



December 19, 2023

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
5900 Capital Gateway Drive
Camp Springs, MD 20588

Attn: Charles L. Nimick
Chief, Business and Foreign Workers Division

Re: "[Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers](#)" Proposed Rulemaking (*DHS Docket No. USCIS—2023-0005*)

Dear Mr. Nimick:

We appreciate the opportunity to provide comments on the Department of Homeland Security's ("DHS") proposed amendments to its regulations governing H-1B specialty occupation workers to modernize and improve the efficiency of the H-1B program, add benefits and flexibilities, and improve integrity measures.

America's national security and global economic competitiveness depends on a strong, skilled national workforce. The growing severity of our skills gap is negatively impacting our entire economy and our ability to counter massive STEM investments made by China. If left unaddressed, the talent gap of workers with a post-secondary degree will result in more than 9 million job vacancies and \$1.2 trillion in lost production over the next decade.¹ In addition, a 2021 [report](#) by the Center for Security and Emerging Technology projected, based on current enrollment patterns, that by 2025 Chinese universities will produce more than 77,000 STEM PhD graduates per year compared to approximately 40,000 produced in the United States.

¹ TechNet, "Closing the Skills Gap," (2021)

A new [report](#) from the National Foundation for American Policy shows that admitting more foreign-born scientists and engineers is essential for U.S. economic growth and our ability to compete with China. It found that immigrants remain vital to the U.S. economy as entrepreneurs and researchers, noting that immigrants have started more than half (319 of 582, or 55 percent) of America's startup companies valued at \$1 billion or more and 65 percent of the top U.S. AI companies. In addition, it noted that America's most significant challenge in attracting and retaining talent remains its immigration policies.²

That is why we have long urged Congress to find common ground on high-skilled immigration and border reform and reduce critical STEM talent gaps by recapturing unused visas, creating a startup visa for entrepreneurs, exempting advanced graduates in STEM fields from green card caps, and eliminating outdated and arbitrary per-country caps on green cards that no longer track to economic need.

In the absence of Congressional reforms to America's immigration system, DHS's proposed amendments to the H-1B program are a welcome effort that, on balance, will improve program integrity. We believe this rulemaking will codify a number of commonsense revisions to H-1B regulations and provide much needed clarity to immigrants and U.S. employers alike. As discussed in more detail below, we applaud several of DHS's proposed changes to modernize the H-1B program and highlight several additional areas that should be clarified to ensure the proposed rules, once finalized, have as positive an impact as possible.

H-1B Cap Exemptions

We applaud DHS's efforts to revise the definition of "nonprofit research organization" and "governmental research organization" under 8 CFR 214.2(h)(19)(iii)(C). Since 1998, Congress exempted from the annual 65,000 H-1B cap petitions filed for workers employed at: (1) an institution of higher education; (2) a nonprofit entity related to or affiliated with such an institution; (3) a nonprofit research organization; or (4) a governmental research organization.³

DHS's proposed revisions to the definition of "nonprofit research organization" and "governmental research organization" will provide clarity for adjudicators and employers. Specifically, by replacing "primarily engaged" and "primary mission"

² National Foundation for American Policy, "U.S. Immigration Policy and the Competition with China," (December 5, 2023)

³ P.L. No. 106-313



with “a fundamental activity of,” DHS would rightfully align the standard for nonprofit research organization and governmental research organizations with the standard found for formal written affiliation agreements and eliminate the inconsistency and confusion surrounding eligibility for these cap exemptions.

Automatic Cap-Gap Extensions for International Students

We support the rule’s proposed extension to the “cap-gap” to provide clarity for F-1 students who are working in the United States under the Optional Practical Training (OPT) and STEM OPT programs. The OPT and STEM OPT programs are critical to attracting and retaining the world’s top students and allowing them to continue their career development in the U.S. and put their talents to work for the American economy. The cap-gap extension, first created in 2008, serves as a temporary, but important, bridge between a student’s F-1 status and their potential H-1B status. Approximately half of all H-1B workers were previously foreign students studying in the United States.⁴

Unfortunately, due to processing delays and other circumstances outside of their control, international students have endured gaps in status and work authorization, harming them, their families, and their employers. These gaps can lead to increased compliance costs and interfere with normal business operations of employers.

Currently, the automatic cap-gap extension is valid until October 1 of the fiscal year for which H-1B status is being requested. By extending the duration of status and post-completion OPT or 24-month extension of post-completion OPT until April 1 (an additional six months), DHS will provide much needed predictability for U.S. employers to lawfully employ F-1 students.

Entrepreneurs’ Access to H-1B Visas

We support the rule’s proposed changes to promote access to H-1Bs for entrepreneurs by allowing entrepreneurs that own a controlling interest in a petitioning entity to perform non-specialty occupation duties, such as those related to owning and directing the business.

⁴ Society for Human Resource Management, “Lawsuit Against OPT Programs for Foreign Students Expires at Supreme Court,” (October 23, 2023)



However, we respectfully urge you to amend the proposed 18-month H-1B validity period for beneficiary-owned entities. We believe a standard 36-month validity period should apply, as DHS already has the discretion to limit the duration of a petition approval if there are concerns about the viability of the business. By creating an across-the-board reduction in the validity period at the outset, the proposed rule could severely curtail founders' ability to innovate and experiment on new technologies in the United States and may encourage startup founders to go to other countries where their ideas and business ventures are actively welcomed.

For the United States to win the next era of innovation, policymakers should embrace proposals that allow the United States to continue being the top destination for global talent. In the absence of the formal creation of a startup visa by Congress, changes to promote access to H-1B visas for entrepreneurs are a welcome effort that will provide immigrant entrepreneurs additional flexibility to work and create jobs in the United States.

Reforms to H-1B Visa Lottery

We also support efforts to eliminate gamesmanship in the current H-1B registration process that cause uncertainty for U.S. employers and their employees. We support DHS's proposal to codify and clarify its existing deference policy on prior determinations when adjudicating petitions. We agree that deference has "helped promote consistency and efficiency for both USCIS and its stakeholders."⁵

Given the significant increase in total registrations received in FY2024, and the 147 percent increase in the number of registrations for individuals with multiple registrations, we are concerned that H-1B visas could be counted multiple times for each individual beneficiary. This has long been a concern given that USCIS has historically determined H-1B cap usage based on the number of petitions approved, rather than the number of visas used.

On balance, the proposed rule's reforms to the H-1B registration process are a welcome effort to move towards a beneficiary-centric model, and we urge DHS to move forward with these proposed changes for the upcoming cap season, while ensuring that other proposed changes are not finalized until DHS has sufficiently considered stakeholder feedback.

⁵ 88 Fed. Reg. 72880 (Oct. 23, 2023)

Codification of Deference Policy

We urge DHS to modify the proposed rule to ensure that the codification of USCIS' deference policy for prior determination of eligibility "creates predictability for petitioners and beneficiaries and leads to fairer and more reliable outcomes" as stated by the agency in the proposal. In doing so, DHS should clarify that any modifications to requirements and standards for H-1B eligibility will apply only to individuals whose initial petition is submitted after the final rule goes into effect. If DHS were to apply changes for requirements or standards to H-1B eligibility for individuals already in the immigration queue, it would increase burden and lead to unpredictable outcomes to the detriment of employees, their family members, and employers.

Compliance Site Visits

We are concerned by provisions in the proposed rule which aim to codify policy for USCIS site visits to ensure compliance and verification by petitioners and beneficiaries. While we appreciate the authority of USCIS to conduct site visits to ensure compliance, we are concerned that these provisions could disrupt employers and employees at their place of employment. As stated in the Notice of Proposed Rulemaking, "if USCIS is unable to verify facts related to an H-1B petition, including due to the failure or refusal of the petitioner or third party to cooperate in an inspection or other compliance review, then the lack of verification of pertinent facts, including from failure or refusal to cooperate, may result in denial or revocation of the approval of any petition for workers who are or will be performing services at the location or locations that are a subject of inspection or compliance review, including any third-party worksites."⁶

We urge DHS to add language to the final rule that would allow petitioners and their attorneys to be notified of the impending site visit. This notification should provide petitioners the opportunity to respond and provide additional information prior to a denial or revocation determination being made. Additionally, as many H-1B beneficiaries are able to work from home, we are concerned that site visits may include unannounced government visits to private homes. If a USCIS site visit is required, we request that the agency provide advance notice of the visit and allow it to take place at an agreed upon time at the employer's location. We also urge DHS to include protections for petitioners and beneficiaries with respect to third-party placement, as unaffiliated H-1B beneficiaries at a worksite should not unfairly

⁶ Id. at 72908



impact a petitioner or their H-1B beneficiaries. Finally, we would request that DHS include a provision in the final rule that for any interview with a government representative, an attorney or a representative of the employer is allowed to be present.

Additional Recommendations

To ensure that employers have sufficient regulatory clarity as the proposed rule is finalized, we echo the comments of the Compete America Coalition and urge DHS to institute a mechanism that informs a potential employer that a beneficiary has more than one registration.

In addition, we urge DHS to adjust the proposed regulatory text related to “specific specialty (or its equivalent)” degree requirements so that the text is fully consistent with the rule’s preamble; as written, we believe the proposed text is subject to various interpretations and could cause significant confusion and inconsistencies in the adjudication process.

In the preamble, DHS states that the proposed change is intended to codify existing practice, including “existing USCIS practice that there must be a direct relationship between the required degree field(s) and the duties of the position; there may be more than one acceptable degree field for a specialty occupation; and a general degree is insufficient.”⁷ However, the proposed rule does not codify many existing practices in this area, including an employer’s ability to explain how a degree or range of degrees relates to a position or, when necessary, to demonstrate how the coursework underlying a degree qualifies the beneficiary for the position. There are many degree programs, including some described as “general” by the proposed rule, that include specific, highly technical coursework like business degrees with specialized studies in analytics, mathematical and statistical methods, finance, and more. Because the text does not codify these current practices, we are concerned that adjudicators may apply the proposed text more narrowly and reject degrees that are acceptable under current practice.

More than half of U.S.-born individuals and 18 percent of temporary visa holders working in computer occupations have a degree other than computer science or electrical engineering. Nearly half of chemists and 15 percent of temporary visa

⁷ 88 Fed. Reg. 72874



holders have a degree other than chemistry.⁸ The wide range of degrees for these roles are a direct reflection of both the nature of today's current educational programs and the realities of the modern workforce. These varied degrees are in fact related to the offered roles and provide the knowledge and skillset that employers are seeking to fulfill those jobs properly. To best promote usage of the H-1B visa program and allow the U.S. to maintain its lead in emerging technologies like AI, we urge DHS to eliminate the "directly related specific specialty" degree requirement, or modify the language to codify existing USCIS practice fully, in order to allow occupations that require generalized degrees as well as specialized experience and training to qualify as specialty occupations.

We also urge DHS to remove language that directs USCIS to look to a third-party's requirements for an H-1B beneficiary's position rather than the petitioner's stated requirements. DHS proposes to create a new standard of bona-fide employer, employer-employee relationship, and job offer mandating client validation and contracting terms that are not standard business frameworks. The proposed rule gives investigators complete discretion to request whatever information and documentation that the individual investigator feels is pertinent, rather than what is reasonably relevant to the benefit being sought. This lack of specificity, which includes, but is not limited to, the high skilled professional's name, role, and client job requirements in business contracts coupled with the lack of a client's willingness to validate such contract terms, could result in petition denial causing business disruption, and undue hardship on employers and high skilled foreign talent. As written, we anticipate that many of our members will be subject to broad requests necessitating the devotion of substantial resources to field information and document demands without limit.

Finally, we urge USCIS to refrain from implementing modifications to the current adjudication process for third-party placements and continue to engage with relevant stakeholders to ensure the intended policy goals are reached. As written, USCIS is utilizing a new framework for third-party placements that is based on a non-standardized determination of whether an H-1B beneficiary is "staffed" to a third party or is "providing services." We are concerned that these proposed changes do not establish clear, standardized criteria for adjudicators and believe these changes will likely lead to significant uncertainty for H-1B petitioners as well as an inconsistent adjudication process. We respectfully request that USCIS

⁸ Society for Human Resources Management, "Will USCIS Proposal to Redefine H-1B Qualifications Limit or Expand Eligibility?" (December 4, 2023)



continue its thorough engagement with stakeholders and consider amending these provisions prior to finalizing the proposed rule.

We stand ready to assist you in ensuring that we provide certainty to immigrants and their families, improve our nation's immigration system, and win the global race for talent. Please do not hesitate to reach out if we can be a resource on this issue or if you have any questions.

Sincerely,

TechNet

Information Technology Industry Council

Semiconductor Industry Association