CENTER FOR IMMIGRATION STUDIES

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Charles L. Nimick, Chief
Business and Foreign Workers Divisions
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

**RE: *Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers*, RIN 1615-AC70, DHS Docket No. USCIS–2023–0005.**

Dear Chief Nimick,

The Center for Immigration Studies (CIS) submits the following public comment to the U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Homeland Security (DHS) in response to the request for comments on the Notice of Proposed Rulemaking (NPRM) titled ***Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers***, as published in the Federal Register on October 23, 2023.[1]

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation's only think tank devoted exclusively to the research of U.S. immigration policy to inform policymakers and the public about immigration's far-reaching impact. CIS is animated by a unique **pro-immigrant, lower-immigration** vision which seeks fewer annual admissions but a warmer welcome for those admitted.

## I. Background

Congress created the H-1B nonimmigrant visa program to authorize DHS to admit limited numbers of high-skill workers to the United States temporarily.[2] The program allows U.S. employers to temporarily employ foreign workers in specialty occupations, defined by statute as occupations that require the theoretical and practical application of a body of highly specialized knowledge and a bachelor's or higher degree in the specific specialty, or its equivalent.[3]

[1] 88 Fed. Reg. 72870 (Oct. 23, 2023).
[2] INA § 101(a)(15)(H)(i)(b).
[3] INA § 214(i).

Congress has imposed restrictions on immigration, including wage requirements for H-1B visa holders and other foreign workers, to "preserve jobs for American workers," and ensure safeguards to the domestic labor market.[4] Section 214(g)(1) of the Immigration and Nationality Act (INA) limits H-1B admissions to 65,000 per fiscal year, not including spouses or children who accompany principal H-1B visa holders. Foreign workers who are 1) employed or received an offer of employment at an institute of higher education or a related or affiliated nonprofit entity; 2) are employed at a nonprofit research organization or a governmental research organization; or 3) have earned a master's degree or higher degree from a U.S. institution of higher education, until the number of aliens who are exempted from such numerical limitation during such fiscal year exceeds 20,0000 are not subject to the 65,000 cap prescribed by section 214(g)(1)(A). Section 214(g)(4) also limits the period of authorized admission of H-1B visa holders to no more than six years.

Current DHS policies require USCIS to select registrations on a purely random basis, utilizing a lottery system, when demand for H-1B visas exceeds the numerical limit set by statute.[5] All petitioners seeking to file an H-1B cap-subject petition must first submit a registration for each beneficiary on whose behalf they seek to file an H-1B cap-subject petition to USCIS. The current selection process also allows for selection based solely on the submission of petitions in any year in which the registration process is suspended by the agency. In such case, USCIS would also utilize a random selection process for any year in which the number of petitions received on the final receipt date exceeds the applicable numerical limitation.

While the INA requires employers to pay H-1B workers the greater "of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question," or the "prevailing wage level for the occupational classification in the area of employment,"[6] the statute also provides that, when a government survey is used to establish the wage levels, "such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision."[7]

Current regulations allow H-1B employers to unlawfully underpay H-1B workers. The U.S. Department of Labor (DOL) has set the wage levels to correlate to a worker's skill level as follows: Level 1: 17 percent; Level 2: 34 percent; Level 3: 50 percent; and Level 4: 67 percent.[8] Notably, both Level 1 and Level 2 are set significantly below actual prevailing (or average) wages (set at Level 3).

[4] *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 893 (1984); *see* H.R. Rep. No. 1365, 82d Cong., 2d Sess., 50-51 (1952) (discussing the INA's "safeguards for American labor").
[5] 8 C.F.R. § 214.2.
[6] INA § 212(n)(1)(A).
[7] INA § 212(p)(4).
[8] *See* Employment and Training Administration, U.S. Department of Labor, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Nov. 2009).

DHS data shows that the H-1B program is neither used to bring "the best and the brightest" workers to the United States nor pay them fairly compared with their U.S. worker counterparts.[9] The majority of H-1B registrations are proffered wages at Level 1 and Level 2, with only 28.53 percent of H-1B petitions received in fiscal years 2018 and 2019 filed for Level 4 and Level 3 wages.[10]

Federal regulations also provide inadequate protections to U.S. workers that may be competing with H-1B workers. Very few H-1B employers are required to confirm with DOL that hiring H-1B workers will not displace U.S. workers. Most H-1B employers are required to merely attest as a part of their labor certification application that bringing on H-1B workers will not negatively impact the working conditions of their current employees.

For instance, employers are only compelled to attest that they will not displace U.S. workers if they are paying the H-1B worker less than $60,000 per year or the worker has not earned a degree higher than a bachelor's.[11] As a result, many companies are able to circumvent even these minimal protections.

In addition to structural flaws, the H-1B nonimmigrant visa program has been plagued with fraud and abuse since its inception. Numerous reports indicate unacceptably high rates of employers underpaying H-1B workers, companies forcing their U.S. workers to train their H-1B replacements as a condition of receiving severance and unemployment insurance, for-profit companies colluding with universities and other cap-exempt entities to cheat the system and obtain workers without participating in the H-1B lottery.

Site visits conducted by the USCIS Fraud Detection and National Security Division have uncovered significant amounts of noncompliance in the program since 2009, when the agency began its compliance review program. For instance, DHS reported that between fiscal years (FY) 2019–22, USCIS conducted a total of 27,062 H–1B compliance reviews and found 5,037 of them, equal to 18.6 percent, to be noncompliant or indicative of fraud. That marked an increase from FY 2013-16, which found 12 percent noncompliance (3,811 found noncompliant of 30,786 compliance reviews) and FY 2016-2019, which found 11.4 percent noncompliance (2,341 found noncompliant of 20,492).[12]

Even the H-1B registration process has seen large-scale abuse. Notably, this year, more than 780,000 registrations were submitted for 85,000 H-1B cap-subject visas. This marked a significant increase from last year, which recorded 480,000 registrations. USCIS reported that nearly half of this year's submissions were on behalf of foreign nationals with multiple registrations. While it is

[9] Costa, Daniel, Hira, Ron, Economic Policy Institute, H-1B visas and prevailing wage levels, *A majority of H-1B employers – including major U.S. tech firms – use the program to pay migrant workers well below market wages* (May 4, 2020).

[10] See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, H1B Petitions for Non Immigrant Worker (I-129) Summarized by IT (SOC code 15) and Other by Wage Level As of August 28, 2020, Database Queried: Aug. 28, 2020, Report Created: Aug. 28, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (reflecting total received H-1B petitions categorized by wage levels as follows: 13.2% for level I, 46.23% for level II, 17.85% for level III, 10.68% for level IV, and a combined 12.03% for N/A and blank wage levels)

[11] *See* INA § 212(n)(3); 20 C.F.R. § 655.736(g).

[12] 88 Fed. Reg. 72870, 72907 (Oct. 23, 2023).

possible (albeit unlikely) for more than one company to file a valid H-1B registration under current rules, USCIS indicated these results prompted the agency to initiate fraud investigations to determine whether employers unlawfully colluded to increase their chances of having a worker selected by submitting multiple registrations for what ultimately is the same employment opportunity.[13]

On October 23, 2023, DHS issued this NPRM to reform the H-1B program. The proposal would amend regulations to revise the definition and criteria for a "specialty occupation"; clarify when an amended or new petition must be filed due to a change in an H-1B worker's place of employment; codify the agency's deference policy, which instructs adjudicators to defer to prior determinations of facts involving the same parties; eliminate the itinerary requirement, which applies to all H classifications; expand the types of employers who are exempt from the annual statutory limit on H-1B visas; automatically extend the duration of F-1 status for graduates changing status to H-1B; and address registration abuse by selecting registrations by unique beneficiaries; among other proposed reforms.[14]

## II. *Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers*

CIS strongly recommends that DHS amend its NPRM, titled *Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers*, to provide stronger protections for both U.S. and foreign workers. Specifically, DHS must:

- Withdraw proposed 8 C.F.R. § 214.1(c)(5), which requires immigration officers to defer to prior determinations of fact when adjudicating subsequent petitions or applications;
- Withdraw proposed changes to 8 C.F.R. § 214.2(h)(8)(iii)(4) and 8 C.F.R. § 214(h)(19)(iii)(C), which unlawfully expands the types positions and types of employers who may petition for a cap-exempt H-1B worker;
- Withdraw proposed changes to 8 C.F.R. § 214.2(f)(5)(iv), which unlawfully extends the amount of time an F-1 student may remain in the United States and work after graduation;
- Maintain the H programs' itinerary requirement; and
- Strengthen the definition of "specialty occupation" by striking the phrase "normally required" from proposed 8 C.F.R. § 214.2(h)(4)(iii).

In section II, CIS proposes additional reforms DHS should make to reform the H-1B program.

[13] *See* U.S. Citizenship and Immigration Services, *H-1B Electronic Registration Process* (Jul. 31, 2023); *see also* Exner IV, John, Calica, Timothy, National Review, *USCIS: Substantial Increase in H-1B Registrations for FY 2024 May Indicate Potential Fraud* (May 5, 2023).
[14] 88 Fed. Reg. 72870 (Oct. 23, 2023).

### A. DHS should withdraw proposed 8 C.F.R. § 214.1(c)(5) to reduce fraud in the H-1B program.

CIS opposes DHS's proposal to codify a deference policy for H-1B adjudications and constrain USCIS officers' fact-finding authority.[15] This policy will instruct immigration officers to conform to prior determinations involving the same parties. Proposed 8 C.F.R. § 214.1(c)(5) would apply to all nonimmigrants using Form I-129, Petition for a Nonimmigrant Worker, and would include a request on Form I-129 involving the same parties and same material facts. This proposal would apply to requests for an "extension of petition validity" and all other requests filed on Form I-129. Adjudicators, however, are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous.[16]

While DHS conditions this instruction on there being "no material error with the prior determination, no material change in circumstances or in eligibility, and no new material information adversely impacting the petitioner's, applicant's, or beneficiary's eligibility,"[17] CIS respectfully asserts that under this proposal, an adjudicator would have to either assume these circumstances to be true or merely take an applicant or petitioner's word. Without confirming the basis of the prior adjudication, adjudicators lose an opportunity to uncover errors and fraud. This leap of faith, however, is not necessary and constitutes a reckless abdication of authority. Adjudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous.[18]

Additionally, CIS shares USCIS's 2017 concern that such deference policy inappropriately shifts the burden of establishing eligibility from the petitioner to USCIS. The burden of proof to establish all elements of eligibility remains on the petitioner, even where an extension of nonimmigrant status is sought.[19]

Given the high rate of fraud and abuse consistently found in the H-1B program, CIS believes that requiring immigration officers to confirm all material facts before granting any request filed on Form I-129 would serve as an important fraud detection mechanism and general deterrent. Adjudicators should not feel restricted from requesting additional evidence while adjudicating a petition extension, consisting with existing USCIS policy regarding requests for evidence, notices of intent to deny, and the adjudication of petitions for nonimmigrant benefits. Accordingly, DHS should rescind the NPRM's proposal and the corresponding April 27, 2021 USCIS Policy Manual update in order to require adjudicators

[15] *See* proposed 8 C.F.R. § 214.1(c)(5).
[16] *Matter of Church Scientology Intl*, 19 1&N Dec. 593, 597 (Commissioner 1988).
[17] 88 Fed. Reg. 72870, 72880 (Oct. 23, 2023).
[18] *Matter of Church Scientology Intl*, 19 1&N Dec. 593, 597 (Commissioner 1988).
[19] *See* 8 CFR § 103.2(b)(1) ("An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication); 8 CFR § 214.1(c)(5) ("Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service.")

**B. DHS must withdraw changes to proposed 8 C.F.R. § 214.2(h)(8)(iii)(4) and 8 C.F.R. § 214(h)(19)(iii)(C), which inappropriately widens loopholes to allow non-qualified employers to circumvent the H-1B cap.**

DHS must withdraw its proposal, at proposed 8 C.F.R. § 214.2(h)(8)(iii)(4) and 8 C.F.R. § 214(h)(19)(iii)(C), which expands eligibility for cap-exempt H-1B visas and widens loopholes that allow for-profit organizations to benefit from cap exemption, directly in conflict with the statute.

Specifically, DHS proposes to reduce the amount of time a H-1B beneficiary must work for a cap-exempt entity when they are in fact not directly employed by an institution, organization, or entity identified in INA § 214(g)(5)(A) or (B) that is exempt from the H-1B cap. Additionally, DHS proposes to remove the requirement that a beneficiary's duties "directly and predominantly further the essential purpose, mission, objectives or functions" of the qualifying institution, organization, or entity and replace it with the requirement that the beneficiary's duties "directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions" of the qualifying institution, organization, or entity.[20]

These changes weaken existing rules that are already known to be exploited by ineligible (and often for-profit) corporations, organizations, and other entities. For example, in 2016, Senator Chuck Grassley wrote to then-USCIS Director Leon Rodriguez regarding numerous reports of "hacking" the H-1B program. He cited to reports of high-tech industry advocates and immigration lawyers colluding with state university to set up entities that "'employ' foreign nationals in some nominal fashion in H-1B status, thereby giving the worker lawful immigration status …as a cover up for the true purpose of [their] presence in the United States: establishing and working for his own start-up company."[21] As Senator Grassley explained, "such arrangements are a backhanded attempt to evade the prohibition on self-employment by H-1B workers."[22] Third party petitioners often profit off of these arrangements by taking equity shares in such startups as payment for the arrangements.

Other instances of H-1B "hacking" include nonprofit organizations, such as the Global Entrepreneur in Residence Coalition, which match "foreign nationals seeking to establish and work for their own business, colludes with universities … who agree to sponsor the foreign national for a cap-exempt H-1B visa. The university appears to then employ the foreign national in H-1B status as an 'entrepreneurial mentor' to students at the university, while the foreign national is simultaneously setting up and working at his own business."[23]

In even more extreme circumstances, the New York City Economic Development Corporation (NYCEDC) engaged in similar unlawful schemes designed to secure H-1B status for foreign nationals seeking to open a business in the United States. In a plan called IN2NYC, the NYCEDC "promised to provide sponsor foreign nationals 'with the support to form an

[20] *See* proposed 8 C.F.R. § 214.2(h)(8)(iii)(F)(4).
[21] Letter from Senator Chuck Grassley to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services (February 25, 2016).
[22] *Id.*
[23] *Id.*

independent board of directors, which established an employer-employee relationship between the company and the entrepreneur so that the company can sponsor an H-1B petition on behalf of the entrepreneur."[24]

The changes proposed by this NPRM facilitate this kind of H-1B fraud and abuse. In a purported attempt to "increase flexibility," the NPRM weakens the standards that are designed to ensure that foreign workers that receive a cap-exempt H-1B visa meet the standards that are set by Congress in INA § 214(g)(5).

CIS further charges that DHS has not justified these proposed changes in light of these types of abuses. To explain its rationale, DHS has merely stated that the proposed changes are "intended to update" the availability of cap exemptions to include a larger set of potential beneficiaries, with the overall intent to "clarify, simplify, and modernize eligibility for cap-exempt H–1B employment, so that they are less restrictive and better reflect modern employment relationships." Further, DHS noted that the "proposed changes are also intended to provide additional flexibility to petitioners to better implement Congress's intent to exempt from the annual H–1B cap certain H–1B beneficiaries who are employed at a qualifying institution, organization, or entity," without demonstrating that Congress intended for broad inclusion of beneficiaries who are not directly employed by qualifying employers and are "splitting their time" to conduct non-qualifying work.

Accordingly, to apply the cap-exemption consistently with Congressional intent, DHS must withdraw proposed 8 C.F.R. § 214.2(h)(8)(iii)(4). CIS further recommends that DHS rescind current 8 CFR 214.2(h)(8)(iii)(F)(4) that allows an alien to receive a cap-exempt H-1B visa if they are not directly employed by a qualifying employer. Eliminating cap-exempt eligibility for this category of beneficiaries will reduce fraud and abuse of the H-1B program and further Congressional intent designing the H-1B program to supplement the U.S. workforce, not compete with or replace it.

### C. DHS must rescind its regulations that permit F-1 nonimmigrant visa holders (students) to obtain employment authorization documents after they graduate without first adjusting to an employment-authorized status.

CIS urges DHS to rescind all regulations and proposals that allow F-1 nonimmigrant visa holders (students) to work in the United States in violation of their status following graduation. Specifically, in this NPRM, DHS proposes to revise 8 C.F.R. 214.2(f)(5)(vi) to provide an "automatic extension of duration of status and post-completion Optional Practical Training (OPT) or 24-month extension of post completion OPT, as applicable, until April 1 of the relevant fiscal year for which the H-1B petition is requested."[25] DHS further proposes to specify that the H-1B petition must be "nonfrivilous" in order for the student to benefit from the cap extension.[26]

OPT, however, was created by DHS without authorization and violates the conditions Congress created for the F-1 visa. Statute specifically requires that an F-1 nonimmigrant be an "alien

[24] *Id.*
[25] *See* proposed 8 C.F.R. § 214.2(f)(5)(vi).
[26] *See* proposed 8 C.F.R. § 214.2(f)(5)(vi)(A)(3).

having a resident in a foreign country which he has no intention of abandoning, who is a *bona fide* student qualified to pursue a full course of study and who seeks to enter …temporarily and solely for the purpose of pursuing such a course of study."[27] Once a F-1 student completes their course of study, they no longer are entitled to an extension of their status or work authorization in the United States.

DHS has taken the position that it is authorized to allow F-1 visa holders who have graduated to nevertheless extend their stay and receive work authorization by virtue of DHS's statutory authority to set the time and conditions of admission for nonimmigrants.[28] The unambiguous reading of this authority, however, is to allow DHS to supplement – not disregard – the conditions laid out in INA § 1101. This is supported by section 1184(a)(1), which provides that DHS may required "the giving of a bond … **to insure that** at the expiration of such time or **upon failure to maintain the status under which he was admitted**, or to maintain any [other nonimmigrant] status subsequently acquired …such alien will depart…." (Emphasis added.)

Indeed, the Supreme Court has affirmed this interpretation in the context of the required intent to not abandon a foreign residence that is inherent to the F-1 and most other nonimmigrant programs. In *Elkins v. Moreno*, 435 U.S. 647 (1978), the Court ruled that "Congress expressly conditions admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States**… [S]ince a nonimmigrant alien who does not maintain the conditions attached to his status can be deported…it is…clear that Congress intended that … nonimmigrants in restricted classes who sought to establish domicile would be deported**." (Emphasis added.) (Citations omitted.) [29] Accordingly, the Court recognized that the requirements, or "conditions," of entry are also the requirements and conditions of good standing in the United States.

Moreover, only Congress, not the Executive Branch, has the authority to designate categories of aliens who are eligible to work in the United States. DHS does not have the authority to grant EADs to aliens whom the INA does not provide such benefits.[30] Rather, DHS should protect job opportunities for American workers consistent with the employment-based admission limitations passed by Congress.

Article I of the U.S. Constitution gives Congress plenary power over immigration, and Congress has established an extensive scheme for the admission of immigrant and nonimmigrant foreign workers into the United States through the creation of numerous visa programs.[31] Congress has never conferred nor delegated the authority to DHS to create employment eligibility for classes of aliens not already provided by law. Designating new classes of eligible populations undermines the deliberate scheme created by Congress which has contemplated intricate social, economic, and foreign policies beyond the scope of DHS's interests and mission.

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[27] INA § 101(a)(15)(F)(i).
[28] INA § 214(a)(1).
[29] *Elkins v. Moreno*, 435 U.S. 647, 665-66 (1978).
[30] Pub. L. No. 104-208, § 604, 110 Stat. 3009, 3009-693.
[31] *See* INA. § 101 et seq.

Further, contrary to DHS's regulatory position (which DHS has disavowed in litigation[32]), Congress did not confer such authority with the enactment of the definition of "unauthorized alien," in section 1324a of the INA. Section 1324a was enacted by the *Immigration Reform and Control Act of 1986* to criminalize and impose civil sanctions on the act of hiring an alien who is not authorized to work in the United States. [33] Section 1324a(h)(3) defines those aliens that it is unlawful for an employer to hire. This section, however, is merely definitional and refers to the authorities the Secretary already possesses through enactment of other provisions in the INA. It does not itself grant any authority.[34]

Rather, since the enactment of this position, Congress has specifically extended and limited DHS's authority to grant work authorization to similar classes of aliens on numerous occasions.[35] Interpreting the definition of "unauthorized alien" to confer such broad authority would also render Congress's later enactments superfluous and violate the non-delegation doctrine as an impermissible delegation of legislative authority without sufficient intelligible principles to guide the Secretary.[36]

Even with OPT in place, this NPRM does nothing to address the incentives that employers are given to hire F-1 nonimmigrant visa holders over recent American graduates. Because recent graduates working under the OPT program are classified as students (despite no longer being enrolled in any course of study), employers receive approximately an 8.25 percent subsidy by virtue of a Social Security, Medicare, and Unemployment Insurance Program tax break.[37]

This rulemaking only facilitates unfair job market competition between U.S. workers (including recent graduates) and foreign workers. Many students participate in OPT precisely to find employers willing to sponsor them for the H-1B program or be able to work in the U.S. should

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[32] "Section 1324a . . . cannot reasonably be interpreted to have 'brought about the enormous and transformative expansion' in the Secretary's authority. . . ." Rep. Br. for the Pet'rs, Dep't of Homeland Security, et al. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (No. 18-587) (quoting Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 573 U.S. 302, 324 (2014)).

[33] Pub. L. No. 99–603, § 101, 100 Stat. 3445 (creating the new section § 274a of the INA codified at 8 U.S.C. § 1324a).

[34] *See W. Union Tel. Co. v. Fed. Commc'ns Comm'n*, 665 F.2d 1126, 1136–37 (D.C. Cir. 1981) (holding a section was "only definitional" where it began with "as used in this section" and contained only definition subsections); *Texas v. United States*, 787 F.3d 733, 760 (5th Cir. 2015), aff'd by an equally divided court, 136 S. Ct. 2271 (2015) (observing § 1324a(h)(3) was merely definitional).

[35] For example, the Omnibus Consolidated Appropriations Act 1997 provided that "[a]n applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General." Pub. L. No. 104-208, § 604, 110 Stat. 3009, 3009-693.

[36] The Supreme Court "repeatedly [has] said that when Congress confers decision making authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to act' is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); *see also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685(1980) (Rehnquist, J. concurring) ("[The nondelegation doctrine] ensures . . .that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.").

[37] North, David, Center for Immigration Studies, *Huge Tax Subsidies for Employers Hiring Ex-Foreign Students from Marginal Schools* (Nov. 23, 2018).

an H-1B slot not be available. In fact, almost half of all H-1B workers were previously foreign students.[38]

Allowing F-1 nonimmigrant visa holders to extend their period of authorized stay for the purpose of working after they are no longer students blatantly violates the scheme Congress created to regulate the admission of nonimmigrants and to regulate employment in the United States. Because OPT is not authorized under federal immigration law and creates unlawful competition among workers, DHS must rescind all regulations that permit such employment and extensions of F-1 status because they are unlawful.

### D. DHS should strike the phrase "normally required" from the regulatory definition of "specialty occupation" at proposed 8 C.F.R. § 214.2(h)(4)(iii).

CIS recommends that DHS strengthen the regulatory criteria for "specialty occupation" by striking both the current and proposed regulatory language that permit occupations that do not always require a bachelor's degree to be considered a "specialty occupation" for H-1B purposes. This language violates the statute's clear requirement in law that attainment of a bachelor's degree or higher is required for purposes of H-1B participation.[39]

Section 214(i)(1) of the INA plainly states that a "specialty occupation" requires attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. However, the current regulatory definition at 8 C.F.R. § 214.2(h)(4)(iii)(A) states that a bachelor's degree be "normally" required, or "common to the industry," or that the knowledge required for the position is "usually associated" with at least a bachelor's degree or equivalent.

In this NPRM, rather than rectifying the regulation's inconsistency with its authorizing statute, DHS proposes to maintain this policy, but clarify that "normally," for the purposes of the criteria for 8 C.F.R. § 214.2(h)(4)(iii), "means 'conforming to a type, standard, or regular pattern' and is 'characterized by that which is considered usual, typical, common, or routine.' The proposed regulation also clarifies that '[n]ormally does not mean always.'"[40]

DHS explained that, "[f]or these purposes, there is no significant difference between the synonyms 'normal,' 'usual,' 'typical,' 'common,' or 'routine.'"[41] However, like DHS itself explained in 2020, this wording, even with the addition of this definition, could be read to encompass occupations that allow relatively low percentages of positions which do require a bachelor's degree or higher, fully undermining Congress's clear intent.

Accordingly, CIS believes these provisions create a standard that is inappropriately low given the statute's clear requirements. A reasonable person could interpret these provisions to mean that a position may be a specialty occupation if merely 60 percent of positions within a certain

[38] In 2021, DHS approved H-1B petitions for initial employment for 123,414 aliens -- 58,042 (47 percent) of whom were changing from F status. USCIS, Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2021 Annual Report to Congress: October 1, 2020 – September 30, 2021 at 62 (tables 14 and 15) (2022).
[39] INA § 214(i)(1).
[40] 88 Fed. Reg. 72870, 72876 (Oct. 23, 2023).
[41] *Id*.

occupation require at least a certain bachelor's degree. This is plainly inconsistent with the most natural read of the statutory definition of a "specialty occupation," which imposes a minimum entry requirement of a bachelor's or higher degree in the specific specialty (or its equivalent).[42] Striking "normally" and the term's proposed definition in proposed 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (5) will ensure that the regulatory criteria for "specialty occupation" align with the requirements of the statute.

CIS also recommends that DHS further strengthen the education requirement embedded in the definition of "specialty occupation" by requiring that an alien receive a bachelor's degree (or its equivalent) from a single institute of higher education, rather than receive multiple, lesser degrees that USCIS may cumulatively consider to be equivalent to a bachelor's degree. This change would not require a worker to have attended the same university for the entirety of their studies. Rather, it would require that they have at least one degree that meets the statutory requirement rather than multiple, lesser degrees that USCIS haphazardly considers to equate to a bachelor's degree in culmination.

This change more closely conforms to the requirements in the statute and likewise ensures that H-1B workers with qualifying levels of education are more likely to access the program. In turn, this will likewise benefit the U.S. economy by enabling employers to hire the "best and the brightest" foreign workers, for which competition for cap-subject visas is significant year after year.

### E. DHS should maintain the H programs' itinerary requirement.

CIS recommends that DHS maintain its current requirement that petitioners file an itinerary with any petition that requires services to be performed in more than one location. Current 8 C.F.R.§ 214.2(h)(2)(i)(B) states that "[a] petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions."[43] Itineraries provide DHS officers easy access to important information that can be used to uncover fraud and abuse in the H-1B program.

Rather than repeal itinerary requirements, DHS should amend this NPRM to require that, in addition to providing an itinerary that only includes the dates and locations of services, that petitioners provide more detailed itineraries to demonstrate that the petitioner has non-speculative employment. For instance, an itinerary that specify the dates of each service or engagement; the names and addresses of the ultimate employer; the names, addresses (including floor, suite, and office); telephone numbers of the locations where the services will be performed for the period of time required; and corroborating evidence for all of the above would facilitate USCIS officers determine whether there are specific and non-speculative qualifying assignments.

[42] *See* INA § 214(i)(1).
[43] In addition, current 8 C.F.R. § 214.2(h)(2)(i)(F) contains itinerary requirements for agents who serve as petitioners.

## III. Additional Reforms

In addition to making the changes detailed above to the NPRM, CIS recommends that DHS include the following policies to strengthen the H-1B program and deter fraud.

### A. DHS should amend the H-1B visa selection process to require USCIS to select the highest paid H-1B registrations.

CIS strongly urges DHS to amend its regulations, consistent with the final rule it issued (and later withdrew), titled *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions*, to require USCIS to select higher-paid and higher-skilled foreign workers for H-1B cap-subject visas.[44]

Prioritizing the highest paid workers (relative to their occupation and region they will be working in) would ensure that U.S. businesses have access to the best pool of foreign workers. This reform would have also discouraged wage suppression and reduced unfair competition to U.S. workers. Currently, USCIS issues H-1B cap-subject visas on a purely random basis using a lottery system.[45]

To ensure high foreign workers have access to employment-based visas and are able to contribute to the U.S. economy and innovation, DHS should prioritize the selection of higher-skilled and higher-paid workers for employment-based visas, consistent with DHS's 2021 final rule. In addition to increasing the highest-qualified aliens' access to immigration benefits, this policy change will benefit American workers as well, who often must unfairly compete with foreign workers who are paid less than their American counterparts for the same jobs in the same locations.

The methodology for the selection of H-1B registrations (or petitions, in years registration is suspended) is a matter that Congress left to USCIS discretion. The INA states that "aliens who are subject to the numerical limitations . . . shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status."[46] The term "filing" is ambiguous, however, and the statute is silent as to how USCIS must select H-1B petitions, or registrations, to be filed toward the numerical allocations in years of excess demand. Additionally, because of excess demand and limited registration and filing periods, USCIS often receives multiple submissions simultaneously.[47]

Accordingly, DHS may rely on its general statutory authority to implement the H-1B statute and revise regulations to redesign the selection system to more effectively, efficiently, and faithfully administer the cap selection process.[48] "Congress left to the discretion of USCIS how to handle

[44] 86 Fed. Reg. 1676 (Jan. 8, 2021).
[45] *See* U.S. Citizenship and Immigration Services, *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models* (last updated Sept. 15, 2023).
[46] 8 U.S.C. § 1184(g)(3).
[47] *See Walker Macy LLC v. USCIS*, 243 F. Supp. 3d 1156, 1170 (D. Or. 2017).
[48] *See* INA section 103(a), 214(a) and (c)(1).

simultaneous submissions."[49] Prioritizing selections on the basis of wages proffered is a reasonable interpretation of the statute that furthers Congress's primary purposes in creating the H-1B program to help U.S. employers fill actual labor shortages in positions requiring highly skilled or highly educated workers, without undermining labor conditions or otherwise suppressing wages in the domestic labor market.

As DHS has reiterated, prioritizing wage levels in the registration selection process incentivizes employers to offer higher wages, or to petition for positions requiring higher skills and higher-skilled aliens that are commensurate with higher wage levels, to increase the likelihood of selection for an eventual petition.[50] Similarly, it discourages abuse of the H-1B program to fill lower-paid, lower-skilled positions, which is a significant problem under the present selection system.[51]

By requiring USCIS to prioritize registrations (or petitions) with proffered wages equaling or exceeding Level 4 to Level 1, in descending order, DHS will provide significant incentives to pay foreign workers higher wages. If employers are required to pay H-1B workers approximately the same wage paid to U.S. workers doing the same type of work in the same geographic area and with similar levels of education, experience, and responsibility as the H-1B workers, employers will have little reason to prefer H-1B workers over U.S. workers, and U.S. workers' wages will be less likely to be suppressed, and to a lesser degree, by the presence of foreign workers in the relevant labor market.

Conversely, a purely random selection process does not serve the H-1B program, further Congressional intent, or protect U.S. workers. Rather, the purely random selection process fosters a "race to the bottom" labor market, resulting in unfair competition to U.S. workers and wage suppression among industries that participate in the H-1B program by allowing employers to offer workers' wages that fall significantly below competitive domestic wages. These tactics benefit only profit-collectors and undermine the H-1B program's primary purposes.

H-1B beneficiaries will also benefit significantly from this change in selection policy. As affirmed by DHS when this policy was initially proposed in 2020, selecting the highest paid H-1B registrations will eliminate nearly all incentives to underpay a foreign worker by offering wages below the prevailing wage for the profession. Because an employer must petition for a

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[49] *See Walker Macy*, 243 F.Supp.3d at 1176 (finding that USCIS's rule establishing the random-selection process was a reasonable interpretation of the INA).

[50] *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions*, 86 Fed. Reg. 1676 (Jan. 8, 2021).

[51] *See* U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, I-129 Petition for H-1B Nonimmigrant Worker (Cap Subject) Wage Levels for H-1B Petitions filed in FY2018, Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (showing that, for petitions with identifiable certified labor condition applications, 161,432 of the 189,963 (or approximately 85%) H-1B petitions for which wage levels were reported were for level I and II wages); I-129 Petition for H-1B Nonimmigrant Worker (Cap Subject) Wage Levels for H-1B Petitions filed in FY2019, Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (showing that, for petitions with identifiable certified labor condition applications, 87,589 of the 103,067 (or approximately 85%) H-1B petitions for which wage levels were reported were for level I and II wages).

foreign worker in order to for the worker to participate in an employment-based visa program and employers have significant power over an H-1B's ability to remain in the United States, many foreign workers have substantially less negotiating power with regard to salary and labor conditions compared to U.S. workers in similar occupations.

Implementing this policy change makes no changes to the number of visas allocated for the H-1B program nor alters substantive eligibility requirements, but only increases access for the highest qualified workers. Accordingly, because of the extremely high demand demonstrated year after year for H-1B visas, there is little reason to believe that implementation of change will result in fewer visas issued under the H-1B program.

The change will, however, provide both petitioning employers and foreign workers greater predictability in the selection process than a purely random selection lottery. This type of selection process is also more equitable than the current random lottery system because it is hinged on a factor that correlates closely with the merit and value of the foreign worker.

The purely random selection process USCIS currently uses, on the other hand, harms H-1B beneficiaries because it allows employers to offer wages that fall significantly below competitive domestic wages with no consequence. Currently, employers are only required to offer wages that equal or exceed a Level 1 wage rate for that profession, which is currently set at the 17th percentile of domestic worker's wages in that profession. Neither an H-1B beneficiary nor DOL have the practical ability to challenge an employer's claim regarding the worker's skill level. Accordingly, the current system benefits only profit-collectors and undermines the interests of "the best and brightest" foreign workers seeking to contribute to the U.S. economy.

Implementing this reform would ensure H-1B petitioners have an incentive to pay beneficiaries wages they deserve while providing the highest qualified workers greater access to visas and mitigating unfair competition to U.S. workers. Given the economic conditions worsened by the COVID-19 pandemic, discussed above, this policy would make critical changes to support beneficiaries, U.S. workers, and the overall economy.

### B. DHS should strengthen the regulatory definition of "specialty occupation."

In addition to the amendments to the NPRM recommended in section I, subsection D, CIS recommends that DHS further strengthen the regulatory definition of "specialty occupation" to clarify that a position would not qualify as a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position.

Current 8 C.F.R. § 214.2(h)(4)(ii) defines "specialty occupation" as an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

If the minimum entry requirement for a position is a general degree without further specialization or an explanation as to what type of degree is required, the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), would not be satisfied. For example, a requirement of a *general* engineering degree for a position of software developer would not satisfy the specific specialty requirement. In such an instance, the petitioner would not satisfactorily demonstrate how a required general engineering degree provides a body of highly specialized knowledge that is directly related to the duties and responsibilities of a software developer position.

While a position may allow a range of degrees, and apply multiple bodies of highly specialized knowledge, each of those qualifying degree fields must be directly related to the proffered position. As DHS explained in 2020,[52] this requirement is consistent with the statutory requirement that a degree be "in the specific specialty" and has long been the position of DHS and its predecessor, Immigration and Naturalization Service (INS).[53]

### C. DHS must expand worksite enforcement and rescind its nonenforcement policies.

CIS urges DHS to rescind its October 27, 2021 policy memorandum, *Guidelines for Enforcement Actions in or Near Protected Areas*.[54] As a result of this overbroad policy, U.S. Immigration and Customs Enforcement (ICE) officers are fundamentally barred from engaging in any enforcement action in the interior of the country in places that are located in or near locations that DHS has identified as "protected places." Such places include recreation centers, schools, places of worship or religious study, locations that offers vaccinations (such as pharmacies), community-based organizations, any locations that host weddings (such as a civic center, hotel, or park), any locations with a school bus stop, any places "where children gather," and many more sites that are also common places of employment.[55] Under this policy, officers are also prohibited from enforcing the law anywhere "near" these locations, an imprecise standard that has "no bright-line definition."[56]

DHS must also resume widespread worksite enforcement audits to ensure compliance with employers' federal immigration and labor laws and to rescind its October 12, 2021 policy memorandum, *Worksite Enforcement: The Strategy to Protect the American Labor Market, the*

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[52] *See* 85 Fed. Reg. 63918, 63925 (Oct. 8, 2020).

[53] *See Royal Siam Corp.* v. *Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (stating "[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H–1B specialty occupation visa"); *see also Shanti, Inc.* v. *Reno*, 36 F. Supp. 2d 1151, 1166 (D. Minn.1999) (the proffered position's requirement of a business administration degree is a general degree requirement, and therefore, INS did not abuse its discretion in denying the H–1B petition); *All Aboard Worldwide Couriers, Inc.* v. *Attorney General*, 8 F. Supp. 2d 379, 381 (S.D.N.Y. 1998) (INS did not abuse its discretion in determining that the proffered position did not qualify as a specialty occupation based on "an absence of evidence that [the petitioner] require[s] job candidates to have a B.A. in a specific, *specialized* area.").

[54] Memorandum to Tae Johnson, Acting Director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Guidelines for Enforcement Actions in or Near Protected Areas (Oct. 27, 2021).

[55] *Id*.

[56] *Id*.

*Conditions of the American Worksite, and the Dignity of the Individual*.[57] Robust worksite enforcement efforts are necessary to ensure the integrity of labor and immigration laws, and promote a fair and healthy domestic labor market. Any robust worksite enforcement endeavor cannot be effective so long as DHS continues to broadly prohibit U.S. Immigration and Customs Enforcement (ICE) officers from engaging in enforcement actions. Overly narrow DHS guidelines already drastically limit which aliens can be subject to immigration enforcement,[58] but DHS's October 2021 policies further undermines ICE's mission by severely limiting where officers may even conduct enforcement actions or observation.

These nonenforcement policies subvert DHS's ability to effectively detect fraud and abuse in the H-1B program. DHS cannot accomplish its enforcement mission when it has defined "protected areas" so broadly as to include large portions of U.S. communities, including businesses and locations that employ millions of people in the United States.

### D. USCIS should require employers to demonstrate an ability to pay their current and prospective workers before USCIS approves an H-1B petition.

CIS strongly recommends that DHS require employers to demonstrate an ability to pay its existing workforce and any foreign workers that an employer petitions for an H-1B visa. Requesting evidence that an employer has the financial means to compensate its current and prospective workers consistently with any existing labor contract, state, local, and federal labor laws, and relevant immigration laws would reduce the risk that an employer is improperly using the H-1B program to replace U.S. workers, to exploit H-1B workers, or for the sole purpose of outsourcing the business.

As discussed in detail above, Congress created the H-1B nonimmigrant program to supplement the domestic workforce when legitimate gaps exist in the labor market. USCIS should not assume that employers who cannot demonstrate an ability to pay their workers will participate in the H-1B program lawfully, in good faith.

Sincerely,

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[57] Memorandum to Tae Johnson, Acting Director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (October 12, 2021).
[58] Memorandum to Tae Johnson, Acting Director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Guidelines for Enforcement of Civil Immigration Law (Sept. 30, 2021).