December 22, 2023

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
5900 Capital Gateway Dr.
Camp Springs, MD 20588-0009

Attn: Charles L. Nimick
Chief, Business and Foreign Workers Division

Submitted via www.regulations.gov
DHS Docket ID No. USCIS-2023-0005

Re: Regulatory Proposal for Modernizing H–1B Requirements, Providing Flexibility in the F–1 Program, and Program Improvements Affecting Other Nonimmigrant Workers – ***Supplemental Comment***

Dear Mr. Nimick:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) respectfully submit the following comment in response to the above-referenced 60-day notice and request for comments on the USCIS proposal for "Modernizing H–1B Requirements, Providing Flexibility in the F–1 Program, and Program Improvements Affecting Other Nonimmigrant Workers," published in the Federal Register on October 23, 2023.[1] Specifically, we provide this supplemental comment to addresses all other topics not covered by our comment on the H-1B registration system which was submitted on November 28, 2023, and is incorporated herein by reference.

Established in 1946, AILA is a voluntary bar association of more than 16,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and

[1] 88 FR 72870 (October 23, 2023).

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AILA Doc. No. 23122631. (Posted 12/26/23)

interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposal to modernize the H-1B regulations, and to certain regulations applicable to the F-1 and other nonimmigrant classifications and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act and its implementing regulations.

General Comments

AILA and the Council commend USCIS for seeking to modernize the H-1B visa program, not merely by increasing efficiency and helping to fill labor shortages but also by rightly acknowledging that H-1B modernization must create "opportunities for innovation and expansion." This initiative is thus in keeping with the legislative history of the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) and the American Competitiveness in the Twenty-first Century Act of 2000 (AC21).[2] These statutes, and the congressional motivations behind them are especially important today as multiple countries (including Canada, the UK, Australia, and Germany) have enacted new immigration programs to attract high-skilled workers, and many more countries and regions of the world now offer digital nomad visas.[3]

Because AILA and the Council believe that the H-1B program can play a significant role in enhancing both U.S. economic growth and global competitiveness, we have prepared detailed comments on multiple aspects of this notice that we believe will make the proposal even more effective in creating a 21st Century innovation economy in the United States. While we encourage USCIS to thoughtfully consider our comments, we believe it is equally important for the agency to prioritize finalizing the H-1B registration portion of this regulation before the start of the FY 25 registration period in March 2024 in a separate rulemaking and finalize the remainder of this regulation before the end of 2024 so that H-1B modernization can take full effect at the earliest possible opportunity.

Specific Comments

Table of Contents

[2] See 88 FR at 72873 n. 6.

[3] See, Ward Williams, "Countries Offering Digital Nomad Visas," *Investopedia*, July 20, 2023, accessible at: https://www.investopedia.com/countries-offering-digital-nomad-visas-5190861 (last visited on November 30, 2023), identifying 49 countries and regions which offer digital nomad visas.

AILA Doc. No. 23122631. (Posted 12/26/23)

A. Modernization and Efficiencies

1. Amending the Definition of a "Specialty Occupation"
2. Amending the Criteria for Specialty Occupation Positions
3. Amended Petitions
4. Deference
5. Evidence of Maintenance of Status
6. Eliminating the Itinerary Requirement for H Programs
7. Validity Expires Before Adjudication

B. Benefits and Flexibilities

1. H-1B Cap Exemptions
    a. Employed at a cap-exempt institution - 8 C.F.R. § 214.2(h)(8)(iii)(F)(4)
    b. Nonprofit or tax-exempt organization- 8 C.F.R. § 214.2(h)(19)(iv)
    c. Research organizations - 8 CFR 214.2(h)(19)(iii)(C)
    d. Additional recommendation to define terms or phrases that are not defined in the current regulations.

2. Automatic Extension of Authorized Employment Under 8 CFR 214.2(f)(5)(vi) (Cap-Gap) and Start Date Flexibility for Certain H-1B Cap-Subject Petitions

C. Program Integrity

1. Provisions to Ensure Bona Fide Job Offer for a Specialty Occupation Position

    a. Contracts
    b. Non-Speculative Employment
    c. LCA Corresponds with the Petition
    d. Revising the Definition of U.S. Employer (Legal Presence and Service of Process)
    e. Employer-Employee Relationship
    f. Bona fide Job Offer

2. Beneficiary-Owners
3. Site Visits
4. Third-Party Placement (Codifying Defensor)
    a. Lack of Clarity for Adjudicators and the Public - Unclear Adjudication Criteria
    b. Inability of Petitioners in Third-Party Placement Arrangements to Comply Makes the Proposed Rule Inequitable and Unduly Burdensome
    c. Increased and Unfair Burdens on Individual Sectors of the Economy - Disparate Treatment for Individual Sectors of the Economy

AILA Doc. No. 23122631. (Posted 12/26/23)

D. Request for Preliminary Public Input Related to Future Actions/Proposals

1. Use or Lose
    a. USCIS Analysis of its Data Overlooks Legitimate Reasons for Delays and Amendments
    b. USCIS Proposed Changes to the H-1B Registration System Will Increase the Utilization of H-1B Cap Numbers.
    c. Post-Approval Mechanisms Will Be Overbroad and Burden Legitimate Petitioners
2. Beneficiary Notification

E. Other Discussion Items

1. Immediate and Automatic Revocation
2. Comparable Evidence

Specific Comments

A. Modernization and Efficiencies

1. AILA and the Council oppose the proposed Amendment to the Definition of a "Specialty Occupation."

The Immigration and Nationality Act (INA) plainly defines a "specialty occupation" as requiring the "theoretical and practical application of a body of highly specialized knowledge" and attainment of at least a bachelor's degree in the specific specialty (or its equivalent) for entry into the occupation in the United States.[4] Congress, in defining the H-1B category, created the "body of highly specialized knowledge" requirement, which limits the fields of study that comprise "the specific specialty" or "equivalent."

AILA and the Council believe that DHS would exceed its statutory authority if it finalized the proposed new requirement that "the required *specialized studies* must be *directly related* to the position" and, in so doing, has added two undefined phrases – "specialized studies" and "directly related." In practice, occupations in which the degree requirement is not readily apparent or obviously linked, and does not require a professional license, typically accept a variety of different fields of study that all provide the highly specialized knowledge required for the occupation. In its proposal, DHS purports to recognize that multiple fields of study may be appropriate but treats the "body of highly specialized knowledge" requirement as an alternative to the fields of study ("qualifying degree fields"). This equivalency conflicts with the statute in which a "body of highly specialized knowledge" limits the fields of study comprising the "specific specialty" or its "equivalent." The agency compounds the conflict by requiring that each of these alternatives be "directly related to the position." Adjudicators presented with these additions are effectively being

[4] 8 USC § 1184(i)(1); *INA* § 214 (i)(1).

AILA Doc. No. 23122631. (Posted 12/26/23)

encouraged to reject an occupation as a *specialty* occupation if it does not require already-recognized degrees.

The proposed rule also severely restricts the ability of employers to hire educated professionals in emerging fields that may have an interdisciplinary approach to problem solving, notwithstanding the core principles and base of knowledge required for the occupation. DHS indicates that "'specific specialty' is *only* met if the degree in a specific specialty or specialities, or its equivalent, provide a body of highly specialized knowledge directly related to the duties and responsibilities of the particular positions as required by section 214(i)(1)(A) of the INA."[5] DHS is repackaging an approach that courts have already rejected as unduly restricting the statutory definition of "specialty occupation."[6] DHS also states in the preamble that requiring "any engineering degree in any field of engineering for a position of software developer would generally not satisfy the statutory requirement" of a specialty occupation.[7] We believe this is inconsistent with the INA, which defines the term "profession" to include, but not be limited to, "architects, engineers, lawyers, physicians, surgeons, and teachers…."[8] The INA defines "profession" at a categorical level, listing "lawyers" rather than "tax lawyers." Similarly, the law does not define an engineer any more narrowly.

DHS also should not codify what amounts to a presumption against business administration degrees. The statutory definition already covers the agency's concern as a specialty occupation requires the application of a body of highly specialized knowledge attained through at least a bachelor's degree in the specific specialty (or equivalent). The body of specialized knowledge in a business administration degree could be through a specified major, minor, concentration, or evidence of certain course work. Business administration degrees should not be categorically stigmatized but rather should be treated as any other degree program providing a body of highly specialized knowledge.

A "directly related" requirement will stymie employers from establishing that a newly emerging body of specialized knowledge is acquired through at least a bachelor's degree in "the specific specialty" or "its equivalent." For example, Business Intelligence Analysts are in demand and categorized with the "Bright Outlook" label according to O*Net. This occupation draws upon various disciplines for analysis, as these professionals must be able to query large data sources, develop methods to extract data, and identify patterns and trends. An interdisciplinary approach is often required to attain the highly specialized knowledge, such as statistics, applied mathematics, data management, and computer science. There is a body of highly specialized knowledge that must be acquired for this new occupation, but it does not necessarily have to be in a specific field of study that is regularly identified with the occupation.

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[5] 88 FR 72870, 72875 (Oct. 23, 2023) (emphasis added).

[6] See, *e.g., RELX, Inc. v. Baran*, 397 F. Supp. 3d 41, 55 (D.D.C. 2019) ("[I]f the position requires the beneficiary to apply practical and theoretical specialized knowledge and a higher education degree it meets the requirements.") *See also* Raj & Co. v. U.S. Citizenship & Immigration Servs., 85 F. Supp. 3d 1241, 1247 (W.D. Wash. 2015) ("Congress and the INA recognized that the needs of a specialty occupation can be met even where a specifically tailored baccalaureate program is not typically available for a given field.")

[7] 88 FR 72870, 72876 (Oct. 23, 2023).

[8] 8 USC § 1101(a)(32).

AILA Doc. No. 23122631. (Posted 12/26/23)

2. AILA and the Council oppose the Proposed Amendment to the Criteria for Specialty Occupation.

AILA and the Council strongly oppose the inclusion of a "directly related" requirement in the criteria for classification of a job as a specialty occupation at 8 CFR 214.2(h)(4)(iii) for reasons identical to those described above. Rather than modernizing H-1B eligibility standards, this proposed limitation would shackle the category to an outdated and unnecessarily restrictive interpretation precisely at a time when our national interest requires that we attract entrepreneurs and innovators in emerging and evolving 21st Century business sectors for which "directly related" degrees may include multiple academic fields that provide a specific body of knowledge. Adding this requirement to H-1B adjudications will impede innovators in their efforts to create multi-functioning, interdisciplinary teams by imposing artificial barriers to their ability to access critical global talent. We therefore urgently request that USCIS remove all references to the "directly related" requirement from 8 CFR 214.2(h)(4)(iii).

AILA and the Council are also concerned by the addition of a criterion (prong three) that imposes differing requirements for determining whether an occupation is a specialty occupation depending on the type of third-party staffing arrangement. As noted elsewhere[9] in this comment, we believe this third-party information is not legally relevant to a petitioner's filing on behalf of its employee. A bedrock principle of the H-1B program and, indeed, the entirety of our employer-sponsored immigration framework is that the merits of a petition should be considered based on the facts and circumstances of the specific job offer that is extended to the beneficiary employee in that petition. The placement of a professional worker at a third-party location is not directly connected or correlated to that third party's more general hiring practices.

Indeed, businesses purchase professional services from other business specifically because they are unable to perform that service internally. A thoracic surgeon is no less qualified for specialty occupation classification because she regularly performs ambulatory surgeries for a sister hospital where that specialty/job description does not exist, a business immigration lawyer is no less qualifying for specialty occupation classification because she is assigned to an extended compliance audit at a client office where the client does not employ immigration lawyers, and a founder/software engineer deploying novel AI technologies for a client is no less qualifying for specialty occupation merely because she is the start-up inventor of a technology who is deploying it for a client without internal engineering teams. In other words, we do not support a requirement for a reference to specific third party/end-users' job descriptions as they are unlikely to be dispositive as to a petitioner's job requirements as listed, under penalty of law for false statements, in an H-1B petition. We are deeply concerned that this reference will confuse adjudicating officers and result in inconsistent adjudications that are unsupported by any statutory predicate.

We are also concerned with the inclusion of the word "staffed" in this prong of the definition of specialty occupation. In the overwhelming majority of circumstances, where H-1B petitioning employers place their beneficiary employees at third party sites, they are, by the terms and definition of the proposed regulation itself, not staffing companies. Rather, they are corporate

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[9] See section C.1.a of this comment at pages #15-19.

entities with which another entity has engaged for the delivery of professional services. We acknowledge that the preamble language intends to narrow the definition of "staffed" and applies only where a beneficiary employee will be employed at a third-party worksite "to fill a position in the third party's organization." In practice, however, the distinction may not be as readily apparent as the definition is not sufficiently detailed. There is no clear explanation in the preamble or anywhere in the proposed regulatory language of what "filling a position" in the organizational hierarchy of a client means or what parameters may apply for adjudicators. In the previously referenced artificial intelligence founder example, the beneficiary employee is providing a service that did not previously exist within the third-party client's business. Because the employment in that hypothetical could be considered filling "a position" within the organizational hierarchy of the client's business, the founder/engineer, despite meeting all of the petitioner's academic requirements for the position, may be deemed ineligible for H-1B classification because the newly created position to be "staffed" by the foreign national has no requirements that could be verified independently through the third party client's business, belying the expansion of H-1B eligibility to founders and in contravention of the immigration policy statements of Executive Order 13859.

For these reasons, AILA strongly recommends striking the following phrase from prong three of the new definition of specialty occupation at 8 CFR 214.2(h)(4)(iii)(A)(3), "or third party if the beneficiary will be staffed to that third party."

3. AILA and the Council oppose requiring an employer to file an amended or new H-1B petition when there is a change in the place of employment necessitating a new Labor Condition Application (LCA) as it impedes the NPRM's goal of increasing efficiency.

We oppose the obligation on H-1B petitioners to file an amended or new petition when there is "any change in the place of employment to a geographical area that requires a corresponding labor condition application to be certified to USCIS." Rather than modernize the H-1B program to create opportunities for innovation and expansion, this change would hinder it by proposing burdensome and costly requirements. Any such change, according to the proposed regulation would be "considered a material change and require . . . an amended or new petition to be filed with USCIS before the H–1B worker may begin work at the new place of employment."[10]Regrettably, the manner in which the NPRM proposes to codify *Matter of Simeio Solutions, LLC*,[11] and the Policy Memorandum[12] which guides adjudicators in applying *Simeio* when an H-1B worker's place of employment requires a new LCA, will make America a far less attractive destination for knowledge workers, and as a result, exacerbate job shortages, and hamper innovation and economic expansion. Worse yet, this proposal, if finalized, will negatively impact USCIS backlogs, divert adjudicator focus from more pressing matters, and create a material risk that highly educated H-1B workers will leave the United States, whether voluntarily or otherwise.

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[10] See 88 FR at 72958.

[11] 26 I&N Dec. 542 (AAO 2015).

[12] USCIS Policy Memorandum: USCIS Final Guidance on When to File an Amended or New H-1B Petition After Matter of Simeio Solutions, LLC. PM-602-0120. July 21, 2015.

We observe, as has been widely reported in surveys of employers, that whether for personal or job-related reasons, employees are increasingly mobile and often working remotely, at times far from company facilities, and U.S.-based businesses are attuned to the need to be agile in responding to oft-changing customer requirements even when a relocation of employees, including H-1B workers, is required. The NPRM does not address the frequency that amended and new petitions will be required if this proposal is finalized. Furthermore, we submit that the NPRM's requirement of filing amended or new petitions when job-location changes require a new LCA to be certified may have the deleterious effect of undermining USCIS's laudable decision to formalize as a regulation its policy of deference to prior adjudications.

While we recognize that USCIS prevailed as to its interpretation, as expressed in *Simeio* and the Policy Memorandum referenced above, in *IT Serve Alliance, Inc., v. U.S. Department of Homeland Security*,[13] we submit, however, that there is a better and less disruptive way to afford USCIS reasonable oversight of such job location changes than the approach of the NPRM. AILA and the Council understand that, while the aforementioned case was pending, USCIS had considered a notice-of-address-change procedure roughly modeled after the AR-11 notification process. We propose an intermediate process – less than merely a notification, but not a full re-adjudication of the H-1B petition.

AILA and the Council propose that, in situations where there is no material change in job duties and job requirements after a job-location change, e.g., where a worker with a bachelor's degree in electrical engineering will continue to perform substantially the same electrical engineering duties (albeit in a new location), USCIS should accord deference to the prior adjudicator's finding that the specialty-occupation requirements were satisfied, and thus establish a presumption of continuing H-1B eligibility. Specifically, we propose that:

- The petitioning employer would notify USCIS (via a new, simplified online form) in advance of the job move in order to advise the agency that the change relates only to the place of employment;
- The petitioner will include proof of a newly certified LCA and that they will pay the required wage.
- The petitioner will attest, under penalty of perjury, that the job duties have remained substantially the same;
- Upon filing of a nonfrivolous form and accompanying evidence, the employee may begin working at the new location, consistent with H-1B portability provisions. USCIS will review the form to determine whether the LCA properly corresponds with the new location, the wage requirements will be satisfied, and the job duties remain the same.
- If needed, an adjudicator may issue a request for additional evidence (RFE) or a notice of intent to deny (NOID) if the officer determines, based on the evidence in the particular case, that the job change has raised legitimate questions of continuing H-1B eligibility;
- If the petitioner will be deemed by USCIS to have satisfied these requirements, the beneficiary will be considered to have maintained nonimmigrant status and continue to be employed with authorization.

[13] 71 F.4th 1028 (D.C. Cir. 2023).

AILA Doc. No. 23122631. (Posted 12/26/23)

- If the application is denied, then USCIS would require a new Form I-129, with fees, to be filed within the 60-day grace period.

Our proposal thus stands as a reasonable balance of competing concerns. Deference to the prior specialty occupation findings would be accorded. Job location changes would occur without impediment or delay, while still ensuring compliance with wage and job requirements. Adjudication workload would not be needlessly overburdened. Innovation and economic expansion would be fostered. Agency oversight and program integrity would be maintained. AILA and the Council therefore urge USCIS to modify the final rule by adopting this proposal.

4. AILA and Council support DHS' proposal to codify the deference policy, with recommended modifications.

AILA and the Council support the Service's proposal to codify its deference policy a part of the proposed regulation.[14] The proposed language adds clarity with respect to the application of deference for applicants, their counsel and adjudicators which may be relied upon for personal and business planning purposes.

While we recognize that USCIS must retain some level of discretion to correct clearly erroneous outcomes, we believe adjudicators should exercise deference to prior adjudications in the following additional circumstances:

a. First, we recommend revising the first exception relating to material error in the prior approval to limit its applicability to pure errors of law, whereby the case, on the given facts, was not approvable as a matter of law (such as a determination that the beneficiary was eligible for AC21 extensions when they were ineligible as a matter of law), and not to include within this exception purported interpretive "errors" involving complex, multifactored discretionary determinations, such as whether, under the totality of the facts, a position would be considered to meet the definition of a "specialty occupation." Failure to do so will provide the capacity for adjudicators to use the "material error" standard to re-adjudicate the facts of a case and circumvent the fundamental purpose of this provision;

b. Second, we propose codification of a rule that gives eligibility determinations made by other agencies (e.g., DOS), in the absence of a material legal error, appropriate deference. We further recommend that the regulation require that, before a petition or application in this scenario is denied, that the decision specifically acknowledge the other agency's approval, confirm in detail that it was considered by the adjudicator and provide a detailed factual and/or legal explanation for why the USCIS officer believes the other agency's determination was in error; and

c. Most importantly, we are gravely concerned by the inclusion of the term "material change in circumstances or eligibility requirements" in the proposed description of factors that would lead to a decision to decline to give deference to a prior adjudication.[15] As USCIS

[14] 88 FR at 72880.
[15] Proposed 8 CFR 214.1(c)(5) at 88 FR 72957.

AILA Doc. No. 23122631. (Posted 12/26/23)

is well aware, there are many H-1B beneficiaries (and accompanying family members) who are subject to immigrant visa quota backlogs that are currently well over a decade. For these individuals, and their employers, routine approvals of extensions of stay over many years have created a reasonable and justifiable reliance on the ability to obtain future extensions of stay as long as the facts and circumstances of employment remain the same. Specifically, AILA and the Council are concerned that the proposed changes to the regulatory definition of specialty occupation (detailed in other sections) may jeopardize the eligibility for future extensions of stay of individuals who have become established and respected members of their professional and local communities over many years because of a regulatory or policy change. Beyond this rule, we believe it is also intrinsically inequitable, *at a minimum*, to subject these individuals, all of whom have acted in good faith in our immigration system and worked to maintain legal status for many years, to the unpredictable policy interpretations of changing administrations. Accordingly, we believe it is critical to amend the proposed description of the factors that would prevent an exercise of deference to remove the reference to "changing eligibility requirements."

5. AILA and Council are concerned that the Maintenance of Status Proposal is ambiguous as written and potentially unduly burdensome.

The NPRM proposes to delete 8 CFR § 214.2(h)(14) which provides that in the case of a request for an H-1B petition extension, "[s]upporting evidence is not required unless requested by the director." In its place, the NPRM proposes to require evidence to be submitted by the *current* petitioning employer when requesting an amendment, extension or change of status that an H-1B beneficiary has maintained status in the United States. It further proposes to require evidence that status had been maintained when a U.S. employer petitions to amend, extend or change a beneficiary's nonimmigrant status in *every other* employment-based nonimmigrant category as well.[16] The NPRM also "make[s] clear that it is the filers' (sic) burden to demonstrate that status was maintained **before** the extension of stay request was filed."[17] (Emphasis added.)

Although the NPRM purports to require proof that status had been maintained "before the extension of stay request was filed," the NPRM does not provide a specific temporal reference, i.e., it does not say how far back in time the evidence must establish that nonimmigrant status has been maintained. The NPRM implies, however, by referring to the Form I-129 instructions, that evidence covering two pay periods may be long enough.[18] Elsewhere, the NPRM offers the

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[16] See 88 FR at 72880: "These changes would impact the population of nonimmigrants named in 8 CFR 214.1(c)(1): E–1, E–2, E–3, H–1B, H–1B1, H–2A, H–2B, H–3, L–1, O–1, O–2, P–1, P–2, P–3, Q–1, R–1, and TN nonimmigrants."

[17] 88 FR at 72881.

[18] 88 FR at 72880: "The form instructions further state that if the beneficiary is employed in the United States, the petitioner may submit copies of the beneficiary's last two pay stubs, Form W–2, and other relevant evidence, as well as a copy of the beneficiary's Form I–94, passport, travel document, or Form I–797." (Footnote omitted.) We note, however, that the specific reference to two pay stubs does not appear in the text of the proposed regulation. We are therefore concerned that this suggested temporal limitation will be disregarded, and that adjudicators will issue RFEs or NOIDs if a petitioning employer – in line with Form I-129 instructions – submits proof of salary payments for only two pay periods. Such a wholly foreseeable outcome calls into question the NPRM's assertions that deleting the current rule at 8 CFR § 214.2(h)(14), which dispenses with the need to proactively submit evidence that status

AILA Doc. No. 23122631. (Posted 12/26/23)

example that “evidence pertaining to the beneficiary's **continued employment** (*e.g.,* paystubs) may help USCIS to determine whether the beneficiary **was being employed consistent with the prior petition approval** or whether there might have been material changes in the beneficiary's employment (*e.g.,* a material change in the place of employment).” (Emphasis added.)

These references suggest that the time range required of the current petitioning employer is only during the period when the present petitioner has employed the beneficiary. This temporal limit would be reasonable given that the current employer is likely to possess, or is capable of readily acquiring, evidence to establish that nonimmigrant status has been maintained while in the petitioner’s employ. If, however, the rule is finalized as proposed in the NPRM, the current petitioning employer might be asked by an adjudicator in an RFE or NOID to submit foreseeably unattainable evidence in the possession of a beneficiary’s **prior** employers.

By requiring the present petitioner to submit only evidence of a beneficiary’s status maintenance that is already possessed by or readily accessible to that party, or available from the beneficiary since last entry to the U.S., the final rule would also be consistent with 8 CFR § 214.1(c)(4) which provides in relevant part that an “extension of stay may not be approved for an applicant who failed to maintain **the** previously accorded status.” (Emphasis added.) By using the article “the” rather the more general article “a,” this regulation indicates that the “previously accorded status” is solely the status granted when the beneficiary was admitted by CBP upon last entry to the United States.

AILA and the Council agree that “issuing RFEs and NOIDs takes time and effort for adjudicators—to send, receive, and adjudicate documentation—and it requires additional time and effort for applicants or petitioners to respond, resulting in extended timelines for adjudications.”[19] We further appreciate USCIS’s candid acknowledgement that “[b]ecause the data are not standardized or tracked consistently DHS cannot estimate how many RFEs and NOIDs are related to maintenance of status.” AILA and the Council therefore urge that USCIS not send current petitioners and the agency’s own adjudicators on a quest down a rabbit hole of long-past activities requiring unattainable proof of a beneficiary’s past engagements, associations and activities involving prior employers on previous entries to the United States.

For these reasons, AILA urges USCIS to publish a final rule which expressly states that:

- The present petitioner will only be required affirmatively to submit as initial evidence that the beneficiary’s status has been maintained by providing evidence of the last two pay periods while in the employ of this petitioner, although an RFE or NOID may be issued requesting the petitioner or the beneficiary to provide evidence demonstrating that the individual’s status since last entry to the U.S. has been maintained; and
- A determination that a beneficiary has failed to maintain prior status since last entry to the U.S. may result in an adjudication that the individual is out of status, but such a decision would not preclude an adjudicator from favorably exercising discretion pursuant to 8 CFR § 214.1(c)(4) to restore status and would not relieve USCIS of the duty to

had been maintained, “should reduce the need for RFEs or NOIDs. ... and would not add an additional burden on the petitioner or applicant.” (88 FR at 72881.)

[19] 88 FR at 72931.

AILA Doc. No. 23122631. (Posted 12/26/23)

adjudicate any otherwise approvable petition seeking employment-based nonimmigrant classification.

6. AILA and Council support eliminating the itinerary requirement.

AILA and the Council support the elimination of the itinerary requirement for H-1B petitions. Further, we agree with the agency's rationale for this change in that all information provided in an itinerary statement is duplicative of information/evidence that is required to be provided elsewhere in the petition. This is a common-sense change that is consistent with the agency's otherwise stated goals to modernize and simplify the H-1B petition process. AILA and the Council, along with petitioning employers and beneficiary employees who have been negatively impacted by document deficiencies in currently required itinerary statements, look forward to the implementation of this change as drafted in the final rule.

7. AILA and Council support the proposal to extend petition validity.

AILA and the Council support the proposal to allow USCIS to extend the validity of an H-1B petition that is approved after the requested validity period has expired as it is a more efficient manner in which to address this scenario than requiring the filing of an amended petition. We recommend, however, that USCIS reconsider the prohibition against the petitioner lowering the offered salary when responding to the RFE with revised validity dates. If the offered salary still meets the required wage, then lowering the salary would not be a material change and submitting and adjudicating an amended petition would not be an efficient use of petitioner's or USCIS's resources. For example, a change in economic conditions could require that the petitioner implement across-the-board pay cuts, lowering both the actual wage for the position and the required wage but, as long as both wage levels exceed the prevailing wage, there would be no material change requiring the filing and adjudication of an amended petition.

B. Benefits and Flexibilities

1. AILA and Council support proposed changes to H-1B Cap Exemptions, with recommended clarifications.

AILA and the Council greatly appreciate and support the additional clarifications offered regarding H-1B cap exemptions, codifying agency practice to promote consistency. There are many fact patterns involving cap-exempt employment. We note, for example, the recent USCIS posting on its Electronic Reading Room of a letter from USCIS Director Ur Jaddou to Jim Baker (Associate Vice President for Research at Michigan Technological University dated October 18, 2023) answering questions ("Jaddou Cap Exemption Letter") on a variety of innovative ventures and how those would be treated under the current cap exemption regulations. The range of situations discussed highlights the importance of the proposed regulation in confirming agency practice.

The enhanced guidance in the proposed rule offers greater transparency for petitioners, which have been reluctant at times to file H-1B petitions based on informal guidance or past experience. We very much agree with the stated goal to "clarify, simplify, and modernize eligibility for cap-exempt

H-1B employment [to]… better reflect modern employment relationships… and to better implement Congress' intent." The proposed rule follows the high-skilled worker rule known as the "AC21 Rule" published in January 2017, as a welcome clarification of H-1B cap exemption policy.

In that spirit, we offer the following suggestions for additional clarity, specifically with respect to the "employed at" and the research organization exemptions.

a. *Employed at a cap-exempt institution - 8 C.F.R. § 214.2(h)(8)(iii)(F)(4)*

Currently, the regulations require that: the worker spend the majority of time at a qualifying institution, organization, or entity; the worker's job duties will directly and predominantly further the essential purpose, mission, objectives or functions of the qualifying institution, organization, or entity; and there is a nexus between the work to be performed and the essential purpose.

We appreciate the recognition that remote or hybrid work is an essential part of the post-COVID employment environment. Some nonprofits are increasingly hiring remotely to have access to much needed talent in a tough labor market. We support the common-sense change in the proposed regulation to "at least half" instead of "the majority of" the time. Few employers track work time to the minute, so demonstrating 51% can be a challenge. AILA and the Council suggest clarifying that the "at least half" standard is to be judged over the course of the petition's validity period, rather than a smaller unit of time such as monthly.

We commend USCIS for recognizing the reality of the modern, post-COVID work environment by including in the proposed regulation that duties do not need to be physically performed onsite and that "USCIS will focus on the job duties to be performed rather than where the duties are physically performed."

We also support that the proposed regulation clarifies the requirement that a beneficiary's duties "directly and predominantly further the essential purpose, mission, objectives or functions" of the qualifying entity, by adding the requirement that the duties "directly further an activity that supports or advances one of the fundamental purposes, missions, objective or functions" of the qualifying entity. For example, an academic medical center provides healthcare to patients, conducts research and clinical trials, and trains doctors and nurses - multiple essential purposes. Through the proposed regulation, DHS is acknowledging that an organization may have more than one fundamental purpose, mission, objective, or function and the cap-exempt petitioner need not show the beneficiary's work contributes to all of these purposes. AILA and the Council also support removing the overlapping, redundant requirement for a "nexus," which did not substantively add to the requirements.

b. *Nonprofit or tax-exempt organization- 8 C.F.R. § 214.2(h)(19)(iv)*

The proposed regulation notes that it relies on the definition of "nonprofit entity" from 8 CFR § 214.2(h)(19)(iv), based on the statute at INA 214(g)(5) about "a related or affiliated nonprofit entity". The current regulation clarifies that "an entity is considered a nonprofit entity if it meets the definition described at paragraph (h)(19)(iv) of this section," which states:

AILA Doc. No. 23122631. (Posted 12/26/23)

Non-profit or tax exempt organizations. For purposes of 8 CFR 214.2(h)(19)(iii)(B) and (C) of this section [re the ACWIA fee], a nonprofit organization or entity is:

(A) defined as a tax-exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6), 26 U.S.C. 501(c)(3), (c)(4) or (c)(6), and

(B) has been approved as a tax-exempt organization for research or educational purposes by the Internal Revenue Service.

However, this definition of nonprofit leaves out government entities lacking an affiliation with an institution of higher learning that do not fall within those sections of the tax code. For example, in the STEM context, inner city or rural schools may struggle to recruit science and math teachers. Currently, public schools and other government agencies may be hesitant to expend scarce resources on filing an H-1B cap-exempt petition because of the uncertainty of approval.

The current regulation heading is "Non-profit or tax-exempt organizations," indicating by the "or" that there are two separate types of organizations to be considered for cap exemption. "Nonprofit" is then defined but "tax exempt" is not. We suggest removing the specific reference to IRS Code Sections 501(c)(3), (c)(4) or (c)(6), in keeping with long standing practice in approving cap exemptions, and the recent Jaddou Cap Exemption Letter stating that "USCIS will continue to consider exemption requests from government entities that are also organized as nonprofit entities" on a case-by-case basis.

We also suggest that the final rule address modern nonprofit management situations by adding clarification that:

- An organization with its own tax filing and payroll can qualify for cap-exemption even if it is part of a larger nonprofit and uses that parent nonprofit's federal employer identification number (FEIN), and

- A nonprofit that engages a Professional Employer Organization (PEO) for human resource and payroll services may still qualify for cap-exemption even if the taxpayer identification number of the PEO is used for those functions.

c. Research organizations - 8 CFR 214.2(h)(19)(iii)(C)

AILA and the Council support replacing the requirement that a nonprofit research organization be "primarily engaged" in conducting research to "a fundamental activity" is research. This avoids the subjective evaluation of the exact percent of effort an organization spends on research. For example, consider a nonprofit that is focused on a particular disease. That nonprofit might be involved both directly and indirectly in research. That research might inform related educational, grant-making, and advocacy activities. We are pleased to see such an example specifically noted in the Federal Register.

We appreciate the elimination of 8 CFR 214.2(h)(19)(iv)(B) stating that the employer/petitioner has been approved as a tax-exempt organization for research or educational purposes by the

AILA Doc. No. 23122631. (Posted 12/26/23)

Internal Revenue Service. As a practical matter, IRS tax exempt letters do not identify the organization's purpose, leaving some subjectivity in describing its activities.

Lastly, we support the clarification that research can include "designing, analyzing and directing the research of others if on an ongoing basis and through the research cycle." This recognizes the inherently interconnected collaborative nature of basic and applied research, and the many organizations that are often involved.

d. *Additional recommendation to define terms or phrases that are not defined in the current regulations:*

I) "Active working relationship" - 8 CFR 214.2(h)(8)(iii)(F)(2)(iv)

AILA and the Council suggest taking this opportunity to clarify the type of evidence that can be used to show that a nonprofit has an "active working relationship" with an institution of higher education. Such evidence could include (but would not be limited to) students doing internships or research for course credit or as part of a requirement of the educational program, or employees of a nonprofit teaching, mentoring, or speaking to or collaborating with faculty and students. We also suggest that the proposed regulation clarify that a recently established working relationship can support a cap exemption, and can be demonstrated by specific provisions of a written agreement, which will be implemented in the next academic term (such as emails, or evidence of meetings between the two entities to implement the affiliation agreement).

II) "Attached" - 8 CFR 214.2(h)(19)(iii)(b)(3)

AILA and the Council suggest that DHS take this opportunity to define the term "attached" to include where the nonprofit "had a consistent collaboration with the institution of higher education, or that the institution of higher education has a vote or key role in the administration of the nonprofit's program or budget." There is little guidance or case law on this issue.

2. Automatic Extension of Authorized Employment (Cap-Gap) and Start Date Flexibility for Certain H-1B Cap Subject Petitions

AILA and the Council mostly support this proposal and welcome USCIS's acknowledgment that regulatory enhancements are necessary to avoid employment gaps that are due to H-1B petition adjudications that remain pending beyond October 1st. It is our understanding that the proposed rule would, in essence, extend F-1 status and OPT employment authorization for petitions not adjudicated by October 1st until the date of petition approval or April 1 of the relevant fiscal year, whichever is earlier. We recommend, however, that USCIS further clarify the regulatory term "until the validity start date of the approved petition" to remove any potential misinterpretation as to the effect of the extension. We propose the following clarifying language:

> The duration of status, and any employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) or (C), of an F–1 student who is the beneficiary of an H–1B petition subject to section 214(g)(1)(A) of the Act (8 U.S.C. 1184(g)(1)(A)) and who requests a change of status, **that has not been finally adjudicated by the**

AILA Doc. No. 23122631. (Posted 12/26/23)

> **requested start date on the petition,** will be automatically extended until April 1 of the fiscal year ... for which such H–1B status is being requested or until the validity start date of the approved petition, whichever is earlier.

Alternatively, we propose that USCIS eliminate the April 1 outside limit on cap gap coverage, as petitioners and beneficiaries should not be penalized by significant adjudication delays that are typically beyond their control. Instead, status and work authorization should be extended throughout the entire pendency of the petition.

In lieu of the alternate language proposed above, we recommend instead that USCIS revise the proposed regulation as follows:

- if the petition is adjudicated and approved on or before the start date requested on the petition, F-1 status and OPT work authorization are extended until the requested start date; and
- if the petition is adjudicated after the requested start date, F-1 status and OPT work authorization are extended until the adjudication of the petition

We also recommend that USCIS provide additional clarification with respect to the requirement that the H-1B petition be non-frivolous. Specifically, non-frivolous should be defined consistently with the tolling provision of INA 212(a)(9)(B)(iv) for foreign nationals who do not accrue unlawful presence after their Form I-94 expires if there is a timely filed, non-frivolous extension or change of status pending, or for H-1B portability when a non-frivolous H-1B change of employer petition is filed under INA 214(n).

C. Program Integrity

1. Provisions to ensure Bona Fide Job Offer for a Specialty Occupation Position.

a. *Contracts (3rd Party Placement)*

AILA and the Council oppose USCIS' proposal to codify its ability to "request contracts, work orders, or similar evidence" where the initial evidence is purportedly not sufficient to establish "the terms and conditions of the beneficiary's work and the minimum educational requirements to perform the duties."[20] We believe the certified LCA is prima facie evidence of a sufficient employer-employee relationship and it is not clear why additional documentation is necessary to establish the terms and conditions of the beneficiary's work. The NPRM suggests an additional justification may relate to whether a bona fide job offer exists, however, the tentative nature of this justification suggests this expansion of authority is, at a minimum, on uncertain ground.

Upon closer inspection, contracts and work orders specifying minimum educational requirements are not legally probative in most employment contexts, and in actual business practice often do not exist at all. Whether it is an employment agreement between an employer and employee, or a master services agreement between contractor and client, contracting parties simply do not negotiate "minimum education requirements" as envisioned by this regulation. Simply putting "stakeholders on notice"[21] does not make it so and creates the potential to exclude sectors of the

[20] 88 FR at 72901.
[21] 88 FR at 72901.

AILA Doc. No. 23122631. (Posted 12/26/23)

economy from the H-1B program, as well as place burdensome obligations on parties not before USCIS.

i. The Regulation Creates a New Eligibility Requirement without a Sufficient Statutory Basis.

The proposed regulation is overbroad and unduly burdensome if the agency intends to interpret it as requiring that all parties in a contractual relationship include in their documentation minimum education requirements if an H-1B is to be obtained.[22] While the language of the regulation is couched as permissive in nature, the practical impact, which is to codify USCIS' ability to require contracts will be the formal establishment of an additional, complex documentary requirement for which compliance will be difficult for many employers. Although the NPRM does not mandate submission of contracts with the required information, it is strongly suggested:

> The documentation should also include the minimum educational requirements to perform the duties. ... Through proposed 8 CFR 214.2(h)(4)(iv)(C), DHS seeks to put stakeholders on notice of the kinds of evidence that could be requested to establish the terms and conditions of the beneficiary's work and the minimum educational requirements to perform the duties.[23]

The implied threat for noncompliance with this "request" is made clear:

> Although a petitioner may always refuse to submit confidential commercial information, if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of denial. *Cf. Matter of Marques*, 16 I&N Dec. 314, 316 (BIA 1977) (in refusing to disclose material and relevant information that is within his knowledge, the respondent runs the risk that he may fail to carry his burden of persuasion with respect to his application for relief).[24]

Contractual agreements in business do not normally discuss minimum educational requirements for jobs being performed pursuant to the agreements as they are not typically relevant to the parties' business interests. While such documentation might be desirable to USCIS, it does not normally exist, nor can it be practicably obtained, and would represent a significant barrier that could unnecessarily impede access to immigration benefits.

For example, many client contracts contain nondisclosure provisions that prohibit disclosure of the contracts to third parties. Statements of Work (SOWs) and Master Services Agreements (MSAs) often contain a variety of specifications about the project being performed, and both parties to the contract have legitimate business reasons why those details should not be disclosed to third parties.

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[22] Id. The scope of the burden is disproportionate to the goal of ensuring a bona fide job offer in a specialty occupation. "Evidence submitted should show the **contractual relationship between all parties**, the terms and conditions of the beneficiary's work, and the minimum educational requirements to perform the duties. ... The submitted contracts should include both the master services agreement and accompanying statement(s) of work (or similar legally binding agreements under different titles) signed by an authorized official of any party in the contractual chain, including the petitioner, the end-client company for which the beneficiary will perform work, and any intermediary or vendor company." (emphasis added)

[23] Id.

[24] Id. at n. 110.

AILA Doc. No. 23122631. (Posted 12/26/23)

The language of the proposed regulation would put these petitioners in very difficult place where they must choose between violating a specific contractual provision prohibiting disclosure or having an H-1B petition for a key employee denied. Using the NPRM to attempt to put companies "on notice" that such information should be included in a contract solely for purposes of satisfying an immigration requirement is essentially trying to have the "tail wag the dog."[25]

ii. AILA and the Council Oppose the Proposed Regulation Which Would Create an Unrealistic and Artificial Requirement that Parties add Educational Requirement Language in Contracts for Immigration Purposes.

At its essence, a contract memorializes the obligations the parties make to each other. Promises are exchanged to ensure one party performs or refrains from a specific course of action, but in all cases, parties invest their resources and time only in negotiations over terms of the contract they perceive as valuable. In the H-1B employment context, a limited number of variations of contracting parties are possible:

- Between the Petitioner and the H-1B worker;
- Between the Petitioner and a client for services or labor, to include the duties to be performed by the H-1B worker.

Between a Petitioner and H-1B worker, it is unlikely that the employee will ever seek to enforce any warranties regarding the employer's minimum educational requirements for the position they will perform as it is simply not relevant to their interests. Similarly, an employer has no incentive to make warranties about the educational requirements of the employment to be offered to the prospective employee. Warranties are usually sought to protect a party to the agreement and no party would ever unilaterally enter into a warranty enforceable against itself. As such, applying this proposed regulation and requiring such documentation in a direct employer-employee situation would be arbitrary and capricious.

When a petitioner and a client negotiate for a specific deliverable, clients do not typically seek to impose any minimum educational requirements on the employees the petitioner might assign to the project as the satisfactory completion of the project is the overarching objective. While the client may seek warranties about the quality and specifications of the product or deliverable, the client has no incentive (and is indeed disincentivized) to waste negotiating leverage on the staff that the Petitioner might engage to produce that product.[26]

Notwithstanding any mutuality of interests that petitioners, beneficiaries or end clients may have in connection with a specific project, end clients are not parties to the H-1B petition and are not bound by USCIS regulations. As such, they are neither incentivized nor required to comply with USCIS's regulations for contracting language, placing employers who attempt to hire H-1B

[25] 88 FR at 72942.

[26] When negotiating for services, clients negotiate for the duration, quality, and scope of the services provided. Clients may even negotiate on rare occasions for the services of specific employees, who by their education, professional reputation, or skill may be uniquely valuable. But clients, seeking to avoid creating an unintentional employer-employee relationship, will rarely, if ever, stipulate any sort of requirement for the minimum education to be possessed by the petitioner's staff servicing their account.

AILA Doc. No. 23122631. (Posted 12/26/23)

workers to work on the contract at a severe disadvantage in the marketplace if they are unable to access key foreign national talent.

Because companies that seek specialized IT services contract with consulting firms rather than their employees, they do not typically participate in the H-1B visa process and often lack institutional knowledge about the sort of information USCIS requires. The uncertainty surrounding when USCIS might look to a third party's requirements imposes administrative burdens on all companies to generate and maintain otherwise unnecessary records for possible inspection, regardless of whether they are, in the agency's view, "staffing" the H-1B worker or merely receiving their services.

Additionally, looking to third parties' "requirements" for a position invites the risk that adjudicators will rely on a company's requirements for related positions within the company's hierarchy that do not adequately reflect the level of skill they expect and require from contractors. For example, adjudicators may mistakenly conclude that the third party does not "normally require a degree or its equivalent for the position" simply because it may not have such a requirement for similar but less-skilled labor within its own workforce.[27]

For these reasons, we believe this provision in the proposed regulation should be deleted or modified to specify that the lack of information with respect to education requirements in contractual documentation creates no evidentiary presumption with respect to the existence of a bona fide job offer.

iii. The Terms and Conditions of Employment are Established by the Certified LCA.

It is not clear to AILA or the Council that this part of the proposed regulation requiring provision of contracts will accomplish anything more than that which is already achieved through less burdensome means. As the Service notes in the NPRM, "H-1B petitioners are required to submit an LCA attesting that they will pay the beneficiary, see, e.g., 8 CFR 214.2(h)(4)(i)(B), as well as a copy of any written contracts between the petitioner and the beneficiary (or a summary of the terms of the oral agreement under which the beneficiary will be employed, if a written contract does not exist), which typically demonstrates that they will hire and pay the beneficiary."[28]

There is little evidentiary value in requesting contract documentation, which likely has little information relevant to the H-1B petition, when a certified LCA has been provided. That LCA, combined with a signed supporting statement from the petitioner describing the role to be performed, is sufficient to demonstrate that the role qualifies as a specialty occupation. The certified LCA already stipulates under penalty of perjury and possible debarment:

- The amount and rate of compensation
- The worksite at which the duties will be performed
- Dates of employment
- Description of the duties to be performed by reference to a standard occupational code

[27] See 8 C.F.R. § 214.2(h)(4)(ii).

[28] Id.

- Equal treatment as to hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules

Contracts, work orders, or other similar evidence between parties in a contractual relationship, which typically have little or no relevant information as to the educational requirements for the H-1B occupation and often are not signed under penalty of perjury or debarment, are unlikely to be more probative than the certified LCA.

Significantly, USCIS is also proposing to eliminate a petitioner's obligation to submit, in addition to an LCA, evidence of an employer-employee relationship, under common law or otherwise.[29] A recitation of the terms and conditions of employment is also not immediately relevant to the issue of whether actual employment exists, and thus only has a tenuous connection to the "bona fide job offer" requirement, as USCIS itself acknowledges.[30]

iv. Contractual Evidence of Minimum Educational Requirements Is Not Always Germane to Whether a Job is a Specialty Occupation.

Under the NPRM, an employer may establish that a position qualifies as a specialty occupation through either the standards of the occupational classification, normal industry hiring practices, the employer's own hiring practices, or the nature of the position. As such, reference to the specific duties to be performed is relevant for only one of the four possible criteria. Thus, contractual documentation of the duties to be performed and the minimum education required to perform those duties is, at best, only relevant in some instances, making the regulation overly broad while at the same time signaling to adjudicators a regulatory justification to engage in unnecessary RFEs.

v. Recent History and Best Practice favor a Narrow Scope

Codifying the ability to request contracts is an invitation for adjudicators to view contracts as a basic requirement for *all* H-1B petitions, even when such contracts are legally irrelevant to establishing the existence of a *bona fide* job offer, particularly in consideration of the fact that the burden of proof is a "preponderance of the evidence" standard. When viewed through this lens, the proposed regulation goes far beyond that which is necessary by establishing a requirement potentially applicable to all that is only probative in a subset of situations.[31]

This requirement will also unduly restrict growth in certain sectors of the economy. Consulting companies of various denominations all depend on business-to-business contracts and agreements to survive. Clients of these companies generally negotiate thoughtfully and will not oblige contractual provisions that have no business value. We therefore respectfully recommend that DHS remove this proposed new requirement from the regulation.

Upon closer inspection, contracts and work orders specifying minimum educational requirements are not legally probative in most employment contexts, and in actual business practice often do

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[29] 88 FR at 72903-04.

[30] "This evidence, in turn, *could* establish that the petitioner has a bona fide job offer for a specialty occupation position for the beneficiary." 88 FR at 72901 (emphasis added).

[31] While a stronger argument could be made for the utility of this evidence under USCIS's previous common-law standard for employer-employee relationship, USCIS has now abandoned this standard. This regulation will, therefore, not yield any material benefits and will exacerbate an issue USCIS seeks to correct, namely unnecessary and burdensome RFEs.

AILA Doc. No. 23122631. (Posted 12/26/23)

not exist at all. Whether it is an employment agreement between an employer and employee, or a master services agreement between contractor and client, contracting parties simply do not negotiate "minimum education requirements" as envisioned by this regulation. Simply putting "stakeholders on notice"[32] does not make it so and creates the potential to exclude sectors of the economy from the H-1B program, as well as place burdensome obligations on parties not before USCIS.

b. Non-speculative Employment.

While we support the agency's proposal to codify the requirement that petitioners establish the existence of a non-speculative position in a specialty occupation, we are concerned by the lack of guidance by the agency as to the types of evidence that would meet this requirement. We do, however, welcome the agency's guidance on what is *not* required to establish non-speculative employment. Notably, employers are no longer required to provide specific daily work assignments for the duration of the intended employment. We also welcome the agency's decision not to limit H-1B validity periods to the duration of contracts, work orders, or other similar documents to show employment. Nevertheless, the absence of any guidance on what is required to establish non-speculative employment raises concerns that the regulatory provision may result in RFEs and NOIDs with open-ended requests for documents that are practically difficult for petitioners to provide.

In particular, the NPRM notes that "At the time of filing, the petitioner must establish that it has a non-speculative position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition."[33] This proposal is "complement[ed]" by "DHS's proposal to codify the requirement for a bona fide," or "legitimate," "job offer."[34] This nonspeculative-employment requirement is functionally equivalent to the prior administration's invalidated policy guidance related to third-party placements and lacks textual support in the INA.

In *ITServe Alliance, Inc. v. Cissna*,[35] the court addressed, among other things, whether nonspeculative-work-assignment requirements in the 2018 Policy Memorandum (Policy Memo) violated the APA.[36] The Policy Memo targeted "H-1B petitions filed for workers who will be engaged at one or more third-party worksites."[37] Specifically, the Policy Memo provided that the requirement that a beneficiary be "employed in a specialty occupation" meant "that the petitioner has *specific and nonspeculative qualifying assignments* in a specialty occupation for the beneficiary *for the entire time requested in the petition*."[38]

The court discussed USCIS's explanation of this provision. "CIS stressed that 'H-1B petitions do not establish a worker's eligibility for H-1B classification if they are based on speculative

[32] 88 FR at 72901.
[33] Proposed 8 C.F.R. § 214.2(h)(4)(iii)(F) at 88 FR 72960.
[34] 88 FR at 72904.
[35] 443 F. Supp. 3d 14 (D.D.C. 2020).
[36] USCIS Policy Memorandum: Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites. PM-602-0157. February 22, 2018.
[37] Supra *note 37* at 25 (quoting Policy Memo at 1).
[38] *Id* (quoting Policy Memo at page #4 (emphasis added)).

AILA Doc. No. 23122631. (Posted 12/26/23)

employment or do not establish the actual work.' Therefore, 'uncorroborated statements describing the role' of the foreign worker at a third-party worksite 'are often insufficient.'"[39]

The court held that the nonspeculative-work requirement was unlawful. "What the law requires, and employers can demonstrate, is the nature of the specialty occupation and the individual qualifications of foreign workers."[40] Relying on the statutory definition for "specialty occupation," the court emphasized that "Congress devised a definition for an 'occupation,' not a 'job.' Thus, a specialty occupation would likely encompass a host of jobs, from trainee to expert along with concomitant but differing job duties."[41]

In rendering the decision, the court noted, "[n]othing in [the definition of specialty occupation] requires specific and non-speculative qualifying day-to-day assignments for the entire time requested in the petition." The court further invalidated the related requirement that petitioners provide an "itinerary" including "descriptions of non-speculative work assignments for the duration of the requested visa."[42] Beyond being inconsistent with the regulations, the court emphasized that "as applied to [the] Plaintiffs in the IT consulting sector, it [was] irrational, that is, arbitrary and capricious" to "require[e] contracts or other corroborated evidence of dates and locations of temporary work assignments for three future years." The court recognized doing so would be "a total contradiction of the [companies'] business model of providing temporary IT expertise to U.S. businesses," and the requirement would "effectively destroy a long-standing business resource without congressional action."[43]

Unfortunately, the NPRM repackages the prior administration's "specific and nonspeculative qualifying assignments" requirement into a "non-speculative position" requirement. This is a distinction without a difference, and the agency fails to offer one.

DHS pays lip service to *ITServe Alliance*, asserting that "establishing non-speculative employment does not mean demonstrating non-speculative daily work assignments through the duration of the requested validity period."[44] Yet, as applied to circumstances where the petitioning employer will contract the beneficiary's services to third parties, DHS offers no explanation for how adjudicators will determine that a qualifying, "non-speculative position" exists *without* requiring the same evidence of "specific and nonspeculative qualifying assignments" or an "itinerary," which the *ITServe Alliance* court held USCIS must not require.

Just as the *ITServe Alliance* court recognized, requiring consulting firms that petition for H-1B classification to provide proof of "nonspeculative" employment in the way the proposed rule contemplates is arbitrary and capricious as applied. It is "a total contradiction of" the business of

[39] *Id.* (quoting Policy Memo at 4).
[40] *Id.* at 39.
[41] *Id.*
[42] *Id.* at 40.
[43] *Id.* at 41-42.
[44] 88 Fed. Reg. at 72902; *id.* at n. 115.

AILA Doc. No. 23122631. (Posted 12/26/23)

companies that provide consulting services and would "effectively destroy" the "longstanding business resource" such companies provide U.S. businesses.[45]

There is, for example, no statutory basis to limit the range of evidence that can demonstrate a non-speculative position to signed contracts. Flexibility is both critical and appropriate to allow the H-1B visa program to continue fulfilling its intended role to close high-skilled labor gaps in the domestic labor market in a manner that is reflective of current business practices. The IT industry depends on consulting firms' ability to place H-1B workers with multiple clients over the course of their H-1B validity period. Additionally, the nonspeculative-employment requirement is unnecessary to ensure H-1B employment offers are legitimate. The mere fact that a beneficiary's position is subject to some flexibility before placement with a third party does not render the position speculative or otherwise "suggest that there may not have been a bona fide job opportunity available at the time of filing."[46]

Amending petitions in the months between an application and deployment reflects the reality of modern business, where workforce needs fluctuate faster than USCIS's adjudicatory process can match—particularly in IT positions for which H-1B workers fill a critical and oft times unanticipated gap in the domestic workforce.

c. *LCA Corresponds with the Petition*

In the NPRM, USCIS asserts that the regulatory change including language describing its authority to confirm that the LCA conforms to the accompanying H-1B petition will only serve to "mirror" existing DOL regulations and "clarify" USCIS's scope of authority to determine whether certified labor condition applications "properly correspond" with the petition in the H-1B process.[47] In actuality, these changes represent an unnecessary expansion of USCIS authority that would serve to create jurisdictional conflict and unlawfully expand the evidentiary requirements for adjudication. USCIS has always had the ability to compare the LCA with the proffered role to ensure that the LCA supports the H-1B petition. Our concern with the proposed regulation is that it appears to require – or at least encourage – USCIS adjudicators to go much further and instead perform a detailed analysis of each element of the LCA and potentially reject the LCA altogether if the adjudicator does not agree with one of the many elements of the underlying LCA.

The proposed regulation contains no instructions for how an adjudicator should determine whether an LCA "properly corresponds" with the petition. With that said, the NPRM purports that USCIS intends to examine: "(1) the SOC code; (2) the wage level (or independent authoritative source equivalent); and (3) locations of employment" and ". . . compare the information contained in the LCA against the information contained in the petition and supporting evidence."[14] Upon review of these elements, USCIS asserts adjudicators will apply an undisclosed test to determine whether this information "sufficiently aligns" as described in the rest of the record. USCIS also proposes to reserve for itself the authority to revoke any previously approved H-1B petition upon future investigation of any allegedly false statements contained within the LCA.[15]

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[45] *Id* at 41-42.
[46] *See* 88 FR at 72909.
[47] 88 FR at 72902.

AILA Doc. No. 23122631. (Posted 12/26/23)

This proposal represents an impermissible expansion of USCIS' authority, encroaching on the authority exclusively vested with the Department of Labor and, therefore, AILA and the Council oppose the regulatory change. In the alternative, we propose that the final rule expressly indicate that, while USCIS has the authority to verify that the data in the LCA matches the data listed in the H-1B petition, it cannot re-adjudicate DOL's certification of the LCA.

1. The Exercise of this Proposed Authority by USCIS Violates the INA and Conflicts with Existing Department of Labor Regulations.

The Department of Labor (DOL) possesses the jurisdiction to verify wage levels and representations listed in an LCA.[48] There is no legitimate purpose for USCIS to investigate or otherwise examine prevailing wage information or the underlying attestations contained therein if USCIS does not intend investigate an employer's LCA practices. To determine whether a petition "corresponds" with an H-1B petition, USCIS need only verify that the certified LCA and the petition at issue do not materially conflict. However, with the proposed examination of the "wage level (or an independent authoritative source equivalent),"[49] USCIS appears to open the door to go further than mere comparison and venture into investigations more properly in the domain of DOL.

No possible analysis that USCIS might conduct exists for which the prevailing wage level is relevant. The required wage is evident on the face of the LCA and reveals whether the certified LCA comports with the offered salary. But the prevailing wage level itself goes to the heart of the prevailing wage determination process, which is exclusively within DOL authority. The prevailing wage determination is in no way indicative of the duties the foreign national will perform, and an OES Level 1 wage level determination is wholly consistent with a specialty occupation.[50]

Therefore, to inquire into the wage level itself is to examine whether and how the employer properly applied DOL regulations and guidance. However, it is precisely this authority that the Immigration and Nationality Act, Section 101 (a)(H), invests in the DOL. This scope and division of regulatory authority is codified at 20 C.F.R. § 655.700 and following where:

20 C.F.R. § 655.700(a)(4) states:

> [The INA] establishes an enforcement system under which **DOL is authorized to determine whether an employer has engaged in misrepresentation or failed to meet a condition of the LCA, and is authorized to impose fines and penalties**. [emphasis added]

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[48] See 20 C.F.R. 655.705(a)(2); 20 C.F.R. § 655.800; and 20 C.F.R. § 655.805.

[49] It is possible that USCIS intended to identify "required wage" as one of the relevant items of inquiry, and the mention of "prevailing wage level or an independent authoritative source equivalent" may be the product of inartful drafting. Indeed, practitioners often use "prevailing wage" and "required wage" interchangeably, however under DOL regulations and guidance, these are two very distinct and different concepts. The prevailing wage rate can be irrelevant in many cases where the actual wage (and by extension the required wage) is higher.

[50] USCIS indicates that "The wage level is not solely determinative of whether the position is a specialty occupation," however this not accurate – the wage level is not indicative at all of specialty occupation. A designation of OES Wage Level 1 merely indicates that the employer does not require any additional education or experience beyond the minimum normally required for entry into the occupation. This fact by itself is not probative of whether a specific offer of employment qualifies as a specialty occupation position. 88 FR 72903.

AILA Doc. No. 23122631. (Posted 12/26/23)

and Section 655.705(a)(2) states:

> The Wage and Hour Division of the Employment Standards Administration (ESA) is responsible, in accordance with subpart I of this part, for **investigating and determining an employer's misrepresentation in or failure to comply with LCAs** in the employment of H-1B nonimmigrants. [emphasis added]

Finally, 20 C.F.R. § 655.800 and following relates to "Enforcement of H-1B Labor Condition Applications…" Subsection § 655.805, "What violations may the Administrator investigate?" states:

> (a) The [U.S. DOL] Administrator, through investigation, shall determine whether an H-1B employer has –
> . . .
> (6) Failed to specify accurately on the labor condition application the number of worker sought, **the occupational classification in which the H-1B nonimmigrant(s) will be employed, or the wage rate and conditions under which the H-1B nonimmigrant(s) will be employed;** [emphasis added]

Despite USCIS's assertions to the contrary, under the NPRM, USCIS would need to analyze "the wage rate and conditions under which the H1B nonimmigrant(s) will be employed"[51] when verifying that any particular wage level, wage survey, or attestation "properly corresponds" to an H-1B petition. The Immigration and Nationality Act, by its plain language, clearly vests subject matter jurisdiction for this type of investigation with the U.S. DOL. To imply that USCIS also has subject matter jurisdiction to conduct this analysis goes far beyond merely "mirroring" and "clarifying" USCIS's existing authority and will invalidate the existing enforcement scheme.[52]

2. The Regulation Must Clarify that USCIS Will Not Examine Prevailing Wage Information or Level.

Notwithstanding these concerns, the NPRM tries to assure the public that these revisions will not change the status quo or result in any new powers.[53] If that is the agency's intention, the Final Rule must clearly articulate that fact to the regulated public, as well as to present and future adjudicators. Specifically, the final rule and any related Policy Manual guidance must clarify that, while adjudicators may confirm that the offered salary satisfies the required wage obligation, USCIS adjudicators may not question the prevailing wage level or alternative wage survey information listed on the LCA. The prevailing wage level information is not determinative of the foreign

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[51] 20 C.F.R. 655.805(a)(5).

[52] Sec'y of Labor v. Twentymile Coal Co., 411 F.3d 256, 260-61 (D.C. Cir. 2005) ("To read the regulation's use of the term... [in this way] would lead to absurd results .... This Court will not adopt an interpretation of a statute or regulation when such an interpretation would render the particular law meaningless."); AT & T Corp. v. FCC, 394 F.3d 933, 938-39 (D.C. Cir. 2005) (finding that the FCC could not interpret its own regulations such that it rendered them meaningless)

[53] "By adding it to DHS regulations, DHS would align its regulations with existing DOL regulations, which would add clarity and provide transparency to stakeholders." 88 FR at 72902; "USCIS would not, however, supplant DOL's responsibility with respect to wage determinations." 88 FR at 72903.

AILA Doc. No. 23122631. (Posted 12/26/23)

national's proposed specialty occupation activities and the adjudicator cannot confirm the accuracy of the prevailing wage determination without usurping the authority exclusively delegated to the DOL by statute.

Similarly, the final rule should also mirror the existing DOL regulation in stating that USCIS will determine "whether the petition is supported by an LCA which corresponds with the petition, [and] whether the occupation named in the labor condition application is a specialty occupation" and remove ambiguous and potentially expansionary language like "properly corresponds" that appear to broaden USCIS' scope of inquiry regarding LCAs. The current language could otherwise signal that USCIS is either now, or in the future, expanding its authority to investigate LCAs and the attestations that underly them.[54]

In summary, the final rule should articulate the specific criteria USCIS will use to determine whether a certified LCA corresponds with the accompanying H-1B petition and should clarify that the inquiry will solely examine whether the certified LCA and the instant petition correspond as to occupational classification, required wage, and area of employment.

d. Revising the Definition of U.S. Employer (Legal Presence and Service of Process)

AILA and the Council support USCIS' proposal requiring that, to qualify as a U.S. employer, a petitioner must show that it has both a proper legal presence in the United States and is amenable to service of process as it provides clear guidance to all employers, especially new and emerging companies, with respect to the minimum legal threshold for establishing their status as bona fide U.S. employers.

e. Employer-Employee Relationship

DHS proposes to remove the reference to an employer-employee relationship from the definition of U.S. employer, which in the past was interpreted using common law principles and was a significant barrier to the H-1B program for certain petitioners. We agree that past policies regarding the establishment of employer-employee relationships have led to significant administrative barriers and limited access to key H-1B talent.

We note that DHS confirms that "[i]t is in DHS's interests to promote, to the extent possible, a more consistent framework among DHS and DOL regulations for H-1B, E-3, and H-1B1 petitions and to increase clarity for stakeholders," and acknowledges that USCIS past policy was inconsistent with DOL's regulatory definition of an employer, which resulted in USCIS deciding a petitioner was not an H-1B employer when DOL determined the petitioner was an employer and certified the LCA. **This disparity increased the potential for confusion among H-1B stakeholders."[24]** (Emphasis added)

Nevertheless, the NPRM purports to significantly redefine DHS's definition of employer to exceed and conflict with DOL's regulatory definition,[55] which will undoubtably increase confusion and lead to contradictory results. In particular, by focusing on contracts with third parties to determine

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[54] We also suggest that USCIS revise the proposed regulation under CFR 214.2(h)(4)(i)(B)(1)(iii) to allow petitioners to identify additional beneficiaries by another identifier in the event a file number has not yet been issued.

[55] See 20 CFR 755.715.

AILA Doc. No. 23122631. (Posted 12/26/23)

whether a role is or is not a specialty occupation, USCIS is inherently shifting the focus of the employer-employee relationship to the contractual relationship that exists between a company and its customers. DHS should remove the emphasis on contractual relationships as a general matter and, in particular, any reference that relates to the definition of an employer-employee relationship.

f. *Bona Fide Job Offer*

We support the agency's update with respect to how it defines a U.S. employer so that it is clear that the employer is offering a position to the specified beneficiary for work to be performed in the U.S. The clarification that a bona fide job offer may include "telework, remote work or other off-site work within the United States" is also a particularly welcome clarification as many U.S.-based companies have moved to a remote workforce but need the employee in the U.S. for a variety of business reasons.

2. Beneficiary-Owners

AILA and the Council appreciate and generally support the USCIS proposal to amend the H-1B, E-3, and H-1B1 regulations related to the employer-employee relationship and beneficiary-owners to better reflect the long-standing and practical reality that there are foreign national owners/entrepreneurs who may have an ownership interest in a startup entity that may appropriately benefit from specialty occupation workers. The commentary is correct to point out that "USCIS's common law analysis of the employer-employee relationship has been an impediment for certain beneficiary-owned businesses." USCIS rightly has acknowledged the confusion created by the legacy of the now rescinded 2010 guidance on the employer-employee relationship, as well as consular guidance that had impacted beneficiary owners' utilization of specialty occupation visas.

The proposed substantial changes to the regulations, using a "majority of the time" framework, will give clarity to economically significant startup entities and entrepreneurs. These changes have the potential (to the extent that these regulations are able to do so) to both encourage the use of specialty occupation workers in critical industries and meet the Agency's policy goals of reducing the barriers of entry to startups. While legislative changes are necessary to fully unlock the potential of startup entities and entrepreneurs, the proposed regulatory changes will play a key role in attracting innovative companies and individuals that will help the U.S. economy in key technological industries and create high-quality U.S.-situated employment opportunities. We commend USCIS for moving towards a framework of providing more flexibility to startup entities and entrepreneurs, thereby allowing them to consider specialty occupation workers to develop their businesses and expand and innovate our economy.

The proposed regulation's establishment of a "majority of the time" framework provides a level of flexibility for a beneficiary owner to not only undertake the duties related to their position as a specialty occupation but also the duties related directly to "owning and directing" the U.S. employer "as long as the beneficiary will perform specialty occupation duties a majority of the time, consistent with the terms of the H-1B petition." AILA and the Council believe the proposed structure strikes a good balance between the specialty occupation duties and those directly related to owning and directing the business. We also appreciate USCIS' express confirmation in the commentary that concurrent H-1B employment may be sought by beneficiary-owners with

AILA Doc. No. 23122631. (Posted 12/26/23)

multiple qualifying specialty occupation roles as long as the "majority of the time" framework applies to those situations as well.

Further, the commentary to the proposed rule states: "[t]he goal is to ensure that a beneficiary who is the majority or sole owner and employee of a company would not be disqualified by virtue of having to perform duties directly related to owning and directing their own company, while also ensuring that the beneficiary would still be 'coming temporarily to the United States to perform services . . . in a specialty occupation' as required by INA section 101(a)(15)(H)(i)(b)." We strongly agree that a goal of these proposed changes should be to ensure that startups and entrepreneurs are able to use specialty occupation visa categories. We also agree with the commonsense explanations in the commentary and believe that USCIS has provided a workable framework to allow the beneficiary owner to wear the various "hats" that a beneficiary-owner may undertake in startup entities and as entrepreneurs.

While the commentary on the proposed rule highlights examples of job duties that may "directly relate" to owning and directing the U.S. employer, AILA and the Council request that additional guidance be provided either by regulation or in the USCIS Policy Manual to facilitate consistent decision making by adjudicators. We are concerned by the significant possibility for disagreement over what duties are considered to be directly related to owning and directing a start-up business in determining eligibility for specialty occupation classification. In its commentary to the proposed rule, USCIS has acknowledged there have been adjudicative issues specifically related to job duties and specialty occupation determinations in the past. The commentary seems to indicate that the concept should encompass a broad range of duties (e.g., making copies or answering the telephone), but additional clarification would be helpful to guide future USCIS adjudications.

Still, we have concerns that the broader changes to the definition of a specialty occupation could impact a beneficiary owner's ability to qualify for a specialty occupation visa category when they evolve into more executive roles, where said beneficiaries may have degrees that are in a technical field but may not qualify as "directly related specific specialty" as that criterion has been enunciated in the NPRM, a limitation that we oppose. For example, when an engineer who has a small startup wants to move into a CEO role with their company once the company grows but only has a degree directly related to their engineering role. We believe that the changes to the definition of a specialty occupation could negatively impact the use of H-1B visas for such executive and senior managerial (yet still technical) roles, highlighting a potential unintended consequence of USCIS's proposed narrowing of specialty occupation.

It must also be noted that only the commentary on the regulation discusses when there is a "controlling interest" by the beneficiary in the U.S. employer. This would seem to be a regulatory term that should have a precise regulatory definition when enacting substantial changes to the regulations governing H-1B eligibility. In the commentary, USCIS states that a controlling interest exists when "the beneficiary owns more than 50 percent of the petitioner or when the beneficiary has majority voting rights in the petitioner." However, USCIS did not define this in the proposed rule. AILA and the Council believe that USCIS should codify this definition within the current proposed regulations to ensure clarity as to which beneficiary-owners are subject to this

AILA Doc. No. 23122631. (Posted 12/26/23)

framework.[56] We believe it would be beneficial to define this within the regulatory framework as opposed to doing so in Policy Manual guidance at a later time.

The proposed 18-month limitation on the validity period of both the initial approval and first extension filed by a U.S. employer in which the H-1B beneficiary possesses a controlling interest is unduly burdensome and discriminates against qualifying startup entities that, by their very nature, are often financially constrained. Thus, this proposal works in opposition to the intended purpose of facilitating beneficiary-owners participation in the H-1B program. The cost of the additional filing is at least $1210 (i.e. the sum of basic I-129 filing fee of $460 and ACWIA fee of $750, but not including a potential Premium Processing fee of $2,500), not to mention opportunity costs and likely attorney fees. These resources could be better utilized by a beneficiary-owner to ensure the successful growth of the startup.

USCIS, by imposing an 18-month validity limitation on the initial and subsequent first extension, appears to assume without explanation that startup entrepreneurs have a higher likelihood of noncompliance than other H-1B petitioners. No data-based explanation was provided to support the creation of this additional hurdle for startups. We recommend that USCIS, before reaching an unsubstantiated conclusion that could create negative inferences by adjudicators towards all startups, collect data to test its assumption that additional guardrails are needed before limiting petition approval timeframes within this regulation.

3. Site Visits.

The NPRM proposes a codification and expansion of its site visit program as part of its H-1B modernization rule. While USCIS deserves to be commended, *inter alia*, for one of its avowed purposes in publishing the NPRM, namely, to improve "program integrity, AILA and the Council are concerned that the provision at 8 CFR 214.2(h)(4)(i)(B)(2) authorizing denial of a petition for failure to cooperate with a site visit does not provide sufficient safeguards to ensure that H-1B petitions are not unreasonably denied or revoked for unintentional or non-willful reasons. This is particularly important when the H-1B nonimmigrant is working at a third-party site where the petitioner and the beneficiary can only influence, but not control, third party behavior. We recommend the addition of specific language in 8 CFR 214.2(h)(4)(i)(B)(2)(ii) to provide petitioners with notification of noncompliance (similar to an RFE) and a reasonable opportunity to remedy noncompliance by a relevant third party prior to the issuance of a denial or revocation based on the third party's lack of cooperation. By doing so, denials or NOIDs based on a third party's inadvertent, unknowing or unintentional noncompliance could be avoided as well as the attendant inefficient use of agency resources.

Although language in the discussion of the proposed rule suggests that petitioners would be provided an opportunity to comply with the terms of the site visit before a petition is denied, the

[56] Should USCIS agree to this recommendation, we propose the definition of "control" closely follow the alternatives provided in the L-1 intracompany nonimmigrant visa category (e.g., at least 50% ownership; 50% ownership in a 50-50 joint venture with equal control and veto power, and less than 50% ownership with a controlling interest).

AILA Doc. No. 23122631. (Posted 12/26/23)

regulations are silent on this issue. We therefore recommend the following proposed language, which would closely mirror the relevant text in the discussion of the proposed rule:[57]

> Before denying or revoking the petition, USCIS will provide the petitioner an opportunity to rebut adverse information and present information on its own behalf.

In addition, although we also commend USCIS for recognizing that H-1B employment may involve telework, remote work, or other off-site work within the United States, both AILA and the Council are concerned about the possibility of H-1B workers being subject to site visits in their homes. We believe H-1B workers should have express permission to refuse to accommodate a site visit in their home if they are uncomfortable allowing a site visit for safety or privacy reasons. Such refusal should not be deemed evidence of noncompliance leading to denial or revocation. Further, we believe USCIS must provide advance notice of the intent to conduct a site visit to both the H-1B employer and H-1B worker[58] and allow the site visit to occur at an appropriate location (e.g., the employer's place of business or other safe location) outside of the H-1B worker's home.

4. Third-Party Placement (Codifying Defensor)

In the NPRM, DHS essentially proposes to codify the principles established in *Defensor v. Meissner*,[59] such that in certain circumstances where an H–1B worker provides services for a third party, USCIS would look to that third party's education and experience requirements for the beneficiary's position, rather than the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation.[60] The stated rationale for this approach is to "ensure that petitioners are not circumventing specialty occupation requirements by imposing token requirements or requirements that are not normal to the third party."[61] To this end, DHS has further proposed to distinguish instances where an H-1B beneficiary will be staffed to a third party from those where a beneficiary is providing services to a third party.[62]

We acknowledge that, for purposes of this provision, DHS is specifically recognizing that there is a difference between a beneficiary who is "staffed" to a third party (that is, contracted to fill a position in a third party's organization and becoming part of that third party's organizational hierarchy by filling a position in that hierarchy) and a beneficiary who is providing services to the third party (whether or not at a third-party location).

Notwithstanding this acknowledgement, we have three primary reservations regarding the proposed rule: (a) lack of clarity for adjudicators and the public; (b) the inability of petitioners to comply with this requirement; and (c) increased and unfair burdens on individual sectors of the economy.

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[57] 88 FR at 72908.
[58] If either the H-1B employer or H-1B worker (or both) are represented by counsel, we believe the representative listed on any Forms G-28 accompanying the H-1B petition should also be provided advance notice of the site visit.
[59] 201 F.3d 384 (5th Cir. 2000).
[60] 88 FR at 72908.
[61] 88 FR at 72908.
[62] Id.

AILA Doc. No. 23122631. (Posted 12/26/23)

a. *Lack of Clarity for Adjudicators and the Public - Unclear Adjudication Criteria*

Although we appreciate USCIS's desire to provide a bright line rule, business reality is often murky, making the proposed rule difficult to apply. Moreover, the addition of a reference to third party staffing arrangements and their job descriptions is not legally relevant to a petitioner's filing to employ a specialty occupation worker.

A bedrock principle of the H-1B program and, indeed, the entirety of our employer-sponsored immigration framework, is that the merits of a petition should be considered based on the circumstances of the specific job offer that is extended to the beneficiary employee in that petition. The placement of a professional worker at a third-party location is not directly connected or correlated to that third party's hiring practices.

Indeed, businesses purchase professional services from other businesses specifically because they are unable to perform that service internally. A thoracic surgeon is no less qualifying for specialty occupation classification because she regularly performs ambulatory surgeries for a sister hospital where that specialty/job description does not exist, a business immigration lawyer is no less qualifying for specialty occupation classification because she is assigned to an extended compliance audit at a client office where the client does not employ immigration lawyers, and a founder/software engineer deploying novel AI technologies for a client is no less qualifying for specialty occupation merely because she is the start-up inventor of a technology who is deploying it for a client without internal engineering teams. In other words, we do not see the need for a reference to a specific third party/end-user's job descriptions as they are unlikely to be related to the facts of the petition. We believe it likely this reference will confuse adjudicating officers and result in inconsistent adjudications that are unsupported by the statutory guidelines.

We are also concerned about the inclusion of the word "staffed" in the third prong of the regulatory criterion. In the overwhelming majority of circumstances, where H-1B petitioning employers place their beneficiary employees at third party sites, they are – by the terms and definition of the proposed regulation itself – not staffing companies. Rather, they are corporate entities with which another entity has engaged for the delivery of professional/specialty occupation services. We acknowledge that the agency expresses in the preamble its intent to narrow the definition of "staffed" to apply only where a beneficiary employee will be employed at a third-party worksite "to fill a position in the third party's organization." But the wording of the proposed criterion does not sufficiently narrow the definition to achieve the professed intent.

There is no clear explanation in the preamble or the proposed regulatory language of what "filling a position" in the organizational hierarchy of a client means or what parameters apply. In such scenarios, it is not clear how USCIS will ensure that adjudicators flesh out the distinction between a staffing arrangement and the provision of services consistently to determine which party should be called upon to state the degree requirements.

For these reasons, AILA and the Council strongly urge the agency to strike the following phrase from the third prong of the regulatory criteria: *"or third party if the beneficiary will be staffed to that third party."* Should the regulation be implemented as currently drafted, we urge USCIS to provide comprehensive examples in the preamble to the final rule that would help clarify distinctions in varied business contexts—particularly since the absence of additional qualifying examples may impact the consistency and accuracy of how USCIS adjudicators will distinguish

AILA Doc. No. 23122631. (Posted 12/26/23)

between the broad spectrum of arrangements and scenarios that can arise in business. Without additional guidance, we are concerned that adjudicators will not be consistent in determining when and what documentation a petitioner may be required to submit to establish a position's degree requirements.

b. Inability of Petitioners in Third-Party Placement Arrangements to Comply Makes the Proposed Rule Inequitable and Unduly Burdensome.

The types of evidence envisioned by this rule are not universal to all business models and arrangements, making the rule significantly burdensome, if not in some cases impossible. The petitioning employer is essentially an independent contractor in terms of its relationship with the end client in the context of third-party placement of H-1B workers. The employment eligibility verification regulations already neatly define an independent contractor at 8 CFR 274a.1(j), stating:

> (j) The term *independent contractor includes* individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis.

The key element here is the recognition that the individuals or entities contract "*to do a piece of work according to their own means and methods, and are subject to control only as to results*."

This sums up the normal relationship between two companies resulting in placement of an H-1B worker at a third-party site. It is the H-1B employer that determines, based on the end client's project, that only a person in the particular specialty occupation can do the work. For this reason, these independent contractor-structured contracts do not generally include information about the educational requirements, duties, or other conditions of employment for a given role on the project.

The proposed regulatory change also fails to recognize that the petitioning H-1B employer may not have a contract with the end client at whose business location the H-1B worker will be placed upon which to draw. It is entirely common for a consulting company to enter an agreement to produce – as an example -- a new accounting or order fulfilment technology system for a client, and then itself enter subcontracting agreements with other companies for portions of that project. In such a case, not only would the subcontracting companies be unable for nondisclosure reasons to produce a contract with the end client, but indeed such a contract would not even exist.

As such, the proposed regulation fails to recognize the complex and rapidly changing nature of modern-day business arrangements, and in so doing creates unnecessary and unfair roadblocks to employers who need to access key talent using the H-1B program.

Moreover, as discussed elsewhere in this comment, the content of those contracts normally does not provide information relevant to the proposed H-1B employment, and almost never will speak to the educational requirements for a particular task to be performed as part of fulfilment of the contract. There appears to be a disconnect between what USCIS believes would be included in a client contract and what is included for bona fide business reasons.

AILA Doc. No. 23122631. (Posted 12/26/23)

c. Increased and Unfair Burdens on Individual Sectors of the Economy - Disparate Treatment for Individual Sectors of the Economy.

By proposing to require petitioners to establish a bona fide job offer and non-speculative employment in a specialty occupation through the provision of contracts, work orders, technical documentation, milestone tables, or similar, it seems USCIS is proposing to increase considerably the evidentiary burden placed on petitioners in third party placement assignments. Yet, this is already accomplished through the petitioner's LCA attestations and the Form I-129 petition submitted under penalty of perjury.

We recommend eliminating this provision of the proposed regulation because: (A) the risk is too high that this will be applied to third-party placements that do not involve staffing agencies and where the requirements are in fact determined and set by the petitioner and (B) end client documentation often does not specify the educational requirements, making compliance impossible.

To the extent the rule is implemented, we would ask that USCIS give more consideration to codifying that client contracts would continue to be an optional – but not mandatory – type of evidence that can be provided to support an H-1B petition. Doing so would ensure that, when such contracts are in fact material to the specific H-1B petition, they would and should be provided. However, where they are not material nor relevant, other evidence demonstrating that the specific role is a specialty occupation would control. Furthermore, there is a substantial risk that adjudicators will be unable to distinguish between a "staffing" and a "services" arrangement, resulting in inefficiencies and selective burdens on an entire and important sector of the economy.

D. **Request for Preliminary Public Input Related to Future Actions/Proposals**

1. AILA and the Council Oppose the "Use it or Lose it" Provision.

In its NPRM, USCIS expresses the concern that some petitioners may file cap-subject H-1B petitions without a job opportunity available as of the requested start date.[63] In response, USCIS requests feedback from the public for measures to "to prevent petitioners from receiving approval for speculative H–1B employment, and to curtail the practice of delaying H–1B cap-subject beneficiary's employment in the United States until a bona fide job opportunity."[64]

Specifically, USCIS requests feedback regarding two possible proposals: (1) "amend 8 CFR 214.2(h)(8)(ii)(B) to require petitioners to notify USCIS if a beneficiary does not apply for admission after a certain amount of time, so that USCIS may revoke the approval of the petition" and (2) " create a rebuttable presumption that a petitioner had only a speculative position available for the beneficiary of an approved H–1B cap subject petition, which would be triggered if certain circumstances occurred."[65]

AILA and the Council appreciate USCIS efforts to ensure a well-functioning H-1B cap system and to discourage practices that undermine the integrity of the H-1B cap system, however we have deep concerns regarding a "use it or lose it" mechanism. First, the assumptions underlying its

[63] 88 FR at 72909.
[64] FR 88 at 72912.
[65] Id.

AILA Doc. No. 23122631. (Posted 12/26/23)

analysis of the patterns USCIS has identified in support of a "use it or lose it" approach fail to recognize the legitimate reasons why those patterns exist, which undermines the need for these proposed mechanisms. Second, USCIS's proposed beneficiary-based cap registration system may increase the overall utilization of annual H-1B cap numbers, reducing the concerns for unused cap numbers. Third, the proposed post-approval mechanisms will serve to reduce access to critical foreign talent, are overbroad, and disproportionately burden legitimate petitioners.

a. *USCIS Analysis of its Data Overlooks Legitimate Reasons for Delays and Amendments*.

In support of policy action in this area, USCIS has marshalled data that purports to show that a significant percentage of beneficiaries do not enter the U.S. within six months of the employment start date, as well as data to show that a large number of new or amended H-1B petitions are filed on behalf of cap-subject beneficiaries prior to their first entry.[66] While USCIS acknowledges that there could be innocent reasons for these patterns,[67] and that its data is imperfect,[68] USCIS asserts "these data illustrate that there may be a problem with petitioners filing H–1B petitions and taking up cap numbers without having non-speculative job opportunities as of the requested start date on the petition."[69]

AILA and the Council respectfully submit that this conclusion may not be supported by the data. First, USCIS acknowledges that its data only includes beneficiaries for whom USCIS could locate arrival data[70] and does not disclose what percentage of the actual total population its tables represent. For Table 9, USCIS acknowledges that its data excludes beneficiaries who entered the U.S. prior to, or six months after, the requested H-1B effective date.[71] As such, it is difficult to determine what conclusions, if any, can be drawn from this data.

Regardless, the focus on the interval between a petition's approval and a beneficiary's entry into the U.S. in H-1B status may be misplaced, as a significant number of cap beneficiaries are frequently employed by the petitioners in another status.

For example, F-1 students currently working for the petitioner in CPT, OPT, or STEM OPT status may delay activation of their H-1B status for a year or more, so as to fully utilize the benefits available to them before starting their six-year period in H-1B status. Because of the low odds of selection in the lottery, it has been necessary for many years to enter these employees in the H-1B lottery early in their authorized practical training.

Similarly, employers may seek H-1B status for existing employees in L-1, E-3, or E-2 status for the benefits and advantages of H-1B status during the permanent residency process but decline to change the beneficiary's status until a later date to maintain the employment authorization of the beneficiary's spouse.

As these basic examples illustrate, there are many legitimate business reasons to lawfully request consular notification for a future admission that do not involve speculative employment. Similarly,

[66] FR 88 at 72910.
[67] FR 88 at 72911-72912.
[68] FR 88 at 72910.
[69] FR 88 at 72912.
[70] FR 88 at 72909.
[71] 88 FR at 72910 at fn. 157.

AILA Doc. No. 23122631. (Posted 12/26/23)

in this context, the need for amendments and new petitions subsequent to the approval of the initial H-1 B cap petition becomes predictable.

b. *USCIS Proposed Changes to the H-1B Registration System Will Increase the Utilization of H-1B Cap Numbers.*

USCIS asserts that, "[g]iven the history of demand for H–1B visas that greatly exceeds supply, it is of great concern when a petitioner requests an H–1B cap number and receives approval, but does not use that approved H–1B petition to employ an H–1B worker when the petitioner claimed to need that worker to start and significantly delays such employment by six months or more."[72]

To the extent USCIS bases this regulatory action on the need to reduce the number of H-1B cap petitions that go unused, we believe USCIS has already outlined a less burdensome and more effective measure to increase H-1B cap usage—the proposed beneficiary-based registration system.[73]

Under the proposed system, any employer who registers a beneficiary that year will also have the ability to employ the beneficiary in H-1B status if the beneficiary is selected in the lottery. This will broaden the number of employment opportunities to which a foreign worker may lawfully have access and reduce the number of cap petitions held in reserve, in contrast to the current system which limits access to each cap number initially to a single employer. For the reasons discussed elsewhere, the beneficiary-based registration system will have a number of benefits, one of which will be an increased utilization overall of cap selections, reducing the need for the policy action USCIS has described herein.

c. *Post-Approval Mechanisms Will Be Overbroad and Burden Legitimate Petitioners.*

As USCIS concedes, post-approval "use it or lose it" mechanisms will necessarily be overbroad and unduly burdensome, as they will not deter actors who are determined to abuse the system.[74] While obviously beyond the scope of this regulation, the incentive to "bank" H-1B cap petition numbers is essentially more a symptom of the actual problem: an H-1B annual quota that is disproportionate to economic need. While doing little to discourage determined bad actors, a "use it or lose it" requirement will eliminate important flexibilities upon which many U.S. employers rely in managing their global workforce.

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[72] 88 FR at 72909.

[73] See AILA's comments on the proposed changes to the H-1B Registration Process, submitted via regulations.gov on November 28, 2023.

[74] "However, this approach would not prevent a petitioner without a legitimate reason for the delay from circumventing the intent of this provision, such as by filing an amended petition for the cap-subject beneficiary and further delaying their admission, or having the beneficiary enter the United States one day before the deadline and then leaving shortly thereafter." 88 FR at 72912. "DHS is aware that either option could have a broad reach and potentially include petitions for beneficiaries whose admission into the United States was delayed for legitimate reasons beyond their control, such as lengthy consular processing times. Either option would place an additional burden on petitioners, which may be particularly difficult to overcome for a subsequent petitioner that is distinct from the original petitioner that filed the initial H–1B cap-subject petition. Further, the above options would focus on the beneficiary's timely admission into the United States but would not account for the beneficiary's or petitioner's subsequent actions." 88 FR at 72913.

AILA Doc. No. 23122631. (Posted 12/26/23)

AILA and the Council oppose implementation of a "use it or lose it" mechanism as a means to limit speculative employment and underused H-1B cap number numbers. We believe these mechanisms will primarily burden legitimate petitioners engaging in lawful use of the H-1B program and will not deter bad actors from manipulating the system. If any additional regulation is necessary in this area, it should be limited to the filing and adjudication of the initial petition, and not extend into post-approval obligations and burdens.

2. Beneficiary Notification

In its NPRM, USCIS identifies a desire to improve the ability of beneficiaries to access receipt notices during the adjudication process so that they are able to verify their own immigration status and be less susceptible to employer abuse. USCIS suggests that the agency may in the future seek to make it a requirement that employers also provide receipt notice to beneficiaries seeking an extension or change of status and has solicited feedback with respect to this proposal. This policy suggestion appears to be in response to recommendations made by the Office of the Citizenship and Immigration Services Ombudsman that "USCIS directly notify beneficiaries of Form I-129 of actions taken in the petition."[75] According to the Ombudsman, the "lack of direct notification may leave [beneficiaries] without status documentation, rendering them noncompliant with the law, susceptible to abuse by employers, and unable to access benefits requiring proof of status."[76]

AILA and the Council support the Ombudsman's recommendation that direct notification by USCIS is required, and so it is unclear that placing this additional administrative burden on employers will be a superior option to achieve the desired policy goals.

In lieu of USCIS's proposal, we suggest the following alternatives:

- USCIS modify its online portal, akin to the U.S. CBP online system for obtaining Form I-94, allowing beneficiaries to access their status information directly;
- Interested beneficiaries create a MyUSCIS account to which USCIS may upload receipt information, which may be linked using the beneficiary's passport information;
- USCIS send a copy the notice to the beneficiary at the address listed in the Form I-129; and
- USCIS email notification to the beneficiary's email address listed in the Form I-129.

While less challenging than other obligations placed on H-1B employers, it is unclear that placing this additional administrative burden on employers will fully address the harm it is intended to prevent and we believe a more secure option necessitates that USCIS notify beneficiaries directly.

E. Other Discussion Items

1. Immediate and Automatic Revocation

The proposed addition to 8 CFR 214.2 (h)(11)(ii) that provides, "[t]he approval of an H-1B petition is also immediately and automatically revoked upon notification from the H-1B petitioner that the

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[75] *See* DHS, Office of the Citizenship and Immigration Services Ombudsman, *Recommendation to Remove a Barrier Pursuant to Executive Order 14012: Improving U.S. Citizenship and Immigration Services' Form I–129 Notification Procedures* *Recommendation Number 62* (Mar. 31, 2022).
[76] Id.

AILA Doc. No. 23122631. (Posted 12/26/23)

beneficiary is no longer employed" requires clarification as it appears to result in immediate automatic petition revocation rather than revocation on notice if the petitioner notifies USCIS of the foreign national's 's termination. Specifically, the USCIS's Options for Terminated NIV Workers webpage indicates that a terminated worker can rejoin the petitioning company within a 60-day grace period without the need to file a new petition as long as the petition has not yet been revoked. However, the combination of the current regulatory requirement to notify USCIS "immediately" of a termination and the proposed automatic revocation provision would effectively nullify the clear intent of this USCIS FAQ to provide flexible options for terminated NIV workers. If that is not the intent of this provision, it is important for USCIS to provide clarifying regulatory language for adjudicators.

2. Comparable Evidence

We propose adding a comparable evidence criterion for H-1B eligibility, similar in concept to the EB-1B Outstanding Researcher comparable evidence criterion. The criterion would provide that, if none of the listed regulatory criteria clearly apply to the evidence the petitioner intends to submit, the petitioner may submit comparable evidence to establish that the offered job is a specialty occupation. This would allow a petitioner who wants to employ a beneficiary in a specialty occupation to submit evidence comparable to the evidence otherwise described in 8 CFR 214.2(h)(4)(iii)(A)(1)-(4), which may demonstrate that the proffered position qualifies as a specialty occupation. The intent of this provision is to allow petitioners, in cases where evidence of the specialty occupation does not fit neatly into the enumerated list, to submit alternate, but qualitatively comparable, evidence. This is particularly critical given the proposed changes to (A)(3), where petitioners are limited to showing evidence of an established recruiting or hiring practice, effectively precluding, as the Service indicated, first-time hirings from qualifying.[77]

AILA's proposed regulatory language, which we insert at 8 CFR 214.2(h)(4)(iii) (A)(6) is as follows:

> (A)(6) Comparable Evidence. If the standards in paragraph (A)(1) - (4) of this section do not readily apply, the petitioner may submit comparable evidence to establish the position qualifies as a specialty occupation.

Conclusion

We appreciate the opportunity to comment on the USCIS proposals to modernize the H-1B program and we look forward to a continuing dialogue with USCIS on this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL

[77] 88 FR 72878, n 36.

AILA Doc. No. 23122631. (Posted 12/26/23)