LAW OFFICES
KAMLESH TEWARY, P.C.
A PROFESSIONAL CORPORATION
1974 HIGHWAY 27
P. O. BOX 996
EDISON, NEW JERSEY 08818-0996

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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: Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens
(Docket No. USCIS-2008-0014)

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 Proposed Cap Registration System is Flawed

While the theoretical concept of a cap pre-registration system is laudable, the DHS's proposal is flawed because it invites fraudulent filings – one of the the very ills that DHS has been focused on preventing in recent years. The diversity lottery has been plagued with fraudulent filings in recent years,[2] and the Proposed Rule would invite similar fraud in the H-1B arena. In its proposal, USCIS attempts to account for the possibility of frivolous filings by vaguely invoking its enforcement authority:

> If USCIS finds that petitioners are registering numerous beneficiaries but are not filing petitions for selected beneficiaries at a rate indicative of a pattern and practice of abuse of the registration system, USCIS would investigate those

[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."
[2] U.S. State Department, Bureau of Consular Affairs, *Fraud Warning*, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fraud.html.

TELEPHONE (732) 287-0080 LAW@TEWARY.COM FACSIMILE (732) 287-3836

> practices and could hold petitioners accountable for not complying with the attestations, consistent with its existing authority to prevent and deter fraud and abuse.
> Proposed Rule at 62414.

However, that authority is unlikely to be an effective deterrent in the vast majority of cases involving actual fraud. After all, those who commit fraud are already well aware that their activities are illegal and punishable under the law. The above-quoted reminder, buried deep within the Federal Register, adds little deterrent value.

To make matters worse, USCIS's enforcement may ensnare innocent parties. In many cases a particular petitioner may have legitimate reasons to abandon a cap filing despite selection under the lottery. For instance, the beneficiary may lose interest in the position, or the petitioner's business needs may change from the time of registration until the filing window. Enforcement of immigration law is already a daunting task. The proposal only makes that task more difficult by requiring investigators to weed out fraudulent cap registrations from innocent ones.

Instead of relying on its enforcement authority, USCIS should revise the structural features of the registration system so as to invite legitimate filings and deter fraudulent ones. For example, one major flaw in the proposed system is that there is no fee for registration. This creates incentives for submissions by parties with no real intention of filing. DHS should revise its proposal to require registrants to pay filing fees that would be refunded in cases of non-selection. Lottery winners who decide not to proceed with petition filings would not have their filing fees refunded. Under such a system, few frivolous or fraudulent registrations would be submitted.

The Stated Preference for Master's Degree Holders is Illegal

DHS proposes to change the current cap selection process by running the 65,000 "regular" lottery first, followed by the 20,000 "Master's" lottery. 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 most-skilled or highest-paid petition beneficiaries."

However, Congress never intended for the H-1B visa to be given on a preferential basis to the most-skilled or 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:

> 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.").

The proposed reordering of the lottery system is also flawed because it contravenes the plain words of the Immigration and Nationality Act ("INA"). Section 214(g)(5) of the INA states that the 65,000 numerical limitation

> "**shall not apply** to any nonimmigrant alien issued a visa or otherwise provided status under section 1101(a)(15)(H)(i)(b) of this title who . . . (C) has earned a master's or higher degree from a United States institution of higher education (as defined in section 1001(a) of title 20), **until** the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000" (emphases added).

That is, a U.S. Master's degree holder cannot be considered under the regular cap of 65,000 visas "until" the Master's allocation of 20,000 has first been extinguished. *Id.* The Proposed Rule contradicts this clear directive by permitting U.S. Master's holders to be considered under the regular cap of 65,000 visas *before* the Master's allocation of 20,000 has been extinguished.

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." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 151 (2000). Here, the proposed reordering of the U.S. Master's allocation is without statutory authority, and is therefore reversible under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(C).

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

Sincerely,

Akshat Tewary, Esq.

AT/pf
Via Electronic Delivery