



May 2, 2011

Department of Homeland Security
USCIS, Chief Regulatory Products Division
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Washington, DC 20529-2020
Via E-mail: rfs.regs@dhs.gov

**Re: DHS Docket No. USCIS-2008-0014
ACIP Comments on USCIS Proposed Rule – Registration Requirements
for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject
to Numerical Limitations - 76 FR 11686 (March 3, 2011)**

The American Council on International Personnel (ACIP) and the Society for Human Resource Management (SHRM) submit the following comments in response to the 60 Day Notice of Proposed Rulemaking and Request for Comments – Registration Requirements for Petitioners Seeking to File H-1B Petitions on Behalf of Aliens Subject to Numerical Limitations (DHS Docket No. USCIS-2008-0014).

ACIP is an organization comprised of approximately 220 corporate and institutional members with an interest in the movement of personnel across national borders. Each of our members employs at least 500 employees worldwide, and in total, ACIP members employ millions of United States citizens and foreign nationals in all industries throughout the United States. ACIP sponsors seminars and produces publications aimed at educating human resource and legal professionals on compliance with immigration and employment verification laws, while working with Congress and the Executive Branch to facilitate the movement of international personnel. Most ACIP members employ H-1B professionals, and we applaud USCIS's desire to streamline the H-1B process and reduce costs and unnecessary paperwork burdens on employers. Therefore, we appreciate the opportunity to comment on the proposed rule and we look forward to a continued dialogue with USCIS on this important matter.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR

professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

As background, ACIP and SHRM members recruit for positions and follow an extensive evaluation and interview process before deciding to make an offer of employment. However, once that offer is accepted and it is determined that the new employee will need H-1B status in order to work, the employer moves swiftly to acquire the visa. For most employers, the time it takes to evaluate whether a foreign national candidate for employment is eligible for an H-1B visa, file the Labor Condition Application (LCA) with the U.S. Department of Labor (DOL), accommodate the 10 business day posting period, complete the Form I-129, and file the petition can be anywhere from 4 to 16 weeks. As such, we have great concerns about adding yet another layer of bureaucratic burden on an already arduous process. Therefore, in response to this request for comments, we express our concerns, as well as some suggestions, in greater detail below:

- Ensure the new system is developed in tandem with Transformation initiatives – otherwise time and resources may be devoted to a new project which is short-lived and possibly unnecessary.
- Increase Registration Period to at Least 4 Weeks and Engage in Beta-Testing.
- Avoid overbooking – instead regulate the waiting list and make numbers available as they dip below 65,000 or 20,000.
- Manage and regulate registrations to allow petitioners to “lock in” a number; thereby allowing 60 days to file.
- Allow petitions to be filed without certified LCAs to ensure that registrants with bona fide cases can get their cases filed, given that the filing period will effectively be shortened by either the 60-day window or fear of being “bumped.”
- Issue registration verifications in a timely manner to reduce negative impact on OPT and “cap gap” cases.
- Establish “spillover” system to allow for advanced degree petitions to spill into the 65,000 cap-subject pool once the 20,000 advanced degree limit is reached.
- Disqualify duplicate registrations in the spirit of the 2008 Rule. Stipulate disincentives for employers who engage in speculative or prospective filings thereby creating artificial demand.

Develop the H-1B Registration System in Tandem with Transformation

ACIP and SHRM question how the proposed registration system fits into USCIS's overall Transformation efforts with regard to both technology and timing. We understand that H-1B registration will be implemented for FY2013 petitions, which means during March of 2012. We also understand that Transformation will allow for

e-filing of the Form I-129 as early as the end of calendar year 2012. In addition, USCIS has informed stakeholders that the H-1B registration will not integrate with Transformation. We question the efficacy of expending limited resources on a system that is not an immediate need or may become obsolete. We question whether Transformation will ultimately replace H-1B registration or whether they will run parallel. Either route raises concerns.

If Transformation will replace the H-1B registration system, why would USCIS expend resources to develop a new H-1B registration system which might only be used for a year or two and during a time where large-scale lotteries are not anticipated? The H-1B cap was not reached during the initial filing periods for FY 2010 and 2011, and is particularly low for FY 2012, with more than 80% remaining after the first month of filing – lower filings than in 2010 or 2011. While the improving economy may yield higher demand for H-1B numbers in the longer term, it is doubtful that the cap will be reached during the initial filing period anytime soon. The wisdom of developing a system that may be unnecessary for the next two or three fiscal years and obsolete thereafter is questionable.

On the other hand, if the systems will run in parallel, we question whether the agency is really creating less of a workload burden for employers or itself. As we have raised with USCIS in other contexts, we firmly urge that any e-filing system must integrate with the human resource management software systems (HRMS) utilized by large multinational employers who often track hundreds or thousands of international assignees. A non-integrated system will add another layer of burden on employers, the opposite of what we believe is intended by this proposed rule.

ACIP and SHRM agree with USCIS that it might be prudent to build a system with an up-front lottery component for case types with numerical limits. We would recommend, however, that USCIS carefully review timing issues, and perhaps focus its efforts on incorporating a lottery system into its Transformation initiative, rather than creating a new system that may be obsolete before it is necessary. Incorporating the lottery concept into Transformation would give the agency additional time to plan and should open the door to additional technological options as well.

As such, USCIS can design, develop and implement an efficient and effective H-1B registration system, in conjunction with Transformation, which would reduce the economic burden for both employers and USCIS.

Increase Registration Period to at Least 4 Weeks and Engage in Beta-Testing

As set forward in the proposed rule, employers would be required to register online during a filing window of at least two weeks. The registration would begin no later than March of every year. As a practical matter, we would suggest a time period of at least

four weeks, similar to the application period for the DV lottery. In addition, ACIP would like to recommend that the registration system allow employers the option to enter, save and review data before submitting the request. This will allow employers adequate time to enter data and evaluate their decision, and perhaps reduce the number of potential registrations resulting in an artificial demand. The agency should also seriously take into account the potential for glitches in a new system and engage in extensive beta-testing with stakeholders before implementation. Such testing has greatly facilitated the transition to online filing of LCAs and labor certifications with the Department of Labor. ACIP and SHRM members would be pleased to participate in such an initiative with USCIS.

Avoid Overbooking

ACIP and SHRM are concerned that having the registration period in March may not give employers sufficient time to prepare and file petitions soon after the April 1st lottery. Under normal circumstances, it usually takes employers anywhere from 4 to 16 weeks to prepare, review and file an H-1B petition. Furthermore, USCIS needs to clarify whether notice will be provided immediately or whether there will be a processing time before the employer is notified. Although we appreciate that the rule suggests that employers would have at least 60 days to file once “winning” a registration, we are concerned that the proposed rule also suggests that such a victory would not guarantee a number since the agency will be “overbooking” available slots by several percent.

Overbooking available slots will undoubtedly undermine employers’ confidence in the system. The “overbooking” could result in a situation similar to that of a traveler booking a flight, getting to the airport ostensibly on time, but then being bumped anyway because the seats filled more quickly than anticipated. In spite of the filing window of at least 60 days that USCIS suggests in the proposed rule, employers with successful registrations would have a major incentive to rush to file petitions by April 1st to avoid being shut out. The problem will be compounded by ongoing concerns with DOL’s issues with its iCert program and if USCIS continues to refuse to accept less than complete petitions.

Employers need certainty when managing their workforces. The unpredictability inherent in the H-1B quota system already threatens U.S. economic competitiveness. To add another layer of uncertainty will simply cause more employers to determine that it is too risky to do business in the United States.

Allow Petitioners to “lock in” a Number

Given that USCIS plans to establish a waiting list, we suggest that USCIS consider setting up a system so that it may manage and regulate registrations to avoid

overbooking and allow petitioners to “lock in” a number. The agency could set up a system similar to the one many colleges and universities do with rolling admissions. This might mean keeping the initial petition pool slightly smaller, but it would also avoid the race to the Service Center door and might also benefit the agency by spreading the workload over a slightly longer period of time. Then permits the 60-days filing window to be more meaningful.

Alternatively, if USCIS cannot establish a system where a number can be locked in and some overbooking is necessary or makes more sense from a statistical and practical standpoint, we suggest that USCIS begin the registration period as early as is practicable – perhaps in February – and have an expanded “initial filing period” for petitions in the event the lottery is triggered – perhaps the entire month of April.

Allow Skeletal Petitions

Given the abbreviated time period, USCIS should also allow for the filing of skeletal petitions. We would suggest that employers would need to submit the I-129 form and all fees, but should be able to provide the certified LCA and additional supplementary evidence at a later point. This suggestion will possibly be better managed once USCIS Transformation is up and running.

Reduce Negative Impact on OPT and “cap gap” Cases

The proposed rule does not fully consider how the new registration system might affect foreign national beneficiaries seeking to extend their F-1 Optional Practical Training (OPT) and/or status during the “cap gap” period between expiration of their OPT authorization and October 1. See 8 CFR Section 214.2(f)(5)(vi).

If the registration takes place in March and the cap is reached, those on OPT, particularly with April expiration dates, may be placed at a severe disadvantage in terms of their employer’s time and ability to timely file a petition. Moreover, if the cap is not reached and “registration remains open,” USCIS should ensure that registration verifications are issued timely, if not instantaneously, so as not to create undue delay.

Establish “spillover” System for Advanced Degree Petitions

The proposed rule is not clear about how the registration system will properly ensure that U.S. advanced degree graduates will not be disadvantaged by the system. The rule suggests that there are two caps – the standard and advanced degree caps. However, the 20,000 is not a maximum on advanced degree filings. The present system outlined in the preamble of the March 24, 2008 rule recognizes this by allowing for a spillover of advanced degree petitions to the standard 65,000 pool if the

advanced degree limit is reached first. ACIP and SHRM suggest a similar mechanism as part of the registration system.

Disqualify Duplicate Registrations in the Spirit of the 2008 Rule.

ACIP and SHRM have a major concern about how the agency will handle duplicate registrations. The proposed rule needs to ensure and enforce the rule that employers cannot file duplicate registrations for the same employee. Current policy is that when duplicate petitions are filed, all are disqualified. See “Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt from the Annual Numerical Limitation” 73 Fed. Reg. 15389 (March 24, 2008). In the 2008 Interim Rule, USCIS described allowing duplicate filings by one employer for the same employee as creating “a loophole for employers that seek to exploit the random selection process to the competitive disadvantage of other petitioners.” This loophole would be even more pronounced with a system that requires no documentation and includes no fee. We recommend at the very least, therefore, that the policy embodied in the 2008 rule be extended to the registration system – i.e., when there are multiple filings by the same employer for the same employee, all should be disqualified.

Stipulate Disincentives to Speculative or Prospective Filings

Another concern is that some employers will file registrations for workers where the need might be more speculative or prospective. For instance, some business models rely on large numbers of employees with interchangeable and less specialized skills. In such situations, there might be no immediate plan or need to bring a particular worker into the United States, but the employer may decide to file for large numbers of workers “just in case.” This could greatly skew the results of the registration and create an artificial demand or an even more troublesome backlog than the ones we have experienced in recent years.

As a practical disincentive, the agency could consider collecting the basic I-129 filing fee at the time of the registration. One method, perhaps more burdensome to USCIS, would be collecting payment and refunding those that are not successful in the lottery or wait list. A more practical and less burdensome method is to collect credit card information that would only be charged if a registration is successful and is able to capture a number. This relates back to our comments about Transformation above – it would seem that creating a system where non-winners could automatically either not be charged or receive credits would be easier to administer with a system developed to accept fees online. Announcing such a system well in advance would also give companies an opportunity to get their systems and processes in order to submit credit card information.

Once again, we thank you for this opportunity to provide our comments. If we can provide you with any additional information, please feel free to contact us.

Sincerely,



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