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U.S. Department of Homeland Security
20 Massachusetts Avenue NW
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Submitted via www.regulations.gov

Re: Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens
Docket No.: USCIS-2008-0014

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the U.S. Citizenship and Immigration Services (USCIS) notice of proposed rulemaking (NPRM), “Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens,” published in the Federal Register on December 3, 2018.¹

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. 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 American companies, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

Background: The Current H-1B Random Selection Process

INA §214(g) sets forth the annual numerical limitation or “cap” on H-1B temporary workers, which since fiscal year (FY) 2004, has been set at 65,000. Exempt from this limitation, under INA §214(g)(5), are the following categories of individuals:

- (A) Those who are employed (or who have received an offer of employment) at a U.S. institution of higher education, or a related or affiliated nonprofit entity;

¹ 83 Fed. Reg. 62406 (Dec. 3, 2018).

(B) Those who are employed (or who have received an offer of employment) at a nonprofit or governmental research organization; and

(C) Up to 20,000 individuals who have earned a master's or higher degree from a U.S. institution of higher education.

Under INA §214(g)(3), cap-subject H-1B nonimmigrants “shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed . . .” USCIS regulations allow employers to file a petition for an H-1B worker up to six months prior to the date of need.² Therefore, the earliest that U.S. employers who are seeking to hire a cap-subject H-1B worker to start at the beginning of a fiscal year (October 1) can file an H-1B petition is April 1 of the preceding fiscal year.

Current procedures for allocating H-1B numbers are found at 8 CFR §214.2(h)(8)(ii) and require USCIS to “make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors.”³ USCIS monitors cap-subject H-1B receipts and when it determines that it has received enough petitions to meet the cap, establishes a “final receipt date.”⁴ Petitions filed on the final receipt date undergo a random selection process to determine which cases will be processed to completion for that fiscal year.⁵ Consistent with a strong economy and low unemployment rates, since fiscal year 2013, USCIS has received more than enough petitions within the first five business days of the filing period to meet the statutory H-1B cap and the master's degree exemption, thus requiring USCIS to conduct a random selection process from all petitions filed within those five days.⁶ When this occurs, USCIS first selects H-1B petitions subject to the advanced degree exemption, and then conducts the random selection process for the regular H-1B cap which includes petitions that were not selected under the exemption.⁷

As noted in the Supplementary Information, in high demand years, “USCIS routinely receives hundreds of thousands of H-1B petitions in early April each year,” such that the period of time leading up to and including the first five business days of April is commonly known as “H-1B cap season.”⁸ Not surprisingly, USCIS admits that “it is difficult to handle” a large influx of petitions in a short period of time, as USCIS must not only accept and process all properly filed petitions, but also reject and return petitions that are not properly filed, as well as those that are not randomly selected for adjudication.⁹ USCIS must also store the “voluminous petition filings,” which purportedly causes a “massive strain on USCIS operations.”¹⁰

² 8 CFR §214.2(h)(9)(i)(B).

³ 8 CFR §214.2(h)(8)(ii)(B).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* See also 83 Fed. Reg. at 62412, Table 2.

⁷ 83 Fed. Reg. at 62412.

⁸ *Id.*

⁹ *Id.* (“[s]ome of the front-end processing activities associated with handling this exceptionally high volume of petitions include, but are not limited to, opening and sorting mail, manually assigning unique identifier numbers to each petition for random selection, and returning the unselected and improperly filed petitions along with associated fees.”) 83 Fed. Reg. at 62412-13.

¹⁰ 83 Fed. Reg. at 62413.

The Supplementary Information also cites the burdens and costs of the current process that are imposed on U.S. employers, “particularly if the petition must ultimately be returned because the numerical limit was reached and the petition was not selected....”¹¹ Thus, USCIS questions the efficiency of the current process, while posing whether it might also have “the unintended effect of deterring petitions by employers with a bona fide need, but who are reluctant to file given the high-cost involved in filing the petition versus the low likelihood of selection.”¹² To address these challenges, and “to create a more streamlined filing and selection process,” USCIS is proposing to amend the rules and procedures for filing cap-subject H-1B petitions.¹³

Overview of the Proposed H-1B Registration System

USCIS proposes the creation of a mandatory electronic registration system for petitioners seeking to file cap-subject H-1B petitions.¹⁴ USCIS proposed a similar registration system in 2011, but never finalized and implemented the system presumably because many of the issues identified by the regulated community through the comment process could not be adequately addressed.¹⁵ AILA submitted comments in response to the 2011 NPRM, and to the extent they remain relevant, we have incorporated those remarks into this comment letter.¹⁶

The Registration Process: Under the proposed registration system, an employer would be required to submit a separate registration for each potential beneficiary and would be prohibited from submitting more than one registration per beneficiary.¹⁷ The registration period would open at least 14 days prior to April 1 of each year and would remain open for at least 14 days.¹⁸ USCIS will notify the public of the start and end date of the registration period via the USCIS website.¹⁹ USCIS states that it will provide the public with at least 30 days advance notice of the opening of the initial registration period for the upcoming fiscal year.²⁰

Petitioners would be required to provide “basic information” regarding the petitioner and beneficiary, including but not limited to: (1) the employer’s name, mailing address, and employer identification number (EIN); (2) the authorized representative’s name, job title, and contact information; (3) the beneficiary’s full name, date of birth, country of birth, country of citizenship, gender, and passport number; (4) whether the beneficiary has obtained an advanced degree from a U.S. institution of higher education; and (5) the employer’s attorney or accredited representative.²¹ USCIS states that the information solicited will be “the minimum amount of information that [it] would need to identify the prospective H-1B petitioner and the named

¹¹ *Id.*

¹² *Id.*

¹³ 83 Fed. Reg. at 62412.

¹⁴ *See generally* proposed 8 CFR §214.2(h)(8)(iii).

¹⁵ 76 Fed. Reg. 11686 (Mar. 3, 2011).

¹⁶ “AILA Comments on Proposed H-1B Registration System,” (May 2, 2011), *available at* <https://www.aila.org/infonet/aila-comments-on-proposed-h-1b-registration-system>.

¹⁷ Proposed 8 CFR §214.2(h)(8)(iii)(2).

¹⁸ Proposed 8 CFR §214.2(h)(8)(iii)(A)(3).

¹⁹ *Id.*

²⁰ 83 Fed. Reg. at 62413.

²¹ 83 Fed. Reg. at 62414.

beneficiary, to eliminate duplicate registrations, and to match selected registrations with subsequently filed H-1B petitions.”²² The employer would also be required to attest as to the truth and accuracy of the contents of the registration and that the employer intends to employ the beneficiary consistent with the registration.²³

STEP 1: Selecting “Regular” Cap Registrations: USCIS would first select registrations towards the 65,000 “regular” cap. The process for selecting registrations would depend on the level of demand for cap-subject H-1Bs during the initial registration period.

- **The number of registrations received during the initial registration period is fewer than what is needed to meet the 65,000 cap.** USCIS would announce that the registration period will remain open, and that all registrations submitted during the initial registration period have been selected.²⁴ Once USCIS determines that enough registrations have been received, it will announce a “final registration date” and if necessary, conduct a random selection process for all petitions received on that date.²⁵
- **The number of registrations received during the initial registration period is sufficient to meet the 65,000 cap.** USCIS would conduct a random selection of all of the registrations received during the initial registration period.²⁶ USCIS would hold unselected petitions in reserve for possible use if it determines that additional registrations are needed to meet the cap.²⁷ If all reserved registrations are selected and USCIS determines that more are needed to meet the cap, the registration period may be reopened.²⁸

STEP 2: Selecting Advanced Degree Exemptions: After selecting registrations for the regular cap, USCIS would then select registrations towards the 20,000 advanced degree exemption, following a process similar to the one described above for regular cap registrations.²⁹

Notification of Selection: USCIS would notify all petitioners with selected registrations that they are eligible to file an H-1B petition on behalf of the registered beneficiary.³⁰ Notices will indicate a specific filing location and a designated time period in which the petition must be filed.³¹

Filing the H-1B Petition: Petitioners with selected registrations will be given a 60-day time period to file a complete H-1B petition. USCIS anticipates staggering filing periods and providing more than 60 days, if necessary, to accommodate processing backlogs or other

²² *Id.*

²³ *Id.*

²⁴ Proposed 8 CFR §214.2(h)(8)(iii)(A)(5)(i).

²⁵ *Id.*

²⁶ Proposed 8 CFR §214.2(h)(8)(iii)(A)(5)(ii).

²⁷ Proposed 8 CFR §214.2(h)(8)(iii)(A)(7).

²⁸ *Id.*

²⁹ Proposed 8 CFR §214.2(h)(8)(iii)(A)(6).

³⁰ Proposed 8 CFR §214.2(h)(8)(iii)(C).

³¹ Proposed 8 CFR §214.2(h)(8)(iii)(D)(2).

operational needs.³² USCIS will reject all H-1B petitions that are not filed in connection with a selected registration or that are not filed on behalf of the beneficiary named in the original registration.³³ Petitions filed outside the designated filing period will be rejected if caught at intake, or denied if caught during adjudication.³⁴

Implementation of an Electronic Registration System Should Be Delayed Until at Least the FY 2021 H-1B Cap Season

Preliminarily, we note that in describing its legal authority for the proposed regulatory changes, USCIS cites INA §214(g) generally, as the statutory provision that “prescribes the H-1B and H-2B numerical limitations, various exceptions to those limitations, and criteria concerning the order of processing H-1B and H-2B petitions.”³⁵ However, nowhere in the NPRM does USCIS specifically reference INA §214(g)(3), which states that cap-subject H-1B nonimmigrants “shall be issued visas (or otherwise provided nonimmigrant status) *in the order in which petitions are filed . . .*” (emphasis added). Thus, the proposed H-1B registration system, which would mandate selection of “registrations” over “petitions,” is arguably unlawful and would likely be the subject of a court challenge if finalized and implemented.

However, assuming without conceding that such a system is a reasonable interpretation of the statute, DHS should suspend implementation of an H-1B registration system until at least the FY 2021 H-1B cap season. As the national association of U.S. immigration attorneys, no non-governmental organization is in a better position to attest to the challenges and difficulties associated with the current cap-subject H-1B selection process than AILA. Each year, delivery trucks line up on the first business day of April to deliver thousands of petitions to USCIS service centers, and inevitably, reports of missing or destroyed packages send panic through the AILA community as members scramble to decide whether to submit a second petition and risk rejection or hope for the best that the package was delivered despite a lack of courier confirmation.³⁶ Therefore, any measures that would improve a far-from-perfect process would be welcome. However, there are simply too many questions presented within the scope of the current NPRM to justify rushing implementation of a registration system over the finish line in order to accommodate FY 2020 H-1B filings in just three short months. In addition, employers will not realize any cost savings associated with an electronic registration system for FY 2020 cap-subject petitions, as work to prepare and file those petitions under the current system has already commenced, as discussed in detail below.

³² 83 Fed. Reg. at 62417.

³³ Proposed 8 CFR §214.2(h)(8)(iii)(D).

³⁴ Proposed 8 CFR §214.2(h)(8)(iii)(D)(2).

³⁵ 83 Fed. Reg. at 62408.

³⁶ “Visa Applications Pour In by Truckload Before Door Slams Shut,” New York Times (Apr. 3, 2017), available at <https://www.nytimes.com/2017/04/03/us/tech-visa-applications-h1b.html>; “Practice Alert: H-1B Cap Case Deliveries to VSC and CSC,” (Apr. 2, 2015), available at <https://www.aila.org/infonet/practice-alert-h-1b-cap-case-deliveries-to-vsc-csc>; “Members Report FedEx Scanning Troubles at CSC,” (Apr. 5, 2013), available at <https://www.aila.org/infonet/members-report-fedex-scanning-troubles-at-csc>; “Have an H-1B Package Sent FedEx that Isn't Tracking? Read This!,” (Apr. 4, 2008), available at <https://www.aila.org/infonet/uscis-have-an-h-1b-package-sent-fedex>.

The NPRM includes a regulatory change that would allow USCIS to suspend the H-1B registration requirement “if it determines that the system is inoperable for any reason.”³⁷ Recognizing that implementing a registration system for the FY 2020 H-1B cap season might be contrary to ensuring “orderly and appropriate administration of the H-1B allocations,” DHS states that this provision may be invoked to “allow USCIS to up-front delay the implementation of the H-1B registration process past the FY 2020 cap season, if necessary to complete all requisite user testing and vetting of the ... system ... and to otherwise ensure [it is] operable.”³⁸ The implementation of a new registration system is a major undertaking, requiring extensive planning and testing to ensure that its roll-out is as seamless as possible. For this reason, we ask that USCIS suspend implementation of the H-1B registration process until at least the FY 2021 H-1B cap season or until such time that a comprehensive, completely functional system that has been thoroughly beta-tested can be rolled-out. We also ask that USCIS immediately make an announcement to this effect, to provide U.S. employers with adequate assurances regarding the process that will commence in only a few short weeks.

USCIS Has Not Adequately Addressed the Problem of “Flooding the System” and Generating False H-1B Demand

The Supplementary Information emphasizes the problems USCIS has encountered in fiscal years where H-1B demand is high and it receives 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, the implementation of the registration system as proposed 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. DHS attempts to address these “flooding” concerns by prohibiting petitioners from submitting more than one registration for the same beneficiary during the same fiscal year, requiring employers to attest to their intention to file an H-1B petition for the beneficiary named in the registration, and to “closely monitor” whether selected registrations result in the filing of petitions.³⁹ Although these requirements might help reduce the volume of unwarranted registrations, they are not sufficient to address the problem.

First, in order to register, an employer would be required to provide very basic and cursory information about the company and the beneficiary. 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 immigration law and H-1B requirements to abstain from 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

³⁷ Proposed 8 CFR §214.2(h)(8)(iv).

³⁸ 83 Fed. Reg. at 62418.

³⁹ 83 Fed. Reg. at 62414.

unnecessarily set aside for unqualified beneficiaries, while qualified beneficiaries and needful employers are shut out of the process.

In addition, in order to secure an H-1B slot and maintain a competitive advantage in the job market, employers will be compelled to 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.

It is also unclear whether protections are in place to prevent sabotage of the system and ensure that only authorized company representatives and attorneys can submit registrations. Will any person with access to a company's EIN be able to register hundreds or even thousands of inappropriate jobs? 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 protections in place to ensure that only legitimate employers and their attorneys are able to submit cap-subject H-1B registrations, the system is vulnerable to these kinds of abuses.

USCIS explains in the Supplementary Information that “[t]he high costs of filing a full H-1B petition without the guarantee of obtaining a worker under the status quo could be a barrier to some small entities, [while] [t]he lower costs of a registration system could allow more small entities to submit a registration that otherwise may not file a full H-1B petition.”⁴⁰ However, this would only be the case if the system is utilized as it is intended and is not flooded by overly zealous employers or unscrupulous actors. A very small number of companies that can employ economies of scale and utilize systems to file a large number of registrations to generate a higher yield, could effectively force small employers out of the H-1B program altogether.

DHS acknowledges that “it does not currently have a solution for the registration process ... that guarantees prevention of all non-meritorious registrations”⁴¹ Instead of rushing to implement a system that USCIS acknowledges is deficient, the agency should reach out to U.S. employers and immigration attorneys to obtain feedback and workable solutions to address these issues and better ensure the integrity of the system.

If Used Properly, the Registration System Will Not Result in the Cost Savings to Employers Articulated in the NPRM

As noted above, even if USCIS implements the H-1B registration system in time for FY 2020 H-1B cap season, employers will not realize any cost savings for FY 2020 H-1B cap cases because work to prepare full H-1B petitions has already commenced and is continuing under the assumption that the status quo will remain in place. Beyond FY 2020, USCIS states that the main benefit to U.S. employers associated with 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,

⁴⁰ 83 Fed. Reg. at 62441.

⁴¹ *Id.*

unless USCIS has selected the employer's registration.⁴² USCIS estimates that unselected petitioners would realize a net cost savings of \$47.3 million to \$75.5 million, depending on who petitioners use to submit the registration.⁴³ However, this is based on an assumption that it would take only 30 minutes for an employer or its representative to complete each electronic registration, and that no preliminary work or analysis would be done to determine whether the position qualifies as a "specialty occupation" or whether the beneficiary qualifies for H-1B status.⁴⁴

To use the system as we believe USCIS intended (i.e., to register only those individuals who would conceivably qualify for H-1B status), good faith employers will still need to invest resources to have an attorney or experienced human resources specialist conduct a preliminary analysis prior to registering a potential H-1B beneficiary. 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, USCIS's estimated opportunity cost for registering a single beneficiary is grossly understated.⁴⁵ Moreover, without the initial attorney assessment, the risk of unnecessary and unqualified registrations, as discussed above, is significantly magnified.

USCIS Must Increase the Time Period for Filing H-1B Petitions for Selected Registrations

In order to generate the savings articulated by USCIS in the proposed rule, USCIS assumes that employers will not do any preparatory work on an H-1B petition prior to being notified of a registration's selection, and that all required work can be done within a 60-day window. However, larger companies with higher filing volume simply cannot prepare potentially hundreds of petitions within that short time frame, and small companies that often rely on outside counsel and vendors such as educational credentials evaluators to assist with H-1B petition preparation, cannot wait to engage these services until registrations are selected, and would be severely disadvantaged if they delay gathering and analyzing voluminous and often complex supporting documentation. Small employers also often lack access to costly industry wage surveys and must rely on the Department of Labor (DOL) to obtain a prevailing wage determination, a process which currently takes 4 months to complete. And once that prevailing wage determination is received, it is questionable at best, whether the DOL iCERT portal, which is often plagued with technical challenges, could handle a massive influx of Labor Condition Applications within a short time period. Indeed, just yesterday, on January 1, 2019, the DOL's iCERT portal became unavailable as a result of "overwhelming filing demand" from H-2B employers seeking to obtain a temporary labor certification for the second half of FY 2019.⁴⁶

⁴² 83 Fed. Reg. at 62419.

⁴³ *Id.*

⁴⁴ *Id.* at 62421.

⁴⁵ USCIS estimates the opportunity cost for registering a single beneficiary as follows: For an HR specialist = \$23.24; for an in-house lawyer = \$49.80; and for outside counsel = \$85.28. *Id.* at 62430.

⁴⁶ The following error message appeared on iCERT (<https://icert.doleta.gov/>) on January 1, 2019: "We sincerely apologize for the major service interruption in the iCERT System early in the morning of January 1, 2019. Due to overwhelming filing demand, the Department's technology staff is working diligently to investigate the cause of the system outage and has temporarily taken the iCERT System down for the remainder of January 1st and until further

Although USCIS indicates that staggered filing periods and filing periods longer than 60 days might be allowed to accommodate processing backlogs or other operational needs, it should instead amend proposed 8 CFR §214.2(h)(8)(iii)(D)(2) to set forth a minimum 120-day filing period to ensure a wide enough berth to accommodate the needs of approximately 20,000 individual employers who will be filing an estimated 110,000 H-1B petitions.⁴⁷ The 120-day window should commence on April 1, which would mean the initial registration period would need to open at least 14 days prior to that date. Even if an employer waited until the 120th day to file a petition, USCIS would still have approximately 60 days to complete adjudication prior to an October 1 start date.

USCIS Must Ensure Prompt Adjudication of H-1B Petitions by Codifying the Availability of Premium Processing

The savings articulated by USCIS in the proposed rule are also contingent upon the ability of USCIS to complete adjudication of all petitions before the start date of employment. USCIS processing of H-1B petitions is currently taking up to 11 months.⁴⁸ With premium processing of cap-subject H-1B petitions suspended since April 2018, and additional categories of H-1Bs added to the suspension in September 2018, adjudication delays and a lack of predictability are having a significant negative impact on U.S. employers who are finding it increasingly difficult to staff critical projects and functions and plan for the future.⁴⁹ Therefore, although any increase in processing efficiencies created by the H-1B registration system would presumably be passed on to petitioners in the form of speedier adjudications and other processing improvements, this alone is not enough. USCIS must also ensure the availability of premium processing for all H-1B petitions, with the exception of petitions to extend status and continue employment without change, which are provided with an automatic 240-day extension of employment authorization under 8 CFR §274a.12(b)(20). Without any certainty as to the timing of the opening or closing of the initial registration period, whether the registration period might be reopened at any time, plus filing windows that are subject to change both in timing and duration, USCIS must commit to ensuring that premium processing remains available to H-1B employers and should codify that commitment in the regulations by amending proposed 8 CFR §214.2(h)(8)(iii)(D)(2).

notice” On January 2, 2019, the DOL provided a further update indicating that “[w]ithin the first five minutes of opening the semi-annual H-2B certification process on January 1, 2019, the U.S. Department of Labor iCERT system had an unprecedented demand for H-2B certifications ... [w]ith more than thirty-times the user demand on the iCERT system compared to last year on January 1, the iCERT system experienced a system disruption. The Employment and Training Administration, working with the Department of Labor’s Office of the Chief Information Officer, is working diligently to have the system ready within a few days to accept a record number of H-2B applications.”

⁴⁷ 83 Fed. Reg. at 62417. The estimated number of individual entities filing H-1B petitions is found at p. 62439, and the estimated number of H-1B petitions is found at p. 62420.

⁴⁸ See <https://egov.uscis.gov/processing-times/>.

⁴⁹ See “USCIS Extends and Expands Suspension of Premium Processing for H-1B Petitions to Reduce Delays,” (Aug. 28, 2018), available at <https://www.uscis.gov/news/uscis-extends-and-expands-suspension-premium-processing-h-1b-petitions-reduce-delays>.

Amendments are Required So that Cap-Gap Beneficiaries Are Not Disadvantaged by the Registration Process

Many F-1 students who are seeking a change of status to a cap-subject H-1B are currently authorized to work under the Optional Practical Training (OPT) program. However, their work authorization often expires between the date an H-1B petition is filed (typically the first week of April) and October 1, which is the first date they can commence work in H-1B status. To alleviate hardships associated with a lapse of status and employment during this time period, 8 CFR §214.2(f)(5)(vi) allows an F-1 student who is the beneficiary of a timely filed H-1B cap-subject petition requesting a change of status to H-1B effective October 1 to receive an automatic extension of F-1 status and employment authorization through September 30. Thus, under the current filing procedures:

- F-1 student whose OPT expires April 15, 2018 has an offer of employment to work in H-1B status with Company A.
- Company A files a petition to change F-1 student's status to H-1B on April 1, 2018.
- Company A's petition is selected in the H-1B lottery.
- F-1 student receives an automatic extension of F-1 status and employment authorization through September 30 and will not lose employment authorization as of April 16.
- If the petition is approved prior to October 1, there is no lapse in employment and the beneficiary can start working in H-1B status on October 1.

However, cap-gap protections don't attach until an H-1B *petition* has been timely filed. Under the proposed registration process, students who would be entitled to cap-gap protections now, might not be entitled to such protections under the new system. For example:

- The regulation states that employers will be provided a 60-day window in which to file an H-1B petition and that filing periods could be staggered.
- If a registration is selected, and the petitioner is given a 60-day window to file the petition beginning May 1, the beneficiary described above would not be eligible for cap-gap protections because the employer would be prohibited from filing the petition until after the beneficiary's OPT expired.

Moreover, even if the 60-day registration window opened on April 1 and the individual described above could benefit from cap-gap relief, there is little likelihood that the employer could prepare and file a complete H-1B petition prior to the expiration of employment authorization -- in just 15 days. The only way that could be accomplished is if the employer dedicated significant time and resources to preparing the H-1B petition *prior* to the announcement of selected registrations, which, as discussed above, negates the cost savings attributed to employers that USCIS has articulated in the NPRM. In order to address this, USCIS should amend 8 CFR §214.2(f)(5)(vi) to recognize a properly submitted registration as sufficient to lock in cap-gap relief if the registration is selected.

In addition, cap-gap relief under 8 CFR §214.2(f)(5)(vi)(A)(2), is only available when a petitioner requests "an H-1B employment start date of October 1 of the following fiscal year."

However, proposed 8 CFR §214.2(h)(8)(iii)(A)(4), limits the submission of registrations during the initial registration period to those with a requested start date of “the first business day” of the applicable fiscal year. Because the first business day of the fiscal year is not always October 1, proposed 8 CFR §214.2(h)(8)(iii)(A)(4) should be amended to use the same terminology as 8 CFR §214.2(f)(5)(vi)(A)(2), to ensure that cap-gap relief is available for selected registrants in the initial registration period.

Changes to Prioritize the Selection of Advanced Degree Professionals

Under the current process, USCIS first counts petitions filed on behalf of beneficiaries with a master’s degree or higher from a U.S. institution of higher education until the projected number of petitions needed to meet the 20,000 advanced degree exemption is reached. All petitions that are not selected as part of the advanced degree exemption are then placed in the pool with all other petitions for random selection under the 65,000 “regular” cap.

Under proposed 8 CFR §214.2(h)(8)(iii)(A)(5) and (6), USCIS would first conduct the random selection process for the regular cap (which would include advanced degree registrations), and would only conduct the advanced degree random selection process once it is determined that enough registrations have been received to meet the 65,000 regular cap. USCIS states that “[c]hanging the order in which USCIS counts these prospective beneficiaries ... would likely ... increase the number of individuals with a master’s or higher degree from a U.S. institution of higher education who are issued H-1B visas or otherwise provided H-1B status.”⁵⁰ In justification of these changes, DHS cites the April 18, 2017 Executive Order 13788, Buy American and Hire American, which directed the agency to “suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.”⁵¹ DHS then goes on to state its belief that the current lottery system does not “provide an optimal mechanism” for achieving the mandate of INA §214(g)(5)(C) “to increase the number of individuals with advanced degrees from U.S. institutions issued H-1B visas or otherwise provided H-1B status by 20,000 ... because it dilutes the candidate pool in a manner that greatly diminishes the possibility of adding 20,000 such H-1B nonimmigrants beyond those that would be admitted without the advanced degree exemption allocation.”⁵²

Although we recognize the importance of providing better access to job opportunities for individuals who have earned U.S. advanced degrees and would support proposed changes or reforms that comport with the statutory framework and the will of Congress, simply possessing a master’s or higher degree from a U.S. institution cannot serve as the sole means by which the value of an individual might be measured, particularly given the varying needs and minimum educational requirements of the U.S. industries and job sectors that depend on H-1B professionals to drive growth and satisfy consumer demand. For example, U.S. businesses who employ professionals in fields where a master’s degree is not typically required, such as public education, accounting, and architecture, would find it more difficult to obtain an H-1B as a result of these changes. The healthcare sector, moreover, which relies heavily on foreign physicians to

⁵⁰ 83 Fed. Reg. at 62417.

⁵¹ 83 Fed. Reg. at 62407, citing EO 13788 at Sec. 5(b).

⁵² 83 Fed. Reg. at 62417.

supplement a shortage of U.S. doctors, will also be disadvantaged, as many such physicians complete their medical education overseas before seeking employment in the United States.

USCIS also seems to ignore the fact that its own data shows that an ever-increasing number of individuals with U.S. advanced degrees are seeking cap-subject H-1Bs. In the Supplementary Information, USCIS data indicates that the number of “advanced degree receipts” nearly tripled from 30,641 in FY 2013 to 87,380 in FY 2017.⁵³ Moreover, data published on the USCIS website states that 95,885 master’s exemption eligible petitions were received for FY 2019.⁵⁴ Thus, any concerns that the candidate pool for the 20,000 advanced degree exemption is somehow being “diluted” are unfounded.

Lastly, USCIS does not adequately address the fact that the 20,000 master’s degree exemption is in fact just that – an exemption of up to 20,000 individuals with U.S. master’s or higher degrees from the 65,000 regular cap. INA § 214(g)(5) provides that the 65,000 numerical limitation “shall not apply” to any H-1B nonimmigrant who has earned a U.S. advanced degree “until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.” (emphasis added). Therefore, because the statute contemplates counting the 20,000 advanced degree exemption first, the proposal to reverse the order of the random selection process is contrary to the statute and would likely be the subject of a court challenge if finalized and implemented.

USCIS Electronic Processing Might Alleviate the Administrative Burdens Expressed by USCIS

As USCIS Director Cissna has stated in numerous public fora, it is his intention to implement electronic filing of most USCIS petitions and applications by the end of the 2020 calendar year.⁵⁵ Given that so many of the challenges associated with the current process can be directly attributed to the current paper-based process, it would appear that many of those problems will be alleviated within the next two years, as USCIS completes implementation of paperless processing. Therefore, we strongly urge USCIS to place this proposed rule on indefinite hold, at least until electronic filing is fully implemented and the administrative costs and burdens can be reassessed under the new system. Alternatively, if USCIS opts to move forward with the registration system, we encourage it to engage in extensive beta testing of the system, with maximum stakeholder participation and feedback prior to its roll-out, in an effort to address the issues described above.

Conclusion

We appreciate the opportunity to comment on this NPRM and look forward to a continuing dialogue with the USCIS on this important matter.

⁵³ 83 Fed. Reg. 82424.

⁵⁴ See <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2019-cap-season>.

⁵⁵ See “Deep Commitment at USCIS Day to ‘Huge Shift’ of Paperless Filing by 2020,” Homeland Security Today (Oct. 15, 2018), available at <https://www.hstoday.us/federal-pages/dhs/uscis-dhs-federal-pages/deep-commitment-at-uscis-day-to-huge-shift-of-paperless-filing-by-2020/>.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION