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IMMIGRATION  
LAWYERS  
ASSOCIATION

December 2, 2020

Charles L. Nimick, Chief, Business and Foreign Workers Division  
Samantha Deshombres Chief, Regulatory Coordination Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Avenue, NW  
Washington, DC 20529-2120

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

**Re: Department of Homeland Security, U.S. Citizenship and Immigration Services, Notice of Proposed Rulemaking; *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions* (DHS Docket No. USCIS-2020-0019; CIS No: 2674-20; RIN 1615-AC61)**

Dear Mr. Nimick and Ms. Deshombres:

The American Immigration Lawyers Association (AILA) submits the following additional comment to supplement our previous comment submitted on December 2, 2020.<sup>1</sup> Although AILA strongly opposes the finalization of this rule, this additional comment offers feedback to USCIS specifically relating to the H-1B electronic registration filing process that was not previously addressed in AILA's prior comment.

AILA has received widespread reports from our members during the FY2021 H-1B cap filing season expressing confusion about the agency's regulatory requirement set forth at 8 CFR section 214.2(h)(8)(iii)(A)(4) which was adopted as part of the January 31, 2019 Final Rule entitled "Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens."<sup>2</sup> 8 CFR section 214.2(h)(8)(iii)(A)(4) provides:

*A petitioner may submit a registration during the initial registration period only if the requested start date for the beneficiary is the first day for the applicable fiscal year. If USCIS keeps the registration period open beyond the initial registration period, or determines that it is necessary to re-open the registration period, a petitioner may submit a registration with a requested start date after the first business day for the applicable fiscal year, as long as the date of registration is no more than 6 months before the requested start date.*

<sup>1</sup> See *AILA and the Council Submit Comments Opposing USCIS Proposal To Create Wage-Based Selection Process for H-1Bs*, Am. Immigration Lawyers Ass'n (Dec. 2, 2020), available at <https://www.aila.org/infonet/comments-opposing-uscis-proposal-create-wage-based>.

<sup>2</sup> Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 888 (Jan. 31, 2019).

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Although this language is silent on the required start date on a Form I-129 that is being filed based on a selected registration, USCIS has interpreted this regulation to require that a 10/1/2020 start date must be listed on Form I-129, Petition for a Nonimmigrant Worker, for H-1B cap-subject petitions submitted in the first and second filing windows based on registrations filed in the initial registration period, otherwise a petition may be rejected or denied.

This ambiguity in the regulations has resulted in numerous H-1B cap-subject petitions for specialty occupation professionals being rejected or administratively closed if they failed to list a 10/1/20 start date on Form I-129. This regulation and the agency's implementation of it has caused considerable stakeholder confusion, particularly for H-1B cap subject petitions filed during the second filing window which ran from mid-August to November 16, 2020. For H-1B cap-subject petitions filed during the second-round filing window, in many cases, the Labor Condition Application (LCA) was not prepared and certified until after October 1, 2020. In such cases where the LCA was prepared after October 1, 2020, the LCA necessarily has a start date after October 1, 2020 because a start date on an LCA cannot be backdated. What this means is that the LCA start date and the start date on the Form I-129 did not align. This is not intuitive in practice for petitioners to backdate the Form I-129 with a start date earlier than the start date listed on the LCA. Although AILA reached out to the agency for clarification regarding this issue earlier this summer, the agency did not issue a broad stakeholder announcement that it would accept petitions in situations where the start date listed on the Form I-129 was earlier than the start date listed on the LCA, leaving many stakeholders unaware of the agency's new practice.

To minimize confusion regarding this issue, AILA recommends that USCIS modify its regulation at 8 CFR section 214.2(h)(8)(iii)(A)(4) permitting a requested start date on or after the first day for the applicable fiscal year. Specifically, AILA proposes the following language (in bold):

*(4) Limitation on requested start date. A petitioner may submit a registration during the initial registration period only if the requested start date for the beneficiary is on the first day for the applicable fiscal year. **If USCIS selects registrations from those that are on reserve pursuant to subparagraph (7), the requested start date on the petition may be any date within the filing period noted on the selection notice.** If USCIS keeps the registration period open beyond the initial registration period, or determines that it is necessary to re-open the registration period, a petitioner may submit a registration with a requested start date after the first business day for the applicable fiscal year, as long as the date of registration is no more than 6 months before the requested start date.*

Although 8 CFR section 214.2(h)(8)(iii)(A)(4) was not specifically revised in the Proposed Rule, the recommended change is within the scope of this proposed rule because it directly impacts the selection process which is the subject of the Proposed Rule. Modifying the regulation in this way would better align with U.S. employers' business practices and be more intuitive to the way in which LCAs are prepared, particularly if USCIS will keep the filing window open beyond October 1 like it did for the FY2021 H-1B cap filing season.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION