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OF THE
UNITED STATES OF AMERICA

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March 10, 2021

Chief Charles L. Nimick
Business and Foreign Workers Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland
20 Massachusetts Avenue, NW
Washington, DC 20259

Via electronic submission: www.regulations.gov

RE: Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions; Delay of Effective Date
86 Fed. Reg. 8543 (February 8, 2021)
RIN 1615-AC61

Dear Chief Nimick:

The U.S. Chamber of Commerce supports the decision by the Department of Homeland Security ("DHS" or "the Department") to delay the effective date of the final rule entitled "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions" to December 31, 2021. The Chamber is extremely concerned that this rule would have a profoundly negative impact on the business community. The Chamber hopes that the delay in this rule's effective date will provide DHS with the opportunity to adequately review this rule and determine that the arbitrary and capricious changes made to the H-1B program should be abandoned.

The rule's provisions drastically alter the H-1B registration selection process in a manner that is inconsistent with the statutory text governing the operation of the H-1B program. This rule would significantly hinder the ability of companies across a host of industries to meet their workforce needs. Policies that disrupt the long-term workforce planning decisions of companies will have the effects of limiting business expansion, economic growth, and job creation in the U.S. As such, we implore DHS to abandon this rule. Should DHS desire to pursue a new formal rulemaking effort on this issue, we strongly urge the Department to do so in a much more methodical, deliberative fashion that provides stakeholders with more opportunities to provide input to USCIS prior to the commencement of the formal rulemaking process.

THIS WAGE PRIORITIZATION SCHEME IS STATUTORILY IMPERMISSIBLE

In designing how the H-1B program should be administered by the executive branch, Congress created clear parameters for how cap-subject H-1B visas should be awarded in a given fiscal year. The Immigration and Nationality Act established various parameters, including an annual quota for new H-1B recipients, certain enumerated exemptions to said annual quota, and most importantly how U.S. Citizenship and Immigration Services (hereinafter "USCIS") should prioritize the issuance of these cap-subject H-1B visas.[1] The statutory annual cap-subject H-1B quota is set at 65,000 visas, with another 20,000 visas allocated for qualifying individuals who are covered by the U.S. advanced degree exemption, for a total of 85,000 new H-1B recipients each fiscal year.[2] With regard to how H-1B visas are issued to prospective beneficiaries who are subject to the 65,000 annual quota, Congress specifically stated that aliens "who are subjected to the numerical limitations…shall be issued visas (or otherwise provided nonimmigrant status)…in the order in which petitions are filed for such visas or status.[3]

In using the term "shall," Congress emphasized that this requirement was not subject to the discretion of the Secretary or any other Department official. The statute does not authorize the Department to use *any* other basis for selecting foreign nationals who will receive visas subject to the annual quota. This point is critical, as companies fiercely compete for these visas for their workers every fiscal year. The data bear this out, as DHS noted in its proposal that it is a common occurrence for the amount of cap-subject H-1B petitions sought by American employers to be significantly higher than the number of visas supplied under the statute.[4]

The final rule completely ignores the governing statutory text, as it seeks to replace this purely procedural rule based on when petitions are filed. In doing so, USCIS claims the authority to select among the requests for H-1B visas based on its assessment of the relative *substantive* merit of the aliens who would receive the visas. USCIS justifies this significant policy change due to its stated preference that cap-subject H-1B visas should be granted to individuals who are the most skilled and highest paid H-1B workers.[5] In the view of DHS, individuals earning the highest wages relative to their Standard Occupational Classification code and area(s) of intended employment should be given priority with respect to the allocation of cap-subject H-1B visas because the Department believes that one's salary is a reasonable proxy for skill level in a given field of employment.[6]

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[1] See Immigration and Nationality Act §214(g), 8 U.S.C. § 1184(g).
[2] INA §214(g)(1)(A)(vii) specifically states that the annual quota since Fiscal Year 2003 has been set at 65,000, notwithstanding the master's degree exemption at INA §214(g)(5)(C); see both 8 U.S.C. §1184(g)(1)(A)(vii) and 8 U.S.C. §1184(g)(5)(C).
[3] INA §215(g)(3); 8 U.S.C. §1184(g)(3).
[4] See 85 Fed. Reg. 69236, 69239 (Nov. 2, 2020), where USCIS notes that in every fiscal year since FY 2011, the amount of cap-subject H-1B petitions filed by employers, including those for the filed for the advanced degree exemption, has exceeded the annual H-1B numerical allocations.
[5] See 85 Fed. Reg. 69236. 69237 (Nov. 2, 2020) and Executive Order 13788, *Buy American and Hire American*, 82 Fed. Reg. 18837, §5(b) (Apr. 18, 2017).
[6] 85 Fed. Reg. 69236, 69239 (Nov. 2, 2020).

Reasonable minds can disagree as to what the optimal policy would be with respect to the issuance of cap-subject H-1B visas. However, the executive branch is bound by the terms that Congress created for the program's administration if it wants to make regulatory changes to a federal program. USCIS cannot craft the new conditions governing the issuance of cap-subject H-1B visas that it seeks to impose through this proposal. In fact, when DHS finalized the implementation of the H-1B Registration system, the Department expressed its view that prioritizing registration selection on other factors, such as salary, would require statutory changes.[7] The statute governing the issuance of H-1B visas has not changed since DHS made those public statements, but DHS now desires to rank and select H-1B registrations based upon the wage level being offered to the putative H-1B beneficiary.[8] That ranking and selection process would give priority to "the highest OES wage level that the proffered wage would equal or exceed . . . , beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I."[9] It is our view that if DHS wants to finalize this proposal and make these types of substantive changes to the H-1B, the only way they may do so legally is if Congress passes legislation providing them with the authority to effectuate these changes.

Similarly, the proposal's insistence on a wage-based "ranking and selection" process for the 20,000 visas subject to the advanced degree exemption is contrary to the plain language of the provisions governing the exemption's operation. When Congress created the advanced degree exemption, it set forth its own priorities regarding how it wanted the executive branch to adjudicate H-1B petitions by providing special treatment for a subset of putative H-1B beneficiaries.[10] The existence of this exemption in the INA proves that Congress can exercise its authority over immigration matters to implement preferences for certain subcategories of H-1B nonimmigrants. The exemption created by Congress made more H-1B visas available for individuals with advanced degrees from U.S. universities, but USCIS would adjudicate this subset of H-1B visa petitions based upon when those petitions were filed.

The final rule, with its new criteria designed to provide more favorable treatment for a select group of potential H-1B recipients seeking visas under with advanced degree exemption, creates new agency priorities governing the adjudication of H-1B petitions for this subset of potential H-1B recipients based upon the wages they would be paid. These new wage-based priorities are inconsistent with the statutory text. By supplanting the temporal filing considerations that Congress chose to implement statutorily with this new wage methodology, DHS and USCIS are trying to substitute their judgment for Congress' judgment, which they simply cannot do. This rule clearly strikes a different policy balance than what Congress did when it created the advanced degree exemption. DHS does not possess the authority to rewrite the statutory text in the INA that governs this process.

[7] See 85 Fed. Reg. 69236, 69244 (Nov. 2, 2020), and 84 Fed. Reg. 888, 913 (Jan. 31, 2019).
[8] 85 Fed. Reg. 69236, 69263 (Nov. 2, 2020).
[9] 85 Fed. Reg. 69236, 69237 (Nov. 2, 2020).
[10] 8 U.S.C. §1184(g)(5).

Related to these concerns are the issues several employers have regarding the changes that DHS made to the relationship between the adjudication of the visas provided under the advanced degree exemption and the general H-1B quota of 65,000. The Chamber highlighted these concerns in our 2019 comments when DHS created the H-1B Registration System, and those concerns bear repeating, as this move remains statutorily suspect in the view of many Chamber members.

The Chamber remains concerned that the provisions in this rule adjusting the adjudication order of the regular cap and the advanced degree exemption conflict with the statutory provisions governing the issuance of H-1B visas under the Immigration and Nationality Act (INA). The INA is clear that the numerical limitations governing the 65,000 visas allotted under the regular H-1B cap shall not apply to anyone who qualified under the advanced degree exemption until the number of aliens who are exempted from the regular cap's numerical limitations during a given fiscal year exceeds 20,000.[11] If the H-1B regular cap cannot apply to someone qualifying under the advanced degree exemption until 20,000 individuals have been chosen to be exempted from the cap, the language of the statute would appear to require that the allotment of the visas, and in the case of the H-1B registration program, the approval of the registrations, must be conducted for the advanced degree exemption first before the approval of registrations for the regular cap.

DHS did not revisit this issue in its initial proposal, thus leaving intact the process whereby USCIS adjudicates the 65,000 visas in the annual H-1B quota prior to adjudicating the 20,000 visas under the advanced degree exemption. The Chamber believes that this arrangement presents a legal vulnerability to the agency's rules governing the operation of the H-1B registration system. If DHS wants to ensure that its rules governing its registration program are on solid legal ground, then it should abandon both its wage prioritization scheme and the reversal of the adjudications process between the general H-1B quota and the advanced degree exemption.

THIS PROPOSAL WOULD CAUSE SIGNIFICANT WORKFORCE DISRUPTIONS

This rule has many companies very concerned about their business's continued ability to meet their workforce needs moving forward. DHS stated that it believed a worker's salary is a good proxy for that worker's skill, which forms the Department's justification for using the OES wage level that corresponds with the potential H-1B worker's salary to ensure that the most skilled or highest paid workers come into the country on the H-1B program.[12]

Many companies are specifically concerned about this proposal's impact on their business's continued ability to hire foreign national professionals that are beginning their careers in America. These firms worry that this H-1B wage prioritization proposal would all but foreclose their ability to hire the people they need to expand their businesses, increase productivity, undertake important research and development initiatives, and create more jobs in

[11] INA § 214(g)(5)(C); 8 U.S.C. §1184(g)(5)(C).
[12] 85 Fed. Reg 69236, 69239 (Nov. 2, 2020).

the U.S. Various Chamber members, whether they are technology companies, financial services firms, pharmaceutical companies, heavy equipment manufacturers, among others, hire a significant amount of foreign nationals that graduate from U.S. universities, oftentimes with advanced degrees. Cutting off this source of talent would be incredibly disruptive to the operations of many American companies.

Several companies informed me that many of their key workers on their critical R&D initiatives are younger workers who are extremely bright and promising employees, but they have very little professional work experience at the time they were hired. As such, these workers are paid wages that are commensurate with their skills and work experience at OES Wage Level I or II. Many of the individuals that will be critical to these company's future R&D efforts would be harmed by these new wage requirements, particularly since this new methodology for awarding visas would apply to both the 65,000 visas awarded the H-1B program's general fiscal year quota and the 20,000 visas provided under the advanced degree exemption. In fact, the Department's proposal would actively undermine the goal's set by Congress when they provided an additional 20,000 H-1B visas for graduate-level degree holders from U.S. universities, as the rule creates new conditions for obtaining these H-1B visas that Congress never contemplated.

Similarly, other Chamber members, particularly those stakeholders in the healthcare industry, are very concerned about the impact this rule change would have on their ability to continue hiring foreign medical graduates on H-1B visas. Many of these young physicians are critical for healthcare providers to meet the needs of their patients, especially for those doctors that are serving rural and other medically underserved areas in the U.S. The disruptions caused by incorporating this wage prioritization proposal into the H-1B registration process would be profound on these employers.

Many Chamber members have been emphatic in expressing their views to us that using the OES wage levels at which a prospective H-1B employee is being paid is an inadequate proxy for the worker's skill level. To that end, many companies insist that the use of the OES wage level is also a poor proxy for how much an employer values/needs the contributions of that worker at their business. Using these wages levels as skill proxies is imperfect for many reasons, but the Labor Department's guidance on this issue is instructive, as the DOL guidance lays out that these wage levels are utilized to evaluate not just the worker's skill, but their education, their experience, any special skills, occupational licenses, supervisory duties, among other factors associated with the worker's employment at the company.[13]

Given the multi-factor analysis underpinning the wage level associated with the worker, the higher wage level workers that DHS and USCIS insist will be best for the country would likely capture workers with more experience and seniority in their work history, but American

[13] Employment and Training Administration Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs, Revised November 2009, available at https://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf, (accessed December 1, 2020).

employers value professionals at all skill levels with varying levels of education, work experience, and other skills that an employer values. This wage prioritization scheme would result in the federal government meddling in the workforce planning decisions of many American employers, with the federal government substituting its judgment for companies need in place of the business judgment of an employer that is competing in the marketplace. This example of government heavy-handedness is one of many immigration regulations that is front of mind for many employers, as the prospective difficulties in meeting their workforce needs has many companies revisit their long-term development and investment plans in the U.S. Given the problems this rule creates for many American companies, the Department should abandon this approach.

CONCLUSION

Businesses across multiple sectors of the U.S. economy are extremely concerned about the operational disruptions their companies would confront should this rule go into effect. The Chamber greatly appreciates DHS delaying the effective date of this rule thorough the end of the current calendar year. We urge the Department to abandon the approach taken by the prior administration in this rule. Should DHS desire to continue working on regulations that address this issue, we implore the Department to work with interested stakeholders by either issuing a Request for Information or an Advance Notice of Proposed Rulemaking before embarking upon the formal rulemaking processing. This would provide interested stakeholders with a sufficient amount of time to provide the Department with data and opportunities for meetings to help inform DHS and USCIS as to what type of regulatory/administrative changes could help the Department achieve its policy objectives without causing an undue amount of uncertainty and disruption for American businesses that rely upon the H-1B program to meet their company's workforce needs.

Thank you for considering our views.

Sincerely,

Jonathan Baselice
Executive Director, Immigration Policy
U.S. Chamber of Commerce