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Chief, Regulatory Products Division  
U.S. Citizenship and Immigration Services  
U.S. Department of Homeland Security  
20 Massachusetts Ave., NW  
Washington, DC 20529-2020

Submitted via [www.regulations.gov](http://www.regulations.gov)

**Re: 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)]  
Docket No.: USCIS-2008-0014**

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the notice of proposed rulemaking, "Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to the Numerical Limitations."

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. The organization has been in existence since 1946 and is affiliated with the American Bar Association. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed H-1B registration rules and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

## **I. Introduction**

The Department of Homeland Security (DHS) is proposing to amend the procedures for filing H-1B petitions that are subject to the H-1B annual numerical limitations. The rule would require cap-subject petitioners to file an electronic registration with U.S. Citizenship and Immigration Services (USCIS) to secure an H-1B number for a designated beneficiary for the fiscal year. While we appreciate USCIS's

efforts to reduce administrative burdens and costs to employers and the service centers that process H-1B petitions, we have a number of concerns with the proposed regulations described in detail below.

## II. The Current H-1B Framework and Process

INA §214(g) sets forth the numerical limitations for H-1B temporary workers. Since fiscal year 2004, the general H-1B cap has been set at 65,000. In addition, there is a cap of 20,000 for individuals who have earned a master's or higher degree from a U.S. institution of higher education.<sup>1</sup> The 65,000 cap is reduced by the annual numerical limitations placed on nationals of Chile and Singapore (1,400 and 5,400, respectively), who are admitted in H-1B1 status in accordance with the United States-Chile and the United States-Singapore Free Trade Agreements.<sup>2</sup> We note at the outset that nowhere in the supplementary information is it mentioned that the 65,000 cap is reduced by the numerical limitations placed on H-1B1 nonimmigrants, and we ask that USCIS amend the information to clarify this point.

Exempt from the cap are aliens who (1) are employed at, or have received an offer of employment from, an institution of higher education, or a related or affiliated nonprofit entity; or (2) are employed at, or have received an offer of employment from, a nonprofit research organization or a governmental research organization.<sup>3</sup> In addition, the cap does not apply to petitions to extend H-1B status or to amend the terms of employment, or to petitions to change employment where the beneficiary is currently in H-1B status.<sup>4</sup>

At present, USCIS processes H-1B petitions in the order in which they are received. USCIS monitors the distribution of H-1B numbers, and posts regular H-1B cap updates on its website. When it determines that it has received enough petitions to meet the cap, USCIS announces a "final receipt date." Petitions filed on the final receipt date undergo a random selection process to determine which cases can be processed to completion for that fiscal year. If USCIS receives enough petitions within the first five business days of the filing period, it randomly selects from all petitions filed within those five days. USCIS rejects all remaining petitions.

The supplementary information explains that problems have arisen when demand for H-1B workers is high and USCIS receives a large number of petitions within the first few days of the filing period.<sup>5</sup> Significant expenses are also incurred due to the initial processing, rejecting and returning of petitions that are not selected for adjudication. The supplementary information explains that the current system is also problematic for employers. Preparing and mailing petitions, with the associated fees, can be costly for

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<sup>1</sup> INA §214(g)(5)(C).

<sup>2</sup> INA §214(g)(8).

<sup>3</sup> INA §214(g)(5)(A), (B).

<sup>4</sup> INA §214(g)(7).

<sup>5</sup> 76 Fed. Reg. 11686, 11688.

employers when there is no guarantee that the petition will not be returned if the cap is reached.<sup>6</sup>

### **III. General Comments and Concerns**

#### ***The Registration System Will Create a Rush of Registrations and Generate False H-1B Demand***

USCIS proposes to alleviate the stated costs and administrative burdens on service centers and employers by creating an electronic registration process for employers who wish to hire cap-subject H-1B workers. Each individual beneficiary who would be subject to the cap must be registered separately. Only those petitioners whose registrations are selected may proceed to file an H-1B petition on behalf of the beneficiary named in the registration. The registration period would open prior to April 1 and would remain open for a minimum of two weeks. Once USCIS has determined that it has received a sufficient number of registrations to reach the cap, the registration period would be closed, and a wait list would be created for any registrations that were timely filed, but not initially selected.

The supplementary information emphasizes the problems USCIS has encountered in fiscal years where H-1B demand was high and it received a large volume of petitions within the first few days of the filing period. However, while the registration system may limit the volume of petitions that are eventually filed, and decrease the number of petitions that must be processed and returned once the cap is reached, we submit that this additional layer to the H-1B filing procedures will only serve to further complicate an already complex process by creating a flood of unnecessary or unqualified registrations, potentially numbering in the thousands, that will ultimately be abandoned or denied.

First, under the current system, in years where demand has been steady, employers have been able to monitor the cap through the weekly status updates on the USCIS website. If and when an employer locates a potential H-1B employee, the employer can determine whether to incur the expenses associated with preparing and filing a petition based on the number of cap-subject petitions already received and processed. The new system proposes a minimum two-week registration period. Without the ability to track the H-1B cap, employers will naturally proceed under the assumption that demand is high and will rush to register all potential H-1B workers within a very short window. In order to secure an H-1B slot and maintain a competitive advantage in the job market, employers will register anyone who might potentially be offered a job, even those who remain in the very early recruitment and/or interview stages. While a single individual who interviews with multiple employers may be registered by each potential employer, the beneficiary will only accept one job offer, and the remaining registrations will be abandoned.

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<sup>6</sup> *Id.*

Second, in order to register, an employer would be required to provide what appears to be very basic and cursory information about the company and the beneficiary: (1) the employer's name, employer identification number (EIN), employer's mailing address; (2) the authorized representative's name, job title, and contact information (telephone number and e-mail 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.<sup>7</sup> None of the information required to submit a successful registration requires the employer to even minimally evaluate whether the position in question is of "H-1B caliber," or whether the employee has the proper education and credentials to qualify for H-1B status. By not forcing employers to go through an initial eligibility assessment, there is no incentive for employers who are not well-versed in H-1B law to abstain from randomly registering any position that they believe might qualify for an H-1B. While the employer will either forego filing an H-1B petition once it is determined that the employee does not qualify, or will file a petition that will be denied, H-1B numbers will be unnecessarily set aside for unqualified beneficiaries, while qualified beneficiaries are relegated to the wait list.

Third, as discussed below, there are no regulations or clear guidance to assist employers in determining whether they would qualify for cap-exemption as a nonprofit organization "related to or affiliated with" an institution of higher education. Adjudications in this regard have been very inconsistent. If a petitioner has any doubt as to its cap-exempt status, it will elect to proceed with caution and register. As a result, H-1B cap numbers will be unnecessarily allocated to petitioners who would have otherwise qualified as cap-exempt.

Finally, the system supposes that employers will have projected their staffing needs for the entire fiscal year by the time the registration period opens, presumably in March. This is completely unrealistic, particularly for small and emerging businesses. The flood of registrations that will be created by notice of a two-week registration period, the lack of any employer accountability for evaluating eligibility, the lack of guidance on who qualifies for cap-exemption, and the uncertainty in demand, will effectively squeeze small businesses out of the H-1B program.

### ***The Cost/Benefit Assessment Is Flawed***

USCIS estimates that over the next ten years, the net cost savings to employers that file H-1B petitions will be \$23,884,568 at a 3 percent discount rate, and \$19,666,029 discounted at 7 percent.<sup>8</sup> USCIS states that the main benefit of this rule is that employers will be able to forego the time and expense of preparing and filing a full H-1B petition, with all supporting documentation, unless USCIS has selected the employer's registration for further processing.<sup>9</sup>

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<sup>7</sup> Proposed 8 CFR §214.2(h)(8)(ii)(B).

<sup>8</sup> 76 Fed. Reg. at 11692.

<sup>9</sup> *Id.* at 11693.

USCIS estimates that the public reporting burden for each individual registration will average 30 minutes per response.<sup>10</sup> This includes time to review the instructions, and complete and submit the registration. While a recent analysis indicated that 93 percent of H-1B petitions were accompanied by a G-28,<sup>11</sup> USCIS states that the straightforward nature of the registration process “should require minimal skills,” such as those of a human resources assistant, and estimates the paperwork burden of each registration to be \$12.66.<sup>12</sup> However, a human resources assistant has neither the knowledge nor the skills to determine whether an individual or a particular position would qualify for H-1B status. To use the system as we believe USCIS intended (i.e., to register only those individuals who would conceivably qualify for H-1B status), an initial preliminary analysis would need to be conducted by an attorney. This would include, but not be limited to, an evaluation of the salary offered to ensure it meets both prevailing and actual wage requirements, evaluation of a detailed job description, the company’s business and business model, and a review and evaluation of the potential employee’s educational, and possibly work credentials. Thus, the paperwork burden of \$12.66 is grossly understated. Moreover, without the initial attorney assessment, the risk of unnecessary and unqualified registrations, as discussed above, is significantly magnified. We further note that the various statements contained in the supplemental information about the minimal time and expenses associated with the preparation and filing of H-1B petitions discounts the hugely complicated nature of the H-1B process.

***USCIS Transformation/Paperless Processing Will Alleviate the Administrative Burdens Expressed by USCIS***

We are very concerned that the registration process will serve to add an unnecessary layer to the already complicated H-1B process and will cause tremendous difficulties for U.S. companies who utilize the H-1B program. USCIS has emphasized that most of the difficulties encountered with the current system arise in years when demand for H-1Bs is high and a large number of petitions is filed within the first few days of the filing period. USCIS describes its service centers as having been “overwhelmed ... with the quantity of paper petitions received in early April ...” in fiscal years 2008 and 2009.<sup>13</sup> We believe that many of these problems will be alleviated upon the complete implementation of paperless processing via the USCIS Transformation program. Therefore, we strongly urge USCIS to place this proposed rule on indefinite hold, at least until USCIS Transformation is fully implemented and the administrative costs and burdens can be reassessed under the new system.

Alternatively, if USCIS insists on moving forward with the registration system prior to Transformation, we encourage USCIS to engage in extensive beta testing of the system, with maximum stakeholder participation and feedback prior to its roll-out, in order to address the procedural difficulties identified and described below.

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<sup>10</sup> *Id.* at 11695.

<sup>11</sup> *Id.* at 11693.

<sup>12</sup> *Id.* at 11695–96.

<sup>13</sup> *Id.* at 11693.

#### **IV. Registration**

##### ***Announcement of the Registration Period***

The registration period would commence prior to the earliest date on which petitions may be filed for a particular fiscal year (i.e., April 1). USCIS will notify the public of the start and end date of the registration period via the USCIS website.<sup>14</sup> USCIS proposes to set the registration period to begin “no later than in the month of March each year, for a minimum period of two weeks.”<sup>15</sup>

A properly filed H-1B petition must include a certification from the Department of Labor (DOL) that a labor condition application (LCA) has been filed, and further requires the gathering of extensive documentary evidence, including evidence of the petitioner’s business and the beneficiary’s qualifications, and the development of a detailed description of the job to be performed. In order to allow petitioners adequate time to prepare and file H-1B petitions for selected registrations in time for the first available fiscal year filing date of April 1, we ask that the registration period be opened earlier in the calendar year, on January 1. While this would be most helpful in years where enough people register before April 1 to reach the cap, given that there is no guarantee for even selected registrations to actually receive an H-1B number, it can be assumed that employers will rush to file at the earliest date possible. The more time petitioners have to prepare and adequately document an H-1B petition, the better they will be able to avoid a request for evidence (RFE) and the unnecessary waste of USCIS resources during the adjudication process.

##### ***Information Required and USCIS Acceptance of Registrations***

As noted, an employer would be required to provide basic information in order to complete the registration process. USCIS states that the listed information is the minimum it will need to identify the petitioner and beneficiary, eliminate duplicate registrations, and match selected registrations with subsequently filed petitions.<sup>16</sup>

USCIS has asked for comments on the type of information requested and whether the list should be expanded or changed. As we have expressed, we are concerned that the *de minimis* information requested in the registration process, coupled with the uncertainty in H-1B demand from year to year, and the lack of guidance on cap-exemption will have the net effect of creating an influx of registrations for potential H-1B beneficiaries which will ultimately be abandoned. In an effort to alleviate this problem, USCIS should request additional information during the registration process which would, at a minimum, force

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<sup>14</sup> Proposed 8 CFR §214.2(h)(8)(ii)(A)(2).

<sup>15</sup> 76 Fed. Reg. 11686, 11689 (Mar. 3, 2011). *See also id.*, “The electronic registration process would be in advance of the start of the period during which actual petitions can be filed for a new fiscal year (*i.e.*, immediately prior to April 1).

<sup>16</sup> 76 Fed. Reg. at 11689.

an employer to analyze whether a potential employee would actually qualify for H-1B status. Toward that end, USCIS should consider requesting the beneficiary's job title, and whether the petitioner seeks to file under the general 65,000 cap, or the 20,000 master's cap.

In addition, the proposed rules provide that “employers” must provide the requested information for the registration process.<sup>17</sup> Although the DHS Privacy Impact Assessment (PIA) states that a “legal representative” may be a “designated user,”<sup>18</sup> the regulation should be amended to reflect this. Qualified immigration attorneys are in the best position to advise an employer whether a potential employee might qualify for H-1B status. Allowing attorneys to submit registrations would help avoid the problem of employers registering job candidates who would not qualify for an H-1B before the attorney has had the chance to assess eligibility.

Further, it is also not clear whether protections are in place to ensure that only authorized company representatives (including attorneys) are able to submit registrations. A company's employer identification number is discoverable fairly easily. Will any person be able to register hundreds or even thousands of inappropriate jobs in an effort to sabotage the system? Will a foreign worker be able to self-register in a misguided attempt to secure an H-1B slot on his or her own behalf? Without adequate protections in place to ensure that valid employers and their attorneys or accredited representatives are the only individuals who are able to submit cap-subject H-1B registrations, the system is vulnerable to these kinds of abuses.

Finally, for large companies who may sponsor numerous H-1B nonimmigrants on an annual basis, an additional 30 minute time commitment on top of the time it takes to prepare and file a petition can amount to a major burden. Therefore, we ask that USCIS implement a procedure whereby companies can register their information once, and then register each individual alien separately.

## **V. Selection of Registrations and Tracking H-1B Numbers**

If the number of registrations received by April 1 is less than the cap, USCIS will notify all registered employers that they may file H-1B petitions on behalf of the named beneficiaries, and will keep the registration period open.<sup>19</sup> When it determines it has received enough registrations to reach the cap, USCIS will announce a final receipt date and will conduct a random selection of all registrations received on the last day of the registration period.<sup>20</sup> Selected employers will be notified in the order that the registrations are received.<sup>21</sup>

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<sup>17</sup> Proposed 8 CFR §214.2(h)(8)(ii)(B).

<sup>18</sup> DHS Privacy Impact Assessment for the H-1B Visa Cap Registration (Jan. 28, 2011), at 4.

<sup>19</sup> Proposed 8 CFR §214.2(h)(8)(ii)(C)(I).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

If the number of registrations is more than the cap, USCIS will close the registration period and randomly select a sufficient number of registrations to meet the general and master’s cap.<sup>22</sup> “Some or all” of the remaining registrations would be placed on a wait list, based on statistical estimates of how many additional registrations may be needed to fill the cap should the initial pool fall short.<sup>23</sup> USCIS would notify wait-listed employers when and if they become eligible to file.<sup>24</sup> If not randomly selected or placed on the wait list, the employer will be notified that it is not eligible for that fiscal year.<sup>25</sup>

A few issues regarding the tracking of available H-1B numbers and allocation of numbers to the wait list require clarification. We ask that USCIS address the following concerns:

- If the registration period is closed, and the H-1B petition is denied, how quickly will the number go back into the pool for the next person on the wait list, e.g., after the period for appeal has passed? Will there be a prohibition against the petitioner filing a new H-1B petition on behalf of the named beneficiary under that registration until the next fiscal year?
- If the registration period is still open, and the H-1B petition is denied, resulting in the number going back into the pool, may the petitioner submit a second registration for the named beneficiary, and file a new H-1B petition if the new registration is selected?
- Will the system permit withdrawal of a *registration* once it has been submitted? Allowing an employer to withdraw a registration upon discovery of an obvious error or the employer’s determination that the beneficiary does not qualify for H-1B status, or that the beneficiary has accepted another job offer, would allow USCIS to put the previously unavailable number back into the H-1B pool more quickly than it would if it otherwise had to wait out the minimum 60-day filing period to do so.
- Whether the registration period is open or closed, if an H-1B petition is filed within the registration period, but the *petition* is withdrawn for any reason, may the employer file a new petition for the same individual if the registration has not expired? In other words, will the number not go back into the pool until the registration has expired?
- Will individuals who would otherwise qualify under the master’s cap of 20,000 automatically “drop down” into the general cap of 65,000 in the event that the master’s cap is reached first? We believe this would be fair and appropriate.

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<sup>22</sup> Proposed 8 CFR §214.2(h)(8)(ii)(C)(2); 76 Fed. Reg. at 11690.

<sup>23</sup> Proposed 8 CFR §214.2(h)(8)(ii)(C)(2)(ii).

<sup>24</sup> Proposed 8 CFR §214.2(h)(8)(ii)(C)(2)(iv).

<sup>25</sup> Proposed 8 CFR §214.2(h)(8)(ii)(C)(2)(v).



- ***Special Concerns for Cap-Exempt Petitioners.*** Will petitioners who are uncertain as to their cap status be permitted to register, and if selected, file the H-1B petition and argue that they are cap-exempt? Due to the absence of definitive guidance, there is a great deal of uncertainty surrounding the question of whether a petitioner may qualify for a cap-exemption as a nonprofit entity “related to or affiliated with” an institution of higher education. If USCIS concludes that the registered employer is not subject to the cap, the petition should be approved, and the number placed back in the pool to be used by another petitioner. If USCIS concludes that the employer is subject to the cap, the registration should be recognized for that purpose. Further, we ask that USCIS immediately issue clear guidance on cap-exemption so that petitioners can better determine whether they would qualify as exempt and confidently forego the registration process if deemed appropriate.

In addition, neither the regulations nor the supplementary information indicate the time period for notifying petitioners that their registrations have been selected. We ask that USCIS provide guidelines in this regard, and urge a brief turn-around period of two weeks or less.

Finally, we ask USCIS to clarify what, if any, benefits and obligations attach upon registration or notification that the registration has been selected. At present, H-1B beneficiaries must be qualified for the position at the time the H-1B petition is filed. With the implementation of the registration system, would beneficiaries be required to show eligibility at the time of registration? Will a VIBE query on the employer or a background check on the beneficiary be run upon registration? Do any benefits attach to the beneficiary upon registration or selection, such as F-1 cap-gap relief?

## **VI. Filing of H-1B Petition Following Selection**

### ***Availability of Cap Numbers***

As articulated in the supplementary information, a key benefit of the registration process is that employers that want to hire an H-1B worker will be able to forego the expense associated with preparing and filing a complete H-1B petition with an LCA unless USCIS tells them that space exists under the cap. However, as USCIS may accept more registrations than the prescribed statutory limit, the possibility exists that the cap may be reached before the date that a selected registrant has filed a petition. Therefore, the supplementary information to the proposed rule provides, “[I]f an H-1B petition is otherwise approvable, a petitioner would be assured, but would not be guaranteed” the availability of an H-1B visa number.<sup>26</sup> Given the reliance many employers will place upon having been selected to proceed, we urge USCIS to include clear, bold language in the selection notice that an H-1B number is by no means guaranteed.

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<sup>26</sup> 76 Fed. Reg. at 11690.

### ***Filing Time Period***

The proposed rule provides that the deadline for filing the H-1B petition will be stated in the selection notice, and selected petitioners would have “not less than 60 days” from the date of notification to properly file a completed H-1B petition for the named beneficiary.<sup>27</sup> USCIS states that the variable filing period would permit it to provide filing periods longer than 60 days to accommodate processing backlogs.<sup>28</sup>

Based on this purpose, it can be assumed that the designated filing period could vary from case-to-case within the same fiscal year. We are concerned that this will cause unnecessary confusion for employers with multiple H-1B filings. An employer who receives a 90-day notice for “Beneficiary A” may naturally assume that it will receive a 90-day notice for “Beneficiary B.” If Beneficiary B receives a 60-day notice, the employer may find itself in the difficult position of gathering and preparing the extensive documentation required to file an H-1B petition in an abbreviated time period. The regulation should further explain whether “filed” is to be interpreted as “received by USCIS” or “postmarked by the petitioner.”

### ***Submission of Selection Notice with H-1B Petition***

The proposed rule requires the employer to submit the selection notice with the H-1B petition and supporting documentation at the time of filing.<sup>29</sup> Each selection notice will have a unique machine-readable identification number that USCIS will use to verify the petitioner and beneficiary. “Failure to submit the registration notice will result in rejection of the petition and return of the filing fees.”<sup>30</sup>

Because of the unreliability of e-mail and the possibility that a company’s authorized representative will change during the process, we urge USCIS to provide additional means to obtain a copy of the selection notice. Selection notices should be accessible via a secure portal on the USCIS website, or USCIS should provide a method for requesting a duplicate copy of the selection notice. Alternatively, USCIS should include a field in the registration for the name of the attorney or accredited representative, and create a mechanism whereby the selection notice would be sent to the attorney, in addition to the company’s authorized representative. The penalties for failing to file the selection notice with the H-1B petition are harsh. Employers must be assured that they can obtain a duplicate copy should they never receive or lose the original notice.

## **VII. Information Sharing**

The DHS PIA states that in general, USCIS will not share registration information with internal organizations, but may, “on an individual basis ... share selected records from

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<sup>27</sup> Proposed 8 CFR §214.2(h)(8)(ii)(D)(2).

<sup>28</sup> 76 Fed. Reg. at 11691.

<sup>29</sup> Proposed 8 CFR §214.2(h)(8)(ii)(D)(2).

<sup>30</sup> 76 Fed. Reg. at 11691.

this system with its Fraud Detection and National Security Data System or with Immigration and Customs Enforcement (ICE) or Intelligence and Analysis (I&A) for enforcement or intelligence purposes.”<sup>31</sup> We ask USCIS to provide guidance as to when registration information may be shared with other internal agencies. Are there circumstances where the simple act of registering can trigger information sharing with FDNS or ICE?

### **VIII. Conclusion**

We appreciate the opportunity to comment on this notice of proposed rulemaking and look forward to a continuing dialogue with the USCIS on this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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<sup>31</sup> DHS Privacy Impact Assessment for the H-1B Visa Cap Registration (Jan. 28, 2011), at 9-10.