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By electronic submission: www.regulations.gov

RE: Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens
83 Fed. Reg. 62406 (December 3, 2018)
RIN 1615-AB71

Dear Chief Deshommes:

The U.S. Chamber of Commerce submits the following comments with regard to the Notice of Proposed Rulemaking entitled *Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens,* 83 Fed. Reg. 62406 (December 3, 2018) (hereinafter referred to as "NPRM," or "proposal").

The Chamber appreciates the stated desire of U.S. Citizenship and Immigration Services (hereinafter "USCIS") to institute reforms that would make the application process for cap-subject H-1B petitions more efficient and less costly for employers by providing more electronic-based processing for filing petitions. Unfortunately, Chamber members have serious concerns with regard to several aspects of this proposal. These concerns include not only specific provisions contained within the NPRM that would increase the administrative burden on businesses, but the agency's suggested timeline for implementation as well. As proposed, this new registration system will likely increase the costs that employers must bear to utilize the H-1B program. Furthermore, the uncertainty associated with several suggested changes to the system could make the H-1B petition process more onerous and less efficient than it currently is today.

Chamber members were extremely frustrated by the short 30-day comment period provided by the agency to comment on the proposal. Their frustrations only grew with the lack of any formal response to our request, as well as the requests of many other groups, to extend the public comment period. Extending the comment period would have provided stakeholders with

an opportunity to provide the agency with data and information that called into question the assumptions and assertions made by USCIS in this proposal.

It remains unclear as to whether USCIS intends to implement this rule for the FY20 H-1B cap season, which begins on April 1, 2019. If USCIS does intend to implement this rule in short order, the increased uncertainty for H-1B employers of all sizes and in various industries will cause significant disruptions to every business that utilizes the H-1B program to meet their workforce needs. The apparent haste of USCIS to finalize this rule before this April's H-1B cap season is all but certain to jeopardize the ability of American companies to acquire the talent they need to innovate, expand their operations, create jobs, and compete in the global economy.

The Chamber implores the agency to not move forward with implementing this rule before the FY21 cap season. Not only do our members have several substantive concerns with the NPRM, but the Chamber believes that a hasty finalization and implementation of this registration system will cause USCIS to run afoul of its regulatory obligations under the Paperwork Reduction Act and the Administrative Procedure Act. Furthermore, the Chamber is concerned certain provisions of this proposal might be in excess of USCIS's statutory authority under the Immigration and Nationality Act. Our concerns are described below in due course.

PAPERWORK REDUCTION ACT AND ADMINISTRATIVE PROCEDURE ACT PRECLUDE IMPLEMENTATION OF THE PROPOSAL FOR THE FY20 H-1B CAP SEASON

There is Insufficient Time to Implement the Proposal Prior to the FY20 H-1B Cap Season

The H-1B registration proposal includes several information collection components that are subject to the Paperwork Reduction Act (PRA). These include the new H-1B registration tool being implemented by USCIS, revisions to USCIS's Identity and Credentialing Access Management (ICAM) system, and to USCIS Form I-129 and USCIS Form G-28.[1] Given that the agency must comply with the notice and comment requirements under the PRA with regard to these four components, it effectively precludes the agency from implementing this new registration requirement before the start of the FY20 H-1B cap season on April 1, 2019.

With regard to each information collection component included in the proposal, the agency expressly stated that comments on the information collections will be accepted for **60 days** from the publication of date of the proposed rule, with the comment period ending on February 1, 2019. More importantly, the PRA requires that the agency, after providing this initial 60 day comment period with regard to the aforementioned information collection changes, must review all of the public comments received on all of the proposed new/revised information collections associated with this proposal. Once that review process is completed, the agency must submit their final paperwork burden analysis on all of the proposed information collections contained in the NPRM to the Office of Management and Budget (OMB) and, pursuant to the PRA, USCIS must publish another notice in the Federal Register that provides stakeholders with an **additional 30 day** public comment period.

[1] See 83 Fed. Reg. 62406, 62442-62444 (Dec. 3, 2018).

When comments are received for the proposed information collections at the end of the final 30 day public comment period, they must be reviewed and considered before they can be implemented as part of the final regulation that would create the proposed H-1B registration process. The Administrative Procedure Act (APA) requires that a final rule cannot go into effect until **30 days** have passed since its publication in the Federal Register.[2]

Adding all of these aforementioned time periods together equals 120 days, which is the exact amount of days between December 3, 2018 and April 1, 2019, with April 1 being the first day upon which cap-subject H-1B petitions can be filed with USCIS. Given that the current proposal envisions a registration system where the registration period would begin "at least fourteen calendar days before the first day of filing in each fiscal year," and that "USCIS would give the public at least 30 days advance notice of the opening of the initial registration period for the upcoming fiscal year via the USCIS website,"[3] the only way this new system, as proposed, could be operational for the FY20 H-1B Cap season is if the final regulation went into effect on February 15, 2019.

It is legally impossible for USCIS to compress a timeline that will include, at the very least, 120 days to comply with statutorily authorized requirements, into a 74 day time period between December 3, 2018, and February 15, 2019. If USCIS attempted to do so, the agency would be violating its obligations under the PRA and the APA. Moreover, even if the agency sought to complete all of these required processes under the PRA and APA within 120 days, the agency would still run afoul of its obligations under the PRA and APA because the agency could not complete the multiple notice-and-comment procedures required under those statutes in a manner where the agency thoughtfully considers the comments submitted to it by the regulated community. As such, USCIS should issue a formal, public statement that it will not move forward with implementing this registration requirement for the FY20 H-1B cap season.

USCIS Has Failed to Properly Apprise the Regulated Community of the New Paperwork Burdens Being Considered in its Proposal

In order for the regulated community to provide USCIS with meaningful comments on the new paperwork burdens being considered in the NPRM, USCIS has to provide the public with adequate supporting documentation that objectively lays out what these new information collections will fully entail for stakeholders. As of today, no such documentation has been provided by the agency to the public on the new USCIS H-1B Registration Tool, the proposed changes to USCIS Form I-129, the proposed changes to USCIS Form G-28, or the proposed changes to the USCIS Identity and Credentialing Management (ICAM) System.

In comparing this current proposal with USCIS's prior effort in 2011 to consider an H-1B registration system,[4] the agency provided the public with the supporting documentation to illustrate to stakeholders what information the government would require from putative H-1B petitioners the day after the proposal was published in the Federal Register. One might posit that the agency's position is that the supporting documentation released in the 2011 NPRM

[2] 5 U.S.C. §553(d).
[3] 83 Fed. Reg. 62406, 62413 (Dec. 3, 2018).
[4] 76 Fed. Reg. 11686 (Mar. 3, 2011).

constitutes the requisite notice for the new information collections proposed in the 2018 NPRM and the agency is not required to provide new supplemental information for the 2018 NPRM. That logic is flawed for multiple reasons and the agency must provide stakeholders with the information to adequately assess their new burdens under these new and revised information collections in order to provide meaningful comments to USCIS. If USCIS fails to provide stakeholders with the necessary information, the agency will not be in compliance with its obligations under the PRA and the APA to provide an adequate description of the issues USCIS is contemplating in the NPRM.

First, the 2011 NPRM only proposed a new electronic registration system as its new information collection.[5] In the current NPRM, there is not only a new electronic registration system being proposed for the H-1B program; there are revisions to the Form I-129, the Form G-28, and the USCIS ICAM.[6] There is no reasonable argument to be made that the supporting documentation for an electronic registration system proposed seven years ago could be construed to also cover proposed changes to the information collections covered under two USCIS immigration forms and the USCIS ICAM. USCIS has to rectify this by providing new supplementary documents to the public that covers all four of these proposed information collections covered under its current proposal.

Second, in comparing the information to be collected under the registration system proposed in the 2018 NPRM and the 2011 proposal, the current proposal explicitly states that the information collected under the 2018 registration system will ask for two specific items not enumerated under the 2011 proposal. These two items are 1) if the beneficiary obtained a Master's degree of higher from a U.S. institution of higher education and 2) the employer's attorney or accredited representative.[7] The supporting materials for the 2011 NPRM that are available on regulations.gov website, namely the three screen shots of the prior registration proposal provided to the public in March 2011,[8] do not contain any reference to an employer's attorney/accredited representative, or the Form G-28 designating that individual in either of those capacities. In short, the regulated community has not been provided with any insight by the federal government as to how this information would be collected under this registration system. USCIS must remedy this problem by providing stakeholders with this information before it moves forward with rulemaking process.

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[5] 76 Fed. Reg 11686, 11697 (Mar. 3, 2011).
[6] 83 Fed. Reg. 62406, 62414 (Dec. 3, 2018).
[7] *Compare* 83 Fed. Reg. 62406, 62414 (Dec. 3, 2018) *with* 76 Fed. Reg. 11686, 11689 (Mar. 3, 2011). The latter NPRM asked for 1) the employer's name, employer identification number, and employer's mailing address; 2) the authorized representative's name, job title, and contact information (telephone number and email address); 3) the beneficiary's full name, date of birth, country of birth, country of citizenship, gender and passport number; and 4) any additional information requested by the registration or USCIS. These four information requests are almost identical to the other four information requests included in the 2018 NPRM.
[8] H-1B Screenshots 1, 2, and 3. Supplemental Materials for *Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to the Numerical Limitations*, 76 Fed. Reg. 11686 (Mar. 3, 2011). Retrieved on January 2, 2019 from http://www.regulations.gov, at https://www.regulations.gov/document?D=USCIS-2008-0014-0004, https://www.regulations.gov/document?D=USCIS-2008-0014-0005, and https://www.regulations.gov/document?D=USCIS-2008-0014-0006.

Lastly, regarding the information request as to whether a potential H-1B beneficiary has received a Master's degree from a U.S. institution of higher education, the 2011 supplemental materials do include a differentiation between the 65,000 visas allotted under the H-1B regular cap and the 20,000 H-1B visas provided under the advanced degree exemption.[9] However, these materials still cannot be reasonably interpreted to provide the public with the critical information they need to assess what their new requirements will be under this new registration process, let alone provide them with the opportunity to provide meaningful comments to the agency on this point. The 2011 materials clearly indicate that the selection to be made on the "Edit Beneficiary Registration" page refers to a specific "H-1B Category," or "pool," that must be checked by the employer's registrant. This would indicate to USCIS whether the potential H-1B recipient will be seeking admission under the "regular" registration pool for the 65,000 lottery or the "Master's degree" registration pool for the 20,000 visa exemption.[10]

This differentiation of "pools" devised in 2011 is inconsistent with the 2018 NPRM because the new proposal changed how these visa petitions would be awarded by reversing the order of adjudication between the 20,000 advanced degree exemption and the 65,000 regular cap. The 2018 NPRM's approach places all these applications, regardless of the potential beneficiary's possession of a U.S. graduate degree, into the "same pool" at the beginning of the adjudication process under the proposed registration system. Even with the prior supplemental materials that address the distinction between applicants who possess a U.S. Master's degree (or above) and those who do not, USCIS cannot reasonably rely on these seven year old documents to provide the regulated community with the information they need to properly assess their new regulatory burdens and provide the agency with meaningful comments to that effect.

To resolve these predicaments, USCIS needs to provide stakeholders with updated supplemental documentation and information concerning the 2018 NPRM so that the public has the necessary information to make informed judgments on the proposal and provide feedback to the agency during the public comment period. Since USCIS has not provided this information to the public as of today, once they compile this information with regard to the four information collections associated with its proposal, they must issue a new notice in the Federal Register, provide the public with access to these documents, and provide a new 60 day comment period with regard to these information collections in order for the agency to meet its requirements under the PRA and the APA.

[9] H-1B Screen Shot 2, Supplemental Materials for *Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to the Numerical Limitations*, 76 Fed. Reg. 11686 (Mar. 3, 2011). Retrieved on January 2, 2019 from http://www.regulations.gov, at https://www.regulations.gov/document?D=USCIS-2008-0014-0005.
[10] Id.

CONCERNS REGARDING THE PROPOSED MODIFICATION TO THE SELECTION PROCESS FOR NUMERICALLY LIMITED H-1B PETITIONS

USCIS Might Not Possess the Statutory Authority to Reverse the Adjudication of the Visas Allotted Under the Advanced Degree Exemption with the Regular Cap

The Chamber appreciates USCIS's goal to allocate more cap-subject H-1B visas to individuals who possess higher levels of education and individuals who earned their educational credentials at U.S. colleges and universities.[11] As a policy matter, the Chamber supports various measures to provide more opportunities to international students that graduate from U.S. universities to stay in the U.S. after graduation, work here, and contribute to our nation's economic well-being. However, the Chamber is concerned that the approach utilized in this NPRM to accomplish that goal is in excess of USCIS's statutory authority.

Currently, there are 65,000 H-1B visas that are awarded under the H-1B cap allocation. There is also exemption for 20,000 individuals who have earned a Master's degree or higher from a U.S. college or university, which is commonly referred to as the advanced degree exemption. The existing process that USCIS utilizes to issue these 85,000 visas every fiscal year is to allocate the 20,000 visas associated with the advanced degree exemption first, followed by the awarding of the visas under the 65,000 regular cap.

The NPRM would reverse how these two groups of H-1B visas are allocated. In crafting its proposed registration system, all potential applicants for numerically-limited H-1Bs in a given fiscal year (including both the regular cap and the advanced degree exemption) would register for the opportunity to file their petition with USCIS. If that potential H-1B recipient's registration is approved, they will be allowed to file their petition. However, all potential H-1B beneficiaries would first be counted against the 65,000 H-1B Regular cap, even those applicants who possess a Master's degree (or above) from a U.S. institution of higher education and are eligible for the advanced degree exemption.[12] If the number of registrations is such that the 65,000 visas allotted under the regular cap are likely to be met once the completed H-1B petitions are filed with USCIS, then USCIS would select from the remaining registrations who possess a U.S. Master's degree to exhaust the 20,000 advanced degree exemption.[13]

The Chamber is concerned that the provisions in the proposal adjusting the order of the regular cap and the advanced degree exemption are in 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.[14] 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

[11] 83 Fed. Reg. 62406, 62408 (Dec. 3, 2018).
[12] 83 Fed. Reg. 62406, 62415 (Dec. 3, 2018).
[13] 83 Fed. Reg. 62406, 62415 (Dec. 3, 2018).
[14] INA § 214(g)(5)(C); 8 U.S.C. §1184(g)(5)(C).

the case of the NPRM, the approval of the registrations, must be conducted for the advanced degree exemption first before the approval of registrations for the regular cap.

Nothing in the NPRM is offered as a justification of the legal authority for the proposed changes in the counting of these two groups of numerically-limited H-1B visas. All that is offered by USCIS is a statement in the preamble that increasing the chances for beneficiaries with a Master's degree or higher from a U.S. institution of higher education would be selected under the 65,000 H-1B cap "…is generally consistent with congressional intent in enacting section 214(g)(5)(C) to prioritize these workers and the administration's goal to improve policies such that H-1B visas are more likely to be awarded to the most skilled and highest paid beneficiaries."[15] While reasonable minds can disagree as to what Congress intended to do with respect INA § 214(g)(5)(C), Congress' intentions are not nearly as important as what Congress did. What Congress did in crafting the 20,000 H-1B visa advanced degree exemption was create a means to ensure that a certain amount of individuals with advanced degrees from U.S. universities would be awarded H-1B visas each year. To accomplish that task, Congress, in our view, wanted those 20,000 individuals to be selected before the adjudication of the 65,000 H-1B visas under the regular cap. Nothing in that statutory text would indicate that Congress wanted those 20,000 individuals to be chosen after the regular cap count was adjudicated.

Having said all that, the Chamber is not completely foreclosing its opinion on the issue of whether this administrative action is consistent with the statutory text. However, USCIS must provide a more robust legal explanation to justify how its proposed changes to the counting of these visas is not only consistent with Congress' intentions, but also Congress' actions in creating §214(g)(5)(C) of the INA.

Practical Concerns Associated with Reversing the Order of Adjudication for the H-1B Regular Cap and the Advanced Degree Exemption

USCIS's proposal to adjudicate the H-1B cap prior to the advanced degree exemption is based on the premise that by providing more opportunities for individuals with advanced degrees from U.S. universities to be approved for H-1B visas in any given year, it will help further the administration's goal of ensuring that "H-1B visas are awarded to the most skilled or the highest paid beneficiaries."[16] While many would agree with the general notion that the more education one has received would translate into higher potential earning power, it does not stand to reason that admitting more individuals with U.S. advanced degrees will necessary achieve the agency's end of ensuring that the aggregate skill or pay level of all H-1B visa recipients will increase as well. In fact, the proposal provides no evidence to support its assumptions, and many of our members believe this proposal could be counterproductive in various ways.

The concern many of our members have with this proposal is that while it seeks to increase the number of H-1B recipients that possess a graduate level degree from a U.S. university, it does not account for other qualities of a potential H-1B beneficiary that heavily reflect a person's skill level or pay level. The two most common characteristics cited by our members that are not reflected in this proposal are 1) the potential H-1B beneficiary's prior work experience and 2) the field of study in which a potential H-1B beneficiary earned his/her degree.

[15] 83 Fed. Reg. 62406, 62408 (Dec. 3, 2018).
[16] 83 Fed. Reg. 62406, 62408 (Dec. 3, 2018).

These two factors directly influence both the skill level and the potential earning power of H-1B visa holders.

For example, it is not obvious to any of our members that an H-1B beneficiary who earned a Master's degree in Medieval History from a U.S. university will be more skilled or paid higher than an H-1B beneficiary with a Master's degree in Economics from the London School of Economics. Our members have similar reservations regarding whether the holder of the Master's degree in Medieval History would be more skilled or paid higher than an individual seeking an H-1B visa who possesses a Medical Doctorate (M.D.) from a foreign university. The agency provides no evidence to show how, in examples like this, the individual possessing the U.S. Master's degree would necessarily be more skilled or paid more than the individuals who do not possess the U.S. Master's degree.

In a related note, the proposal provides no evidence to show that an individual who just earned a Master's degree in Computer Science from a U.S. university would necessarily be more skilled or command a higher salary than an individual who earned a Bachelor's degree in Computer Science and possesses 10 years of work experience in cloud computing. If the aim of the agency is to truly award H-1B visas to the most skilled or the highest paid in line with the President's stated goal in E.O 13788,[17] the agency cannot focus on only one criterion to measure the potential skill level or earnings potential of a prospective H-1B visa recipient. The mere possession of any Master's degree from a U.S. university is a vastly suboptimal proxy for both skill level and earnings potential.

One specific area in which we have heard significant concerns on the impact of this rule is in the field of healthcare. The emphasis on trying to obtain more U.S. Master's degree holders has the potential to negatively impact the ability of non-U.S. citizen international medical graduates (IMGs) to be able to obtain H-1B visas and practice medicine in the U.S. Recent estimates show that the U.S. could see a physician shortage of up to 120,000 by the year 2030.[18] There are many non-U.S. citizen IMGs who did not earn their M.D. in the U.S. These doctors play a vital role in alleviating current physician shortages across the country, particularly in rural and other medically underserved areas of the country.

If USCIS continues to move forward with this proposal, it must, at the very least, provide evidence to substantiate its assertions that this change in the allocation of the H-1B regular cap and the advanced degree exemption will in fact raise the overall skill and pay levels of H-1B recipients. The current proposal fails to do so.

[17] See § 5(b), Exec. Order No. 13788, 82 Fed. Reg. 18837, 18839 (Apr. 18, 2017).
[18] See Press Release, Association of American Medical Colleges, *New Research Shows Increasing Physician Shortages in both Primary and Specialty Care*, (Apr. 11, 2018), https://news.aamc.org/press-releases/article/workforce_report_shortage_04112018/ (accessed Jan. 2, 2019).

SUBSTANTIVE CONCERNS WITH THE AGENCY'S PROPOSAL

Current Registration Time Constraints are Insufficient to Meet the Needs of Businesses

The proposed registration system consists of a multi-step process. The first step in that process is the initial registration period, which according to the proposal, will 1) be held for a period of at least 14 calendar days and 2) will commence at least 14 calendar days before H-1B cap subject petitions can be filed with USCIS.[19] During that 14 day period, employers are expected to file all of their registration applications to try and qualify for the ability to file the petitions for any of their registrations that are approved by USCIS. In the event that an employer receives an approval, they will be provided with a 60 day period within which to complete all of the necessary paperwork for the prospective H-1B beneficiary and file the petition.[20]

The Proposal's preamble states that USCIS would give the public at least 30 days advance notice of the opening of the initial registration period,[21] but no such notice requirement is set forth in the proposed regulatory text. The proposed regulatory text merely states that USCIS will announce the start and end dates of the initial registration period on its website.[22] The 30 day notice prior to the commencement of the initial registration period must be codified in the proposed 8 C.F.R. § 214.2(h)(8)(A)(3). Without the inclusion of this language, the agency could announce the initial registration on the day the agency would begin receiving registrations. This would not only be patently unfair to stakeholders, but the potential uncertainty and disruption this would cause for businesses both large and small could be profound. This potential concern can be easily ameliorated by adding in language that clarifies the agency's announcement regarding the initial registration period's commencement will be made no less than 30 days prior to the beginning of the initial registration period.

Chamber members strongly believe that the requirement to file a petition within a 60 day period determined by USCIS is an inadequate amount of time within which to complete all of the necessary tasks associated with compiling an H-1B petition. Many larger members of ours typically spend 4-6 months compiling all of the necessary information for their petitions they file under the current system. If USCIS insists on maintaining this 60 day window for submitting a petition, it will lead to negative consequences for businesses of all sizes.

Insisting on a 60 day time period to file a petition ensures that none of its expected cost savings to employers will materialize, as employers will need to continue doing all of the work they currently do in advance of the current H-1B cap process. The only difference is employers will be doing this work prior to the commencement of the proposed initial registration period, as opposed to before they file the completed H-1B petition. For employers that file a significant amount of petitions every year, it is simply impossible to review an individual's credentials, evaluate their educational achievements, prepare their Labor Condition Application, evaluate prevailing wage data for their pay levels, and complete the Form I-129, the Form H Supplement,

[19] 83 Fed. Reg. 62406, 62445 (Dec. 3, 2018).
[20] 83 Fed. Reg. 62406, 62446 (Dec. 3, 2018).
[21] 83 Fed. Reg. 62406, 62413 (Dec. 3, 2018).
[22] See Proposed 8 C.F.R. §214.2(h)(8)(A)(3); 83 Fed. Reg. 62406, 62445 (Dec. 3, 2018).

and the employer's petitioning statement for all of their prospective H-1B workers in a 60 day period.

For small businesses that find themselves in need of an H-1B worker, the first action they will likely take to obtain that worker under the proposed system is to file the registration during the initial registration period. They will likely lack the familiarity with the H-1B program that larger companies have and they will certainly have less resources to devote to all of the tasks necessary to file a successful H-1B petition within the 60 day time period set forth in the proposal. Small businesses that have an approved registration will be forced to scramble to properly file their petitions because of the compressed time period for filing the petition. All of this uncertainty will only make it more difficult for small businesses to obtain the H-1B workers they need. In sum, this 60 day filing period must be lengthened.

Assuming that a company has a registration approved and successfully files its H-1B petition within the allotted time frame, the concern for the employer can be summarized in the following question: "will our company receive an approval in a timely manner such that it allows us to begin employing the worker when we need them?" Given the proposed framework of the registration periods and the filing periods that are not fixed to any point on the calendar, as well as the experience of our members, many of whom are still waiting for answers to petitions filed for the current Fiscal Year's allotment of cap-subject H-1B visas, this proposed system injects more uncertainty for businesses with regard to meeting their workforce needs. Businesses of all sizes and in various industries need more certainty with regard to the prospective H-1B workers that they want to employ. Providing mandatory access to premium processing for employers seeking cap-subject H-1B petitions is the best way to provide employers with the certainty they need.

In sum, if this proposal is going to be workable for the American business community, USCIS must incorporate the following measures into its rule:

- The 60 day time period for filing H-1B petitions must be expanded to 120 days.
- The regulatory text must explicitly provide employers with access to premium processing for any H-1B petition that is subject to the numerical limitations in either the H-1B regular cap or the advanced degree exemption.

Concerns Regarding Employers Filing More Registrations than Necessary

Many employers are concerned that under the proposed registration system, large companies will submit registrations for more people than they intend to bring into the U.S. and employ as H-1B workers. This concern is particularly acute among our small business members, who are concerned that a "flood" of registrations from larger companies will crowd out smaller businesses with less resources from being selected during the initial registration process.

To its credit, USCIS recognizes this risk of companies "flooding the system with non-meritorious registrations."[23] To minimize this risk, the agency proffers the following as a means

[23] 83 Fed. Reg. 62406, 62414 (Dec. 3, 2018).

to combat these actions:

- Petitioners will be barred from submitting more than one registration for the same beneficiary during the same fiscal year, and
- Petitioners must attest to their intent to file an H–1B petition for the beneficiary in the position for which the registration is filed.[24]

The Chamber is unconvinced that these measures alone will be sufficient to prevent this type of activity, as the agency itself acknowledges that it "does not currently have a solution for the registration process that guarantees prevention of all non-meritorious registrations or filings prior to adjudication."[25] The agency further states that it seeks comments on how to increase the integrity of its proposed registration system. Given the fact that the agency only provided stakeholders with 30 days upon which to provide comments on this proposal, Chamber members hope that the agency delays the implementation of this rule and engages in more outreach to the business community to develop the necessary safeguards to prevent the flooding of the proposed registration system.

Employers Worry that an Untested Electronic Registration System will Malfunction and Cause Further Disruptions to their Business Operations

Chamber members are wary of the potential obstacles that can present themselves whenever the federal government implements a new electronic system. Recently, the Department of Labor experienced several technical problems when it electronically rolled out the new ETA Form 9035, Labor Condition Application for Nonimmigrant Workers.[26] Not only was this experience incredibly disruptive for employers, but this issue concerned the mere electronic implementation of a single government form that the Labor Department had been actively working on since August 2017.

Given this context in implementing a new electronic government form over the course of a year, the agency should appreciate the serious concerns that various businesses have with USCIS implementing an entirely brand new electronic system in a matter of months. If this registration system were to be implemented this spring and technical failures occurred, the level of uncertainty with regard to businesses being able to meet their workforce needs would increase substantially. Moreover, if these system's failures forced USCIS to suspend the operation of the registration system and employers had to revert to filing paper-based petitions, the cost that companies would bear in order to obtain the workers they need would precipitously rise as well.

USCIS needs to give itself adequate time to test and troubleshoot this electronic registration system before it mandates its use. Furthermore, USCIS needs to be transparent with the regulated community about the system and its test results. The types of concerns expressed to us by our members include, but are not limited to, the following:

[24] Id.
[25] Id.
[26] See Practice Alert: Technical Issues After Implementation of New ETA Form 9035, AILA Doc. No. 18111276, (Nov. 28, 2018).

- Can the H-1B Registration System accommodate the simultaneous filing of tens of thousands of registrations at any given time?
- What types of security measures will be incorporated into this system to ensure that it can only be accessed by petitioning employers and their authorized representatives and that the personally identifiable information for the named beneficiaries is not misused?
- Will the regulated community be provided with any form of training by the agency prior to the mandated use of the system, and if so, when?
- Has the agency considered features that would allow petitioners filing multiple registrations for H-1B workers to register once as a sponsoring employer such that the general employer information would auto-populate during each of the employer's registrations?

If businesses that rely upon the H-1B program to meet their workforce needs do not have definitive answers to these type of questions, companies will be hesitant to embrace this new registration system. USCIS should delay the finalization of this rule until it has conducted further testing, publicly disclosed the results of these tests, and worked with the regulated community to ensure that the agency would not need to suspend the registration system's operation once its use is mandated.

Stakeholders Need Clarity with Regard to the Information Being Requested by the Registration System

In discussing the specific information USCIS would seek from petitioners during the registration process, the agency states in the preamble that it will only ask for the following from petitioners:

- The employer's name, employer identification number, and mailing address;
- The employer's authorized representative's name, job title, and contact information;
- The beneficiary's full name, date of birth, country of birth, country of citizenship, gender, and passport number;
- If the beneficiary has obtained a Master's degree or higher from a U.S. institution of higher education;
- The employer's attorney or accredited representative; and
- Any additional basic information requested by the registration system or USCIS.[27]

The agency's statement in the preamble is inconsistent with the proposed regulatory text, as the proposed regulatory text contains no reference to the specific information sought. In so doing, the agency would maintain the ability to change the information sought during the registration phase of the H-1B petition process based upon future revisions to form instructions. The uncertainty that poses for companies is unacceptable, as the obligations that companies must abide by could change year after year. The regulatory text should be revised to explicitly state that employers are only required to provide the first five items referenced above, and the sixth "catch-all" piece of information, should be stricken from this proposal when USCIS finalizes it.

[27] 83 Fed. Reg. 62406, 62414 (Dec. 3, 2018).

Cap-Gap Concerns for Optional Practical Training Recipients Working in the U.S.

Our members are very concerned about the continued employment of their current Optional Practical Training (OPT) recipients for whom they want to obtain H-1B visas for in the future. What appears to be a minor oversight in the crafting of the regulatory text could cause serious problems for employers who are seeking to sponsor their OPT workers for H-1B visas in the future.

The proposed regulatory text requires that any employer seeking to file a registration during the initial registration period must request that the potential H-1B worker commences employment on the "first business day for the applicable fiscal year."[28] This is inconsistent with the current regulatory text concerning "cap-gap" protections for OPT recipients that are losing their student visas but have been awarded an H-1B visa for the following fiscal year. The cap-gap protections were designed to allow those OPT recipients to stay in the U.S. lawfully until they receive their H-1B visa, but the regulations governing the cap-gap protections require that their expected H-1B employment commences specifically on "October 1 of the following fiscal year."[29]

The problem lies in the fact that first business day of a given fiscal year is not always going to be October 1. For example, in FY23, the first business day is October 3. In that year, not only will a putative cap-gap relief recipient have their cap-gap relief exhausted 48 hours before their first work day that year, but the employer of that OPT recipient would be barred from registering that OPT recipient for an H-1B petition during the initial registration period under this proposal. That would needlessly put that employer and the OPT recipient at a distinct disadvantage with regard to whether they continue their employment relationship in the future. Moreover, if the FY23 cap is filled during the initial registration period in the spring of 2022, all of these OPT recipients that were educated in the U.S., many of whom presumably could have obtained a graduate degree here in the U.S., would not even be able to avail themselves of the advanced degree exemption because of this inconsistency in the "cap-gap" regulations and this proposal. USCIS must rectify this problem; the Chamber suggests that the referenced language in the NPRM be amended in a manner consistent with the language used in the "cap-gap" regulations.

[28] 83 Fed. Reg. 62406, 62445 (Dec. 3, 2018).
[29] 8 C.F.R. §214.2(f)(5)(vi)(A)(2).

CONCLUSION

The Chamber appreciates the effort of USCIS to utilize technological upgrades to improve the operability of the H-1B system. However, the current proposal presents many issues of concern for our members that must be addressed before the use of this electronic registration system is implemented. We implore USCIS to conduct further outreach to the regulated community on this proposal to ensure that it can operate successfully and in a manner that does not cause significant uncertainty or business disruption once it is implemented.

Thank you for considering our views.

Sincerely,

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