Center for Immigration Studies

Cato Institute Uses Flawed Analysis to Critique New H-1B Rules

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I previously wrote about my disappointment with DHS's new H-1B regulations. Under the H-1B program, there is a limit of 65,000 visa per year, plus an additional 20,000 visas for those with graduate degrees from U.S. universities, plus unlimited visas for academia.

Because the demand for cheap, foreign labor is so great, DHS receives more petitions for H-1B visas on the first day it starts accepting them for the next fiscal year than there are visas available. DHS has used a lottery to allocate those visas. In past years, DHS has done a lottery for the 20,000 U.S. graduate visas, then a lottery for the 65,000 general visas.

Under DHS's proposed regulation, it would do the 65,000 lottery first, then the 20,000 lottery second, giving those with U.S. graduate degrees a chance to get in on both.

Some have attacked the proposal as being unlawful. Our good friends at the Cato Instituteassert the same and provide a legal analysis worthy of a D- on an administrative law final exam.

These folks argue that the new regulation conflicts with this provision:

(5) The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 1101(a)(15)(H)(i)(b) of this title who—

. . .

(C) has earned a master's or higher degree from a United States institution of higher education (as defined in section 1001(a) of title 20), until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

Their argument is that this provision prohibits counting U.S. graduates toward the 65,000 until their 20,000 quota is used up.

The fatal flaw in this argument flows from this provision:

(3) Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status.

The process Congress has described in the statutes covers the situation where USCIS can serialize H-1B petitions in the order they were received.

But what happens when the folks at USCIS show up at work on the morning of April 1 and find 200,000 H-1B petitions have been delivered overnight to multiple locations around the country for the 85,000 visas? In that circumstance (which occurs nearly every year), there is no way for USCIS to determine the order in which the petitions have been received — and Congress has not addressed that situation in the statutes.

Under what is known as *Chevron* Deference, agencies have effectively unlimited power to fill gaps in the statutes as long as their actions are not arbitrary and capricious.

Under the flawed legal logic Cato uses, the lottery system that has been in place for years is unlawful. The alternative is for USCIS to not give out the visas for the year.

Cato is on stronger ground in arguing against this process of counting petitions toward the 65,000 cap even in years where a lottery is not necessary. However, USCIS has the counter argument that such fiscal years are infrequent, that USCIS would not know for sure until the last minute whether a lottery would be necessary, and that having to use multiple allocation systems is impracticable.

Cato asserts that this regulatory change amounts to "a potential cut to legal immigration" because, in theory, it would be possible that counting U.S. graduates first could cause part of the 20,000 quota to be unused while exhausting the 65,000 quota. While theoretically possible, this is unlikely in the current environment. USCIS has the standing defense to challenging this aspect of the proposed regulation. A plaintiff would need to show that it is "actual or imminent" that they would be deprived of a visa because of this change.