AMERICAN IMMIGRATION LAWYERS ASSOCIATION

American Immigration Council

November 28, 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 - *Initial Comment on Proposed Changes to H-1B Registration Process at 8 CFR 214.2(h)(8)(iii)*

Dear Mr. Nimick:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) respectfully submit the following initial 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 initial comment on the proposed changes to the H-1B registration process. A subsequent comment on the remaining sections of this notice of proposed rulemaking will be submitted in accordance with the instructions in the Federal Register.

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 interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the

[1] 88 FR 72961 (October 23, 2023).

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proposed revisions to the H-1B registration process 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 DHS for its efforts to modernize and improve the efficiency of the H-1B program, and in particular, the H-1B registration process. The H-1B program has long been recognized as an important mechanism to increase innovation and expand the U.S. economy. Most recently, in an October 30, 2023, Executive Order, President Biden called on the Secretary of State and the Secretary of Homeland Security to promote innovation and competition in artificial intelligence and other critical and emerging technologies by "streamlin[ing] processing times of visa petitions for those to work, study or conduct research in AI or other critical and emerging technologies."[2] In support of this initiative, USCIS' proposals to modernize and streamline the H-1B program will enhance our nation's ability to attract and retain critically needed global talent in these important sectors.

We believe we share a vision with USCIS in which employers with bona fide job opportunities are not disadvantaged in their efforts to obtain H-1B nonimmigrant visa classification for their key foreign talent by those who manipulate the registration process in order to increase lottery selection rates. As reported by USCIS, for the FY24 registration process, there were 408,891 registrations for beneficiaries with multiple registrations, up from 165,180 only a year earlier.

To improve the H-1B program and enhance its integrity measures, we are encouraged by the proposal to move towards a beneficiary-centric H-1B selection process. On June 1, 2023, AILA and the Council joined high-skilled immigration advocacy organizations in sending a letter to Secretary Mayorkas recommending the institution of a beneficiary-centric registration and lottery process in an effort to reduce fraud in the current system.[3] AILA and the Council commend USCIS' commitment to ensure the integrity and fairness of the H-1B program and support the proposal to create a beneficiary-centric lottery with the following recommendations on ensuring due process and fairness. We look forward to working together with USCIS to improve the H-1B program and the associated registration system.

Specific Comments

[2] Exec. Order No. 14110, 88 FR 210 (October 30, 2023).
[3] AILA and Partners Send Letter to DHS on the H-1B Registration and Lottery Process (June 1, 2023) available at https://www.aila.org/library/letter-to-dhs-on-the-h-1b-registration-and-lottery.

1. **Protection from automatic denial/revocation for typographical errors on an H-1B registration**

The current H-1B regulatory provisions allow for denial and automatic revocation of H-1B petitions for statements on the petition that are "inaccurate, fraudulent, or misrepresented a material fact."[4] The NPRM proposes an extension of this denial/revocation to information submitted in the H-1B registration process.[5] While fraud or misrepresentations of material facts are defensible bases for denial, USCIS adjudicators should be expressly provided with the ability to exercise discretion in allowing the petitioner to correct typographical errors on a registration submission (i.e. misspelling of a name or omission of a number in a passport number). In the case of an H-1B petition, there is the opportunity for petitioners to correct any typographical errors relating to a beneficiary if USCIS issues an RFE or by informing USCIS of the error while the petition is pending and requesting an amendment to the form. By automatically denying or revoking H-1B petitions due to inaccurate information contained on a registration, USCIS is not allowing the petitioner the same opportunity to correct a typographical error. This outcome is also not in accordance with current USCIS policy. The USCIS FAQs on H-1B registration state:

> **Q5. If there is a typo on the registration in comparison to the Form I-129, will USCIS reject the Form I-129 petition?**
>
> **A5.** Although we will not automatically reject the Form I-129 petition for typos on the selected registration in comparison with the Form I-129, the burden is on the registrant/petitioner to confirm that all registration and petition information is correct and to establish that the H-1B cap petition is based on a valid registration submitted for the beneficiary named in the petition and selected by USCIS.[6]

We recommend amending the regulatory text to codify that USCIS may excuse typographical errors on a registration in its discretion: "In its discretion USCIS may find that a change in identifying information in some circumstances would be permissible. Such circumstances could include, but are not limited to, a legal name change due to marriage, change in gender identity, or a change in passport number or expiration date due to renewal or replacement of a stolen passport in between the time of registration and filing the petition, ***or a typographical error corrected on the H-1B petition supported by relevant identity documents and where petitioner satisfies USCIS that the inaccuracy was unintentional and did not create any advantage in the lottery selection.***"[7] We note that this change would also necessitate an amendment to the regulatory section at 8 CFR §§ 214.2(h)(10)(ii) and 214.2(h)(11)(iii)(A)(2) by adding the caveat that these regulatory provisions are "***subject to the exceptions contained in 8 CFR §214.2(h)(8)(iii)(D)(1)***."

2. **Instituting fee payment confirmation during registration process**

[4] 8 CFR §§ 214.2(h)(10)(ii), (h)(11)(iii)(A)(2).
[5] 8 CFR §214.2(h)(8)(iii)(D)(1).
[6] H-1B Electronic Registration Process | USCIS
[7] 8 CFR §214.2(h)(8)(iii)(D)(1).

The NPRM proposes to codify that USCIS may deny or revoke the H-1B petition if the registration fee is declined, not reconciled, disputed or otherwise invalid after submission.[8] We recommend either removing this regulatory proposal or amending it due to the potential for significant issues with the payment mechanism during the H-1B registration process.

As USCIS is aware, the Department of Treasury's "pay.gov" site is used to remit H-1B registration payments either by ACH or credit/debit card payment. In FY24, massive traffic on the site caused the pay.gov site to crash multiple times during the registration period. The site crash was attributed to the overload of users submitting registrations and the need for the USCIS registration site to redirect to a third-party site for payment. We are concerned that H-1B registrations may be rejected in situations where a payment issue resulted from systems issues with the payment platform (i.e. the payment website crashing) rather than user error. There are also many innocuous reasons why a fee payment would not be successful, such as the inadvertent use of an expired card, typos or a bank hold due to suspected fraud activity that are typically out of the registrant's control. Additionally, because pay.gov does not generate a receipt as proof the payment was submitted and accepted by the website, registrants have no definitive way to determine whether payment was successful.

While we recognize it is ultimately the responsibility of the registrant to properly submit a registration, including fee payment, we recommend that USCIS make every reasonable effort to communicate with the attorney or employer as soon as any issue(s) regarding the payment is discovered, so that the employer can correct the problem. We suggest the following amendment to the regulatory proposal to allow petitioners to correct registration fee payment issues before USCIS denies the H-1B petition or revokes an approval: "***USCIS will afford H-1B petitioners ten business days to cure payment issues once notified. After that time,*** USCIS may deny or revoke the approval of an H–1B petition if it determines that the fee associated with the registration is declined, not reconciled, disputed, or otherwise invalid after submission."[9]

Accordingly, we propose the following specific changes to the H-1B registration tool to address payment issues:

a. Sending an email notification to the H-1B registrant and the attorney/representative, if applicable, once the payment has cleared, or in the alternative, add an extra column to the registration summary page noting "payment confirmed" when the payment has cleared, or "payment pending" if the payment has not cleared;

b. Sending an email notification to the H-1B registrant and the attorney/representative, if applicable, if the payment does not clear or was rejected, and provide the opportunity to provide a substitute payment method (i.e., credit card, debit card, ACH transfer, etc.); and

[8] 8 CFR §214.2(h)(8)(iii)(D)(2).
[9] *Id.*

c. Providing a reasonable grace period after notifications are sent to cure payment issues, even if that occurs after the registration period has closed or after selection.[10]

3. **The requirement to prove "legitimate business need" in the proposed regulation when related entities file an H-1B petition for the same beneficiary is unnecessary, unclear and unworkable.**

AILA and the Council believe that USCIS should eliminate that portion of the proposed rule[11] which discusses "related entities." This proposal would require a USCIS adjudicator who suspects that related entities (such as a parent company, subsidiary, or affiliate) may not have a "legitimate business need" to file more than one H–1B petition on behalf of the same foreign national to issue a request for additional evidence (RFE) or notice of intent to deny (NOID) or notice of intent to revoke (NOIR) for **each and every** petition for that foreign national by the related entities.

As noted elsewhere in this comment, AILA and the Council applaud the changes to the registration system which for the first time will track each "unique beneficiary."[12] This change, we believe, makes unnecessary any requirement that related entities prove a legitimate business need to file multiple petitions for the same beneficiary. The express purpose for tracking each unique beneficiary is to avoid a "gaming" of the registration system, thereby unfairly increasing the chances of selection. The "unique-beneficiary" tracking system assures that only one H-1B lottery number will be used and – as a result – the chance for selection will be no greater for a multiple-registration beneficiary than for any single registration beneficiary. Thus, we believe the incentive for related entities to game the system to increase the odds of selection no longer exists.

We also believe that the proposal is ambiguous and likely to contribute unnecessarily to agency backlogs. Because it fails to define the term "related entities," the proposal fails to give USCIS adjudicators any clear standard to determine the minimum degree of relatedness necessary to trigger a duty to issue an RFE, NOID or NOIR,[13] including the percentage of common ownership, type of corporate structure or other factors that would justifiably cause an adjudicator to apply this restriction. This would cause significant hardship and confusion for legitimate employers, such as separate companies that are owned by a common private equity firm but may have given entirely distinct offers of employment to the same beneficiary.

Similarly, the proposed rule does not provide any standards for the adjudicator to determine whether a "legitimate business need" has been established. Worse still, should an adjudicator fail to appreciate the legitimacy of the business need for any one of multiple petitions filed on behalf of the same beneficiary, the proposed consequence is overkill: "If **any** of the related entities fail to demonstrate a legitimate business need to file an H–1B petition on behalf of the same alien, **all**

[10] In the event that the payment issue cannot be cured within a reasonable period because it was identified too close of the end of the registration period, the registration should nevertheless be included in the lottery and an H-1B petition should only be permitted to be filed if the payment issue has been cured.
[11] Proposed 8 CFR §-214.2(h)(2)(i)(G) at 88 FR 72958.
[12] 88 FR at 72897.
[13] *Compare* the L-1 regulations which use similar intracompany terminology at 8 CFR §-214.2(*l*)(1)(ii)(G)(definition of "Qualifying organization") and the similar definitions at 8 CFR §-204.5(j)(2) for certain First Preference multinational executives and managers (definition of "Multinational").

petitions filed on that foreign national's behalf by the related entities will be denied or revoked." (Emphasis added.)

We also believe that there may be any number of valid business reasons why multiple related entities might legitimately wish to sponsor a highly sought-after and talented H-1B beneficiary for sole or concurrent H-1B employment. The reasons, however legitimate to the businesses, may fall short of a "need" cognizable by an adjudicator. We urge USCIS to delete the portion of 8 CFR §214.2(h)(2)(i)(G) dealing with related entities in its entirety.

4. **Ensuring fairness for employers who invest in foreign national talent.**

Under the proposed beneficiary-centric H-1B registration system, the employer would receive notification that USCIS selected its registration for the beneficiary but will not have visibility into additional registrations that other employers filed on the beneficiary's behalf. In its comments to the NPRM, the agency explains that the new beneficiary-centric system is meant to deter multiple employer registrations that could unfairly increase a beneficiary's odds of selection while at the same time creating a new process that will provide additional bargaining power to the beneficiary in negotiating with multiple potential employers.

However, by not providing any visibility for employers into a beneficiary's multiple registrations, the proposed system unfairly disadvantages good faith employers who have often made substantial investments into recruiting, training and otherwise developing employees who they are registering in the H-1B lottery. Often, employers registering their employees in the H-1B lottery have recruited the employees as F-1 students from U.S. universities and invested substantial resources in onboarding and training these entry-level workers, sometimes for years, before registering them in the H-1B lottery. These employers will be significantly disadvantaged by not having any visibility into the number of registrations filed for each beneficiary and thereby not being afforded an opportunity to evaluate the costs and benefits for filing an H-1B petition for that beneficiary.

We understand that the proposed regulations seek to continue to provide the beneficiary with the ability to negotiate with multiple employers so that they can select among legitimate job offers. However, we believe it is inconsistent with the goals and purpose of the H-1B program not to notify employers when a prospective employee is the beneficiary of multiple employer registrations, so that employers may factor this information into their negotiations with the beneficiary when making a decision to invest significant resources in connection with an H-1B petition.

To avoid this scenario, which would waste the resources of multiple employers and would cause USCIS workloads to increase with unnecessary H-1B petition filings, we recommend that USCIS include in the selection notification to employers an indication of either (1) the number of employer registrations or (2) whether the beneficiary has one or multiple employer registrations. USCIS could provide the notification of the beneficiary's multiple employer registrations either in the on-line registration employer interface, on the selection notice, or through any mechanism that would convey the information to the employers upon the beneficiary's selection.

Providing a notification of multiple registrations to employers would preserve the employee's ability to negotiate multiple offers and be the subject of multiple petitions while also providing some minimal information to the employer. The petitioner deserves the right to make an informed decision regarding its next sizeable investment in the employee – the legal and government filing fees for the H-1B petition – with some minimal visibility into the employee's intentions. More significantly, providing this type of notification will also help reduce any legal consequences that may arise from multiple petitions being approved on a beneficiary's legal status as discussed below.

5. **Providing regulatory clarity of the impact of multiple H-1B petitions filed by various employers on behalf of the same beneficiary**.

If multiple employers file H-1B registrations on behalf of one beneficiary, as the proposed regulations envision, which USCIS selects, and the agency subsequently approves petitions filed on the beneficiary's behalf, then the agency would issue a series of H-1B approvals for the beneficiary with varying approval notification dates. If a change of status is requested, as is commonly the case, this allows for the even more practically confusing and legally muddled scenario of one beneficiary potentially being granted multiple changes of status to H-1B nonimmigrant for multiple employers with multiple different petition approval and start dates. There are many possible variations on the scenario, including:

- Two employers file H-1B registrations based on legitimate job offers for the beneficiary. Due to uncertainty in the economy, the beneficiary requests that both employers file H-1B petitions for him. Both employers receive notification of the beneficiary's selection in the H-1B lottery. USCIS approves the H-1B petition for Employer A first, followed by the H-1B petition for Employer B. The beneficiary makes plans to join Employer A upon the beginning of the validity period on October 1, but in September, before the planned employment begins, Employer A loses its largest client and rescinds the job offer to the beneficiary. The beneficiary now wishes to commence work with Employer B on October 1.

- A beneficiary has requested eight separate employers to submit H-1B registrations on her behalf to maximize her ability to negotiate her salary. She is selected in the H-1B lottery and the eight employers receive notifications. Each of the eight employers – unbeknownst to each other – file H-1B petitions requesting a change of nonimmigrant status for the beneficiary during the designated period for the employee, all of which are approved at various points in time, both before and after October 1st. The employee proceeds with her negotiations, at one point starting work with one employer for a few days, and then resigning and beginning work with another employer, where she then remains.

In all of these scenarios, USCIS has approved multiple H-1B petitions with varying approval and start dates in an arbitrary sequence as a result of petitions properly filed in a designated H-1B filing period. To avoid any confusion resulting from the arbitrary approval notification dates, we urge that the agency clarify and codify that each approved H-1B petition is valid, and that neither the date of filing, the date of adjudication (benefiting those filing with premium processing), or the

requested start date (for those chosen in later selections) impact the validity of an approved H-1B petition, and that the beneficiary can commence work under any of the approved petitions even if another petition in the same H-1B filing period is subsequently approved.[14]

We note that the proposed beneficiary-centric mechanism has the potential to be significantly different in its execution than the current petitioner-based registration system, with the possibility of multiple H-1B petition approvals with varying approval and start dates. We therefore strongly urge the agency to provide the clarification recommended above to avert unnecessary employer and employee confusion when multiple H-1B approval notices are issued in an arbitrary sequence with potentially different approval and start dates.

6. Requiring all registrants to provide a valid passport for the beneficiary

The proposed rule requires all registrants to submit the same valid passport information at the time of registration and petition submission for the beneficiary as a mechanism to guard against multiple registrations. Unfortunately, this proposal will prevent employers from submitting registrations for stateless individuals,[15] who by definition do not have a nationality of any country.[16] It may also impact other individuals, such as those who are refugees or those who have fled their countries, such as Afghan evacuees, or those whose passports who have been lost or expired in the interim. In the proposed rule, USCIS has invited the public to provide ideas on how to deal with situations involving stateless individuals as the DHS has expressed its willingness to consider alternatives to the passport requirement. Fundamentally, the concern is that creating an exception to the valid passport number requirement for stateless individuals will provide opportunities for fraudulent multiple entries and undermine registration integrity despite the limited frequency of stateless persons applying for H-1B visas.[17]

AILA and the Council believe that an exception to the passport requirement should be created to accommodate stateless individuals in view of their unique status. In August 2023, the USCIS Policy Alert detailing changes to the Policy Manual clarifying the definition of statelessness and confirming the potential immigration benefits for which stateless individuals may be eligible. The new policy became effective October 20, 2023 and builds on a December 15, 2021. DHS announcement of its commitment to enhance the protection of stateless individuals in the United States.[18]

The registration process should have an option for registrants to attest that beneficiaries are stateless, with additional data requirements verifying identity for this group. For example, some stateless individuals physically present in the United States may have been issued A numbers or Employment Authorization Documents. In these cases, the A number or EAD card number could

[14] If employment does not commence or ceases, the employer would be subject to the existing guidelines and obligations regarding effective employer withdrawal of the H-1B petition.
[15] See generally, 1954 Convention relating to the Status of Stateless Persons.
[16] Individuals who are unable to extend or renew an expired passport (e.g., Afghan nationals) will also be negatively affected by the requirement to provide a valid passport number.
[17] Specifically, the department estimates that, between 2010 and 2022, 89 H1B visas were issued to individuals with no nationality out of a total of 1,988,856 visas issued.
[18] https://www.dhs.gov/news/2021/12/15/dhs-announces-commitment-enhance-protections-stateless-individuals-united-states

serve as an acceptable identification substitute for the passport number, in combination with other beneficiary information provided during the registration process (i.e. name, date of birth, country of birth).

For those beneficiaries who are not in the United States, we recommend that USCIS assign a unique identification number that can be used, again in conjunction with identifying information such as name, date and country of birth. For those stateless individuals selected in the H-1B lottery, USCIS could run a separate query of selected beneficiaries using their individual identifying data to determine if the individual was the beneficiary of duplicate petitions. While this will require an extra validation step for stateless individuals that will occur post H-1B petition filing, we believe the burden on USCIS should be minimal given that USCIS data indicates an average of fewer than 8 stateless H-1B petition approvals annually.

The registration system should not adversely impact stateless persons or others who may not have access to valid passports. We appreciate that our recommendations create an additional layer of authentication by the USCIS for stateless individuals but we believe these are necessary both to address any discrimination concerns and to further the agency's goal of registration integrity.

Conclusion

We appreciate the opportunity to comment on the proposed revisions to the H-1B registration process and we look forward to a continuing dialogue with USCIS on this important matter. As previously noted, AILA and the Council will submit comments on the remaining sections of the notice of proposed rulemaking in accordance with the instructions in the Federal Register.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL