DECEMBER 18, 2018

Business Roundtable Comments on "Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens" Proposed Rule
Department of Homeland Security Docket No. USCIS-2008-0014

INTRODUCTION

Business Roundtable is an association of more than 200 chief executive officers of leading U.S. companies working to promote sound public policy and a thriving U.S. economy. Business Roundtable member companies employ nearly 15 million people; produce more than $7 trillion in annual revenues; invest nearly $147 billion annually in research and development; pay nearly $296 billion in dividends to shareholders; and generate more than $488 billion in sales for small and medium-sized businesses annually. Business Roundtable companies also make more than $8 billion a year in charitable contributions.

Business Roundtable appreciates the opportunity to comment on the U.S. Department of Homeland Security's (DHS) proposed regulation, "Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens." Business Roundtable welcomes U.S. Citizenship and Immigration Services (USCIS) efforts to find ways to increase efficiency and optimize resources for both the agency and companies. At the same time, Business Roundtable believes that the USCIS make certain that its H-1B lottery reforms are consistent with implementation of the agency's Electronic Immigration System (ELIS). The Roundtable also requests that the agency undertake additional testing and stakeholder engagement before introducing these reforms. Further detail and recommendations follow.

BUSINESS ROUNDTABLE AND IMMIGRATION

Business Roundtable supports immigration policies that promote a healthy economy – accelerating growth, encouraging hiring, and creating American jobs – and that keep the United States and its citizens safe while remaining true to the American values of welcoming immigrants, protecting the vulnerable and treating all people fairly. Business Roundtable has conducted extensive research and released in-depth reports that examine immigrants' contributions to the United States,[i] compare U.S. immigration policies to those of other countries,[ii] and propose realistic measures to fix the country's immigration system.[iii] Most recently, Business Roundtable released a report that evaluates the economic impact of scaling back Optional Practical Training (OPT) programs for international students.[iv]

Due to structural problems with the current immigration system, it is imperative that Congress acts to reform the U.S. system of immigration. Regulations intended to improve existing work visa categories are welcome, but they are no replacement for immigration legislation that addresses the core structural problems within the current immigration system. Business Roundtable will, therefore, continue to encourage Congress to fix America's broken immigration system and pass laws that keep America secure and while supporting economic growth.

ALIGN H-1B LOTTERY REFORM WITH IMPLEMENTATION OF ELECTRONIC FILING

USCIS Director L. Francis Cissna has said that the agency's top priority is to fully implement the agency's ELIS before the end of 2020, allowing electronic filing of all immigration applications and petitions.[v] Business Roundtable strongly supports this effort to modernize the immigration system. Business Roundtable has concerns, however, that the proposed H-1B lottery registration is a stopgap approach that will divert government resources and focus away from ELIS. Business Roundtable recommends prioritization of ELIS and encourages the agency to postpone consideration of a stand-alone,

online lottery H-1B registration system until such time as those changes and that system can be implemented in closer coordination with ELIS.

RECOMMENDATIONS FOR CONTINUED TESTING AND STAKEHOLDER ENGAGEMENT

In addition to re-evaluating whether the agency should prioritize online H-1B registration ahead of ELIS, Business Roundtable offers the following comments regarding the proposed regulation:

USCIS should announce that the online H-1B registration process will not be in place for FY20 cap filings.

USCIS published the proposed rule on December 3, 2018 and seeks to implement a regulation before the April 2019 H-1B cap filing period. This means USCIS would need to put the electronic registration system in place by mid-March 2019 at the latest, and employers would then need to quickly learn to navigate the new system and process for submitting registrations.

The agency has sent mixed signals about its actual timeline for implementing the changes. The proposed regulation states that the agency intends to make changes to the FY20 cap process (which begins on April 1, 2019). However, shortly after publishing the proposed regulation, the agency issued a statement on Twitter stating that "it is likely that the FY21 cap season would be the first time that electronic registration is required." This uncertainty poses significant problems for Business Roundtable members, who begin planning their H-1B cap process up to a year in advance. Because the agency has significant concerns about its ability to implement the online registration process in the next few months, Business Roundtable recommends that USCIS issue a public statement as soon as possible to clarify that the agency will not change the H-1B filing process for FY20 cases.

USCIS should not finalize the regulation until it is known that the online registration system will work.

Federal government agencies frequently experience unexpected obstacles and delays when phasing in new electronic systems. For example, the U.S. Department of Labor (DOL) recently experienced widespread problems when it implemented a new electronic form, the ETA 9035/9035E, Labor Condition Application for Nonimmigrant Workers (LCA). Similarly, after the U.S. Department of State transitioned the Diversity Visa lottery to an electronic system, the agency experienced a technical failure that resulted in the invalidation of lottery results for individuals who had already been notified that they had won. A technical failure of an online H-1B registration system could cause widespread business disruption, substantial costs for employers and negative consequences to the immigration status of applicants.

Allowing for adequate time to fully vet, test and troubleshoot the online registration system before mandating its use would minimize the risk of such problems that may arise. This is particularly true when the agency acknowledges that it does not know how companies will use the new system, suggesting that additional testing will be necessary *after* public comments have been received and analyzed by USCIS.

Although USCIS has proposed giving itself authority to suspend the electronic registration process in any year should problems arise, such a proposal would inject too much uncertainty into the visa application process and increase costs for companies. Technical issues are most likely to arise before or during the online registration process, which would give companies limited time to revert to the current system and submit full paper filings for all registrants. Companies, not knowing which system will be in place in any given fiscal year, will be forced to prepare "backup" paper filings – thereby *increasing* costs for companies.

Business Roundtable therefore requests that USCIS delay finalization of the online registration proposal until further testing is conducted and the agency is confident that there will not be a need to revert to the current system.

USCIS should reconsider its proposed H-1B petition filing process, which provides insufficient time to prepare petitions and will further delay government processing of cap-subject petitions.

The proposed rule will require certain employers whose registrations were selected in the lottery to prepare and file full H-1B petitions within 60 days of selection, insufficient time for many employers. In addition to obtaining a certified LCA from DOL, which alone can take weeks, the employer and employee must secure extensive documentation on the job position and the employee's eligibility, document translations and independent expert opinion letters. USCIS will deny a petition that does not contain all required information.

The agency also proposes to build in several petition filing periods for each fiscal year — for example, filing windows of April 1 to May 31, and May 1 to June 30. Today, government processing times frequently exceed nine months for H-1B cap cases. Pushing the filing window beyond the first week of April without addressing government processing times would result in further delaying employer access to high-skilled workers beyond the start of the fiscal year. Business Roundtable therefore recommends that USCIS allow employers up to four months to file an H-1B petition after the registration is selected in the lottery, but delay implementation of the regulation until the agency can adjudicate H-1B cap petitions within 60 days. This approach would ensure sufficient time for employers to file and for the government to adjudicate, H-1B petitions before the beginning of the fiscal year.

USCIS should seek further review and input regarding potential unintended consequences that could result from the new online H-1B registration system.

The agency acknowledges in the proposed regulation that many questions remain unanswered as to how companies will use the new online registration system. Under the proposal, USCIS would not charge a filing fee for registrations and would select beneficiaries based on skeletal filings containing limited information about the petitioner and beneficiary. The agency concedes that some companies might try to manipulate the system yet states that it does not have a solution to prevent fraud and abuse apart from monitoring filing patterns. Even if the government observes manipulation of the online registration system, the agency will not be able to prevent those employers from flooding the system to improve their chances of obtaining H-1B visa slots.

The H-1B visa program is too important for the government to implement changes without knowing whether, and to what extent, legitimate users will be adversely affected or even be shut out of the program. Business Roundtable therefore requests that USCIS (i) provide additional information to the public about the effectiveness of the government's legal authorities and operational tools to prevent such abuses, and (ii) then allow the public additional time to analyze and submit comments on whether the benefits of the proposal outweigh potential unintended consequences.

CONCLUSION

Business Roundtable welcomes the agency's efforts to find ways to more efficiently manage the cap filing process and optimize resources for both the agency and companies that file immigration petitions. At the same time, Business Roundtable encourages USCIS to reconsider whether online registration should be the agency's top priority today. Business Roundtable also requests that the agency undertake additional testing and stakeholder engagement before introducing reforms to the H-1B lottery.

Business Roundtable appreciates the opportunity to comment on this proposal and looks forward to continued communication with the agency on these and other issues surrounding the U.S. immigration system.

[i] Business Roundtable. (2017, September). *Economic effects of immigration policies: a 50-state analysis*. Retrieved from https://s3.amazonaws.com/brt.org/archive/reports/BRT%20Economic%20Effects%20Immigration.pdf
Business Roundtable. (2014, June). *Contributing to American growth: the economic case for immigration reform.* Retrieved from https://s3.amazonaws.com/brt.org/archive/0_immigration_report/2014.06.06%20BRT%20Immigration%20Report.Contributing%20to%20American%20Growth.pdf
[ii] Business Roundtable. (2015, March). *State of immigration: how the United States stacks up in the global talent competition.* Retrieved from https://s3.amazonaws.com/brt.org/BRT-immigrationreport-2.pdf
[iii] Business Roundtable. (2013, April). *Taking action on immigration: realistic solutions for fixing a broken system.* Retrieved from https://s3.amazonaws.com/brt.org/archive/reports/20130405_Taking_Action_on_Immigration.pdf)
[iv] Business Roundtable. (2018, December). *The economic impact of curbing the optional practical training program.* Retrieved from https://s3.amazonaws.com/brt.org/BRT-OPTProgramReport_1.pdf
[v] Francis, Laura D. (2018, October 17). Paperless intake is immigration agency director's top priority. *Bloomberg Law.* Retrieved from https://news.bloomberglaw.com/daily-labor-report/paperless-intake-is-immigration-agency-directors-top-priority