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PRESIDENT BIDEN MUST REJECT TRUMP ERA H-1B LOTTERY RULE AND WORK VISA TRAVEL BAN

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By: Cyrus D. Mehta and Kaitlyn Box*

On March 3, 2021, Democratic Senator Dick Durbin and Republican Charles Grassley submitted a letter to new DHS Secretary Alejandro Mayorkas urging the DHS to implement the Trump administration's H-1B lottery final rule entitled "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions", which was published in the Federal Register on January 8, 2021. The final rule would replace the current H-1B lottery system with a preference-based system that prioritizes workers earning higher wages. Originally set to go into effect on March 9, 2021, implementation of the rule was postponed until at least December 31, 2021. It is a shame that Senator Durbin would throw his support behind a clearly ultra vires regulation of the Trump era that is designed to hurt small businesses, start-up companies and keep the U.S. from retaining the best and brightest foreign students from entering the U.S. workforce. If allowed to go into effect during this year's H-1B lottery, the rule will have a devastating impact on international students, entry-level workers, and employees of non-profits, all of whom tend to earn modest salaries.

The Biden administration's welcoming immigration policies have been a breath of fresh air, but one must keep in mind that certain members of the administration disfavor the H-1B visa program, viewing it erroneously as a source of "cheap labor" that threatens the interests of U.S. workers. The H-1B visa indeed requires employers to pay the higher of the prevailing wage or actual wage paid to similarly situated workers in the company. Distrust of the H-1B program could explain why President Biden selectively rescinded Proclamation 10014, but not Proclamation 10052, which restricts the entry of

individuals who were outside the United States without a visa or other immigration document on the effective date of the Proclamation, June 24, 2020, and are seeking to obtain an H-1B visa, among other categories. We have discussed Proclamation 10052 in detail in a previous blog. In its last days, the Trump administration extended Proclamation 10052 to March 31, 2021.

Given the tremendous hardship it causes to noncitizens subject to the ban, the Biden administration ought to allow Proclamation 10052 to expire on March 31 rather than further extending it. Better still, the Biden administration should rescind it even before March 31 as every day causes hardship to those who have been adversely impacted. The affirmative rejection of 10052 would symbolically also demonstrate that Proclamation 10052 is based on the same xenophobic premise that led to the rejection of Proclamation 10014. The Proclamation already conflicts with several of the Biden administration's early immigration policies. Proclamation 10052 was based on the same tired and xenophobic narratives as Proclamation 10014, which Biden has already rescinded. Section 5(c)(iii) of the Proclamation, which aims to prevent "aliens" (a term the Biden administration has pointedly avoided using) with final orders of removal from obtaining eligibility to work in the United States does not comport with Biden's new priorities memo, which would allow such noncitizens to seek work authorization under an order of supervision. A provision at Section 5(b) in Proclamation 10052 requires measures to prevent noncitizens seeking admission under the EB-2 or EB-3 categories from disadvantaging U.S. workers under INA 212(a)(5)(A). Biden's February 2, 2021 Executive Order entitled "Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans", on the other hand, lauds the contributions of immigrants to the U.S. economy and promised to reduce barriers to naturalization.

Biden's U.S. Citizenship Act of 2021 also reflects a certain reluctance on the part of the Biden administration to address the H-1B visa program. The sweeping bill is largely favorable to immigrants, featuring as its keystone a path to legal status for undocumented noncitizens who were present in the United States as of January 1, 2021. The bill also endeavors to reduce the backlogs in the employment and family based categories by adding additional numbers and not counting dependent family members, among other ameliorative measures. However, the bill had comparatively little to say about H-1B visas. One of the few provisions that did address the program empowers DHS to "issue

regulations to establish procedures for prioritizing such visas based on the wages offered by employers", which concerningly echoes Trump's H-1B lottery rule. While the issuing of more green cards to skilled workers is indeed welcome and absolutely necessary, there also needs to be a complimentary work visa program that allows employers to quickly employ much needed skilled workers and which also provides a bridge to the green card. Also another glaring lacuna in the bill is the absence of the much needed startup visa that would incentivize foreign national entrepreneurs to found companies in the US, which in turn could grow and create jobs for Americans in addition to creating paradigm shifting technologies.

If the Biden administration truly wishes to act in the best interest of the U.S. economy it must reject the idea, whether it is championed by opponents of skilled immigration on the left or the right, that H-1B workers are a threat to the United States. The administration must seek to delay the implementation of the H-1B lottery rule and rescind it notwithstanding Senator Durbin's support for it. Indeed, Senator Durbin, teaming up with known immigration foe Senator Grassley (who has never repudiated Trump), has been a constant and irrational foe of the H-1B program for over two decades and his opposition to the H-1B is not a reasoned voice and lacks credibility. Proclamation 10052 also does not benefit U.S. workers by separating talented H-1B employees from their families and preventing them from performing critical jobs in the United States. As Stuart Anderson points out in a recent Forbes article, many H-1B workers are employed in the computer and tech field, which has not seen significant increases in unemployment during the COVID-19 pandemic. In fact, large numbers of positions remain open in this field and would likely go unfilled without highly skilled H-1B workers. With no cogent economic justification remaining to support it, it is hoped that Proclamation 10052 soon goes the way of Proclamation 10014.

According to an earlier Forbes article, "H-1B visas are important because they generally represent the only practical way for high-skilled foreign nationals, including international students, to work long-term in the United Sates and have the chance to become employment-based immigrants and U.S. Citizens. In short, without H-1B visas nearly everyone from the founders of billion-dollar companies to the people responsible for the vaccines and medical care saving American lives would never have been in the United States.". The H-1B lottery rule, if implemented, will clearly provide a disincentive for international

students to pursue higher education in the US. By eliminating the chances of entry level students from obtaining H-1B visas, they will pursue educational opportunities in other countries, which in turn will adversely impact American universities. As AILA's comment to the H-1B lottery rule points out, international students comprise over 5% of the total number of students enrolled in higher education in the U.S., and contribute billions of dollars to the American economy. *See* "AILA and the Council Submit Comments Opposing USCIS Proposal to Create Wage-Based Selection Process for H-1Bs", AILA Doc. 20120234 (Dec. 2, 2020). Talented foreign students have long flocked to U.S. universities, so losing this population would not only financially devastate American educational institutions, but also result in the loss of this source of talented entry-level workers. The notion that foreign students after completing a year or two of OPT or STEM OPT will be able to command Level 4 wages and thus compete for H-1B visas under the new rule is a canard.

United States companies, too, depend on H-1B workers. U.S. employers have long recruited highly skilled and highly education H-1B visa holders to fill entry-level STEM positions. With foreign students comprising the vast majority of graduates of some STEM programs in the United States, there are simply not enough qualified U.S. workers to fill all open positions in many fields. *See* AILA Doc. 20120234, *supra*. By effectively foreclosing the H-1B visa as an option for entry-level workers who are not yet earning enormous salaries, the H-1B lottery rule will cause untold disruption and economic harm to U.S. employers who rely on H-1B talent. With some H-1B workers filling critical roles in healthcare and research to combat COVID-19, the potential for harm extends beyond the mere economic and could further delay the United States' recovery from the pandemic. *See* AILA Doc. 20120234, *supra*. If talented H-1B workers go elsewhere for employment, the United States would also lose its ability to attract the "best and brightest" who have made contributions of untold significance to the United States. When the Immigration Act of 1990 revised the H-1B visa and set a 65,000 cap, the internet had not taken off. Since then there have been immense technological leaps, while the H-1B cap continues to remain at 65,000 with a paltry 20,000 added for those with master's degrees in 2004. Still, it is H-1B visa holders who have contributed to advances in technology and who have ultimately become CEOs of companies like Google and Microsoft. The new H-1B lottery rule will kill the ability of attracting talented foreign nationals on H-1B visas who will ultimately greatly contribute to the US.

Finally, the fact that the H-1B visa is used by IT consulting companies should not be a justification to promulgate the new H-1B lottery rule. The use of IT consulting companies is widespread in America (and even the US government contracts for their services), and was acknowledged by Congress when it passed the American Competitiveness and Workforce Improvement Act of 1998 (AVWIA) by creating onerous additional attestations for H-1B dependent employers. The current enforcement regime has sufficient teeth to severely punish bad actors. IT consulting employers who hire professional workers from India unfortunately seem to be getting more of a rap for indiscriminately using up the H-1B visa. Even the Durbin-Grassley letter falsely accuses outsourcing companies for gaming the H-1B lottery system without taking into account the limited supply of H-1B visa numbers and the increased demand for skilled workers each year. However, it is this very business model that has provided reliability to companies in the United States and throughout the industrialized world to obtain top-drawer talent quickly with flexibility and at affordable prices that benefit end consumers and promote diversity of product development. This is what the oft-criticized “job shop” or “body shop” or “outsourcing company” readily provides. By making possible a source of expertise that can be modified and redirected in response to changing demand, uncertain budgets, shifting corporate priorities and unpredictable fluctuations in the business cycle itself, the pejorative reference to them as “job shop” is, in reality, the engine of technological ingenuity on which progress in the global information age largely depends.

By continuing to limit and stifle the H-1B program, either through a new H-1B lottery rule or by perpetuating Proclamation 10052, U.S. employers will remain less competitive and will not be able to pass on the benefits to consumers. We need more H-1B visa numbers rather than less. We also need to respect H-1B workers rather than deride them, even if they work at an IT consulting company, as they too wish to abide by the law and to pursue their dreams in America. The best way to reform the H-1B program is to provide more mobility to H-1B visa workers. By providing more mobility, which includes being able to obtain a green card quickly. H-1B workers will not be stuck with the employer who brought them on the H-1B visa, and this can also result in rising wages within the occupation as a whole. Mobile foreign workers will also be incentivized to start their own innovative companies in America, which in turn will result in more jobs. This is the best way to reform the H-1B visa program,

rather than to further shackle it by making it harder to win the H-1B lottery.

The comment period closes on THIS WEDNESDAY March 10 at 11:59 pm ET. We would highly recommend that everyone submit their own comment supporting the delay of the rule and the need for further review of the rule, underscoring why a delay is necessary because implementation cannot be rushed through right before cap season, why the rule is unlawful, and why the economic data does not support the rule as written. You can submit your own comment here:

https://www.federalregister.gov/documents/2021/02/08/2021-02665/modification-of-registration-requirement-for-petitioners-seeking-to-file-cap-subject-h-1b-petitions#open-comment

**Kaitlyn Box graduated with a JD from Penn State Law in 2020, and works as a Law Clerk at Cyrus D. Mehta & Partners PLLC.*