November 16, 2020

Via Electronic Mail

Chad F. Wolf
Acting Secretary
U.S. Department of Homeland Security
301 7th Street, SW
Washington, DC 20528

Paul J. Ray
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Request for 60-Day Comment Period (30-Day Extension)
DHS Docket No. USCIS-2020-0019 (CIS No. 2674-20)
RIN 1615-AC61

Dear Acting Secretary Wolf and Administrator Ray,

The undersigned employers, associations, coalitions, and groups come to you jointly to ask for a 30-day extension to the comment period for the Department of Homeland Security's (hereafter referred to as DHS or Department) Notice of Proposed Rulemaking (NPRM), published on November 2, 2020, entitled "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions" (hereafter referred to as NPRM or H-1B Wage Lottery proposal). Presently, comments are due December 2, 2020 and we ask that ***on or before November 24, 2020 (before the Thanksgiving holiday) a Federal Register Notice is published extending the comment period to January 4, 2021***.

Introduction

We are writing to request a full 60-day period to provide the Department thoughtful, detailed, and, where appropriate, data-based feedback on this important matter, either ourselves or through our trade associations and coalition partners. DHS has published an NPRM on a matter that has never appeared in any administration's Unified Agenda for which it did not provide the standard 60-day comment period for the public. This is a rule that will have a direct and negative impact for tens of thousands United States employers and tens of thousands college-educated, foreign-born professionals – and the underlying commercial and not-for-profit activities undertaken by these actors, including significant scientific and other efforts.

Justification for 60-Day Comment Period

The Executive Orders governing the regulatory process establish unequivocally that the standard time for comment is 60 days, and is needed for this rulemaking given the Department's multiple requests for commenter input in the NPRM. EO 12866 states that agencies should allow "not less than 60 days" for public comment in most cases, in order to "afford the public a meaningful opportunity to comment on any proposed regulation." EO 13563 states that "[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."

Indeed, DHS itself affirmatively asks for stakeholder feedback of the type that would necessitate at least a 60-day comment period. The NPRM identifies at least six separate issues where the agency itself desires public feedback, such as (1) alternative mechanisms to weight the agency's consideration of registered H-1B petitions by salary or skill, (2) insights or suggestions as to how identify or measure those H-1B petitions with the highest valued use to the U.S. economy, (3) whether the new approach will eat in to the time- and cost-saving nature of the registration process, (4) the consequence of tallying registered H-1B petitions solely by skill level without regard to corresponding wage level, (5) better or more accurate means to assess the impact to recruiting and hiring generated by the proposed rule, and (6) a better understanding on how smaller entities or specific types of entities might be impacted by the change.[1]

The regulated community could not have known that a regulatory proposal reordering H-1B cap-subject petitions from least-skilled to most-skilled foreign-born professionals was forthcoming. Indeed, OIRA's website confirmed when it completed its review of the NPRM, "this rule has not been published in a Unified Agenda."[2] Neither the Trump administration nor any prior administration ever listed this significant regulatory action on a Unified Agenda. Just last year, the Trump administration conducted a notice and comment rulemaking creating a new H-1B Registration process, that had been discussed for many years within DHS under both the Obama and Trump administrations. In the 2019 final rule[3] entitled "Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens," the Department considered the very policy now being promoted in the H-1B Wage Lottery proposal and unambiguously stated to the public that such a prioritization scheme was not a DHS action permitted under the governing authorities of the Immigration and Nationality Act and therefore would not be pursued.[4] As such, stakeholders did not anticipate the need to engage in the sophisticated analysis necessary to assess the policy announced in the NPRM.

The new H-1B Wage Lottery proposal will dramatically reduce access to H-1B status for early-career professionals, including those completing Master's and Doctoral degrees at U.S. universities and colleges. This merits extensive inquiry and data analysis by stakeholders, including the import of the proposed H-1B Wage Lottery proposal with respect to the ability of U.S. Master's and above graduates to secure H-1B status.

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[1] 85 Fed. Reg. 69236 at 69242, 69255, 69256, 69258, 69259, 69260 (November 2, 2020).
[2] OIRA's website lists agency actions reviewed within the preceding 30 days, with a link to the RIN and prior Agenda listings. OIRA started its review of the NPRM on November 3, 2020, the day after it was published, and completed its review on November 4th. The website conformation of OIRA's review of the H-1B Wage Lottery proposal will end on December 3, 2020. See https://www.reginfo.gov/public/do/eoReviewSearch, last accessed November 16, 2020.
[3] 84 Fed. Reg. 888 (January 31, 2019).
[4] Id. at 914. In the final H-1B Registration rule published in 2019, the Trump administration explained unequivocally "DHS does not have the statutory authority to prioritize H-1B beneficiaries based on their skills" and "DHS believes, however, that prioritization of selection on other factors, such as salary, would require statutory change."

Such work by stakeholders is particularly relevant because an initial review of the NPRM suggests that, for a variety of reasons, the Department is only able to provide limited data analysis. Most fundamentally, as the NPRM explains, "DHS does not have the wage level break down for the 85,725 (44 percent) of petitions that were not selected since those petitions were returned to petitioners without entering data into DHS databases."[5] This means, at best, DHS is proceeding with this wholesale change of the H-1B system while missing important information on almost half of all registered H-1B petitions. At this juncture, stakeholder analysis might be the sole means to indicate whether the proposal has unintended results for a variety of employers or for important groups of beneficiaries, including early-career professionals in certain sectors and international students earning degrees from U.S. institutions of higher education. For example, it appears that under the NPRM that new Master's and Doctoral graduates from U.S. institutions of higher education would largely be unable to access the H-1B program. While further surveying would be required to document this, an early review of the numbers on H-1B petitions for only advanced degree holders implies this result.

Calculating and understanding the exact impact of the NPRM is of great concern to the regulated community, which requires at least 30 further days for public review.

Conclusion

Many of us actively take steps as organizations or through our members to ensure the United States has the capacity to both educate and employ domestic sources of professional talent. Many of us have worked with successive administrations and Congress on issues critical to the global mobility of talent and compliance, functionality, and integrity in the employment-based immigration system of the United States. Despite differences in approach, sector, and membership, each signatory has found it core to our mission as an organization that **high-skilled immigration is a key component of the ongoing ability of the United States to obtain and retain the talent necessary for America and American enterprise to continue to innovate and create jobs in the United States**. Under current law, the H-1B nonimmigrant classification is the sole vehicle U.S. employers have to hire foreign-born professionals in specialty occupations, and, thus, a functioning H-1B program is key to the nation's high-skilled immigration system.

We value the opportunity to participate in the rulemaking and policy implementation process. In order to best assist the Department in its consideration of possible revisions to the H-1B registration process and the adoption of a new lottery process, we would require further time to conduct necessary data analysis and number-crunching as well as complex legal analysis, which requires the full, standard 60-day comment period.

If you have questions or follow-up concerning this letter, please contact Scott Corley, Executive Director of the Compete America Coalition, who can be reached at scott@corleydc.com.

[5] 85 Fed. Reg. 69236 at 69250 (November 2, 2020).

Respectfully submitted,

280 Technologies LLC
ABB Inc.
Adform
Adroit Associates Inc
airSlate, Inc.
AirWorks Solutions, Inc.
AKG North America, Inc.
American Chemical Society
American Immigration Council
American Immigration Lawyers Association
American Walnut Management
Arias Information Solutions LLC
Arteris, Inc.
Ball Horticultural Company
Bastion of Balmoral LLC
BDI
Bidgely Inc
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Bold Screen Media, Llc
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Broad-Ocean Motor
BSA | The Software Alliance
Budish Insurance Services, Inc.
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C & S Roasters
Calypso Technology
Cerus Corporation
Chartboost
Chinese American Service League, Inc
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Cockroach Labs Inc
CompareNetworks
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Computer Packages Inc.
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Data Theorem, Inc.
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Elpis Biopharmaceuticals, Corp.
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Far East Metals, Inc.
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Infortech Corporation
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Internet Association
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Kendall Psychological Associates, P.C.
Kuku Studios, Inc.
L.E.K. Consulting LLC
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Legat Architects
Lendbuzz
LinkedIn
Live Oak, Inc
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Maine Business Immigration Coalition
Maple Health Group, LLC
Material Difference, LLC
MatterApp Inc.
Microsoft Corporation
MNC Express, Inc.
Morningstar, Inc.
Multilingual Connections
MycoWorks
Narwal Inc.
National Immigration Forum
National Retail Federation

NB2M LLC
Nokia
Northside Center for Relationship Counseling, P.C.
Nuvoton Technology Corporation America
OneOrigin LLC
PathAI, Inc.
Patreon, Inc.
People Center, Inc. dba Rippling
Presidents' Alliance on Higher Ed. & Immigration
Psychiatric Specialties, PLC
Quality Catering for Kids. Inc.
Quogent, LLC
Real Kitchen II LLC
Remix Software, Inc.
ReviverMx, Inc.
RSM Technology Solutions Inc
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Sara Dittoe Barrett Psychological Services, Ltd
Servotech Inc
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Snider - Flautt Lumber, Inc.
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SolarEdge Technologies Inc.
Solix Technologies Incorporated
SPIN Analytics and Strategy, LLC
Tarana Wireless Inc
TechNet
Teqtron, Inc.
Texas Biomedical Research Institute
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The Smith-Kettlewell Eye Research Institute
Tula Technology, Inc.
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Vitalant Research Institute
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