Zachary Nightingale (CA #184501)
Van Der Hout LLP
180 Sutter Street, Suite 500
San Francisco, CA 94104
Telephone: (415) 981-3000
Facsimile: (415) 981-3003
Email: ndca@vblaw.com

Leslie K. Dellon (DC #250316) (*Pro hac vice to be filed*)
Kate Melloy Goettel (IA #23821) (*Pro hac vice to be filed*)
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7530 (Dellon)
Telephone: (202) 507-7552 (Goettel)
Facsimile: (202) 742-5619
Email: ldellon@immcouncil.org
Email: kgoettel@immcouncil.org

Counsel for Amicus Curiae American Immigration Council

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

Case No. 4:20-cv-7331-JSW

BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION COUNCIL IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION TO STAY AGENCY ACTION OR FOR PARTIAL SUMMARY JUDGMENT

Date: November 23, 2020
(Plaintiffs' Motion)
Time: 10:00 a.m.
Judge: Hon. Jeffrey S. White
Ctrm.: 5

I. Introduction and Interest of Amicus Curiae[1]

Amicus American Immigration Council (Council) submits this brief in support of the position of Plaintiffs U.S. Chamber of Commerce, *et al*., that Defendants violated the Administrative Procedure Act when they issued interim final rules without undergoing notice and comment rulemaking. The Council provides examples below where the immigration agency contemplated significant regulatory changes affecting the H-1 visa category, issued a notice of proposed rulemaking, and made beneficial changes in response to public comment before issuing a final rule.

These examples stand in sharp contrast to the U.S. Department of Homeland Security's (DHS) interim final rule. Among other substantial changes, DHS is altering its regulatory definition of "specialty occupation" – a term Congress defined in 8 U.S.C. § 1184(i)(1)(A)-(B) – and the regulatory criteria by which an employer demonstrates that its job is in a "specialty occupation." Yet, DHS intends to impose these changes on December 7, without first considering what those interested and affected have to say. The Administrative Procedure Act's notice and comment provisions are among the "procedural safeguards" that "help ensure that government agencies are accountable and their decisions are reasoned." *Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004) (quoting *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 758 (9th Cir. 1992)). Through the notice and comment procedures, an agency's regulations "are tested via exposure to diverse public comment" and "ensure fairness to affected parties" as well as to give those parties an opportunity to develop record evidence to support objections. *California v. Health and Human Servs*., 281 F. Supp. 3d 806, 823 (N.D. Cal. 2017) (quoting *Envtl. Integrity Project v. Envtl. Prot. Agency*, 425 F.3d 992, 996 (D.C. Cir. 2005)).

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration

[1] This brief has not been authored, in whole or in part, by counsel to any party in this case. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the amicus, or its counsel, contributed money that was intended to fund preparation or submission of this brief.

laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act, and its implementing regulations.

II. Substantial Regulatory Changes Affecting the H-1 Visa Category Where the Agency Recognized the Benefit of Public Comments

Over the past 34 years, the legacy Immigration and Naturalization Service (INS) and its successor, U.S. Citizenship and Immigration Services (USCIS), have issued several rules for the H-1 category utilizing the notice-and-comment rulemaking process, as required by the Administrative Procedure Act. Three examples are provided of rules where the immigration agency made substantial changes between the proposed and final rule, evincing the need for such a process with the present IFR.

A. The Agency Issued a Proposed Rule Setting Standards for Demonstrating H-1 Eligibility

In August 1986, the INS issued a proposed rule applicable to the H-1 category for foreign nationals "of distinguished merit and ability," *See* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 51 Fed. Reg. 28,576, 28,576-80 (Aug. 8, 1986).[2] The agency identified a "main objective" of the proposed rule: "[T]o establish realistic standards for determining who qualifies as a [foreign national] of distinguished merit and ability for H-1 classification." *Id*. at 28,576. INS provided a 60-day period for public comment. *Id*. at 28,577.

By utilizing the notice and comment procedure, the agency realized that it should not proceed to a final rule. Instead, INS issued a second proposed rule. *See* Temporary Alien

[2] The proposed rule also included the H-2 (temporary services or labor) and H-3 (trainee) categories then in effect. Congress established these three H categories in 1952. *Id*. at 28,577. In 1986, INS was part of the Department of Justice. In 2003, Congress transferred immigration authority to the Department of Homeland Security and USCIS became the benefits component when Congress divided "legacy" INS into three areas of responsibility. *See* 6 U.S.C. §§ 111-12, 113(a)(1)(E), 557 (USCIS initially was identified as the Bureau of Citizenship and Immigration Services).

Workers Seeking Classification Under the Immigration and Nationality Act, 53 Fed. Reg. 43,217 (Oct. 26, 1988). The agency explained:

> Due to the controversial nature of the previous rule and the extensive modifications which the Service proposes to make to the proposal after considering the comments and consulting with affected groups, the Service is issuing this new Notice of Proposed Rulemaking to give the public an opportunity to comment on the changes.

53 Fed. Reg. at 43,218.

In response to requests from "several" congressional committees, INS, through an outside consulting firm, conducted a study about the occupations, wages and working conditions of H-1 workers, their impact on U.S. workers, and the impact the proposed rule would have on the admission of H-1 workers, and in turn on the industries that employed them. *Id*. Congress delayed publication of a final rule from the original (August 1986) proposed rule to allow time for it to review the study and decide whether to amend the Immigration and Nationality Act. *Id*. The agency also expressed concern about lawsuits filed against it about the standards for H-1 classification. *Id*. In response, INS proposed "this significantly modified H rule which addresses the major areas of concern of the public, employers, labor organizations, and Congress." *Id*. The agency provided 30 days for public comment. *Id*.

In January 1990, INS issued the final rule, effective 31 days after publication. *See* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 Fed. Reg. 2606, 2606 (Jan. 26, 1990). The agency noted the positive reaction from commenters that the second proposal was a "significant improvement" over the original proposed rule and incorporated many of the changes recommended in response to the first proposal. *Id*. at 2606-07. As one example where INS responded to public input, as well as consideration of court decisions and further agency research, the agency eliminated an experience equivalency that required two years of college-level training and instead expanded how equivalency could be established through different methodologies, such as credit for training and/or work experience, or meeting certain testing or professional association requirements. *See id*. at 2611.

B. The Agency Issued A Proposed Rule To Address Statutory Changes To The H-1 Category

Congress established the present-day H-1B classification for temporary workers in a "specialty occupation" as part of the Immigration Act of 1990 (IMMACT90). § 205(c), Pub. L. No. 101-649, 104 Stat. 4978, 5020 (Nov. 29, 1990). In July 1991, INS issued a proposed rule for, inter alia, the purpose of "conform[ing] Service policy" to congressional intent relating to changes in the H category. *See* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 31,553, 31,553 (July 11, 1991). The agency said that Congress "significantly changed the definition of the H-1B category." *Id*. Comments were due 32 days later. *Id*.

INS issued its final rule in December 1991, five months after it published the proposed rule. *See* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 61,111 (Dec. 2, 1991). Based on comments, the agency amended the degree equivalency requirements to accept foreign degrees determined equivalent to doctorate degrees granted by U.S. academic institutions through documentation described in the final regulation. *See id*. at 61,112, 61,122 (then to be codified at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)). Another example of the benefit of public comment was INS' modification of the requirement that employers pay for return transportation expenses when an H-1B worker is "dismissed" to clarify that the employer must have acted to terminate the worker's employment. *Id*. at 61,113.

C. The Agency Issued a Proposed Rule to Implement Registration Instead of Requiring Fully-Documented H-1B Petition Submissions

In December 2018, DHS issued a proposed rule creating a registration tool for H-1B petitioners. *See* Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 83 Fed. Reg. 62,406 (Dec. 3, 2018). The registration tool was a significant change from past practice. Before DHS adopted the registration tool, companies had to submit fully-documented petitions to the agency even though USCIS could only accept a

fraction due to the 65,000 annual "cap" on H-1B visa numbers.[3] *See id*. at 62,408-09 (discussing that USCIS "would no longer need to physically receive and handle hundreds of thousands of H-1B petitions (and the accompanying supporting documentation) before conducting the random selection process"). The system of filing fully-documented petitions burdened and frustrated the agency, the employer-petitioners, and the foreign national-beneficiaries. *See id*. at 62407. Instead, the agency proposed that companies submit an electronic registration, with limited information required about the company and the foreign national. If more registrations were submitted than visa numbers available, the agency would conduct a random selection of the registration forms. Only companies notified by USCIS would be eligible to file a fully-documented H-1B petition. DHS did not make such a momentous change by interim final rule. Instead, the agency gave advance notice and accepted comments for 30 days. *Id*. at 62,406.

On January 31, 2019, DHS issued the final rule, with an effective date of April 1. *See* Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 888, 888 (Jan. 31, 2019). Two examples of important changes DHS made in response to public comment are: 1) providing at least thirty days' advance notice of the starting date for the initial registration period, published in the Federal Register instead of the original proposal to give notice only on USCIS' website with no timeline; and 2) providing at least 90 days for filing a fully-documented H-1B petition after commenters explained that the proposed 60 days was too short to gather supporting documentation. *Id*. at 889.

[3] The 65,000 H-1B visa number limitation is per fiscal year. 8 U.S.C. § 1184(g)(1)(A)(vii). Congress requires the agency to set aside up to 6,500 per free trade agreements with Chile and Singapore (for the H-1B1 visa category). *See* 8 U.S.C. § 1184(g)(8). Congress also provides an additional 20,000 visa numbers annually for foreign nationals with U.S. master's or higher degrees. *See* 8 U.S.C. § 1184(g)(5)(C). USCIS included selection for these visa numbers in the proposed registration system to replace fully-documented H-1B petition submission. *See* 83 Fed. Reg. at 62,406. Certain categories of employers, such as institutions of higher education are exempt from the "cap" and are able to file H-1B petitions as needed. *See* 8 U.S.C. § 1184(g)(5)(A)-(B).

III. Conclusion

These examples demonstrate the value of APA notice and comment procedures in making agencies aware of the real-world impact of their proposals. Comments about flaws in the premises on which a proposed rule rests; impracticalities or inefficiencies or lack of clarity in regulatory language; the need to provide alternative procedures are just some of the benefits to an agency from receiving and considering comments before issuing a final rule. The American Immigration Council urges the Court to grant the Plaintiffs' motion for preliminary injunction to stay the interim final rules.

Respectfully submitted this 30th day of October, 2020,

/s/ Zachary Nightingale
Zachary Nightingale (CA #184501
Van Der Hout LLP
180 Sutter Street, Suite 500
San Francisco, CA 94104
Telephone: (415) 981-3000
Facsimile: (415) 981-3003
Email: ndca@vblaw.com

Leslie K. Dellon (*Pro hac vice to be filed*)
(DC #250316)
Kate Melloy Goettel (*Pro hac vice to be filed*)
(IA #23821)
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7530 (Dellon)
Telephone: (202) 507-7552 (Goettel)
Facsimile: (202) 742-5619
Email: ldellon@immcouncil.org
Email: kgoettel@immcouncil.org

Counsel for Amicus Curiae
American Immigration Council