FAIR
FEDERATION FOR AMERICAN IMMIGRATION REFORM

May 19, 2021

Ms. Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
5900 Capital Gateway Drive
Camp Springs, MD 20746

RE: DHS Docket No. USCIS-2021-0004: Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input

Dear Ms. Deshommes,

The Federation for American Immigration Reform (FAIR) respectfully submits the following public comment to the U.S. Department of Homeland Security (DHS) in response to the agency's request for information, as published in the Federal Register on April 19, 2021. *See Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input* (DHS Docket No. USCIS-2021-0004).

FAIR is a national, nonprofit, public-interest organization comprised of millions of concerned citizens who share a common belief that our nation's immigration laws must be enforced, and that policies must be reformed to better serve the national interest. FAIR examines trends and effects, educates the public on the impacts of sustained high volume immigration, and advocates for sensible solutions that enhance America's environmental, societal, and economic interests today, and into the future.

I. Introduction

FAIR applauds DHS's efforts to reduce administrative waste and increase efficiency in the legal immigration system. Efforts to maximize taxpayer resources and eliminate unnecessary redundancies, however, should not be confused with, or used as a vehicle to, expand eligibility for immigration benefits beyond for what is provided in the Immigration and Nationality Act (INA). To have a properly functioning legal immigration system, the executive branch must enforce the laws passed by Congress.

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Further, while administrative reforms are sorely needed to promote efficiency in USCIS's administration of immigration benefits, these reforms should not come at the expense of the American public, who are the primary stakeholders in their country's immigration system. Thus, FAIR urges DHS to heavily weigh national security interests, public safety interests, and the overall integrity of the immigration system when evaluating reforms to enhance access to the lawful immigration system and to protect the interests of American workers, on whose behalf Congress has created numerical and categorical limitations in immigration law to protect.

II. Improve Access to the Asylum System for Legitimate Asylum Seekers by Deterring Fraud and Abuse

FAIR strongly urges DHS to implement policies to deter fraud in the asylum system in order to ensure legitimate asylum seekers are able to have their cases adjudicated without unreasonable delays and to deter illegal immigration into the United States, which hurts the general American public by depressing wages, undermining public health interests, and increasing national security risks in the United States. Currently, the asylum backlog totals over 1 million cases.[1] The result is that most asylum applicants must wait years in order to have their cases fully resolved by an asylum officer or an immigration judge.[2]

The need for administrative deterrence is critical given the current crisis at the southern border, specifically the sharp increase of encounters with aliens at the border, a subsequent dramatic increase in requests for asylum relief, and the large number of meritless, fraudulent, or frivolous asylum claims that are straining the nation's immigration system. The availability of prompt release from detention, as well as employment authorization availability has caused the number of credible fear claims to skyrocket to crisis levels in the past decade, and most drastically, in 2021.[3]

Apprehending and processing the growing number of aliens who arrive illegally into the United States and make fear claims consumes an ever-increasing amount of DHS resources, which must surveil, apprehend, screen, and process the aliens who enter the country and must represent the U.S. Government in cases before Department of Justice (DOJ) immigration judges, the Board of Immigration Appeals, and the U.S. Courts of Appeals. Most asylum claims, however, ultimately fail, and many are fraudulent. The past decade has seen over a 1,883% increase in credible-fear claims (data for fiscal years

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[1] TRAC Immigration, *Backlog of Pending Cases in Immigration Court*, (Apr. 2021) https://trac.syr.edu/phptools/immigration/court_backlog/.
[2] TRAC Immigration, *Immigration Court Processing Times By Outcome*, (Apr. 2021) *available at* https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php.
[3] U.S. Customs and Border Protection, Southwest Land Border Encounters, (May 11, 2021) available at https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.

2008 to 2018).[4] In 2018 specifically, DHS processed 99,035 credible fear claims.[5] Immigration courts received over 162,000 asylum applications in FY 2018, a 270 percent increase from five years earlier.[6] Given CBP has reported that unlawful border crossings have reached a 20 year high in 2021, credible fear and asylum claim totals are expected to continue to rise.

Over the past decade, the majority of these claims were determined to be meritless. The Supreme Court noted, when evaluating the expedited removal process, that a random sampling of asylum claims found 58 percent possessed indications of fraud, while 12 percent were conclusively fraudulent.[7] Moreover, of the applicants determined to have a credible fear (or a significant possibility of establishing eligibility for asylum or withholding of removal), about 50% over the same 10-year period, ultimately did not submit an asylum application after their fear screening.[8] In 2019, a grant of asylum followed a credible fear determination just 15% of the time.[9]

Given these facts, FAIR urges DHS to adopt the following reforms in order to allow legitimate asylum seekers reasonable access to asylum benefits, deter fraud and abuse of the asylum system, obtain control over the southern border, and deter illegal immigration into the United States:

A. Utilize Section 235(b)(2)(C) of the INA or Reinstate the Migrant Protection Protocols (MPP)

FAIR urges DHS to continue operation of section 235(b)(2)(C) of the INA and require certain arriving aliens to wait in Mexico pending their removal proceedings with an immigration judge in the United States as an alternative to detaining arriving aliens in the United States under section 235(b)(1) (known as "expedited removal" proceedings) or removal proceedings pursuant to section 235(b)(2)(a)(i). DHS's operation of MPP, which implemented section 235(b)(2)(C), has a proven track record to reduce illegal immigration across the southern border and successfully ended the 2019 border crisis. DHS should reinstate MPP to end the current crisis.

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[4] *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829, 33838, (July 16, 2019), *available at* https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications.
[5] *Id.*
[6] *Id.*
[7] *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. at 1959, 1967-68.
[8] *See* Executive Office of Immigration Review, *Adjudication Statistics: Rates of Asylum Filings in Cases Originating With a Credible Fear Claim* (Nov. 2018); *see also* 84 Fed. Reg. 33841 (noting that many instead abscond).
[9] *See* Executive Office of Immigration Review, *Asylum Decision Rates in Cases Originating With a Credible Fear Claim* (Oct. 2019).

The availability of employment authorization with a pending asylum application, combined with "catch-and-release" policies that ensure most aliens can avoid detention and be released into the United States, provides a strong incentive for illegal border crosses, and once apprehended by DHS, for making a fraudulent or frivilous asylum claims and later disappear into the interior of the United States. By eliminating the possibility of release into the interior of the United States pending an alien's immigration court hearing, MPP eliminated the most significant pull factor for illegal border crossings. MPP also provides amenable aliens a significantly quicker avenue to an immigration hearing, where they are able to pursue a claim for any relief or benefits for which they may be eligible. Reducing the overall numbers of fraudulent and frivolous claims is critical to allow both DHS and DOJ to reduce their backlogs and allow legitimate asylum seekers access to benefits without unreasonable delays.

B. Reunite Children with Their Families in Their Home Countries

DHS must ensure that all inadmissible families and unaccompanied alien minors who arrive illegally and are ineligible to obtain a lawful immigration status are reunited safely at home, not in the United States. Repatriating and reuniting aliens in their home countries, rather than in the United States, is the most humane policy that maintains the integrity of the immigration system, consistent federal immigration law. Importantly, this policy eliminates the incentive to send minors on the dangerous journey alone or with smugglers to illegally cross the southern border and will mitigate the humanitarian crisis that has unsustainably strained and diverted the immigration system's limited resources.

C. Rescind Restrictive Enforcement Priorities and Enforce Immigration Law in the Interior of the United States

FAIR urges DHS to allow the U.S. Immigration and Customs Enforcement (ICE) to enforce immigration law by removing arbitrary limitations on who may be arrested or removed. DHS must immediately rescind ICE its recent policies: *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*, February 18, 2021 ("2021 Johnson Memo*"); Rescission of Civil Penalties for Failure-to-Depart* policy, April 23, 2021; and *Civil Immigration Enforcement Actions in or near Courthouses*, April 27, 2021 ("Joint Johnson and Miller Memo").

ICE has a Congressionally-mandated role to enforce our immigration laws in the interior of the country. Preventing ICE officers from initiating enforcement actions serves no purpose aside to signaling to the world that the U.S. Government does not intend to enforce immigration laws. The 2021 Johnson Memo, *Rescission of Civil Penalties for Failure-to-Depart* policy, and Joint Johnson and Miller Memo not only all threaten public safety and undermine the integrity of the immigration system, but also incentivize illegal immigration and wayward employers to hire unauthorized aliens. These policies

must be rescinded immediately to reduce the significant and needless strains on the asylum system and restore order on our border.

D. Require Asylum Officers to Apply the Mandatory Bars to Asylum and Withholding of Removal to Credible Fear Determinations

FAIR strongly urges DHS to implement its joint final rule, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (Dec. 11, 2020), which among many important updates and clarifications to the asylum process, requires USCIS asylum officers to apply the mandatory bars to asylum and statutory withholding of removal at the credible fear stage. Specifically, DHS should require asylum officers to determine (1) whether an alien is subject to one or more of the mandatory bars to being able to apply for asylum under section 208(a)(2)(B)-(D) of the Act, 8 U.S.C. 1158(a)(2)(B)-(D), or the bars to asylum eligibility under section 208(b)(2) of the Act, 8 U.S.C. 1158(b)(2), including any eligibility bars established by regulation under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C); and (2) if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under the regulations implementing the Convention Against Torture (CAT).

With this policy in place, an alien who establishes a credible fear of persecution or reasonable possibility of persecution but for the fact that he or she is subject to one of the bars that applies to both asylum and statutory withholding of removal should receive a negative fear determination, unless the alien establishes a reasonable possibility of torture, in which case he or she should be referred to the immigration court for asylum-and-withholding-only proceedings. In those proceedings, the alien would have the opportunity to raise whether he or she was correctly identified as being subject to the bar(s) to asylum and withholding of removal and also pursue protection under the CAT regulations.

As DHS and DOJ have jointly acknowledged, it is pointless, wasteful, and inefficient to adjudicate claims for relief in section 240 proceedings when it can be determined that an alien is subject to one or more of the mandatory bars to asylum or statutory withholding at the screening stage.[10] Accordingly, applying those mandatory bars to aliens at the "credible fear" screening stage would eliminate removal delays inherent in section 240 proceedings that serve no purpose and eliminate the waste of adjudicatory resources currently expended in vain. These resources could instead be used to process and adjudicate claims from applicants that have a greater likelihood of success in their asylum application.

E. Maintain "Last in, First Out" Processing Priorities

[10] *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274 (Dec. 11, 2020).

USCIS should maintain its "Last In, First Out" asylum application processing priorities. Giving priority to recent filings allows USCIS to promptly place such individuals into removal proceedings, which reduces the incentive to file for asylum solely to an obtain EAD. This approach, which originally had been used for nearly two decades, paused in 2014 and reinstated in 2018, also has allowed USCIS to decide qualified applications in a more efficient manner and allowed the agency to focus more resources on applications that are more likely to be meritorious as a result.

F. Terminate USCIS's Practice of Accepting Motions for Reconsideration after an Immigration Judge Has Concurred with a Fear Screening Determination

USCIS should terminate its practice of accepting motions or requests for reconsideration for all credible fear or reasonable fear determinations that have been reviewed by an immigration judge. The practice of filing requests for reconsideration for claims that have already been screened or adjudicated and subsequently reviewed *de novo* by an immigration judge in section 240 removal proceedings[11] has become an overwhelmingly popular tactic to delay the removal of aliens in expedited removal without meritorious fear claims. Such tactics only serve to further drain USCIS resources and divert resources away from alien with legitimate and unresolved fear claims. Accordingly, FAIR urges DHS and DOJ to repeal 8 C.F.R. § 1003.23 and end its practice of reconsidering or reopening all credible fear and reasonable fear determinations after USCIS has transferred jurisdiction of a case to the DOJ or an immigration judge has issued a final decision on a case.

III. Terminate Unlawful Parole Programs

FAIR strongly disagrees with commenters that suggest using parole as a mechanism to allow aliens who are otherwise ineligible for immigration benefits to be admitted into the United States. The creation of *ultra vires* and unfunded parole programs diverts agency resources from the adjudication and administration of lawful visa programs, for which many applicants and beneficiaries experience significant wait times and processing delays.[12] Congress has not delegated DHS authority, through section 212(d)(5) of the INA or any other provision in law, to permit the limitless admission of classes defined solely by DHS's interpretation of "significant public benefit." Accordingly, DHS should also terminate the Department's International Entrepreneur Parole (IEP)[13] and Central

[11] 8 C.F.R.§ 1003.42.
[12] U.S. Citizenship and Immigration Services, *Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year*, (Apr. 30, 2021) *available at* https://egov.uscis.gov/processing-times/historic-pt.
[13] *International Entrepreneur Parole Rule*, 82 Fed. Reg. 5,238 (Jan. 17, 2017).

American Minors (CAM) programs. Both programs are *ultra vires*, contrary to the public interest, and result in unnecessary diversions of the agency's limited resources.

The use of programmatic parole directly conflicts with Congress's intent in enacting the parole authority. The history of the parole statute is one of increasing tightening of its language in response to agency overreach. Congress's actions have resulted in the restriction of agency discretion.[14] Today, parole may only be granted: (1) temporarily, (2) "on a case-by-case basis," (3) for no others purpose than "urgent humanitarian reasons or significant public benefit," (4) if the parolee was in the "custody" of DHS at the time of the grant of parole, and (5) if the grant of parole is never ("shall not be") "regarded as an admission of the alien."[15]

It is irrational to conclude that, while Congress acted to subdue the agency's discretionary parole authority, Congress simultaneously sought to expand the agency's parole authority without doing so expressly to the vast extent necessary to authorize class-based parole admissions programs, including the IEP and CAM programs.[16] No such provision in law exists. Rather, Congress has created a detailed and comprehensive scheme for regulating the admission and employment of aliens, including entrepreneurs, refugees, and familial relatives, into the United States.[17] It would be unreasonable to conclude that Congress regulated employment by aliens as carefully as it has, but also intended DHS to be able to use parole to admit an indefinite number of additional aliens, in its discretion, and to allow them to engage in employment.[18]

Accordingly, FAIR strongly urges DHS to return to the government's long-standing interpretation of the parole authority, which restricted parole to only aliens whose circumstances, on a case-by-case basis, were determined to meet the high "significant public benefit" standard and were temporary in nature.[19] This interpretation will enhance

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[14] As a response to agency abuse of discretionary parole, Congress included in the 1980 Refugee Act a prohibition the discretionary exercise of parole for any "alien who is a refugee," unless the Attorney General determined that "compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207." 8 U.S.C. § 1182(d)(5)(B). In 1996, Congress acted again to rein in agency abuse of discretion to parole aliens into the United States by authorizing discretionary grants of parole by "only" where additional conditions had been met.

[15] 8 U.S.C. § 1182(d)(5)(A).

[16] *See Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1119 (9th Cir. 2007) ("The scope of § 1182(d)(5)(A) is carefully circumscribed: Aliens may be paroled into the United States 'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.').

[17] *See* 8 U.S.C. § 1101 et seq.

[18] *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[H]ad Congress wished to assign ['a question of deep economic and political significance'] to an agency, it surely would have done so expressly."); *See also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress [] does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes.").

[19] *See* U.S. Dep't of Homeland Sec., *Report to Congress: Use of the Attorney General's Parole*

DHS's ability to focus its resources on processing immigration benefits for which Congress has authorized or funded, and increase access to these benefits without unreasonable delays in processing.

IV. Discretionary Issuance of Employment Authorization Documents

FAIR strongly disagrees with comments that urge DHS to extend employment authorization benefits to aliens who are ineligible to receive employment authorization documents (EADs) under the INA. DHS does not have the authority to grant EADs to aliens whom the INA does not provide such benefits or for whom the INA expressly grants the Secretary discretionary authority, such as is the case with asylum based EADs.[20] Rather, DHS should protect job opportunities for American workers consistent with the employment-based admission limitations passed by Congress. Accordingly, FAIR recommends DHS to comply with the INA and remove the following regulations that unlawfully create new classes of eligible EAD holders:

1) *Employment Authorization for Certain H-4 Dependent Spouses*, 80 Fed. Reg. at 10,294;
2) *Enhancing Opportunities for H-1B1, CW-1, and E-3 Nonimmigrants and EB-1 Immigrants*, 81 Fed. Reg. 2,068 (Jan. 15, 2016);
3) *Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students*, 81 Fed. Reg. 13,040 (Mar. 11, 2016); and
4) *International Entrepreneur Rule*, 82 Fed. Reg. 5,238, 5,239 (Jan. 17, 2017).

Article I of the U.S. Constitution gives Congress plenary power over immigration, and Congress has established an extensive scheme for the admission of immigrant and nonimmigrant foreign workers into the United States through the creation of numerous visa programs.[21] Congress has never conferred nor delegated the authority to DHS to create employment eligibility for classes of aliens not already provided by law. Designating new classes of eligible populations undermines the deliberate scheme created by Congress which has contemplated intricate social, economic, and foreign policies beyond the scope of DHS's interests and mission.

Authority Under the Immigration and Nationality Act Fiscal Years 1997–1998, ("…In general, the parole authority in section 212(d)(5) allows the INS to respond individual cases that present problems that are time-urgent or for which no remedies are available elsewhere in the Immigration and Nationality Act. The prototype case arises in an emergency situation. For example, the sudden evacuation of U.S. citizens from dangerous circumstances abroad often includes household members who are not citizens or permanent resident aliens, and these persons are usually paroled….") *available at* https://www.ilw.com/immigrationdaily/news/2001,0329-Parole.shtm.

[20] Pub. L. No. 104-208, § 604, 110 Stat. 3009, 3009-693.

[21] *See* 8 U.S.C. § 1101 et seq.

Further, contrary to DHS's regulatory position (which DHS later disavowed in litigation[22]), Congress did not confer such authority with the enactment of the definition of "unauthorized alien," in section 1324a of the INA. Section 1324a was enacted by the *Immigration Reform and Control Act of 1986* ("IRCA")[23] to, for the first time, criminalize and impose civil sanctions on the act of hiring an alien who is not authorized to work in the United States. Section 1324a(h)(3) defines those aliens that it is unlawful for an employer to hire. This section, however, is merely definitional and refers to the authorities the Secretary already possesses through enactment of other provisions in the INA. It does not itself grant any authority.[24]

Rather, since the enactment of this position, Congress has specifically extended and limited DHS's authority to grant work authorization to similar classes of aliens on numerous occasions.[25] Interpreting the definition of "unauthorized alien" to confer such broad authority would also render Congress's later enactments superfluous and violate the non-delegation doctrine as an impermissible delegation of legislative authority without sufficient intelligible principles to guide the Secretary.[26]

Rescinding DHS's unlawful regulations is even more critical today given the economic hardships faced by Americans during the ongoing COVID-19 crisis. While economic activity and employment rates have recovered modestly since the beginning of the crisis in early 2020, the economic downturn has affected nearly all industries and occupations

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[22] "Section 1324a . . . cannot reasonably be interpreted to have 'brought about the enormous and transformative expansion' in the Secretary's authority. . . ." Rep. Br. for the Pet'rs, Dep't of Homeland Security, et al. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (No. 18-587) (quoting Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 573 U.S. 302, 324 (2014)).

[23] Pub. L. No. 99–603, § 101, 100 Stat. 3445 (creating the new section § 274a of the INA codified at 8 U.S.C. § 1324a).

[24] *See W. Union Tel. Co. v. Fed. Commc'ns Comm'n*, 665 F.2d 1126, 1136–37 (D.C. Cir. 1981) (holding a section was "only definitional" where it began with "as used in this section" and contained only definition subsections); *Texas v. United States*, 787 F.3d 733, 760 (5th Cir. 2015), aff'd by an equally divided court, 136 S. Ct. 2271 (2015) (observing § 1324a(h)(3) was merely definitional).

[25] For example, the Omnibus Consolidated Appropriations Act 1997 provided that "[a]n applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. Pub. L. No. 104-208, § 604, 110 Stat. 3009, 3009-693.

[26] The Supreme Court "repeatedly [has] said that when Congress confers decision making authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to
act' is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); *see also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685(1980) (Rehnquist, J. concurring) ("[The nondelegation doctrine] ensures . . .that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.").

in the United States, resulting in mass layoffs and business closures.[27] Department of Labor (DOL) data shows that the United States currently has more than 9.8 million fewer jobs than it did just a year ago, and has only recovered less than half of the jobs that were lost just during the first few weeks of the pandemic.[28] The nonpartisan Congressional Budget Office has predicted that the U.S. labor market will take over a decade for conditions to return to pre-pandemic levels.[29] This crisis has been so severe that the United States Congress has passed and continues to consider multiple trillion-dollar stimulus legislation to provide emergency funding to unemployed U.S. citizens and struggling businesses.[30]

The U.S. Government has both a moral and legal obligation to ensure that U.S. workers of all backgrounds are first in line for jobs as the economy reopens. Utilizing agency discretion to provide EADs to only populations authorized by Congress is a necessary step in ensuring domestic employment opportunities are not unfairly and unlawfully diminished and will reduce processing delays for beneficiaries of lawful programs.

V. Increase High-Skilled Workers' Access to Immigration Benefits

To ensure the best and the brightest foreign workers have access to employment-based visas and are able to contribute to the U.S. economy and innovation, DHS should prioritize the selection of higher-skilled and higher-paid workers for employment-based visas, consistent with the Department's recently published final rule. In addition to increasing the highest-qualified aliens' access to immigration benefits, this policy change will benefit American workers as well, who often must unfairly compete with foreign workers who are paid less than their American counterparts for the same jobs in the same locations.

The methodology for the selection of H-1B registrations (or petitions, in years registration is suspended) is a matter that Congress left to USCIS discretion. The

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[27] The pandemic has also had a disproportionate impact on the employment of minorities and women in the U.S. According to labor reports, at least 8.6 percent of Hispanics, 9.2 percent of Black people, and 6.6 percent of Asians are unemployed domestically. Additionally, nearly 60 percent of people who left the workforce since February 2020 are women. Bureau of Labor Statistics, U.S. Dep't of Labor, The Employment Situation – January 2021, Feb. 5, 2021, available at https://www.bls.gov/news.release/pdf/empsit.pdf.

[28] Bureau of Labor Statistics, U.S. Dep't of Labor, *The Employment Situation – February 2021*, Mar. 5, 2021, *available at* https://www.bls.gov/news.release/pdf/empsit.pdf (last visited Mar. 9, 2021).

[29] Congressional Budget Office, *An Overview of the Economic Outlook: 2021 to 2031*, Feb. 2021, *available at* https://www.cbo.gov/system/files/2021-02/56965-Economic-Outlook.pdf.

[30] Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub.L. 116–136; Clifford Colby, *Stimulus Bill Poised to Pass Wednesday Morning, When Will Biden Sign*, Mar. 9, 2021, available at https://www.cnet.com/personal-finance/stimulus-bill-poised-to-pass-wednesday-morning-when-will-biden-sign/.

Immigration and Nationality Act (INA) states that "aliens who are subject to the numerical limitations . . . shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status."[31] The term "filing" is ambiguous, however, and the statute is silent as to how USCIS must select H-1B petitions, or registrations, to be filed toward the numerical allocations in years of excess demand. Additionally, because of excess demand and limited registration and filing periods, USCIS often receives multiple submissions simultaneously.[32]

Accordingly, DHS may rely on its general statutory authority to implement the H-1B statute and proposes to revise the regulations to redesign the selection system to more effectively, efficiently, and faithfully administers the cap selection process.[33] "Congress left to the discretion of USCIS how to handle simultaneous submissions."[34] Prioritizing selections on the basis of wages proffered is a reasonable interpretation of the statute that furthers Congress's primary purposes in creating the H-1B program to help U.S. employers fill actual labor shortages in positions requiring highly skilled or highly educated workers, without undermining labor conditions or otherwise suppressing wages in the domestic labor market.

As DHS has reiterated, prioritizing wage levels in the registration selection process incentivizes employers to offer higher wages, or to petition for positions requiring higher skills and higher-skilled aliens that are commensurate with higher wage levels, to increase the likelihood of selection for an eventual petition.[35] Similarly, it discourages abuse of the H-1B program to fill lower-paid, lower-skilled positions, which is a significant problem under the present selection system. [36]

By requiring USCIS to prioritize registrations (or petitions) with proffered wages equaling or exceeding Level 4 to Level 1, in descending order, DHS will provide

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[31] 8 U.S.C. § 1184(g)(3).
[32] *See Walker Macy LLC v. USCIS*, 243 F. Supp. 3d 1156, 1170 (D. Or. 2017).
[33] *See* INA section 103(a), 214(a) and (c)(1), 8 U.S.C. 1103(a), 1184(a) and (c)(1).
[34] *See Walker Macy*, 243 F.Supp.3d at 1176 (finding that USCIS' rule establishing the random-selection process was a reasonable interpretation of the INA).
[35] *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions*, 86 Fed. Reg. 1676 (Jan. 8, 2021).
[36] *See* U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, I-129 Petition for H-1B Nonimmigrant Worker (Cap Subject) Wage Levels for H-1B Petitions filed in FY2018, Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (showing that, for petitions with identifiable certified labor condition applications, 161,432 of the 189,963 (or approximately 85%) H-1B petitions for which wage levels were reported were for level I and II wages); I-129 Petition for H-1B Nonimmigrant Worker (Cap Subject) Wage Levels for H-1B Petitions filed in FY2019, Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (showing that, for petitions with identifiable certified labor condition applications, 87,589 of the 103,067 (or approximately 85%) H-1B petitions for which wage levels were reported were for level I and II wages).

significant incentives to pay foreign workers higher wages. If employers are required to pay H-1B workers approximately the same wage paid to U.S. workers doing the same type of work in the same geographic area and with similar levels of education, experience, and responsibility as the H-1B workers, employers will have little reason to prefer H-1B workers over U.S. workers, and U.S. workers' wages will be less likely to be suppressed, and to a lesser degree, by the presence of foreign workers in the relevant labor market.

Conversely, a purely random selection process does not serve the H-1B program, further Congressional intent, or protect U.S. workers. Rather, the purely random selection process fosters a "race to the bottom" labor market, resulting in unfair competition to U.S. workers and wage suppression among industries that participate in the H-1B program by allowing employers to offer workers' wages that fall significantly below competitive domestic wages. These tactics benefit only profit-collectors and undermine the H-1B program's primary purposes.

H-1B beneficiaries will also benefit significantly from implementation of the final rule. As reiterated by DHS, the final rule will nearly eliminate all incentives to underpay a foreign worker by offering wages below the prevailing wage for the profession. Because an employer must petition for a foreign worker in order to for the worker to participate in an employment-based visa program and employers have significant power over an H-1B's ability to remain in the United States, many foreign workers have substantially less negotiating power with regards to salary and labor conditions compared to U.S. workers in similar occupations.

Implementing this policy change makes no changes to the number of visas allocated for the H-1B program nor alters substantive eligibility requirements, but only increases access for the highest qualified workers. Accordingly, because of the extremely high demand demonstrated year after year for H-1B visas, there is little reason to believe that implementation of change will result in fewer visas issued under the H-1B program. The change will, however, provide both petitioning employers and foreign workers greater predictability in the selection process than a purely random selection lottery. The selection process created by the final rule is also more equitable than the current random lottery system because it is hinged on a factor that correlates closely with the merit and value of the foreign worker.

The purely random selection process USCIS currently uses, on the other hand, harms H-1B beneficiaries because it allows employers to offer wages that fall significantly below competitive domestic wages with no consequence. Currently, employers are only required to offer wages that equal or exceed a Level 1 wage rate for that profession, which is currently set at the 17th percentile of domestic worker's wages in that profession. Neither an H-1B beneficiary nor DOL have the practical ability to challenge an employer's claim regarding the worker's skill level. Accordingly, the current system

benefits only profit-collectors and undermines the interests of "the best and brightest" foreign workers seeking to contribute to the U.S. economy.

Implementing this selection process update would ensure H-1B petitioners have an incentive to pay beneficiaries wages they deserve while providing the highest qualified workers greater access to visas, and mitigating unfair competition to U.S. workers. Given the economic conditions worsened by the COVID-19 pandemic, discussed above, this policy would make critical changes to support beneficiaries, U.S. workers, and the overall economy.

VI. Terminate the Unlawful Deferred Action for Childhood Arrivals (DACA) Program

DHS must immediately terminate the unlawful DACA program, which allows certain illegal aliens who arrived in the United States as minors to apply for a two-year forbearance of removal.[37] Those granted such relief become eligible for work authorization and various federal benefits. As the Attorney General explained in 2017, "DACA was effectuated by the [Obama] administration through executive action, without proper statutory authority and with no established end-date, after Congress's repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch."[38] Moreover, for the reasons explained in section IV, the issuance of EADs to DACA recipients is an unlawful abuse of agency discretion and should be immediately rescinded.

As an unauthorized and unfunded program, all costs stemming from implementation of this program, including man-power, diverts attention and resources from lawful immigration programs, which only increase costs and delays for legitimate immigrant and nonimmigrant programs. More importantly, the creation of the DACA program is one of the strongest pull-factors that ignited recent border crisis. CBP began reporting unprecedented numbers of illegal border crossing of unaccompanied alien minors and family units in excess of single adult aliens after the U.S. Government began signaling an unwillingness to enforce immigration law against these populations.[39] The humanitarian crisis on the border continues to serve as a threat to national security, public health, wage levels and employment security, and poses unsustainable strains to DHS, DOJ and HHS resources.

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[37] *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891(2020).
[38] Letter from Attorney General Sessions to Acting Secretary Duke, (2017) *available at* https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf.
[39] U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children FY 2014,* (Nov. 2015) *available at* https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014.

VII. Conclusion

Levels of illegal immigration and illegal border crossings are at crisis levels that negatively impact the American public, U.S. workers, and immigrants' and nonimmigrants' ability to access lawful immigration benefits. To address this crisis, consistent with law, humanity, and integrity, DHS must immediately:

- Utilize section 235(b)(2)(C) of the INA or reinstate MPP;
- Reunite unaccompanied alien minors with their family in their home countries;
- Rescind restrictive enforcement priorities and enforce immigration law in the interior of the United States;
- Require asylum officers to apply the mandatory bars to asylum and statutory withholding of removal to Credible Fear determinations;
- Maintain "Last In, First Out" asylum processing priorities;
- Terminate USCIS's practice of accepting motions or requests for reconsideration after an Immigration Judge has concurred with a fear screening determination;
- Terminate unlawful parole programs, including IEP and CAM;
- Revoke unlawful regulations expanding which classes of aliens are eligible to receive EADs;
- Increase higher-paid and higher-qualified workers' access to employment visas; and
- Terminate the unlawful DACA program.

These sorely needed reforms will allow DHS to enhance eligible immigrant and nonimmigrant applicants access to lawful immigration benefits and minimize unreasonable processing delays by ensuring that agency resources are focused on Congressionally-authorized operations. These policies will also eliminate many of the pull factors that encourage fraud and abuse of the asylum system, which has resulted in historic backlogs and delays. More importantly, they also serve the interests of the American public by addressing pull-factors for illegal immigration, reducing unfair competition in the domestic labor market, and enhancing border security, which implicates national security and public safety.

Sincerely,

Dan Stein
President
Federation for American Immigration Reform (FAIR)