2A (Agricultural Worker) I-129 Petitions" (interoffice memorandum, Washington, DC: Citizenship and Immigration Services, October 19, 2007).

³¹⁶ Quant, interview.

³¹⁷ "Combating Fraud and Abuse in the H-2B Visa Program," Citizenship and Immigration Services, March 13, 2020, <https://www.uscis.gov/report-fraud/combating-fraud-and-abuse-h-2b-visa-program>.

³¹⁸ Citizenship and Immigration Services.

Similarly, U.S. embassies and consulates overseas, part of the DOS, offer an online portal for workers to verify whether they are receiving a legitimate job offer and report fraud to the Fraud Prevention Unit.³¹⁹ They also have staff available to process that information in Spanish, and the telephone calls are confidential.³²⁰ Finally, the online portal for the DOS offers resources for workers to obtain information about their rights to receive a fair wage and report human trafficking.³²¹ The availability of these online mechanisms for fraud reporting demonstrates the efforts of the authorities to address fraud and abuse in the program by requesting cooperation from possible victims.

Despite the fraud and national security risks already described, the authorities have been proactive in trying to prevent such abuse. For instance, to address fraudulent practices in the H-2B program, the authorities have promoted close relationships between the different agencies involved in fraud investigation. Successful prosecutions of employers that violated the H-2B program have been attributed to successful cooperation between different agencies. For instance, according to the DOS, it has been successful in prosecuting H-2B cases because it places agents in Mexico with the Bureau of Diplomatic Security, ultimately developing close professional relationships with staff at the embassy.³²² Through these relationships, the authorities can identify employers engaged in fraud and refer those cases for further investigation and prosecution.

The authorities are also proactive in addressing guest worker abuse. For instance, the U.S. Consulate in Monterrey, Mexico, provides briefings to workers about their rights, distributes a hotline number for help, and supplies brochures containing this type of information.³²³ Also, the DOL has formed partnerships with consulates and embassies in 11 countries—Belize, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Peru, and the Philippines—to protect these

³¹⁹ “H-2 Visas,” U.S. Embassy & Consulates in Mexico, accessed April 10, 2020, <https://mx.usembassy.gov/embassy-consulates/monterrey/visas/h2-visas-in-monterrey/>.

³²⁰ U.S. Embassy & Consulates in Mexico.

³²¹ U.S. Embassy & Consulates in Mexico.

³²² Sherrill, *H-2A and H-2B Visa Programs*, 53–54.

³²³ Sherrill, 39.

defenseless workers from further abuse.³²⁴ According to the DOL, thanks to these partnerships, it has been successful in communicating with workers in those countries to inform them of their rights under the H-2B program.³²⁵ An informed group of guest workers may be an important component in efforts of the authorities to investigate and prosecute abuses.

The law also offers certain protections for victims of severe abuse. Victims of abuse in the H-2B program, including human trafficking victims, can find assistance in several federal agencies.³²⁶ For example, Legal Services Corporation (LSC) is a non-profit organization that offers grants to legal services providers dedicated to delivering legal aid to some eligible non-citizens and low-income U.S. citizens.³²⁷ In the case of H-2A and H-2B workers, LSC offers telephonic consultations, as long as they do not require continuous representation.³²⁸ However, most H-2B workers are unable to obtain legal assistance by LSC because full legal services can be offered only to human trafficking victims, H-2B workers who work in forestry, and H-2A workers.³²⁹ Although the services are limited, the fact that H-2B workers being subjected to human trafficking can receive legal representation is a measure that could offer recourse for these victims.

Furthermore, USCIS offers immigration benefits to trafficking victims who are willing to assist in the prosecution of employers.³³⁰ This type of immigration assistance comes in the form of the T and U visas. Workers under the H-2A and H-2B programs who become victims of trafficking can apply for these visas.³³¹ The T visa is reserved for victims of severe human trafficking while the U visa is available for victims of qualifying

³²⁴ Sherrill, 39.

³²⁵ Sherrill, 39–40.

³²⁶ Sherrill, 43.

³²⁷ Sherrill, 43.

³²⁸ Sherrill, 43.

³²⁹ Sherrill, 43.

³³⁰ Sherrill, 45.

³³¹ Sherrill, 45–46.

criminal activity, such as fraud in foreign labor contracting or severe human trafficking.³³² Also, the Department of Justice and Department of Health and Human Services provide funding to service organizations that assist victims of human trafficking.³³³ In turn, these organizations assist victims with food, shelter, clothing, and medical and legal services.³³⁴ Both visa programs and their related services are an attempt by the authorities to provide assistance to these victims, while facilitating the investigation and prosecution of unscrupulous employers.

An attempt by the authorities to fight fraud in the H-2B program is highlighted in a June 2019 DHS report that details several reform options. The report, prepared by USCIS in consultation with the DOL, makes several recommendations for “improving the overall H-2B program.”³³⁵ Some of the options presented by USCIS include requiring H-2B employers to use E-Verify and restricting the use of H-2B visas to employers that have demonstrated “good business/corporate citizenship.”³³⁶ If these measures are successfully implemented, they could be used to disincentivize fraudulent practices, because employers would know their future participation in the H-2B program depends on a history of responsible behavior.

Other solutions proposed by USCIS include creating substantial financial sanctions for H-2B petitioners that do not comply with reporting requirements by imposing a fine on those who fail to report to USCIS any instances of workers failing to report to the worksite or terminations.³³⁷ In addition, USCIS proposes allowing H-2B workers to self-report to USCIS if they obtain a different immigration status, depart the United States, or change employers.³³⁸ Another approach recommended by USCIS is to increase the H-2B fraud

³³² Sherrill, 45–46.

³³³ Sherrill, 14–15.

³³⁴ Sherrill, 14–15.

³³⁵ Department of Homeland Security Under Secretary for Management, *Options for Reforming the H-2B Visa Program and Improving Late Season Employers’ Access to Workers* (Washington, DC: Department of Homeland Security, 2019), ii.

³³⁶ Department of Homeland Security Under Secretary for Management, 8–9.

³³⁷ Department of Homeland Security Under Secretary for Management, 9.

³³⁸ Department of Homeland Security Under Secretary for Management, 9.

detection and prevention fees and use those funds to combat fraud by implementing further site visits.³³⁹ USCIS also recommends creating a statute that would prohibit H-2B employers from “passing along” fees for such things as transportation or visas to workers.³⁴⁰ If these measures are implemented, they could be used by the authorities as part of a successful fraud deterrence strategy.

In terms of improving oversight of the H-2B program, recent propositions by USCIS suggest eliminating the use of recruiters or increasing oversight of recruitment agents.³⁴¹ Increased oversight of recruitment agents is long overdue, based on abuses committed by some recruiters in the past. USCIS has also proposed that foreign recruiters receive certification by registering with the government before H-2B petitioners may hire workers through them.³⁴² Furthermore, USCIS recommends that DHS disclose to the public the identities of agents and recruiters.³⁴³ These additional measures would address existing deficiencies in the H-2B program while promoting transparency in the program.

In addition, the authorities are taking steps to improve the fraud and national security risk detection mechanisms used in the H-2B visa program. As recent as March 2020, DHS announced new initiatives “to improve integrity of visa programs for foreign workers.”³⁴⁴ According to DHS, the authorities are adopting several new measures, such as limiting supplemental visas to habitual workers with a reputation for following the law, increasing the use of site visits, and requiring identical starts dates on the H-2B petition and the date of need specified by the employer.³⁴⁵ These strict new measures may prove effective in detecting and preventing fraud.

³³⁹ Department of Homeland Security Under Secretary for Management, 10.

³⁴⁰ Department of Homeland Security Under Secretary for Management, 10.

³⁴¹ Department of Homeland Security Under Secretary for Management, 9.

³⁴² Department of Homeland Security Under Secretary for Management, 9.

³⁴³ Department of Homeland Security Under Secretary for Management, 9–10.

³⁴⁴ “DHS to Improve Integrity of Visa Program for Foreign Workers,” Department of Homeland Security, March 5, 2020, <https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers>.

³⁴⁵ Department of Homeland Security.

In all, the authorities have been proactive in addressing gaps in fraud and security risk detection, but the government can still improve by building on the successes of the H-2B program in terms of the legal framework of the program, fraud detection funding mechanisms, and interagency collaboration. By improving their ability to combat fraud and security risks in the H-2B program, the authorities can succeed in terms of “special prevention or deterrence”—prosecuting individuals who engage in fraud and abuse. At the same time, each successful prosecution announced in the news or on official government websites sends the message to society as a whole—the authorities’ “general prevention” duty—that guilty parties will be punished if they commit fraud and abuse.

IV. ANALYSIS, RECOMMENDATIONS, AND CONCLUSION

This chapter presents a comparative analysis of the marriage visa programs and the H-2B visa program, and the conclusions of this research. The first section applies the strengths of the H-2B visa program to the weaknesses of the marriage visa programs and details recommendations for improvement. It also explores the findings of the 2015 GAO report discussing leading practices that can be adopted by leadership in government agencies to better manage fraud risks: the fraud risk management framework. These best practices can be used in the marriage visa programs to improve their current deterrence and fraud prevention mechanisms. This section also discusses how these recommendations are compatible with the USCIS's *2019–2021 Strategic Plan*. The second section presents the conclusions of the thesis, including opportunities for future research.

A. COMPARATIVE ANALYSIS AND RECOMMENDATIONS

At first glance, the H-2B program and the marriage programs do not have much in common. After all, they serve different purposes in the immigration system of the United States. However, these programs are similar in that the authorities are required to combat fraud and prevent national security risks in both programs. In addition, both programs, when exploited by unscrupulous parties, may expose innocent victims to fraud and physical or psychological abuse. Under Strategic Goal 2, the USCIS's *Strategic Plan* specifies that the agency is charged with protecting the nation from immigration fraud through strict security measures.³⁴⁶ Furthermore, USCIS must promote external and internal information sharing to protect the integrity of the U.S. immigration system.³⁴⁷ Absent comprehensive immigration reform, officials involved in the administration of immigration policies—specifically civil servants and law enforcement personnel—will continue to fill the void that immigration law cannot address. Therefore, it is imperative that these employees are

³⁴⁶ Citizenship and Immigration Services, *2019–2021 Strategic Plan* (Washington, DC: Citizenship and Immigration Services, 2019), 4, https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Budget%2C%20Planning%20and%20Performance/USCIS_Strategic_Plan_2019-2021.pdf.

³⁴⁷ Citizenship and Immigration Services, 4.

provided with the necessary tools to fulfill their duties in detecting and preventing fraud and national security risks, while protecting the integrity of the U.S. immigration system.

As already mentioned, the GAO completed a study in 2015 titled *A Framework for Managing Fraud Risks in Federal Programs*.³⁴⁸ As described by the GAO, the framework offers a group of recommended practices that managers can use to combat fraud, conduct fraud assessments, and create an effective anti-fraud strategy.³⁴⁹ This thesis applies the framework to the marriage visa programs. The framework consists of four pillars for effective fraud risk management: commit, assess, design and implement, and evaluate and adapt.³⁵⁰ The term *commit* means creating an organizational structure that promotes effective fraud risk management.³⁵¹ For instance, an agency that is efficient in this aspect is characterized by its strong commitment from leadership to combat fraud by involving employees at all levels in its anti-fraud efforts.³⁵² In addition, the term *assess* signifies that the organization dedicates time to planning fraud risk assessments and creating a fraud risk profile.³⁵³ For example, an effective agency dedicates time to examining existing controls.³⁵⁴ These two concepts are significant in fraud detection and prevention because an efficient agency must engage all employees in its fraud detection process while remaining constant in evaluating its use of fraud controls.

The *design and implement* concept means that the organization has created a successful anti-fraud risk strategy.³⁵⁵ For instance, the agency has developed, documented, and communicated its anti-fraud strategy, making sure that the employees focus their efforts in control activities that are preventive.³⁵⁶ Finally, the *evaluate and adapt* concept

³⁴⁸ Lord, *Framework for Managing Fraud Risks*.

³⁴⁹ Lord, 1.

³⁵⁰ Lord.

³⁵¹ Lord.

³⁵² Lord.

³⁵³ Lord.

³⁵⁴ Lord.

³⁵⁵ Lord.

³⁵⁶ Lord.

means that the organization uses a risk-based approach to evaluate outcomes while adapting activities to better fraud risk management.³⁵⁷ For example, the agency can use the findings of investigations, evaluations, and monitoring to make improvements to its fraud detection and prevention efforts.³⁵⁸ These four main concepts provide a roadmap for this thesis in recommendations for better fraud and national security risk detection and prevention at USCIS. Also, these best practices are relatively easy to implement.

The following sub-sections present the comparative analysis of the marriage visa programs with the H-2B visa program, while addressing the findings of the 2015 GAO study and their connection to the USCIS *Strategic Plan*. The H-2B visa program has stronger control mechanisms for fraud and security risk prevention and detection than the marriage programs; thus, important lessons can be derived and applied to the marriage programs after examining these stronger controls.

1. Require Financial and Time Investments and Modify the Legal Framework for the K-1 Visa Program

One of the strengths of the H-2B visa program, as described on Chapter III, is that the petitioners in that program invest a substantial amount of time and financial resources to hire the guest workers. The process of hiring the guest workers includes paying thousands of dollars while the approval of the visas may take months. As a result, the companies may pause before using additional funds to engage in fraud and potentially face costly penalties if the authorities discover the scheme. As already mentioned elsewhere, the H-2B program does not create a pathway to naturalization while the marriage programs may lead to permanent residency or naturalization. Thus, the incentive to commit fraud in the marriage programs is stronger as they might be a means of obtaining legal status quickly.

As discussed in Chapter II, substantial fraud and abuse occur in the K-1 visa category—visas for fiancé(e)s of U.S. citizens. It would be impossible to impose a time limitation to the K-1 visa program because the goal of a marriage—ideally—is a permanent

³⁵⁷ Lord.

³⁵⁸ Lord.

union. Nonetheless, in the case of the K-1 visa, it could be helpful to expand the period required for the foreign national to acquire a Green Card, necessitating additional financial and time investment to acquire legal status in the United States. It could be beneficial to increase the waiting period of 90 days to 180 days or more, providing for further time for the authorities to ascertain the validity of the marriage once the foreign national has arrived in the United States. Also, while the foreign citizen waits to apply for the Green Card, the alien cannot work in the United States without applying for work authorization.³⁵⁹ If the foreign citizen wants to work during the waiting period, he or she is required to file Form I-765, the Application for Employment Authorization, with USCIS and pay the corresponding fee, adding another layer of financial investment.³⁶⁰ Thus, if these modifications were implemented, couples might think twice before engaging in fraud through this category of marriage visa.

Increasing the waiting period in this visa category would require a modification to the legal framework of the K-1 visa program but would be a method for USCIS to comply with the design and implement component of the GAO's framework. As described by the GAO, this component can be used to focus on preventive activities by properly documenting and communicating an anti-fraud strategy.³⁶¹ Extending the waiting period to provide additional time for the government to evaluate the validity of the marriage would qualify as a preventive control activity, sending the message to applicants that the authorities are carefully implementing additional anti-fraud measures to detect fraud and security risks in the marriage programs.

Furthermore, extending the waiting period in the K-1 visa program would assist USCIS in becoming compliant with Objective 2.1 of the *Strategic Plan*: "Identify[ing] and mitigat[ing] known and unknown risks to the lawful immigration system."³⁶² According to this document, USCIS is charged with identifying weaknesses that individuals or groups

³⁵⁹ Bray, *Fiancé & Marriage Visas*, 100.

³⁶⁰ Bray, 100.

³⁶¹ Lord, *Framework for Managing Fraud Risks*.

³⁶² Citizenship and Immigration Services, *2019–2021 Strategic Plan*, 10.

could use to commit fraud or attack the homeland.³⁶³ Furthermore, one of the desired outcomes is for USCIS to identify risks throughout the immigration cycle.³⁶⁴ In the case of the K-1 visa program, expanding the period required for the foreign national to acquire the Green Card would enhance the ability of USCIS to identify risks throughout the immigration cycle, one of the desired outcomes described in the *Strategic Plan*.

2. Impose Notifications and Require More Frequent Site Visits for the Marriage Visa Programs

As already discussed in Chapter III, an important component of the H-2B visa program, in terms of controls against fraud and national security risks, is that current regulations by DHS impose notification requirements for H-2A and H-2B employers.³⁶⁵ The H-2B program counts on enforcement controls that prevent these workers from remaining in the United States beyond a specific period, as the employer must verify that the workers are reporting to the worksite. For instance, in the H-2B visa program, the petitioner is required to notify DHS within two business days if a worker fails to report to the worksite.³⁶⁶ The notification requirements of the H-2B program demands frequent interactions between the employer and the authorities. By contrast, in the marriage visa programs, apart from site visits by FDNS officers, these controls are nonexistent. Because the purpose of the H-2B program and the marriage programs are different, it would be impossible to use immigration officers or FDNS officers to supervise continuously the whereabouts of applicants in the marriage programs. However, in meritorious cases, USCIS could benefit from scheduling additional site visits by FDNS officers. This additional layer of review, through supplementary site visits, would be comparable to the notification requirements of the H-2B visa program as it would mandate further contact with the authorities.

³⁶³ Citizenship and Immigration Services, 10.

³⁶⁴ Citizenship and Immigration Services, 11.

³⁶⁵ Bruno, *H-2A and H-2B Temporary Worker Visas*, 18.

³⁶⁶ Bruno, 24–25.

As described on the USCIS website, FDNS utilizes the Targeted Site Visit and Verification Program for cases in which the authorities suspect “fraud and abuse of employment and family based visas.”³⁶⁷ In addition, FDNS uses a program called the Administrative Site Visit and Verification Program (ASVVP), whereby FDNS officers conduct impromptu site visits while an application or petition is being adjudicated.³⁶⁸ The objective is to corroborate information that the applicants have presented to USCIS with their applications or petitions.³⁶⁹ Also, the ASVVP includes “compliance review site visits” involving documentation review, public records investigations, government systems studies, and applicant interviews.³⁷⁰ However, these visits are limited to petitions filed under the EB-5 immigrant investor program, special immigrant religious workers petitions, L-1 nonimmigrant intracompany transferee executive or manager visas, and the H-1B nonimmigrant temporary visas.³⁷¹ FDNS uses site visits to look into marriage fraud, but an increase in the frequency of site visits for meritorious cases might prove advantageous in the fight against fraud and security risks. Apart from detecting fraudulent marriages, expanding the use of site visits could be a useful tool in uncovering abuse to the beneficiary or the petitioner, not to mention cases of human trafficking.

Amplifying the use of site visits in the marriage programs would be a method of ensuring that USCIS complies with the evaluate and adapt component of the GAO’s framework. As described in the GAO report, this component is used to improve fraud risk management by using the results of investigations to monitor and evaluate detection and prevention efforts.³⁷² Increasing the use of site visits and reporting for meritorious cases would provide USCIS with a method for integrating the results of investigations,

³⁶⁷ “Administrative Site Visit and Verification Program,” Citizenship and Immigration Services, last modified September 9, 2019, <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program>.

³⁶⁸ Citizenship and Immigration Services, “Fraud Detection and National Security Directorate”; Citizenship and Immigration Services, “Administrative Site Visit and Verification Program.”

³⁶⁹ Citizenship and Immigration Services, “Administrative Site Visit and Verification Program.”

³⁷⁰ Citizenship and Immigration Services.

³⁷¹ Citizenship and Immigration Services.

³⁷² Lord, *Framework for Managing Fraud Risks*.

evaluations, and monitoring into its prevention and detection efforts. Finally, Objective 2.1 of the *Strategic Plan* mandates that USCIS identify and mitigate risks to the immigration system, as one of the progress indicators for this objective is to expand the use of the site visit program.³⁷³ Thus, expanding the use of site visits in the marriage programs would assist FDNS in becoming compliant with this objective.

3. Improve Interagency Collaboration in the Marriage Visa Programs

As described in Chapter III, the H-2B visa program features solid collaboration between the different agencies involved in the approval of visas for guest workers.³⁷⁴ Similarly, as presented in Chapter II, the marriage visa programs also feature robust interagency mechanisms to detect and prevent fraud, abuse, and security risks. However, as explained by Officer Anello, the marriage visa programs would still benefit from increased communication between FDNS officers and their counterparts in other agencies, such as ICE agents, consular officers, and CBP officers.

In terms of improvement in increasing communication and collaboration between these officers, the marriage visa programs could benefit from offering detail opportunities for immigration and FDNS officers to other offices across USCIS. The benefit of facilitating these details is that the FDNS officers could interact with immigration officers among others in various regions of the nation, obtaining experience in local best practices that they could bring back to their home offices. As discussed in Chapter II, each USCIS field office is limited to its own geographic location, serving particular populations from specific nationalities and ethnic groups.³⁷⁵ It would be beneficial to both immigration officers and FDNS officers to participate in those details to foster information sharing initiatives across USCIS, learn about best practices across geographic boundaries, and facilitate the exchange of information about innovative fraud schemes in different regions of the nation.

³⁷³ Citizenship and Immigration Services, *2019–2021 Strategic Plan*, 10–11.

³⁷⁴ Quant, interview.

³⁷⁵ Anello, interview.

Another possibility would be establishing an exchange program between USCIS immigration and FDNS officers and officers from ICE, DOS, and CBP. This type of exchange program would benefit not only the officers participating in the exchange program but their leadership as well. Ideally, the officers participating in the exchange program would acquire new professional relationships that assist them in performing their duties related to fraud detection and prevention. Also, upon return to their home offices, these officers could inform their superiors of best practices in the offices they visited that might be replicated at home.

In the marriage visa programs, another source of improvement, to promote interagency communication and cooperation, could be increasing the frequency of interactions between FDNS officers and their ICE counterparts through the DBFTF. As indicated by Officer Annello, currently, participation by FDNS officers in the DBFTF for the marriage programs occurs only monthly.³⁷⁶ Increased participation in DBFTFs could further promote interagency information sharing and cooperation, while addressing national security concerns.³⁷⁷ USCIS should consider sending FDNS officers to DBFTF meetings two to three times per month.

As explained by Officer Annello, FDNS officers have limited interactions with the consular officers working the same cases, other than reviewing the information added by the officers to existing government databases.³⁷⁸ Fostering increased and regular communication between FDNS and consular officers would benefit both agencies. Finally, Annello also explained that interactions between FDNS officers and ICE agents only occur once a formal criminal investigation has begun.³⁷⁹ Yet again, increased communication and interagency cooperation would benefit both USCIS and ICE. A manageable solution to solve this impediment is to establish regular monthly roundtables with immigration officers, FDNS officers, consular officers, ICE agents, and CBP officers to discuss fraud

³⁷⁶ Annello.

³⁷⁷ Annello.

³⁷⁸ Annello.

³⁷⁹ Annello.

trends, novel fraud schemes, and progress made in fraud investigations. Thus, USCIS could benefit from fomenting increased interagency communications through the promotion of these roundtables, which could prove pivotal in combating fraud and abuse.

Implementing a system that immigration and FDNS officers could use to participate in details with other FDNS offices across the nation, and with other agencies, and encouraging increased and continuous interaction between all agencies' officers and agents would help USCIS reach compliance with the commit component the GAO's framework. According to the GAO, this component is used to foment an organizational culture dedicated to combating fraud.³⁸⁰ USCIS could benefit from actively promoting increased communication and cooperation between the different agencies involved in detecting fraud, as these practices would solidify an organizational culture dedicated to combating fraud at all levels of the agency.

In addition, these measures would help FDNS comply with Objective 2.3 of the *Strategic Plan*, which mandates that the agency maximize external and internal information sharing practices.³⁸¹ Objective 2.3 means that the agency will facilitate the exchange of information across DHS, across USCIS, and with other agencies dedicated to the protection of the homeland.³⁸² Specifically, one desired outcome of Objective 2.3 addresses existing barriers to information sharing across the agency.³⁸³ Any improvement or advancement in information sharing efforts within USCIS and with other agencies is a step in the right direction.

Adopting these three measures—modifying the legal framework of the K-1 visa program, increasing the use of site visits in meritorious cases in the marriage visa programs, and fomenting better interagency communication and collaboration in the marriage visa programs—would enhance the agency's ability to combat fraud and security risks in these programs. These recommendations are easy to implement, and they can be pivotal in

³⁸⁰ Lord, *Framework for Managing Fraud Risks*.

³⁸¹ Citizenship and Immigration Services, *2019–2021 Strategic Plan*, 12.

³⁸² Citizenship and Immigration Services, 12.

³⁸³ Citizenship and Immigration Services, 12.

stopping fraudulent schemes at every step of the process. Furthermore, these proposals are based on a comprehensive analysis of past governmental reports and two case studies exposing known deficiencies. These three propositions, if implemented, will assist USCIS in creating more effective programs to stop nefarious actors from using fraud to weaken the U.S. immigration system.

B. OPPORTUNITIES FOR FURTHER RESEARCH

The results of this thesis could be significant for academics and practitioners in that they provide recommendations to amend existing deterrence mechanisms at FDNS. Future research will be needed to examine the recommendations in other visa programs at USCIS, and with other agencies within DHS, such as ICE and the DOS. For instance, a potential area of research might be an exploration of how the type of petitioners in the H-2B visa program, as opposed to the petitioners in the marriage visa programs, affects the fraud rates in each of these programs. For example, it might be that the H-2B program has stronger fraud detection mechanisms because the petitioner is a company and the stakeholders are afraid of fraud accusations, public exposure, and irreparable damage to their reputation in the communities where they are doing business. Also, in the H-2B program, the company, depending on its size, has many internal levels of review, and it might be too risky for the owner to be involved in fraud, without being exposed. In addition, future researchers might be interested in the analysis of how countries with similar legal and cultural backgrounds to the United States address the challenges of marriage fraud in their immigration systems. Valuable lessons could be learned from this type of comparative analysis.

An area for further research is to explore the strengths and weaknesses of other visa programs, in terms of fraud and national security risk detection and prevention, at USCIS and other agencies through surveys conducted with immigration officers, FDNS officers, ICE agents, and consular officers. The surveys could also be completed with employees, supervisors, and leadership. It would be interesting to explore how different or similar perspectives are about fraud and national security risks among these different groups of civil servants. One possibility to expand this research is to develop analysis using a quantitative approach by exploring available statistics for fraud and national security risks

in the marriage visa programs and the H-2B visa program, or other visa programs of interest. An interesting topic for further study might be the use of data analytics to uncover fraud in the marriage visa programs and the H-2B visa program. It might be fruitful to study how USCIS is succeeding or failing to utilize data analytics as a tool in fraud detection and prevention. One area of study that could prove pragmatic is an exploration of how effective the current training models utilized by USCIS are in terms of preparing immigration officers and FDNS officers for fraud and security risk detection.

Another research possibility is a comparison of how different agencies in the United States utilize prosecution as a deterrence tool by publishing successful anti-fraud efforts on their websites and through other methods. Indeed, individuals who are thinking about engaging in fraud might pause after learning about possible penalties.³⁸⁴ A topic worthy of further study might explore whether the FDNS units assigned to the marriage visa programs are properly funded or if they are in need of additional financial support to be successful. Finally, another significant area of study could explore new methods to address existing weaknesses in the H-2B visa program.

C. CONCLUSION

After obtaining an immigration benefit through fraud, nefarious actors could gain access to the United States and engage in acts that threaten the security of the homeland. Thus, immigration fraud is a major topic for academics and practitioners involved in the homeland security enterprise. The authorities in the United States must remain ever vigilant in searching for new ways to combat immigration fraud. In addition, the authorities must be proactive in preventing those who seek to defraud the government or harm the homeland from gaining access to the United States and perpetuating a cycle of fraud, criminality, and national security risk.

³⁸⁴ Lord, *Framework for Managing Fraud Risks*, 43.

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