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Microsoft

November 15, 2007

The Honorable Michael Chertoff
Secretary
United States Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Chertoff:

I appreciated very much the chance to speak with you recently at the dinner that Ed and Debra Cohen hosted to discuss immigration reform issues. I am writing to follow up in more detail on the suggestion we briefly discussed for action that the Department of Homeland Security can take easily and immediately, as part of its administrative reforms initiative, to help address the H-1B visa shortage. That is, DHS can extend the period of Optional Practical Training ("OPT") – the period of employment that students are permitted in connection with their degree program – beyond its current maximum of one year. Additional suggestions relating to visa programs for the highly skilled follow as well.

Fulfilling a Key Part of DHS's August 10, 2007 Administrative Reform Initiative

Microsoft believes that it was wise of the Administration, after Congress failed to move forward on comprehensive immigration reform, to commit to exploring changes it could make to strengthen the immigration system without congressional action. As part of the twenty-six point plan that you announced on August 10, 2007, DHS committed, along with the Department of Labor, to explore "potential administrative reforms to visa programs for the highly skilled." DHS has properly recognized that reforms of visa categories for professionals should be given a high priority, because America's talent crisis has reached emergency levels.

The H-1B Shortage and American Competitiveness

Our high-skilled immigration policies are blocking access to crucial foreign talent. With demand in fields like science, technology, math, and engineering far surpassing the supply of American workers, America's employers find themselves unable to get the people they need on the job. The H-1B program, with its severely insufficient base annual cap of 65,000 visas, is at the center of the problem. This year, on April 2 – the very first day that employers could seek an H-1B visa for the coming fiscal year – DHS received about twice as many requests as there were visas available, *for the entire year*. This means that (1) employers stood only a one-in-two chance of getting a visa at all for critical recruits; (2) employers could not even ask for an H-1B visa for students about to graduate the next month *from our own universities*; (3) employers are now in the midst of a staggering *eighteen-month blackout period* before they can put a worker on the job with a visa from the following year's supply; and (4) the chances of even getting one of those visas in the first place will be even worse than this year's throw of the dice.

These restrictive policies are a stark contrast to the policies of many other countries, which are now streamlining their immigration programs to attract highly skilled professionals. Notably, the European Union recently proposed a "Blue Card" program, under which skilled workers would be able to obtain a temporary work visa, similar to an H-1B visa, in just one to three months.

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Microsoft has long made it a top-level company priority to center its development work in the United States, and we have devoted a great deal of energy into trying to help shape the policy changes that would permit us to continue to do so. To compete globally, however, Microsoft – like other employers of the highly skilled across America – must have access to the talent it needs.

How Extending OPT Will Help

True reform of the H-1B program, of course, will require congressional action. Yet the Administration, consistent with its August 10 commitment, can take a simple, immediate step to help address this crisis: extend from twelve to twenty-nine months the period that students can work in their field of study for OPT. Today OPT exists solely by regulation; no statutory change is necessary to make this needed adjustment. The current regulations provide for OPT to last up to twelve months [see 8 C.F.R. 214.2(f)(10)-(11)]. This period of employment is typically a crucial bridge to a more stable position in the American workforce through an H-1B visa. With this year's historic H-1B cap crisis, however, OPT will expire long before it can bridge the gap to an H-1B. Without corrective action, the same can be expected next year. As a result, U.S. employers will lose recruits to competitors overseas. Soon, by necessity, U.S. jobs will follow. Extending OPT to twenty-nine months would permit U.S. employers to hire those students and keep them in service until longer-term visas become available.

OPT can be extended quickly. It would require no more than the issuance of a regulation to replace the word "twelve" with "twenty-nine" in 8 C.F.R. 214.2(f)(11). This simple extension of a critical existing program would provide tremendous relief in this emergency situation. Immediate action is necessary to initiate and announce this change so that U.S. companies and their recruits can make decisions knowing that relief is coming.

Timing of OPT Extension

A commitment to extend OPT should be announced immediately, and a regulation effectuating the extension should be in place no later than next spring. The regulation must be in place by next spring because OPT must be requested before the completion of the student's academic program. We suggest that an interim regulation and comment period would be fully permissible under the Administrative Procedures Act and would facilitate the regulation being in place on time. The announcement must be made now so both employers and students can plan for the recruitment cycle. An announcement now will give employers the assurance that, if they recruit on campus but lose the H-1B lottery, they will not have to lose their recruits and can again seek an H-1B for them when the next year's supply becomes available. It will also give highly prized students considering their employment options the knowledge that they will have reliable work authorization for a period sufficient to move into a longer-term immigration status.

Other Administrative Reforms

There are other significant steps the Administration can take to alleviate the talent crisis facing the U.S. These steps would help to address the retention and other problems that result from the extreme waits that face most professionals seeking employment-based green cards.

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Multi-year work and travel authorization documents

DHS could issue multi-year employment authorization documents ("EADs") and advance parole documents. These documents are typically issued for only one year and, during the several-year green card wait, must be renewed multiple times. Given its massive adjudications caseload, DHS often is unable to process renewal applications promptly, and often cannot meet the 90-day deadline that its regulations provide for EAD adjudications. This literally means professionals must come off the job, as employers cannot lawfully continue to employ any employees who do not have evidence of employment authorization, even where timely filed renewal applications have not been adjudicated within the regulatory deadline.

This problem would be alleviated greatly if DHS were to issue EADs and advance paroles that were valid for two or three years rather than one. DHS has full authority to issue multi-year documents. It already issues multi-year EADs to certain nonimmigrants, including the spouses of E and L visa holders. There is no statutory or regulatory limit on the validity periods for EADs and advance paroles, and the Secretary of Homeland Security has wide discretion under section 103 of the Immigration and Nationality Act to "establish such regulations; ... issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act."

Moreover, it is in the strong interest of DHS itself to issue multi-year EADs and advance paroles. By doing so, USCIS would greatly reduce the adjudicative burden it now faces, unnecessarily, as a result of annual renewals. This is especially significant now, when USCIS is struggling with a major front-log and is having difficulty even receipting incoming petitions. In this situation, any elimination of unnecessary adjudication workload should be highly desirable to DHS. In addition to this efficiency incentive, DHS has a financial incentive as well. Under the new USCIS fee regulations that took effect on July 30, 2007, applicants who have paid the fee for Form I-485 to adjust to lawful permanent resident status do not have to pay an additional fee to renew an EAD or advance parole. This means that DHS will collect no additional revenue for all the additional work it performs to renew EADs and advance paroles repeatedly for these applicants.

Pre-certification

DHS also could establish a "pre-certification" process to allow employers who petition USCIS frequently for visas to submit petitions via an expedited system. Under such a system, USCIS would review an employer's organizational documents to establish certain generic information, such as the employer's ability to pay employees, and would pre-certify the employer. When a pre-certified employer submitted a visa application, it would not mean an automatic approval; USCIS would analyze the particular foreign national's eligibility for the visa. It would simply relieve USCIS of the burden of re-adjudicating, over and over, the criteria that have already been determined through pre-certification. Such a system would reduce the burden on USCIS and allow employers to obtain the visas they need in a more efficient and expeditious manner.

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Conclusion

We are very grateful to you for your commitment to administrative reforms of the visa programs for the highly skilled. If there is anything that Microsoft can do to be of assistance to your efforts, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Jack Krumboltz". The signature is written in a cursive style with a large initial "J" and a stylized "K".

Jack Krumboltz
Managing Director of Federal Government Affairs
Associate General Counsel

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