

April 28, 2011

**VIA ELECTRONIC SUBMISSION**

Alejandro Mayorkas  
Director  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Avenue, NW  
Washington, D.C. 20529-2020

***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); DHS Docket No. USCIS-2008-0014.***

Dear Director Mayorkas,

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration is pleased to submit these comments to the United States Citizenship and Immigration Services (USCIS) regarding its proposed rule which creates an early registration process for H-1B petitions subject to numerical limitations. After our recent roundtable, which included small business representatives, Advocacy believes that the proposed registration requirement may make it more difficult for small businesses to obtain vital high-skilled foreign workers through the H-1B visa program. Advocacy recommends that USCIS reevaluate the potential compliance burdens of this rule on small entities, and possibly reconsider whether the agency should proceed with this program.

**The Office of Advocacy**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>1</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>2</sup> 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 business and to consider less burdensome alternatives. Moreover, Executive Order 13272<sup>3</sup> requires federal agencies to

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<sup>1</sup> 5 U.S.C. § 601 et seq.

<sup>2</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

<sup>3</sup> Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking (67 Fed. Reg. 53461) (August 16, 2002).

notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, both Executive Order 13272 and a recent amendment to the RFA, codified at 5 U.S.C. 604(a)(3), require the agency to include in any final rule any comments filed by Advocacy to the agency. The agency must provide a detailed statement of any change made to the proposed rule as a result of the comments.

## **I. Background**

H-1B visas are temporary visas used by employers to hire for up to six years high-skilled foreign nationals and foreign students graduating from U.S. universities. USCIS estimates that about 88.6 percent of petitions requesting an H-1B employee are filed by small entities.<sup>4</sup> The employers approved to hire H-1B workers are from high growth industries, including professional, scientific and technical services (38 percent); manufacturing (11 percent); health care and social assistance (8 percent); educational services (6 percent); and finance or insurance (5 percent).<sup>5</sup>

Congress has established limits on the number of foreign workers who may be granted H-1B visas; there is a yearly numerical cap of 65,000 for general petitions and 20,000 for petitions for workers with a U.S. master's or higher degree. USCIS allows employers to file H-1B petitions as early as six months ahead of the projected start date for the fiscal year, and the agency accepts applications starting April 1<sup>st</sup>. USCIS determines the "final receipt date" based on the number of applications received, and performs a random selection of these applicants for these limited slots. Since USCIS first created the random selection process in 2005, it has twice received such significant numbers that the numerical caps were exceeded on the first day.<sup>6</sup>

USCIS is proposing a registration requirement for H-1B petitions subject to the numerical caps. Employers must electronically register each prospective H-1B employee during a designated registration period that would begin no later than in the month of March each year, for a minimum period of two weeks. USCIS would notify employers of the registration start and end times, and randomly select employers from this pool to meet the numerical caps. Only employers that are randomly selected in the registration process can file a more thorough H-1B petition. USCIS anticipates that this new process will reduce administrative costs for employers that currently spend significant resources compiling an H-1B petition for potential employees without certainty that they will actually obtain this employee due to the numerical caps. USCIS also believes the mandatory registration will alleviate administrative burdens on USCIS service centers that will process fewer H-1B petitions.<sup>7</sup>

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<sup>4</sup> 76 *Fed. Reg.* at 11696.

<sup>5</sup> U.S. General Accounting Office. *H-1B Visa Program: Reforms are Needed to Minimize the Risks and Costs of Current Program* 95 (January 2011) (*GAO Report*). See Figure 21, Industries of Employers Approved to Hire H-1B Workers, FY2000-FY 2009.

<sup>6</sup> 76 *Fed. Reg.* at 11696, 11697.

<sup>7</sup> *Id.*

Advocacy appreciates USCIS's efforts to address the administrative burden and uncertainty faced by the agency and by employers when the demand for H-1B petitions is high. However, small business representatives have expressed concern that the proposed registration requirement may actually create more burden and uncertainty for small entities who are trying to obtain vital high-skilled foreign workers through the H-1B visa program. Advocacy recommends that USCIS evaluate the potential small business concerns and regulatory alternatives outlined in this comment letter and in the docket, and possibly reconsider whether the agency should proceed with this new H-1B visa design.

## **II. Small Entity Concerns with the Rule**

On April 15, 2011, Advocacy hosted a small business roundtable attended by stakeholders representing small businesses utilizing the H-1B visa program in a wide variety of industries including technology, manufacturing, health care and staffing. Representatives from USCIS also attended the meeting to provide a background briefing and answer questions about the proposed rule. The following comments are reflective of the issues raised during the roundtable discussion and in subsequent conversations with small business representatives.

### **1. The Proposed Registration Requirement May Not Result in Cost Savings for Employers.**

In USCIS's Regulatory Flexibility Analysis, the agency certified that this rule would not have a significant economic impact on a substantial number of small entities. The analysis states that the registration process will take small employers only 30 minutes to complete, at a cost of only \$12.66 per worker. It also states that small employers will have a large cost savings in legal fees because the registration "requires minimum skills," and because these employers will only have to prepare H-1B petitions for those workers for whom they obtain registration selection notices.<sup>8</sup>

Small business representatives at the roundtable disagreed with this analysis, stating that employers will still have to determine the eligibility of prospective H-1B workers before submitting registrations—this process will just be done earlier than before. Employers have to expend resources to evaluate whether the position and prospective worker qualifies for a specialty occupation, whether their worker needs an educational evaluation and whether the offered wage meets or exceeds the prevailing wage in the area.

A representative from the National Association of Manufacturers, whose members utilize the H-1B program to obtain engineers and technology experts, has told Advocacy that the new registration program just adds another layer of bureaucracy instead of streamlining the already complicated H-1B process.<sup>9</sup> USCIS records showed that 93 percent of H-1B petitions filed by employers were done so by an attorney.<sup>10</sup> Many roundtable participants

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<sup>8</sup> 76 *Fed. Reg.* at 11695-11697.

<sup>9</sup> Telephone call with Christine Scullion, Director of Human Resources Policy, National Association of Manufacturers (April 25, 2011). NAM has over 11,000 members; 81.2 percent of these members are small entities (utilizing SBA's size standard of less than 500 employees).

<sup>10</sup> *Id.* at 11693. 93 percent of H-1B petitions were accompanied by a USCIS Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, which indicates that the petitioner is represented.

believe that small businesses will continue to utilize attorneys for this additional step. Small business representatives also commented that this registration process may actually discourage employers from this necessary evaluation of whether a potential H-1B worker qualifies for H-1B status, and may result in the registration of unqualified applicants.

## **2. Registration “Flooding” May Cause Administrative Burdens and Uncertainty for Small Businesses Trying to Obtain an H-1B Worker.**

Small entities are concerned that the new registration system might encourage petitioners to submit many visa registrations in an attempt to increase their chances of obtaining H-1B workers, “flooding” or “diluting” the registration pool and making it more difficult for small businesses to obtain an essential H-1B slot and worker. In a January 2011 Report to Congressional Committees by the U.S. Government Accountability Office on the H-1B Visa Program, the authors also cautioned USCIS about this possible problem with the registration program. The report states, “whether or not petitioners would over-submit in response [to the registration program] is a matter we believe should be further studied or tested.”<sup>11</sup>

The registration process outlined in the proposed rule may encourage this behavior because there is no fee for registering a prospective H-1B worker and the registration itself requires minimal information about the company and the beneficiary.<sup>12</sup> The rule states that only employers that have registered during this open period can receive an H-1B slot. An employer that ultimately receives the H-1B slot through the random selection process has a “hold” of 60 days on the slot; there is no penalty for not ultimately filing the petition.

Attorneys representing small H-1B users at the roundtable were concerned that the ease of the registration process coupled with the uncertainty in the demand for H-1B petitioners from year to year may force employers to submit any possible candidate (such as all the people they are interviewing for a position) or risk the possibility of being shut out of the chance of getting an H-1B slot. There may be multiple registrations for the same beneficiary, as many employers are vying for the same qualified foreign applicants. This may result in an artificial demand for H-1B employees and unnecessary registrations.

An artificial demand may also “close” the registration process early in a year where any business could normally get an H-1B worker. For example, this year, there were only 7,100 petitions filed for the normal H-1B cap and 5,100 petitions filed for the higher degree cap as of April 15, 2011.<sup>13</sup> Currently, in a projected “slow” year as in FY2012, a small employer could be more likely to file and receive an H-1B petition and receive an H-1B slot throughout the year when they need it. However, this proposed registration process may create a false demand in a slow year and prevent small entities from getting needed workers they would have gotten otherwise.

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<sup>11</sup> *GAO Report*, at 66.

<sup>12</sup> 76 Fed. Reg. at 11689. The proposed rule does not discuss any fees for registration, and notes that registrations must include basic information regarding the company and beneficiary: (1) the employer’s name, employer identification number (EIN), and employer’s mailing address; (2) the authorized representative’s name, job title, and contact information (telephone number and e-mail address); (3) the beneficiary’s full name, date of birth, country of birth, country of citizenship, gender and passport number; and (4) any additional information requested by the registration or USCIS.

<sup>13</sup> USCIS Website, *H-1B Fiscal Year (FY 2012) Cap Season*, <http://www.uscis.gov>.

Small business representatives expressed concern that this new registration process may benefit larger companies that have more resources and databases of possible H-1B employees, allowing them to submit hundreds of registrations. Participants also were concerned about possible manipulation or misuse of the new registration system by larger companies or bad actors, and inquired about the types of tools that USCIS would be utilizing to prevent this type of activity.

The new registration system may actually result in small employers facing a new administrative burden of submitting multiple registrations and more uncertainty regarding the likelihood of actually getting an H-1B slot and worker in this potentially larger pool of registration numbers. USCIS may face new administrative burdens associated with the registration system, such as handling many unnecessary registrations and rejections and dealing with allocating these rejections to a waitlist pool.

### **3. Early Timing of the Registration Process May Shut Small Businesses Out of H-1B Program.**

Roundtable participants were concerned that the early timing of the registration process may shut small business out of the H-1B program because they cannot anticipate their business employment needs at this earlier date. The proposed rule states that the registration period would “begin no later than the month of March each year.”<sup>14</sup> Under this proposed rule, it is possible that the registration period may begin earlier than March, such as in January or February. Employers registering for an H-1B employee in March would actually receive their H-1B employee on October 1<sup>st</sup>, so an employer would need to know their employment needs, select a beneficiary and complete some evaluation of the H-1B visa requirements for this individual seven months (or more) in advance. According to roundtable participants, this early registration system may favor large companies that are better able to forecast their labor needs and recruit workers for these positions so far in advance.

Small technology firms have stated that this early registration period may make it almost impossible for them to utilize the H-1B program. “You can’t hire all of your labor needs for the whole year in March,” an owner of the small software consulting firm told Advocacy, “It is very difficult to have all of your plans coincide to meet this deadline.”

TechServe Alliance, a national trade association representing mostly small U.S. based IT-staffing companies, stated that it is already difficult for staffing companies to meet the current April 1<sup>st</sup> petition deadline. Last year, USCIS instituted a policy change requiring client letters for H-1B petitions involving third-party placement, and this change resulted in their members largely being unable to file H-1B petitions. TechServe Alliance’s members cannot obtain letters from clients far enough in advance of the project so as to satisfy these new filing requirements.<sup>15</sup>

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<sup>14</sup> 76 Fed. Reg. at 11689.

<sup>15</sup> Telephone call with Laura Reiff, Greenberg Traurig, who represents TechServe Alliance (April 20, 2011). The SBA Size Standard for Computer Systems Design and Related Services (NAICS Code 54151) is \$25 million dollars in annual gross revenue. 84 percent of TechServe Alliance’s membership have an annual gross revenue of \$20 million dollars or less, and are therefore considered small businesses under the SBA definition.

An owner of a small IT-staffing firm told Advocacy that U.S. firms just do not have qualified in-house staff for short term technology projects and many utilize IT staffing firms like his to complete short term projects. This small business owner stated that USCIS's recent policy change had a chilling effect on his staffing firm, and he feared that this new registration policy would make it more difficult for his staffing firm and other technology firms to use the H-1B visa program. This individual noted that the H-1B visa program was so crucial for the high-growth industries like technology because foreign students are earning a large portion of the doctorate degrees in sciences and engineering at U.S. institutions.<sup>16</sup>

#### **4. Recent H-1B Visa Demand Does Not Require Immediate Implementation of New Registration Program.**

USCIS is proposing the mandatory registration process to alleviate the administrative burdens on USCIS service centers that process H-1B petitions during busy application years. Small business representatives have questioned the necessity and usefulness of USCIS implementing the registration program for next year, since there has been a lack of demand for H-1B petitions in the last few years.<sup>17</sup> USCIS notes that this trend is “due to the struggling economy and high unemployment rates.”<sup>18</sup> Small businesses currently are able to file H-1B petitions without being rejected due to the numerical caps and USCIS has not had to process an excess amount of H-1B petitions in a limited time frame. Based on the concerns outlined by small entities and due to the lack of urgency for this program at this time, Advocacy recommends that USCIS further study the potential impacts of proposed registration program before applying it to FY2013.

### **III. Small Business Regulatory Alternatives**

Small business representatives offered the following regulatory alternatives at Advocacy's small business roundtable:

#### **1. Transformation Project Provides Opportunities to Streamline the H-1B Process.**

USCIS is currently undertaking an agency-wide effort to move immigration services from a paper-based model to an electronic filing system within the next few years. Roundtable participants recommend that USCIS put this proposed registration process on hold until the transformation project is fully implemented. These small entities believe that a new online

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<sup>16</sup> Congressional Research Service. *Foreign Science and Engineering Presence in U.S. Institutions and the Labor Force* 4-5 (October 28, 2010). See Figure 1, Doctorate Degrees: U.S. and Non-U.S. Citizens, 2006. This report cites National Science Foundation data that reveals that in 2006, the foreign student population earned approximately 36.2 percent of the doctorate degrees in sciences and approximately 63.6 percent of the doctorate degrees in engineering from U.S. institutions. In 2006, foreign students on temporary resident visas earned 32 percent of the doctorates in sciences, and 58 percent of the doctorates in engineering.

<sup>17</sup> 76 Fed. Reg. at 11687. In FY2009, USCIS received nearly 163,000 H-1B petitions between April 1 and April 7, 2008. However, in FY2010, the application process started on April 1, 2009 and the “final receipt date” was not until December 21, 2009. In FY2011, the “final receipt date” was not until January 26, 2011. In FY2012, there were only 7,100 regular H-1B petitions submitted and 5,100 higher degree petitions submitted on April 15, 2011.

<sup>18</sup> *Id.*

submission process under the Transformation Project for the H-1B visa would remove many of the paperwork-related burdens that employers and the agency face with this program.

The January 2011 GAO report on the H-1B Program states: “We believe that the ongoing Transformation Project affords the opportunity to explore creative and thoughtful solutions to the challenges of administering the H-1B program.”<sup>19</sup> The report stated that USCIS could establish as part of this electronic program a system “where businesses with a strong record of compliance with H-1B regulations may use a streamlined application process.”<sup>20</sup>

## **2. USCIS Should Require More Information from Registration Applicants.**

Roundtable participants recommended that USCIS should require more information be provided in the H-1B registration process, to make sure that employers analyze whether a potential employee would even qualify for H-1B status and to prevent unnecessary or fraudulent registrations. For example, USCIS could request beneficiary job title, post-secondary education and work history, and whether the petitioner seeks to file under the 65,000 or the 20,000 caps. Small entities also recommended that the USCIS verify the information submitted in the registration process, to prevent fraudulent registrations.

## **3. USCIS Should Work on the Timing and Notification of Registration Process to Help Small Employers.**

If USCIS does go forward with the proposed registration process, the agency should time this process to occur on March 1<sup>st</sup> or later in order to make it easier for smaller employers to utilize this program. Additionally, USCIS should widely publicize the notifications to employers regarding the start and end times of the registration period, which would prevent smaller employers from missing the window of opportunity to apply for the H-1B visa.

## **4. USCIS Should Clarify More Details Regarding the Registration Process.**

Roundtable participants had many questions regarding how the registration process would work in practice. These questions include: How do small businesses submit the acceptance notice? Can attorneys submit applications on behalf of employers? How do employers deal with information that may change regarding the beneficiary or the status of the company? Do beneficiaries have to be qualified for the H-1B petition at the time of the registration? Do non-cap exempt H-1B classifications still have to undergo the registration process? When do employers that obtain an H-1B registration slot complete a labor condition application? How will the waiting list work? How will the information submitted be protected from a privacy standpoint? Advocacy recommends that USCIS clarify the following questions raised at the roundtable and other questions raised during the comment period in a Small Business Compliance Guide.

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<sup>19</sup> *GAO Report*, at 63.

<sup>20</sup> *Id.*

#### **IV. Conclusion**

Advocacy appreciates USCIS for taking time to participate in our Small Business Roundtable. One of the primary functions of the Office of Advocacy is to assist federal agencies in understanding the potential impact of their regulatory programs on small entities. Small business representatives have expressed concern that the proposed registration requirement may actually create more burden and uncertainty for small entities trying to obtain vital high-skilled foreign workers through the H-1B visa program. Advocacy recommends that USCIS evaluate the potential small business concerns and regulatory alternatives outlined in this comment letter and in the docket, and possibly reconsider whether the agency should proceed with this program at this time. Additionally, should the agency go forward with the rule as proposed, Advocacy recommends that USCIS complete a Small Business Compliance Guide, to help small employers better understand how to comply with this regulation. Advocacy is available to assist USCIS on its RFA compliance. Please contact me or Janis Reyes at (202) 205-6533 ([Janis.Reyes@sba.gov](mailto:Janis.Reyes@sba.gov)) if you have any questions or require additional information.

Sincerely,

//signed//  
Winslow Sargeant, Ph.D.  
Chief Counsel for Advocacy

//signed//  
Janis C. Reyes  
Assistant Chief Counsel

cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs