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U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
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Re: Docket No. USCIS-2014-0014, Notice of Request for Information

Thank you for the opportunity to submit comments to USCIS-2014-0014: Notice of Request for Information. The undersigned associations, representing small and large businesses from all sectors of the economy across the country, have significant interest in ensuring the U.S. immigration system functions in a manner that allows for maximization of growth and innovation. To provide the widespread corrections to the system necessary for employers to have stability in the coming years, there is no substitute for congressional action and this is reflected in the limited scope of the Request for Information (RFI). Therefore, we jointly submit the following responses regarding agency activities that might, in combination, provide a more reliable and functional immigration system until broader congressional action is achieved.

The responses outlined below are not in order of priority of importance to the employer community, but rather in the order of format presented in the RFI.

Legal immigration system streamlining – Questions #2, 3b, 3c, 3e, 5, 12

Question #2

When considering nonimmigrant visa processing at the consular posts of the Department of State, it should be a priority for businesses to be able to learn the "real reason" for visa denials relating to valued employees, customers and business associates. Nonimmigrant visa denials are most often based solely on a 214(b) refusal (referring to §214(b) of the Immigration and Nationality Act, 8 U.S.C. 1182(b)), meaning that the consular officer concluded the applicant did not generally meet his burden to prove he was complying with the

terms of a nonimmigrant classification and, therefore, could not document his intent to return home. Excluding refusals under 221(g) (INA §221(g), 8 U.S.C. 1201(g)) – since 89 percent of these "soft" refusals are overcome (221(g) denials are for lack of initial proper documents) – the Department of State's data shows that about 93 percent of nonimmigrant visa denials are grounded in 214(b). In effect, 214(b) operates as a catch-all category that allows a consular officer to deny a nonimmigrant visa without ever having to identify the deficiency in the applicant's case.

We believe that the Department can and should study ways in which it could provide better transparency for the administrative review of consular visa decisions and strike a better balance between security, efficiency, and fairness.

Question #3b

With regard to policies relating to employment-based immigrant visa petitions, one critical policy that should be a top priority is U.S. Citizenship and Immigration Services (USCIS) recognition of dual intent for F-1 visa students. The higher education system in the United States is a magnet that attracts top students from around the world; a substantial portion of those students study in the science, technology, engineering, and math (STEM) fields where there are documented labor shortages and low-employment rates in the United States.

Yet when those students complete their degrees, our out-of-step immigration system often forces them to return to their home country. A foreign graduate of a U.S. university may pursue Optional Practical Training (OPT) after graduation, but that program's duration is limited to 12 months (29 months in the case of a STEM graduate). It may not be extended even if the foreign student continues to pursue a full course of study. And, at no time may the foreign student's U.S. employer sponsor him for a green card. Those administrative restrictions prevent many foreign graduates from transitioning into the U.S. workforce and obtaining green cards that will allow them to stay permanently in the U.S. and further contribute to the American economy.

During his 2012 State of the Union address, President Obama rightly said it "doesn't make sense" that "we send [these graduates] home to invent new products and create new jobs somewhere else."

We therefore reiterate our view that the Department of Homeland Security should, without delay, clarify that those F-1 visa students may pursue permanent resident status. The government has taken the position that, if a student is sponsored for a green card, he or she

violates the terms of the F-1 visa. This interpretation is contrary to how the government interprets nonimmigrant intent for other visa classifications (e.g. O-1 visa). The government should issue policy guidance that clarifies that the pursuit of a green card by an F-1 student, including one engaged in OPT, does not in and of itself violate the terms of F-1 visa status. This change does not require rulemaking and could be made immediately.

Question #3c and 3e

With respect to priorities that relate to USCIS processing of nonimmigrant petitions (question #3c) and H-1B visa petitions for specialty occupation workers (question #3e), we would identify as a priority that USCIS adopt a policy of binding deference. A significant hurdle has evolved in H-1B and L-1 visa petition adjudications where USCIS adjudicators issue extensive numbers of burdensome Requests for Evidence (RFE) when the employer has filed a petition on behalf of a nonimmigrant worker who already holds the status in question for that same employer, performing the same duties. The U.S. Chamber of Commerce has gathered data from its members regarding the frequency with which RFEs are issued on extension requests for petitions by the same employer, on behalf of the same employee, for performance of the same job, and data on how company resources are used to respond to RFEs, as well as the final result of such extension requests subject to RFE. The Chamber's analysis found that over 99 percent of H-1B and L-1 visa petition extension requests having received RFEs are approved but that the cost paid by employers in internal resource time and outside counsel fees to comply with the unnecessary RFEs is between $20.1 million $121.1 million annually.

To ensure these costs are avoided while also ensuring consistency and timeliness in decision-making, USCIS should issue guidance – and simultaneously publish a rule proposing that this guidance be codified as binding on all USCIS adjudicators – that establishes a regulatory obligation to approve H-1B, L-1A, and L-1B visa petition extensions of stay involving the same employer and same employee except in those instances where (A) there was a material error with regard to the previous petition approval; (B) a substantial change in circumstances has taken place; or (C) new material information has been discovered that adversely impacts the eligibility of the employer or the nonimmigrant. The employer could be asked to attest under penalty of perjury that there has not been any substantial change. The agency's ability to identify a material error regarding a previous case or to discover new material information could be driven by USCIS's ongoing site visits in the Administrative Site Visit and Verification Program (ASVVP) or other existing investigatory tools.

Question #5

With regard to the Adjustment of Status process at USCIS, the agency needs to allow immigrants, whose employers have received final approval of a Labor Certification and Immigrant Visa Petition, to file Adjustments of Status as long as all allocated visa numbers in the same preference category have not already been issued for the current fiscal year. While an immediately available green card number is required under §245 of the Immigration and Nationality Act (INA), the Department of State and USCIS has flexibility to define when a visa number is available to better ensure that the government allocates all available visas within the fiscal year. This change would be a tremendous improvement for eligible individuals who could concurrently file for employment authorization and travel documents.

We understand that this policy would affect about 410,000 people currently waiting in the green card backlog. Those individuals would not get permanent residence any faster, but would be able to get the other benefits of having filed an adjustment of status application – namely, they would have more freedom to change jobs and accept promotions without the fear that they might have to start the green card process over.

In addition to primary visa holders, dependents of those immigrants who file for an adjustment of status would be able to receive interim work authorization and travel documents. While we understand that the administration is finalizing a work authorization process for certain spouses holding H-4 status, this could allow broader opportunities for work authorization – for spouses in other categories, as well as children who are of a legal age to work. This provides tremendous relief to individuals who might be hesitant to pursue green cards or even remain in the U.S. workforce should their dependents be unable to work.

Question #12

As associations representing employers with decades of experience using private independent wage surveys to make compensation determinations for thousands of positions across companies of every industry and geography in this country, we doubt that O*Net can be sufficiently changed in a cost-effective manner to avoid the need for access to private surveys. Thus, a priority in this area is to protect access to private independent wage surveys. To be available to an employer, an independent wage survey should have to meet certain standards but the Department of Labor (DOL) should be required to approve use of any survey that meets such criteria. Independent surveys, unlike the Occupational Employment Statistics data used under the DOL formula at O*Net, collect and analyze actual salary figures (as opposed to compensation bands), as well as information on the actual skill and responsibility levels of

employees being paid at particular wage levels. They are more accurate and are incentivized by existing market pressures to remain so.

One common proposal is to eliminate the so-called "level one" wage in O*Net. We strongly oppose this change. The U.S. Chamber of Commerce has gathered data from its members regarding the frequency with which the use of O*Net data would necessitate employers paying wages that exceed what today is paid to Americans doing those same jobs if the leveling in O*Net is changed to eliminate level one. The results show that for less-experienced workers, eliminating level one in O*Net would require employers to pay foreign born workers on visas more than Americans doing those same jobs approximately 55 percent of the time. Even for fully-qualified professionals being paid at the top level, the U.S. Chamber data suggests that eliminating level one in O*Net would exceed what today is paid to similarly situated Americans approximately 43 percent of the time.

This degree of imprecision shows starkly that wage levels created by Congress for O*Net are not the best mechanism for wage comparison, even though it is based on OES data which is itself accurate for the purposes for which it is collected. The OES survey does not collect data identifying compensation levels based on education, experience, and supervision, despite the mandate in §212(p) of the INA to provide such data. As the Bureau of Labor Statistics (BLS) has itself explained, "no BLS program publishes occupational wage data by level." *The Relevance of Occupational Wage Leveling (BLS)*[1]

Ensuring all immigrant visa numbers are used – Question #15

We believe that the State Department has authority to use in the current fiscal year preference immigrant visa numbers that were not issued to preference immigrants in prior fiscal years.

Through various provisions of the INA, Congress has crafted provisions to ensure immigrant visa numbers (green card numbers) that are allocated by Congress get used, and get used fairly. Congress provided for immigrant visa numbers for green card status to spill up and down among the preferences (§202(e) of the INA) and fall across between the employment-based and family-based preference categories (§201(c)(3)(C)) and §202(d)(2)(C) of the INA), to be cross-charged to the country of birth of an immigrant's immediate family instead of the immigrant himself (§202(b) of the INA), and to allocate some numbers without regard to per-

[1] http://www.bls.gov/opub/mlr/cwc/the-relevance-of-occupational-wage-leveling.pdf.

country caps (§202(a)(5) and §202(a)(4)(A) of the INA). Despite this system, over 200,000 allocated immigrant visas for preference immigrants have been allowed to go unused by USCIS and the Department of State since 1992.

For the business community, the increasing importance of ensuring employment-based immigrant visa numbers are utilized is tied to the extent to which the green card backlog has grown exponentially in the last decade. For example, with regard to Employment-Based Second Preference immigrants: in June 2004 advanced degree professionals born in India and China found that visa numbers were "current" and available once prerequisite Labor Certification and Immigrant Visa Petition processing was completed, but today India natives have a ten year backlog while China natives have a five year backlog.

Modernizing IT Infrastructure – Questions #17 and 18

We believe the Department of Homeland Security (DHS) and the Department of State (State) must continue and accelerate the acquisition and deployment of electronic systems and applications to modernize the immigration processing IT infrastructure and provide both immigrant and non-immigrant customers and government employees with capabilities that will allow a better customer experience, enable more efficient processing, and provide greater transparency in the process.

First, DHS needs to migrate from a paper-based system to an electronic system that enables automation of application submission and forms processing to reduce and prevent delays and backlogs. Such a migration would also reduce applicant mistakes in their application submissions, providing faster and less costly processing of applications.

Second, DHS and the Department of State need to invest in systems and infrastructure to aid in the authentication and verification of the identity of individuals and to improve fraud detection. DHS should also include use of multifactor authentication or biometrics to protect applicant data, verify identity, and reduce fraud.

Third, we support the integration of electronic documents evidencing employment authorization into E-Verify, such as the I-9. E-Verify must also be enhanced to add effective automated authentication of identity to prevent identity fraud. Investing in these tools will provide the most significant improvements to the user experience and drive cost-efficiencies for the government. By creating mobile access, web-based tools, and approved third-party providers to enhance and automate, these processes would modernize the immigration

processing IT infrastructure, increase transparency and situational awareness, improve enforcement, facilitate commerce, and allow employers to hire with additional certainty.

Additional topics

Although the subjects set forth in these comments are of particular importance to employers, it is also necessary to highlight other administrative actions that are critical to the success of employment-based immigration. Finalizing the proposed rule to provide work authorization for certain H-4 visa holders would allow for increased stability for many families whose spouses do not have the right to work for, in some cases, up to ten years, even though the employer has completed all steps to sponsor the principal H-1B worker for permanent resident status. Employers also would like the long-promised guidance on L-1B visas to provide more consistent adjudications. These two issues are long-term concerns of which the administration has been attempting to address for more than three years. Just as this RFI addresses these as outside the scope of the current request, employers also consider these to be issues of significant importance that are already being considered outside of the scope of the Executive Actions, forming a parallel track to the other possible administrative changes outlined in this document, and completed in a similar time frame.

In addition, employers are encouraged by efforts to streamline the permanent labor certification program (PERM) process at the Department of Labor to better reflect real-world recruitment realities and work at USCIS to modify the work authorization period provided under OPT to better align with the real-world opportunities employers want to provide to graduates of U.S. universities.

Although not specifically mentioned in the RFI, it is necessary for the Administration to provide guidance to the employer community regarding employment of persons who may request work authorizations as a result of the Deferred Action for Parent Accountability (DAPA) Program and the expansion of the Deferred Action for Childhood Arrivals (DACA) Program, including consideration of a "good faith" presumption for updating employment information for DACA/DAPA participants. An update of verification documents or an application for new documents under the President's initiatives should not alone be a trigger for investigation or create concern for federal contractors.

Conclusion

While congressional action is necessary to update the Nation's broken immigration laws, limited actions may be taken to improve the immigration system through the normal regulatory

process of interpreting and finalizing regulations. The undersigned associations, representing a broad swath of the nation's employers, ask that the Administration consider:

- Providing a clear understanding of the basis for visa denials,
- Deference to previously adjudicated cases in future decisions,
- Allowing students being educated in the United States to apply for permanent resident status,
- Use of previously allocated green cards by Congress to be utilized to their potential,
- Ensuring that there is access to private wage surveys in prevailing wage determinations and no elimination of level-one wages in O*Net, and
- Accelerated investment in improvement of the IT infrastructure.

In addition, we seek significant changes to the immigration system that need to be accomplished outside the scope and priority of the RFI, but in a parallel timeframe, such as work authorization for certain H-4 spouses and the long-promised L-1 guidance. We also look to a streamlining of the PERM process, the update of OPT, and a clear, fair method of addressing employers' concerns as DACA/DAPA participants present new work authorization papers. Again, thank you for the opportunity to respond to this Request for Information. We look forward to working with you in the future.

Sincerely,

American Immigration Lawyers Association
Business Roundtable
Compete America Coalition
Council for Global Immigration
FWD.us
HR Policy Association
Information Technology Industry Council
National Association of Home Builders
National Association of Manufacturers
National Venture Capital Association
Partnership for a New American Economy
Society for Human Resource Management
Semiconductor Industry Association
Silicon Valley Leadership Group
TechNet
U.S. Chamber of Commerce