IRLI IMMIGRATION REFORM LAW INSTITUTE

25 Massachusetts Avenue, NW
Suite 335
Washington, DC 20001
202.232.5590 | 202.464.3590(fax)
www.irli.org

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Megan Herndon
Senior Regulatory Coordinator
Office of Visa Services
Bureau of Consular Affairs
U.S. Department of State
600 19th St. NW
Washington, DC 20006

VIA Federal eRulemaking Portal

Docket Number DOS-2020-0041; RIN 1400-AE95

Public Comment of the Immigration Reform Law Institute Re: Visas: Temporary Visitors for Business or Pleasure

Dear Coordinator Herndon,

The Immigration Reform Law Institute ("IRLI") submits the following public comment to the U.S. Department of State ("DOS") in response to the Department's Notice of Proposed Rulemaking ("NPRM") as published in the Federal Register on October 21, 2020. *See Visas: Temporary Visitors for Business or Pleasure*, (85 Fed. Reg. 66,878-888).

IRLI is a nonprofit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

IRLI fully supports the Department's proposed elimination of the current B-1 in lieu of H policy because it would help protect American workers. The B visa category is intended only for foreign visitors coming to the country temporarily for business or pleasure; the law explicitly prohibits coming to the United States as a B visitor "for the purpose of … performing skilled or unskilled labor." In this

comment, IRLI will address two points: (1) the B-1 in lieu of H policy is inconsistent with the current statutory framework; and (2) the policy should be eliminated because it permits employers to evade worker protections established by Congress.

I. The B-1 In Lieu Of H Visa Policy Is Inconsistent With The Current Statutory Framework

As the Department acknowledges, its past failure to update or align the regulation with the current statutory framework has created confusion about the limits of permissible activity on the B visa because, although the Immigration and Nationality Act ("INA") prohibits B visa holders from engaging in employment or labor for hire in the United States, the current regulation defining "business" suggests that an alien admitted on a B-1 visa may engage in temporary labor in the United States so long as the alien is employed from abroad and such employment is not pursuant to a contract or other prearrangement. By updating the language in the regulation to better conform to the applicable statutory framework and by terminating the B-1 in lieu of H policy, the revised rule will better reflect the current law and help protect American workers.

In order to understand the current statutory framework, it is necessary to review the historical development of the two nonimmigrant classes established by 8 U.S.C. § 1101(a)(15)(B) and (H), the B and H visa classifications. One of the reasons that Congress has historically restricted immigration is to protect American labor.[1] In the early 1920s, Congress excepted certain aliens from limitations on immigration by excluding them from the definition of "immigrant." One such exception to immigration restrictions consists of temporary visitors for business or pleasure.[2] In the absence a statutory definition of "business," and in light of the legislative purpose of protecting American labor from foreign competition, administrative and judicial interpretations of the temporary business visitor (B visa) classification focused on whether such temporary visitors would compete with American workers for employment, and restricted the temporary business visitor classification to those who engage in commercial activities incidental to business and commerce, but excluded those who engage in labor for hire in the United States.[3]

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[1] *See Karnuth v. United States*, 279 U.S. 231, 243 (1929) ("The history of [various immigration-related acts of Congress] points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor.")

[2] *See*, *e.g.*, § 3(2) of the Immigration Act of 1924, 68 Pub. L. 129, 43 Stat. 153, 154 (1924).

[3] *See*, *e.g.*, *Karnuth*, 279 U.S. 242-44 (holding that temporary visitors for business under the Immigration Act of 1924 were permitted to enter the United States to engage in activities of a commercial nature but were prohibited from engaging in labor for hire in competition with American workers); *Matter of Hira*, 11 I&N Dec. 824 (BIA 1965, 1966, A.G. 1966) (holding that a temporary visitor for business may take orders and measure customers for clothes to be made abroad, where the foreign tailor was both employed and paid by a foreign tailoring firm); *Matter of M—*, 2 I&N Dec. 240 (BIA 1945) (holding that a temporary visitor for business may not work in the United States under contract as a professional dancer).

In 1952, Congress first introduced the temporary foreign worker visa category by enacting section 101(a)(15)(H) of the INA, 8 U.S.C. § 1101(a)(15)(H). This H visa classification was subdivided between aliens of "distinguished merit and ability" (H-1), other aliens who would perform work for which workers were not available in the United States labor market (H-2), and industrial trainees (H-3). All three types of H visa classifications required a petition approved by the Immigration and Naturalization Service ("INS") to establish eligibility for the classification, but the H-2 visa classification also required a labor test or certification demonstrating that there were insufficient American workers available to fill the position.

It was under this statutory framework that the B-1 in lieu of H policy was first adopted in the 1960s. This policy applied only to aliens who otherwise fell within the H-1 or H-3 visa classifications and who were employed and compensated by a foreign firm and who did not receive any remuneration from a U.S. source (other than for incidental expenses). The policy was implemented in order to reduce paperwork and facilitate international travel by eliminating the requirement for filing H-1 and H-3 visa petitions with the INS. The B-1 in lieu of H policy never applied to aliens who fell within the H-2 visa category due, at least in part, to the additional labor test requirement for that visa category.

In order to bring its regulations up-to-date, the Department proposes to delete two sentences from the regulation defining business as it relates to nonimmigrant visas for temporary visitors for business and to eliminate the B-1 in lieu of H visa policy. The two sentences, which form the basis for the B-1 in lieu of H policy, and which have remained the same since the early 1950s, are:

> An alien seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or other prearrangement is required to qualify under the provisions of § 41.53 [relating to H visa classification requirements]. An alien of distinguished merit and ability seeking to enter the United States temporarily with the idea of performing temporary services of an exceptional nature requiring such merit and ability, but having no contract or other prearranged employment, may be classified as a nonimmigrant temporary visitor for business.[4]

Although the definition of business explicitly excludes "local employment or labor for hire," the two sentences quoted above are misleading because they suggest that an alien of "distinguished merit and ability" who seeks to enter the United States temporarily as a nonimmigrant for employment or labor may be classified as temporary visitor for business so long as the alien has no contract or other prearranged employment lined up in the United States with a local employer.[5] The Department's Foreign Affairs Manual restricts B-1 in lieu of H policy to aliens

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[4] 22 C.F.R. § 41.31(b)(1).

[5] The first sentence is misleading because it fails to account for types of visa categories other than the H category that permit the performance of labor in the United States,

who are paid by a foreign source.[6] These two sentences and the current B-1 in lieu of H visa policy do not take into account legislation enacted since 1952.

Because of changes in the law since 1952, the B-1 in lieu of H policy is obsolete and contrary to law, and undermines protections for the American workforce. As relevant here, one of the most consequential changes in law since 1952 is the enactment of section 250 of the Immigration Act of 1990 ("IMMACT 90"), which amended the H-1B nonimmigrant classification by: (1) imposing numerical limitations on the number of H-1B visas available; (2) modifying the standard applicable to aliens from those with "distinguished merit and ability" to those who would perform services in a "specialty occupation"; and (3) instituting a labor condition requirement.[7] Thus, since the enactment of the IMMACT 90, the H-1B nonimmigrant classification has been subject to both numerical limitations on the number of visas available and to a labor condition requirement, neither of which were in place when the B-1 in lieu of H policy was adopted. Further, the H-1B classification is no longer available to aliens of "distinguished merit and ability," but instead applies only to aliens who are entering the United States temporarily to perform services in a "specialty occupation."[8] The IMMACT 90 also limited the H-3 program to exclude training programs "intended primarily to provide productive employment."[9]

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such as the L, O, P, Q, and R visa categories. It is also misleading inasmuch as skilled or unskilled labor is prohibited under the B visa classification regardless of whether it would be pursuant to a contract or other prearrangement.

[6] *See* 9 FAM 402.2-5(F)(a) ("it is essential that the remuneration or source of income for services performed in the United States continue to be provided by the business entity located abroad").

[7] *See* 8 U.S.C. §§ 1182(n), 1184(g)(1)(A); *see also* 8 U.S.C. § 1184(i) (defining "specialty occupation"). Under current law, an employer must file a labor condition application with the Department of Labor and demonstrate that the employer will pay the prevailing wage, that working conditions for other employees will not be adversely affected, that there is no strike, lockout, or work stoppage at the place of employment, and notify both current and prospective workers of the application. *See generally* 8 U.S.C. § 1182(n). The H-1B visa classification resulted from a split of the H-1 category into the H-1A and H-1B categories; the H-1A category is now defunct.

[8] Subsequent legislation has imposed further procedural protections for American workers, including the imposition of filing fees for certain H-1B petitioners. In addition, several other nonimmigrant visa categories have been created since 1952 that permit employment in the United States, including: the L visa category (intra-company transferees); the O visa category (aliens with extraordinary ability); the P visa category (athletes and entertainers); the Q visa category (international cultural exchange participants); and the R visa category (religious occupations).

[9] 8 U.S.C. § 1101(a)(15)(H)(iii). Additional regulatory requirements have been instituted relating to the H-3 trainee visa classification since the advent of the B-1 in lieu of H

In sum, the statutory framework governing temporary foreign workers has evolved by instituting new procedural protections for American workers since the B-1 in lieu of H visa policy was adopted in the 1960s. Nevertheless, this policy has remained in place without incorporating any of these protections.[10] Although the Department states that it has "endeavored to interpret its B-1 in lieu of H policy in a manner consistent with the statutory framework" and has limited the policy to only those cases that most clearly meet the definition of "business" as set forth in judicial and administrative decisions, the regulation defining business and 9 FAM 402.2-5(F) are outdated and irreconcilable with the current statutory framework.[11] Accordingly, IRLI fully supports the proposed amendment to the regulation and the elimination of the B-1 in lieu of H policy.

II. Elimination Of The B-1 In Lieu Of H Visa Policy Would Help Protect American Workers

As noted above, Congress has established several procedural protections for American workers in the H-1B visa program, including: limiting the number of temporary foreign worker (H-1B) visas, requiring employers who hire H-1B workers to pay the prevailing wage; and requiring certain employers to pay significant fees to fund assistance to the U.S. workforce and prevention and detection of fraud. Because the application process for a B-1 visa does not include similar requirements, the B-1 in lieu of H policy allows aliens and their employers to circumvent the restrictions and requirements relating to the H nonimmigrant classification established by Congress to protect U.S. workers. For instance, under the B-1 in lieu of H policy, a company could import workers via the B-1 business visitor visa and evade the H-1B visa cap and prevailing wage requirements that would otherwise apply to such workers so long as the workers could show that their paychecks were still coming from a foreign company. By evading the prevailing wage requirement, the foreign company would not be required to pay its temporary foreign workers anything above the minimum wage, while U.S. employers would be at a disadvantage and unable to recruit American workers without offering at least the prevailing wage for that occupation.

Furthermore, the policy's requirement that the B-1 worker be paid from a foreign source has become subject to easy exploitation in today's global marketplace. Many of the large companies

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policy. *See* 8 C.F.R. § 214.2(h)(7) (setting forth protections for American workers, including a requirement that a "beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed").

[10] The Department and INS both proposed eliminating the B-1 in lieu of H visa policy in 1993. *See* 58 Fed. Reg. 40,024-30, (July 26, 1993) (Department NPRM); 58 Fed. Reg. 58,982-88 (Nov. 5, 1993) (INS NPRM). Neither agency finalized their proposed rule to eliminate the policy.

[11] 85 Fed. Reg. at 66,882.

that employ foreign workers in the United States have offices abroad and can easily "pay salaries" from such places.

In addition to the legal ways in which the B-1 in lieu of H policy undercuts the restrictions that protect American workers, the policy is also subject to exploitation, abuse, and fraud. For instance, in 2013, Infosys Limited, an India-based information technology firm that is one of the top users of H-1B visas, entered into a $34 million settlement with the Department of Justice after allegations of systematic visa fraud.[12] Infosys allegedly attempted to bypass the prevailing wage requirement of the H-1B program by sending workers to the U.S. on B-1 visas to perform skilled labor. Infosys also allegedly coached employees applying for B-1 visas on how to deceive U.S. consular officials in their visa interviews. More recently, on August 28, 2019, an Indian management consulting firm, Mu Sigma, agreed to a $2.5 million settlement for visa fraud.[13] Mu Sigma illegally circumvented H-1B visa regulations by employing B-1 visa holders under contract within the U.S. In addition, Mu Sigma's invitation letters for the B-1 visa holders misrepresented the nature of the visitors' intended business, and company officials coached B-1 visa applicants on how to avoid detection by immigration authorities. Mu Sigma B-1 visa holders were also paid in India at India-based wages, which are substantially lower than their U.S. counterparts. This unlawful employment tactic greatly increased Mu Sigma's profit margins and the company's ability to provide low bids for end-user contracts. Mu Sigma even forced its employees to sign bond contracts that unlawfully sought reimbursement of up to $10,000 of the H-1B visa costs if an employee ceased employment before an agreed-upon date.

In conclusion, foreign workers seeking to engage in local employment or labor for hire must follow the procedural requirements enacted by Congress to protect U.S. workers. The current B-1 in lieu of H policy is inconsistent with the current statutory framework, and the policy's meager requirement that a skilled foreign worker derive his pay from a foreign source is wholly inadequate to protect American workers as well as the foreign workers who are mistreated and underpaid. For these reasons, IRLI fully supports the Department's proposal to delete the misleading and outdated language from the regulation, eliminate the B-1 in lieu of H policy, and return to the long-standing interpretation of "business" as it relates to temporary visitors for business and its focus on protecting American workers from competition from such temporary visitors.

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[12] *Indian Corporation Pays Record Amount To Settle Allegations Of Systemic Visa Fraud And Abuse Of Immigration Processes*, (available at: https://www.justice.gov/usao-edtx/pr/indian-corporation-pays-record-amount-settle-allegations-systemic-visa-fraud-and-abuse) (last visited 12/11/2020).

[13] *Indian Management Consulting Firm Agrees To $2.5 Million Global Settlement In North Texas For Visa Fraud, Inducing Aliens To Enter US* (available at: https://www.ice.gov/news/releases/indian-management-consulting-firm-agrees-25-million-global-settlement-north-texas-visa) (last visited 12/11/2020)

Respectfully submitted,

Immigration Reform Law Institute
by Matt A. Crapo