



December 20, 2018

VIA ELECTRONIC SUBMISSION

L. Francis Cissna
Director
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
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Re: Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens¹

Dear Director Cissna and Chief Deshommes:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments to the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) regarding its proposed rule which creates an early registration process for the H-1B visa lottery for petitions subject to numerical limitations. This proposed rule would also change the order of the H-1B visa lottery to increase the number of beneficiaries with a master's or higher degree from a U.S. institution of higher education.

Advocacy appreciates USCIS' efforts to reform the H-1B visa lottery process. However, small businesses are concerned that the USCIS is replacing one burdensome lottery for another. The

¹ Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 83 Fed. Reg. 62406 (proposed Dec. 3, 2018) (hereinafter "2018 Proposed Rule").



proposed rule seeks to insert an untested registration requirement and lottery changes in the upcoming season, which will increase uncertainty and may make it more difficult for small businesses to obtain vital high-skilled workers. USCIS is only providing 30 days for the public to comment on this rule, during the busy holiday season. Advocacy recommends that USCIS postpone the implementation of the registration program until after this H-1B application season and extend the comment period so that the agency can get more public feedback, further evaluate the impact of this rule on small businesses, and adequately test this electronic system.

The Office of Advocacy

Congress established Advocacy under Pub. L. No. 94-305 to represent the views of small entities before Federal agencies and Congress.² Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁵ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule. The agency is not required to provide a response for the Federal Register if it certifies that the public interest is not served by doing so.⁶

I. Background

H-1B visas are temporary visas used by employers to hire high-skilled foreign workers in specialty occupations. USCIS estimates that about 78 percent of petitions requesting an H-1B employee are filed by small entities.⁷

Congress has established limits on the number of foreign workers who may be granted H-1B visas. Currently, there is a yearly numerical cap of 65,000 for general petitions and an exemption from this cap of 20,000 for petitions for workers with a U.S. master's or higher degree. Since USCIS created the random selection process in 2005, it has routinely received

² 1976 Amendments to the Small Business Act and Small Business Investment Act, Pub. L. No. 94-305, 90 Stat. 663.

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

⁴ Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified at U.S.C. § 601)

⁵ Pub. L. No. 111-240 §1601, 124 Stat. 2504, 2551 (2010) (amending 5 U.S.C. § 604(a)).

⁶ 5 U.S.C. §§ 604, 608 (2016).

⁷ See 2018 Proposed Rule at 62439.

petitions far surpassing the capacity within the first few days. In 2017, USCIS received almost 200,000 petitions for both the general cap and the advanced degree exemption.⁸

The proposed rule would create an early registration system, where employers file online registrations for intended workers during a two-week period before April 1. USCIS would conduct a lottery and select enough registrations to meet the H-1B cap numbers. Those chosen under this lottery would then file a full H-1B petition. USCIS proposed a similar early registration system for the H-1B visa program in 2011, but the rule was never finalized.⁹ Advocacy held a Small Business Roundtable on the 2011 proposed rule and submitted a public comment letter to USCIS expressing concerns that the proposed registration process would make it more difficult for small businesses to obtain H-1B visas.¹⁰

The proposed rule would also change the order of the H-1B lottery process to increase the number of beneficiaries with a master's or higher degree from a U.S. institution of higher education. This change is made pursuant to Executive Order 13788, Buy American and Hire American, which directed DHS and other agencies to "suggest reforms to help ensure that H-1B visas are awarded to the most skilled or highest-paid petition beneficiaries."¹¹ USCIS would first select registrations submitted on behalf of all beneficiaries to meet the numerical cap of 65,000, including those eligible for the advanced degree exemption. USCIS would then select from the remaining registrations a sufficient number to reach the advanced degree exemption of 20,000.¹² The current process is the exact reverse of this order.

II. Small Entity Concerns with the Proposed Rule

Advocacy held conference calls with small businesses, small start-up companies, immigration attorneys, and other small business representatives to obtain feedback on this proposal. The following comments are reflective of the issues raised in these conversations. Many of the issues raised by small business in response to the 2011 proposed rule were echoed by small businesses again in this rulemaking, as that rule contained a similar early registration requirement.

1. The Proposed Registration Requirement May Not Result in Cost Savings

The proposed rule promises to reduce costs and paperwork burdens for H-1B employers, because only petitioners who get selected in the lottery complete a full petition. Advocacy believes this registration requirement may not accomplish the cost savings estimated by USCIS this year or

⁸ *Id.* at 62412.

⁹ Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to Numerical Limitations, 76 Fed. Reg. 11686 (proposed Mar. 3, 2011) (hereinafter "2011 Proposed Rule").

¹⁰ Winslow Sargeant and Janis Reyes, Re: Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to Numerical Limitations; 76 Fed. Reg. 11686 (March 3, 2011); USCIS Docket No. USCIS-2008-0014 (Apr. 28, 2011), https://www.sba.gov/sites/default/files/uscis11_0428.pdf.

¹¹ Buy American, Hire American, Exec. Order No. 13788, 82 Fed. Reg. 18837, Sec. 5 and 5(b) (Apr. 18, 2017) (hereinafter "Executive Order").

¹² See 2018 Proposed Rule at 62415.

any subsequent year; and may just add another layer of bureaucracy to the already complicated process.

The agency has not yet announced whether the proposed changes to the lottery process will apply to the 2019 season, and this has created uncertainty for employers. Attorneys that have spoken to Advocacy are advising their clients to proceed with business as usual in preparing a full H-1B petition but cautioned them to be ready for any scenario. In its rule, USCIS stated that if the registration requirement does not go forward, “USCIS may suspend the H-1B registration requirement, in its discretion, if it determines that the registration process is inoperable for any reason.”¹³ Small businesses may not have cost savings for future years with this pre-registration requirement because these petitioners will hire attorneys and spend the same amount of time evaluating beneficiaries—this process just happens a month or more earlier.

Advocacy believes that USCIS has underestimated the compliance costs of the registration requirement. According to USCIS, 75 percent of petitions are filed by lawyers.¹⁴ Also, because small businesses typically lack the scale and resources to have in-house lawyers or human resources staff, they will more likely utilize outsourced lawyers to file their registrations and petitions. USCIS estimates that the registration requirement per worker will take only 1.55 hours of time and a cost of \$264.35 (for outsourced lawyer).¹⁵ USCIS should increase their estimates of burden hours per employee and fully factor in small businesses that may have multiple registrants.¹⁶

2. Registration Timing May Shut Small Business from H-1B Program

USCIS has not established a specific timeline for this new H-1B visa process for this season and this uncertainty makes it difficult for small businesses to participate in this program. Each participant business must track developments, plan their workforce, set their budgets and complete the H-1B petitions. Because USCIS has not scheduled the actual dates to notify potential participants of the registration, the registration dates, and the petition submission dates (which may have staggered submission dates), businesses will not know when to start the process. As noted above, USCIS has not even made it clear whether this pre-registration period will be implemented in this season or not.

Advocacy also believes that the early timing of the registration process may shut small businesses out of the H-1B program because they cannot anticipate their employment needs at the new earlier date. USCIS will hold the electronic registration for two weeks before April 1. Employers registering for an employee in February or March would receive their H-1B employee on or after October 1, meaning that an employer would have to know their employment needs and select beneficiaries seven months or more in advance.

Small companies told Advocacy that they are not good at budgeting staff needs six months or 12 months out; they know what they need and when they have cash they act quickly to get that hire. Advocacy spoke to representatives of small U.S. based IT staffing companies, who stated that it

¹³ *Id.* at 62446.

¹⁴ *Id.* at 62440.

¹⁵ *Id.*

¹⁶ *Id.*

is already difficult for staffing companies to meet the current April 1st deadline.

Under this rule, USCIS petitioners with selected registrations have at least 60 days to file a complete H-1B petition. The 60-day filing window may not be enough time for small businesses to obtain a Labor Condition Application, a prevailing wage determination, and obtain the needed documentation to file a petition. For example, there are a limited number of individuals who can perform an educational evaluation for beneficiaries and there is a limited number of immigration attorneys that can be available within a particular time frame. USCIS has also suspended premium processing, so businesses can no longer expedite their petitions if there are any problems with obtaining any of these items.

Another concern is the impact of the registration program for international students on an F-1 visa who are authorized to work under the Optional Practical Training (OPT) program. When a student's OPT work authorization expires (often near the April timeframe), many students attempt to change their status to an H-1B visa. Under current "cap-gap" regulations, an F-1 student who submits a timely filed H-1B petition can be authorized to work through September 30.¹⁷ It is unclear whether a timely submission of a registration would allow an F-1 student to also work through September 30. Under this proposed rule, there are rolling dates for the submission of petitions; these F-1 students may be unauthorized to work or get deported if this is not resolved. Small businesses could lose valuable workers because of this provision.

3. Registration "Flooding" May Shut Out Small Businesses from H-1B Program

Advocacy is concerned that the new registration system might encourage large companies to submit many registrations to increase their chances of obtaining H-1B workers. This increase of registrations would "flood" the registration pool and making it more difficult for small businesses to obtain vital H-1B workers. Advocacy heard this same concern from small businesses when USCIS proposed this registration system in 2011.¹⁸

Small business representatives posed many potential ways that this new registration system could be manipulated to negatively impact small entities. Foreign outsourcing companies with offices in the U.S. have lists of thousands of potential beneficiaries overseas that they can register to work in the United States to work at consulting jobs. Large companies also have lists of many potential beneficiaries, whether they are people they are interviewing or those already working for them overseas that could be all submitted into the lottery. In contrast, small businesses would only be entering a few candidates in this lottery. Additionally, USCIS has not discussed any methods in this rule to verify the identification of an employer, and the minimal registration information required can be found in public labor and securities databases. Advocacy is aware of much concern within the business community that malicious actors may create fraudulent registrations to hurt competitors or disrupt this controversial immigration program.

To combat such fraud, the rule requires employers to attest to their intent to file an H-1B petition for the beneficiary they have filed for; however there is no specific penalty or bar for employers

¹⁷ 8 C.F.R. 214.2(f)(D)(iii)(5)(vi).

¹⁸ See footnote 10.

submitting fraudulent registrations.¹⁹ USCIS states that the agency “does not currently have a solution for the registration process, or any of its filing processes, that guarantees prevention of all non-meritorious registrations or filings prior to adjudication,”²⁰ even though USCIS has had since 2011 to test the pre-registration process and create safeguards against fraud and abuse. USCIS is seeking feedback from the public on “ways to enhance the integrity of the registration system and reduce potential for abuse,”²¹ but the agency is only giving the public 30 days to recommend solutions to fix this proposal. The agency may implement this proposal in the upcoming season despite these concerns.

4. Untested New Electronic Registration Program May Create Delays and Uncertainty

Advocacy is concerned that the proposed electronic H-1B registration system has not been properly tested and may not be able to handle the large volume of registrations submitted by employers. This may result in delays, uncertainties and a possible suspension of the registration program during a crucial time. The proposed rule even contains a contingency plan of suspending this registration proposal.²² USCIS has had a history of problems with the implementation of electronic platforms. There are multiple reports about the obstacles encountered by USCIS when it tried to implement its decade-long “Transformation Initiative” to convert the agency’s paper-based case filing into an electronic platform.²³ One of these reports by the Citizenship and Immigration Services Ombudsman noted that “system breakdowns, design flaws, and partially-functioning programs that were not properly tested prior to deployment repeatedly interfered with achieving milestones.”²⁴

5. Proposed Advanced Degree Exemption Allocation Amendments May Be Detrimental to Small Businesses

This proposed rule changes the order of the lottery process, to increase the number of petitions filed for beneficiaries with a master’s or higher degree from a U.S. institution of higher education. Executive Order 13788 directed DHS and other agencies to “suggest reforms to help ensure that H-1B visas are awarded to the most skilled or highest-paid petition beneficiaries.”²⁵ USCIS does not anticipate petitioning employers would suffer economic harm from this change.²⁶

¹⁹ See 2018 Proposed Rule at 62414.

²⁰ *Id.* at 62414.

²¹ *Id.*

²² See 2018 Proposed Rule at 62446.

²³ DHS Office of Inspector General, *USCIS Automation of Immigration Benefits Processing Remains Ineffective* (Mar. 9, 2016), <https://www.oig.dhs.gov/reports/2016-03/uscis-automation-immigration-benefits-processing-remains-ineffective/oig-16-48>; DHS Office of Inspector General, *USCIS Has Been Unsuccessful in Automating Naturalization Benefits Delivery* (Nov. 30, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-23-Nov17.pdf>; U.S. Government Accountability Office, *Immigration Benefits System: Significant Risks in USCIS Efforts to Develop its Adjudication and Case Management System* (Mar. 16, 2017), <https://www.gao.gov/assets/690/683403.pdf>.

²⁴ Citizenship and Immigration Services Ombudsman, *Annual Report 2018*, (Jun. 28, 2018), <https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202018.pdf>.

²⁵ Exec. Order No. 13788, 82 Fed. Reg. 18837, Sec. 5 (April 18, 2017).

²⁶ See 2018 Proposed Rule at 62441.

USCIS should re-analyze the impacts on this provision on small businesses. Small start-up businesses commented that the most skilled and highest paid staffers at their technology companies often only have a four-year degree, and this rule may deter these types of companies from participating in the H-1B program. This rule does not factor in the importance of the work experience of employees with only a bachelor's degree, who could be more skilled than a newly minted graduate student.

III. Recommendations

1. USCIS should inform the public immediately whether it will proceed with the registration requirement for the current season starting April 2019. The business community needs to know how to prepare for this upcoming lottery season; uncertainty will create increased costs and may make it more difficult for small businesses to obtain H-1B workers.
2. USCIS should postpone the implementation of the registration requirement until after this season. USCIS should extend the comment deadline by 60 days for the public to comment on this important rule and its impact on small businesses. Advocacy would be pleased to work with USCIS again on completing small business outreach, such as conference calls and roundtables.
3. USCIS should release more information about the registration process, such as the form employers will be submitting. USCIS needs to set a timeline with specific dates for this H-1B visa registration and petition process, so that businesses can plan their workforce and budgets properly.
4. USCIS should test their electronic registration system before implementation, to prevent errors and delays in this program. USCIS should create a system to verify the identity of the employer submitting registrations. The agency should not proceed in implementing these changes unless it can create these safeguards.
5. USCIS should work on the timing and notification of the registration process to help small employers. If this registration process should go forward, the registration date should occur on March 1st or later to make it more feasible for smaller employers to participate in this program. The agency should publicize widely the start and end times of the registration period, which would help prevent smaller employers from missing the window of opportunity to apply for an H-1B visa.
6. USCIS should analyze the small business impacts of the lottery changes that give preferences to beneficiaries with a master's or higher degree from a U.S. institution of higher education.

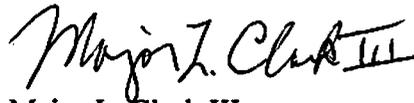
IV. Conclusion

Advocacy appreciates USCIS' efforts to reform the H-1B visa lottery process, as this is a critical program for small businesses to obtain vital high-skilled workers. USCIS stated goals are to streamline the H-1B program and provide cost savings for employers and the agency. Advocacy is concerned that USCIS is adopting untested changes to the upcoming H-1B lottery and may not accomplish this goal of providing cost savings. USCIS is also adopting changes to the lottery

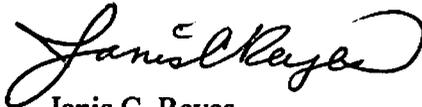
process, without evaluating the impact of these changes on small businesses. Advocacy recommends that USCIS postpone the implementation of the registration requirement until after this season and extend the comment deadline by 60 days to give the public time to provide more comments on the issues raised in this letter. Advocacy would be pleased to work with USCIS again on completing small business outreach, such as conference calls and roundtables. Advocacy is available to help USCIS in its compliance with the RFA.

If you have any questions or require additional information please contact me or Assistant Chief Counsel Janis Reyes at (202) 619-0312 or by email at Janis.Reyes@sba.gov.

Sincerely,



Major L. Clark III
Acting Chief Counsel for Advocacy



Janis C. Reyes
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Copy to: The Honorable Neomi Rao, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget