CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

JONATHAN BASELICE
EXECUTIVE DIRECTOR, IMMIGRATION POLICY
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5448 · 202/463-3194 FAX

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Ms. Megan Herndon
Senior Regulatory Coordinator
Office of Visa Services
Bureau of Consular Affairs
U.S. Department of State
20 Massachusetts Avenue, NW
Washington, D.C. 20259

By electronic submission: www.regulations.gov

RE: Visas: Temporary Visitors for Business or Pleasure
85 Fed. Reg. 66878 (October 21, 2020)
RIN 1400-AE95

Dear Ms. Herndon:

The U.S. Chamber of Commerce submits the following comments regarding the notice of proposed rulemaking (NPRM) referenced above. Many Chamber members are concerned about the negative impacts the elimination of the B-1 in lieu of H Nonimmigrant Visa (BILOH) policy would have on their businesses. We urge the State Department to rethink its current approach, as the wholesale elimination of this longstanding policy it seeks to impose will likely result in negative unintended consequences for the American businesses impacted by this policy change and the American workers employed by these companies.

THE DEPARTMENT'S RATIONALE FOR ELIMINATING THE B-1 IN LIEU OF H POLICY IS INCONSISTENT WITH THE INA AND EXISTING REGULATIONS

The State Department states in the NPRM's preamble that it will eliminate "two sentences" of confusing regulatory language regarding the scope of business-related activities that a foreign national may engage in while they are in the U.S. on a B-1 visitor's visas for business reasons.[1] In addition, the State Department stated that should this rule be finalized, it will eliminate all of the relevant language governing the current BILOH policy in the Department's Foreign Affairs manual.[2]

[1] *Visas: Temporary Visitors for Business or Pleasure*, 85 Fed. Reg. 66878, 66878-66879 (Oct. 21, 2020).
[2] See 9 FAM 402.2-5(F)

The proposed rule purports to strike the following language from 22 C.F.R. §41.31:

> "…An alien seeking to enter as nonimmigration for employment or labor pursuant to a contract or other prearrangement is required to qualify under the provisions of §41.53. An alien of distinguished merit and ability seeking to enter the United States temporarily with the idea of performing temporary services of an exceptional nature requiring such merit and ability, but having no contract or prearranged employment, may be classified as a nonimmigrant temporary visitor for business."[3]

The first sentence that State wishes to purge from its regulation is outdated language that concerns individuals who otherwise should be obtaining temporary workers visas under a section of the C.F.R. that governs the issuance of nonimmigrant visas under the H visa classification. The second sentence, which is regulatory language that has existed since 1952,[4] concerns matters involving distinguished merit and ability that today now are covered by the O and P nonimmigrant visa classifications, which did not exist when this regulatory text was written.

The Chamber agrees with the State Department's basic premise that the Immigration and Nationality Act (INA) precludes temporary workers from coming to the U.S. on business visitor visas to engage in the type of employment that is reserved for various temporary worker programs under the Act. This is clear from the relevant statutory text that precludes an individual from entering as a temporary business visitor on a B-1 visa if the individual is coming to the U.S. to "perform skilled or unskilled labor."[5] The governing regulations provide some additional clarity in that regard by proclaiming that the term "business" in "business visitor" does not cover "local employment or labor for hire."[6]

However, this section of the C.F.R. contains other provisions that control how the State Department may operate this program with respect to business travelers. Specifically, the regulatory text clearly allows B-1 visitors for business purposes to come to the U.S. and participate in "conventions, conferences, consultations and **other legitimate activities of a commercial or professional nature**"[7] (emphasis added). The State Department is bound by these regulatory provisions just as much as it is to ensure that foreign nationals aren't using B-1 visas to be employed in "local employment or labor for hire" in the U.S. Furthermore, if Congress wanted to ban B-1 business visitors from engaging in various legitimate business activities while they are present in the U.S., it could have explicitly enumerated those types of activities that one may not engage in when crafting the language of INA, but Congress made no such clarifications in the governing statutory text. As such, the State Department must balance its interests of protecting U.S. workers with the needs of the B visa recipients that will engage in legitimate business activities in the U.S., which includes many activities that foreign nationals

[3] *Id.*
[4] 85 Fed. Reg. 66878, 66880 (Oct 21, 2020).
[5] See INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B).
[6] 22 C.F.R. §41.31(b)(1).
[7] *Id.*

seek to engage in while in the U.S. on B-1 visitor visa for business purposes under the existing BILOH policy.

Several Chamber members have expressed significant concerns regarding the incongruity between the Department's desire to eliminate outdated regulatory language and its stated plan to eliminate the entire BILOH program. As stated above, there are many legitimate business activities that a foreign national with a B visa can partake in that do not rise to the level of engaging in "local employment or labor for hire" in the U.S. Unfortunately, the Department's approach seeks to conflate these two concepts in such a manner that the Department must treat these two mutually exclusive notions as one and the same. This significant policy changes provides the Department with its justification for eliminating the BILOH policy, as anyone benefiting from said policy is and presumably engaging in conduct that was once allowed under the law will now be considered the type of labor/employment that is not allowed to be performed in the U.S. under the B visa classification.

If Congress wanted these two concepts treated as one-and-the-same, it would have had no need to differentiate them in the existing regulatory text. However, Congress chose to bar one set of activities for individuals seeking to conduct business activities in the U.S. on a B-1 visa, while allowing for B-1 business travelers to be free to engage in the other set of business activities. The Department claims that it is compelled to eliminate the BILOH policy with its desired regulatory languages changes because of various legislative changes to the INA over the years,[8] but none of those changes ever amended the relevant statutory text in the INA in a manner that would command the elimination of the BILOH policy. The argument that the Department is compelled to eliminate this policy simply does not hold water; this is a policy change that the State Departments wants to impose, not one that it is forced to impose.

Lastly, the Department suggests that by striking two sentences of regulatory text and a section of guidance language in the Foreign Affairs Manual will provide more certainty and transparency for stakeholders.[9] Unfortunately, merely striking this language without replacing it with any sort of detailed guidance as to how the State Department will determine what types of activities constitute legitimate business visitor activities under the statute will only serve to increase the arbitrariness of the Department's decision-making process. In short, this will inject much more uncertainty for employers and their workers in this context, which stands in stark contrast to providing clarity to interested stakeholders. The proposed rule would likely have a chilling effect on companies being able to meet their critical business needs in a timely manner. The only certainty this policy change would likely provide is an increase in denials of visa applications, which have negative impacts upon American businesses and their employees.

DEPARTMENT MUST PROVIDE FURTHER CLARIFICATION ON B-1 ELIGIBILITY UNDER MATTER OF HIRA

[8] See 85 Fed. Reg. 66878, 66881 (Oct. 21. 2020).
[9] 85 Fed. Reg. 66878, 66879 (Oct. 21, 2020).

In the NPRM, the State Department declared that "[t]emporary visits for business activities that are consistent with *Matter of Hira* will still be permissible purposes for B-1 visa issuance under this proposal."[10] Chamber members welcomed the inclusion of this language in the NPRM with respect to what types of arrangements would be permissible for companies to bring in foreign nationals employees on B-1 visas. However, further clarification is desperately needed, as there remain many doubts as to how the *Hira* criteria would be applied by the State Department moving forward should this rule be finalized.

In *Matter of Hira,* the Board of Immigration Appeals (BIA) found that a tailor who was performing market research and taking customer measurements for suits that would be produced abroad was engaging in legitimate B-1 business visitor activities. The BIA made this decision based on the following factors: (1) his clear intent to continue his foreign residence and not abandon his domicile abroad, (2) the principal place of business and actual place of accrual of eventual profits was predominately in a foreign country, (3) the activities constituted intercourse of a commercial character, (4) he continued to receive remuneration from a source abroad, and (5) his activities did not conflict with local labor.[11] The State Department specifically noted in this NPRM that the fact that the physical location of the employer's office and the source of the worker's remuneration were both outside the U.S. were dispositive factors for determining whether the activities engaged in by the foreign national were impermissible local employment or a permissible business activity that is a necessary incident to international trade or commerce.[12]

What companies find troubling in the NPRM are the statements that cast doubt on how the State Department will utilize the *Hira* criteria in determining whether an individual can partake in certain business activities while in the U.S. on a B-1 visa. The Department stated that "the focus on these factors alone might lead to an incorrect conclusion that skilled labor is permissible in the B–1 classification, if these factors are met" for individuals who would otherwise require an H-1B specialty occupation visa to enter the U.S.[13] Moreover, the State Department expressed similar reservations for B-1 in lieu of an H-3 trainee visa in that by ending the BILOH policy for this nonimmigrant classification, it will help foreclose the "misuse of the B-1 in lieu of H policy to bypass the important protections built into the H-3 classification."[14] The Department's insinuation that company's utilizing lawful means to meet the needs of their businesses with a program that has operated for many decades is now "misuse" or "abuse" of the program gives many companies pause over their future abilities to meet their company's needs. Simply put, companies are concerned the State Department will no longer view many business activities that once allowed a foreign national to come into the U.S on a B-1 visa should this rule be finalized, thus inhibiting the ability of companies to access critical talent during emergency situations or conduct essential training programs for foreign national employees.

[10] 85 Fed. Reg. 66878, 66881 (Oct. 21, 2020).
[11] *Matter of Hira*, 11 I&N 824 (BIA 1965; A.G. 1966)
[12] 85 Fed. Reg. 66878, 66882 (Oct. 21, 2020).
[13] *Id*.
[14] 85 Fed. Reg. 66878, 66884 (Oct. 21, 2020).

The Chamber implores the State Department to not move forward with eliminating the BILOH policy and the accompanying guidance in the Foreign Affairs Manual, as that would be the best course of action to ensure business continuity in the many different situations where companies need rapid access to critical foreign talent. In the alternative, should the State Department desire to continue its rulemaking effort on this subject matter, the State Department needs to seriously consider utilizing the *Hira* criteria as the test by which consular officers will determine whether the activities to be performed by a foreign national in the U.S. on a B-1 visa are permissible business activities under the INA. At the very least, the State Department should not rescind the entirety of 9 FAM §402.2-5(F). The Department should either retain this guidance or it should amend this guidance in a manner that allows for workers who can show that they meet the *Hira* criteria to remain eligible to perform various business related functions, including the participation in company training opportunities, while they are in the U.S. while on a B-1 visitor visa.

BUSINESSES FEAR OPERATIONAL DISRUPTIONS CAUSED BY BILOH ELIMINATION

Many companies have expressed concerns over the impact this proposal would have on their business operations. Eliminating the BILOH policy will inhibit the ability of companies to be flexible regarding their workforce planning decisions and will create a rational disincentive for companies to engage in various types of business arrangements in the U.S. The State Department claims that striking this regulatory language and eliminating the BILOH policy "will lead to an increase in wages for U.S. workers."[15] The Chamber believes this policy will not lead to wages increases for American workers for the reasons elucidated below.

For example, a large technology company conveyed to us the disruption these proposed changes would have on its training programs that it operates for its engineers located around the world. These training programs are typically only a few weeks in duration and the engineers that come to the U.S. to participate in these programs maintain their residence abroad and continue to be paid by the company's foreign entities. As such, these individuals meet all of the dispositive criteria for being able to participate in these legitimate business functions while in the U.S. on a B visa under *Hira*. Eliminating the BILOH policy would force this company to inure significantly higher costs to conduct these training programs in the U.S. by requiring them to meet higher thresholds under the H-3 or J-1 program, each of which comes with further limitations on their business and less certainty with respect to their ability to train these individuals in the U.S.

In addition, the training that is provided for foreign national engineers for this firm is conducted by U.S. workers of this company, and the expenses that are paid by the foreign national engineers while they are in the U.S. receiving this training helps support the jobs of workers at various other companies e.g. the hospitality workers employed by the hotel they are staying at during their visit to the U.S., the food service workers employed by the restaurants

[15] 85 Fed. Reg. 66878, 66880 (Oct. 21. 2020).

where they will eat their meals, the transportation companies that drive them back and forth between the hotel and the company's facilities, etc. These economic benefits will not inure to the U.S. if it becomes so difficult to conduct these types of training programs in the U.S. that the company decides to move its training operations offshore or begin to conduct more training sessions virtually.

Other companies have expressed to us how their concerns over this policy would have prevented them from meeting critical business needs in the past year. A consumer products company experienced a very serious production problem at one of its U.S. facilities earlier this year that inhibited the company's ability to produce various over-the-counter medicines during the height of the COVID-19 pandemic in the spring. This was a very serious problem for the company, and it was solved by their ability to quickly obtain the needed talent on B visas to help repair its broken industrial equipment in short order. Without these types of individuals being able to come to the U.S. to help solve these problems, their production of over-the-counter medicines could have been significantly hindered for many eastern states in the U.S. for a prolonged period of time.

Admittedly, the Chamber acknowledges that the ability of this company to bring in these individuals was governed by a different section of the Foreign Affairs Manual than the one explicitly mentioned by the State Department that it would repeal if this proposed rule was finalized.[16] However, it is critically important to note that this company, which relied upon 9 FAM § 402.2-5(E) for its ability to bring these individuals into the U.S. to solve this particular problem, had to confront a similar construct in the FAM that allowed their company to bring this talent into the U.S. on a B visa in lieu of an H visa. The guidance language in the FAM governing the issuance of B visas in these situations is as follows:

> "While the categories listed below generally may be classified **under the proper applicable nonimmigrant class**, i.e., A, E, **H**, F, L, or M visas, **you may issue B-1 visas to otherwise eligible aliens under the criteria provided below**."[17] (emphasis added)

Preventing companies in these types of desperate situations from being able to solve their problems in a timely manner can be devastating for both the company and its employees. The need for companies to generate sales revenue during an economic slowdown is extremely important. If these types of operational disruptions cannot be ameliorated expeditiously, it could very well lead to furloughs or layoffs that would have been avoided if the company was able to obtain the necessary talent at the time it was needed.

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[16] See 85 Fed. Reg. 66878, 66881 (Oct. 21, 2020), where the State Department explains that it will rescind 9 FAM §402.2-5(F), and the policy governing commercial/industrial workers used by this companied is located at 9 FAM §402.2-5(E).

[17] See 9 FAM §402.2-5(E)(U), which states that for the commercial/industrial workers covered under 9 FAM §402.2-5(E)(1), those workers who could be covered under the H visa classification may nonetheless still be allowed into the U.S. to perform these legitimate business related functions on a business visitor visa under the B Nonimmigrant classification.

Another group of companies impacted by these proposed changes are healthcare providers. If the State Department were to repeal its guidance at 9 FAM 402.2-5(F), this would include the provisions that govern foreign medical doctors from coming into the U.S. to observe U.S. medical practices and consult with colleagues on the latest medical treatments.[18] These types of collaborative practices in the healthcare industry are beneficial to both the foreign national physicians and the American doctors. Eliminating the ability for these types of arrangements to be mad under the BILOH policy will inhibit the ability of American medical care providers to influence the provision of health care globally and make foreign health care providers more attractive options for foreign doctors to receive training and the latest insight on cutting edge health care practices and procedures.

CONCLUSION

The Chamber urges the State Department to abandon its current approach in this proposal, as it will disrupt the operations of many different companies. Retaining the BILOH policy would be the optimal outcome for many companies, as it will go the furthest in terms of ensuring the continuity of business operations for companies that utilize the BILOH policy to meet the needs of their business.

Alternatively, if the State Department insists on moving forward with this rulemaking, it should not end the BILOH policy in its entirety, as a complete rescission of the policy and the FAM guidance will cause significant disruptions for many American employers. The State Department should consider utilizing the *Hira* criteria as the test by which consular officers will determine whether the activities to be performed by a foreign national in the U.S. on a B-1 visa are permissible business activities under the INA in order to provide businesses with the certainty they need to maintain and build upon their U.S. operations.

Thank you for considering our views.

Sincerely,

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

[18] See 9 FAM §402.2-5(F)(3).