CENTER FOR IMMIGRATION STUDIES

October 24, 2025

Business and Foreign Workers Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capitol Gateway Drive
Camp Springs, MD 20746

Re: Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject H-1B Petitions, CIS No. 2820-25; DHS Docket No. USCIS-2025-0040

Dear Mr. Good,

The Center for Immigration Studies (CIS) respectfully submits the following public comment to the U.S. Department of Homeland Security (DHS) in response to the department's notice of proposed rulemaking (NPRM), "Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject H-1B Petitions," Docket No. USCIS-2025-0040, as published in the Federal Register on September 24, 2025.

CIS is a national, nonprofit, public-interest organization comprised of millions of concerned citizens who share a common belief that our nation's immigration laws must be enforced, and that policies must be reformed to better serve the national interest. CIS examines trends and effects, educates the public on the impacts of sustained high-volume immigration, and advocates for sensible solutions that enhance America's environmental, societal, and economic interests today, and into the future.

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.[1] 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.[2]

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

[1] INA § 101(a)(15)(H)(i)(b).
[2] INA § 214(i).

safeguards to the domestic labor market.[3] 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 the U.S. Citizenship and Immigration Services (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.[4] 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,"[5] 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."[6] DOL's regulations set four prevailing wage levels classified as "entry," "qualified," "experienced," and "fully competent," respectively, relative to the occupation.[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

[3] *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").
[4] 8 C.F.R. § 214.2.
[5] INA § 212(n)(1)(A).
[6] INA § 212(p)(4).
[7] U.S. Dep't of Labor, Emp. and Training Admin., *Prevailing Wage Determination Policy Guidance: Nonagricultural Immigration Programs* (revised Nov. 2009).

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).

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] Under the current framework, lower wage level workers (i.e., workers with lower levels of experience, education, and/or skill) are able to crowd out workers with higher levels of experience, education, and/or skill from receiving visas.

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.[11] 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.[12] 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.[13] As a result, many companies are able to circumvent even these minimal protections.[14]

In addition to structural flaws, the H-1B nonimmigrant visa program has been plagued with fraud and abuse since its inception.[15] 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

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[8] *See* Emp. and Training Admin., U.S. Dep't of Labor, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Nov. 2009).
[9] *See* 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. Dep't of Homeland Sec., U.S. Citizenship and Immigr. Servs., Office of Policy and Strategy, Policy Research Division, H-1B 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* 20 C.F.R. §§ 655.736, 655.737(c), 655.738.
[12] *See* INA § 212(n)(1)(A)(i); 20 C.F.R. § 655.732(a).
[13] *See* INA § 212(n)(3); 20 C.F.R. § 655.736(g).
[14] In May 2024, the Bureau of Labor Statistics reported that the median annual wage for workers in "Computer and Information Technology Occupations" in the United States was $105,990. U.S. Bureau of Labor Stat., Occupational Outlook Handbook, *Computer and Information Technology Occupations*, May 2024.
[15] Cong. Research Serv., *The H-1B Visa for Specialty Occupation Workers* (IF12912), at 1, 4 (Feb. 18, 2025) (noting "program fraud and abuse" as a key concern).

companies colluding with universities and other cap-exempt entities to cheat the system and obtain workers without participating in the H-1B lottery.[16]

Moreover, site visits conducted by the USCIS Fraud Detection and National Security Division (FDNS) 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).[17]

II. DHS Should Replace the Purely Random H-1B Lottery with One that Gives Priority to Workers at Higher Wage Levels.

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*, 86 Fed. Reg. 1676 (Jan. 8, 2021), to require USCIS to select higher-paid and higher-skilled foreign workers for H-1B cap-subject visas. In the alternative, CIS supports DHS's current proposal to give petitions certified at higher wage levels more weight, but believes this proposal, while a notable improvement from the status quo, will be less effective at protecting the interests of U.S. and foreign workers.

Currently, USCIS issues H-1B cap-subject visas on a purely random basis using a lottery system.[18] 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.

A. USCIS's Random Selection Process Hurts Both U.S. and H-1B Workers.

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-

[16] *See, e.g.,* 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)); Center for Immigration Studies, *Untold Stories: The American Workers Replaced by the H-1B Visa Program* (May 4 2019); *U.S. Att'y's Office, S.D. Ohio, Wright State University Agrees to Pay Government $1 Million for Visa Fraud* (Nov. 16, 2018) (Investigators found the university "grossly misused the H-1B visa cap exemption," placing H-1B workers with outside companies so cap-subject firms could use those workers via contracts).
[17] 88 Fed. Reg. 72870, 72907 (Oct. 23, 2023).
[18] 86 Fed. Reg. 1676 (Jan. 8, 2021).

skilled aliens that are commensurate with higher wage levels, to increase the likelihood of selection for an eventual petition.[19] 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.[20]

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 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.

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[19] *See* 86 Fed. Reg. 1676 (Jan. 8, 2021).

[20] *See* U.S. Dep't of Homeland Sec., U.S. Citizenship and Immigr. Servs., Off. 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).

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 with 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 a 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.

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.[21] In addition to increasing the highest-qualified aliens' access to immigration benefits, this policy change will benefit U.S. workers as well, who often unfairly compete with foreign workers who are paid less than their American counterparts for the same jobs in the same locations. This happens because the laws and regulations governing the H-1B program generally do not require employers to attempt to hire a U.S. worker before petitioning for a H-1B worker.

B. USCIS Can Lawfully Select H-1B Petitions Based on Wage Levels.

USCIS can lawfully select H-1B petitions based on prioritizing wage levels or select H-1B petitions given the weighted selection scheme posed by this NPRM. The agency is not confined to employing either a purely random or purely chronological selection process.

[21] *Id.*

The methodology for the H-1B registration selection (or petitions, in years registration is suspended) is a matter that Congress left to USCIS discretion.[22] 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."[23] 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.[24]

Accordingly, DHS must 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.[25] "Congress left to the discretion of USCIS how to handle simultaneous submissions."[26]

Prioritizing selections based on wage level 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.

Similarly, weighting petitions based on wage level while conducting a lottery is another reasonable interpretation of the statute. While this method would be less effective in preventing the program from undermining conditions in the domestic labor market, it would still be an improvement from the status quo.

CIS suggests amending the proposed selection process to more closely align with the statute and the agency's policy objectives. To accomplish this, USCIS should create application windows for each wage level, beginning with the highest wage level (4). Hypothetically, USCIS could require that petitions for workers receiving level 4 wage levels be submitted between April 1 and April 15, petitions for workers receiving level 3 wage levels be submitted between April 16 and April 30, petitions for workers receiving level 2 wage levels be submitted between May 1 and May 15, and petitions for workers receiving level 1 wages be submitted between May 16 and May 30. Of course, USCIS could adjust the filing windows in its discretion. Additionally, when USCIS receives more petitions than visas are available in each wage level, USCIS could further narrow

[22] *Walker Macy LLC v. U.S. Citizenship & Immigration Servs.*, 243 F. Supp. 3d 1156, 1170 (D. Or. 2017) (citing 8 U.S.C. §§ 1103(a), 1184(a)(1)); *see also* 6 U.S.C. § 271(a)(3).
[23] INA § 214(g)(3).
[24] *See Walker Macy LLC v. USCIS,* 243 F. Supp. 3d 1156, 1170 (D. Or. 2017).
[25] *See* INA §§ 103(a), 214(a) and (c)(1).
[26] *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).

the selection process either by a random method or one that prioritizes occupations with the greatest need for workers.

Conducting the selection process this way will allow USCIS to ensure when it selects a petition based on the highest proffered wage level, that wage level was filed before any petition with a lower wage level, consistent with INA § 214(g)(3). CIS believes this type of selection process would benefit both U.S. and foreign workers, provide increased predictability to employers, and better withstand legal challenges.

III. DOL Must Amend 20 C.F.R. §§ 655.731 and 646.40 to Raise Wage Level Rates in the H-1B, H-1B1, E-3, and PERM Programs Because Current Wage Level Rates Conflict with Statutory Requirements.

DOL must amend 20 C.F.R.§§ 655.731 and 646.40 to raise the wage levels required in the H-1B, H-1B1, E-3 and PERM visa programs. Current regulations allow employers to pay foreign workers certified at wage level 1 or wage level 2 below the prevailing or average wage, contrary to what is required by statute.[27] Moreover, the current framework frustrate the primary purpose of the restrictions on immigration created by the INA, both numerical and otherwise, which is to "preserve jobs for American workers."[28]

As explained above, under the INA, employers must 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 "the prevailing wage level for the occupational classification in the area of employment."[29] These requirements are meant to guard against unfair competition, wage suppression, and the replacement of U.S. workers by foreign labor.[30]

In the PERM context, statute requires that the Secretary of Labor determine that there are no qualified U.S. workers available and that hiring the foreign worker "will not adversely affect the wages and working conditions of workers in the United States similarly employed."[31] To accomplish this, employers must attest that they offer a wage that equals or exceeds the prevailing wage. DOL implements these requirements through regulation, which sets the

[27] INA § 212(n)(1)(A)-(C).
[28] *Sure-Tan, Inc.* v. *N.L.R.B.,* 467 U.S. 883, 893 (1984).
[29] INA § 212(n)(1)(A).
[30] *See* 65 Fed. Reg. 80110 (Dec. 20, 2000) ("The [INA], among other things, requires that an employer pay an H-1B worker the higher of the actual wage or the prevailing wage, to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers."); *Panwar* v. *Access Therapies, Inc.,* 975 F. Supp. 2d 948, 952 (S.D. Ind. 2013) ("The wage requirements are designed to prevent . . . the influx of inexpensive foreign labor for professional services.").
[31] INA § 212(a)(5)(A).

prevailing wage standard.[32] Similar to the H-1B program, the prevailing wage requirement is intended to further the statute's primary purpose of protecting the interests of U.S. workers.[33]

Despite the standards set by statute to minimize unfair competition against U.S. workers, the wage levels that have been set by DOL allow employers to offer wages significantly below the prevailing wage so long as the employer hires a worker at wage level 1 (17th percentile) or level 2 (34th percentile). Wage level 3 is set at the prevailing wage level (50th percentile), and only wage level 4 requires employers to offer wages above the prevailing wage (at least the 67th percentile).[34]

In addition to setting two of the four wage levels below the prevailing wage, the data set DOL uses, OES, includes the wages of workers who themselves may not be considered to qualify for a "specialty occupation," the only type of occupation an H-1B worker can perform under that visa classification, further diluting the pay an H-1B worker should receive.[35] The statutory framework, however, requires DOL to set the prevailing wage levels based on what workers similarly employed to foreign workers make, taking into account worker's qualifications.[36]

It is inappropriate to consider the wages of the least educated and experienced workers in OES occupational classifications in setting the prevailing wage levels. While OES may be the best data set DOL has available to consider wage statistics, DOL, has never offered a full explanation or economic justification for the way it currently calculates the prevailing wage levels it uses for these foreign labor programs.[37] As DOL explained in 2020, "Common sense dictates that workers making less than the median wage of the occupation cannot be regarded as being similarly qualified to the most competent and experienced members of that occupation."[38]

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[32] 20 C.F.R. §§ 656.10(c)(1), 656.40, 656.41.
[33] *See, e.g., Durable Mfg. Co.* v. *U.S. Dep't of Labor,* 578 F.3d 497, 502 (7th Cir. 2009) ("The point remains that the new § 656.30(b) advances, to some degree, the congressional purpose of protecting American workers."); *Rizvi* v. *Dep't of Homeland Sec. ex rel. Johnson,* 627 F. App'x 292, 294-95 (5th Cir. 2015) (unpublished) ("Viewed in the proper context, the challenged regulation serves purposes in accord with the statutory duty to grant immigrant status only where the interests of American workers will not be harmed; showing the employer's ongoing ability to pay the prevailing wage is one reasonable way to fulfill this goal.").
[34] 20 C.F.R. § 656.40(b)(2).
[35] *See* 85 Fed. Reg. 63872, 63880-81 (Oct. 8, 2020), U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook* (last modified Aug. 28, 2025).
[36] INA § 212(n)(1)(A)(i)(II) ("The employer – (I) will pay the nonimmigrant 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.").
[37] *See* 78 Fed. Reg. 24047, 24051 (Apr. 24, 2013) ("Since the OES survey captures no information about actual skills or responsibilities of the workers whose wages are being reported, the two-tier wage structure introduced in 1998 was based on the assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a reasonable proxy for the entry-level wage. DOL did not conduct any meaningful economic analysis to test the validity of that assumption ….").
[38] 85 Fed. Reg. 63872, 63881 (Oct. 8, 2020).

DOL's wage level structure has directly resulted in harm to U.S. workers and foreign workers alike. Unsurprisingly, the vast majority of H-1B workers petitioned for by employers are at the first or second wage level rates. Data provided by DHS in November 2020 showed that the two-year average of H-1B selections for FY 2019 and FY 2020 indicated that 85 percent of employers were paying at wage levels I or II.[39] Additionally, 90 percent of petitions that claimed an advance degree exemption were given to employers paying at wage levels I and II.[40] Moreover, in the preamble of this NPRM, DHS noted that in every fiscal year from FY 2019 to FY 2024, petitions for beneficiaries at wage levels III and IV (the higher of the four wage levels and the only two that meet or exceed the prevailing wage) were the least represented among all wage levels in cap-subject H-1B filings, both under the regular cap and the advanced-degree exception.[41]

In place of the current framework, CIS recommends that DOL set wage level 1 to be at least above the 50th percentile for that occupation based on the BLS OES survey, with each higher level advancing from there. Setting wage level 1 above the 50th percentile will reflect both the statutory requirement that workers be paid at least the prevailing wage while accounting for the existence of some workers in the OES occupation classification that inevitably would not meet the requirements for H-1B visas. Artificially lowering the prevailing wage standards through DOL's wage level rate regulations allow employers to hire and retain foreign workers at wages well below U.S. workers in the same labor market, performing similar jobs, and possessing similar levels of education, experience, and responsibility receive, contrary to the language and spirit of the INA.

IV. DHS Must Amend 8 C.F.R. §§ 214.2(h)(8)(iii)(F)(4) and 214.2(h)(19)(iii)(C), Which Unlawfully Expand the Types of Positions and Employers Who May Petition for Cap-Exempt H-1B Workers.

DHS must amend 8 C.F.R. §§ 214.2(h)(8)(iii)(F)(4) and 214.2(h)(19)(iii)(C), which define "non-profit research organization" and "governmental research organization." Changes made to these provisions in 2024 unlawfully expanded eligibility for cap-exempt H-1B visas and widened loopholes that allow unqualified or for-profit organizations to benefit from cap exemption, directly in conflict with the statute.

Historically, regulations required that a nonprofit research organization be "primarily engaged in resource" or have its "primary mission" be research. Governmental research organizations similarly were required to be "primarily engaged" or have its "primary mission" be research to

[39] 85 Fed. Reg. 69236, 69250 (Nov. 2, 2020).
[40] *Id*.
[41] 90 Fed. Reg. 45986, 45989 (Sept. 24, 2025) (citing USCIS OPQ, CLAIMS3 and ELIS, queried 3/2025, TRK #17265. LCA data from DOL. Disclosure Files for LCA Programs (H-1B, H-1B1, E-3), FY-2018-FY-2024).

qualify. The changes to the rule, finalized in 2024, however, lowered these thresholds such that an organization could qualify for the H-1B cap exemption if research was just a "fundamental activity" of the entity, rather than being its primary mission.[42] Additionally, DHS 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 replaced 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.[43]

Specifically, DHS reduced 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. Under the new standard, work performed for a qualifying cap-exempt employer can now include remote work or off-site work, provided that at least *half* of the beneficiary's tie is spent performing duties for the qualifying entity. Prior to the regulatory change, performance of job duties had to occur at the physical location of that employer (or at its site where the qualifying entity operated).[44]

These changes weakened 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.[45] Senator Grassley 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."[46] As Senator Grassley explained, "such arrangements are a backhanded attempt to evade the prohibition on self-employment by H-1B workers."[47] 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

[42] 89 Fed. Reg. 103054 (Dec. 18, 2024).
[43] 8 C.F.R. § 214.2(h)(8)(iii)(F)(4).
[44] *See* 89 Fed. Reg. 103054 (Dec. 18, 2024).
[45] Letter from Senator Chuck Grassley to Leon Rodriguez, Director, U.S. Citizenship and Immigr. Servs. (February 25, 2016).
[46] *Id*.
[47] *Id*.

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."[48]

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 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."[49]

This is a clear example of H-1B program abuse because it undercuts the heart of what the statute and regulations require: a bona fide employer-employee relationship and a legitimate job offer to perform a specialty occupation work for a U.S. employer,[50] not self-employment disguised as sponsorship.[51] The program effectively manufactured "employers" whose sole purpose was to allow the foreign national to self-petition. However, Congress designed the H-1B program for employer-driven hiring to fill bona fide labor shortages – not for foreign entrepreneurs to sponsor themselves through shell entities.[52]

The changes created by these new regulatory provisions facilitate this kind of H-1B abuse. In a purported attempt to "create more flexibility for nonprofit and government research organizations,"[53] DHS weakened 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). Accordingly, CIS recommends that DHS amend 8 C.F.R. §§ 214.2(h)(8)(iii)(F)(4) and 214.2(h)(19)(iii)(C) to only allow an alien to receive a cap-exempt H-1B visa if they are directly employed by a qualifying employer.

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[48] *Id*.
[49] *Id*.
[50] *See* INA § 214(c), 8 C.F.R. § 214.2(h)(4)(ii).
[51] To "create" an employer–employee relationship, NYCEDC arranged for each startup to form a board of directors that could *nominally* "employ" and "supervise" the entrepreneur — allowing the company to file an H-1B petition for its own founder. But that "board" existed only to satisfy USCIS's formal requirement; it did not represent an independent, functioning employer capable of exercising *real* control over the H-1B worker's employment.
[52] *See* Immigration Act of 1990, Pub. L. No. 101-649, § 205, 104 Stat. 4978, 5011 (codified as amended at 8 U.S.C. § 1184(c)); H.R. REP. NO. 101-723, pt. 1, at 674 (1990) ("[The H-1B category] is designed to help U.S. employers meet temporary needs for highly skilled foreign workers in specialty occupations.").
[53] 88 Fed. Reg. 72870, 72872 (Oct. 23, 2025).

V. DHS Should Repeal 8 C.F.R. § 214.1(c)(5) to Reduce Fraud in the H-1B Program.

CIS strongly recommends that DHS repeal 8 C.F.R. § 214.1(c)(5), which imposes a deference policy for H-1B adjudications and constrains USCIS officer's fact-finding authority. This policy instructs immigration officers to conform to prior determinations involving the same parties.

8 C.F.R. § 214.1(c)(5) applies to all nonimmigrants using Form I-129, Petition for a Nonimmigrant Worker, including a request on Form I-129 involving the same parties and same material facts. Moreover, the regulation applies 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.[54]

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,"[55] CIS respectfully asserts that under this regulation, 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.[56]

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.[57]

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

[54] *Matter of Church Scientology Intl*, 19 1&N Dec. 593, 597 (Comm'r 1988).
[55] 88 Fed. Reg. 72870, 72880 (Oct. 23, 2023).
[56] *Matter of Church Scientology Intl.*, 19 I. & N. Dec. at 597.
[57] *See* 8 C.F.R. § 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 C.F.R. § 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.")

petition extension, consisting with existing USCIS policy regarding requests for evidence, notices of intent to deny, and the adjudication of petitions for nonimmigrant benefits.

VI. DHS Must Amend 8 C.F.R. § 214.2(h)(4)(ii) to Define of Specialty Occupation to Require Attainment of a Bachelor's or Higher Degree, Consistent with INA § 214(i).

DHS must amend its definition of "specialty occupation" at 8 C.F.R. § 213.2(h)(4)(ii) to exclude occupations that do not always require attainment of a bachelor's degree or higher to comply with statute. In addition to conforming to legal requirements, this change will ensure that H-1B visas are reserved to fill occupations that are most difficult to fill, consistent with congressional intent that the H-1B program supplement, not replace, U.S. workers in high-skill jobs.[58]

INA § 214(i)(1)(A)-(B) defines "specialty occupation" as an occupation that "requires theoretical and practical application of a body of highly specialized knowledge" and "*requires the 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." (Emphasis added.) DHS's regulatory definition, however, lowered this standard by first, saying 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, rather than always required.

In December 2024, DHS finalized a rule that further weakened the definition of "specialty occupation" by clarifying that "normally" for the purposes of this criterion "does not mean always."[59] However, even with this clarifying language, this wording remains subjective and 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 language that a attainment of a bachelor's degree or higher be required as a minimum for entry into the occupation.[60]

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[58] *See* INA § 212(n)(1)(A)(i)(I)–(II); S. Rep. No. 106-260, at 11 (2000) (noting that "the purpose of the H-1B program is to help employers fill gaps in the U.S. workforce in specialty occupations where there is a shortage of skills, not to displace U.S. workers."); 89 Fed. Reg. 103054, 103064 (Dec. 18, 2024) ("This rule helps ensure that the H-1B program continues to serve its intended purpose of allowing employers to hire foreign workers to fill specialty occupations in cases of genuine need, while protecting U.S. workers.").

[59] 89 Fed. Reg. 103054 (Dec. 18, 2024).

[60] *See* 85 Fed. Reg. 63918, 63926 (asserting that the pre-2024 definition of specialty occupation should be strengthened because the words "normally," "common," and "usually" "could be read to encompass anything from 51 percent to 99 percent, and possibly a broader range depending on the interpretation, highlighting how ambiguous they are. Use of these terms, if interpreted to mean that a position is a specialty occupation if merely 51 percent of positions within a certain occupation require at least a certain bachelor's degree, is inconsistent with the most natural read of, and arguably runs directly contrary to the statutory definition of, a 'specialty occupation' which imposes a

Accordingly, CIS believes these provisions create a standard that is unlawfully low. 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 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).[61] Striking "normally" in the term's definition in 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 equating to a bachelor's degree in culmination.

CIS's proposed amendment would more closely conform to the requirements in the statute and likewise ensure 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.

VII. DHS Should Revive the H Nonimmigrant Visa Programs' Itinerary Requirement.

CIS strongly recommends that DHS restore the H programs' itinerary requirement under former 8 C.F.R. § 214.2(h)(2)(i)(B), which stated 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." DHS revoked this requirement in 2024 by amending 8 C.F.R. § 214.2(h)(2)(i)(B) and (F). Restoring these guestworker programs' itinerary requirements will help DHS both detect and deter fraud in the H nonimmigrant visa programs.

DHS should amend this proposed rule to require that, in addition to providing an itinerary that only includes the dates and locations of services, that petitioners provide more detailed itineraries

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minimum entry requirement of a bachelor's or higher degree in the specific specialty (or its equivalent)."); INA 214(i)(1).

[61] *See* INA § 214(i)(1).

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.

CIS also disagrees with DHS's 2024 conclusion that itineraries are not necessary because some information is provided elsewhere within the petition and required documentation.[62] When an itinerary clarifies where and when work will occur, DHS and DOL can more easily verify that wages correspond to each work location, ensuring compliance with prevailing wage requirements and preventing wage arbitrage across regions. Clear itineraries promote adjudicatory consistency and reduce Requests for Evidence (RFEs). Employers will also benefit from predictable standards that clarify documentation expectations at filing, while DHS gains a more objective basis for determining eligibility.

Moreover, an itinerary requirement supports the statutory mandate under INA § 214(c)(1) that the petitioner demonstrate control over the beneficiary's work. When workers are placed at third-party sites, DHS must ensure that the H-1B petitioner, rather than a client company, retains the right to hire, pay, supervise, and terminate the beneficiary.[63] Requiring an itinerary allows adjudicators to verify that each worksite reflects a genuine employer-employee relationship and not an impermissible labor-for-hire arrangement.

Itineraries discourage "benching" practices by third party recruiters and false claims of work availability, consistent with DOL's enforcement authority under 20 C.F.R. § 655.731(c)(7)(i). Without an itinerary, petitions could secure H-1B approvals for speculative employment and file petitions before contracts exist or before clients are identified.

Itineraries also facilitate DHS compliance with the OIG's recommendations regarding fraud reduction in these programs.[64] USCIS FDNS can better focus their resources by targeting site visits to verify compliance. An itinerary gives FDNS officers the opportunity to know where to inspect and ensures employers cannot obscure offsite placements, which will enhance transparency and accountability.

[62] 89 Fed. Reg. 103054, 103100 (Dec. 18, 2024).
[63] *See* 8 C.F.R. § 214.2(h)(2)(i)(A); *Matter of Aphrodite Investments Ltd..,* 17 I&N Dec. 530 (Comm'r 1980).
[64] U.S. Gov't Accountability Off., *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program*, GAO-11-26 (Jan. 2011).

VIII. DHS Should Require Employers to Demonstrate an Ability to Pay Current and Prospective Workers Before USICS 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.

IX. Conclusion

CIS commends DHS for taking steps to strengthen integrity in the H-1B program through this proposed rule. While CIS believes DHS's proposal will improve the status quo, the reforms outlined above are essential to ensure that the H-1B program fulfills its statutory purpose: to allow U.S. employers to temporarily hire truly high-skilled workers when qualified U.S. workers are unavailable – without displacing or undercutting American labor.

Replacing the purely random selection process with one that prioritizes higher wages and higher skill levels will help restore the program's original intent, discourage abuse, and protect both U.S. and foreign workers from unfair labor practices. In tandem, revising DOL's prevailing wage methodology, narrowing cap exemptions to bona fide nonprofit and governmental research organizations, reinstating the itinerary requirement, repealing the deference policy, and tightening the "specialty occupation" definition will close known loopholes and enhance oversight.

Taken together, these changes will make the H-1B program more transparent, merit-based, and consistent with the letter and spirit of the INA. CIS urges DHS to adopt a final rule that fully advances these objectives and to coordinate with DOL to ensure that wage-setting and certification processes align with congressional intent**.**