

June 2, 2023

The Honorable Alejandro Mayorkas  
Secretary  
U.S. Department of Homeland Security  
301 7th Street SW  
Washington, DC 20528

[BY ELECTRONIC SUBMISSION]

Dear Secretary Mayorkas,

On behalf of the American Immigration Lawyers Association, we are writing to supplement the June 1, 2023 letter we submitted jointly with our partner organizations to underscore the importance and need to finalize the recommended regulatory provision before the start of the Fiscal Year 2025 H-1B registration period in March 2024.

As noted in the June 1, 2023 letter, the Department of Homeland Security must urgently and immediately implement regulatory changes proposed as part of the H-1B Modernization Rule that will “bolster the H-1B registration process to reduce the possibility of misuse and fraud in the H-1B registration system.”<sup>1</sup>

Specifically, AILA believes that USCIS should immediately issue regulations that would base lottery selections on the number of unique beneficiaries registered for selection (by unique identifier) rather than unique registrations. This change would give each beneficiary an equal chance in the lottery, regardless of whether they have 1 or 10 registrations submitted on their behalf. We believe that this would level the playing field for all beneficiaries, give them more agency over their own career decision, and close loopholes that have resulted in overexaggerated demand. The details of this proposal are outlined in the June 1 letter.

*USCIS has Good Cause to Forego Notice and Comment Rulemaking to Implement the Change in How the Lottery is Run*

AILA believes that USCIS can and must implement this specific change prior to the FY 2025 registration period as part of the H-1B Modernization Rule. While many parts of the H-1B Modernization rule will likely require full notice and comment rulemaking, we believe that USCIS can and must take prompt regulatory action to make the above registration change effective before commencing the registration process for FY 2025. An agency may forgo notice and comment rulemaking when such rulemaking would be impracticable, unnecessary, or contrary to the public interest, including when economic harms may ensue,<sup>2</sup> which we fervently believe is the case for regulatory changes needed to restore integrity and fairness in the H-1B registration process.

To address the problems highlighted in the FY 24 cap season, it would be ***impracticable*** to go through full notice and comment rulemaking. There is insufficient time for the agency to publish a proposed rule, solicit comments for 60 days, review all comments, and issue a final rule with sufficient time for it to be

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<sup>1</sup> See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1615-AC70>.

<sup>2</sup> See *Purdue Univ. v. Scalia, No. CV 20-3006 (EGS), 2020 WL 7340156 (D.D.C. Dec. 14, 2020)* (which held that for purposes of “good cause,” a situation is impracticable when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required, including where economic harms are at issue.)

effective before March 2024. Moreover, we believe notice and comment rulemaking is *unnecessary* because this change is consistent with a plain reading of INA 214(g)(1), which describes “the total number of *aliens* who may be issued visas or otherwise provided nonimmigrant status during any fiscal year.” (emphasis added). Pursuant to the statute, visas should be allocated and counted by foreign national, rather than approved petitions. Finally, waiting to finalize this portion of the H-1B Modernization rule until full notice and comment rulemaking is complete *harms the public interest*. In the past two years, we have seen a significant increase in the number of H-1B registrations submitted. In FY 23, there were 483,927 registrations. This total increased more than 61 percent for FY 24, with more than 780,000 total registrations, and there was a 147 percent increase from FY 23 to FY 24 in the number of individuals who had multiple registrations filed on their behalf. While some of this increase is due to legitimate demand, it is inescapable that the numbers have been overinflated by workers and employers trying to have as many “bites at the apple” as possible.

Moreover, failure to address these problems before the FY 25 cap will cause *significant economic harms*. This year, due largely to the dramatic increase in individuals having multiple registrations submitted on their behalf, the selection rates were significantly lower than in prior years—less than 15 percent of submitted registrations were selected to file an H-1B petition. This means that many legitimate business needs, and eligible beneficiaries have been left behind, negatively impacting economic growth at a time when unemployment rates are very low and labor demand is high. Waiting one more year to implement a new process to curb excess registrations would be detrimental to the overall economic growth of the United States and harm U.S. employers. We also believe that issuing this regulation is the best way to improve integrity in the H-1B registration process and is a more reasonable and fair proposal than USCIS’s suggestion to increase H-1B registration fees by more than 2,000% as it has proposed in the USCIS Fee Rule (88 Fed. Reg. 402).

Issuing this part of the H-1B Modernization rule on an interim or temporary basis with immediate implementation, while the remaining parts of the rule are issued with full notice and comment as proposed, will help ensure that the deficiencies identified in the FY 24 Cap will not be repeated. The public should still be offered to submit comment on the interim or temporary rule and any necessary changes can be made by DHS as part of a final rule.

We appreciate your serious consideration of this recommendation and the others included in the June 1, 2023 letter. Please contact AILA’s Director of Government Relations, Sharvari (Shev) Dalal-Dheini at [sdalal-dheini@aila.org](mailto:sdalal-dheini@aila.org) or 202-507-7621 to address any questions or concerns that you may have.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

CC: Ur Jaddou, USCIS Director  
Avideh Moussavian, Chief Office of Policy & Strategy, USCIS  
Doug Rand, Senior Advisor to USCIS Director  
Betsy Lawrence, Deputy Assistant to the President for Immigration