CompeteAmerica

The Alliance for a Competitive Workforce

May 19, 2021

Samantha Deshommes
Regulatory Coordination Division Chief
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input
DHS Docket No. USCIS-2021-0004
RIN: 1615-ZB87

Dear Chief Deshommes:

The Compete America coalition advocates for ensuring that the United States has the capacity to educate domestic sources of professional talent and to obtain and retain the necessary talent for American employers to continue to innovate and create jobs in the United States. Our coalition members include higher education associations, industry associations, the nation's largest business and trade associations, and individual employers that work together concerning issues pertaining to the high-skilled immigration system of the United States. For more than twenty years, Compete America has worked with successive administrations and Congress on issues critical to the professional global mobility of talent and compliance, functionality, and integrity in the employment-based immigration system of the United States.

Members of our coalition are among the nation's foremost creators of jobs for U.S. workers. Our members contribute to the nation's economic strength and global competitiveness. In addition to the U.S. workers who make up the vast preponderance of their workforce, our members also leverage the talents of well-educated and highly skilled professionals from abroad. Many of these highly sought-after professionals have been drawn to this country not only by the vast opportunities for innovation and growth offered by America's employers, but also by America's unmatched higher education system.

Compete America therefore has a strong interest in ensuring that the U.S. immigration system functions efficiently and effectively, and that foreign nationals can easily access immigration benefits and services. We welcome the opportunity to provide a response to the Request for Public Input U.S. Citizenship and Immigration Services published on April 19, 2021, "Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services." We commend USCIS for engaging in this important effort and look forward to continued and meaningful conversation with the agency regarding ways to improve the immigration system.

EXECUTIVE SUMMARY

- **Consistency in Adjudications**
  - Ensure adjudicators of nonimmigrant petitions receive training on the reinstated deference policy to reduce Requests for Evidence (RFEs), Notices of Intent to Deny (NOIDs), and denials.
  - Issue policy guidance prohibiting overly burdensome boilerplate RFEs and NOIDs.
- **Green Card Backlog**
  - Recapture and issue the more than 220,000 employment-based green card numbers that the agency did not issue between FY 1992 and FY 2019 due to administrative delays.
- **Case Processing Delays**
  - Expand premium processing to additional immigration benefit filing categories, including all Forms I-129, I-140, I-539, and I-765, and specifically Forms I-140 EB-1(c) (multinational manager) and I-129 H-1B1. Take steps to ensure premium processing is not suspended.
  - Look into all possible measures to restore reasonable processing timelines for both initial and renewal Employment Authorization Document (EAD) applications, especially for H-4, L-2, and F-1 nonimmigrants who have suffered harm due to these delays.
  - Expand availability and length of automatic EAD extensions, based on realistic estimates of processing times. Allow employees to apply for renewals more than 180 days in advance.
  - Allow employers to accept electronic USCIS approval notices for Form I-9 purposes.
  - Increase the 240-day employment authorization extension for Form I-129 extension of stay applicants to 365 days to account for current lengthy processing times.
- **Administrative Burdens**
  - Resume previous policy of waiving interviews for employment-based adjustment of status applications except when eligibility or facts in the application are in question.
  - Reevaluate the USCIS definition of "material change" and rescind *Matter of Simeio* policy that requires companies to file an amended H-1B petition with USCIS every time a new Labor Condition Application (LCA) is filed for a change in worksite.
  - Consider ways to modernize requirements for the H-1B and other nonimmigrant visa categories to align with the business models of U.S. industries and companies, so that they can attract, develop, and retain the best talent from around the world.
  - Reduce, not increase, burdens and scrutiny on reputable U.S. businesses that may assign H-1B employees to locations other than the company's brick and mortar offices (i.e., home/remote work arrangements or client locations).
  - Make the Customer Service Center more accessible and responsive to customers and consider establishing parameters to self-schedule in-person Infopass appointments for emergencies.
- **Stakeholder Engagement**
  - Continue engaging in dialogue with the public, considering input, and assessing the impact of potential policy changes before implementing them.
  - Given that employers plan up to a year in advance for H-1B cap, delay any potential changes to the H-1B lottery beyond the coming year's cap season, in order to fully assess the legality and impact of the rule and avoid changing the rules mid-stream for employers.
  - Provide advance notice and opportunity to discuss and provide input on other H-1B changes and U.S. Department of Labor (DOL) wage efforts.
- **Electronic Filing**
  - Expand electronic filing and transition fully to an electronic environment.
  - Amend guidance to allow petitioning employers to submit electronic or digital signatures.

IMMIGRATION POLICY AND PROCESS RECOMMENDATIONS

Compete America offers the below recommendations to improve the immigration process for petitioning employers and their employees, while also creating efficiencies and supporting the fiscal and operational health of the agency.

Consistency in Adjudications

For companies to be able to hire and retain the talent required to compete in the global economy, the U.S. government must apply immigration law and policy in a consistent and transparent manner. Compete America commends USCIS for reinstating its longstanding policy of deferring to prior visa approvals when no material change in fact has occurred and there was no error in the prior approval. Unexpected denials caused serious harm to our member companies' employees and their families, particularly those who had been waiting for years in the green card backlog and had received multiple extensions in the past. U.S. companies lost the ability to plan and staff operations due to this unpredictable adjudication environment, which harmed the country's economy. Completing a full review of an extension application when no change had occurred also wasted valuable agency time and resources. This change in course is a bright spot that we encourage USCIS to look to as an example to emulate as it determines other reforms to pursue, to ensure fair and consistent adjudications and make the U.S. a welcoming destination for highly skilled individuals from around the world.

The updated policy requires USCIS officers who determine that deference to a prior approval is not appropriate to acknowledge the previous approval(s) in the denial, Request for Evidence (RFE), or Notice of Intent to Deny (NOID); articulate the reason for not deferring to the previous determination; and provide the petitioner or applicant an opportunity to respond to the new information. Officers then must obtain supervisory approval before deviating from a prior approval in a final decision. We urge USCIS to ensure adjudicators receive training on this new policy and issue RFEs and NOIDs in a more judicious manner. We also encourage USCIS to issue policy guidance to prohibit adjudicators from issuing overly burdensome boilerplate RFEs and NOIDs. RFE and denial rates increased dramatically under the previous administration, which led to uncertainty and unpredictability, long case processing times, and unnecessary administrative burdens for petitioning employers.

Green Card Backlog

The limited number of employment-based green cards available each year and per-country limits result in decades-long wait times for highly skilled foreign nationals pursuing permanent residence in the United States. Employers must repeatedly file petitions with USCIS to extend the nonimmigrant status of employees waiting for their priority date to become current so that they can file their adjustment of status applications, which in turn places burdens on the agency to process and adjudicate those petitions. We propose that USCIS take action to recapture the more than 220,000 employment-based green card numbers that the agency did not issue between FY 1992 and FY 2019 due to administrative delays. Issuing these unused visa numbers to applicants who have been waiting for years for a green card would considerably reduce the current backlog. It would provide long-overdue relief to these applicants and their families and would eliminate the obligation of USCIS to continually adjudicate renewals of their nonimmigrant status.

Case Processing Delays

In recent years, case processing timelines have reached unprecedented lengths. U.S. employers have been forced to terminate or suspend the employment of critical employees who are simply waiting for their Employment Authorization Document (EAD) to arrive in the mail. Disruptions in employment cause unnecessary harm to foreign nationals and their families, which is particularly serious given the challenges they are already facing due to the COVID-19 pandemic. These gaps in employment also interrupt business operations and impose administrative burdens and costs on companies that must take employees off of payroll, adjust staffing, and potentially even recruit and hire a new candidate to fill the role. Processing delays are causing personal and economic harm at a time when stability is needed more than ever. We propose the below solutions to mitigate these harms.

Compete America asks that USCIS accelerate its implementation of the Emergency Stopgap USCIS Stabilization Act, which was enacted on September 30, 2020 as part of P.L. 116-159, Continuing Appropriations Act, 2021. The legislation requires USCIS to expand the availability of premium processing to additional immigration benefit filing categories, including the Forms I-129, I-140, I-539, and I-765. We specifically note the Form I-140 EB-1(c) for multinational managers and Form I-129 for H-1B1, both of which are not currently eligible for premium processing. Expanded availability of premium processing will give employers the predictability they need, while providing a much needed revenue boost that USCIS can use to improve regular processing of immigration benefits. We also encourage USCIS to take steps to ensure premium processing is not suspended, so that employers can plan in advance without the concern that it will suddenly become unavailable without notice.

We acknowledge that USCIS announced a temporary policy on May 13 to suspend biometrics requirements for H-4, L-2, and E spouses applying to extend or change their status. Compete America thanks USCIS for this change, as it will help to ease the harms caused by processing delays. The biometrics requirement for these categories is duplicative, as these applicants generally have already provided biometrics to the government and has become more burdensome due to limited appointment availability during the pandemic. We ask USCIS to consider additional measures to restore reasonable processing timelines for both initial and renewal EAD applications, especially for H-4, L-2, and F-1 nonimmigrants who have suffered harm due to these delays.

In the meantime, to account for current delays and minimize situations in which employers must remove employees from payroll and employees must depart the country, we urge the agency take the below actions. These changes, which are squarely within USCIS authority, will help employees and their families and will preserve the continuity of business for U.S. companies. They will also take pressure off USCIS as it works through its backlog of cases and determines how to restore reasonable, predictable adjudication timelines.

- Expand the availability and length of automatic EAD extensions. Certain categories of applicants are already eligible, but H-4, L-2, E-1, E-2, and E-3 renewal applicants currently are not included in this policy. We urge USCIS to expand availability of this automatic extension and to determine the length of the extension based on realistic estimates of processing times. Adjudication timelines have exceeded 180 days in many cases, such that even the 180-day extension does not prevent gaps in employment for eligible applicants.
- Allow employees to apply to renew their EADs more than 180 days in advance, to give USCIS more lead time to adjudicate them.

- Update the M-274 Handbook for Employers to clarify that employers may accept electronic USCIS approval notices for Form I-9 purposes. USCIS processing delays, coupled with U.S. Postal Service delays due to COVID-19, frequently leave employers with no choice but to suspend employment, when an employee has an electronic USCIS approval notice but has not yet received the physical notice in the mail.
- Increase the 240-day employment authorization extension for Form I-129 extension of stay applicants to 365 days to account for current lengthy processing times.

Administrative Burdens

We believe USCIS can do more to lessen the administrative and paperwork burdens on petitioning employers and beneficiaries, while also reducing its own workload and increasing the agency's overall efficiency. We urge the agency to reverse the decision to stop waiving interviews for employment-based adjustment of status (i.e. green card) applications and return to its previous policy of waiving interviews except when eligibility or facts in the application are in question. Requiring an interview for every employment-based adjustment of status application adds an unnecessary hurdle to the process and is a particularly onerous requirement in light of current public health concerns. USCIS would still have discretion to conduct an interview, but need not require a personal appearance in every case. As a practical matter, local field offices may already waive this requirement. We recommend restoring this as the agency's uniform practice and giving the National Benefits Center authority to make the decision.

We encourage USCIS to reevaluate the definition of "material change" and rescind its policy of requiring companies to file a new or amended H-1B petition solely for a change in worksite,[1] in situations where there is no change in the job or position in the underlying, approved petition and the employer has secured a certified Labor Condition Application (LCA) for the additional work location. The requirement to file an amendment with USCIS in this circumstance has created significant paperwork burdens, especially given that the petition process is paper-based. It also adds an unnecessary work stream for USCIS officers.

We ask that USCIS consider ways to modernize requirements for the H-1B and other nonimmigrant visa categories to align with the business models of U.S. industries and companies, so that they can attract, develop, and retain the best talent from around the world. This is particularly important as the U.S. economy recovers from the impact of the global pandemic. We encourage the agency to reduce, not increase, the burdens and scrutiny on reputable U.S. businesses that may assign H-1B employees to locations other than the company's brick and mortar offices (i.e., home/remote work arrangements or client locations). Work arrangements have changed dramatically over the last year, and USCIS should pursue policies that reflect these changes and do not inhibit growth in the U.S.

Additionally, we urge USCIS to make the Customer Service Center more accessible and responsive to customers. We understand USCIS has made positive changes to its customer service protocols, but in many cases, individuals who need rush services such as emergency parole cannot wait to go through the current multi-step process to obtain an Infopass appointment. We encourage USCIS to consider establishing parameters under which applicants can self-schedule in-person Infopass appointments for emergencies.

[1] *USCIS Final Guidance on When to File an Amended or New H-1B Petition After* Matter of Simeio Solutions, LLC, PM-602-0120 (July 21, 2015).

Stakeholder Engagement

Under the previous administration, significant changes in immigration policy occurred with little notice to the public and without an opportunity to comment or provide feedback before they took effect. We greatly appreciate this effort by USCIS to engage with stakeholders and solicit input on how the agency can reduce barriers to immigration benefits and implement President Biden's Executive Order on legal immigration. We urge the agency to continue its dialogue with the public and continue considering input and assessing the impact of potential policy changes before implementing them.

USCIS published a final regulation on January 8, 2021, "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions" (86 FR 1676), which would overhaul the allocation process for cap-subject H-1B visas. On February 8, USCIS formally delayed the rule's effective date until December 31, 2021 (86 FR 8543) to work through issues associated with implementation and review the rule and its associated policies. Compete America submitted a comment in support of the delay and urged the agency to carefully review the rule's legality and its potential impact, especially on employers engaged in not-for-profit activity, rural hospitals and health clinics, start-ups, and small and medium-sized enterprises. We also asked USCIS to consider the impact on early-career professionals, including international students completing undergraduate, graduate, or professional degrees at American colleges and universities.

We respectfully request that in determining how to move forward, USCIS acknowledge the concerns we raised in our previous comment. We ask that the agency bear in mind the critical nature of the limited number of H-1B visas that become available on April 1 of each year, and how far in advance companies identify candidates and prepare for the March registration period. Our member companies typically begin planning up to a year in advance for the following year's cap season. It is essential that U.S. companies have certainty of what the legal requirements will be and how the cap process will work. We respectfully recommend that USCIS further delay changes beyond the coming year's FY23 H-1B cap season, in order to fully assess the legality and impact of the rule and avoid changing the rules mid-stream for employers. Implementing an entirely new process when companies are well underway in planning would harm American companies.

We understand USCIS is also considering other changes to the H-1B nonimmigrant program and the Department of Labor (DOL) is working on changes to wage requirements. We reiterate the same concerns described above regarding the need for advance notice. It is vital that employers know what the H-1B eligibility and evidentiary requirements will be at least a year in advance of the upcoming cap season. We would welcome the opportunity to discuss potential changes and provide input.

Electronic Filing

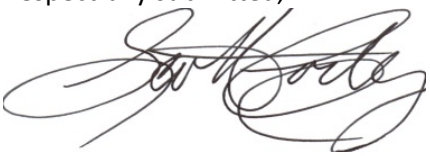
The current paper-based process that requires wet ink signatures and submission of voluminous paper applications through the mail is burdensome and costly for employers, applicants, and the government. We strongly support the agency's eProcessing initiative and the work USCIS has done to date to expand the availability of online filing (e.g., H-1B electronic registration, Optional Practical Training (OPT) EAD filing). We urge USCIS to continue to find ways to more effectively leverage electronic filing and transition fully to an electronic environment. Online filing would reduce administrative costs for all parties involved and would significantly reduce processing times and employment disruptions. While USCIS works to shift to e-filing, we propose that the agency amend its guidance on signatures to allow petitioning employers to submit electronic or digital signatures, in line with the practice of many other

U.S. government agencies. We would welcome any opportunities to assist the agency in these efforts and provide feedback.

CONCLUSION

Compete America greatly appreciates USCIS's issuance of this Request for Public Input and consideration of the above recommendations. We look forward to continued dialogue with the agency and will continue working with Congress and the Biden administration to advocate for reforms to the United States immigration system.

Respectfully submitted,



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