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United States Senate

WASHINGTON, DC 20510-2203

January 1, 2001

The Honorable Alexis Herman
Secretary of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

The Honorable Jacob Lew
Director of the Office of Management and Budget
Old Executive Office Building
17th St. and Pennsylvania Ave., N.W.
Washington, DC 20503

Re: Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. no. 245, December 20, 2000

Dear Secretary Herman and Director Lew:

We are writing to express disappointment at the December 20, 2000 Interim Final regulations promulgated on the American Competitiveness and Workforce Improvement Act (ACWIA), regarding H-1B visas.

In two previous letters on February 19, 1999 and April 23, 1999 (the second letter included a bipartisan group of 23 members of Congress) we detailed many areas in which the proposed regulations of January 5, 1999 (64 Fed. Reg. 628) contravened Congressional intent and amounted to a usurpation of powers by the Department of Labor (DOL) over key components of America's most vibrant industries. We do not seek to reiterate here the prior litany. However, we must note that while the DOL has relented in some areas in this version of the regulations, on many other issues the DOL has ignored not only the clear language of the legislation but also the contemporaneous statements that Senator Abraham made as chief bill sponsor and negotiator with the Administration prior to the Senate's floor consideration of the American Competitiveness and Workforce Improvement Act.

Paperwork and Record-Keeping Requirements: Since we did not see significant changes in the Interim Final regulations from the proposed regulations of January 5, 1999, we repeat what we wrote in our April 23, 1999 letter: "In the American Competitiveness and Workforce Improvement Act, Congress did not contemplate or authorize that the Department of Labor would require or impose new record keeping burdens, nor does the statute authorize the creation of an independent violation of the Labor Condition Application (LCA) process for the mere failure . . . [to maintain records]. Under DOL's proposals, even unintentional paperwork oversights could result in significant fines or possibly even debarment from the use of visas."

Administrative Remedies: In our April 23, 1999 letter, we wrote, "The proposed regulations vastly expand the scope of administrative remedies to go far beyond anything contemplated in the legislation or which the law permits." There was no change in the Interim Final regulations from the proposed regulations, so our earlier statements from the April 23 and February 19 letters remain our position on this subject.

Part-time Employees Can Also Qualify as Exempt Employees for Dependent Employers: The Interim Final regulations, like the proposed regulations, effectively deny the possibility that part-time employees can qualify as exempt employees for H-1B-dependent employers. The statute states that an H-1B worker qualifies as exempt if he or she ". . . receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000 . . ." The Department disallows part-time employees from qualifying as exempt by arguing the statute means "the full $60,000 annual wages or salary must be received by the employee in order for the employee to have 'exempt' status." The DOL's interpretation is simply incorrect and again beyond its statutory authority, since ACWIA purposely uses the language "at an annual rate equal to." In fact, the Interim Final regulation (Sec. 655.737) is illogically inconsistent in that while effectively barring part-time employees from exempt status, it concedes, as it should, that "rate" is the operative word when it allows for an exempt designation for an employee who, for example, resigns after three months: "[T]he determination as to the $60,000 annual wages will be on a *pro rata basis* (i.e., whether the employee had been paid at a rate of $60,000 per year (or $5,000 per month) including any unpaid, guaranteed bonuses or similar compensation)."

Micromanaging the Movement of Employees: As we commented in two previous letters, the DOL's proposed regulations included an astonishingly complex scheme of limiting visits to any area by an H-1B employee to 90 days in a 3-year period, and prohibiting visits by any other H-1B employees thereafter without again undergoing the entire labor condition process. In its Interim Final regulations, the DOL demonstrated how arbitrary these types of rules are by changing the new rule to limiting such visits by H-1B employees out of their initial area to 30 days in some circumstances and 60 days in other circumstances, both within a one-year period. The 1994 Final Rule, which was enjoined by the courts, set yet a third standard that "specified that the 'short-term' 90-day period would be calculated by totaling all days of work by all the employer's H-1B workers in the area of employment." The DOL has no authority to impose the kind of complex monitoring requirement included in any of these three versions of the regulations. Moreover, we cannot accept the DOL's argument that this provision – and by extension many other regulatory provisions – are not burdensome or unlawful because they are "voluntary" in the sense that high tech and other employers are not forced to send employees to perform work in different parts of the country. Such a theory is unworkable. Starting a business or even driving a car are matters of choice but that fact does not expose Americans engaged in those activities to any and all intrusions simply because they are considered "voluntary" actions.

In addition to those issues cited above, we remained concerned that the Interim Final regulations do not adequately address the concerns raised by ourselves and others on other topics, including, but not limited to, the DOL's definition of "employed by the employer" and "essentially equivalent job;" the DOL's policy regarding job offers and geographic areas; recruitment; benefits; benching; DOL 's perceived investigative authority; and limitations, in practice, of a nonimmigrant's right to legal representation. All of these were referenced in one or both of our previous letters.

Foreign-born professionals are an important part of the American economy and a significant reason why U.S. high tech companies are the best in the world. Therefore, we continue to be concerned that these new rules will cost jobs and hurt America's competitiveness. We ask that appropriate actions be taken to prevent the negative impact these regulations will have on American employers, employees, and the U.S. economy.

Sincerely,

Bob Graham
United States Senator

Spencer Abraham
United States Senator