FAIR
FEDERATION FOR AMERICAN IMMIGRATION REFORM

December 22, 2023

U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security

RE: Docket No. USCIS-2023-0005, RIN 1615-AC70, Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers

The Federation for American Immigration Reform (FAIR) respectfully submits the following public comments to the Department of Homeland Security (USCIS) in response to the Department's Notice of Proposed Rulemaking (NPRM), as published in the Federal Register on October 23, 2023.

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. Our organization 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.

FAIR has over three million members and supporters of all racial, ethnic, and religious backgrounds, and across the political spectrum. The organization was founded in 1979 and is headquartered in Washington, D.C.

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On October 23, U.S. Citizenship and Immigration Services (USCIS) at the Department of Homeland Security (DHS) published in the Federal Register an expansive regulation to amend the policies and procedures related to the H-1B visa program. The proposed regulation not only hurts American workers but it undermines the integrity of the program and will encourage more fraud. FAIR urges USCIS to reconsider many provisions, in addition to doing more in a final rule related to program integrity and protecting American workers.

FAIR has highlighted the abuses of the H-1B program, specifically the displacement of American workers.[i] The visa program was intended to complement the U.S. workforce – not replace it. Nevertheless, the H-1B visa lobby, primarily tech giants and outsourcing firms, frequently claim that a sustained influx of foreign guest workers is necessitated by labor shortages and that America's economic growth would suffer without foreign "top talent" that the program supposedly brings into the country. In fact, the program does not *supplement* the U.S. workforce. Rather, it *supplants* able-bodied Americans with foreign workers who are beholden to their employers by virtue of their presence in the U.S. depending upon employer sponsorship.

The Biden Administration's proposed rule barely gets to the heart of the H-1B visa fraud and abuse schemes that undermine the intent of the program. Study after study has highlighted fraud and abuse, and has shown that visa holders are not actually the best and brightest from around the world. In fact, they are coming into the United States to replace Americans (and sometimes be trained by Americans in the process).

While the administration claims the new rule will "modernize" the long-plagued H-1B visa program, instead it undermines American workers. It relaxes requirements on aliens working in the U.S. and the employers who hire them. It is an attempt to cut corners under the guise of efficiency, capitulating to big business and ignoring American workers at home who must compete for high skilled job opportunities.

I. Background

Since 1990, non-immigrants have been able to obtain a temporary employment-based visa, or H-1B visa, that allows companies in the U.S. to hire them in certain specialty occupations, such as engineering or information technology. Every fiscal year, United States Citizenship and Immigration Services (USCIS) makes 85,000 H-1B visas available to those individuals who hold a bachelor's degree or a master's degree and are sponsored by a U.S. employer. This numerical cap, set in statute, does not include the thousands of H-1B workers who are exempt from the cap (such as those who work for nonprofit entities or universities).

Because the number of applications typically exceeds the annual cap, USCIS created a lottery process to distribute the visas. Rather than operating a merit-based or skill-based lottery, however, the agency began to distribute visas via a random lottery.

In theory, the H-1B program is considered a "skilled" guest worker program because it requires foreign workers to meet certain educational criteria to participate. However, according to the 2023 Characteristics of H-1B Specialty Occupation Workers, which reviewed fiscal year (FY) 2022 petition, USCIS said that 31.7 percent of beneficiaries with an approved H-1B petition in FY 2022 was a bachelor's degree while 31.1 percent of approved petitions for workers with a master's degree.[ii] The agency said 26 percent had an unknown education level.

Further, those obtaining H-1B visas are not necessarily working in highly technical fields of study, as often implied. According to the same internal characteristics report, of all the H-1B petitions approved in FY 2022, 66 percent of all beneficiaries were supposedly working in computer-related occupations. While many work in STEM related fields, at the time of this comment submission, there were job postings for H-1B visa holders to work as executive assistants, marketing, entry level developers, for example.

Contrary to some employers' claims that the program is needed to fill shortages or bring in "top talent" in specialty fields, a 2019 Atlantic Council report by scholars Ronil Hira and Bharath Gopalaswamy shows that "most H-1B workers have no more than ordinary skills, skills that are abundantly available in the U.S. labor market."[iii]

The report's findings are further supported by research from the Center for Immigration Studies (CIS) that shows that "only about one third of natives with college degrees in STEM fields actually hold STEM jobs." In addition, the Wall Street Journal reported recently that many tech companies are passing over older American IT workers in favor of younger – and cheaper – applicants.[iv]

According to Hira and Daniel Costa, of the Economic Policy Institute, more than half of the top 30 H-1B employers were outsourcing firms that "exploit the H-1B program's weaknesses to build and expand a business model based on outsourcing jobs from other companies."[v] They say that the aim of these companies is "ultimately to move as much work as possible abroad to countries where labor costs are lower and profit margins are higher."

Studies have also shown that foreign workers are driving down wages of American workers. The Economic Policy Institute issued a report in 2020 that explains that a majority of H-1B employers are using the program to pay foreign workers well below market levels.[vi]

In summary, the intent behind the program was to create a means for companies to fill temporary skilled worker shortages, but rather than supplementing the U.S. workforce with highly specialized workers, the program has morphed into a means by which companies can secure cheap labor at the expense of American workers.

II. Random Lottery

The Trump Administration attempted to reform the program by transitioning away from the current, deeply flawed system that allocates H-1B visas to employers via a lottery.[vii] In this rule, issued in 2020, the agency itself said the random lottery was not optimal. It argued the random selection "contradicts the dominant legislative purpose of the statute because the intent of the H–1B program is to help U.S. employers fill labor shortages in positions requiring *highly skilled* or *highly educated* workers."

In its place, the Trump Administration proposed awarding visas to prospective H-1B guest workers based on salary, rather than randomly.[viii] DHS, at that time, reasoned that 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. Similarly, it disincentivizes abuse of the H–1B program to fill lower-paid, lower-skilled positions, which is a significant problem under the present selection system."

The Biden Administration, however, refused to implement the changes envisioned by the Trump Administration and withdrew the final rule in December 2021 after it was vacated by the U.S. District Court for the Northern District of California.

FAIR urges the Biden Administration to reconsider the lottery process and again publish regulations that would overhaul the program, doing away with the random lottery system, and instead work toward a merit-based distribution system that rewards higher wages and attracts the best and brightest around the world.

III. Bypassing the Numerical Cap

The Biden proposed rule would allow companies to bypass the statutory numerical cap by partnering with nonprofit entities or researchers to hire H-1B workers. This essentially formalizes an abuse of the program that has already been taking place. For years, there have been reports about universities and state governments partnering with companies simply to allow an individual *appear* to be a nonprofit employee to avoid the cap placed on for-profit employers.

One such example was a program launched at the City University of New York (CUNY) in 2016. According to the New York Times, CUNY was luring foreign entrepreneurs to

campus to "advise professors and students" and, in exchange, obtain their sponsorship for an H-1B visa. Today, several universities agree to sponsor foreign nationals for the Global Entrepreneur in Residence program for companies to obtain a cap-exempt H-1B visa. Senator Grassley (R-IA) highlighted these issues in a 2016 letter to then Homeland Security Secretary Jeh Johnson, describing the "growing movement" of employers "hacking" the program.

Instead of addressing the loophole, however, the Biden Administration is authorizing and encouraging its use. The proposed rule would exempt foreign workers from the cap if the workers are "not directly employed by a qualifying institution, organization, or entity" so that the employment relationships are less restrictive. Rather than allowing the practice to continue, USCIS should tighten the existing regulation in this area and prohibit the practice altogether.

IV. Criteria for "Specialty Occupation" Positions

The law states that H-1B visa is intended for those coming temporarily to the United States to perform services in a "specialty occupation." A specialty occupation is defined as one that requires: 1) theoretical and practical application of a body of highly specialized knowledge, and 2) 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.

Until now, USCIS has interpreted this to mean that a foreign worker "normally" must hold a bachelor's degree to obtain an H-1B visa. One criteria, outlined in current regulations at 8 CFR 214.2(h)(4)(iii)(A), states that a bachelor's degree be "normally" required, or "common to the industry," or that the knowledge required for the position is "usually associated" with at least a bachelor's degree or equivalent.[ix] Yet, these terms are not in the statutory definition of a "specialty occupation." The Biden Administration is attempting to loosen this requirement by saying that "normally doesn't mean always" and that the petitioner does not have to establish that the bachelor's degree in a specific specialty is always a minimum requirement for entry into the occupation in the United States.

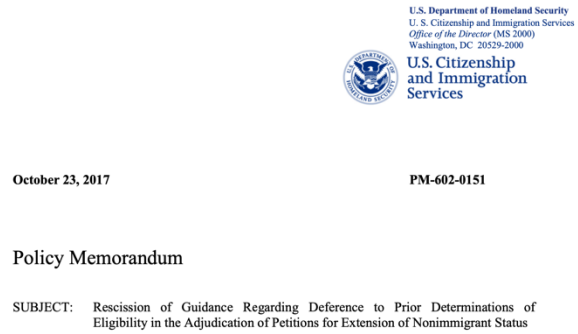
Instead, the final rule should clarify that, to qualify as a specialty occupation, a position must require a degree in a specific specialty, which is what USCIS proposed in a NPRM in 2020[x]. In that 2020 NPRM, USCIS stated that "the words "normally," "common," and "usually" are not found in the statute, and therefore, should not appear in the regulation." At that time, USCIS attempted to align the definition in regulation to that in the statute. USCIS opted to eliminate the terms "normally," "common," and "usually" from the regulatory criteria so that "the petitioner will have to establish that the bachelor's degree in a specific specialty or its equivalent is a minimum requirement for entry into the occupation in the United States by showing that this is always the requirement for the

occupation as a whole, the occupational requirement within the relevant industry, the petitioner's particularized requirement, or because the position is so specialized, complex, or unique that it is necessarily required to perform the duties of the specific position." FAIR recommends that the final rule eliminate the term "normally" in current regulation, as it did in 2020.

In addition, the rule provides that if an alien is placed at a third-party site, then it is the third party – not the petitioning employer – who is responsible for determining whether the position is a specialty occupation. This change makes it easier and more palatable for employers to outsource their workers to staffing firms, which was not the intent of the program.

V. Deference

The Biden rule also codifies a practice known as *deference*, or presuming one is eligible for an immigration benefit simply because it was previously approved. The Trump Administration, in 2017, attempted to rein in the practice of granting deference and expressly required agency officials to use their fact-finding authority. USCIS issued a policy providing that "adjudicators must, in all cases, thoroughly review the petition and supporting evidence to determination for the benefit sought." In 2017, the agency argued that continued scrutiny of H-1B petitions is warranted because the burden of proof in establishing eligibility is, at all times, on the employer (not the government). The agency also argued that the deference policy was "impractical and costly to properly implement" and that "an adjudicator's fact-finding authority should not be constrained by any prior petition approval, but instead, should be based on the merits of each case."



U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

October 23, 2017 **PM-602-0151**

Policy Memorandum

SUBJECT: Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status

Under the Biden rule, however, adjudicators will be encouraged to approve renewals, deferring to the first approval – rather than looking at the new evidence and making sure the petitioner is truly eligible. The agency claims that applying deference will "help promote consistency and efficiency for both USCIS and its stakeholders." By codifying this policy, adjudicators can now cut corners in order to approve petitions faster, appeasing employers in the process.

VI. Foreign Students and Validity Periods

Throughout the proposed regulation (including the title of the rule), DHS justifies the changes it is making by stating they "provide flexibility" for H-1B employers. In reality,

the changes "provide flexibility" to employers by ensuring that the aliens are able to start or continue working in the country.

Most notably, the proposed rule authorizes automatic extensions of a student's authorized period of stay for those who want to obtain an H-1B visa and work in the United States after completing their Optional Practical Training (OPT). Specifically, the rule states, "DHS proposes to revise 8 CFR 214.2(f)(5)(vi) to provide an automatic extension of duration of status and post-completion OPT or 24-month extension of post-completion OPT, as applicable, until April 1 of the relevant fiscal year for which the H–1B petition is requested."

In 2008, DHS unlawfully created the cap-gap extension to satisfy employers who sought to hire foreign students in the U.S., providing a bridge to a student's status so there would not be a gap in their authorized stay and their employment with an H-1B employer. These "cap-gap extensions" were not authorized by Congress, just as OPT was not authorized by Congress. Not only does he NPRM under consideration continue to endorse the unlawful policies, it provides for an automatic extension until the following fiscal year to ensure that there is no disruption to employers.

In the proposed rule, DHS states that "Changing the automatic extension end date from October 1 to April 1 of the relevant fiscal year would prevent the disruptions in employment authorization that some F–1 nonimmigrants seeking cap-gap extensions have experienced over the past several years." However, the proposal to extend the automatic cap-gap extension from October 1 to April 1 is not rooted in statute, nor does the rule cite any legal justification for the change. The change is attempting to help "prevent employment disruptions," which, even if well-intentioned, is not authorized by law.

As stated, FAIR contends that the use of OPT is contrary to the statute. We also believe that there are major operational flaws, fraud, noncompliance, and national security risks associated with OPT. The Government Accountability Office has issued reports related to the program[xi], recommending that ICE take steps to identify and assess risks, and to improve tracking of foreign students who are supposed to be working. U.S. Immigration and Customs Enforcement has conducted investigations into program fraud and has arrested foreign nationals who fraudulently used OPT to remain in the country[xii]. FAIR has long sought an end to the OPT program on the grounds that it undermines U.S. workers and that it belies the whole purpose of the student visa program, under which foreign nationals are supposed to study here and then return home. Given the shaky legal ground and the operational challenges of the OPT program, DHS should consider eliminating OPT entirely to better protect American students and workers.

VII. Oversight of Foreign Workers

Under current rules, "[an H-1B] petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions." This itinerary requirement was intended to deter and detect fraud and abuse, and ensure that foreign nationals are working where the employer claims.

The Biden rule eliminates this itinerary requirement, arguing that it's "largely duplicative" and slows down processing. However, it is well documented that many H-1B visa holders are not working where their employers say they are. The Office of the Inspector General reported that "in many cases, the projects provided within the petition are non-existent" which "allows beneficiaries to arrive in the country and not work in accordance with the H-1B agreements." Eliminating this itinerary requirement, as is now proposed by USCIS, will encourage more fraud in the program.

VIII. Site Visits

In the 2020 NPRM on strengthening the H-1B visa program, DHS stated that "the existing authority to conduct inspections is vital to the integrity of the immigration system as a whole, including the H–1B program specifically, and protecting American workers."[xiii]

FAIR appreciates that the agency has used this NPRM to clarify that USCIS has the authority to conduct site visits and that "refusal to comply with site visits may result in denial or revocation of the petition." However, USCIS should go further in mandating site visits for certain employers, namely those where visa holders are working at third-party worksites.

As DHS stated in the 2020 NPRM, "beginning in 2017, USCIS began taking a more targeted approach in conducting site visits related to the H–1B program. USCIS started focusing on H–1B-dependent employers (those who have a high ratio of H–1B workers as compared to U.S. workers, as defined in section 212(n) of the INA), cases in which USCIS cannot validate the employer's basic business information through commercially available data, and employers petitioning for H–1B workers who work off-site at another company or organization's location." These site visits "uncovered a significant amount of noncompliance" and "found that the noncompliance rate for petitioners who indicated the beneficiary works at an off-site or third-party location is much higher compared to worksites where the beneficiary does not work off-site (21.7 percent versus 9.9 percent, respectively)." Therefore, FAIR urges USCIS to conduct pre-adjudication site checks for petitions, particularly for H-1B dependent employers.

IX. Alternatives and Additions

In addition to the aforementioned concerns and suggestions for improving the NPRM, FAIR encourages USCIS to consider additional changes to the H-1B visa program to shore up the integrity of the system, which will result in stronger protections for American students and workers who must compete with cheaper foreign labor. Below are a number of recommendations for USCIS to strengthen the H-1B program:

- USCIS should require that petitioners remain in good standing and in compliance with federal, state, and local laws. It could even impose a heightened standard of proof (i.e. clear and convincing) for a certain period of time for petitioners where there has been a finding of fraud or material misrepresentation.

- USCIS should rein in the unwillingness of countries to take back their criminal aliens by prohibiting any employer from a recalcitrant country from petitioning for an H-1B visa.

- USCIS should ensure that petitioning employers have the funds to pay any and all H-1B beneficiaries. USCIS should require that the employer establish, through proper evidence, that it has the ability to pay the wage offered to the H-1B worker as set forth in its petition. The employer should also prove it can pay that worker for the full validity period of the petition.

- The agency should also limit the types of employment that an H-1B beneficiary can undertake. The agency currently allows for part-time employment and employment with more than one entity. USCIS should prohibit part-time and concurrent employment for H-1B visa holders. Second, USCIS should prohibit an individual from self-petitioning under the H-1B program via a corporate veil.

- Under current practice, USCIS accepts three-year degrees from certain educational systems (see 8 CFR 214.2(h)(4)(iii)(D)). Meanwhile, the agency does not accept such degrees in support of an individual's I-140 employment-based petition. Further, USCIS should include a provision in the final rule requiring a "single-source" degree, versus the current practice of allowing a combination of lesser degrees to qualify as "equivalent to a U.S. bachelor's degree."

- Rather than codifying and further weakening the ability of foreign workers to be placed in third-party worksites, USCIS should incorporate into the regulation the common-law employer-employee requirements, specifically by clarifying the "right to control" is just one factor – not the determining factor, in an adjudicator's analysis.

- USCIS should set a maximum validity period for third-party placements. In the 2020 H-1B proposed rule, DHS stated that "DHS believes that fraud and abuse is more likely to occur in cases involving third-party placements, as evidenced by the higher rate of noncompliance in those cases." It also said that "DHS believes that limiting the maximum validity period for petitions where beneficiaries are placed at third-party worksites is reasonable given this significantly higher noncompliance rate, and so will also encourage compliance with the regulations and improve the program's overall integrity." FAIR urges DHS to include a provision similar to this in the final rule.

- Under current practice, H-1B visa holders are permitted to "recapture" the time spent outside the United States to help extend their stay in the country. Even the Economic Times of India stated that "there's a loophole to this cap by which you can potentially exceed the 6-year limit" allowed under the law.[xiv] In "decoding" the policy, the Economic Times told readers, "It's as if the clock stops when you leave, and resumes when you come back. H-1B recapture does not require proof of why you traveled abroad. You do not need to show that the time you spent outside the US was "meaningfully interruptive" of your H-1B stay. If USCIS does not strengthen the requirements surrounding this recapture time, USCIS should eliminate the ability to recapture it entirely, which allows the alien to stay beyond the statutory maximum period.

- The final rule should also address the failed legal opinion that USCIS issued after enactment of Public Law 114-113, which assessed a fee for H-1B petitions on certain employers who employ more than 50 people and more than 50 percent are foreign workers. The fee should be assessed on all employers, including extensions of status. The increased revenue would fund the entry/exit system, per the statute, so that the U.S. could better control its borders and determine when individuals enter or depart the country.

X. Conclusion

The Biden rule, proposed ostensibly to "modernize" the long-plagued H-1B visa program, fails to address the harm to American workers who compete against foreign nationals imported under the program. The visa program was intended to complement the U.S. workforce – not replace it. Study after study has highlighted fraud and abuse in the H-1B program and has shown that H-1B workers are not actually the best and brightest from around the world. In fact, they are coming into the United States to replace Americans (and sometimes be trained by Americans in the process).

This rule does not "modernize" the program, as the Biden Administration claims. Rather, it relaxes requirements on H-1B workers and the employers who hire them. It is an

attempt to cut corners under the guise of efficiency, capitulating to big business and ignoring American workers at home who must compete for high-skilled job opportunities.

FAIR urges USCIS to reconsider the provisions mentioned above and work to publish a final rule that does more to protect American workers.

Sincerely,

Dan Stein
President

[i] https://www.fairus.org/issue/workforce-economy/h-1b-visas-cheap-foreign-labor-versus-american-worker

[ii] https://www.uscis.gov/sites/default/files/document/data/OLA_Signed_H-1B_Characteristics_Congressional_Report_FY2022.pdf

[iii] https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming_US_High-Skilled_Guestworkers_Program.pdf

[iv] https://www.wsj.com/articles/older-it-workers-left-out-despite-tech-talent-shortage-11574683200?shareToken=stabbbe4c3bac64ecb94eaece00e047661

[v] https://www.epi.org/blog/the-h-1b-visa-program-remains-the-outsourcing-visa-more-than-half-of-the-top-30-h-1b-employers-were-outsourcing-firms/

[vi] https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/

[vii] https://www.fairus.org/legislation/legal-immigration/trump-administration-change-h1b-program

[viii] https://www.federalregister.gov/documents/2020/11/02/2020-24259/modification-of-registration-requirement-for-petitioners-seeking-to-file-cap-subject-h-1b-petitions

[ix] https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-214/section-214.2#p-214.2(h)(4)(iii)(A)

[x] See the "Strengthening the H-1B Nonimmigrant Classification Program" NPRM from October 8, 2020. https://www.federalregister.gov/documents/2020/10/08/2020-22347/strengthening-the-h-1b-nonimmigrant-visa-classification-program

[xi] https://www.gao.gov/products/gao-14-356

[xii] https://www.ice.gov/news/releases/ice-arrests-15-nonimmigrant-students-opt-related-fraud

[xiii] https://www.federalregister.gov/documents/2020/10/08/2020-22347/strengthening-the-h-1b-nonimmigrant-visa-classification-program

[xiv] https://economictimes.indiatimes.com/nri/migrate/decoding-recapture-time-how-you-can-use-your-vacation-to-maximise-your-h-1b-visa-duration/articleshow/101124735.cms#:~:text=The%20six%2Dyear%20maximum%20stay,in%20the%206%2Dyear%20limit.