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Re: DHS Docket No. USCIS-2007-0060
8 C.F.R. 214(h)
USCIS Interim Rule on Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt From the Annual Numerical Limitation, 73 Fed. Reg. 15389-95 (March 24, 2008)

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments to the Interim Rule on Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt From the Annual Numerical Limitation published in Volume 73 of the Federal Register pages 15389-95 (March 24, 2008). AILA is a voluntary bar association comprised of over 11,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA takes a broad view of immigration law issues, as our member attorneys represent thousands of business and industries in sponsoring foreign workers, as well as tens of thousands of individuals applying for temporary or permanent employment-based visas.

AILA very much appreciates the efforts that U.S. Citizenship and Immigration Services (USCIS) and its employees have made over the years to refine the process of petitioning for H-1B visas. Due to the shortages of these visas as described in detail in the notes to the Interim

Final Rule, there have been many challenges for employers, their attorneys, and USCIS officials in managing the tremendous volume of petitions that are filed over a short window of time. This Interim Rule is the latest practical and helpful step in that process. While nothing short of Congressional action to increase the quota of H-1B visas will completely alleviate the problem, AILA strongly commends USCIS for working to address challenges from previous years.

Finalization of this rule in 2008 will greatly assist our members and clients, as well as USCIS, in preparing ahead for another round of H-1B petitions in April 2009.

I. Multiple H-1B petitions

AILA suggests that USCIS clarify that the ban on multiple filings by the same employer for the same alien in the same fiscal year should not apply where the beneficiary is exempt from numerical limitation on any of the three grounds in INA § 214(g)(5). Presently, the Interim Regulation at 8 C.F.R § 214.2(h)(2)(i)(G) states:

> An employer may not file, in the same fiscal year, more than one H-1B petition on behalf of the same alien if the alien is subject to the numerical limitations of section 214(g)(1)(A) of the Act or is exempt from those limitations under section 214(g)(5)(C) of the Act.

As stated in the notes to the Interim Rule, the goal of the limitation on multiple filings is to avoid having employers and attorneys attempt to "increase the chances of being selected in the random selection process." For FY 2007 filings, USCIS reported approximately 500 cases where a single beneficiary was named on at least two petitions by the same petitioner. This "stacking the deck" should clearly be stopped.

Permitting the submission of multiple petitions by the same employer for the same alien where the employer is seeking cap-exemption in one petition and is not claiming cap-exemption in the other does not contradict this well-reasoned policy.

For nonprofit affiliated entities, there may be valid reasons to file two petitions for the same employee in the same fiscal year due to the complexity in defining what entities qualify as "affiliated or related to an institution of higher education" under INA § 214(g)(5)(A). For example, while very useful guidance on this issue has been provided by a USCIS Memorandum (Michael Aytes, "Guidance Regarding Eligibility from the H-1B Cap," HQPRD 70/23.12 (June 6, 2006)) instructing adjudicators to use the definition of affiliation in the fee exemption context (8 C.F.R. 214.2(h)(19)(iii)(B)) to determine affiliation for cap exemption, there are still ambiguities in this area, and although the Aytes memorandum provided a definition of "affiliation," there is still no clear definition of a "related" nonprofit for cap exemption purposes.

We have seen situations where a nonprofit entity hires a foreign worker close to April 1 and choses to file a cap-subject petition in order to avoid the uncertainty of the "affiliated or related" issue. In this example, if the cap-subject petition is denied, the nonprofit may then choose to file as cap-exempt with documentation of its affiliation or relation to an

institution of higher education (with appropriate fee as per revised 8 C.F.R. 214.2(h)(8)(ii)(B) and (D)).

AILA also suggests that the Interim Rule explicitly allow the "protective filing" of a second petition by the same employer for the same alien (as opposed to multiple filings) in extraordinary circumstances, where the subsequent filing is clearly identified as a "protective filing." We use the term "protective filing" to describe a subsequent petition submitted by a petitioner when the petitioner has *bona fide* reason to believe that the initial filing has been lost, destroyed, delayed, or otherwise has not been delivered in a timely manner, whether in fact there has been a failure of delivery or not. Under those circumstances, we propose that the USCIS permit the filing of the subsequent petition, with explanation, and that the USCIS screen those petitions prior to rejection and denial as provided in the current Interim Regulation.

Experience with the filings in April of 2008 reveal that circumstances beyond control of petitioners gave rise to a number of such "protective filings." We suggest again that the number of protective filings in any given year will be small, and that clearly labeled protective filings should not be rejected. The process of evaluating such protective copies at the mailroom would be analogous to evaluation of resubmissions of the few H-1B petitions that were incorrectly rejected by a Service Center.

II. Increase of the Filing Window to Five Business Days

AILA commends USCIS for increasing the period of filing H-1B cap subject petitions from two business days to five at 8 C.F.R. § 214.2(h)(8)(ii)(B). We found that this significantly eased the burden on the USCIS, the U.S. Postal Service, and private courier services. We agree that the five business day period should remain in the Final Rule.

III. Treatment of Advanced Degree Level Cases in the Random Selection Process

AILA supports the treatment of H-1B petitions subject to the Advanced Degree section of 8 C.F.R. § 214(g)(5)(C). It is very much in the spirit of that Section to run a random selection process for the Advanced Degree cases, and then include those Advanced Degree cases not selected in the second round of random selection. The goal of 8 C.F.R. § 214(g)(5)(C) was clearly to help those professionals who received advanced degrees from U.S. institutions of higher education to remain in the United States and use their skills to assist U.S. businesses.

IV. Conclusion

AILA reiterates its approval of the overall structure of the Interim Rule and applauds the USCIS for its initiative in developing the provisions of the Interim Rule. We offer the

above suggestions based upon experience gained and lessons learned during the first H-1B filing “season” under this regulation.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION