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February 6, 2019

The Honorable Kirstjen M. Nielsen  
Secretary, Department of Homeland Security  
800 K Street, NW, #1000  
Washington, DC 20528

The Honorable L. Francis Cissna  
U.S. Citizenship and Immigration Services  
U.S. Department of Homeland Security  
20 Massachusetts Avenue NW, 4th Floor  
Washington, DC 20529

Dear Secretary Nielsen and Director Cissna:

The American Society for Clinical Pathology (ASCP) is deeply concerned about the current state of U.S. immigration policy. Due to a severe shortage of pathologists (physicians) and non-physician laboratory professionals, our nation's clinical laboratories are finding it increasingly difficult to staff their facilities. Unfortunately, recent immigration policy changes by the U.S. Citizenship and Immigration Services (USCIS) are hampering the efforts of U.S. clinical laboratories and medical facilities to provide our nation's patients with quality, timely pathology and laboratory services.

The ASCP is a 501(c)(3) nonprofit medical specialty society representing over 100,000 members. Our members are board certified pathologists (including medical examiners), other physicians, clinical scientists (PhDs), certified medical laboratory scientists/technologists and technicians, and educators. ASCP is one of the nation's largest medical specialty societies and is the world's largest organization representing the field of laboratory medicine and pathology. As the leading provider of continuing education for pathologists and medical laboratory personnel, ASCP enhances the quality of the profession through comprehensive educational programs, publications, and self-assessment materials.

As Governor Jeb Bush and Thomas F. McLarty, Co-Chairs of the Council of Foreign Relations Panel on U.S. immigration policy, noted in their report, *U.S. Immigration Policy*, the United States has "reaped tremendous benefits from opening its doors to immigrants, as well as to students, skilled employees and others who may only live in the country for shorter periods of time."<sup>1</sup> Unfortunately, "the continued inability of the United States to develop and enforce a workable system of immigration laws threatens to undermine these achievements," they warned.

Per the federal *Clinical Laboratory Improvement Amendments (CLIA) of 1988* (See [42 CFR 1487](#)), our nation's clinical laboratories, including those located in or affiliated with hospitals, medical systems, and

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<sup>1</sup> Council on Foreign Relations, Independent Task Force Report No. 63 Jeb Bush and Thomas F. McLarty III, Chairs Edward Alden, Project Director U.S. Immigration Policy, [U.S. Immigration Policy](#). Accessed via internet: January 18, 2019.



medical schools/laboratory professional training programs, are required to be adequately staffed with pathologists and laboratory professionals qualified to perform high complexity laboratory testing. For years, however, the fields of pathology<sup>2</sup> and laboratory medicine<sup>3</sup> have suffered from a shortage of qualified staff, and satisfying this CLIA condition has long been a challenge. As a result, employment options utilizing foreign-born individuals on non-immigrant visas, specifically H-1B visas, have been important tools to help clinical laboratories meet their obligations to quality patient care. Data from the National Resident Matching Program indicates that for the specialty of pathology, approximately 33% percent of current medical residents are non-US citizen International Medical Graduates. This means that our nation's patients and medical systems rely heavily on pathology services provided by non-U.S. citizens.<sup>4</sup> This is the highest rate of any major medical specialty, including internal medicine, pediatrics, family medicine and neurology. In addition, more than 18 percent of U.S. clinical laboratories require the services of foreign-born laboratory professionals<sup>5</sup> when they are unable to find qualified Americans to fill these jobs. Although foreign national physicians and scientists may train in the United States on J-1 visas, at the conclusion of formal training the terms of that visa require the trainee to return to his/her native country. Via the Conrad program, which offers a limited number of waivers of the two-year home residency requirement, physicians who sign contracts at federally qualified health centers are allowed to transfer to H-1B visas and serve the American people as fully qualified and boarded physicians, *but pathologists rarely qualify for such programs.*

While some non-physician laboratory professionals have had success accessing some of the severely limited number of H-1B visas, the situation for pathologists has been more problematic. Many of the routes available to physicians are not viable options for hiring pathologists who are not U.S. citizens or permanent residents. For example, pathology is not an eligible physician specialty within the National Public Health Service Corps.<sup>6</sup> Moreover, physician specialists, such as pathologists, have fewer employment visa and waiver options (J-1), often limiting employment opportunities to primary care physicians who can more easily gain access to career opportunities in federally under-served areas or qualified medical centers.

Unfortunately, USCIS's recent immigration policies--which significantly increases the likelihood that pathologists and laboratory professionals on J-1, H-1B, and other visas could lose their immigration

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<sup>2</sup> Acad Pathol. Petriceks AH et al., [Trends in Pathology Graduate Medical Education Programs and Positions, 2001 to 2017](#), 2018 Jan-Dec; 5: 2374289518765457. Accessed Jan. 24, 2019

<sup>3</sup> The U.S Veterans Health Administration (VHA) has repeatedly ranked medical laboratory scientists (medical technologists) as one of the five most critical shortage occupations within the Agency. See Department of Veterans Affairs Office of Inspector General Office of Healthcare Inspections, [OIG Determination of Veterans Health Administration's Occupational Staffing Shortages](#), Report No. 15-00430-103, January 30, 2015, p. 2. Accessed January 24, 2019.

<sup>4</sup> [Charting Outcomes in the Match: International Medical Graduates: Characteristics of International Medical Graduates Who Matched to Their Preferred Specialty in the 2018 Main Residency Match](#). 2nd Edition. National Resident Matching Program. July 2018. p. 3. Accessed January 30, 2019.

<sup>5</sup> Garcia E et al.; The American Society for Clinical Pathology's 2016-2017 Vacancy Survey of Medical Laboratories in the United States, *American Journal of Clinical Pathology*, Volume 149, Issue 5, 29 March 2018, Pages 387–400, <https://doi.org/10.1093/ajcp/aqy005>

<sup>6</sup> [National Health Service Corps Scholarship Program & Students to Service Loan Repayment Program Academic Year 2019-2020 Postgraduate Training Bulletin January 2019](#). See *Ineligible Post Graduate Training Programs*, p. 4. Accessed Jan. 24, 2019.



status--complicates this task. Due to the insufficient numbers of employment-based visa options, many employees find themselves stuck in an immigration processing limbo lasting years, if not more than a decade. ASCP is concerned that USCIS policy changes impose unnecessary costs and burdens on employers and their employees. Moreover, it is fundamentally unfair and inappropriate to change the rules for adjudicating applications after they have been submitted.

USCIS has issued several policy memoranda over the past year that have made things even worse by creating a confusing, arbitrary, and inconsistent adjudications process. Such developments threaten patient care and exacerbate our nation's shortages of pathologists and laboratory professionals. In many cases, international employees were educated or trained here, receiving their academic degrees or completing their medical residencies or clinical training in the United States. For pathologists, these training positions are funded heavily by the Centers for Medicare & Medicaid Services (CMS), representing a significant financial investment by the United States. Our nation's patients would benefit more from these investments if foreign-born pathologists, as well as laboratory professionals, were better able to extend their stays in the United States to provide critical pathology and clinical laboratory services.

Foreign-born pathologists and laboratory professionals are currently experiencing the following challenges:

- Inconsistent Immigration Decisions: On October 23, 2017, USCIS rescinded its long-standing "deference" policy which ensured consistent immigration decisions by the government unless there was a material change in facts or there was an error in the prior government decision. Now, adjudicators can disagree with multiple prior approvals without explanation.
- Uncertainty about Required Information: The USCIS issued a memorandum on July 13, 2018, enabling adjudicators to deny petitions or applications on the basis that the "initial evidence" was not properly submitted—despite the fact that the agency has yet to offer *any* guidance to adjudicators or the public on how to apply this policy. This inappropriately adds ambiguity and inconsistency to adjudications. As a result, clinical laboratories now are unable to determine whether a work visa petition approved last month would be approved if an identical application to extend an employee's status was submitted today. This challenge is especially problematic for laboratories that hire H-1B professionals as the government has narrowed the eligibility criteria without issuing guidance to adjudicators or the public.
- Revoked Status for Spouses: USCIS is soon expected to revoke work authorization eligibility for the spouses (H-4 status) of H-1B employees. These spouses are often skilled professionals as well and these actions undermine the ability of American employers to access highly skilled employees. As other nations allow these international professionals to work there, denying spouses the ability to work in the United States undermines our nation's competitiveness.
- Commencement of Removal Proceedings: USCIS recently announced that it will place a legal immigrant in removal (deportation) proceedings if his or her application to change or extend status is denied and he or she does not have another underlying lawful status. Non-immigrant pathologists and laboratory professionals are concerned that they could face removal

proceedings even if they have complied with immigration laws and intend to promptly depart the country. ASCP is further concerned these policies could inappropriately trigger the 3- and 10-year re-entry bars through no fault of the international professional.

- Uncertainty Regarding Practical Training for International Students: USCIS's current regulatory agenda indicates that the agency is planning on changing its regulations to restrict or eliminate the ability of foreign students to work after completing their degree studies by limiting optional practical training for students in critical science, technology, engineering and math (STEM) fields. This proposal is of great concern to the laboratory sector as these fields are critical to the education and training of pathologists and laboratory professionals.

At a time when the number of job vacancies is reaching historic highs due to labor shortages, now is not the time to restrict the access of U.S. clinical laboratories, hospital-based systems, and academic medical centers to the skilled pathologists and laboratory professionals needed to provide quality patient care. As the federal government undertakes a review of our nation's immigration policies, it must avoid making changes that interfere with patient access to quality, prompt pathology and clinical laboratory services; disrupt the lives of highly trained pathologists and laboratory professionals; and inflict economic harm on U.S. clinical laboratories.

ASCP appreciates the opportunity to provide comment on this matter. If we can be of any assistance, please do not hesitate to contact me or Matthew Schulze, Director, ASCP Center for Public Policy, at (202) 735-2285.

Sincerely,



Melissa P. Upton, MD, FASCP  
President, ASCP





U.S. Citizenship  
and Immigration  
Services

April 5, 2019

Dr. Melissa P. Upton  
President  
American Society of Clinical Pathology  
1225 New York Avenue, Suite 350  
Washington, DC 20005

Dear Dr. Upton:

Thank you for your February 6, 2019 letter. Secretary Nielsen asked that I respond on her behalf.

U.S. Citizenship and Immigration Services (USCIS) is committed to faithfully implementing our nation's lawful immigration system while protecting the economic interests of U.S. workers. Pursuant to Executive Order (E.O.) 13788, the Department of Homeland Security was directed to: propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, and to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse. *See* E.O. 13788, *Buy American and Hire American*, v.82 Fed. Reg. 18837 (April 18, 2017).

As noted in your letter, USCIS has issued several policy memoranda (PM) which provide updated interpretive guidance of existing rules and advance policies that protect the interests of U.S. workers. For example, PM-602-0151, "Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status," makes it clear that the burden of proof remains on the petitioner, even where an extension of nonimmigrant status is sought and also emphasizes that adjudications should be based on the merits of each case. Likewise, PM-602-0163, "Issuance of Certain Request for Evidence (RFEs) and Notice of Intent to Deny (NOIDs); Revisions to *Adjudicator's Field Manual (AFM)* Chapter 10.5(a), Chapter 10.5(b)," highlights that an adjudicator may deny applications, petitions, and requests without first issuing an RFE or a NOID, when appropriate. USCIS believes that this policy will discourage frivolous or substantially incomplete filings used as "placeholder" filings and encourage applicants, petitioners, and requestors to be diligent in collecting and submitting required initial evidence.

Regarding any proposed rulemaking to remove H-4 dependent spouses from the classes of aliens eligible for employment authorization, the public will be given an opportunity in accordance with the Administrative Procedure Act to provide feedback during a notice and comment period on any revisions once the Notice of Proposed Rule Making publishes. It is

important to note that such a proposal would not impact a spouse's ability to remain in the United States or independently seek work authorization through any other legal avenue.

With regard to the commencement of removal proceedings, USCIS currently issues (and in previous years has issued) thousands of Notice to Appear (NTA) to individuals who come before the agency. The NTA memo referenced in your letter provides for the preservation of administrative review; appeals and motions to reopen or reconsider a decision may be filed by the petitioner, including, but not limited to, H-1B nonimmigrants. Generally, an NTA will not be issued during an initial limited period in order to provide the beneficiary time in which to make arrangements to depart the United States. If the petitioner chooses not to file a motion or appeal and the beneficiary departs the United States within that limited period, USCIS, upon confirmation of the individual's departure, will not issue an NTA.

Finally, USCIS' regulatory agenda does not include any proposal to restrict or eliminate the 24-month extension of post-completion optional practical training for a science, technology, engineering, or mathematics degree. USCIS publishes its rulemaking actions on the Unified Agenda (available at [https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1600](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1600)). The Unified Agenda is the most accurate publicly available source of information about regulations under development by the Department.

Taken together, USCIS believes these policies significantly strengthen our nation's immigration system, prioritize U.S. workers within the domestic labor market, and advance the prosperity of all Americans.

Thank you again for your letter and interest in this important issue. Should you wish to discuss this matter further, please do not hesitate to contact me.

Respectfully,

A handwritten signature in blue ink, appearing to read "LFC", followed by a horizontal line.

L. Francis Cissna  
Director