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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

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

Dear Chief Charles L. Nimick:

Attorneys United for a Secure America (AUSA) respectfully submits the following public comment in response to the notice of public rulemaking (NPRM) issued by the U.S. Department of Homeland Security (DHS) as published in the Federal Register as 8 CFR Part 214. See "Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers".

AUSA is a nationwide network of attorneys, law students, investigators, and paralegals who support strong enforcement of federal immigration law and protecting the United States' sovereignty. AUSA exists to put the American people's needs first when enforcing U.S. immigration law. This includes prioritizing national security, defending our country's border, and safeguarding the public across the nation from the harms and challenges posed by mass migration, both lawful and unlawful, to the United States. AUSA is a project of the Immigration Reform Law Institute (IRLI), a 501(c)(3) public interest law firm incorporated in the District of Columbia.

AUSA works to monitor and hold federal, state, and local government officials who undermine, fail to respect or fail to enforce our national immigration and citizenship laws accountable. This includes foreign labor and its impacts on American workers. AUSA also provides expert immigration-related advice, training, and resources to public officials, the legal community, and the general public.

I. Summary

In the proposed rule changes for "Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers", DHS's U.S. Citizenship and Immigration Services has proposed changes that will fundamentally alter immigration laws that exceed their authority. It is well-known that Congress writes the laws, and Federal agencies are to enforce those laws. The proposed changes will only benefit large employers, disadvantage American job seekers, and increase fraud in these visa programs.

The proposed revisions, in some cases, directly undermine INA §§ 101(a)(15)(H), 214(c)(1)(i) and 8 CFR § 214.2(h)(4)(B) via changing the definition of who qualifies as an H-1B visa holder that disadvantages U.S. graduates with the same qualifications. Since 2021, U.S. citizens with specialty degrees and work experience have less employment opportunities. The proposed rules will benefit foreign workers over American workers by loosening the definition of specialty degrees. There is also non-existent guidance showing how DHS can detect fraud and perform enforcement actions. The H-1B visa program was intended as a supplement to fill a gap for employers unable to find qualified Americans. H-1B was never meant to be a replacement of American workers.

AUSA will address the historical context of F-1 and H-B visas, the current proposed revisions, and future proposed rule revisions. AUSA will also provide recommendations to achieve DHS' statutory goals.

II. History of F-1 and H-1B visas

Originally, F-1 visas were created for international students to remain temporarily in the U.S. as long as they were full-time students at an accredited university to pursue a course of study. 8 U.S.C. § 1101(a)(15)(F)(i). After several administrations, F-1 student visas now include ever-increasing opportunities to gain work experience with American businesses through an OPT "Optional Practical Training" program. In 1992, without notice and comment, OPT was created by a regulation that originally authorized student visa holders to remain in the United States and work for a year after graduation. *See* Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992) (1992 OPT Rule) (Pet. App. 734a). OPT is now the largest foreign guest worker program where an F-1 student visa may remain for up to three and a half years after graduation to work or remain unemployed.

The 1990 Act eliminated the requirement that an H-1B nonimmigrant have "a foreign residence which he has no intention of abandoning," and under the regulations, a noncitizen may legitimately come to the U.S. as an H-1B nonimmigrant and "at the same time, lawfully see to become a permanent resident." 8 C.F.R. 214.2(h)(16)(i). In 1998, Congress approved the "American Competitiveness and Workforce Improvement Act" which increased the H-1B visa cap. Also approved were new fees and penalties for abuse of the H-1B system. However, there were very few enforcement actions taken against companies that undermined protections for both foreign workers and Americans.

In 2000, Congress removed effective caps on H-1B by allowing for more renewals of H-1B status without counting against the cap through the "American Competitiveness in the 20th Century Act". Other changes to H-1B were made in 2004 with the "H-1B Visa Reform Act of 2004," which added 20,000 new H-1B slots for foreign students graduating with a master's degree. Each time, F-1, H-1B and similar visas were modified according to the need for employees. While companies had to verify that no qualified American workers were available to meet their employment needs, very little oversight occurred.

The proposed rule changes include H-1B foreign worker visas. H-1B visas are for noncitizens coming to the United States temporarily to provide work services in a specialty occupation. 8 CFR § 214.2(h)(4)(B). Section 214(i) of the INA defines "specialty occupation" as an occupation that requires "theoretical and practical application of a body of highly specialized knowledge" as well as attainment of a bachelor's or higher degree as a minimum for entry into the occupation. INA §§ 101(a)(15)(H), 214(c)(1)(i). The H-1B program must complement and not displace U.S. workers. Controversy exists over whether, in application, it accomplishes what it aims to do.

III. Discussion of Proposed rule revisions

USCIS's stated purpose for this rulemaking is to "…modernize and improve the regulations relating to the H-1B program by: (1) streamlining the requirements of the H-1B program and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) improving integrity measures. Some of the proposed provisions would narrowly impact other nonimmigrant classifications."

The proposed rules would have a greater impact than stated in the current proposed rule revisions. During this decade, numerous American students have graduated with these specialty degrees and gained experience through either internships or part or full-time work. While equally qualified, a large percentage of Americans cannot obtain gainful employment. The proposed rule revisions, which include increasing the number of these visas, do not provide set enforcement consequences should the foreign worker or business cut corners to hire foreigners instead of Americans. These rules aim to hire foreign nationals as temporary foreign workers when and only if a demonstrated labor shortage exists. Unfortunately, DHS provides no explanation of the verification process.

Over the past few decades, H-1B visas have consistently been increased to meet the growing needs of companies for experienced workers with specialty degrees when there was a shortage of similarly qualified American workers. Recently, more Americans have graduated with those degrees and gained the necessary work experience during college. Over the past few years, many American employers have reduced job openings, creating a loss of employment opportunities for Americans. This is why it is "… becoming increasingly difficult for recent college graduates to find employment. They are one of the brackets of the population struggling the most with their job search since January 2021. The unemployment rate for recent graduates is at 4.4 percent – a number higher than the overall jobless rate, according to the Federal Reserve Bank of New

York."[1] As a result, college graduates are more likely to be unemployed while employed Americans are being replaced with foreign workers who are sometimes not qualified for this position. The proposed regulations to increase foreign visas while Americans are struggling are counterintuitive. The proposed rules are also against the stated purpose of and against the needs of Americans seeking jobs in those same companies.

According to College Fix[2], working international students, classified as students by academic institutions, are exempt from paying Social Security and Medicare taxes. This means employers are also exempt from those taxes, creating another financial incentive for businesses to hire cheaper foreign labor at the expense of Americans. Currently, almost "200,000 foreign students are enrolled in OPT. The figures show that international students remaining in the US on student visas has doubled in the past decade".[3]

Another issue is that several large manufacturing companies are moving to other countries such as Mexico and China, increasing unemployment for Americans.[4] Those jobs become unattainable for Americans as Mexico and China have strict foreign worker regulations. The question that remains is why D.H.S. continues to issue more H-1B visas when there are ample equally qualified and unemployed American graduates who can perform the same specialized skills needed by large companies. It is logical to assume that more Americans would qualify for these jobs by loosening the definitions for specialty degrees and qualifications.

Under I.N.A. section 214(i)(1), 8 U.S.C. 1184(i)(1), a "specialty occupation" requires 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. The current regulatory criteria at 8 CFR 14.2(h)(4)(iii)(A)(*1*) states that a bachelor's degree is "normally" required. D.H.S. has proposed to define the term "normally" at proposed 8 CFR 214.2(h)(4)(iii)(A)(*5*) to state that, "for purposes of the criteria in this provision, "normally" means "conforming to a type, standard, or regular pattern" and is "characterized by that which is considered usual, typical, common, or routine." It is then logical that more Americans would qualify for these same jobs with the loosening of the definitions for those specialty degrees and qualifications.

DHS is also proposing to increase the registration fee from $10 to $215 per registration, which will not be enough to determine the extent of potential abuse and prevent beneficiary registrations from submitting multiple registrations to increase the chance of selection. Failing to keep track of every H-1B holder to ensure there is no overstay period or various beneficiaries of a single holder is ripe invites abuse.

Additionally, DHS must perform background checks on foreigners to determine whether any criminal history, credit checks, and authenticity verification of documentation are lacking or non-existent, along with consequences for those who attempt fraud. Although there is an interview

[1] https://www.msn.com/en-us/money/careersandeducation/college-graduates-are-having-a-harder-time-finding-work-after-the-pandemic/ar-AA1kDbcJ "College Graduates Are Having A Harder Time Finding Work After The Pandemic". See also, https://intellizence.com/insights/layoff-downsizing/major-companies-that-announced-mass-layoffs/

[2] https://www.thecollegefix.com/nearly-200000-foreign-workers-classified-as-students-state-department/

[3] https://www.dailymail.co.uk/news/article-12815049/Foreign-students-remaining-work-surge-visas.html

[4] https://www.usatoday.com/story/money/2023/10/31/labor-market-power-shifts-towards-employers/71346438007/

with the petitioner, cooperation in compliance review and inspections is challenging to assess due to the need for more details on the application. Preventing forgeries of passports, degrees, birth certificates, or visas makes verifying information from the applicant challenging when multiple registrations under alias differ from the petitioner's birth name. Maiden names, nicknames, or people with the same names do not make it any easier.

Finally, enforcement actions against those using falsified identification documents to obtain a visa must take place to reduce fraudulent applications. Partial submission of legitimate official documents should not be accepted. When DHS detects fraud, the application must be denied, and the applicant must be disbarred from the program. Otherwise, the prevention of theft of U.S. intellectual property by foreign interests allowed access to U.S. institutions and laboratories will be compromised.

IV. Recommendations and Future Proposed Rule Making

A potential solution would be to freeze the proposed increase in these visa categories during this economic turmoil. The number of unemployed Americans has risen steadily. More Americans have the qualifications needed for the occupations that employers claim are needed to fill. Americans can do this work to reduce unemployment and other problems that coincide with unemployment, such as homelessness, crime, and mental health issues. Therefore, maintaining or reducing the number of visas is the preferable path for DHS now.

DHS has requested public commentary on future proposed rule revisions. These proposals appear necessary and should have been in the current rule revisions. For example, DHS proposes to amend FLC programs to promptly refer all potential criminal violations to the OIG. While admirable, defining "timely manner" and explaining how employers engaged in fraud will be prosecuted and disbarred will be essential.

DHS should verify the accuracy of H-1B labor condition application information, and continue with its efforts to ensure that H-2B applications are processed in time to hire foreign workers by employers' dates of need while also providing the review process to protect the interests of U.S. workers.

We agree with the future proposals for the PERM visa program to "perform post-adjudication reviews to validate the integrity of employers' attestations once applications have been certified since most of the applications are submitted for review without documentation to prove or support employers' attestations." Disbarment should be permanent but also provide for the prevention of re-enrollment under another company name to evade detection. These proposals will ensure foreign visa holders are protected while ensuring that American workers are given priority in hiring over foreigners.

1. Summary

This proposed rule change defeats Congress's intent to protect American workers by increasing the number of foreign visas and loosening the definitions of qualified foreign workers for specialty occupations requiring a bachelor's degree in a specific field. The United States should

focus on employing unemployed and underemployed Americans before employing non-citizens. The recommendation is to keep the definition of specialty occupations with valid and verified degrees needed for unfilled jobs where Americans are given priority without increasing the cap for H-1B visas. As of December 13, 2023, USCIS has already filled the visa cap of the 85,000 H-1B visas reserved for highly skilled workers in specialty occupations for fiscal year 2024.

Respectfully submitted,

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and

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