

THE NATIONAL FOUNDATION FOR AMERICAN POLICY

October 19, 2025

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: Comment on U.S. Citizenship and Immigration Services proposed rule on
“Weighted Selection Process for Registrants and Petitioners Seeking To File Cap-
Subject H-1B Petitions,” DHS Docket No. USCIS-2025-0040
Submitted online via www.regulations.gov.

On behalf of the National Foundation for American Policy (NFAP), a nonpartisan policy research organization, I submit this comment to provide information on the proposed rule on “Weighted Selection Process for Registrants and Petitioners Seeking To File Cap-Subject H-1B Petitions.” The comments are adapted from [An Analysis of the Proposed Rule on H-1B Selection](#), NFAP Policy Brief, September 2025, published by the National Foundation for American Policy.

The Proposed Rule Is Contrary To The Intent Of Congress

The proposed rule is contrary to the intent of Congress. First, the statute states that H-1B petitions “shall” be issued “in the order in which petitions are filed.” Attorneys have pointed out the legal problem. “The statute mandates visas be issued in the order in which they are received,” said immigration attorney Brad Baniyas about the 2021 rule. “While a lottery may be a fair interpretation of that mandate when 250,000 applications show up on the same day, the same cannot be said of prioritizing those applications based on wages. A regulation is an interpretation of an ambiguous statutory provision. This interpretation is wholly unmoored from the statute and likely *ultra vires* (beyond one’s legal authority).”

The current proposed rule no more complies with Congressional intent than the 2021 rule. In fact, the proposed rule differs only slightly from the 2021 rule. The

2021 rule also sought to favor H-1B registrants at Level IV and III over Level I. The two rules only differ in that the current proposed rule maintains a lottery selection process. That likely was done to convince a judge that the proposed rule is similar to the current H-1B selection process, which it is not.

For a 2021 NFAP [report](#), the law firm Curran, Berger & Kludt provided NFAP with data on cases for 170 F-1 students with applications for H-1B cap selection from FY 2018 through FY 2021. According to the law firm's data, 53% of international students were paid at Level I and 37% were paid at Level II (i.e., 90% combined). Any system that reduces the likelihood USCIS will select individuals at Level I salaries will make it less likely that recent international students will gain H-1B status.¹

In January 2019, DHS established by regulation the H-1B registration system. When a commenter suggested the Trump administration prioritize H-1B petitions based on salary or other criteria, officials responded that it would be unlawful under U.S. immigration law: "DHS believes, however, that prioritization of selection on other factors, such as salary, would require statutory changes."

As explained below, the proposed rule disadvantages recent international students and other early-career professionals because they lack the experience to fill positions that correspond to Level III and Level IV salaries.

To the extent Congress has indicated a preference for H-1B visa holders, it is for recent international students. In 2005, Congress passed a 20,000 exemption from the 65,000 H-1B annual limit for foreign nationals with an advanced degree from a U.S. university. Congress has provided no similar exemption for senior managers or other individuals paid at the highest salary. Understanding that opposition places the proposed rule in context, including the questionable choice to reduce American competitiveness by making it much more difficult for recent international students to gain H-1B status.

The proposed rule attempts to legislate, through regulation, a preference for senior managers and represents the personal preferences of decision makers within the administration who have an ideological agenda concerning international students. These officials oppose international students remaining in the United States to work after graduation.

¹ *The Impact on International Students of Ending the H-1B Lottery*, NFAP Policy Brief, National Foundation for American Policy, May 2021.

White House Deputy Chief of Staff Stephen Miller has long opposed international students working in the United States. While on the staff of Sen. Jeff Sessions, Miller helped draft legislation that would have compelled international students to leave the United States for a decade (for undergraduates and master's degree recipients) before they could work in H-1B status. Ph.D. recipients would need to gain two years of experience outside of America before obtaining H-1B status.

During his Senate confirmation hearing, Joseph Edlow, the director of U.S. Citizenship and Immigration Services, said he hopes to end the ability of international students to work on Optional Practical Training after completing their coursework in the United States.

The administration has taken a series of measures that educators say will discourage international students from coming to U.S. universities. The proposed rule is one measure. In August 2025, DHS proposed [a rule](#) to limit international students by replacing the current policy of "duration of status" with fixed admission periods. The State Department suspended student visa interviews for three weeks in May and June to enact enhanced scrutiny of social media accounts of student applicants. The Trump administration also instituted a travel ban on nationals of 19 countries, which affected thousands of international students from Iran and elsewhere.

Earlier this year, the State Department ordered approximately 6,000 international students to leave the country after Immigration and Customs Enforcement assigned a team to run student names through a law enforcement database. The offenses were not normally deportable, and lawsuits stopped the practice. However, the high-profile arrests sent a signal that studying in the United States could be precarious. The administration's action to block the entry of international students from Harvard University also received global attention.

A [survey](#) of international graduate students at U.S. universities conducted by the Institute for Progress and NAFSA: Association of International Educators found "53% of respondents said they would not have enrolled in the first place if access to H-1B was determined by Wage Levels."

As designed, the proposed rule represents an attempt at central planning, one that appears nowhere in the immigration laws passed by Congress. It also does not make sense the competitiveness of the U.S. economy. Bo Cooper, a partner at the Fragomen law firm and a former general counsel at U.S. Citizenship and

Immigration Services, has questioned the wisdom of establishing as U.S. government policy a priority for the recruitment of individuals who already are senior professionals, even though nearly all of America's competitors for talent focus on attracting young talent, particularly recent university graduates.²

According to research by the National Foundation for American Policy, 25% of the billion-dollar startup companies in the United States had at least one immigrant founder.³

In a remarkable achievement, five immigrants to America were awarded the Nobel Prize in economics in 2024 and 2025; four of the five were former international students. Even the 2025 Nobel Prize winner in economics from France, Philippe Aghion, like fellow 2025 winners Joel Mokyr and Peter Howitt, was an international student in the United States, earning a Ph.D. at Harvard University. He taught in America for almost two decades after receiving his degree.⁴

Omar M. Yaghi, a former international student from Jordan, shared the 2025 Nobel Prize in chemistry with Susumu Kitagawa of Japan and Richard Robson of Australia.⁵

On June 19, 2024, then-presidential candidate Donald Trump taped a [podcast interview](#) with venture capitalists on *All-In*. "What I want to do and what I will do is you graduate from a college, I think you should get automatically as part of your diploma a green card to be able to stay in this country," said Trump. "And that includes junior colleges too, anybody graduates from a college. You go there for two years or four years."

The changes, if implemented, will take the U.S. immigration system further away from the goal expressed by Donald Trump in 2024.

² Stuart Anderson, "International Student Enrollment Plummets: Biden Could Bring it Back," *Forbes*, November 17, 2020.

³ Stuart Anderson, *Immigrant Entrepreneurs and U.S. Billion-Dollar Startups*, NFAP Policy Brief, National Foundation for American Policy, July 2022.

⁴ Stuart Anderson, "Five Immigrants To America Won 2024 And 2025 Nobel Prize In Economics," *Forbes*, October 13, 2025.

⁵ *Immigrants and Nobel Prizes: 1901-2025*, NFAP Policy Brief, National Foundation for American Policy, October 2025.

The Significant Difference Between the Proposed Rule and the Current Process

A significant shortcoming of the weighting system in the proposed rule is that it establishes, for H-1B selection purposes, that foreign nationals paid a Level IV wage are four times more valuable to the United States than people paid a Level I wage, or twice as beneficial as someone paid at a Level II wage, without evidence in the proposed rule to support this contention. Employers and attorneys argue that the four DOL wage levels primarily consider an individual's current level of experience in the labor market, not their talent or potential contributions. DOL lists employees at Level IV as people who “generally have management and/or supervisory responsibilities.”⁶

As a practical matter, the proposed rule makes it much more likely that a U.S. company could hire foreign-born senior managers on H-1B petitions than promising recent international students graduating from U.S. universities with degrees in a field such as artificial intelligence. Analysts say shifting the H-1B selection using a Department of Labor salary scale that identifies the amount of experience to fill a position changes the country’s talent acquisition policy toward mid-career professionals rather than encouraging companies to foster more innovation within the United States.

The proposed rule would give registrants who are offered a position that corresponds to a Level IV salary four chances to be selected, a Level III registrant three chances, a Level II registrant two chances and a Level I registrant one chance.

“The method chosen to rank H-1B petitions does not measure skill level, as the proposed rule implies, but is a Department of Labor tool to divide job classifications based on the experience and related factors needed to perform in the position,” according to a National Foundation for American Policy [analysis](#) of the proposed rule.

Immigration attorneys agree that the DOL’s Occupational Employment and Wage Statistics is a bad fit for the H-1B selection process. “The Department of Labor’s OEWS wage levels are designed as a job classification tool that reflects the amount of experience, supervision and responsibility required for a position, not an

⁶ This section includes analysis from Stuart Anderson, “Trump Immigration Rule Shifts H-1B Lottery To Favor Older Visa Holders,” *Forbes*, September 24, 2025.

assessment of whether the worker is ‘highly skilled’ or ‘less skilled,’” said Vic Goel of Goel & Anderson in an interview. “A Level I role is simply an entry-level version of the occupation, while Level IV is a senior-level position requiring greater judgment and independence.”

Goel said USCIS used these DOL levels in the proposed rule for purposes they were never intended. He disputes the central premise of the proposed rule, that higher wage levels in the DOL system equate to higher skill and greater economic value. “USCIS used its framing to justify weighting the lottery in favor of Level III and IV beneficiaries. Wage levels don’t correspond to skill in the way USCIS suggests, and instead they correspond to how DOL has structured job progression for prevailing wage purposes.”

According to Goel, the two systems are incompatible because the DOL wage levels are only focused on ensuring that employer pay for foreign nationals is fair relative to the job requirements. “USCIS lottery weighting attempts to twist those same levels into a proxy for ‘skill’ and ‘best and brightest,’” he said.

Table 1
H-1B Lottery Selection Probability

Salary Level	Probability of Being Selected in H-1B Lottery Under the Current System	Probability of Being Selected in H-1B Lottery Under Proposed Rule
Level I	29.59%	15.29%
Level II	29.59%	30.58%
Level III	29.59%	45.87%
Level IV	29.59%	61.16%

Source: USCIS.

Comparing the current system to the proposed rule reveals a striking difference. Under the current system, individuals at all four salary levels have a 29.59% chance of being selected for an H-1B petition. Under the proposed rule, individuals at Level I would see their probability of being chosen for H-1B petitions decrease significantly, from 29.59% to 15.29% under the proposed rule, according to USCIS. At the same time, individuals at Level IV would see their probability of being selected rise to 61.16% under the proposed rule. The probability of USCIS selecting

individuals at Level III would climb from 29.59% under the current system to 45.87% under the proposed rule, while for people at Level II, the selection opportunity would increase slightly to 30.58%.⁷

The percentage shift in selection probability also illustrates the significant change produced by the proposed rule. (See Table 2.) Under the proposed rule, the probability of USCIS selecting an individual at Level IV for an H-1B petition would increase by 107% but plummet by 48% for individuals at Level I. The probability of USCIS selecting a person for an H-1B petition would rise by 55% at Level III and increase by 3% for individuals at Level II.⁸

Table 2
Change in Probability of H-1B Lottery Selection

Salary Level	Percentage Change in Probability of Selection Under the Proposed Rule
Level I	-48%
Level II	+3%
Level III	+55%
Level IV	+107%

Source: USCIS.

The National Foundation for American Policy discovered an error in calculations made by USCIS in Tables 13 and 14 of the proposed rule that leads the agency to understate the negative impact of the new system on individuals at Level I and the boost the proposed rule gives to individuals at Level III and Level IV.⁹ According to USCIS, people at Level I would receive 10,099 fewer H-1B selections, while individuals at Level IV would receive 3,230 more, Level III individuals would get 4,496 more selections and Level II would receive 2,373 additional selections.

However, after correcting for the USCIS error, NFAP found that people at Level I would receive 11,518 fewer H-1B selections and individuals at Level IV would

⁷ “Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject H-1B Petitions,” U.S. Citizenship and Immigration Services, DHS, RIN 1615-AD01, published September 24, 2025.

⁸ Ibid.

⁹ In the proposed rule, Table 13, line F was incorrectly calculated, and this affected the calculation of total selections under the proposed new system in Table 14, line 5.

receive 4,426 more. Level III would get 5,528 more selections, and Level II would receive 1,564 more selections.

Under the proposed rule, after correcting for the USCIS error in their simulation, the share of H-1B petitions would more than double to 10.1% for individuals offered salaries at Level IV compared to 4.9% under the current system. Similarly, the share of H-1B petitions for individuals at Level III would rise from 11.8% under the current system to 18.3% under the proposed rule. However, the share of H-1B petitions selected for individuals at Level I would drop nearly in half, from 28.0% under the current system to 14.5% under the proposed rule. For Level II, the share of H-1B petitions would rise from 55.2% under the current system to 57.1% under the proposed rule.

Table 3
Estimated Difference in H-1B Lottery Selection By Wage Level:
Current vs. Proposed System
(With NFAP correction to USCIS simulation)

Salary Level	Estimated Share of H-1B Petitions Selected Under the Current System	Estimated Share of H-1B Petitions Selected Under the Proposed Rule	Difference in Estimated Number of H-1B Petitions Selected Under Proposed Rule
Level I	23,830 (28.0%)	12,312 (14.5%)	-11,518
Level II	46,968 (55.2%)	48,532 (57.1%)	+1,564
Level III	10,052 (11.8%)	15,580 (18.3%)	+5,528
Level IV	4,150 (4.9%)	8,576 (10.1%)	+4,426
Total	85,000	85,000	n/a

Source: USCIS, National Foundation for American Policy.

In sum, the proposed rule is unlawful. It contravenes the intent of Congress and the president's belief that the U.S. government should make it easier for international students to remain and work in the United States.

Sincerely,

[Signature Redacted]

Stuart Anderson
Executive Director
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