CompeteAmerica

The Alliance for a Competitive Workforce

October 26, 2018

Kirstjen Nielsen
Secretary, U.S. Department of Homeland Security

George Fishman
Deputy General Counsel, U.S. Department of Homeland Security

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

Craig Symons
Chief Counsel, U.S. Citizenship and Immigration Services

Re: DHS changes to high-skilled immigration policy through sub-regulatory agency action

Dear Secretary Nielsen, Director Cissna, Deputy General Counsel Fishman, and Chief Counsel Symons,

We are writing you to request that you reevaluate the Trump administration's unprecedented use of sub-regulatory actions to change policy governing the high-skilled immigration system.

When making significant policy changes through sub-regulatory actions, U.S. Citizenship and Immigration Services (USCIS) has been able over the last year to promptly proceed with the policy prescriptions it at least initially believes it prefers. But this use of sub-regulatory policy memos means that policy changes do not reflect valuable insights that are dispersed among intra-agency and inter-agency experts in government and widely distributed within the regulated community, including employers engaged in academia, research, non-profit activities, and across a broad cross-section of industry that regularly hire highly skilled foreign-born professionals. Thus, while the GAO has reported that about 59,000 different employers[1] have petitions approved annually for H-1B status, none of these organizations had input, awareness, or visibility regarding changes in policy that directly impact their ability to hire and retain H-1B professionals. The memos are also unnecessarily overbroad, and thus engender, by definition, unintended consequences. Perhaps most critical for the regulated community focused on the high-skilled immigration system, the policy changes by memo over the last year feature a lack of clarity regarding implementation and result in inconsistency. Good government requires more.

INTRODUCTION

The Compete America coalition advocates for ensuring that the United States has the capacity to educate domestic sources of talent, and to obtain and retain the talent necessary for American employers to continue to innovate and create jobs in the United States. Our **coalition members** include higher education associations, industry associations, and employers. Coalition members collaborate to reflect the common interests of universities and colleges, research institutions, and corporations with regard to high-skilled employment-based immigration. For more than 20 years, Compete America has worked with successive administrations and Congress on issues critical to immigration compliance in the employment-based immigration system, as well as the global mobility of talent.

[1] See GAO, H-1B Visa Program (GAO 11-26, January 2011) at Figure 5, page 15.

Our coalition members are committed to and well-understand the importance of protecting the integrity of the immigration system. The need for such integrity includes, but of course is not limited to, preventing fraud and ensuring compliance in the implementation of the nation's high-skilled immigration laws. We stand ready to meet with you to discuss any of the issues we are raising, and would welcome the opportunity to engage in a conversation with you about the important topic of ensuring that the sub-regulatory actions you are pursuing in fact solve the problems you are focused on while avoiding undue burdens on the regulated community.

When making policy changes outside of notice and comment rulemaking under the Administrative Procedure Act, the Office of Management and Budget (OMB) has recommended for a decade that agencies follow **"Good Guidance" practices** pursuant to instructions provided to all federal agencies.[2] Under this OMB directive, even when not required to agencies are nevertheless "encouraged to consider observing notice-and-comment procedures for interpretive significant guidance documents that effectively would [inter alia]… alter the obligations or liabilities of private parties."[3] Many of the sub-regulatory changes recently adopted by USCIS indeed significantly alter the obligations and liabilities of private parties. The OMB approach also presumes that agencies will "invite public comment on the draft document; and prepare and post on the agency's Web site a response-to-comments document."[4] These presumptions have been largely ignored by USCIS in its recent sub-regulatory actions.

It is our understanding that the Trump administration's OMB, including the Office of Information and Regulatory Affairs (OIRA), is focused on the idea of limiting agencies' ability to change the rights and obligations of the regulated community without a thoughtful process. Such a process requires that federal agencies identify the problems they are trying to solve and limit policy changes to those that afford targeted solutions to those problems that can be operationalized and implemented without unintended consequences. There is no reason why high-skilled immigration actions by the agencies should be exempt from this priority.

EXAMPLES OF HIGH-SKILLED SUB-REGULATORY ACTIONS OF CONCERN

Among other immigration policy modifications under the Trump administration, the Compete America coalition is concerned by the following sub-regulatory changes that USCIS announced via policy memos:

1. ***New Request for Evidence and Notice of Intent to Deny policy**, effective for petitions received September 11, 2018.*

In addition to permitting denials without issuance of a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) when required initial evidence is not filed, the new policy specifically permits an adjudicator to deny benefit requests without an RFE or NOID wherever an adjudicator is of the view "the record does not establish eligibility," even where the minimum requirements for initial evidence under the regulations are satisfied. The prior policy required that an RFE or NOID be issued when a potential denial could be overturned with additional evidence. Even if prioritizing the agency's interest in

[2] The linked OMB memo, "Final Bulletin for Agency Good Guidance Practices," was issued January 18, 2007, by the George W. Bush White House, finalizing a draft proposed on November 23, 2005. 72 Fed. Reg. 3432 et seq. (January 25, 2007).
[3] Id. at p. 3438
[4] Id. at p. 3440.

discouraging skeletal filings and even if presuming this new policy will be effective in this regard, permitting individual adjudicators to deny cases without issuing an RFE is highly problematic when the petitioner has indeed submitted the initial evidence required by the agency's regulations. This is especially true because the policy memo and subsequent stakeholder call did not, combined, provide specificity and precision about the interplay between the agency's many longstanding practices on how to present supporting evidence and the new possibility that a denial would be issued without an RFE or NOID.

The new policy leaves employers filing petitions for immigration benefits in a quandary: employers that have satisfied the regulatory requirements for filing may be denied without an opportunity to clarify any misunderstanding the adjudicator may have.

2. ***New Unlawful Presence policy****, effective August 9, 2018.*

The agency announced a new interpretation for students and exchange visitors regarding the unlawful presence statute that Congress enacted in 1996. This is the statute that creates three- and 10-year bars to reentry, without the availability of waivers and exceptions. While the new policy has an obvious impact to the members of our coalition's higher education associations, it has broader consequences in our coalition: our employers commonly engage in vigorous on-campus recruitment at U.S. universities and often hire F-1 students, and many Compete members administer their own private sector J-1 exchange visitor programs.

Contrary to the government's policy in place since September 1997, the new policy equates failure to maintain status with unlawful presence and allows the government to retroactively identify when a foreign national had violated status and started to accrue from unlawful presence. This approach has the possibility of being fundamentally unfair as it leaves large numbers of students and exchange visitors in the situation of not being afforded an opportunity to correct their actions and bring themselves into compliance, because they will only learn about the inadvertent or technical violation of status years later.

The problem with the new policy announcement is that the Administrative Procedure Act requires legislative rule changes to undergo a robust review process. The agency did not engage in formal notice and comment rulemaking, presumably because it will argue that this new policy is an interpretative rule; that is likely wrong. Moreover, the new policy fails as a matter of statutory construction. The statute, in its 1996 amendments, introduced a new phrase – a "period of stay authorized by the Attorney General" (POSABAG) – applied both to define "unlawful presence" as beginning "after the expiration of the period of stay authorized by the Attorney General" [5] and to void nonimmigrant visas if an individual remains in the U.S. "beyond the period of stay authorized by the Attorney General."[6] POSABAG has always been interpreted in both provisions as identifying a period ending on a specified date, necessitating that in the context of a "duration of status" admission (the subject of the new 2018 policy) the period of stay authorized can only be considered "expired" when DHS makes a finding and decision to that effect, thus providing notice and attaching a date certain. Further, the statutory term "unlawful presence" must be given a meaning different from other concepts (such as failure to maintain status) that existed and were retained when this law was enacted in 1996; the new policy fails to do that.

[5] 212(a)(9)(B)(ii) of the INA, codified at 8 U.S.C. §1182(a)(9)(B)(ii).
[6] 222(g)(1) of the INA, codified at 8 U.S.C. §1202(g)(1).

3. ***New Third Party Worksite Evidence policy****, effective February 22, 2018.*

This new policy governs when contracts and itineraries are required for H-1B petitions on behalf of professionals whose work takes them to worksites other than those of their direct employer. The new policy was presented by USCIS merely as an enforcement tool for a general filing regulation that has long been on the books[7] covering the need for contracts and itineraries in nonimmigrant employment-based petitions. However, that regulation was promulgated before the Immigration Act of 1990 created the new H-1B classification for specialty occupations, does not seem to ever have been intended to regulate H-1B specialty occupation workers that might be changing worksites, and had not been interpreted or enforced since 1995[8] in the way suggested by the new policy. Indeed, in 1998 the agency proposed rescinding the applicability of the general contracts and itinerary rule to the H-1B category because the agency realized that the contracts and itinerary rule was not an appropriate mandatory requirement for H-1B classification.[9]

The new policy was adopted even though many employers over the last quarter century have successfully and consistently shown they have a qualifying employer-employee relationship, including the right of control, without ever providing an itinerary or contracts. This is because only a few employers require contracts or date- and time-specific itineraries to provide sufficient proof as to the actual work being performed at a third-party worksite or the non-speculative nature of the offered employment.

The new policy memo could be interpreted as a mandate for all employers to provide contracts and itineraries if an H-1B professional is on site at a third-party location. Unintended consequences immediately and necessarily follow such overbreadth. Perhaps most fundamentally, in many situations the documents described by the new policy memo do not exist.

4. ***New policy Eliminating Deference****, effective October 27, 2017.*

Under a policy previously in place, USCIS had deferred to prior nonimmigrant petition approvals issued by the agency when adjudicating extension requests involving the same employer, same employee, and same underlying facts as the initial determination, absent a material change in fact or a legal error by the agency. The new 2017 policy rescinds all such deference, and there have already been instances of denials being issued on extension requests even where there were no changes in fact and without the

---

[7] The underlying regulation was proposed in October 1988 and finalized January 1990 (55 Fed. Reg. 2606, Jan. 26, 1990), addressing general filing requirements for the H-3 and H-2B petitions as well as the old H-1 category.

[8] The Trump administration's 2018 policy explicitly overturns 1995 guidance interpreting the regulation, which had established that with regard to H-1B petitions the regulation was largely unnecessary and instead "requests for contracts should be made only in those cases where the officer can articulate a specific need for such documentation" because the "itinerary requirement in the case of an H-1B petition can be met in any number of ways." See the November 13, 1995 and December 29, 1995 memos from INS. These old policy memos do not seem to be available any longer on the USCIS website, but they are available through the American Immigration Lawyers Association "InfoNet" (the Nov. 1995 memo is AILA Doc. No. 95111390 and the Dec. 1995 memo is AILA Doc. No. 95122590).

[9] 63 Fed. Reg. 30419, at 30419, June 4, 1998, where INS stated in the NPRM preamble that "[M]any industries in the United States, such as the health care and computer consulting industries, have begun to rely more frequently on the use of contract workers. It has been the experience of the Service that many bona fide businesses which provide contract workers to certain industries under the H-1B classification have experienced difficulty in providing complete and detailed itineraries due to the unique employment practices of such industries. For example, companies which are in the business of contracting out physical therapists or computer professionals often get requests from customers to fill a position with as little as one day advance notice. Clearly an H-1B petitioner in this situation could not know of all particular contract jobs at the time that it first files the H-1B petition with the Service."

agency proving or even suggesting a legal error. Of course, the agency always has the authority to rescind an approval or deny an extension where it finds fraud or a misrepresentation.

The new policy seems to fly in the face of the agency's regulations which establish that "supporting evidence [for a petition extension] is not required unless requested by the director."[10] (Emphasis added.) It is facially inconsistent with the agency's regulation to instead adopt a policy that supporting evidence is always required for a petition extension. Eliminating deference to the agency's prior decisions leaves, for example, individuals who are in long green card backlogs and have held valid H-1B status for a decade or longer now subject to ambiguity and, consequently, possible denials, necessitating they depart the country and abandon their quest for lawful permanent resident status.

The new policy was unexpected because it avoids the otherwise long-accepted and well-recognized principle of administrative law that "justice demands that cases with like antecedents should breed like consequences."[11]

5. ***New Notice to Appear policy**, effective date **not yet finalized** with regard to Part V. governing aliens considered no longer lawfully present after issuance of unfavorable decision on an employment-based petition (policy announced June 28, 2018*).

Neither USCIS or its predecessor agency, the Immigration and Naturalization Service (INS), has ever had a practice of issuing a Notice to Appear (NTA) to commence removal proceedings (previously Orders to Show Cause) for all beneficiaries of denied employment-based petitions when adjudicators believe the beneficiaries are no longer lawfully present. While USCIS has not yet decided if or when it will implement the policy it announced June 2018 to employer-sponsored nonimmigrant and immigrant visa petitions, such a prospect has led compliant employers to scramble to evaluate many internal processes that might allow employers to avoid the negative impact (made more difficult without access to premium processing).

Given the historical inability of USCIS to provide prompt adjudications on all nonimmigrant petitions, USCIS's new policy creates a large pool of individuals who are likely to lose status by the time petition adjudication is completed. In recognition of this fact, DHS regulations make clear that individuals seeking extensions may usually maintain work authorization for up to 240 days awaiting adjudication. Under current practice, it is common for the nonimmigrant's underlying status to expire during this period. It would be helpful if the agency confirmed that – should it decide in the future to apply the new policy to employment-based petitions – it would consider individuals working under the 240-day work authorization regulation as individuals lawfully present for purpose of its NTA policy.

Under the new policy, many of these individuals would now be placed into removal proceedings—even if they promptly depart upon receiving notice of the denial. As USCIS was undoubtedly aware, there is currently no reliable means for a nonimmigrant to officially report her voluntary departure from the United States. The consequences of the NTA policy change would be severe. Among other things, the initiation of removal proceedings would create a legal nightmare for legal nonimmigrant professionals working in and contributing to the United States and the employers that sponsor them. Barring

[10] See, e.g., for the H-1B classification, the regulation at 8 CFR §214.2(h)(14).
[11] See, e.g., pronouncements from "the father of administrative law" and legal scholar Professor Kenneth Culp Davis in Davis, Doctrine of Precedent as Applied to Administrative Decisions, 59 W.Va.L.Rev.111 (1957) and his treatise Davis on Administrative Law (1978).

significant changes to current procedures, many of these cases would likely result in the entry of *in absentia* removal orders, which would make the individuals inadmissible for at least five years and unable to enter the United States for *any* purpose during this period.

CONCLUSION

In each of the above-referenced five examples, the agency made substantive changes to policies that had long been in place without affording the regulated community the protections of the Administrative Procedure Act or OMB's Good Guidance policy. Such protections would make it more likely that USCIS would carefully deliberate operational hurdles and the need to provide consistency.

When linked together, these sub-regulatory shifts create real world disruption for U.S. employers for which they cannot plan. For example, an employer requesting an extension of H-1B status for a foreign-born engineer that has held H-1B status with that employer in the same position for five years might receive a denial without the benefit of an RFE because the agency no longer has to provide deference to its prior decisions or afford the petitioner an opportunity to provide evidence if the adjudicator believes that the agency's current view on H-1B specialty occupation disqualifies the beneficiary.

These linked impacts are especially troublesome when the agency also suspends the option of premium processing, which USCIS has elected to do since April 2018. For instance, where an employer seeks to laterally hire an engineer employed in H-1B status with a different employer in the same or a similar job, the absence of premium processing coupled with the option for the agency to make a final decision without requesting further evidence will ultimately deter the lateral movement of H-1B workers. While portability of such workers is supposed to be encouraged, and protected, by statute, such porting becomes risky when the employee and the new employer are faced with the prospect of waiting six months (or longer) and then summarily receiving a denial.

Continued reliance by USCIS on sub-regulatory actions to administer the nation's high-skilled immigration laws without detailed and deep consideration of implementation challenges leads to serious impacts to the regulated community without any agency accountability. For that reason, we ask that you reconsider your extensive use of sub-regulatory actions to implement significant changes to U.S. high-skilled immigration. Thank you for your attention regarding this matter.

Respectfully submitted,

Scott Corley
Executive Director
Compete America Coalition