



## Senior Policy Council – Options Paper

### *Expanding DNA Testing in the Immigration Process*

**Background:** Deoxyribonucleic Acid (DNA) is hereditary material found in humans and other organisms and is present in nearly every cell of a person's body. Since the ability to create DNA profiles was first realized in 1984, DNA testing has become the gold standard to prove relationships and for forensic identification. It is preferred over older blood testing technologies since it does not require blood samples and it is far more reliable.

USCIS currently does not have the authority to require DNA testing, even when fraud is highly suspected. An April 2006 memo from the CIS Ombudsman to the USCIS Director recommended expansion of DNA testing to prove family relationships. The Ombudsman asked USCIS to revise regulations to allow officers to require DNA testing, saying this would enhance national security, bring scientific certainty to USCIS adjudications, improve customer service, and increase USCIS efficiency. A July 2006 response from USCIS Director Gonzalez indicated that USCIS was drafting updates to Title 8, Code of Federal Regulations (8 CFR) 204.2(d)(vi) to allow USCIS to require DNA when fraud is suspected. The Director indicated that concerns about high costs and limited accessibility were reasons that DNA evidence had not been required in all cases. He said that USCIS would be willing to reconsider the issue when and if DNA testing "becomes more available and affordable worldwide." To date, 8 CFR has not been updated to allow officers to require DNA testing, and the CIS Ombudsman continues to express interest in this issue.

In 2008, in response to reports of relationship fraud among refugees in the Priority Three (P-3) family reunification based refugee access program, the Department of State (DOS) and USCIS initiated a pilot DNA testing program among refugees in Africa. The pilot revealed about an 85% fraud rate, if you combine those with proven fraud and those who refused to be tested. As a result, P-3 processing has been temporarily suspended. Revelation of this high fraud rate in Africa raises serious national security concerns. Up until last year, when USCIS began bringing large numbers of Iraqi refugees to the United States, Somalia represented the largest source country for refugee admissions. Screening from this region is important, as evidenced by the 1998 U.S. embassy bombings in Kenya and Tanzania and the fact that Somalia has long been a haven for Al-Qaeda. Adding urgency to the issue is the recent revelation that a naturalized U.S. citizen blew himself up in a suicide bombing in Somalia. The FBI is investigating, and is concerned that young men of

Somali origin have departed the United States to fight and train overseas, possibly to return on U.S. passports to carry out terrorist acts here.<sup>1</sup>

Leaving open loopholes that allow potential terrorists, or simply fraudulent applicants, to insert themselves in legitimate family groups not only threatens our security, but also creates a large economic burden. A recent refugee-processing circuit ride to West Africa resulted in only a ten percent approval rate, primarily because of relationship fraud. Without the ability to verify family relationships early on, USCIS and DOS will continue to waste vast resources to screen and interview enough refugees in order to meet their annual goal.

The current evidentiary requirements to prove family relationships for immigrant visa petitions are outlined in 8 CFR 204.2(d). All documents in a foreign language must be submitted with a certified English translation. When applicants and petitioners don't possess the necessary documents, USCIS must send written notice of the deficiency and wait for submission of the missing evidence. When primary evidence is not available, secondary evidence may be submitted. This is often a combination of items such as baptismal or school records, sworn affidavits or other documents. This creates a burden not only on the applicants and petitioners but also on USCIS, as relationship fraud screening interviews take an inordinate amount of time, and the entire process makes it difficult to complete adjudications within the target timeframe.

DNA testing could resolve many of these issues, but current regulations curtail USCIS authority to require it. The regulations further confuse the issue by setting out in great detail the circumstances under which blood testing, which is outdated and unreliable, may be requested. Although DNA testing may be suggested and accepted when the existing evidence in a case has been evaluated and determined to be insufficient, the process is not simple. In reality, officers often approve petitions based on documents for which they are unable to verify the authenticity. In the past, DNA has not been a feasible option because of regulatory language, high costs and logistical problems regarding the chain of custody of DNA samples.

Although DNA testing has proven benefits, the integrity of the process is essential, and the current system is broken. When DNA is voluntarily submitted, the procedures using the American Association of Blood Banks (AABB) - accredited labs are rife with problems, especially overseas. Often the integrity of the collection process and chain of custody is compromised, and there are no controlled, streamlined ways to deliver the results to USCIS or DOS. DOS is currently investigating a man who petitioned for 14 children, allegedly providing DNA samples for all. Several labs were used. One lab inadvertently discovered that a DNA sample indicated a male donor instead of a female, even though the sample was for a daughter. When DOS investigated they discovered that a total of only three samples had been presented for the 14 children and one of those was the father's. In order to reap the many benefits of DNA testing USCIS must implement regulations and guidance that will streamline and enhance the integrity of the process. Below are three different options for the SPC to consider. Each advocates expansion of DNA testing,

---

<sup>1</sup>Spillius, Alex, *Telegraph.co.uk*, March 13, 2009, "US facing home-grown Islamic terror threat."  
<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/4987199/US-facing-home-grown-Islamic-terror-threat.html>

beginning with the most comprehensive expansion to the least comprehensive expansion. The status quo (no change at all) is not recommended.

**Issue:** USCIS must protect the integrity of our immigration system, establish identity early on, and take steps to avoid granting benefits to criminals and terrorists. In light of the proven benefits of DNA technology in establishing family relationships and solving crimes, it would seem prudent for USCIS to expand its use of DNA testing, not only to protect the public but to reduce errors and speed benefit adjudication. Streamlining the process can greatly reduce the costs of DNA testing. Various legal, economic and operational issues must be resolved before DNA technology can be implemented within the immigration process.

**Analysis:** This comprehensive approach would benefit the following areas:

**Combat Fraud and Human Trafficking** – In addition to the usual family relationship fraud to help people come to the United States, at times children are petitioned for by persons who are bringing them here as sex slaves or household slaves. In some countries children are kidnapped from their biological parents and sold for adoption. A recent article highlighted the case of an infant kidnapped from her mother at gunpoint in Guatemala. The mother spotted her child 14 months later, right before she was to be adopted by an American couple. DNA tests proved the relationship.

**Combat Crime** – Most applicants for immigration benefits pay a biometric fee and appear at an Application Support Center (ASC), if in the U.S., to provide their photograph, signature and fingerprints. Fingerprints are processed through FBI databases to detect past criminal behavior. Since DNA is sometimes found at crime scenes when fingerprint evidence is not, DNA testing could enhance this immigrant identification and screening process. Below are three examples of alien criminals who were eventually identified through DNA:

- **Angel Resendez:** Also known as the “railroad killer,” this Mexican national was believed to have killed at least 15 people in multiple states. He had numerous encounters with the law, had raped many of his victims, and his DNA was found at multiple crime scenes. If his DNA had been collected early on, many of the murders may have been prevented.
- **Deniz Aydiner:** This Turkish citizen brutally raped, murdered and tortured a young woman in her college dormitory. With no clear suspects, police took samples from approximately 500 males and finally identified Aydiner. He had married an American and sought permanent residency in the U.S. Since no fingerprints were left at the scene, the routine USCIS fingerprint checks would not have identified him as the perpetrator.
- **Jose Juan Garcia-Perlera:** A citizen of El Salvador, he has recently been charged with multiple home invasion robberies of elderly citizens in the Washington, D.C. area. His DNA was found at three of the crime scenes. His crimes escalated, and he murdered one of his last victims. Had his DNA been on file, he may have been caught prior to committing the murder.

The Federal Bureau of Investigation (FBI) oversees two important systems that manage DNA profiles. The Combined DNA Index System (CODIS) is the computer software program used by

federal, state and local agencies to compare DNA profiles electronically. It compares data collected from unsolved crime scenes to samples taken from criminals, and it compares DNA samples from unidentified victims to DNA data that has been provided as a reference by relatives of missing persons. The National DNA Index System (NDIS) is the database that stores the information that feeds into the CODIS system. NDIS is searched on a weekly basis to reveal any matches. All matches are automatically returned to the lab that submitted the DNA profile. The same version of CODIS software is used by all state, local and federal laboratories. Match information is communicated on a secure intranet site, the FBI's Criminal Justice Information Service-Wide Area Network (CJIS-WAN). The FBI provides CODIS software to all public forensic laboratories at no cost. There are currently nearly seven million DNA profiles in NDIS.

Combat Terrorism - In addition to screening for crimes, it may be possible to screen for terrorism. The U.S. Department of Defense has DNA profiles of 80,000 terrorists in their database, and Interpol has 85,000 DNA profiles in their database.

Support Comprehensive Immigration Reform - It is likely just a matter of time before Congress passes some type of immigration reform. How encompassing that legislation will be is yet to be determined, but it will likely involve some way to legitimize millions of illegal aliens. In 2008, the Department of Justice issued a proposed rule and a final rule that expands the requirements for collection of DNA samples to include "non-United States persons who are detained under the authority of the United States." It said "the collection of DNA samples may be limited to individuals from whom an agency collects fingerprints." The samples are to be entered into the FBI's Combined DNA Index System (CODIS). Since all illegal aliens could, in theory, be detained by DHS agents because of their illegal status, there might be arguments for mandating collection of DNA samples in the context of an amnesty as well. Although there would be a host of legal and policy issues to address in such a scenario, it warrants consideration. Downloading DNA profiles into CODIS could enhance the security check processes that are already in place and ensure that we don't grant amnesty to persons who have committed crimes while living illegally in the United States. It could also ensure that only legitimate relatives of program beneficiaries are granted derivative benefits.

Aid Transformation - USCIS recently began a five-year, nearly \$500 million transformation project intended to speed benefits determination, combat identity fraud, and reduce backlogs by moving from paper-based to electronic processing. Requiring DNA testing to provide an initial personal identifier that works even for infants, as well as primary evidence of biological relationships, would enable USCIS to move toward true electronic petition filing for some petition types. On-line filing would automatically prompt biometric appointment notices, which would include DNA testing. DNA comparisons from those appointments would, in many cases, enable adjudication of the petition without the need for submission of birth certificates, marriage certificates or any secondary evidence, such as baptismal records, school records, or sworn affidavits, all of which can be forged.

Enable USCIS to meet goals and objectives outlined in the *USCIS Strategic Plan 2008-2012* - Goal #1 is to "Strengthen the security and integrity of the immigration system." Objective 1.1 is to enhance the security of the U.S. by granting immigration benefits only to eligible applicants and petitioners. Objective 1.2 is to deter, detect and pursue immigration-related fraud. Part of this objective involves information sharing between USCIS and other law enforcement and intelligence agencies to address national security and public safety concerns involving applicants for U.S.

immigration benefits. Also, this objective calls for a system that “allows for efficient policy and procedural changes when a systemic vulnerability or widespread fraud activity has been detected.” Objective 1.3 is to identify and share immigration-related information with partners, and Objective 1.4 is to integrate security precepts with immigration adjudication processes.

**Option #1:** Draft regulations and develop MOUs to enable USCIS to implement DNA testing to establish identity and protect against fraud, human smuggling, crime and terrorism. Streamline the process by incorporating the costs of DNA testing in the biometric fee, with DNA samples collected at the time of biometric capture.

USCIS would publish a Notice of Proposed Rulemaking (NPRM) in the Federal Register and invite public comment on recommendations to enable diffusion of DNA technology in the immigration context. Once comments are received and evaluated, USCIS would publish a final rule. The rule would propose that DNA evidence be used not only to prove qualifying family relationships but also to help determine admissibility to the United States, removability where appropriate and eligibility for other benefits, such as naturalization. In order for DNA profiles to be downloaded to NDIS we must be able to demonstrate a law enforcement purpose, and agreement must be reached with DOJ on that issue. USCIS would use CODIS to verify claimed family relationships. On-line filing would automatically prompt biometric appointment notices and DNA would be captured at USCIS Application Support Centers (ASCs) or at U.S. consulates abroad. Agreement would also have to be reached with DOS to assist in biometrics capture, or we may want to explore expansion of ASC responsibilities overseas. The estimated costs of less than \$40 per person would be incorporated into the biometric fee or, if USCIS is planning to eliminate the biometric fee, it would be incorporated into the cost of the application or petition. Since DNA would be obtained at the same time as photographs and fingerprints, if a person already has his or her DNA on file with USCIS, additional DNA samples from the petitioner would not be necessary should that person later petition for other family members.

DNA collection may create controversy, and it is important that USCIS procedures conform to privacy laws. Of the nearly 200 Constitutional challenges to DNA collection, none has ultimately been successful so far; the courts have likened DNA collection and storage to fingerprint collection and storage, which has become routine. Already, USCIS collects fingerprints and runs them through nationwide databases to locate criminal records. The current guidance on safeguarding fingerprints and other personal information may suffice in dealing with protection of DNA data, but additional safeguards could be implemented if necessary. The FBI’s method of creating DNA profiles, using 13 core loci, positively identifies the individual without disclosing his or her traits, disorders or dispositions. The design and legal rules of CODIS allow for law enforcement identification but prevent the unauthorized use of DNA profiles. Many issues would need to be worked out with DOS and DOJ prior to implementation. The rule should provide USCIS with the flexibility to allow for gradual implementation. It is imperative that the entire process remain transparent and that the preamble fully explains the reasons for the testing and the proposed uses of the DNA collected.

**Budget Implications:** Initial investments would be required to establish a DNA database to manage the DNA profiles and to contract with a lab to perform the analysis. USCIS would need to hire a geneticist to develop protocols and checklists indicating who must be tested and for what relationships, and to confirm matches. Technicians must be trained, collection kits ordered, and a

system established for overseas testing and transmission of samples. If USCIS collaborates with the FBI, the FBI will provide the CODIS program free of charge, which USCIS can use to match samples and determine relationships. Costs for DNA testing have historically been a significant barrier, with the first family member costing up to \$1,000 and additional family members up to \$500 each. This is a heavy burden for most immigrant families. However, with streamlining, we could bring our costs to within the range that was estimated in 2008 by the DOJ -- \$37.50 per sample collection and analysis. Implementation of DNA testing would save money in the long run, not only for USCIS, but for our customers, because it would reduce the need to mail documents, review evidence, issue RFEs, and conduct lengthy fraud interviews. In refugee processing alone, it could save hundreds of thousands to millions of dollars every year in travel and processing costs by USCIS and DOS. Its fraud deterrent effects could result in a large decrease in the number of fraudulent petitions, some of which (such as the I-730) require no fee, but use USCIS resources.

**Pros:**

- Provide a valuable personal identifier, even for infants
- Establish biological relationships without a doubt
- Reduce the need to submit documents
- Allow for increased electronic filing
- Allow USCIS to maintain more control over the chain of custody
- Enhance security checks
- Deter fraudulent petitions
- Free up resources for legitimate applicants
- Detect crime and terrorism
- Deter future criminal acts
- Enable law enforcement to solve more crimes
- Promote information sharing
- Decrease costs of DNA testing considerably

**Cons:**

- Privacy concerns
- Will not solve all immigration relationship issues
- May be “surprises”
- Increased costs to all applicants, at least initially

Flow chart for Option #1 is attached at the end of this document.

**Option #2:** Draft a regulation amending 8 CFR to allow USCIS to require DNA testing to establish identity and prove biological relationships, but do not share DNA results with the FBI. Streamline the process by incorporating the costs of DNA testing in the biometric or other fees, with DNA samples collected at the time of biometric capture. Develop MOUs with DOS to capture DNA overseas or explore ASC expansion. DNA testing would not be used to screen for terrorism or other crimes.

**Budget Implications:** Same as above, except that USCIS may not be given CODIS for free, so would have to purchase a software system to complete the matches.

**Pros:**

- Provide a valuable personal identifier, even for infants
- Establish biological relationships without a doubt
- Reduce the need to submit documents
- Allow for increased electronic filing
- Allow USCIS to maintain more control over the chain of custody
- Deter fraudulent petitions
- Free up resources for legitimate applicants
- Decrease costs of DNA testing considerably

**Cons:**

- Will not solve all immigration relationship issues
- May be surprises
- Will waste opportunity to enhance security checks
- Will waste opportunity for information sharing
- Increased costs to all applicants, at least initially

**Option #3:** At a minimum, USCIS should draft regulations to revise 8 CFR 204.2(d)(vi) to eliminate the reference to blood tests and instead allow USCIS to require DNA testing. Applicants and petitioners would work directly with an AABB-accredited laboratory to arrange and pay for DNA testing. USCIS would collaborate with DOS to improve the current process, in order to gain more control over the transmittal and storage of results, chain of custody and other issues related to the integrity of the testing.

**Budget Implications:** The heavy cost burden would continue to be on individual applicants and petitioners who often cannot afford the hundreds of dollars required for DNA testing through private labs. No time will be saved at the onset, as petitioners will have to wait for an RFE before proceeding with DNA testing. USCIS will not have to expend funds on test kits or transportation of samples, but may consider creating databases to better manage transmission of results. USCIS would need to hire or contract with a geneticist to establish protocols and checklists.

**Pros:**

- Establish family relationships with a little more certainty when fraud is suspected or other evidence is inconclusive
- Deter fraudulent petitions

**Cons:**

- May be surprises
- Costs will remain high, resulting in complaints from the public
- Will waste opportunity to create personal identifier
- Will waste opportunity to enhance security checks
- Will waste opportunity for information sharing
- DNA may have to be captured numerous times if numerous petitions are filed and fraud is suspected or other evidence is inconclusive
- Will not allow USCIS to maintain control over the chain of custody or integrity of the testing
- Will not allow streamlining or improved service

**DNA Testing in the Immigration Process**  
to detect and deter fraud, human trafficking, crime and terrorism  
and to provide immigration benefits with more ease and speed

