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April 2, 2019

Thomas M. Dowd
Deputy Assistant Secretary
Employment and Training Administration
U.S. Department of Labor
Box PPII 12-200
200 Constitution Ave
Washington, D.C. 20210

Submitted via e-mail: H2BReform.Comments@dol.gov

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DOL Notice and Request for Comments: Selection Procedures for Reviewing Applications Filed by Employers Seeking Temporary Employment of H-2B Foreign Workers in the United States

Dear Mr. Dowd,

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced notice and request for comments published in the Federal Register on March 4, 2019.¹ The Department of Labor (DOL) is seeking comments on its procedural changes to provide for fairer and more orderly assignment and review of H-2B applications.

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed procedural changes to DOL's processing of H-2B applications. We believe that our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

¹ 84 Fed. Reg. 7399 (March 4, 2019).

I. Total Processing Time

AILA appreciates the DOL's goal to issue final determinations no later than 30 days before the employer's start date for H-2B employment and DOL's continued efforts to establish fair and orderly processing procedures.

II. Random Selection Process for Assigning H-2B Applications

AILA is pleased with DOL's proposal to change its selection process to select randomly for processing all H-2B applications seeking the earliest start date of employment permitted under the semi-annual allotment under the Immigration and Nationality Act (INA) sections 214(g)(1)(B)) and 214(g)(10), where the applications are received within the first three calendar day of the time period for filing. It is clear from the iCERT system failure on January 1, 2019, that the DOL's computer system cannot accommodate the large number of simultaneous filings resulting from the DOL's current procedures of processing applications based on the date and receipt time calculated by the millisecond. It is also true that technical issues on the part of individual users may impact their ability to file and subsequently participate in the H-2B program under the current filing procedures.

While the proposed procedure is equitable as described, AILA has concerns regarding the potential scenarios outlined below. We ask DOL to consider these scenarios and provide further guidance to clarify how these situations will be addressed.

The New Procedures May Result in Certain Employers Filing More Than One Application for the Same Position

We are concerned that the new random selection process may result in some employers filing multiple H-2B applications for the same position in order to increase the probability of being selected for processing in the initial group of applications ("Group A") based on the earliest start date of work permitted depending on which of the semiannual quotas is open for filing. Under the current regulations, there is no prohibition against filing multiple applications for the same position (same employer, position, duties, number of workers, and employment period). We request that DOL provide further guidance as to how it will process applications where there are multiple applications filed by the same employer for the same position, and how it will ensure an equitable opportunity for those employers that do not file multiple applications.

DOL Should Consider Holding Applications in Abeyance Up to a Specified Release Date for all Certified H-2B Applications Seeking the Earliest Start Date

When DOL receives H-2B applications in a greater amount than the total number of H-2B visas available, it should not be responsible for having to set up a selection process which would give preference to employers chosen in a random selection or impacted by how quickly its Certifying Officers (CO) process a case. A fairer processing system would be one where DOL holds all

certified H-2B applications seeking the first available start date in abeyance up to a certain date on which DOL feels its examiners can process all filed petitions. If availability allows, subsequent groups may also be handled at this time. This will allow employers a fairer chance of obtaining H-2B visa numbers with USCIS by addressing inequities caused when a business is opened seven days a week or is part of a collective bargaining agreement (CBA) and can complete the recruitment phase much earlier than an employer who is open five days a week or who is not part of a CBA. In addition, an employer's chances of submitting the application to USCIS will not be impacted by how fast or how slow a CO is able to process assigned applications. Additionally, as has been shown, USCIS has the authority and ability to set up a lottery system to randomly select H-2B applications in a manner that is fair and not impacted by subjective elements.

III. Conclusion

AILA appreciates the opportunity to comment on the proposed procedures for reviewing applications filed by employers seeking temporary employment of H-2B foreign workers in the United States. We look forward to a continuing dialogue with the DOL on these procedures.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION