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# MODERNIZING H-1B POLICIES AND REGULATIONS

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## EXECUTIVE SUMMARY

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 U.S. Citizenship and Immigration Services (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. 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 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.

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

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.

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[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

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[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.

*Modernizing H-1B Policies and Regulations*

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]

**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.

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[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/.

[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.

**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 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.

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[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.

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.

[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.

## BACKGROUND

Congress designated the U.S. Department of Labor to investigate and oversee labor market protections for the H-1B visa category.[18] USCIS mired itself in questionable policy pursuits and expended vital resources by attempting to take on the duties of another agency. This pattern became pronounced during the Trump administration. After enacting restrictive policies, the denial rate for H-1B petitions rose to 24% in FY 2018 and Requests for Evidence increased dramatically, raising costs for USCIS and U.S. employers.[19]

In October 2020, the Trump administration published an interim final rule seeking to "strengthen" H-1B requirements.[20] Because USCIS published this as an interim final rule, the public and stakeholders did not have a meaningful opportunity to comment on the regulatory changes. Although litigation defeated the rule before it went into effect, the October 2020 regulation would have enacted numerous restrictions on H-1B visas. Employers declared the rule would have made it unlikely they could retain existing employees in H-1B status or hire new H-1B professionals.[21]

Employers explained the problems with the Trump administration's regulation in a successful lawsuit filed by the U.S. Chamber of Commerce and other business and education organizations. "Many of Amazon's most tenured employees with degrees that would not be considered 'directly related' under the DHS Rule are going to be at substantial risk of having their renewal cases denied," according to a declaration by Zane Brown, vice president & associate general counsel, labor and employment at Amazon. Katherine Carreau, associate general counsel at the University of Utah, citing the impact on medical research and the university's 350 employees in H-1B status, said in a declaration, "Unless enjoined, the DHS Rule will also result in substantial irreparable harm to the University of Utah and ARUP Laboratories."[22]

Congress enacted several provisions to limit any potential negative impact of employers hiring high-skilled foreign nationals.

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[18] *See* 8 U.S.C. §§ 1182(n)(1) (describing the process for filing a Labor Condition Application); (n)(2) (creating processes for receiving, investigating, and disposing of complaints).
[19] *H-1B Petitions and Denial Rates in FY 2021*, NFAP Policy Brief, National Foundation for American Policy, January 2022.
[20] *Strengthening the H-1B Nonimmigrant Visa Classification Program*, Interim Final Rule, 85 Fed. Reg. 63918 (Oct. 8, 2020), available at: https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-22347.pdf ("2020 Strengthening IFR").
[21] Ibid. at 63926.
[22] *Chamber of Commerce of the United States et. al. v. DHS*, Plaintiffs' Notice of Motion and Motion for Preliminary Injunction to Stay Agency Action or for Partial Summary Judgment, U.S. District Court in and for the Northern District of California, Oct. 23, 2020.

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.[23]

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."[24] Academic studies have found employers pay H-1B professionals the same or higher wages than comparable U.S. professionals.[25]

Third, Congress included a variety of additional provisions to limit potential negative impacts 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.[26]

Economists Giovanni Peri, Kevin Shih, Chad Sparber and Angie Marek Zeitlin concluded that preventing the entry of H-1B visa holders damaged job growth in the United States: "The number of jobs for U.S.-born workers in computer-related industries would have grown at least 55% faster between 2005-2006 and 2009-2010, if not for the denial of so many applications in the recent H-1B visa lotteries."[27]

Wharton School of Business Professor Britta Glennon examined the impact of more restrictive policies on H-1B visas and found, "[A]ny policies that are motivated by concerns about the loss of native jobs should consider that policies aimed at reducing immigration have the unintended consequence of encouraging firms to offshore jobs abroad."[28]

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[23] https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process.
[24] https://www.dol.gov/agencies/whd/laws-and-regulations/laws/ina/h1b.
[25] *H-1B Petitions and Denial Rates in FY 2021*, NFAP Policy Brief, *National Foundation for American Policy*, January 2022.
[26] Ibid.
[27] Giovanni Peri, Kevin Shih, Chad Sparber and Angie Marek Zeitlin (June 2014), *Closing Economic Windows: How H-1B Visa Denials Cost U.S.-Born Tech Workers Jobs and Wages During the Great Recession*, Partnership for a New American Economy.
[28] Britta Glennon, *How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H-1B Program*, Carnegie Mellon University, May 2019.

Although Congress imposed restrictions on H-1B visa holders, research indicates a federal agency adding more restrictions on H-1B professionals through regulations would harm, rather than help, U.S. workers and the American economy.

## USCIS Should Avoid Narrowing What Qualifies as a Specialty Occupation

Before it went into effect, litigation defeated the Trump administration's interim final rule seeking to "strengthen" H-1B requirements. The regulation would have followed the path of the Trump administration's 2017 policy guidance by enacting new restrictions.

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 . . ."[29]

In its 2020 regulation, the Trump administration narrowed what qualifies as a specialty occupation: "This change means that the petitioner will have to establish that the bachelor's degree in a specific specialty or its equivalent is a minimum requirement for entry into the occupation in the United States by showing that this is *always the requirement for the occupation as a whole*, the occupational requirement within the relevant industry, the petitioner's particularized requirement, or because the position is so specialized, complex, or unique that it is necessarily required to perform the duties of the specific position."[30]

USCIS's policy guidance issued more than three years before the regulation, in March 2017, had effectively narrowed the availability of H-1B visas by encouraging officers to take a restrictive and skeptical view of which

[29] *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.").
[30] 2020 Strengthening IFR, 85 Fed. Reg. at 63926. Emphasis added.

positions or professionals would qualify as a specialty occupation.[31] As a result, during the Trump administration, USCIS lost several lawsuits due to its narrow interpretation.[32]

In *InspectionXpert Corp. v. Kenneth T. Cuccinelli,* USCIS denied an H-1B petition an employer filed for Sathish Kasilingam, who earned a master's degree in mechanical engineering. USCIS claimed the position did not require a degree in a *specific subspecialty*. The agency argued, "The issue here is that the field of engineering is a broad category that covers numerous and various specialties."[33]

On March 5, 2020, U.S. Magistrate Judge L. Patrick Auld ruled against USCIS and its argument that the position did not qualify for an H-1B petition. Judge Auld noted an individual could meet the job's requirements with more than one type of engineering degree. The judge ruled, "That the [USCIS] Decision deemed an engineering degree requirement too generalized further confirms the unreasonableness of the Decision's interpretation. . . . Put simply, in contrast to a liberal arts degree, which the Service deemed 'an [in]appropriate degree in a profession' because of its 'broad[ness]' . . . an engineering degree requirement meets the specialty occupation degree requirement."[34]

The judge's ruling echoed a November 1, 2018, letter to the Trump administration by the business coalition Compete America. The letter stated that USCIS violated the law by "denying an H-1B petition on the basis that the degree held by the sponsored foreign professional is not within a single field of acceptable study for an occupation." The letter added, "Nothing in the statute allows for administrative discretion to restrict a qualifying specialty occupation to only those occupations where '*the* specific *specialty'* necessary for the job is only obtainable through completion of *a single*, exclusive *degree*."[35]

In October 2021, USCIS entered into another settlement agreement regarding its interpretation of "specialty occupation" and whether market research analysts may qualify for H-1B visas.[36]

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[31] *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").
[32] 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.
[33] Ibid. *See also* Stuart Anderson, "Judge Slaps Down USCIS In Significant H-1B Visa Court Case," *Forbes*, March 9, 2020.
[34] Ibid.
[35] Letter to Kirstjen Nielsen, Secretary, U.S. Department of Homeland Security, L. Francis Cissna, Director, U.S. Citizenship and Immigration Services, George Fishman, Deputy General Counsel, U.S. Department of Homeland Security and Craig Symons, Chief Counsel, U.S. Citizenship and Immigration Services, Compete America, November 1, 2018. Emphasis added.
[36] *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.

Several points on specialty occupations are relevant to USCIS and the future of the H-1B category. First, the March 2017 guidance asked USCIS officers to consult the U.S. Department of Labor's *Occupational Outlook Handbook* to assess the minimum educational requirements for occupations to determine if it qualified as a specialty occupation.[37] At the same time, the guidance specifically "reminded" officers that they "may not approve a petition based on inconclusive statements from the *Handbook* about entry-level requirements for a given occupation."[38] This guidance ignored the fact that the *Handbook* itself explicitly states that it "*is not intended to, and should never, be used for any legal purpose*" and "should not be used to determine if an applicant is qualified to enter a specific job in an occupation."[39]

Second, USCIS guidance increasingly focused on whether the employer had demonstrated a sufficiently direct connection between the duties of the proffered position and the specific degree(s) required for the occupation. For example, USCIS often questioned whether Operations Research Analysts qualify for H-1B visas because the *Handbook* describes this occupation as one where "some employers prefer to hire applicants with a master's degree" but there are "many entry-level positions . . . available for those with a bachelor's degree" in fields such as "engineering, computer science, analytics, or mathematics."[40] USCIS has viewed this language as inconclusive and failing to demonstrate that Operations Research Analyst positions meet the statutory definition of a "specialty occupation:" a role that requires the theoretical and practical application of a body of highly specialized knowledge requiring the attainment of at least a bachelor's degree in a specific specialty.[41]

Third, the agency also zeroed in on whether the title of the required degree aligned with the language in DOL resources or other documentation provided by the employer. For example, as in the *InspectionXpert Corp.* case, an employer's requirement that job applicants hold a degree in "engineering" led USCIS to deny H-1B visa petitions under the interpretation that because apparently the employer would accept any engineering degree, the position did not require a degree in a *specific* field.

Fourth, USCIS's guidance increasingly focused on issues related to employers who place H-1B professionals at the worksites of customers. These policies were based on suspicions that the end-client was the true employer of

[37] Computer Programmer Memo at 2 FN1.
[38] Ibid. at 3 FN7.
[39] Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, Disclaimer, available at: https://www.bls.gov/ooh/about/disclaimer.htm. Emphasis added.
[40] *See, e.g., Matter of P-D-S-*, ID# 283927 (AAO July 31, 2017), available at: https://www.uscis.gov/sites/default/files/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20%28H-1B%29/Decisions_Issued_in_2017/JUL312017_01D2101.pdf
[41] *See* 8 U.S.C. § 1184(i)(1).

the foreign national, and therefore the customer's job requirements controlled whether the position qualified as a specialty occupation.[42]

In addition to increased litigation, asking USCIS officers to view employer's evidence and claims with skepticism and to parse the meaning of largely interchangeable words used in the *Handbook* and other DOL resources (such as "most," "typically," and "commonly") led to a dramatic increase in Requests for Evidence (RFE) to demonstrate eligibility and eventual denials of H-1B visa petitions.[43]

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.[44] 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 professional it sponsors, which contributed to a significant increase in Requests for Evidence and denials. "Denial rates for new H-1B petitions for initial employment rose from 6% in FY 2015 to 30% in the first quarter of FY 2020," according to a National Foundation for American Policy (NFAP) analysis.[45]

A January 2010 "Neufeld" memo addressed an "employer-employee" relationship primarily in the context of denying H-1B petitions when an H-1B visa holder would perform work at customer's site. During the Trump administration, USCIS adjudicators applied this memo in a more restrictive fashion. Adjudicators denied H-1B petitions at a higher rate for information technology (IT) services companies but also limited approval times, including, in one instance cited by a judge, an approval that lasted for only a single day.[46] The shorter approval times related to an itinerary rule.

The most appropriate definition of an employer-employee relationship is the longstanding Department of Labor standard definition, contained in DOL regulation, that is also in the existing USCIS regulation. That standard for an

[42] *See Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000) (finding a role's minimum requirements to be set by the end-client's minimum requirements, not the petitioning employer's).
[43] *See I-129 – Petition for a Nonimmigrant Worker Specialty Occupations (H-1B) by Fiscal Year, Month, and Case Status: October 1, 2014 – September 30, 2020*, U.S. Citizenship and Immigration Services, available at: https://www.uscis.gov/sites/default/files/document/reports/I129_Quarterly_Request_for_Evidence_FY2015_FY2020_Q4.pdf.
[44] 2020 Strengthening IFR, 85 Fed. Reg. at 63926.
[45] *H-1B Denial Rates and Numerical Restrictions as Indicators of Current Restrictions*, NFAP Policy Brief, National Foundation for American Policy, May 2020.
[46] Ibid.; Stuart Anderson, "The Story Of How Trump Officials Tried To End H-1B Visas," *Forbes*, February 1, 2021.

employer-employee relationship is easily applied: whether the petitioner "may hire, pay, fire, supervise, or otherwise control the work" of the H-1B professional.[47]

Compare that regulatory framework to the policy guidance introduced by USCIS in 2010, which asked officers to "look at a number of factors" to "establish that [the employer] has the *right to control* over when, where, and how the beneficiary performs the job[.]"[48] As described in the (now rescinded) 2010 policy guidance, USCIS officers would instead consider and weigh evidence for 11 factors, "with no one factor being decisive," including vague elements like:

- Does the [employer] have the right to control the work of the [H-1B worker] on a day-to-day basis if such control is required?
- Does the [H-1B professional] produce an end-product that is directly linked to the [employer]'s line of business?
- Does the [employer] have the ability to control the manner and means in which the work product of the [H-1B professional] is accomplished?

The current DOL and USCIS definitions of an employer-employee relationship are straightforward and preferable to a "test" that inserts substantial subjectivity into the process.

On March 10, 2020, in the significant case of *ITServe Alliance v. L. Francis Cissna*, U.S. District Judge Rosemary M. Collyer ruled, "The [then] current USCIS interpretation of the employer-employee relationship requirement is *inconsistent with its regulation*, was announced and applied without rulemaking, and cannot be enforced."[49]

In effect, USCIS adjudicators went against its own regulation and the DOL definition of an employer by replacing the "or" with an "and," which would mean an employer must be able to hire, pay, fire, supervise, *and* otherwise control the work of any such employee. As the lead plaintiff's lawyer Jon Wasden noted, the judge ruled an employer only has to show "one of the following: hire, pay, fire or otherwise control the H-1B professional to be considered a valid employer-employee relationship," not all four.[50]

Two months after the opinion in ITServe Alliance, in *Serenity Info Tech et al. v. Kenneth T. Cuccinelli*, Judge Amy Totenberg ruled, "[T]he Court finds that there is no basis in the INA [Immigration and Nationality Act] or the Agency's regulations for requiring a petitioner to submit evidence of specific, qualifying work requirements and micro-location

[47] 8 C.F.R. § 214.2(h)(4)(ii).
[48] 2010 Neufeld Memo.
[49] Opinion by U.S. District Judge Rosemary M. Collyer, *ITServe Alliance v. L. Francis Cissna*, March 10, 2020. Emphasis added.
[50] Stuart Anderson, "U.S.-ITServe Settlement Overturns 10 Years of H-1B Visa Policies," *Forbes*, May 21, 2020.

information for every single day of the visa period. Accordingly, the Agency's 2018 interpretation of the statute and regulations, as applied in the instant case, is owed no deference."[51]

On May 16, 2020, USCIS reached a settlement with the ITServe Alliance.[52] Under the terms of the settlement, USCIS took several actions:

- Rescinded a 2018 Contract and Itinerary Memorandum.
- Rescinded the 2010 Neufeld memo.
- When adjudicating cases under the settlement "USCIS agree[d] that it will not apply the interpretation of the current regulatory language . . . defining 'United States employer' to require an analysis of employer-employee relationship under common law, and USCIS agree[d] to comply with Judge Collyer's March 10, 2020, decision in *ITServe Alliance, Inc. v. Cissna*."

USCIS issued a new policy memorandum to replace those the agency rescinded.[53] The new guidance states, "The officer should consider whether the petitioner has established that it meets at least one of the 'hire, pay, fire, supervise, *or* otherwise control the work of' factors with respect to the beneficiary." (Emphasis added.)

The new guidance also states, "In support of the petition, an H-1B petitioner is not required by existing regulation to submit contracts or legal agreements between the petitioner and third parties."[54] This statement in the guidance responded to actions of USCIS adjudicators during the Trump administration involving requests for contracts that would indicate an H-1B professional's activity over the course of three years.

The National Foundation for American Policy found H-1B denial rates dropped dramatically after the judicial rulings in 2020 found USCIS actions to be unlawful and USCIS reached a legal settlement with the ITServe Alliance and withdrew the memos: "Judges declared the Trump administration's actions to be unlawful, forcing changes in restrictive immigration policies that resulted in the denial rate for new H-1B petitions for initial employment 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."

"The impact of the court decisions and a legal settlement became evident in the final months of the Trump administration," according to the NFAP report. "The denial rate for new H-1B petitions for initial employment was 1.5% in the fourth quarter of FY 2020 (July 1 to Sept. 30, 2020), much lower than the denial rate of 21% through the first three quarters of FY 2020. The Biden administration has complied with court decisions and a 2020 legal

[51] Opinion by U.S. District Judge Amy Totenberg, *Serenity Info Tech et al. v. Kenneth T. Cuccinelli*, May 20, 2020.
[52] Settlement Agreement, *ITServe Alliance v. L. Francis Cissna*, May 20, 2020, available at: https://nfap.com/wp-content/uploads/2020/05/ITSERVE-SETTLEMENT-AGREEMENT-fully-executed_Redacted52020.pdf.
[53] *Rescission of Policy Memoranda*, U.S. Citizenship and Immigration Services, Policy Memorandum PM-602-0114 (June 17, 2020), available at: https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2020/PM-602-0114_ITServeMemo.pdf.
[54] Ibid.

settlement with the business group ITServe Alliance, as evidenced by the low denial rate in FY 2021. (FY 2021 began on October 1, 2020, while Donald Trump was still president.)"[55]

The now rescinded Neufeld memo had reinterpreted the USCIS regulation into an unwieldy, multi-factor test that required officers to balance 11 broadly worded factors and exercise their discretion to determine whether an employment relationship exists.[56] This left USCIS officers without a clear sense of what qualifies and how to assess the documentation provided by employers. It also left employers uncertain about what documentation was sufficient to demonstrate that it does, in fact employ the H-1B workers that it hired, pays, has the ability to fire, supervises, or otherwise controls.

By redefining the required employment relationship, USCIS also focused on policing the relationship with end-clients. For other visa types, Congress has made clear when it intends USCIS to assess the employment relationship when an end-client is involved.[57]

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. This continued disconnect was present in the Trump administration's October 2020 regulation, which would have imposed additional documentation requirements and limited the approval period to one year in H-1B status when a worker was to be placed at a "third-party worksite," but not at a remote home worksite.[58] This focus is not tied to one of Congress's goals and has resulted in extensive litigation and backtracking that has left officers and employers confused about what standards apply.

USCIS also should avoid creating a joint- or secondary-employment requirement, as was proposed in DOL guidance issued by Trump administration on January 15, 2021.[59] 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 Congress and goes against common sense. If a homeowner hires a landscaping company, does that also make the homeowner 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

[55] "H-1B Petitions and Denial Rates in FY 2021," NFAP Policy Brief, *National Foundation for American Policy*, Jan. 2022.
[56] 2010 Neufeld Memo.
[57] For example, the L-1 Visa Reform Act of 2004 explicitly requires USCIS to assess whether an L-1B worker "will be stationed primarily at the worksite of an employer other than the petitioning employer" and whether the L-1B worker "will be controlled or supervised principally by such unaffiliated employer" or would essential be "labor for hire" at the unaffiliated employer.
[58] *See* 2020 Strengthening IFR, 85 Fed. Reg. at 63964 (defining "third-party worksite" to include any work location not owned by petitioning employer or the beneficiary's residence).
[59] *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.

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, which might have been the intention of the measure.

In addition to its legal shortcomings, the Trump administration's approach to the employer-employee relationship suffered from a belief that because a service was delivered at a customer's location the government should suspect fraud or exploitation. The administration did not put forth evidence this was the case or that its solution would address fraud or exploitation. Introducing the concept of multiple petitioners for a single H-1B professional seemed aimed at adding complexity as a way to discourage the use of H-1B visas if an employee would deliver services at a customer's location, which is beyond the statute.

The most effective way to impose accountability is via the petitioner rather than putting in place a diffusion of responsibility among multiple petitioners for each professional. This more effective approach would allow federal oversight to target the employer-petitioner for underpayment or any other alleged abuse of an H-1B professional.

## USCIS Should Eliminate Operational Inefficiencies

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 worker, 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.

Institutional skepticism about employers' assertions and evidence combined with increasingly narrow views of what qualifies as a "specialty occupation" and a sufficient "employer-employee relationship" led to a dramatic increase in the number of Requests for Evidence. USCIS data show that the percentage of H-1B visa petitions receiving an RFE nearly doubled between FY2015 and FY2019, growing from 22.3% to 40.2%[60]

One effect of USCIS's focus on the employment relationship has been requiring the petitioning employer to submit extensive documentation of its relationship with end-clients to demonstrate that the end-client is not controlling or supervising the work of the employee.[61] That created more work not just for employers but USCIS adjudicators.

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[60] 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/.

[61] *Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites*, U.S. Citizenship and Immigration Services, Policy Memorandum PM-602-0157 (Feb. 22, 2018), available at: https://www.uscis.gov/sites/default/files/document/memos/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf ("Contracts and Itineraries Memo").

Many of these RFEs contained boilerplate language asserting that the original evidence submitted was not sufficient and provided a long list of evidence that could be submitted to further demonstrate eligibility. When these RFEs did not actively engage with the original evidence, they left employers confused about whether USCIS had actually reviewed the evidence and uncertain what additional evidence they could provide that would lead to an approval. The result of this was longer processing times, frustration from employers and H-1B workers, and more time spent gathering extensive documentation from end-clients and outside experts to qualify for an H-1B visa.

The unwieldy multi-factor test USCIS used to determine whether the petitioning employer is maintaining an "employer-employee relationship" with the H-1B worker increased RFE rates and disparate treatment in the agency. It also left USCIS officers discretion to weigh factors and types of evidence without a sufficiently clear framework. Treating every routine H-1B visa petition as an opportunity to reconsider whether the role and employment relationship qualified slowed down the adjudication process and generated uncertainty and inconsistent outcomes for employers, H-1B workers, and the teams of which they are a part.

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 at the forefront of Congress's mind, USCIS would also free up additional resources and flexibility to address continued backlogs and other funding issues. USCIS should also strive to bring its policy in line with the realities of work in 2022.

## USCIS Policies Should Avoid Inefficient Use of Agency Resources Through Litigation and Policy Churn

Defending sustained litigation has drained resources from USCIS, and the outcomes of lawsuits have forced the agency to backtrack repeatedly on its policies.

First, courts have repeatedly struck down USCIS's interpretations and guidance as ultra vires to Congressional intent. As noted, in June 2020, USCIS entered into a settlement agreement[62] whereby it rescinded guidance related to the employer-employee relationship, agreed not to require detailed itineraries for H-1B professionals and, in general, would end its practice of shortening validity periods based on contractual documentation with end-clients.[63]

[62] *Rescission of Policy Memoranda*, U.S. Citizenship and Immigration Services, Policy Memorandum PM-602-0114 (June 17, 2020), available at: https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2020/PM-602-0114_ITServeMemo.pdf.
[63] *USCIS-ITServe Settlement Overturns 10 Years of H-1B Visa Policies*, Stuart Anderson, *Forbes* (May 21, 2020), available at: https://www.forbes.com/sites/stuartanderson/2020/05/21/uscis-itserve-settlement-overturns-10-years-of-h-1b-visa-policies/?sh=723b6825bf46.

More recently, USCIS entered into another settlement agreement regarding its interpretation of "specialty occupation" and whether market research analysts may qualify for H-1B visas.[64]

Second, courts have repeatedly blocked efforts to enshrine these policies in regulation. In Fall 2020 and 2021, multiple courts blocked the implementation of the October 2020 H-1B rule as having failed to follow proper procedures, among other reasons.[65]

The result has been a churn of litigation and policy backtracking, which consumed more government resources and created additional uncertainty for employers, H-1B workers and their team members, and USCIS officers. In the end, USCIS has been left with inconsistent outcomes on similar cases, limited guidance to determine if an employer maintains the employer-employee relationship and an excessive number of Requests for Evidence that USCIS officers must be draft, mail, respond to and review.

## GUIDING PRINCIPLES AND RECOMMENDATIONS FOR "MODERNIZATION"

Given the opportunity to reform, what would it mean to truly "modernize" the H-1B visa program? It is helpful to start with some guiding principles:

- First, USCIS's actions must align with the focus of the statute. USCIS's focus on narrowing the definition of "specialty occupation" and policing certain business models has created 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 focus on streamlining the petitioning process for employers and the adjudication process for its own officers. By avoiding additional paperwork and frequent back-and-forth between the agency and employers, USCIS can better limit delays and dedicate resources where they are best served.
- Third, USCIS should strive to create predictability in the H-1B visa program. This would align with Congressional statutes aimed at creating stability for employers and H-1B workers, such as allowing dual intent, extensions for H-1B workers pursuing green cards, and allowing job portability throughout a worker's time in H-1B status.

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[64] *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.

[65] *Judge Kills The Last Trump H-1B Visa Rule Left Standing*, Stuart Anderson, *Forbes* (Sept. 17, 2021), available at: https://www.forbes.com/sites/stuartanderson/2021/09/17/judge-kills-the-last-trump-h-1b-visa-rule-left-standing/?sh=64b727b37340.

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

In reviewing the criteria for assessing whether a position qualifies as a "specialty occupation," USCIS should refocus on the applicable preponderance standard and clearly explain the types of evidence it relies on. Congress's definition of "specialty occupation" takes into account that the minimum requirements and value of different degrees necessarily changes over time.[66] USCIS has also acknowledged this in its own policy guidance[67], but the agency continues to define qualifying occupations based on narrow interpretations of when a proffered position "normally" requires a degree directly related to a "specific specialty."

The current regulatory criteria for "specialty occupation" are vague about the kinds of evidence persuasive to USCIS and overlap in ways that can be confusing to employers and USCIS officers. This lack of clarity contributed to previous guidance encouraging officers to rely heavily on parsing DOL resources and the employer's documentation for seemingly "magic words" to demonstrate eligibility.[68]

For example, compare the criterion that "a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position" with a second criterion that "the degree requirement is common to the industry in parallel positions in similar organizations" and yet a third criterion that "[t]he employer normally requires a degree or its equivalent for the position[.]" Is there a meaningful distinction there, and if so, what documentation is most persuasive to USCIS? The overlap and vague distinctions between these standards have generated confusion, additional RFEs, and inconsistent outcomes.

USCIS should move away from its reliance on *Defensor v. Meissner* for the proposition that the end-client's job requirements control whether employment with the petitioning employer places. This places excessive focus on documentation from the end-client, which the petitioning employer may not be able to provide to USCIS.

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[66] Eligibility for the TN visa provides a useful comparison. For TN visas, Congress has tied the acceptable occupations and minimum educational/experience requirements to Appendix 2 of the United States-Mexico-Canada Agreement (replacing the previous North American Free Trade Agreement and Appendix 1603.D.1). This specifically lists qualifying occupations and requirements. *See* United States-Mexico-Canada Agreement Implementation Act, Pub L. 116-113, 134 Stat. 11.

[67] *See* Computer Programmer Memo (discounting previous agency decisions because "computer-occupations . . . have evolved since those decisions were issued").

[68] For example, under current regulations, an employer can demonstrate that "its particular position is so complex or unique that it can be performed only by an individual with a degree" or that "the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree." This raises the question of if there is a difference between being so complex or unique that it can "be performed only by" someone with a degree versus being so specialized and complex that it is "usually associated with" such a degree. Current guidance does not resolve the tension between something "usually associated with" a degree and "be performed only by" someone with a degree.

Acknowledging the changing business landscape would help USCIS modernize its approach to H-1B visa eligibility. The boom of high-skill positions within technology sectors in the United States has changed how companies approach hiring, with many positions requiring the application of highly specialized and theoretical knowledge that cannot be easily categorized as a "specific specialty" or one specific degree. This trend has led some companies to drop strict degree requirements—to the potential detriment of their H-1B visa eligibility. Embracing this reality and the flexibility in Congress's definition of "specialty occupation" would allow USCIS to adapt to the modern employment environment and help employers attract and retain talent with skills across disciplines.

Beyond the opportunity to create manageable standards for eligibility and clear examples of evidence to meet those requirements, USCIS should consider ways to improve and streamline communication between employers and the government agencies responsible for H-1B visas.

Current regulations require employers to inform USCIS of any material change to the H-1B professional's employment, but there is not always clear guidance on what constitutes a material change. This leaves many employers in a gray area of not knowing when they may be required to file an amended H-1B petition with the associated fees. One scenario where this arises is in the context of H-1B workers assigned to end-client projects by their employer—does changing end-client projects constitute a material change if the H-1B worker's duties remain largely the same?

Additional clarity on what USCIS considers a material change would benefit employers and workers, as would developing ways to streamline the process of notifying the agency of the change. For example, if an H-1B worker's employer moves them to a new project for a different end-client, there should be a way to notify USCIS that the end-client and project has changed without needing to file an amended H-1B petition and fee with the agency.

USCIS should also revisit its guidance for when a change in worksite triggers an employer's obligation to file an amended petition with the agency. Current guidance flows from the USCIS precedential decision *Matter of Simeio Solutions LLC*,[69] but this too has faced legal challenges.[70] Revisiting the guidance and formalizing it with regulatory authority would help employers better understand their obligations when it comes to filing an amended petition with USCIS.

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[69] *USCIS Final Guidance on When to File an Amended or New H-1B Petition After* Matter of Simeio Solutions, LLC, U.S. Citizenship and Immigration Services, Policy Memorandum PM-602-0120 (July 21, 2015), available at: https://www.uscis.gov/sites/default/files/document/memos/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf.

[70] *USCIS H-1B Application Rule Withstands IT Group's Challenge*, Grace Dixon, Law360 (Feb. 18, 2022), available at: https://www.law360.com/articles/1466727/uscis-h-1b-application-rule-withstands-it-group-s-challenge.

As the world shifts to more flexible work arrangements, employers and workers will need continued flexibility with work locations. That means the framework created by *Simeio* is likely not ideal moving forward. For example, USCIS should consider whether it requires an amended H-1B visa petition if the H-1B worker will be working from a different Metropolitan Statistical Area with a lower prevailing wage than the previously certified Labor Condition Application. Requiring the employer to file an amended petition with USCIS reflecting a newly certified Labor Condition Application with a lower prevailing wage before the employee can begin working in the new location does not create efficiencies for the agency and does not serve a larger purpose toward Congress's goals.

Establishing a validated employer program could reduce repeat documentation. The need to submit repeatedly the same documentation to USCIS to demonstrate eligibility causes operational inefficiencies for USCIS, companies, employees, and immigration practitioners alike. USCIS should explore creating processes to reduce the amount of repeat documentation required to demonstrate H-1B visa eligibility.

Congress has already provided a model for this in the L-1 visa Blanket Petition process, which allows companies that frequently transfer L-1 workers to the United States from related foreign entities.[71] This creates a more streamlined process for employers and means USCIS and State Department officers do not have to review nearly as much corporate documentation with every individual immigration petition.

USCIS has successfully embraced this idea in other contexts. For example, in the employment-based immigrant visa context USCIS allows companies with over 100 employees to demonstrate the ability to pay the foreign worker by submitting a statement from the company's financial officer instead of by providing annual reports, federal tax returns or audited financial statements.[72]

Such a process would generate greater certainty for employers and employees, reduce the workload on USCIS officers when reviewing visa petitions, avoid unnecessary Requests for Evidence. Also worth noting, reducing the amount of paper sent to USCIS would assist the agency's efforts to digitize its work.[73]

[71] *See* 8 U.S.C. § 1184(c)(2)(A).
[72] *See* 8 C.F.R. § 204.5(g)(2).
[73] *See An Update on the Continuing Complications of USCIS' Digital Strategy*, Citizenship and Immigration Services Ombudsman, Annual Report 2021 (June 30, 2021), available at: https://www.dhs.gov/sites/default/files/publications/dhs_2021_ombudsman_report_med_508_compliant.pdf.

## CONCLUSION: GENERATE PREDICTABILITY AND SAVE USCIS RESOURCES

USCIS should strive to create predictability for employers and H-1B professionals and eliminate operational inefficiencies.

Bringing greater clarity and predictability to requirements will allow USCIS to assess H-1B eligibility, better align with Congressional statutory goals, streamline its processes, reduce churn for its officers and the public it serves, and free up resources internally for addressing other pressing immigration priorities.

Beyond the operational and legal flaws, USCIS's focus on policing the employer-employee relationship and narrowing the types of positions that qualify for H-1B visas created flawed outcomes.

Uncertainty about what standards applied and how USCIS applied them, combined with the rescission of deference to previous approvals, resulted in an increased RFE and denial rate, even for individuals who had been working in H-1B status for years.[74] This resulted in individuals and families falling out of immigration status, additional churn and disruption of business processes and projects, and compounding inefficiencies. Employers have had to implement new processes to guard against disruption and ensure they have excessive documentation required to meet USCIS's unwieldy standards and requirements. This has affected businesses, H-1B professionals and their teams, customers and families.

These flawed outcomes have been particularly challenging for employers given that there are over 1.5 million job openings in the United States in computer occupations. Moreover, studies show that fields with many H-1B professionals have experienced lower unemployment rates and faster earnings growth among college graduates.[75]

To its credit, USCIS has taken proactive and positive steps in the last year to begin addressing the adverse effects described above. In particular, under the Biden administration, USCIS reinstated its previous longstanding guidance generally granting deference to previous eligibility determinations, noting that it "promotes efficient and fair adjudication of immigration benefits" and dovetailed with President Biden's executive order focused on restoring

[74] Rescission of Deference Memo.
[75] *The Impact of H-1B Visa Holders on the U.S. Workforce*, Madeline Zavodny, National Foundation for American Policy (May 2020), available at: https://nfap.com/wp-content/uploads/2020/05/The-Impact-of-H-1B-Visa-Holders-on-the-U.S.-Workforce.NFAP-Policy-Brief.May-2020.pdf; "The Outlook on H-1B Visas and Immigration in 2022," *Forbes.*

faith in the U.S. legal immigration system.[76] The Biden administration also formally vacated the October 2020 H-1B rule issued by the Trump administration.[77]

More broadly, USCIS's External Affairs Department and other offices have begun soliciting more feedback on a variety of issues. To date, this has included national listening and informational sessions[78] and engagement with stakeholders on a local level.[79]

USCIS's H-1B adjudication policies have strayed from statute to focus on narrowing eligibility and policing the employment relationship between sponsors and H-1B workers, which increased operational and legal stresses on the agency while producing worse outcomes for employers and their employees. The Trump administration's October 2020 regulation would have further entrenched these issues, but the upcoming "modernization" regulation is an opportunity to make positive changes for the agency, employers, and employees. By returning to statutory standards and developing manageable adjudication guidance, USCIS can streamline its processes, relieve operational and legal pressure on the agency, and improve predictability for employers and employees. The ongoing funding issues and growing backlogs make finding efficiencies critical for USCIS's future success.

[76] *USICS Issues Policy Guidance on Deference to Previous Decisions*, USCIS (Apr. 27, 2021), available at: https://www.uscis.gov/news/alerts/uscis-issues-policy-guidance-on-deference-to-previous-decisions.
[77] *Strengthening the H-1B Nonimmigrant Visa Classification Program, Implementation of Vacatur*, 86 Fed. Reg 27027 (May 19, 2021), available at: https://www.govinfo.gov/content/pkg/FR-2021-05-19/pdf/2021-10489.pdf.
[78] *See Upcoming National Engagements*, USCIS, available at: https://www.uscis.gov/outreach/upcoming-national-engagements.
[79] *See Upcoming Local Engagements*, USCIS, available at: https://www.uscis.gov/outreach/upcoming-local-engagements.

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