

March 10, 2021

Submitted via Regulations.gov

Charles L. Nimick, Division Chief
Business and Foreign Workers Division
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Suite 1100
Washington DC 20529

Re: U.S. Citizenship and Immigration Services
DHS Docket No. USCIS-2020-0019
RIN 1615-AC61
Final Rule Delaying Effective Date of Modified Registration Requirements for Employers Seeking to File Cap-Subject H-1B Petitions

Dear Division Chief Nimick,

The undersigned associations, coalitions, and groups come to you jointly in response to the Department of Homeland Security's (hereafter referred to as DHS or Department) Final Rule delaying the effective date of the new H-1B Wage Prioritization regulation. The DHS final rule entitled "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions; Delay of Effective Date" was published in the Federal Register February 8, 2021 announcing a delay in the effective date of the previously published regulation that appeared in the Federal Register January 8, 2021.

The Department's final rule on the effective date requested comment on the delay as well as input on the underlying policies because "DHS leadership will also evaluate the January 8th rule and its associated policies, as is typical of agencies at the beginning of a new Administration."¹ We come before you now in support of the agency taking two actions:

- We support delaying the effective date of the DHS H-1B Wage Prioritization regulation, and
- We support DHS reviewing the H-1B Wage Prioritization regulation to ensure that it
 - allows early-career professionals that happen to be foreign-born to be hired by compliant U.S. employers paying appropriate wages for the skill level, including international students completing undergraduate, graduate, or professional degrees from American colleges and universities, and
 - avoids negative impacts to a variety of occupations, geographies, sectors, and employers, to include non-profits, rural hospitals and health clinics, start-ups, and small and medium-sized businesses.

Commenters' Interests

Signatories to this comment have a keen interest in helping to ensure that the U.S. immigration process effectively promotes – with appropriate integrity and security safeguards – the desirability and ability of high-skilled foreign-born professionals to be employed in our country.

Despite differences in approach, sector, and membership, each signatory organization has found that ***high-skilled immigration is a key component of the ongoing ability of the United States to obtain and retain the talent necessary for the U.S. economy to continue to innovate and create jobs in the United States.***

¹ 86 Fed. Reg. 8543 (February 8, 2021).

To maintain the nation's strength and competitiveness, we know that many of the nation's employers hire the talents of well-educated and highly skilled professionals who happen to be foreign-born along with the vast preponderance of U.S. workers that make up their workforce. The ability to hire appropriate, eligible individuals in H-1B visa status is an important tool to bring that workforce together. Established in the 1952 rewrite of the nation's immigration laws, for over 65 years the H-1 visa classification has existed to allow U.S. employers to hire professionals born outside our country working in an occupation that typically requires the type of knowledge only obtained through completion of a university education. Since 1990, this category has been subject to numerical limits and a Labor Condition Application to protect the U.S. labor market, and designated as the H-1B visa. Our organizations' member and affiliated firms, institutions, and associations reasonably expect the H-1B visa category to continue to be available to allow U.S. employers to hire new professional staff, including early-career professionals and international students earning undergraduate, graduate, and professional degrees at U.S. institutions of higher education. The H-1B Wage Prioritization final rule directly upsets these reliance interests.

The legality of the H-1B Wage Prioritization regulation should be carefully reviewed in light of the Department's clear understanding of the INA's provisions on the ordering of H-1B status adjudications.² And, the necessity of the DHS prioritization regulation should be further considered in light of the Department of Labor's role in establishing the required wages for all H-1B petitions including those cap-subject petitions where registration occurs.³ Moreover, though, the *substance* of the H-1B prioritization rule needs to be further assessed.

A similar multi-sector group filed a [joint comment on December 2, 2020](#), in response to the DHS proposed rule concerning the new H-1B Wage Prioritization regulation now being delayed, expressing our willingness to work with the agency on this important issue. This is because we join the Department in believing enhanced public engagement in rulemaking helps agencies avoid proceeding with regulatory proposals that do not first assemble the necessary, comprehensive information needed to tackle complex problems.⁴ Agencies benefit when they can obtain "situated knowledge" as part of rulemaking efforts – an acknowledgement that public officials benefit from having access to knowledge that is widely dispersed among stakeholders.⁵ "In particular, agencies need information from the industries they regulate, other experts, and citizens with situated knowledge of the field in order to understand the problems they seek to address, the potential regulatory solutions, their attendant costs, and the likelihood of achieving satisfactory compliance."⁶ We do not believe the H-1B Wage Prioritization regulation on the books reflects the kind of input and careful consideration needed on an issue of such importance as how to "ration" access to the H-1B visa category.

² It appears that DHS understands that the INA is clear and does not permit the type of prioritization now reflected in the H-1B Wage Prioritization final rule. It reached that exact conclusion recently, when it published the underlying H-1B Registration Requirement regulation in January 2019. In response to commenters' suggestions to consider quotas or prioritization of certain H-1B petitions based on salary or sector of employer activity or other criteria, the Department explained in the final rule such options were unavailable under the statute. "DHS believes, however, that prioritization of selection on other bases such as those suggested by the commenters would require statutory changes. DHS believes that implementing a quota would be inconsistent with the existing statute, as Congress has implemented quotas in other contexts when it has intended to do so." See, 84 Fed. Reg. 888 at 913 (January 31, 2019).

³ DOL published a final high-skilled wage rule at the end of the Trump administration, 86 Fed. Reg. 3608 (January 14, 2021).

⁴ See also, 84 Fed. Reg. 2139 at 2146-2148 (February 6, 2019), [Administrative Conference Recommendation 2018-7, Public Engagement in Rulemaking](#) (adopted December 14, 2018).

⁵ M. Sant'Ambrogio and G. Staszewski, Michigan State University, [Public Engagement with Agency Rulemaking](#) (Administrative Conference of the United States, November 19, 2018) at p. 3.

⁶ *Id.* at p. 10.

Support to Delay the Effective Date

We strongly support the delayed effective date for the very reasons DHS identified in its final rule announcing the delay. We agree that U.S. Citizenship and Immigration Services did not have adequate time to complete system development, thoroughly test the modifications, train staff, and conduct public outreach needed to ensure an effective and orderly implementation of the H-1B registration and selection process for FY2022 cap-subject H-1B petitions. We also agree, as explained by DHS in its final rule announcing the delay, that because of the complexity of the registration and selection process it would be impracticable to implement the new modified registration and selection process at any time during calendar year 2021 when new FY2022 cap-subject H-1B petitions might be registered or selected.

Moreover, as explained in our December 2, 2020 comment on the underlying rule now being delayed, we consider it unwise for the new prioritization policy to be applied to the March 2021 registration period for cap-subject H-1B petitions in FY2022. Employers were already deep into the process of converting Fall 2020 offers of employment into about-to-be registered H-1B beneficiaries, at the time comments were due and a month later when the final rule was published. It would have been chaotic to insert a new, predicate analysis by employers into the registration mechanics. Further, the H-1B wage prioritization analysis is itself less than straightforward for employers to undertake. Especially when the entire H-1B registration process was designed and explained to the public as a cost-saving process where little preliminary work was supposed to be needed to register H-1B petitions, it would be very difficult to introduce this new wage leveling intricacy without significant time for employers to complete internal analysis and training and to publicly engage with U.S. Citizenship and Immigration Services to get questions answered.

Next Steps for DHS to Reconsider H-1B Prioritization Policy

DHS explained its H-1B Wage Prioritization rule by saying it expected the rule to incentivize offers of either higher wages or higher skilled positions to those hired as H-1B workers.⁷ Yet, employers do not have the ability to hire only those that are most tenured and senior or to pay wages disconnected from the actual wages paid similarly-situated U.S. workers. This is a fundamental flaw in the DHS approach.

Moreover, an enduring weakness of DHS's prioritization regulation is that it fails to consider how the new policy will negatively impact employers engaged in not-for-profit activity,⁸ and those that are rural hospitals and health clinics, start-ups, or small and medium-sized enterprises, among others. Many of these employers are part of the vast majority of individual employers filing initial, cap-subject H-1B petitions that request only one such H-1B approval, or handful of H-1B approvals.⁹

In the real-world U.S. labor market for professionals, employers value professionals at *all* skill levels. Indeed, throughout the U.S. economy there are entire hiring, recruitment, and training models *and* business unit long-term and short-term planning that rely on access to early-career professionals who will be developed and mentored. It is not untoward that some foreign-born professionals are also in this cohort, many of whom are international students that have earned degrees at U.S. colleges and universities.

⁷ See, e.g., 85 Fed. Reg. 69236 at 69240 (November 2, 2020).

⁸ With limited exceptions, all non-profits other than those engaged primarily in research must file initial H-1B petitions as cap-subject petitions through the registration and any prioritization process for cap-subject petitions.

⁹ In sharing H-1B data as part of its transparency efforts, DHS has indicated that something on the order of 60 percent of employers receiving H-1B approvals seek and obtain a single (one) H-1B approved petition each year and approximately 90 percent of individual employers seeking H-1B status each year receive fewer than 10 approvals. See data obtainable from the [H-1B Employer Data Hub](#).

There is no single metric that could, would, or should, standing alone, measure the value of a particular professional or position in all situations. This is truer when, as with DHS's current prioritization regulation, no consideration is given to variable compensation, employed by many companies in the 21st century, and especially those doing extensive hiring in the computer-related occupations that dominate the H-1B program. Most fundamentally, though, it is simply incorrect that tenure or seniority, the only thing measured in DHS's H-1B Wage Prioritization rule, can reliably identify the most highly-skilled or most highly-paid as DHS purports is the purpose of its new H-1B Wage Prioritization regulation.

U.S. employers across many sectors have, properly, relied on the ability to hire early-career professionals under the INA. International students are aware of these opportunities, too, and in part that is what drives the highest-achieving foreign-born students to seek a U.S. university degree, especially in graduate-level STEM-centric programs.¹⁰ It is not far-fetched to worry about how the Department's current prioritization scheme could drive away such talent, harming the U.S. higher education and business communities and the U.S. role in cutting edge activities. Indeed, in a recent survey, 46% of foreign-born graduates of U.S. PhD programs in Artificial Intelligence who were still in the United States reported that immigration difficulties were making them more likely to leave.¹¹

For at least the last 50 years, this agency and its predecessor have consistently recognized that this nonimmigrant visa category is appropriate for professionals at all skill levels. Under the predecessor "H-1" classification, individuals with "distinguished merit and ability" included "members of the professions," comparable to the current "specialty occupation" delineation. Questions arose as to whether the agency had authority to ban "entry-level professionals." INS explained that the inclusion of entry-level members of a profession had been well-established before 1970 and concluded in 1990 "that a Congressional amendment to the statute would be required to change the current interpretation after such a long time."¹²

No such statutory amendment barring early-career professionals has been enacted. Nothing in the INA contemplates or suggests that DHS could ever take a position to exclude early-career professionals from securing H-1B status by working at a Skill Level 1 or 2 in a specialty occupation. Yet, we believe that the Department's H-1B Wage Prioritization rule does exactly that as currently promulgated and for that reason must be discarded in its current form.

Conclusion

We value the opportunity to participate in the rulemaking as well as policy development and implementation processes. In order to address the important underlying issues raised by the H-1B Wage Prioritization regulation that is now delayed, many of the undersigned organizations would welcome the opportunity to participate in dialogue with the Department including through an Advance Notice of Proposed Rulemaking process. We believe that an ANPRM would allow stakeholders time to develop and provide more information or data to help DHS determine whether a rule is needed, what regulation to develop, and what alternative suggestions are most viable, especially in light of the limitations of the governing statute.

¹⁰ About 53% of STEM Master's and 43% of STEM PhD graduates from U.S. institutions are international students, while only 7% of undergraduate STEM degrees in the U.S. go to international students. See, National Center for Educational Statistics, *Digest of Education Statistics 2018* (U.S. Department of Education, 2019) at Table 318.45; *accord*, Madeline Zavodny, [International Students, STEM OPT and the U.S. STEM Workforce](#) (National Foundation for American Policy, March 2019) at p. 11.

¹¹ Catherine Aiken, James Dunham and Remco Zwetsloot, [Immigration Pathways and Plans of AI Talent](#) (Center for Security and Emerging Technology, September 2020).

¹² See 55 Fed. Reg. 2606 at 2608-2609 (January 26, 1990).

Respectfully submitted,

American Chemical Society
American Immigration Council
American Immigration Lawyers Association
American Society of Nephrology
Association of American Universities
Association of Public and Land-grant Universities
BSA | The Software Alliance
Compete America Coalition
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HR Policy Association
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