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AMERICAS I EMEA I APAC

November 28, 2020

Charles L. Nimick, Chief
Business and Foreign Workers Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
20 Massachusetts Ave. N.W., Suite 1100
Washington, DC 20529-2120

Re: USCIS-2020-0019 – Comment to "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions," 85 Fed. Reg. 69236 (November 2, 2020).

Dear Mr. Nimick:

Worldwide Employee Relocation Council (Worldwide ERC®) wishes to comment on the recently published USCIS Notice of Proposed Rulemaking, "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions," 85 Fed. Reg. 69236 (November 2, 2020).

Worldwide ERC® is the premier trade association for talent management and global mobility knowledge. Our network of professionals, partners, and stakeholders today includes nearly 1,600 corporations and 10,000 service industry members across Europe, the Middle East and Africa, Asia, and the Americas. Worldwide ERC®'s members come from a diverse range of professions and industries, including human resources, recruiting, military, real estate, financial services, moving, counseling, and consulting.

One of our major objectives is to analyze, communicate about, educate on, generate support around, develop responses to, and where necessary, influence public policy issues affecting the global workforce mobility industry, in a strategic, coordinated, and effective manner. It is with that purpose that we are submitting our comment regarding the proposed USCIS rule. We support USCIS's goal of protecting the U.S. workforce. However, we do not believe that the hiring and retaining of foreign talent is contrary to that mission and we believe that the new rule, in addition to being contrary to the intent of Congress, would shut out of the U.S. labor market talented individuals who are at the start or midpoint of their careers and impose undue burdens on emerging and smaller businesses. The adverse effects of the proposed USCIS wage-based lottery process will be exacerbated by the new U.S. Department of Labor (DOL) wage computation rule, "Strengthening Wage Protections for the Temporary

and Permanent Employment of Certain Aliens in the United States," 85 Fed. Reg. 63872. (October 8, 2020). Moreover, we are concerned that USCIS's encroachment into the arena of wage determination may result in conflicts or potential confusion about long-time and established DOL wage concepts and policy.

In addition to providing a comment on the new rule, we would ask that the USCIS, if it does publish a final or interim final rule imposing a wage factor into the H-1B cap selection process, delay its implementation of the rule until Fiscal Year 2023 H-1B cap season, as employers are already preparing H-1B cap cases for Fiscal Year 2022 with the current registration process in mind. This would permit time for the regulated community to make any necessary adjustments and avoid disruptions caused solely by the regulatory process.

The H-1B Lottery Rule Disadvantages Individuals Early in the Their Careers and Emerging and Smaller Companies

The preamble to the proposed rule acknowledges that the new wage-based lottery will favor those registrations or petitions where wages correspond to Level 3 or Level 4 of DOL's four-tiered wage computation structure – with the consequence of severely limiting the ability for Level 2 candidates to capture H-1B cap numbers and virtually shutting out prospective entry-level H-1B workers where a Level 1 corresponding wage is listed on the registration or petition. The preamble suggests that the benefits of the wage-based lottery would increase the likelihood that slots would be reserved for the highest paid, and "presumably highest skilled or highest valued, beneficiaries."[1] Based on this presumption, the USCIS neglects the realities of industry and company-specific differences in establishing seniority and consequently wages, and the many factors that may enter into wage determinations in the private sector. It further introduces the very subjective notion of "highest valued beneficiaries," which essentially reduces the H-1B selection system to a wage-based auction.

The proposed rule will have a particularly devastating effect on individuals at early or middle stages in their careers, as well as smaller or emerging companies that may operate with lower salary structures, many of which are struggling to survive during the COVID-19 pandemic. Regardless of seniority or size, employers operating or headquartered in the United States compete in a global economy. Their U.S. presence is based on our country's superior capital markets, legal system, the availability of the world's best technology and our economy's premiere competitive position in the global economy. All of these features rely on the unmatched quality of U.S. human capital – perhaps the most critical drawing card of the U.S. economy. Skilled U.S. workers are found domestically, some come here from abroad to work, and others are educated here in our renowned universities and then enter the U.S. labor market. Each facet of the highly skilled U.S. workforce is enabled by an immigration system that allows access to foreign national talent to allow employers to remain competitive. Highly skilled foreign executives and managers enter the U.S to help run key aspects of U.S. companies that create thousands of well-paid jobs for domestic workers; highly skilled foreign national talent enter the U.S. to work alongside similarly employed and skilled U.S. workers; and smart and ambitious young people from around the world come from abroad to study alongside U.S. students at our finest universities – and then upon graduation join the U.S. workforce

[1] "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions," 85 Fed. Reg. 69236, 69245 (November 2, 2020).

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together. There is a symbiosis and synergy between foreign nationals and U.S. residents that underpins our vibrant economy and explains our leadership in the global economy.

Congress in passing IMMACT 90 recognized "that certain entry-level workers with highly specialized knowledge are needed in the United States and that sufficient U.S. workers are sometimes not available."[2] The proposed rule ignores the point that H-1B eligibility hinges on a prospective beneficiary having highly specialized knowledge and not whether such an individual is at an early, intermediate or later stage of his or her career. The proportion of entry-level versus more experienced H-1B workers may vary over time according to market needs – but there is virtually no basis to impose a pre-adjudication or pre-determination of sorts that will inevitably shut out workers at earlier stages of their career. Congress dealt with the wage issue through the labor condition application (LCA) process. H-1B wage requirements as administered by the DOL are meant to ensure that the wages paid to specialty occupation workers are equivalent or exceed their U.S. counterparts. As established by Congress, the DOL wage structure's four tiers recognized that a segment of the H-1B population might be entry or intermediate level. The wage structure was not established to discriminate against individuals who may be at an earlier point in their career or employed at new or smaller businesses. Because the DOL's new wage rule will be skewing entry level wages to all-time highs, the USCIS's concern about low paid entry level H-1B workers seems particularly misplaced and lacks meaningful coordination with its sister agency.

The proposed rule ignores industry-related and other factors that may enter in to wage formulations that would not or should not be determinative regarding an individual's eligibility for H-1B specialty occupation classification. The Department of Labor itself has recognized that wage differentials within occupational classifications may vary by industry and other factors. In "Same Occupation, Different Pay," the DOL recognizes that large differences in wages may be the result of a combination of factors, such as industry of employment, company age and size, geographic location.[3] Worker skill level certainly is a factor, but not the only factor. While some factors are already calculated into DOL's four-tiered wage computation, industry or company-specific differences often are not. For instance, the Department recognizes the large wage difference in entry-level versus highly experienced health care workers. The wage-based lottery could shut out otherwise qualified and highly skilled but entry level health care workers who are particularly critical as we as a country fight the COVID-19 pandemic. Workers at early stages in their careers in science, math and engineering fields might be similarly shut out. Yet these are precisely the talented workers that the economy needs, based on the market-driven recruitment decisions of U.S. workers.

The proposed wage-based lottery system, particularly when combined with the new DOL wage computation rule, will have a particularly deleterious effect on students from U.S. universities seeking to change to H-1B status. Both U.S. universities and U.S. employers have already invested greatly in these prospective H-1B workers, and retaining their talent remains in the national interest and should remain a priority. However, establishing a system that shuts out graduating students or those otherwise newer to

[2] H.R. Rep. 101-723(I) (1990), as reprinted in 1990 U.S.C.C.A.N. 6710.
[3] Torpey, "Same Occupation, Different Pay: How Wages Vary," U.S. Department of Labor Bureau of Labor Statistics (May 2015), at https://www.bls.gov/careeroutlook/2015/article/wage-differences.htm?view_full#:~:text=Reasons%20wages%20vary&text=And%20no%20two%20jobs%20are,may%20have%20smaller%20wage%20differences.

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the labor force, will only serve in driving some of the best trained and educated minds back to their home countries, and perhaps without intention forcing entire businesses off-shore.

The agency, citing legislative history from IMMACT 90, suggests that H-1B positions should be filled by *highly skilled* or *highly educated* workers.[4] In context, the reference states the following:

> The U.S. labor market is now faced with two problems that immigration policy can help to correct. The first is the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages. The second problem concerns the increasing skills gap in the current and projected U.S. labor pool.[5]

No one disputes that H-1B positions should be filled by highly skilled or highly educated individuals; however, the legislative history in no way, shape or form suggests that individuals who are at earlier stages of their careers should be shut out of H-1B classification.[6] New graduates are by their very nature "entry-level," but are often in possession of the kind of highly specialized knowledge that enables them to perform work that is advanced, complex and may be based on new and emerging technology, processes and theoretical constructs that permit U.S. employers to maintain their competitive edge both domestically and internationally. The new registration rule, working in concert with the DOL wage rule, may result in pay that exceeds that of comparable U.S. workers, which may result in personnel strains and ultimately new costs for U.S. companies.[7]

Moreover, the second issue that the authors of IMMACT 90 suggest is a problem, a skills gap, that continues to be an issue today and will only be exacerbated by new government rules that result in the artificial increasing of wages in a way that substantially de-couples the H-1B process from market forces. A recent study by the Chamber of Commerce highlights this very problem in 2020: "American businesses face a difficult dilemma: The demand for skilled workers is greater than ever, but availability is in short supply. Our study finds that 74% of hiring managers agree that there is a skills gap in the current labor market, with 48% saying that candidates lack the skills needed to fill open jobs."[8] To offset this, at least to a point, international students have filled the gap, coming to the United States for their undergraduate or graduate educations, often concentrating in STEM-related academic programs.[9] A major part of this relief valve has been the ability of graduating talent to switch from student status to H-1B specialty occupation

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[4] See H.R. Rep. 101-723(I) (1990), as reprinted in 1990 U.S.C.C.A.N. 6710, 6721.

[5] Ibid.

[6] The only recourse for employers wishing to hire such workers would be to increase wages to correspond with higher wage levels, which would re-enforce the auction like aspects of the proposed rule and result in wages out of kilter with market realities and what similarly situated U.S. workers are being paid.

[7] There is also potential that the distortion of wages will raise U.S. labor law issues, such as national origin discrimination. A complete discussion of this issue is beyond the scope of this comment, but we believe that the current system, requiring the payment of the higher of the actual or prevailing wage to H-1B workers, has created a pay parity of sorts that has reduced the possibility of U.S. employment law challenges.

[8] "Closing the Skills Gap," U.S. Chamber of Commerce Foundation (February 4, 2020), at https://www.uschamberfoundation.org/reports/hiring-modern-talent-marketplace. See also Levesque, "Understanding the Skills Gap and What Employers Can Do About It," Brookings Institution (December 6, 2019), at https://www.brookings.edu/research/understanding-the-skills-gap-and-what-employers-can-do-about-it/

9 See Neuhauser, "Foreign Students Outpacing Americans for STEM Graduate Degrees," U.S. News and World Report (May 17, 2016), at https://www.usnews.com/news/articles/2016-05-17/more-stem-degrees-going-to-foreign-students.

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status – a relief valve that would be essentially closed by the wage-based lottery, particularly when operating in conjunction with the new DOL wage-based computation rule.

In analyzing the DOL wage computation rule, one study emphasized the potential damage to the ability of employers to benefit from the skills and knowledge of U.S.-educated international workers:

> Beyond the challenges presented to under–resourced employers, the increase in the prevailing wage will also affect international students graduating from American colleges and universities. Recent graduates are unlikely to be able to find employers who are willing to pay them at the same rate as their median-wage workers. This would likely lead to American–educated international students taking their knowledge and skills elsewhere instead of putting them to use as part of the U.S. labor market.[10]

The study discusses the impact on smaller employers and emerging businesses as well: "In drastically increasing the prevailing wage at different experience levels, there are a number of consequences, including pricing out smaller employers who need specific skills."[11] The wage-based lottery rule would have a similar impact as the DOL wage computation rule – though approaches the issue in a slightly more indirect fashion – while frustrating the ability of U.S. employers to hire talented workers at the early part of their careers. Moreover, the notion of forcing labor offshore is not far-fetched. Professor Britta Glennon, an assistant professor at the Wharton School of Business at the University of Pennsylvania, in a summary to her recent study, "How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H-1B Program," suggests the following:

> Skilled immigration restrictions may have secondary consequences that have been largely overlooked in the immigration debate: multinational firms faced with visa constraints have an offshoring option, namely, hiring the labor they need at their foreign affiliates. If multinationals use this option, then restrictive migration policies are unlikely to have the desired effects of increasing employment of natives, but rather have the effect of offshoring jobs. Combining visa data and comprehensive data on US multinational firm activity, I find that restrictions on H-1B immigration caused foreign affiliate employment increases at the intensive and extensive margins, particularly in Canada, India, and China.[12]

While prevailing wage requirements are an integral part of LCA practice and ultimately H-1B specialty occupation eligibility, there is nothing in the statute that suggests that workers at earlier stages in their careers who are or will be paid at Level 1 or Level 2 wage levels should be priced out of eligibility for the classification at the point of cap selection – or that workers with seniority combined with employment with older and wealthier companies should be favored over smaller businesses struggling to survive or emerging businesses that may have the most to contribute to helping the United States maintain its competitive edge in technology, health care and other fields that are vital to our economic success. As

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[10] Soto and Lee, "Assessing the Department of Labor's Rule Raising Wage Requirements for H-1B Workers" (November 3, 2020), https://www.americanactionforum.org/research/assessing-the-department-of-labors-rule-raising-wage-requirements-for-h-1b-workers/.

[11] Ibid.

[12] See https://www.dropbox.com/s/tp4okwocw2pajw5/BGlennon_JMP%20Draft.pdf?dl=0, for Professor Glennon's report, "How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H-1B Program."

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described below, there is nothing in the legislative history nor the actual language of the INA itself that suggests that employers compete in an auction-like selection process where the latest class of the potentially best and brightest workers, who have undergone training in the newest and most innovate processes of their professions, should be disregarded and sent home. To the extent that USCIS wants to incorporate a wage factor into the H-1B selection process, it must first seek authorization by Congress.

Incorporating a Wage Factor Undermines the Statutory Intent in Treating H-1B Filings in the "Order in Which Filed"

The imposition of a wage factor into the H-1B cap selection process would require congressional authorization. USCIS justifies imposing a wage factor into the USCIS H-1B cap selection process on the basis that the INA is silent about handling simultaneous filings. The statute may leave the mechanics of accepting simultaneous filings to agency's purview, but it nowhere gives it license to add new criteria for consideration in selecting cases for the cap.

The preamble to the rule itself cites INA section 214(g)(3): "…[A]liens who are subject to the numerical limitations . . . shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status." While establishing a fair selection process that is true to the statutory prescription that cases be adjudicated "in the order in which petitions are filed" may be a challenge in light of voluminous simultaneous filings, it is a challenge that the agency has dealt with reasonably well for the past 25 years.

Early on when faced with H-1B numerical limitations reached before the end of a given fiscal year, the agency would shut off new cap subject filings as soon as the cap was reached and reject and return any overages. Starting in 2005, USCIS began conducting a random lottery of simultaneously submitted petitions, and then moved to a five-day "initial filing period" in 2008. This past year, the agency implemented its electronic registration process, which required only general information about petitioners and beneficiaries, but similarly provided for a random lottery. To date, the agency's goal when faced with simultaneous filings has been to not favor any one prospective H-1B filing over any other so that all of those filed at roughly the same time have an equal chance at the starting gate – arguably the most practical and possibly only way to stay true to the statutory goal of consideration in the order filed when faced with simultaneous filings.

Nothing in the INA permits wages or any other factor to be calculated into the initial selection process for an H-1B cap number. The inclusion of a wage component may open the door to consider other factors that may be tied to the merit of a petitioner or beneficiary – high academic achievement or notable awards on the part of the beneficiary; or, business viability or industry need on the part of the petitioner. Absent a change in the law, however, these should not be utilized in a determination of who and who should not be eligible for an H-1B cap number. Required wages for specific positions are determined by an exacting DOL process. A review of the viability of a business and of a prospective H-1B worker's qualifications are undertaken during an increasingly stringent adjudication process. The statute does not permit USCIS to impose its pre-judgment on wages and skill level into the selection process itself. As discussed above, doing such is both contrary to the statute and misplaced, as it undervalues individuals who may be younger in their professions and businesses that may be newer and more vulnerable in their operations.

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H-1B wage requirements as administered by the DOL are meant to ensure that the wages paid to specialty occupation workers are equivalent to or exceed their U.S. counterparts. The DOL wage structure's four tiers as established by Congress recognized that a segment of the H-1B population might be entry or intermediate level – it was not established to discriminate against individuals who may be at an earlier point in their career or a new or small business that out of necessity may be paying its workers at a lower place on the required wage scale.

The rule's preamble itself refers to the agency's earlier position, less than two years ago, that "prioritization of registration selection on factors other than degree level, such as salary, would require statutory changes."[13] The agency, in reversing its position, concludes the following: "Upon further review and consideration of the issue initially raised in comments to the H-1B Registration Proposed Rule, DHS concludes that the statute is silent as to how USCIS must select H-1B petitions, or registrations, to be filed toward the numerical allocations in years of excess demand." This rationale is facially defective. A new wage-based lottery would be manifestly contrary to the statute.

The preamble to the proposed rule repeatedly cites *Walker v. Macy* as authority. The case, a U.S. district court decision from Oregon, principally held that the USCIS was: (1) not required to establish waiting lists for H-1B beneficiaries, as none are required by the INA; and (2) the agency's use of a random computer-generated selection process for simultaneous submissions H-1B cap selection should be afforded deference, as given the usual excess demand during the same brief period at the start of filing for any given fiscal year's allotment, actually issuing visas or status in the order filed would be impractical. The court suggests that: "Plaintiffs offer no suggestion of how to order 150,000 petitions being delivered on the same day that is less arbitrary than a random computer selection. If a carrier delivers bags of envelopes containing petitions, it is just as arbitrary to order them based on how the envelopes are removed from the delivery bag as it is to randomly select the petitions from a computer."

Implicit in the Walker court's decision is the view that H-1B cap selection should be random and the agency's best approximation of adjudications "in the order filed" – and in no way would suggest that the agency would have license to incorporate other factors, such as wage, into the initial selection process. The district court addressed the petition selection process, not substantive petition review, such as wage level analysis. USCIS can draw no legal support from this judicial decision.

Jurisdictional Considerations and Conclusion

We would request that USCIS not move forward with its wage-based cap lottery rule, both on the basis that it is manifestly inconsistent with the controlling statute and on the basis that it will damage the national interest because it will hinder the ability of U.S. companies to hire and retain entry-level talent – talent that has more often than not been recently trained and educated at U.S. colleges and universities. The regulation may also make it more difficult for start-ups and small businesses, that may be unable to pay at stratospherically high levels, to compete on the national and global stage. These smaller entities are often at the center of economic innovation.

[13] "Registration Requirement for Petitioners Seeking to File H–1B Petitions on Behalf of Cap-Subject Aliens," USCIS Final Rule, 84 Fed. Reg. 888, 913 (January 31, 2019).

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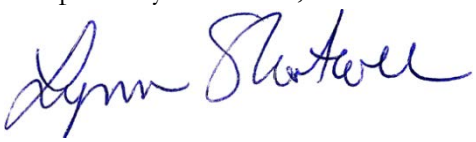
Moreover, by adding in a non-random variable to the H-1B cap selection process, USCIS is opening the door to a pre-adjudication or pre-determination of sorts, which may ultimately add new burdens to petitioners and the agency. While the addition of the wage factor may not slow down cap selection, it does open up the door to a whole new level of second guessing and potential enforcement or audit actions if USCIS does not agree with a petitioner's assessment of "corresponding wage level," either when adjudicating the petition or in the course of a post-adjudication audit.

Additionally, as USCIS enters DOL jurisdictional waters, there is potential for confusion as the "corresponding wage level" listed on the lottery registration would not necessarily match the "wage level" designated on the LCA form.

DOL's treatment of private surveys when there is no comparable OES wage is likewise troubling. While the ability to utilize DOL's prevailing wage worksheet to determine wage level is sensible and reasonable, there is no way to escalate to higher corresponding wage level by paying more – as there is when an OES wage is used. This is troubling as the unavailability of an OES wage may be an indication that a job is new or novel, and when the need to hire into such a proffered position may be particularly acute.

As mentioned at the outset of our comment, in the event that USCIS decides to move forward with an interim final rule, we would request that implementation be deferred until the Fiscal Year 2023 cap season begins in early 2022, so that the regulated community has time to adjust.

Respectfully submitted,



Lynn Shotwell, GMS, SHRM-SCP

President and CEO

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