

CompeteAmerica

The Alliance for a Competitive Workforce

November 21, 2018

The Honorable L. Francis Cissna
Director, U.S. Citizenship and Immigration
Services

The Honorable Neomi Rao
Administrator, Office of Information and
Regulatory Affairs

**Re: Regulation Creating New Pre-Registration for H-1B Nonimmigrant Petitions
RIN # 1615-AB71**

Dear Director Cissna and Administrator Rao,

Compete America is a coalition of employers and higher education and industry associations that advocates for ensuring that the United States has the capacity to educate domestic sources of talent, and to obtain and retain the high-skilled talent necessary for American employers to continue to innovate and create jobs in the United States. [Compete America](#) is writing to summarize our concerns regarding the timing of the initial implementation of the new H-1B pre-registration process and the agency's apparent mischaracterization of this rule as one that is *not* economically significant.

In its most recent Unified Agenda, the Department of Homeland Security (hereafter "DHS") stated its interest in publishing in "Fall 2018" a new regulation instituting for the first time a pre-registration requirement for H-1B petition filings. Relatedly, DHS also expressed its plan to finalize a regulation revising the selection process for H-1B petitions subject to the so-called "H-1B master's cap" and the "H-1B regular cap." The Unified Agenda item (RIN # 1615-AB71) stated that neither policy change was economically significant, and thus the rulemaking was not a major rule which affords the regulated community certain protections in both the standards for the government's cost assessment and in the minimum period of time required before the effective date. Pursuant to the Executive Order governing the regulatory process at federal agencies, the public is invited to share its views concerning any item identified on the government's Regulatory Plan.¹ We are writing in this capacity.

We understand pursuant to the public website of the Office of Information and Regulatory Affairs (hereafter OIRA) that the NPRM (Notice of Proposed Rule Making) for H-1B pre-registration and the revised H-1B cap selection process was docketed for OIRA's review on October 17, 2018. As of today, the proposed regulation has not yet been cleared by OIRA or published in the Federal Register. Following publication, there will be a public comment period after which the agency must take time to respond to the public's input and then finalize a regulation. Presumably, extensive intra-agency review of the new approach by both operational and policy experts at U.S. Citizenship and Immigration Services (hereafter USCIS) is already underway as well as testing of the new pre-registration technology. Even if the new system will work flawlessly, at best the specifics of the new

¹ EO 12866 (September 30, 1993), published 58 FR 51735 (October 4, 1993), at Section 4, subsection (c)(7) "Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA."

process will be published as a proposal four months out from when petitions subject to numerical limits would otherwise be filed for FY2020, with a final rule coming no more than two months prior to when such filings would otherwise be made. It is conceivable the content of the final rule will only be known less than one month prior to implementation of the new pre-registration process.

We hope to convince U.S. Citizenship and Immigration Services (USCIS) and the Office of Information and Regulatory Affairs (hereafter OIRA) that as a matter of good government:

1. The NPRM concerning a pre-registration system for H-1B petitions should be published as one that explicitly would take effect later in calendar year 2019, and would *not* apply to H-1B petitions subject to numerical limits in FY2020 because changing the process at this juncture would be highly disruptive.
2. The proposed rule on H-1B pre-registration should be reclassified as one that is economically significant so that once a final rule is published it would not take effect sooner than 60 days following publication. This would better ensure the significant cost impact to employers in all sectors is fully considered, as well as including an uncertainty assessment - a relevant factor in economic cost analysis.
3. Should the administration be focused on implementing the changes to the selection process for H-1B regular cap and H-1B master's cap cases, this regulation would move separately as it seems to be correctly classified as one that is not of major economic significance, and could apply to H-1B petitions subject to numerical limits in FY2020.

With regard to H-1B pre-registration, this approach would allow employers to see, understand, and plan for the specifics of the finalized rule well in advance of starting compliance efforts for FY2021 H-1B submissions. With regard to changes to the selection process for cases subject to the H-1B regular and master's caps, this approach would allow the agency to move forward for FY2020 H-1B submissions. We know of no legal, policy, or practical reason why the H-1B pre-registration and H-1B cap selection policy changes must move together.

We believe the intent of the pre-registration process is to facilitate operational efficiency at the agency, while also potentially eliminating unnecessary costs for employers in the submission of applications. To the extent that's true, it's commendable. But the rush to push this rule out for the upcoming H-1B cap season will create a level of uncertainty, confusion, and unease that will preclude those efficiencies. It is important to do this in an orderly fashion, with a well-refined approach that incorporates stakeholder and expert input, as well as plenty of notice to all involved. Not only will USCIS ensure a successful pre-registration rollout by targeting the following year's cap (FY2021) for implementation, but the agency could also gain affirmative support of the business community if this is done well.

In short, our concerns may be summarized as follows about rushing a rule out for the pre-registration of filings for FY2020 numerically-limited H-1B petitions:

- Unintended consequences: Without a well-structured approach, a pre-registration process requiring less information and attestations would encourage bad faith users to flood the system with requests to get a higher portion of successful outcomes.

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- Massive disruption: Most employers are already quite far along in the preparation of H-1B petitions subject to numerical limits for FY2020. Changing the process and the rules at this point is incredibly disorderly and would result in real harm to employers and the individuals they seek to sponsor.
- New complexities: Depending on how this is rolled out, the filing process could create new complexities in how cases are prepared and modified by compliant employers.

For more than 20 years, Compete America has worked with successive administrations and Congress on issues critical to immigration compliance in the employment-based high-skilled immigration system, as well as the global mobility of talent. We realize that we will have an opportunity to detail our views regarding the specifics of both the pre-registration proposal and H-1B regular and master's cap selection proposal once published in the Federal Register as an NPRM, and welcome participating in that process. Today's letter is solely about concerns we believe need to be considered *prior* to publication of those new policy proposals, as outlined in Executive Order 12866.²

Thank you for your attention to this matter.

Respectfully submitted,



Scott Corley
Executive Director
Compete America Coalition

Cc: Craig Symons, Chief Counsel, USCIS
George Fishman, Deputy General Counsel, DHS

² See footnote 1.