December 14, 2023

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

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

Submitted online via www.regulations.gov.

Dear Chief Nimick:

On behalf of the National Foundation for American Policy (NFAP), a nonpartisan policy research organization, I submit this comment to provide information on the Department's proposed rule that would affect U.S. policy on H-1B petitions.

As part of the comment, I will refer to original research from the National Foundation for American Policy and take excerpts from three *Forbes* articles (October 23, 2023, and November 7, 2023) by NFAP Executive Director Stuart Anderson. (The articles are linked at the bottom of the comment or can be found on the *Forbes* website.)

Restrictions Do Not Comply With AI Executive Order and National Security Strategy
While the rule contains favorable provisions for employers and students, the new H-1B restrictions in the proposed rule almost certainly violate the Biden administration's National Security guidance and strategy on "attracting and retaining the world's best talent" and the president's October 30, 2023, executive order on the "Safe, Secure and Trustworthy Development and Use of Artificial Intelligence."

According to the National Security Strategy (October 2022), "As we create the conditions for our people to thrive, we will also continue to make America the destination of choice for talent around the world. . . . And we will take further measures to ensure the United States remains the world's top destination for talent."

The rule proposes measures, particularly on restricting what degrees and positions (the "directly related specific specialty" language), that limit who can qualify for specialty occupations, making it much less likely "the United States remains the world's top destination for talent."

The language on "directly related specific specialty," discussed below, violates the AI executive order. The proposed H-1B rule uses the phrase "*directly related specific specialty*" to narrow the positions considered specialty occupations, which will prevent talented individuals from working in the United States, including those who study at U.S. universities and wish to stay.

The October 30, 2023, AI executive order states: "Across the Federal Government, my Administration will support programs to provide Americans the skills they need for the age of AI and attract the world's AI talent to our shores — not just to study, but to stay — so that the companies and technologies of the future are made in America."

Per a recent *Forbes* article (linked below): "There is an inconsistency between the proposed rule and AI executive order," according to Kevin Miner of Fragomen. "Unfortunately, there are several aspects of the proposed H-1B regulation that—if implemented as proposed—will have the exact opposite effect and limits the ability of highly skilled temporary visa holders to stay and work in the United States.

"The language in the proposed regulation could be used by adjudicators at USCIS to deny H-1B petitions where the degree field doesn't precisely match what the adjudicator believes would be required to perform the role, and with fast-evolving jobs like those in AI, this can change quickly. USCIS would be far better off focusing on the entire course of study—including specific coursework completed—rather than the degree field."

Miner notes the rule's restriction would ultimately affect immigrants as well since most employment-based immigrants begin working in the United States with H-1B status. "The reality is that a lot of technology roles, including those in AI, are filled by people who have degrees that are not in something traditional like computer science," said Miner. "A whole variety of engineering disciplines, mathematics, statistics, operations research, physics, and a host of other fields have the kinds of technology content that is required by employers seeking to fill these roles." Today, USCIS often looks at the actual coursework rather than the degree field, which would likely change if the proposed rule takes effect as currently drafted.

Undue Restriction To Qualify For A Specialty Occupation

The Biden administration's proposed rule takes crucial language on degrees from a restrictive interim final rule the Trump administration published in 2020. Courts later blocked the Trump rule. Attorneys and companies warned at the time the rule's language would stop many talented foreign-born professionals from working in America.

Both H-1B rules use the phrase "*directly related specific specialty*" to narrow the positions considered specialty occupations. The rules state to qualify as a specialty occupation, the position must require "A U.S. baccalaureate or higher degree in a *directly related* specific specialty or its equivalent" for entering the occupation.

However, the Immigration and Nationality Act (INA) does not say a degree must be in a "directly related" specific specialty. As for the phrase "specific specialty," the law only states, "The term 'specialty occupation' means an occupation that requires . . . *attainment of a bachelor's or higher degree in the specific specialty* (or its equivalent) as a minimum for entry into the occupation in the United States."

Table 1: Percent With Degree Other Than Computer Science or Electrical Engineering

Occupation	Temporary Work Visa Holder	U.S.-Born
Computer Occupations	18%	51%

Source: National Foundation for American Policy analysis and estimates from the 2021 National Survey of College Graduates.

More than half (51%) of U.S.-born individuals and 18% of temporary visa holders working in computer occupations have a degree other than computer science or electrical engineering, according to a National Foundation for American Policy analysis of the 2021 National Survey of College Graduates. Nearly half (48%) of chemists and 15% of temporary visa holders have a degree other than chemistry. Twenty-seven percent of U.S.-born and 21% of foreign-born working in biology occupations have a degree other than in health or biological science. Twenty-six percent of U.S.-born mechanical engineers have a degree other than mechanical engineering.

"It is a common mistake to think there is an exact correspondence between field of degree and occupation in the technical labor force," said labor economist and NFAP Senior Fellow Mark Regets. "In reality, employers often hire workers who have gained the necessary skills through other coursework and experience. It is unclear how closely USCIS intends to require an exact match between occupational and degree titles, but even assuming they use very broad categories, many current workers with temporary work visas might not meet the new criteria. This non-problem is not due to the temporary work visa system since the U.S.-born have a much higher percentage of seeming mismatches." (Quoted in "Biden Immigration Rule Copies Some Trump Plans To Restrict H-1B Visas," *Forbes*, October 23, 2023.)

In 2020, in *InspectionXpert Corp. v. Cuccinelli*, a judge rejected the USCIS assertion under the Trump administration that it had the right to deny an H-1B petition because the position did not require a degree in a specific subspecialty and could be filled by someone with a degree in more than one discipline, such as different types of engineering degrees. The Biden administration has resurrected the Trump team's restrictive interpretations of immigration law. Jonathan Wasden of Wasden Law alleged that career officials at USCIS are "trying to fix all the court cases they have lost." If that is the case, it is not a legitimate reason to adopt a restrictive measure in an immigration regulation.

Another Section In The Proposed Rule Copied From The Trump Interim Final Rule
Current USCIS regulatory language states: "*Specialty occupation* means an occupation that requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and that requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

The Trump administration's interim final rule and the Biden administration's proposed rule both add underneath (with only a slight grammatical difference in the last sentence) the following restrictive language: "The required specialized studies must be directly related to the position. A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position. A position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields or each body of highly specialized knowledge is directly related to the position."

"The proposed regulation seeking to amend the definition of 'specialty occupation' is of great concern as it would incentivize USCIS examiners to issue Requests for Evidence, which in turn would be burdensome on employers," said attorney Cyrus Mehta. "There is no requirement in the INA provision that the required specialized studies must be directly related to the position. A lawyer would qualify as a specialty occupation, as only a degree in law would allow entry into the occupation. But INA section 214(i)(1) reads more broadly. It also ought to encompass a marketing analyst, even though this occupation may require a bachelor's degree in diverse fields such as marketing, business or psychology."

Mehta argues, citing legal precedents, if an occupation requires a generalized degree but specialized experience or training, it should still qualify as a specialty occupation.

"The proposed rule seems to latch onto old, outdated notions of a business degree being too generalized to qualify for H-1B classification," said Mehta. "The preamble to the rule also states that 'a petition with a requirement of any engineering degree in any field of engineering for a position of software developer would generally not satisfy the statutory requirement' as the petitioner may not be able to demonstrate how the different fields of engineering would qualify the H-1B worker to perform the duties of a software developer."

In 2020, in a declaration in the *U.S. Chamber of Commerce* lawsuit against the Trump H-1B rule, Zane Brown, vice president and associate general counsel, labor and employment at Amazon, wrote, "It would also eliminate the ability of hiring managers to consider employees who bring years of hands-on experience, which is particularly valuable given the pace of technological change. The current regulations permit the combination of education and experience—even if the degree is not in a 'directly' related field. This strict degree requirement is arbitrary in nature to only focus on degree relevance and neglect the importance of industry experience.

"For example, Amazon employs a data scientist who possesses a degree in psychology with substantial coursework in statistics and economics. As another example, Amazon employs a software engineer who possesses a degree in chemical engineering. As a third example, Amazon employs a Senior Product and Customer Insights Manager who possesses a degree in Public Administration, Applied Economics, and Finance. Under the DHS Rule, it is not clear that any of the valued employees would qualify for an H-1B visa because the individual's degree is not sufficiently specialized, even though these employees are well qualified with relevant coursework and possess the needed skills to fill these positions.

"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."

Joseph Elias, director of faculty/staff visa services at the University of Southern California (USC), declared, "This narrowing of eligibility will severely impact research positions in burgeoning cross-disciplinary fields. For example, in the field of bioinformatics, a highly qualified individual might have a degree in computer science/engineering or a degree in biology/health science. . . . Requiring a 'directly related specific specialty' degree threatens to eliminate the ability to employ individuals on H-1B or E-3 visas in these critical fields at the forefront of scientific research."

The proposed rule contradicts current USCIS practice. "For something like a quantitative analysis role, USCIS has been willing to look at coursework and similar factors in evaluating whether the degree supports a specialty occupation," said Kevin Miner of Fragomen. "This language certainly could have the effect of changing that approach, and we could see denials of cases that are traditionally approved. Many finance professionals, for instance, have a degree in business without a further stated specialization. They may have taken a lot of finance coursework, but their degree doesn't specialize in the field. Those are the kinds of cases that could suddenly begin getting denied if there is too literal an interpretation of this rule change."

The above analysis from attorneys appeared in "Biden Immigration Rule Copies Some Trump Plans To Restrict H-1B Visas," *Forbes*, October 23, 2023.)

Business Administration

The proposed H-1B rule states, "A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position." This language in the rule risks disqualifying individuals with master's in business for arbitrary and capricious reasons. It will produce economic harm by depriving companies of talented professionals and discouraging foreign nationals from attending MBA programs in the United States since they will now be unlikely to gain H-1B status after completing the programs.

Our organization examined occupational data and found within one to ten years of earning a master's degree in business, 79% of foreign-born and 70% of U.S.-born work in management and management-related occupations in the United States. (Source: NFAP analysis and estimates of the National Science Foundation's 2021 National Survey of College Graduates.) Within one to

ten years of earning a master's degree in business, 94% of individuals say their work in a management and management-related occupation is related to their degree.

The data show business administration is a specialized field of study. As noted above, 70% to 80% of individuals who earn a master's degree in business work in a management and management-related occupation, and 94% of people who earn a master's in business say their work is related to their degree.

It is incorrect for the proposed regulation to consider business administration a "general degree."

The proposed regulation explicitly mentions the physical sciences as a qualifying body of specialized knowledge and is right to do so. However, one to ten years after their degrees, only 43% of individuals with a master's degree in physical sciences work in a physical science occupation. That is much lower than the percentage of individuals with master's degree in business who work in management and management-related occupations, yet the proposed rule singles out business administration as a "general degree," and cites physical sciences as a qualifying body of specialized knowledge. Even at the Ph.D. level, only 53% of people with a physical sciences Ph.D. work in a physical science occupation one to ten years after receiving their degree. (Source: NFAP analysis and estimates of the National Science Foundation's 2021 National Survey of College Graduates.)

"It would be absurd to consider physical sciences such as physics or chemistry a 'general degree' because it is useful in other occupations," according to economist Mark Regets. "Yet business administration appears to be less of a 'general degree' than physical sciences since over 70% of individuals with a master's degree in business specialize in management and management-related occupations, and only 43% of people with master's degrees in the physical sciences work in a physical science occupation."

Below are some other areas of concern.

Customers and Staffing Firms Under the Proposed Rule

"In situations where an H-1B petition involves placement of the worker at a 3rd party worksite, USCIS is proposing to have the requirements for the role of the 3rd party company—rather than those of the petitioner—control whether the role is a specialty occupation," according to Miner. "USCIS does attempt to clarify that there is a difference between a placement at a 3rd party location and an H-1B worker being 'staffed' at a 3rd party company. However, this language could easily be misinterpreted by adjudicators such that every time the H-1B professional is going to be at a 3rd party company, the adjudicator would want to look at what is required for similar roles at that company. This ignores that the H-1B professional may be performing a very different role on a distinct project from what the 3rd party company normally performs, but we could nevertheless see Requests for Evidence and adjudications based on the 3rd party company rather than the H-1B employer."

Cyrus Mehta shares similar concerns. "*Defensor v. Meissner*, a case referenced in the proposed rule, involved a staffing agency for nurses that contracted the nurses to hospitals. Would USCIS understand the distinction between the nurse in *Defensor* and a software engineer providing

services to the client rather than being staffed at the client? I have a feeling that this provision will still trigger Requests for Evidence."

IT services companies may be forced to prove they are providing services and not "staffing," given the significant distinction in requirements proposed for the two types of firms.

Deference And Clarifying What Normally Means

The proposed rule would codify existing policy announced under USCIS Director Ur Jaddou that adjudicators would defer to prior determinations when no material error, information or circumstance change exists "adversely impacting the petitioner's, applicant's, or beneficiary's eligibility." Jaddou reversed a Trump policy that told adjudicators to no longer defer to prior adjudications when evaluating extension of status applications. That policy had resulted in more work and forced experienced tech employees to leave the United States when their extensions were denied under a different, more restrictive standard.

Attorneys point out a limitation on the deference policy: Deference is irrelevant unless a foreign-born professional first qualifies under the new, more restrictive standards imposed in the proposed rule on specialty occupation.

The proposed rule also would adopt more acceptable definitions of common words that could prevent officials from twisting their meaning. "The proposed regulation . . . clarifies that 'normally does not mean always.'"

During the Trump years, USCIS argued an occupation was not a specialty occupation if it did not "always" require a bachelor's degree. To reach this result, Trump officials claimed the definition of "normally" was "always" and used this to exclude computer programmers (and others) because the Occupational Outlook Handbook said computer programmers "normally" had a bachelor's degree as a minimum requirement for entry. USCIS rescinded the 2017 policy memorandum that twisted the definition of "normally" after a U.S. Court of Appeals for the Ninth Circuit decision (*Innova Solutions v. Baran*).

Maintenance Of Status And Bona Fide Job Offers

Jonathan Wasden, who filed successful lawsuits that forced changes in USCIS policies during the Trump administration, criticizes the parts of the proposed rule on "Maintenance Of Status" and "Bona Fide Job Offers."

"USCIS is attempting to revive two old policies determined to be unlawful by a few federal courts," said Wasden. "They have rebranded the contracts and itineraries memo and nonspeculative work policy and now refer to it as the 'bona fide job offer' test. These policies were invalidated by courts because they contradicted the law's allowance of 'nonproductive status (for lack of work).' If this makes it into the final rule, I don't see how it survives a court challenge again."

"The maintenance of status rule is troubling because it appears USCIS is seeking to punish employees whose employers have not paid full wages," said Wasden. "The statute on this is pretty clear: receipt of wages has nothing to do with maintenance of status. If an employee isn't

paid, they can file a complaint with the Dept of Labor, which has immense authority to compel wage payment. USCIS's proposed rule undermines the statute on this issue."

Below is a discussion of some beneficial provisions in the proposed rule.

Changing The H-1B Lottery

USCIS uses a lottery when companies file more H-1B applications (or registrations) than the annual limit of 85,000 (65,000 plus a 20,000 exemption for advanced degree holders from U.S. universities). According to USCIS, registrations for FY 2024 increased largely due to multiple registrations submitted for the same individuals. Still, due to the low annual H-1B limit, USCIS would have rejected over 75% of H-1B registrations for FY 2024, even if beneficiaries with multiple registrations were excluded from the lottery.

USCIS proposes a solution—selecting H-1B registrations by unique beneficiaries—recommended in a May 1, 2023, *Forbes* article. Many employers will likely approve of the change.

"Under the proposed update to the random selection process, registrants would continue to submit registrations on behalf of beneficiaries and beneficiaries would continue to be able to have more than one registration submitted on their behalf," according to USCIS. "Selection would be based on each unique beneficiary identified in the registration pool, rather than each registration. Each unique beneficiary would be entered in the selection process once, regardless of how many registrations were submitted on their behalf. If a beneficiary were selected, each registrant that submitted a registration on that beneficiary's behalf would be notified of selection and would be eligible to file a petition on that beneficiary's behalf."

USCIS will use "valid passport information" to identify unique beneficiaries, and individuals would select among the employers that submitted H-1B registrations on their behalf. "DHS [Department of Homeland Security] proposes to require the submission of valid passport information, including the passport number, country of issuance, and expiration date, in addition to the currently required information. Registrants would no longer be allowed to select an option indicating that the beneficiary does not have a passport."

USCIS anticipates a beneficiary could have more than one potential employer. "If multiple unrelated companies submitted registrations for a beneficiary and the beneficiary were selected, then the beneficiary could have greater bargaining power or flexibility to determine which company or companies could submit an H-1B petition for the beneficiary, because all of the companies that submitted a registration for that unique beneficiary would be notified that their registration was selected and they are eligible to file a petition on behalf of that beneficiary."

USCIS will "extend the existing prohibition on related entities filing multiple petitions by also prohibiting related entities from submitting multiple registrations for the same individual."

USCIS states, "The proposed change may also potentially benefit companies that submit legitimate registrations for unique beneficiaries by increasing their chances to employ a specific beneficiary in H-1B status."

The controversy over multiple registrations obscures a stark reality for employers: H-1B registrations with only one employer increased by 66% between FY 2022 and FY 2024, illustrating the increasing demand for talent in the U.S. economy.

Extended Cap-Gap Protection For International Students
F-1 students, often working on Optional Practical Training, now receive "cap-gap" protection when changing to H-1B status. In a move students, employers and universities will welcome, the proposed rule provides automatic "cap-gap" protection until April 1 rather than the current October 1 (i.e., an additional six months). USCIS states this "would avoid disruptions in employment authorization that some F-1 nonimmigrants seeking cap-gap extensions have experienced over the past several years."

Nonprofit Research Institutions
The proposed rule would allow more organizations to qualify as nonprofit research institutions. That would make them eligible to file H-1B petitions exempt from the H-1B annual limit. USCIS would change the definition of a nonprofit research organization from one "primarily engaged in basic research and/or applied research" to an organization with "a fundamental activity of" basic research and/or applied research. "This would likely increase the population of petitioners who are now eligible for the cap exemption and, by extension, would likely increase the number of petitions that may be cap-exempt," according to USCIS.

H-1B Petitions For Entrepreneurs
Due to the regulatory definition of an employee-employer relationship, USCIS rules make it difficult for entrepreneurs to qualify for H-1B petitions. USCIS recognizes this causes many high-skilled foreign nationals not to found a company or wait until they acquire permanent residence. "Nearly two-thirds (64%) of U.S. billion-dollar companies (unicorns) were founded or cofounded by immigrants or the children of immigrants," according to research by the National Foundation for American Policy, indicating what the U.S. economy loses when restricting foreign-born entrepreneurship.

"DHS is proposing to add provisions to specifically address situations where a potential H-1B beneficiary owns a controlling interest in the petitioning entity," according to the proposed rule. "One of the proposed conditions is that the beneficiary may perform duties that are directly related to owning and directing the petitioner's business as long as the beneficiary will perform specialty occupation duties authorized under the petition a majority of the time."

Initial approvals for H-1B petitions when the H-1B beneficiary "possesses a controlling ownership interest in the petitioning" business "will be limited to a validity period of up to 18 months."

While the proposed rule contains positive elements, it also includes unnecessary restrictive provisions that will make it more difficult to attract and retain business professionals, AI talent and, more generally, foreign-born scientists and engineers. Those provisions violate the language of the October 2022 National Security Strategy and the president's AI executive order and should be eliminated or changed substantially.

October 23, 2023 (*Forbes*)
Biden Immigration Rule Copies Some Trump Plans To Restrict H-1B Visas

October 23, 2023 (*Forbes*)
USCIS Changes H-1B Visa Lottery, Extends Cap-Gap For Students

November 7, 2023 (*Forbes*)
Biden Executive Order On AI Could Help Immigrant Professionals

Sincerely,

[Signature Redacted]

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