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Samantha Deshommes, Chief
Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529

Re: Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H–1B Petitions (Docket No. USCIS-2020-0019-0001)

Dear Sir or Madam:

I submit this comment letter in response to the Department of Homeland Security's notice seeking public comment on proposed revisions to the methodology for selection of beneficiaries under the H-1B cap ("Proposed Rule"). As an immigration attorney who files H-1B petitions on behalf of numerous clients every cap season, I have an interest[1] in the establishment of a fair and efficient cap selection procedure that complies with the law.

The Stated Preference for High Wage Earners is Illegal

DHS proposes to change the current cap selection process by giving preference for cap-subject H-1B visas to beneficiaries earning the highest wages relative to their SOC codes and area(s) of intended employment. This proposal is in direct response to Executive Order 13788, Buy American and Hire American, 82 FR 18837, sec. 5 (Apr. 18, 2017) ("E.O. 13788"), which directed DHS to "suggest reforms to help ensure that H-1B visas are awarded to the . . . highest-paid petition beneficiaries." The proposal is contrary to the Immigration and Nationality Act and the Congressional intent behind that Act.

Congress never intended for the H-1B visa to be given on a preferential basis to the highest-paid petition beneficiaries. This was plainly stated in the Senate Report for The American Competitiveness Act, which significantly amended the H-1B visa program:

[1] Section 553(c) of the Administrative Procedure Act ("APA") mandates that under notice-and-comment rulemaking, "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."

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> To qualify for an H–1B visa a nonimmigrant must have "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation" or must possess "experience in the specialty equivalent to the completion of [a bachelor's or higher degree], and recognition of expertise in the specialty through progressively responsible positions relating to the specialty."
>
> As this language suggests, Congress has never limited use of H–1B visas to the ''best and brightest.'' In fact, the phrase ''best and brightest'' does not appear in the law.
> S. Rep. No. 105-186, at 8 (1998)

Therefore, to the extent that E.O. 13788 mandates preference for the "best and the brightest" among H-1B applicants, it must be ignored under prevailing principles of federalism. The President lacks the authority, through his executive agencies, to implement a change in law that is contrary to legislative intent. This is a bed-rock principle that has been reiterated innumerable times in court. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

Moreover, the Department of Homeland Security has *itself recognized* that Congressional intent is contrary to an H-1B cap selection system that favors high wage earners. In December 2018, I submitted a comment letter in response to the DHS's proposal to implement what is now the current registration system for H-1B cap cases.[2] That letter made similar arguments as those laid out above, to wit, that Congress never intended for the H-1B system to favor high wage earners. *In the subsequent Final Rule, USCIS agreed with this key point:* ". . . **DHS agrees that Congress has not limited the H-1B classification to the 'best and brightest' foreign nationals**."[3] Despite this striking admission, the agency now contradicts itself in its latest proposal, explaining that DHS will now seek to "maximize H–1B cap allocations, so that they more likely would go to the best and brightest workers."[4]

This sudden *volte-face* is unexplained and unaddressed in the agency's current proposal. A federal agency may not announce a position that abruptly changes direction from prior agency pronouncements without providing a reasoned explanation for the change.[5] In establishing the H-1B visa, Congress never expressed any preference for high wage earners, instead mandating

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[2] Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 888 (Jan. 31, 2019).
[3] *Id.* at 896.
[4] Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H–1B Petitions, 85 Fed. Reg. 69236 (Nov. 2, 2020).
[5] *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("adjudication is subject to the requirement of reasoned decisionmaking"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance").

that cap allocations would occur "in the order in which petitions are filed for such visas or status."[6] This language prescribes an agnostic selection methodology that is contrary to the wage preference system that the DHS now seeks to interpose. The Supreme Court has stated that "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[7] Here, the proposed reordering of the H-1B system in favor of high wage earners is without statutory authority, and is therefore reversible under the Administrative Procedure Act.[8] The general authority granted to DHS by Congress does not extend to flouting the express provisions contained in an agency's implementing statute. Accordingly, the agency would be well advised to abandon its current proposal as contrary to law.

Thank you for your attention to this matter of great public interest.

Sincerely,

Akshat Tewary, Esq.

AT/sb
Via Electronic Delivery

[6] 8 U.S.C. § 1184(g)(3) (2020).
[7] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 151 (2000).
[8] *See* 5 U.S.C. § 706(2)(C).