



IMMIGRATION REFORM
LAW INSTITUTE

25 Massachusetts Avenue, NW
Suite 335
Washington, DC 20001
202.232.5590 | 202.464.3590(fax)
www.irli.org

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Founded in 1986, the Immigration Reform Law Institute (IRLI) is a nonprofit legal organization defending the rights and interests of Americans.

IRLI is a supporting organization of the Federation for American Immigration Reform (FAIR).

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December 22, 2023

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:

The Immigration Reform Law Institute (IRLI) submits the following comments to the proposed regulation Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, DHS Docket No. USCIS-2023-0005.

Matching H-1B Registrations and Petitions to Workers

The number of H-1B visas sought exceeds the number of visas available under the annual quotas. Consequently, some selection process is required for the H-1B system to function. A lottery system has been used to handle the gap between the number of available visas and the number of visa petitions.

The proposed regulation reflects concern over the integrity of the lottery process because it is vulnerable to those abusing the system by filing multiple entries into the visa lottery for the same person. While this concern is valid, the proposed rule does not go far enough to prevent this and similar abuse.

The current visa petition (I-129 form) and lottery registration process only include the name and date of birth to identify the beneficiary unless the beneficiary is already in the United States. The system has no safeguards to

ensure that the actual person entered in the lottery is the same as the one who gets the visa. The current and proposed systems have little defense against the entry of fictitious or generic names into the visa lottery followed by the creation of fraudulent foreign documentation for persons assuming the names selected.

Such fraudulent documentation is readily available in many foreign countries. For example, Lakireddy Bali Reddy succeeded in importing teenage sex slaves he bought in India by fabricating a family through fraudulent Indian documentation and importing them using H-1B and H-4 dependent visas.

There needs to be a unique identification of the beneficiary that is used at every step in the H-1B process. At a minimum, DHS should require a photograph and passport number to be submitted on the visa petition and with any lottery registration application to ensure the beneficiary is the same person at every step.

DHS H-1B Application Processes Need to Be Consistent With LCA Validity

DHS regulations need to be consistent with the validity of a Labor Condition Application. The first step in the H-1B visa process is to get a Labor Condition Application approved by the Department of Labor. Under Department of Labor regulations, 20 C.F.R. § 655.730 (b), a Labor Condition Application must be submitted no earlier than six months before the start of intended employment. This is inconsistent with DHS procedures that start processing H-1B petitions six months before the start of the October 1st fiscal year. An H-1B petition mailed to USCIS for April 1 processing cannot possibly have a valid Labor Condition Application because of the six-month limit on validity. DHS should change its procedures to ensure that Labor Condition Applications for an H-1B petition are submitted no earlier than six months before the start of intended employment.

Third-Party Placements

Fraud is a major problem in the H-1B program. Some examples:

- Houston consulting company admits to H-1B visa fraud conspiracy: <https://www.justice.gov/usao-sdtx/pr/houston-consulting-company-admits-h-1b-visa-fraud-conspiracy>—Cloudgen pleaded guilty to H-1B visa fraud in which the company applied for visas for aliens to fill jobs that did not exist. Cloudgen would seek actual employment for the H-1B workers after they arrived in the United States with third-party employers

- **Man Arrested on Charges of \$21 Million H-1B Visa Fraud Conspiracy:** <https://www.justice.gov/usao-edva/pr/man-arrested-charges-21-million-h-1b-visa-fraud-conspiracy>—Owner of four corporations was arrested for filing H-1B visas for jobs that did not exist. The companies would attempt to find actual work for the aliens after they entered the United States with third-party employers
- **Wright State University Agrees to Pay Government \$1 Million for Visa Fraud:** <https://www.justice.gov/usao-sdoh/pr/wright-state-university-agrees-pay-government-1-million-visa-fraud>—University used its exemption from the H-1B quotas to import foreign workers then subcontract them to third-party employers.

The common feature one finds in all of these massive H-1B frauds is that they involve third-party placements of H-1B workers. It is time for DHS to define the employer–employee relationship for H-1B visas so that it reflects the historical norm that an employee works directly for an employer—not a third party.

History demonstrates that allowing third-party placements of H-1B workers simply opens the door to rampant abuse. As long as DHS permits third-party employment of H-1B workers, DHS demonstrates that it is not serious about reducing abuse in the H-1B program.

Third-party placements also defeat the purpose of H-1B as a means to provide labor when Americans are not available. Allowing H-1B workers to be contracted out to third parties puts Americans in direct competition with H-1B workers made available by third parties for jobs.

If an employer needs an H-1B worker, it should make the visa petition and obtain the required labor certifications itself—not get such workers through third parties. An employer also should not use an agent as a petitioner. Such use of an agent is contrary to the statutory terms of the H-1B program that require an actual employer.

Specialty Occupation

H-1B visas are available to workers in specialty occupations. A specialty occupation requires the attainment of a bachelor’s degree or equivalent. 8 U.S.C. § 1184. DHS and its predecessor have routinely ignored this statutory requirement by allowing “specialty occupation” to be transformed into a packaging requirement for a specific job, rather than an occupational requirement.

The definition of a Specialty Occupation should incorporate an objective threshold. To qualify as a Specialty Occupation, 75% of U.S. workers in that

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occupation must have a college degree. An occupation that does not meet this threshold objectively should not be considered a Specialty Occupation.

Respectfully Submitted,

John M. Miano

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