



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

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Submitted via: [public.engagement@uscis.dhs.gov](mailto:public.engagement@uscis.dhs.gov)

**Re: Comments in Response to USCIS Listening Session:  
“Buy American and Hire American”**

Dear Mr. Cummings and Ms. Melero:

Many thanks to you and your colleagues for providing a forum for stakeholder feedback on President Trump’s Executive Order, “[Buy American and Hire American](#)” on July 26, 2017. We appreciate the opportunity to provide input regarding the potential policy changes that may be borne from the Executive Order, and hope you will find these written comments helpful. By way of background, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Since 1946, our mission has included 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, United States citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of the U.S. immigration laws.

We appreciate USCIS’s recognition that our immigration system is largely governed by statute and by regulation, and that there are limitations as to what can be implemented by Executive Order alone. The immigration statute can only be changed by Congress, and most immigration policies and procedures are dictated by regulation that can only be implemented, modified, or repealed in accordance with the requirements of the Administrative Procedure Act (APA). It is well-settled that before implementing a new policy that represents a major shift from prior practice, and mandating compliance with the new policy, federal agencies must provide notice and an opportunity for public comment in accordance with the APA. The criteria that must be established to qualify for H-1B status, prevailing wage requirements, prioritization of H-1B

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workers, and maintenance of H-1B and other nonimmigrant statuses are all examples of changes that would require either a statutory change by Congress, or at minimum, notice and comment rulemaking. In implementing the “Buy American and Hire American” Executive Order, even if USCIS determines that a policy change does not require rulemaking, we hope that the agency will at a minimum provide the public with notice of the change through a written policy directive and provide an opportunity to comment, rather than implementing changes through the adjudication process.<sup>1</sup>

In addition, as USCIS considers various policy changes, we encourage the agency to make note of [the data released in advance of the call detailing the characteristics of H-1B petitions submitted over the course of the last 10 years](#). This data tells a very different story than recent media reports and presents a contrary reality to many of the statements articulated by callers during the July 26, 2017 listening session. For instance, according to the data, in 2017, the average H-1B worker was compensated at the rate of at least \$92,317 per year. This contradicts the broad assumption that the H-1B visa is a tool to import “cheap labor” and undercut qualified Americans. The data also shows that nearly half of H-1B workers in 2017 earn well above \$100,000 per year. The company-specific data is even more telling, with H-1B workers at Netflix, for example, averaging \$322,405 per year. Finally, according to the data, in 2017, nearly 60 percent of H-1B workers possess a Master’s degree or higher, which is a strong indicator that H-1B workers are already a highly educated group. The perception that H-1B workers are poorly educated or unable to perform at a competent level simply doesn’t square with the USCIS data. Rather than showing that H-1B workers are a source of inexpensive labor, the data proves that the overwhelming majority of H-1B workers are both highly educated and well-paid.

We also encourage USCIS to examine the data with an eye toward determining whether there are factors that may be skewing some of the output, particularly relating to usage trends over the past decade. For example, a person not familiar with our immigration laws might read the data on page 1 of the chart and conclude that since 2007, the United States accepted petitions on behalf of more than 2 million individual H-1B beneficiaries from India, when in fact, that number could represent the cumulative total of many individuals reapplying for H-1B status multiple times over the course of the ten year period. There are several factors that would require the same individual to reapply for H-1B status. First, H-1B status may only be granted for a period of up to three years. Prior to the end of the three-year period, an individual who wishes to remain in H-1B status must, through a petitioning employer, file for an extension. Second, as a result of the lengthy employment-based green card backlogs, many nationals of India and China are forced to remain in H-1B status, and thus file multiple extension requests, for much longer than their counterparts from other countries. It is notable in this regard that the ten year period covered by the data correlates to the increasing backlog in the permanent resident categories for foreign workers. And lastly, individuals working according to a set contract are only granted H-1B status for the period that work is available and can be documented. As a result, many H-1B petitions are granted for one year (or less) and the individual must seek an extension of status when and if

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<sup>1</sup> Agencies must provide a reasoned explanation of the basis for denying an application petition if such denial results from a change in policy. *See Delta Air Lines v. Civil Aeronautics Bd.*, 561 F.2d 293, 311 (D.C. Cir. 1970), cert. denied, 434 U.S. 1045 (1978); *Motor Vehicles Mfrs. Ass’n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (overturning an agency reversal because the agency had provided no explanation for its change in policy).

additional work becomes available. As a result of all of these factors, the perception garnered from this data is that H-1B workers are flooding the American market. The public would be better served by data that illustrates the number of H-1B petitions that were approved (not simply filed) for individuals by nationality, breaking out the number of new (cap-subject) beneficiaries as compared to H-1B extensions.

Finally, we encourage USCIS to consider other existing data and information before implementing any policy changes. [Bureau of Labor Statistics \(BLS\) data for June 2017](#) shows that unemployment in “professional and related occupations” (the occupations for which most H-1B petitions are filed) was just 3.3 percent. While news stories and reports of software engineers unable to find employment are painful to hear and no worker should be required to train their replacement, these instances are the exception, not the rule. The low unemployment rate in professional and related occupations shows that there is more than enough room at the table for both U.S. workers and H-1B workers. Similarly, before ramping up fraud investigations in response to claims of rampant abuse in the H-1B program, USCIS should look to the data gathered by its own Fraud Detection and National Security Directorate, which has conducted tens of thousands of site visits to H-1B employers since 2004, finding in most cases that the H-1B worker is performing the job described on the H-1B petition, is being paid the salary indicated on the petition (and many times, much more), and is in fact the kind of high-skilled professional for which the H-1B program was intended.

Thank you again for the opportunity to provide these comments. We look forward to continuing to engage with USCIS as it undertakes a review of its immigration programs and processing.

Respectfully Submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION