National Foundation for American Policy

April 13, 2022

Contact: Stuart Anderson, 703-351-5042, press@nfap.com

Bipartisan Experts Recommend H-1B Policy Modernization To Free Up USCIS Resources and Improve U.S. Competitiveness

Recommend USCIS Avoid Trump Administration's H-1B Policies That Wasted Resources And Judges Found Unlawful

Arlington, Va. – Bipartisan experts recommend U.S. Citizenship and Immigration Services (USCIS) adopt H-1B policies for high-skilled foreign nationals that free up USCIS resources and improve U.S. competitiveness rather than Trump administration's policies that wasted agency resources and judges found unlawful, according to a new report released by the National Foundation for American Policy (NFAP), a nonpartisan research organization. The authors of the report are Leon Rodriguez, who served as the Director of USCIS from 2014 to 2017 during the Obama administration, Lynden Melmed who served as Chief Counsel of USCIS during the George W. Bush administration, and Steve Plastrik, who served as Associate Counsel for the USCIS Vermont Service Center, where he advised USCIS officers on employment-based nonimmigrant eligibility issues. Rodriguez is a partner at Seyfarth Shaw LLP. Melmed is a partner with Berry Appleman & Leiden (BAL) LLP and Plastrik is a senior associate at BAL.

The report, "Modernizing H-1B Policies and Regulations," can be found at https://nfap.com/.

The Biden administration has made updating H-1B regulations a priority and plans to release a proposed regulation to "modernize" the H-1B visa category.[1] If done correctly, revising H-1B policy could eliminate operational inefficiencies, free up resources for USCIS, direct adjudicators' attention in a more sustainable fashion and improve the competitiveness of the U.S. economy and American businesses.

The Biden administration should avoid the Trump administration's approach to H-1B visa policy, according to the report's authors. The Trump administration's approach resulted in policies that judges ruled to be unlawful, led to high denial rates for H-1B professionals and their employers, encouraged litigation, disrupted legitimate business activity and squandered USCIS resources. The Trump administration's attempt to memorialize these policies in an October 2020 regulation was struck down in court.

Economists and policymakers agree that America needs more people with skills in technology fields. A National Foundation for American Policy analysis of data from EMSI found "more than 1.5 million job vacancy postings in computer occupations (as of December 6, 2021) . . . *close to 30 times* more available jobs in computer occupations than H-1Bs who fill such jobs annually."[2] USCIS data show the median annual salary for H-1B visa holders in FY 2020 was $101,000, and nearly two-thirds possessed a master's degree or higher.[3] Other countries compete with the United States

[1] *Modernizing H-1B Requirements and Oversight and Providing Flexibility in the F-1 Program*, Office of Management and Budget, available at: https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1615-AC70.
[2] Stuart Anderson, "The Outlook on H-1B Visas and Immigration in 2022," *Forbes*, Jan. 3, 2022.
[3] *Characteristics of H-1B Specialty Occupation Workers, Fiscal Year 2020 Annual Report to Congress*, U.S. Citizenship and Immigration Services (Feb. 17, 2021), available at:

for foreign-born scientists and engineers, and U.S. immigration policy and how it is administered plays a significant role in that global competition.

USCIS, the federal agency that adjudicates employers' petitions for H-1B professionals, has drifted from the laws passed by Congress. USCIS issued policy guidance and regulations that placed additional restrictions on H-1B visa eligibility, required extensive documentation from employers to meet the applicable preponderance standard and generated inefficiencies within the agency. These issues are most evident in how USCIS has interpreted which jobs qualify as a "specialty occupation," how employers demonstrate they have a valid employment relationship with an H-1B professional and the types of evidence USCIS requires to demonstrate a position exists for the H-1B visa holder.

The Biden administration's H-1B modernization regulation should center on the following areas and principles:

DOL, not USCIS, Was Designated to Investigate and Oversee H-1B Visas: Congress designated the U.S. Department of Labor (DOL), not USCIS, to investigate and oversee the labor market protections for the H-1B visa category. By attempting to take on the duties of another agency, USCIS has engaged in questionable policy pursuits and expended vital resources.

In establishing new restrictions on H-1B visa holders via memos and regulatory action, USCIS has ignored that Congress chose three primary methods to limit any potential negative impact of employers hiring high-skilled foreign nationals.

First, employers may only receive approved petitions within strict annual numerical limits—65,000 plus a 20,000 exemption for H-1B professionals with an advanced degree from a U.S. university. Those numerical restrictions act as a considerable restriction on H-1B visa holders, preventing USCIS adjudicators from even considering petitions for more than 70% of the H-1B applicants/registrants in FY 2022.[4]

Second, an employer must pay an H-1B professional "(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or (II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater."[5] Academic studies have found H-1B professionals are paid the same or higher than comparable U.S. professionals.[6]

Third, Congress included various additional provisions to limit potential negative impact on U.S. workers, including posting requirements and not allowing H-1B visa holders to be hired during a strike or lockout.

Numerous academic studies have found restrictions on H-1B visa holders have limited the ability of companies to grow in the United States and encouraged companies to shift jobs, research and development to Canada, India and elsewhere, thereby harming U.S. workers.[7] The research indicates a federal agency adding more restrictions on H-1B visa holders through regulations would harm, rather than help, U.S. workers and the American economy.

---

https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2020.pdf.

[4] *H-1B Electronic Registration Process,* U.S. Citizenship and Immigration Services, available at: https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process.

[5] *See* 8 U.S.C. § 1182(n)(1)(A).

[6] "H-1B Petitions and Denial Rates in FY 2021," NFAP Policy Brief, *National Foundation for American Policy*, Jan. 2022.

[7] Ibid.

USCIS Should Not Narrow What Qualifies as a Specialty Occupation: An H-1B professional must work in a specialty occupation. According to the law, "Specialty occupation means an occupation that requires theoretical and practical application of a body of specialized knowledge, and attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the United States . . ."[8]

Three years before the Trump administration's (failed) 2020 regulation, in March 2017, USCIS issued policy guidance issued to narrow the availability of H-1B visas by encouraging officers to take a restrictive and skeptical view of which positions would qualify for H-1B status.[9] As a result, during the Trump administration, USCIS lost several lawsuits due to its narrow interpretation.[10]

In formulating a new H-1B regulation, USCIS should avoid the Trump administration's approach of narrowing what qualifies as a specialty occupation. The Trump administration's regulation would have narrowed the positions that qualify as a "specialty occupation" to positions that "always" require a specific degree that is directly connected to the duties of the position.[11] That is not an accurate interpretation of the statute.

USCIS Should Avoid Redefining an Employer-Employee Relationship: USCIS narrowly redefined how an employer must demonstrate it will maintain an employer-employee relationship with the H-1B worker it sponsors.

On March 10, 2020, in *ITServe Alliance v. L. Francis Cissna*, U.S. District Judge Rosemary M. Collyer ruled, "The current USCIS interpretation of the employer-employee relationship requirement is *inconsistent with its regulation*, was announced and applied without rulemaking, and cannot be enforced."[12]

In effect, USCIS adjudicators went against its own regulation and the DOL definition of an employer, and on May 16, 2020, USCIS reached a settlement with the ITServe Alliance. Under the settlement terms, USCIS rescinded two policy memos responsible for higher H-1B denial rates and took other actions. The National Foundation for American Policy found H-1B denial rates dropped dramatically after judicial rulings in 2020 found USCIS actions to be unlawful, USCIS reached a legal settlement with the ITServe Alliance and the agency withdrew the memos: H-1B petitions for initial employment declined to 4% in FY 2021 to drop to 4%, "far lower than the denial rate of 24% in FY 2018, 21% in FY 2019 and 13% in FY 2020."[13]

---

[8] *See* 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) ("[A]n alien . . . who is coming temporarily to the United States to perform services . . . . in a specialty occupation described in section 1184(i)(1) of this title . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title . . . ."); 1184(i)(1) ("[T]he term 'specialty occupation' means an occupation that requires—(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry in the occupation in the United States.").

[9] *Rescission of the December 22, 2000 "Guidance memo on H-1B computer related positions,"* Policy Memorandum, PM-602-0142) (March 31, 2017), available at: https://www.uscis.gov/sites/default/files/document/memos/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf ("Computer Programmer Memo").

[10] Memorandum Opinion and Recommendation of U.S. Magistrate Judge, *InspectionXpert Corp. v. Kenneth T. Cuccinelli*, U.S. District Court of the Middle District of North Carolina, March 5, 2020.

[11] *Strengthening the H-1B Nonimmigrant Visa Classification Program*, Interim Final Rule, 85 Fed. Reg. 63918, 63926 (Oct. 8, 2020), available at: https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-22347.pdf ("2020 Strengthening IFR").

[12] Opinion by U.S. District Judge Rosemary M. Collyer *ITServe Alliance v. L. Francis Cissna*, U.S. District Court for the District of Columbia, March 10, 2020. Emphasis added.

[13] "H-1B Visa Denial Rates Plunge After Trump Administration Immigration Policies End," Stuart Anderson, *Forbes* (Jan. 12, 2022), available at: https://www.forbes.com/sites/stuartanderson/2022/01/12/h-1b-visa-denial-rates-plunge-after-trump-immigration-policies-end/.

Eliminate Operational Inefficiencies and Avoid Litigation: By narrowly defining what qualifies as a "specialty occupation" and routinely questioning whether the stated employer who has hired and will pay the foreign national worker is the true employer of the H-1B professional, USCIS created unnecessary work for itself and its officers. This drained agency resources, increased processing times for routine H-1B visa petitions and for other types of benefits, and contributed to the agency's ongoing funding issues. USCIS data show that the percentage of H-1B visa petitions receiving a Request for Evidence (RFE) nearly doubled between FY2015 and FY2019, growing from 22.3% to 40.2%.[14]

Clearer standards for the employer-employee relationship would result in more streamlined adjudications with fewer RFEs diving into criteria that cannot easily be demonstrated through available documentation and would bring greater consistency in how the standards are applied between officers and petitions. By streamlining the process and avoiding being bogged down in adjudication issues not prioritized in statute, USCIS would also free up additional resources and flexibility to address continued backlogs and other funding issues.

Defending sustained litigation has sapped resources from USCIS, and the outcomes of lawsuits have forced the agency to backtrack repeatedly on its policies. Courts have struck down USCIS's interpretations and guidance as ultra vires to Congressional intent and have blocked efforts to enshrine these policies in regulation. In October 2021, USCIS entered into another settlement agreement regarding its interpretation of "specialty occupation," this one involving whether market research analysts may qualify for H-1B status.[15]

The churn of litigation and policy backtracking consumed government resources and created uncertainty for employers, H-1B professionals and their team members and USCIS officers.

Recommendations: First, USCIS's actions should align with the focus of the statute. USCIS's focus on narrowing the definition of "specialty occupation" and policing business models has created an extreme litigation risk for the agency. This has drained USCIS resources that could have been used for other purposes.

Second, USCIS should create manageable standards and processes and concentrate on streamlining the petitioning process for employers and the adjudication process for its officers. By avoiding additional paperwork and frequent back-and-forth between the agency and employers, USCIS can limit delays and dedicate resources efficiently. Policies that generate excessive RFEs should be scrutinized.

Moving forward, USCIS should not place as much weight on the ownership of the office where the work occurs. In a world rapidly shifting to flexible office arrangements, the ownership of the office location is not as relevant to the issue of maintaining an employment relationship.

USCIS also should avoid creating a joint- or secondary-employment requirement, as was proposed in Department of Labor guidance issued by the Trump administration on January 15, 2021.[16] Requiring the petitioning employer and the customer to both file Labor Condition Applications with DOL and agree to the related obligations is not supported by the statutory structure created by

---

[14] "H-1B approval rates ticked up in FY2020, but remained historically low," *Berry Appleman & Leiden LLP News Alerts* (Feb. 22, 2021), available at: https://www.bal.com/bal-news/us-h-1b-approval-rates-ticked-up-in-fy2020-but-remained-historically-low/.

[15] *Directions for Class Members Filing Motions to Reopen Pursuant to Settlement Agreement in H-1B Market Research Analyst Class Action Litigation*, U.S. Citizenship and Immigration Services (Oct. 28, 2021), available at: https://www.uscis.gov/newsroom/alerts/directions-for-class-members-filing-motions-to-reopen-pursuant-to-settlement-agreement-in-h-1b.

[16] *H-1B Program Bulletin Clarifying Filing Requirements for Labor Condition Applications by Secondary Employers at 20 C.F.R. §§ 655.715 and 655.730(a)*, U.S. Department of Labor (Jan. 15, 2021), available at: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/DOL-ETA_OFLC_Clarifying-Guidance_H-1B-Secondary-Employers_FINAL.pdf.

Congress and goes against common sense. If a homeowner hires a landscaping company, does that make the homeowner also the legal employer of the worker sent by the company to mow the lawn? The operational and enforcement issues created by requiring multiple entities to ensure the wages, working conditions, benefits and other legal requirements for H-1B professionals would be insurmountable for most companies, particularly customers with limited knowledge of the worker. It could act as a de facto ban on H-1B professionals performing work at customer sites and is beyond the statute.

Third, USCIS should strive to create predictability in the H-1B visa category. This would align with Congressional statutes aimed at creating stability for employers and H-1B professionals, such as features in the law that allow dual intent, extensions for H-1B professionals pursuing green cards and job portability.

Finally, these solutions should work toward maximizing resources and flexibility for USCIS to assist the agency in working through its backlog in other case types and related funding issues.

Does the Biden administration wish to be associated with the anti-immigration approach of the Trump administration or to steer its own path on high-skilled immigration policy? The Biden administration has placed H-1B "modernization" on its regulatory agenda.[17] The administration can use the opportunity to eliminate operational inefficiencies, improve the adjudication of H-1B petitions, enhance U.S. competitiveness and free up resources in an agency strapped for time and money.

About the National Foundation for American Policy

Established in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, Cornell Law School professor Stephen W. Yale-Loehr and former INS Commissioner James W. Ziglar. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at www.nfap.com. Twitter: **@NFAPResearch**

2111 Wilson Blvd., Suite 700, Arlington, VA 22201
phone: (703) 351-5042 fax: (703) 351-9292 www.nfap.com

[17] *Modernizing H-1B Requirements and Oversight and Providing Flexibility in the F-1 Program*, Office of Management and Budget, available at: https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1615-AC70.