Chamber of Commerce
of the
United States of America

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By Electronic Mail

James McCament
Acting Director
U.S. Citizenship and Immigration Services

Joseph Maher
Acting General Counsel
U.S. Department of Homeland Security

Re: **New Mandatory Interviews for Employment-Based Legal Immigration**

Dear Acting Director McCament and Acting General Counsel Maher:

We are writing in response to Monday's announcement[1] that the Department of Homeland Security has changed the long-standing agency interview practices that are integral to the adjudication of employment-based Adjustment of Status cases. As you know, these cases generally involve high-skilled immigrants working for American businesses where the immigrant is being sponsored to obtain Lawful Permanent Resident status because of their skills. The Adjustment of Status request is the last step in a long, multi-year process where prior approvals have been issued confirming that U.S. workers will not be negatively impacted, the individual does not pose a security threat to the U.S., and the foreign professional is qualified to be classified as an immigrant.[2] The Chamber views this change as unwise, as it will negatively impact many employers and their individual employees. We also highlight some initial thoughts regarding whether this procedural change is legally permissible without notice and comment rulemaking.

Impact of Changes to Interview Procedures for Employment-Based Legal Immigration Cases

The Chamber is concerned about the intended shift to mandatory in-person interviews for all employment-based Adjustment of Status cases because it seems unavoidable that such a move will result in unnecessary delays and increased backlogs in the legal immigration system. The current system allows broad discretion for the

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[1] USCIS announced the change on August 28, 2017, effective October 1st.
[2] In particular, the Chamber is concerned about the adjudication of adjustment cases for immigrants in the First, Second and Third Preferences of the Employment-Based immigration system, which involve the only permanent residents in our current immigration system that are specifically selected because of their skills and their future employment-related contributions to the United States.

Department to interview individual applicants whenever clearance, expanded vetting, or other security concerns so dictate. Continuing the selective interview process for employment-based immigrants seems to be sensible, especially since delays and further backlogs have a direct, negative impact not only on our member companies that sponsor key high-skilled, highly-educated professionals for Lawful Permanent Resident status, but the individual workers themselves, many of whom are currently forced to wait several years before they can begin the adjustment process.

Roughly 88% of new employment-based Lawful Permanent Residents each year, or a little more than 120,000 immigrants each year, obtain permanent resident status through the Adjustment of Status process in the United States.[3] These employment-based immigrants represent about 20% of new Lawful Permanent Residents each year who obtain status through the Adjustment of Status process.[4] If there was an approximately 20% increase in the number of in-person interviews for Adjustment of Status applicants without corresponding increases in district office staff to accommodate this increased workload, processing delays are likely to arise. We know of no effort, or means, for U.S. Citizenship and Immigration Services or the Department to request, much less obtain, an increase in district office adjudications staff.

Since 88% of employment-based immigrants adjust status in the United States, we fear that a slowdown in completing such cases would also make it likely that DHS would be unable to utilize the full employment-based immigrant visa allocation each fiscal year. If DHS fails to complete the usual 120,000 employment-based adjustments each year, this means that backlogs lengthen in our legal immigration system, not just that individual cases are delayed.[5] The impact of such a result would be profoundly negative, as this

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[3] See DHS Statistical Yearbook, Table 7. DHS has analyzed the Statistical Yearbook data and determined that, on average, about 88% of new Lawful Permanent Residents admitted in Employment-Based classifications obtain status in the United States through DHS adjudication of an Adjustment of Status application. See Regulatory Impact Analysis of "Retention of EB-1, EB-2, and EB-3 Immigrant Workers" proposed rule at p. 15 (Table 3, RIA published with proposed rule 80 FR 81899, 12/31/15, available at regulations.gov). In the Employment-Based First, Second and Third Preferences, the data (Table 7 in the Statistical Yearbook) show that most of those who do not adjust status in the U.S. are spouses and minor children who "follow to join" the principal immigrant (worker). A little more than half of the immigrants who obtain Lawful Permanent Resident status each year through the Employment-Based preferences are dependent family members.

[4] See DHS Statistical Yearbook, Table 7. For example, in FY15 there were 542,315 new Lawful Permanent Residents who obtained status in the United States through DHS adjudication of an Adjustment of Status application, of which 121,978 were Employment-Based immigrants.

[5] According to the Citizenship and Immigration Services Ombudsman, legacy INS and USCIS had a long history of failing to allocate sufficient resources to complete adjudication of employment-based adjustment cases, such that tens of thousands of allocated employment-based permanent resident numbers went unused. In only 2 of 10 fiscal years leading up to FY06 were all allocated employment-based permanent resident numbers utilized. In the 10 fiscal years following either all or all but a few hundred employment-based permanent resident numbers have been used. See CIS Ombudsman Annual Report to Congress, June 2010 at

slowdown in processing would impact not only those with a pending adjustment application, but everybody else who is waiting in the visa backlogs to file their adjustment application. These slowdowns will inhibit the ability of businesses to promote these key individuals or assign them with different tasks in the workplace, which limits the ability of companies to expand their operations and create jobs for Americans.

As the Department's immigration law experts are aware, DHS has suggested that the vast majority of employment-based permanent residents waiting to complete the immigration process each year are H-1B professionals.[6] Furthermore, the State Department reports that wait times for the employment-based preferences can be a decade or longer.[7] This only makes us more puzzled as to why DHS would suggest a new process that will further delay adjudications of employment-based legal immigrants. We understand and share the national security concerns of the Department. However, most of the individuals that will be affected by this policy change are lawful H-1B professionals who, because of the backlogs in our legal immigration system, have been working in the United States for many years and have, therefore, completed multiple security clearances and interviews before the final adjudication of their Adjustment of Status petition.

Based on practices in place since 1992, DHS recognizes that in-person interviews for employment-based Adjustment of Status applicants are generally, but not always, "unnecessary" pursuant to 8 CFR 245.6 and as explained in the Adjudicators Field Manual.[8] That does <u>not</u> mean that no employment-based adjustment interviews are (or

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p. 35 for years through FY09 and DHS Statistical Yearbook and State Department Report of the Visa Office for years thereafter.

[6] See Regulatory Impact Analysis of "Retention of EB-1, EB-2, and EB-3 Immigrant Workers" proposed rule at p. 43 (those in H-1B nonimmigrant status comprise approximately 97 percent of those with approved I-140 petitions waiting to file for Adjustment of Status because of oversubscribed immigrant visa availability)(RIA published with proposed rule 80 FR 81899, 12/31/15, available at regulations.gov).

[7] See Visa Bulletin of the State Department. For September 2017, for example, immigrants born in India seeking permanent resident status are waiting about 9 years after starting the Employment-Based Second Preference permanent residency process and about 11 years for Employment-Based Third Preference.

[8] The current Policy Manual (replacing the Adjudicators Field Manual with regard to Adjustment of Status) provides that all employment-based adjustment requests should have the adjustment interview waived where the immigrant is currently "working for the same petitioner who submitted the approved underlying employment-based immigrant visa petition or is eligible for adjustment portability" – a provision that covers almost all employment-based adjustment applicants. See Policy Manual, Volume 7-Adjustment of Status, Part A-Adjustment of Status Policies and Procedures, Chapter 5-Interview Guidelines (available on the website of U.S. Citizenship and Immigration Services). The current regulatory text, in place since November 2, 1992, is best described as establishing a selective interview standard for final Adjustment of Status adjudication. The regulatory text mandates that each applicant for Adjustment of Status shall be interviewed by an immigration officer unless the applicant is a child under 14, is clearly ineligible for adjustment, or "when it is determined by the Service that an interview is unnecessary." See 8 CFR 245.6. The agency, through its consistent actions over the last 25 years, including the Adjudicators Field Manual (the AFM has been superseded by the agency's Policy Manual in some places), has treated employment-based adjustment of Status requests as ones where an interview is generally unnecessary.

should be) conducted, or that DHS is not actively engaged in assessing when such interviews should indeed occur. For example, some employment-based adjustment cases are presently subject to an in-person interview based on protocols to prevent fraud and abuse and wherever an adjustment applicant has had contact with law enforcement. And, all such cases are subject to a variety of security-related clearances, which of course could be expanded at any time – and should be expanded however needed to best protect national security. But such security clearances do not require a default in-person interview.

Mandating that every employment-based adjustment applicant undergo an in-person interview is exactly the type of approach that the agency found "unproductive" and was the basis of the rule change 25 years ago. In publishing the rule in 1992, legacy Immigration and Naturalization Service (the predecessor to U.S. Citizenship and Immigration Services) explained that it was necessary to eliminate mandatory interviews "to ease the burden of unproductive interviews on the Service and the public."[9] Specifically, INS stated the following:

> "Although the interview procedure can be a useful tool in obtaining information pertinent to the adjudication of adjustment of status applications, the Service has determined that the probability of gathering such information does not warrant the burdens placed on the Service and the public by requiring an interview in every case. The Service has sufficient information available, including record checks from other agencies, to make the determination whether to waive the required interviews on individual applications."[10]

These findings seem just as valid today. Even after September 11, 2001, the Bush Administration did not move to change the selective interview protocol for Adjustment of Status cases, retaining confidence that the best way to ensure productive interviews is to review each application on a case-by-case basis to determine whether an interview is needed, in addition to adopting a litany of new security and clearance protocols.

<u>Unclear if Suggested Procedural Change is Legal</u>

As a matter of law, it may be that the Administrative Procedure Act necessitates the Department to engage in notice and comment rulemaking to change practices such as the interview procedure for employment-based adjustment cases where the agency has previously established that generally such interviews are unnecessary – since these

[9] 57 FR 49374 at 49375 (11/2/1992). Interim Final Rule effective November 2, 1992. In publishing the final rule without change, INS further discussed the elimination of mandatory adjustment interviewing, reflecting on its four years of experience with that approach. (61 FR 59825, 11/25/96). INS explained that converting to selective interviewing does not assure any particular applicants that they will not be interviewed and does not limit the government's ability to interview a particular applicant for permanent resident status.
[10] 57 FR 49374 at 49375 (11/2/1992).

practices have been in place for a quarter century.[11] The authority that federal agencies have to change long-standing interpretations of regulations without notice and comment rulemaking is murky – the idea being that once an agency has given a regulation a definitive interpretation, amending that interpretation is tantamount to an amendment of the rule itself, and so must comply with the requirements of Section 553 of the APA.

Conclusion

The U.S. Chamber of Commerce represents the interests of businesses of every size, sector, and region in the country, and we are writing on behalf of the business community because we believe that existing procedures provide the Department with sufficient discretion and authority to protect against fraud and abuse, address national security concerns, and ensure the integrity of our immigration system, including the ability to expand vetting checks.

The Chamber appreciates the opportunity to share our observations with the Department. If appropriate, I'd be happy to meet with you to discuss the importance of the employment-based Adjustment of Status system for the nation's legal immigration system, and alternatives to the idea of mandatory interviews for such cases.

Sincerely,

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Senior Vice President
Labor, Immigration and
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Cc: David Palmer
Chief of Staff, Office of the General Counsel
U.S. Department of Homeland Security

John Barsa
Acting Assistant Secretary, Office of Partnership and Engagement
U.S. Department of Homeland Security

[11] When a federal agency doesn't provide for any public input and leaves stakeholders negatively impacted, the agency might be restricted in changing a long-standing practice without notice and comment rulemaking. See, e.g., the line of cases starting with Alaska Professional Hunters Ass'n v. Federal Aviation Administration, 177 F.3d 1030 (D.C. Cir. 1999).