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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

Re: Regulatory Proposal for Modernizing H–1B Requirements, Providing Flexibility in the F–1 Program, and Program Improvements Affecting Other Nonimmigrant Workers - *Comment on Proposed Changes to H-1B Registration Process at 8 CFR 214.2(h)(8)(iii)*

Dear Mr. Nimick:

The Alliance of Business Immigration Lawyers (ABIL) is an invitation-only strategic alliance of 43 prominent law firms in the U.S. and abroad practicing immigration, naturalization, and global mobility law. ABIL is comprised of more than 400 experienced immigration attorneys and law professors (including several past presidents of the national immigration bar association, American Immigration Lawyers Association (AILA)) who have joined forces in advancing best practices in the provision of legal services and positive outcomes for their immigration clients. Ranked as the only "Band 1 Immigration Legal Network" in the prestigious *Chambers and Partners Global Guide*, ABIL advocates publicly for procedural due process, adherence to the rule of law, and enlightened reform of U.S. and foreign immigration laws through comments to proposed agency regulations, continuing legal education, filing amicus briefs and support for publication of immigration-related educational materials and books, including the award-winning *Green Card Stories - 50 people | 5 Continents | 1 America*, while upholding America's promise of exceptionalism and our country's historic tradition as a nation of immigrants. ABIL is accessible at www.abil.com.

ABIL is hereby submitting the below comment respecting the Notice of Proposed Rulemaking re: Modernizing H–1B Requirements, Providing Flexibility in the F–1Program, and Program Improvements Affecting Other Nonimmigrant Workers, 88 Fed. Reg. 203,72901 (Oct. 23, 2023) ("NPRM").

At the outset, we commend USCIS for the many innovations within the NPRM that will immeasurably improve the H-1B system – from registration to implementation – and will provide much needed clarity and guidance to stakeholders and the Agency's own adjudicators. That said, we do have some concerns we would like to raise in hopes of improving the final regulation. We offer the below with that hope in mind and thank you for your time and attention.

THE NEW H-1 REGISTRATION PROCESS

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 of 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 online 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.

The NPRM Fails to Provide Regulatory Clarity of the Impact of Multiple H-1B Petitions Filed by More than One Employer on Behalf of the Same Beneficiary.

In the scenario where multiple employers obtain approval of an H-1B petition on behalf of the same registered beneficiary, it seems likely that the beneficiary may have H-1B approvals from different employers 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 has a change in plans and opts to rescind the job offer to the beneficiary. The beneficiary now wishes to commence work with Employer B on October 1.

- A beneficiary has requested five 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 five employers receive notifications. Each of the five 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.

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.

SPECIALTY OCCUPATION AND RELATED CONCEPTS

The NPRM's New Definition of "Specialty Occupation" Contradicts the INA

We commend DHS for clarifying in the proposed regulation that in order for a particular bachelor's degree to be normally considered the minimum requirement, "normally does not mean always" and that the agency will not differentiate "normally" from the equivalent terms such as "mostly" or "typically" used in the DOL's Occupational Outlook Handbook ("OOH") and other sources of information describing the preparatory requirements for occupations. This is consistent with *Innova Sols., Inc v. Baran*, 983 F.3d 428 (9th Cir. 2020) where the court held that " … there is no daylight between typically needed, per OOH, and normally required, per regulatory criteria. 'Typically' and 'normally' are synonyms."

However, we are deeply concerned that the provision in the NPRM that requires specialized studies to be "directly related" to the position impermissibly exceeds the statutory requirements of the Immigration and Nationality Act ("INA"). The NPRM at 8 CFR 214.2(h)(4)(ii) states,

> A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position. A position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields or each body of highly specialized knowledge is directly related to the position.

There is no requirement in the INA provision that the required specialized studies must be "directly related" to the position. Under § 214(i)(1) of the Immigration and Nationality Act ("INA") a "specialty occupation" is defined as an occupation that requires

- Theoretical and practical application of a body of highly specialized knowledge, and

- Attainment of a bachelor's or higher degree in **the** specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States

Therefore, in contrast to the requirement in the NPRM that the degree must be "directly related" to the position, the statute at INA § 214(i)(1) clearly provides a substantially broader standard, stating that a requirement of a degree in the specialty or its equivalent can form the basis of a specialty occupation. A federal court explicitly stated that the statutory language defining a specialty occupation includes not only a required degree in the specialty but also other combinations of academic and experiential training that would qualify a beneficiary to perform the duties of the specialty occupation. In *Tapis International*, the court held that a

> position may qualify as a specialty occupation if the employer requires a bachelor's degree *or its equivalent.* For the "equivalent" language to have any reasonable meaning, it must encompass … various combinations of academic and experience based training. It defies logic to read the bachelor's requirement of "specialty occupation" to include only those positions where a specific bachelor's degree is offered.

Tapis International v INS, 94 F. Supp. 2d 172 (D. Massachusetts 2000). The holding of *Tapis International* therefore specifically precludes the impermissible limitations that the agency seeks to impose in the NPRM by limiting employers to require only degrees that are "directly related."

The language in INA § 214(i)(1) that defines a specialty occupation by the requirement of either a bachelor's degree or higher in the specific specialty "or its equivalent" as a minimum for entry into the occupation is distinct from the statutory requirement of the qualifications that the H-1B beneficiary must possess to qualify for the specialty occupation. The statute sets forth distinct requirements at INA § 214(i)(2) for the beneficiary to establish his or her qualifications for the specialty occupation, such as completion of a bachelor's degree or experience in the specialty through progressively responsible positions relating to the specialty.

Therefore, the phrase in the statutory definition of specialty occupation at INA § 214(i)(1), which includes both a bachelor's degree or higher in the specific specialty and the alternative of "its equivalent" broadens the permissible requirement for a specialty occupation to "not only skill, knowledge, work experience, or training … but also various combinations of academic and experience based training." *See Tapis, supra*. Thus, under the statutory language, a position can qualify as specialty occupation not only on the basis of a specialized degree requirement, but also where the occupation requires a non-specialized degree combined with specialized experience, training or coursework as the equivalent of a specialized degree to serve as the minimum requirement for entry into the occupation. The rigid standard in the NPRM that the agency seeks to impose with its requirement that every permissible degree must be "directly related" contradicts the clear language of the statute and is therefore *ultra vires* and impermissible.

Another area of significant concern to our organization is the agency's misplaced and impermissible attempt to exclude positions requiring business degrees from the definition of specialty occupation. In its focus on excluding these positions from the definition of specialty

occupation, USCIS appears to base its analysis on outdated notions that positions requiring a business degree are too generalized to qualify for H-1B classification. On the contrary, graduates of undergraduate and graduate business programs typically gain high-demand, sought-after skills in specialized STEM and business areas, including data analysis, technology management, accounting, financial forecasting and analysis, and many other disciplines. For many years the agency's practice has been to provide employers with the opportunity to establish that a position's requirements and the beneficiary's qualifications were sufficient to qualify as a specialty occupation through *either* a business degree with a formal concentration *or*, alternatively, through a specific combination of coursework, *or* in some cases specialized professional experience. We urge the agency to recognize this important and long-established policy and practice and continue to allow employers to build a record to establish the specialized needs of sponsored positions to qualify as specialty occupations.

Similarly, we have significant concerns with the language in the preamble to the rule that would disqualify positions that require an engineering degree, without specialization, from qualifying as a specialty occupation. The NPRM states that "a petition with a requirement of any engineering degree in any field of engineering for a position of software developer would generally not satisfy the statutory requirement" as the petitioner may not be able demonstrate that a range of fields of engineering would qualify the H-1B worker to perform the duties of a specialty occupation. This interpretation is impermissibly narrow and subverts the intent and the plain language of the statute. When a federal court recently overturned an agency denial of an H-1B petition based on the employer's requirement for a non-specialized engineering degree, the court explained that the statute does not require specialty occupations to be subspecialties. In its analysis, the court stated:

> Importantly, the INA defines professions — the basis of the H-1B Regulation's specialty occupation requirement — at the categorical level (e.g., "lawyers" and "teachers," 8 U.S.C. § 1101(a)(32), rather than "tax lawyer" or "college English professor," see id.) and specifically includes "engineers," id. In addition, the specialty occupation provision arose from a need "to meet labor shortages . . . in occupational fields, such as nursing, engineering, and computer science." 1988 Proposal, 53 FR 43217-01, at 43218 (emphasis added). Put simply, in contrast to a liberal arts degree, which the Service deemed "an [in]appropriate degree in a profession" because of its "broad[ness]," 1990 Rule, 55 FR 2606-01, at 2609, an engineering degree requirement meets the specialty occupation degree requirement.

InspectionXpert Corp. v. Cuccinelli, 1:19cv65, 58 (M.D.N.C. Mar. 5, 2020).

The decision in *InspectionXpert*, in addition to explaining that the statute disallows the requirement of specialized engineering degrees, aligns with the reality of the workplace and the skills gained in engineering degree programs. While there are many types of engineering disciplines, engineering degree programs provide a common core of advanced quantitative and technological skills that prepare the worker to perform the technical duties of a range of positions in specialty occupations such as Operations Research Analyst, Software Developer or Computer Systems Analyst. Again, we urge USCIS to recognize the long-established practice of allowing employers

to build a record to establish the specialized needs of their positions to qualify as specialty occupations, including those where the employer believes that the requirements of a particular position includes a number of engineering degrees or a non-specified engineering degree.

Moreover, the disfavoring of business management and engineering degrees in qualifying a position for H-1B classification flatly contradicts the Biden Administration's National Security guidance and strategy on "attracting and retaining the world's best talent" and the President's October 30, 2023, Executive Order on the "Safe, Secure and Trustworthy Development and Use of Artificial Intelligence." Executive Order ("EO") 14110. In studying the AI workforce, experts have found that primary degrees required for *core* AI job duties are business administration, computer science, engineering, mathematics, and statistics.[i] Yet, USCIS has chosen to provide an example in the preamble explanation of the NPRM cautioning employers about requiring the type of quantitative and problem-solving skills developed in an engineering degree as unlikely to be "directly related" to a qualifying H-1B position, and has proposed codifying in regulation that positions requiring business administration studies should *not* qualify for H-1B status. This creates unnecessary hurdles for employers engaging in on-campus recruitment in the U.S. where international students account for more than 50% of graduate engineering degrees [ii] and are among those completing a Master of Business Administration or Bachelor of Business Administration,[iii] and deprives our economy of the precise types of AI, technology and national security talent that the Biden Administration is making significant effort to attract and retain.

In conclusion, the proposal to redefine "specialty occupation" will not only contravene the statutory provisions defining the H-1B criteria, but it will make it unnecessarily restrictive and run counter to the Administration efforts to boost our competitive advantage and our economy. See Stuart Anderson's Biden Immigration Rule Copies Some Trump Plans to Restrict H-B Visas, Forbes (October 23, 2023), which provides examples of emerging occupations vital to U.S. economic growth and competitiveness that may not qualify under the proposed definition of specialty occupation.

Therefore, ABIL proposes that USCIS delete the language in proposed 8 CFR § 214.2(h)(4)(ii) stating that "[t]he required specialized studies must be directly related to the position" and "A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, if sufficient to qualify for the position."

We request that the regulatory language remains consistent with the definition of "specialty occupation" under INA § 214(i)(1) that requires "[a]ttainment of a bachelor's or higher degree in **the** specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."

Also, the proposed regulation should allow for a specific body of knowledge required to perform the job duties of the position to properly interpret "or its equivalent" in INA § 214(i)(1). For instance, if the position of management analyst requires a bachelor's degree and specialized experience or training, it ought to be considered a "specialty occupation" for H-1B classification

if the beneficiary possesses a bachelor's degree in a liberal arts field and also has experience or training in marketing. Similarly, the position ought to also qualify as a specialty occupation if the candidate possesses a bachelor's degree in liberal arts but has significant course work in quantitative fields such as statistics and data analytics that would allow the beneficiary to perform the duties of the position of marketing analyst.

The End Client's Requirements Should Not Determine the Degree Requirement that Qualifies an Offered Position in a Specialty Occupation

Under the NPRM, for a worker who will be "staffed" to a third-party client site, the client rather than the employer would need to establish that it would normally require a U.S. bachelor's degree in a directly related specific specialty. We believe that this requirement is unduly burdensome in the normal course of business as it would be difficult for the sponsoring employer to obtain such documentation from a client.

The agency's reliance in the NPRM on the 5th Circuit's holding in *Defensor v Meissner*, 201 F. 3d 384 (5th Cir. 2000) is misplaced. In *Defensor*, the Court treated the client as a co-employer. In contrast, the H-1B regulations contemplate only the petitioner as the employer. The client does not supervise the H-1B worker or evaluate their job performance. The clients of the petitioner would certainly not want to be viewed as a co-employer and incur potential liability from a claim by the H-1B worker.

It is important to note that the educational requirements of the third party would only be taken into account and would only apply if the H-1B worker is contracted in a "staff augmentation" arrangement to the third party as opposed to providing services to the third party. *Defensor v. Meissner* involved a staffing agency for nurses that filed the H-1B petitions and contracted the nurses to hospitals. There is a critical distinction between the nurse in *Defensor v. Meissner* and a software engineer who is providing services to the client rather than being staffed to the client. The absence of clear guidance on this key distinction is likely to result in a proliferation of RFEs resulting in burdens for the employer and inefficient use of government resources.

For these reasons, ABIL proposes that the phrase "or third party if the beneficiary will be staffed to that third party" in 8 CFR 214.2(h)(4)(iii) be deleted.

Contracts and Work Orders are Not Usually Probative of a Bona Fide Job Offer in a Specialty Occupation

In the proposed regulation, USCIS seeks to codify a right to "request contracts, work orders, or similar evidence" in cases where it deems the initial evidence insufficient to confirm "the terms and conditions of the beneficiary's work and the minimum educational requirements for

performing the duties."[1] We believe that this provision is overbroad and likely to prove ineffective in determining the existence of a bona fide job offer in a specialty occupation.

USCIS already acknowledges the certified Labor Condition Application (LCA) is primary evidence of an employer-employee relationship, and if the purpose of this proposed rule is indeed to get detail respecting the requirements of the position and the terms and conditions that are not reflected in the LCA, this proposed rule will not accomplish that goal. As a group of highly qualified lawyers with decades of experience working with H-1B employers and their beneficiaries, it is ABIL's experience that contracts and work orders are generally neither probative of a position's minimum educational requirements nor available in the standard course of business.

Whether in the context of an employment agreement between an employer and an employee, or a master services agreement between a contractor and a client, the parties typically do not negotiate "minimum education requirements" because that is not relevant to the object and purpose of these agreements. These agreements are typically concluded to relieve the end customer of the need to perform certain defined tasks or design/complete certain specific projects. Often – but not always – the services contracted for are not the core competencies of the end customer. For example, the core competencies of a clothing company are typically designing, manufacturing and selling said clothing, not developing the software systems or the supply chain processes that gets the clothing to the consumer. The end customer cares that the project is done to meet the customer's needs but does not care – and often does not know – what type of degree or what types of skills are required to complete the contracted for services. The entity that does know is the petitioning employer which staffs the project and files the H-1B.

By requiring that "all parties in a contractual relationship" must specify minimum educational requirements in their contracts when seeking to obtain an H-1B visa",[2] USCIS is imposing obligations on entities not currently under the purview of USCIS – these entities are neither petitioners nor beneficiaries and have no role in the H-1B application process whatsoever. This approach will create unintended barriers and complications in the H-1B visa process, affecting a wide range of industries and applicants because the requirement is overbroad in its reach and also places an undue burden on the petitioning employers and their business practices.

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[1] Modernizing H–1B Requirements, Providing Flexibility in the F–1Program, and Program Improvements Affecting Other Nonimmigrant Workers, 88 Fed. Reg. 203,72901 (Oct. 23, 2023) ("NPRM").

[2] "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. Uncorroborated statements about a claimed in-house project for a company with no history of developing projects in-house, standing alone, would generally be insufficient to establish that the claimed in-house work exists. 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." Modernizing H–1B Requirements, Providing Flexibility in the F–1Program, and Program Improvements Affecting Other Nonimmigrant Workers, 88 Fed. Reg. 203,72901 (Oct. 23, 2023) ("NPRM").

Firstly, embedding minimum educational requirements in all related contracts diverges significantly from common business practices. Such stipulations are rarely, if at all, a standard part of contractual negotiations or agreements unless the customer is seeking the services of a specific individual or has a very narrow set of requirements. Requiring this level of detail in contracts purely to enable H-1B visa procurement forces the petitioner and the petitioner's customer into creating an additional step in contract negotiations that will impose a significant administrative and legal burden on all of the contracting parties.

Secondly, this requirement risks creating significant barriers to entry into the H-1B program, particularly for smaller businesses and startups that may lack the resources or the legal expertise to navigate these additional contractual complexities. Such barriers could inadvertently skew the program's accessibility in favor of larger corporations with more extensive legal and administrative capacities, thereby undermining the diversity and inclusiveness that the H-1B program supports. While additional documentation of the requirements for and conditions of employment may be helpful to USCIS in some cases, the requirement simply flies in the face of actual business practice. Forcing employers – and more crucially their customers – to create something that normally does not exist will create a barrier that will unnecessarily impede access to USCIS immigration benefits for smaller employers.

Thirdly, the requirement ignores the reality of contract law. Parties to contracts do not want to bind themselves to something contractually that is not necessary to the performance of the object and purpose of the contract, because doing so risks unintended consequences in respect of the enforcement of the contract. It also creates contractual obligations to and for persons that are not in privity with all of the contracting parties such as the H-1 beneficiary. Enforcing these kinds of contracts in the event disputes arise – as they often do – will be a nightmare for lawyers and judges who will ultimately have to resolve these issues in litigation that likely will have nothing to do with immigration.

Therefore, we respectfully urge a reconsideration of these proposed requirements to ensure they align with practical business realities and do not unduly hinder the H-1B program's efficacy and accessibility.

PROPOSALS TO IMPROVE INTGRITY AND COMPLIANCE

The Proposals Respecting Non-Speculative Employment Need Further Clarification

We concur that issuing H-1Bs for speculative employment undermines the integrity of the H-1B program. It is important that the H-1B visa program not be used to bring in temporary foreign workers for speculative workforce needs. Such practices detract from the program's integrity and its role in meeting the immediate and specific needs of U.S. employers. While we agree the employer should demonstrate the existence of a non-speculative position in a specialty occupation at the time of filing, the NPRM's lack of specific guidance on acceptable documentation provides no opportunity for the regulated public to provide constructive feedback on the practicality of such

documentation for employers. We respectfully suggest the regulation include a non-exhaustive list of acceptable documentation.

We do, however, appreciate the agency's clarification regarding what is not necessary to establish non-speculative employment. The decision to dispense with the requirement for employers to provide detailed daily work assignments for the entire period of intended employment is a positive step. Similarly, we welcome the decision to refrain from tying H-1B validity periods strictly to the duration of contracts, work orders, or similar documents. This approach recognizes the dynamic nature of business operations and provides much-needed flexibility.

In line with these positive changes, we strongly urge the agency to explicitly state in the regulation that deference to prior adjudications applies to petitions involving changes in client locations, provided there are no other substantive changes in the role. For example, an H-1B worker employed by a large technology company typically possesses specialized expertise in a particular process or technology. Often, when there is a change in client locations, there is no significant alteration in the worker's expertise or job duties. For example, a consultant employing data science and analysis techniques for a project with one client does not undergo a material change in their role or the educational requirements for that role simply because they are assigned to a project for a different client of the same consulting company. In instances where the role itself has not materially changed, deference to prior adjudications should be applied to streamline the process and reflect the realities of modern consulting and technology roles.

The Third-Party Placement Provisions are not Practicable in the Real World Business Environment and Need Further Refinement with Respect to Required Versus Acceptable Types of Evidence

In the NPRM, USCIS seeks to apply the holding of *Defensor v. Meissner* (201 F.3d 384 (5th Cir. 2000)), specifically to scenarios where an H-1B worker is engaged in third-party services. Under the proposed rule, USCIS would assess whether a position qualifies as a specialty occupation based on the third party's educational and experience requirements, rather than those of the petitioner. The rationale for this shift is to prevent petitioners from bypassing specialty occupation requirements by imposing nominal or atypical requirements for the third party.
ABIL agrees that there is a distinction between a beneficiary "staffed" to a third party (integrated into the third party's organizational hierarchy) and a beneficiary providing services to a third party (without such integration). However, the limited examples provided and the case-by-case approach to determine whether a beneficiary is "staffed" raise concerns. The lack of comprehensive examples leaves ambiguity in various business contexts, making it challenging to predict how USCIS will treat a particular scenario and what documentation will be necessary to establish that a beneficiary is not "staffed."

In the current business environment, companies often outsource tasks without integrating external service providers into their organizational structure. For instance, it is quite typical for a company to engage in a cooperative effort with a service provider to guarantee the success of a project. In such situations, the service provider's team might contribute to various components of the same

project or business operation in tandem with the client's in-house team, frequently on-site at the client's premises, without becoming integrated into the client's organizational framework. During this process, both the service provider and the end client operate in unison, yet they retain distinct duties and lines of authority. However, these dynamics of collaboration and separation of roles are often not explicitly detailed in the contracts governing the relationship between these entities. It remains unclear how, in such a common hybrid scenario, USCIS will distinguish between staffing arrangements and service provision. It requires employers – at the time they file the petition - to guess which party should define the degree requirements until the RFE arrives telling them they guessed wrong. This places an excessive burden not only on employers but also on USCIS in the form of increased RFEs.

Additionally, the proposed requirement for petitioners to demonstrate a bona fide job offer and non-speculative employment in a specialty occupation via contracts, work orders, technical documentation, or similar seems to considerably increase the evidentiary burden for third-party placements. This requirement appears redundant, given the existing LCA attestations and Form I-129 petition requirements.

As noted, business contracts often do not specify minimum educational requirements, as these are not pertinent to most business arrangements. In scenarios involving third-party services, contractual documents rarely detail the specifics USCIS would need to determine whether an assignment involves staffing or service provision. Thus, the proposed regulation may demand documents that are not typically part of standard business agreements and are not readily available, creating a regulatory-business practice disconnect.
Furthermore, many client contracts include nondisclosure clauses for a variety of legitimate business reasons, which could make it challenging for companies to comply with the proposed regulation without breaching contractual obligations. For example, the requirement fails to consider scenarios where the H-1B petitioner may not have a direct contract with the end client, and nondisclosure agreements may prevent the sharing of relevant contracts.

The complexity of modern business arrangements, such as subcontracting, is also not adequately addressed in the proposed regulation. In third-party placements, the H-1B employing company generally functions as an independent contractor, focused on results rather than specific staffing methods or details. This relationship is clearly defined in the I-9 regulations (8 CFR 274a.1(j)), emphasizing control over results, not the means or methods of achieving them. Consequently, independent contractor-structured contracts seldom contain information about the educational or specific skill requirements for project roles. To require that employers in independent contractor relationships with their customers add this information to the contract with the customer creates potentially serious practical problems for the customer. The IRS, DOL and potentially even the beneficiary could use this added language to argue that the customer is in fact the employer even when it is a true independent contractor arrangement. As a result, the requirement potentially interferes with the right to contract held by the employer and its customers.

We suggest that USCIS consider making client contracts an *optional* form of evidence for H-1B petitions. This approach would allow the provision of such contracts when materially relevant to

the petition while enabling other evidence demonstrating the specialty nature of the role to be considered when contracts are not applicable or available.

The Requirement to Prove "Legitimate Business Need" Where Related Entities File an H-1B Petition for the Same Beneficiary is unnecessary, Unclear and Unworkable.

ABIL believes that USCIS should revise or eliminate the portion of proposed rule 8 CFR §214.2(h)(2)(i)(G) which discusses "related entities." As written, it would require a USCIS adjudicator 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 where they suspect that related entities may not have a "legitimate business need" to file multiple H–1B petitions on behalf of the same alien.

Given that the H-1B registration system will track each "unique beneficiary," any requirement that related entities prove a legitimate business need to file multiple petitions for the same beneficiary is unnecessary. The stated purpose for tracking each unique beneficiary is to avoid "gaming" of the registration system by 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-registrations beneficiary than for any other registered beneficiary. Related entities could not game the system because their submissions would not increase their odds of selection.

Furthermore, the proposed rule is ambiguous and likely to contribute unnecessarily to agency backlogs because it fails to define the term "related parties." 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. *Compare* the L-1 regulations which use similar inter-company 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"). The proposed rule at 8 CFR § 214.2(h)(2)(i)(G) does not specify the percentage of common ownership or other factors that would justifiably trigger an inquiry by USCIS to determine whether there is a "legitimate business need.". Similarly, proposed rule 8 CFR § 214.2(h)(2)(i)(G) does not provide any standards for the adjudicator to determine whether a "legitimate business need" has been established, including the degree of business necessity that must be established and how is legitimacy determined.

Worse still, where an adjudicator decides that any of the multiple registrations filed on behalf of the same beneficiary does not have sufficient legitimacy of business need,, the proposed consequence is overly and disproportionately punitive: "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 petitions filed on that alien's behalf by the related entities will be denied or revoked.**" (Emphasis added.)

In the business world, there can be any number of valid business reasons for multiple related entities to legitimately wish to sponsor an H-1B beneficiary for sole or concurrent H-1B

employment, including different job opportunities at different entities, lack of coordination within a large and loosely connected family of organizations, unrelated and often confidential operations of portfolio companies within a private equity family, and many others. However, the proposed rule as written encourages the adjudicator to simply substitute their own judgment for that of the petitioners who know their business needs better than USCIS and potentially disqualify all of the related entities and the beneficiary from eligibility for an H-1B registration selection. Therefore, ABIL urges USCIS to delete the portion of 8 CFR §214.2(h)(2)(i)(G) dealing with related parties in its entirety.

The Requirement that an Employer File an Amended or New H-1B Petition If a Change in Employment Requires a New LCA Will Impede USCIS's Stated Goals of Increasing Efficiency, Filling Labor Shortages, and Creating Opportunities for Innovation and Expansion of the U.S. Economy.

The NPRM rightly acknowledges that H-1B modernization must create "opportunities for innovation and expansion." This objective is 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). (See 88 Fed. Reg. at 72873, text accompanying FN 6). These statutes, and the Congressional motivations behind them are especially important today as multiple countries are increasingly developing new immigration programs which compete with the U.S. in the search for high-skilled workers, and as many more countries and regions of the world now offer digital nomad visas.[3] The Biden Administration's National Security Guidance and Strategy on "attracting and retaining the world's best talent," and the President's October 30, 2023, Executive Order 14110 on the "safe, secure and trustworthy development and use of artificial intelligence," similarly direct agencies - including USCIS - to create opportunities to better position the U.S. to innovate and lead in technology and other disciplines.

The NPRM undermines these laudable objectives by requiring 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." 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." (See 88 Fed. Reg. at 72958.)
This language appears to be an attempt to codify *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015) (*Simeio*), and the related July 21, 2015 USCIS Policy Memorandum (PM-602-0120). Regrettably, expanding the requirement to file an amended or new petition if there is **any** change in geographic location that requires a new LCA – even if nothing else about the nature of the employment changes – seems to go beyond what *Simeio* and its progeny were concerned about – ensuring compliance with the H-1B program. The NPRM will do nothing to promote or ensure

[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 December 22, 2023), identifying 49 countries and regions which offer digital nomad visas.

compliance if the only change being reported in the amended petition is the change in address. Conversely, it will make America a far less attractive destination for highly educated H-1B workers. It will also exacerbate job shortages, and hamper innovation and economic expansion. Worse yet, this proposal, if finalized, will needlessly exacerbate 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, voluntarily or otherwise.

It is an inescapable fact of doing business today that employees are increasingly mobile and often working remotely – in some cases far from company facilities. This trend has only accelerated in recent years, and U.S.-based businesses must have the flexibility to provide these remote work options if they wish to retain the best talent in a tight labor market. Additionally, customer needs may also require relocation of H-1B workers. U.S. businesses must be able to quickly meet these customer needs if they want to retain their customers. The NPRM seemingly ignores these scenarios and does not address the impact on U.S. businesses given the frequency with which amended and new petitions will be required under these scenarios if this proposal is finalized. Furthermore, the NPRM's requirement of filing amended or new petitions when job-location changes require a new LCA will undermine USCIS's laudable decision to formalize its policy of deference to prior adjudications.

Although USCIS prevailed in its reliance on *Simeio* and PM-602-0120 before the Second Circuit Court of Appeals in *ITServe Alliance, Inc., v. DHS*, No. 1:20-cv-03855 (June 27, 2023), we think there is a better, less disruptive way to reach USCIS's objective. Where there is no material change in job duties and requirements after a job-location change, USCIS should defer to the prior adjudicator's finding that the specialty-occupation requirements were satisfied and presume continuing H-1B eligibility. The petitioner would still submit Form I-129, but the filing would be limited to presenting evidence of the location change and would advise USCIS that there are no other materials changes in job duties and requirements. USCIS would treat the location change as presumptively and automatically approved; however, the adjudicator would be authorized to issue an RFE if the evidence in the particular case indicates that the location change has raised legitimate questions of continuing H-1B eligibility. If an RFE is issued, the usual adjudication process would occur. If no RFE is issued, then the petitioner will be deemed by USCIS to be in full compliance with all H-1B requirements, and the beneficiary considered to have maintained nonimmigrant status and continue to be employed with authorization.

If USCIS adopts this or a similar approach, USCIS would ensure that deference to the prior specialty occupation findings would be accorded, job location changes would occur without impediment or delay and innovation and economic expansion would be fostered. In addition, adjudication workload would not be needlessly overburdened, and agency oversight and program integrity would be maintained.

The New Requirement to Proactively Submit Evidence that a Beneficiary has Maintained Nonimmigrant Status is Ambiguous and Therefore 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 from the *current* petitioning employer when requesting an amendment, extension or change of status that an H-1B beneficiary has maintained status. It further proposes to require evidence that the beneficiary maintained status in *every other* employment-based nonimmigrant category.[4] 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."[5] (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 reach. The NPRM implies, however, by referring to the I-129 form instructions, that evidence covering two pay periods may be long enough.[6] Elsewhere, the NPRM offers the 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 is only the period during which the present petitioner has employed the beneficiary. This temporal limit, ABIL submits, 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 final rule is finalized as proposed in the NPRM, then an adjudicator in an RFE or NOID could request the current petitioning employer to submit potentially unattainable evidence in the possession of a beneficiary's **prior** employers.

If the present petitioner is only required to submit maintenance of status evidence that is already possessed by or readily accessible to that petitioner, or available from the beneficiary, the final rule that USCIS might publish 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

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[4] See 88 Fed. Reg. 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."

[5] 88 Fed. Reg. at 72881.

[6] 88 Fed. Reg. 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.) AILA notes, 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 had been maintained – "should reduce the need for RFEs or NOIDs . . . and would not add an additional burden on the petitioner or applicant." (88 Fed. Reg. at 72881.)

maintain **the** previously accorded status." (Emphasis added.) By using the article "the" rather the more general article "a," this regulation makes clear that the previously accorded status is solely the status granted when the beneficiary was admitted by CBP upon last entry to the United States.

The NPRM rightly states 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." (88 Fed. Reg. at 72931.) 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." Consistent with these shared understandings, ABIL urges USCIS not to send petitioners and the agency's own adjudicators down a rabbit hole of long-past activities to pursue unattainable proof of a beneficiary's past engagements, associations and activities involving prior employers on previous entries to the United States.

Consequently, ABIL urges USCIS to publish a final rule which expressly states that:

- At filing, the petitioner will only be required to present evidence that the beneficiary maintained status during the two pay periods immediately preceding the filing, assuming the beneficiary is currently employed by this petitioner, although an RFE may be issued requesting evidence that the individual has maintained status since their last entry to the U.S.; and
- If a beneficiary has failed to maintain since their last entry to the U.S. this may result in an adjudication that the beneficiary is *out of status but* 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 adjudicate any otherwise approvable petition seeking employment-based nonimmigrant *classification*.

The Final H-1B Rule Should Not Contain Any Site Visit Provision

The NPRM proposes a codification and dramatic expansion of its site visit program as part of its H-1B modernization rule when that program in and of itself is unlawful under the Homeland Security Act (HSA) which did not give USCIS authority to conduct immigration-related investigative and intelligence-gathering activities.[7] Moreover, USCIS did not properly comply with Executive Order (EO) 12988, Civil Justice Reform (February 5, 1996), because the site visit program will undoubtedly trigger costly litigation and may well cause a court to enjoin on-site physical inspections.

A. Under the HSA the role of USCIS is limited to solely adjudicative functions.

[7] Pub. L. No. 107–296, 116 Stat. 2135, enacted November 25, 2002, accessible at https://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf (last visited November 9, 2023).

The HSA tasked DHS with broad responsibilities, including immigration-related investigation, intelligence-gathering, law enforcement, immigration-benefits adjudication, and policy formulation,[8] and created distinct component agencies within DHS to perform these separate functions.[9] HSA §451 transferred all of the adjudications and naturalization functions from legacy INS to what is now USCIS. Significantly, all legacy INS functions that were non-adjudicative or did not relate to naturalization were not transferred to USCIS but were transferred pursuant to HSA §441(b) to ICE and CBP. HSA §471(b) nevertheless expressly prohibited the President from recombining the DHS components or functions into a single agency. Correspondingly, HSA § 476, codified at 6 U.S. Code § 296, established separate accounts for each of the component immigration agencies to be used for respective appropriated funds, and also proscribed in subsection (d) the transfer of fees between the DHS component agencies. Thus, the HSA requires immigration-related adjudications to be performed by USCIS, and for intelligence gathering, investigations, and inspections to be conducted by ICE and CBP. The plain language definition of "adjudicate,"[10] "intelligence,"[11] "investigations,"[12] and "inspections"[13] make clear that "adjudicate" cannot be used interchangeably with the remaining three.

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[8] 6 U.S.C. § 202.
[9] 6 U.S.C. § 271.
[10] "Meaning of adjudicate in English," The Cambridge Dictionary, (2023), Cambridge University Press, accessible at https://dictionary.cambridge.org/us/dictionary/english/adjudicate (last visited December 22, 2023)("to act as judge in a competition or argument, or to make a formal decision about something:

A panel of expert judges has been appointed to adjudicate the community service awards.").
[11] "Meaning of intelligence in English," The Cambridge Dictionary, (2023), Cambridge University Press, accessible at https://dictionary.cambridge.org/us/dictionary/english/intelligence (last visited December 22, 2023)("secret information about the governments of other countries, especially enemy governments, or a group of people who collect and deal with this information:

the Central Intelligence Agency
military intelligence
intelligence that They received intelligence (reports) that the factory was a target for the bombing.").
[12] "Meaning of investigate in English," The Cambridge Dictionary, (2023), Cambridge University Press, accessible at https://dictionary.cambridge.org/us/dictionary/english/investigate (last visited December 22, 2023)("to examine a crime, problem, statement, etc. carefully, especially to discover the truth:

Police are investigating allegations of corruption involving senior executives. We are of course investigating how an error like this could have occurred.").
[13] "Meaning of inspection in English," The Cambridge Dictionary, (2023), Cambridge University Press, accessible at https://dictionary.cambridge.org/us/dictionary/english/inspection (last visited December 22, 2023)("the act of looking at something carefully, or an official visit to a building or organization to check that everything is correct and legal:

on closer inspection:
Her passport seemed legitimate, but on closer inspection, it was found to have been altered.

carry out/make an inspection:

She arrived to carry out/make a health and safety inspection of the building.").

In this respect, "adjudication" for the purposes of HSA § 451(b) should be interpreted to mean the impartial decision-making based on facts presented as evidence before a tribunal and the application of law to the facts.[14] "Investigate," the gathering of "intelligence," and "inspection" as used in HSA § 441(b) should be read as the proactive, affirmative pursuit of intelligence, regardless of source, not constrained to the adjudicative tribunal.[15] Thus, "adjudication" should be based on the evidence submitted to the tribunal (in this case, USCIS), and extrinsic evidence should be limited to publicly available information, such as current events, contents of official documents outside the record, acts that can be accurately and readily determined from official government sources and whose accuracy is not disputed, or undisputed facts contained in the record.[16] While there may be a limited consultative role for FDNS, no statute overrides HSA § 471(b) prohibition on the separation of adjudication from inspection, investigation, and enforcement.[17]

In relevant part, FDNS publicly identifies four mission functions:[18]

> 1. Detect, deter, and administratively **investigate** immigration-related fraud.
> 2. Establish guidance and oversee processes for identifying, reviewing, vetting, and adjudicating cases involving national security concerns.
> 3. **Develop and implement efficient screening policies, programs, and procedures**.
> 4. Serve as USCIS' primary conduit for information **sharing and collaboration with law enforcement and the Intelligence Community**. (Emphasis added.)

Thus, FDNS immigration *investigative* and *enforcement* activities are *ultra vires*, and its continued investigative and enforcement activities funded through USCIS filing fees violates HSA § 476 by unlawfully diverting USCIS funds earmarked for *adjudication*. How the NPRM categorizes the proposed investigative activities is a matter of semantics and does not change the fact that they are not adjudicative and therefore outside the purview of USCIS under the HSA. While USCIS may engage in lawful actions to *adjudicate* immigration-benefits requests, its continued performance of *investigations, intelligence gathering,* and *inspections*, whether under FDNS's current unlawful practice, or under the proposed rule, exceeds the scope of the USCIS's legal authority.

The NPRM's reliance on INA § 235(d)(3) as purported authority to conduct site visits involving H-1B petitioners, beneficiaries and third parties is also misplaced. While this statute authorizes any immigration officer to "administer oaths and to take and consider evidence of or from any

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[14] Brief for the Alliance of Business Immigration Lawyers, Inc., as Amicus Curiae, p. 10, Immigrant Legal Resource Center, *et al.* v. Chad F. Wolf, *et al.*, Case No. 4:30-cv-05883-JSW (2020).
[15] *Id*.
[16] *See Id.*; *see also* 8 C.F.R. § 1003.1(d)(3)(iv) describing administrative notice.
[17] EB-5 Reform and Integrity Act, P.L. 117-103, Div. BB. (providing for consultative role whether to waive an interview in the adjudication of a petition to remove conditions on residency). *See* 8 U.S.C. § 1186b(d)(3)(B).
[18] USCIS, "Fraud Detection and National Security Directorate" https://www.uscis.gov/about-us/organization/directorates-and-program-offices/fraud-detection-and-national-security-directorate (last visited December 22, 2023).

person . . . concerning any matter which is material and relevant to the enforcement of this Act [the INA] and the administration of the Service," the provision is not self-executing. The very next section, INA § 235(d)(4)(A) and (B), makes clear that an administrative subpoena is necessary, and that "in the event of neglect or refusal to respond to a subpoena," or "testify," then the proper remedy is to "invoke the aid of any court of the United States."

The law is clear that if an H-1B petitioner or beneficiary, or a third party, refuses to cooperate during a site visit, USCIS must seek the aid of a federal court to enforce the demand for cooperation in a formal judicial proceeding where the third party might lawfully request that the subpoena be quashed. USCIS does not - in the course of a site visit - possess the unfettered authority to interrogate or demand evidence of anyone, and particularly, a third party that did not sign the H-1B petition.

B. NPRM's public burden estimate is unreliable because it is based upon inconclusive assumptions drawn from flawed and/or unpublished data.

The NPRM wrongly assumes that a site visit will only involve the H-1B beneficiary and his/her on-site supervisor or manager.[19] In the NPRM's economic burden estimate, USCIS offers the sweeping conclusion that the total spent time with these two individuals would be limited to 1.08 hours for each site visit – split evenly between an H-1B beneficiary and supervisor. Yet, this assumption is flawed because a site visit often involves – in addition to the beneficiary's and his/her manager – coordination with the petitioning organization's Human Resources (HR) personnel, its Immigration Department, and its internal legal department, and not merely the beneficiary's functional manager. Furthermore, these corporate officials quite properly might seek assistance from the organization's external immigration counsel in responding to a site visit. Moreover, in the context of a third-party placement of an H-1B beneficiary, a site visit may also involve the third-party's corporate officials as well as the third-party's point of contact with the H-1B beneficiary.

The modern-day business reality is that different stakeholders are involved with the employment of an H-1B worker – with each stakeholder having access to a portion of the information necessary to address the predictable demands of an officer during a site visit. The NPRM's estimate of the burden associated with a site visit is likely to be the low-end and far smaller than the aggregate time spent by these collective immigration stakeholders. Furthermore, the assumption that the 1.08 hours should be evenly split between the beneficiary and his/her manager is also without a persuasive factual basis. For these reasons, ABIL urges USCIS to make a more accurate burden estimate of its proposed site visit program and allow further public comment on the revised calculation before a site visit regulation is finalized.

C. The NPRM omits and conflates key data relied on by USCIS to support its site visit program.

[19] *See* NPRM at 72945.

The NPRM fails to provide adequate data to support its claim regarding noncompliance and/or fraud. Specifically, discussions in the NPRM relating to alleged historical noncompliance uncovered through FDNS's site visits is replete with references to "Summary of H-1B Site Visit Data,"[20] and yet, the NPRMs fails to provide any raw data/statistics (redacted for personally identifiable information) relating to the specific cause that resulted in a finding of noncompliance or fraud or cite to published data. The public cannot meaningfully comment on findings of fraud and noncompliance claimed in the NPRM when that very data upon which NPRM relies upon remain hidden from the public.

The NPRM also conflates asserted instances of "noncompliance" with legal requirements, on the one hand, and "fraud," on the other, by lumping the two into one category even though the two presumably involve different liability triggers.[21] Moreover, there is no explanation offered in the NPRM as to the number of petitions which actually resulted in denial or revocation following the noncompliance/fraud finding. (For example, a comparison of H-1B petition denials/revocations during a comparable period between those petitions subject to a site visit that received a "compliant" determination versus those also subject to a site visit but instead received a "noncompliant/fraudulent" determination will provide a meaningful comparison.) ABIL therefore expresses its serious concern that the NPRM's seemingly flawed and unpublished data analysis may have unjustifiably contributed to this misguided site visit proposal.

D. The NPRM violates Executive Order 12988 for failure to provide a rule that would minimize litigation, provide a clear legal standard, and promote simplification and burden reduction.

E.O. 12988 requires the agency promulgating any new proposed regulation to endeavor to minimize litigation, provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction.[22] Yet, the NPRM unlawfully proposes to task USCIS with investigative authority reserved to ICE and misappropriate funds reserved for USCIS adjudication instead of immigration-related investigations, intelligence gathering and law enforcement. As a result, the proposed rule will likely result in litigation.[23] The proposed rule also contradicts E.O. 12988 by unnecessarily delaying the USCIS H-1B petition adjudication timeframe by adding a site visit component.[24] As set forth above, enforcement should be reserved for other DHS component agencies, not USCIS, and the proposed codification is far from the just and efficient administrative adjudication process contemplated by E.O. 12988.

For the foregoing reasons, ABIL recommends that USCIS revise the proposed regulation by eliminating the on-site inspection provisions of the NPRM, and circumscribing and limiting the

[20] *See* NPRM at 72944 Footnote 203-205; and 72945-72946, passim.
[21] *See* NPRM Tables 42 and 43 at 72945.
[22] Executive Order 12988 at Sec. 3(a).
[23] Indeed, litigation has already occurred challenging the legality of FDNS site visits. *See*, Brief for the Alliance of Business Immigration Lawyers, Inc., as Amicus Curiae, Immigrant Legal Resource Center, *et al.* v. Chad F. Wolf, *et al.*, Case No. 4:30-cv-05883-JSW (2020) – a case in which a federal district court enjoined a prior US EIS filing fee rule on other grounds.
[24] *See Id*. at Sec. 4(b).

scope of FDNS activities to intra-agency review of governmental and public records and evidence accompanying the H-1B petition in a manner that fully complies with the HSA.

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ABIL appreciates USCIS's efforts to modernize the H-1B visa classification, particularly as it contemplates improvements to the H-1B registration system, expanded access to entrepreneurs and international graduates, and improvements to increase program integrity and compliance.

However, we urge USCIS to carefully consider feedback and suggestions from the legal sector. This is crucial in effectively implementing new changes and in understanding the potential adverse effects of certain proposed changes, especially those concerning the definition of specialty occupation, the authority for site visits, and the stipulations for third-party placements.

Given that Congress has not meaningfully updated employment-based immigration policies for over thirty years, the H-1B visa classification has become increasingly vital in attracting and keeping highly skilled professionals in essential roles. We value USCIS's commitment to refining this important visa classification and are eager to continue collaborating to enhance its role in contributing to the growth of the U.S. economy.

Respectfully submitted,

Alliance of Business Immigration Lawyers

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[i] Autumn Toney and Melissa Flagg, U.S. Demand for AI-Related Talent Part II: Degree Majors and Skill Assessment (September 2020), Center for Security and Emerging Technology, p. 3.

[ii] See e.g., National Science Foundation, Science & Engineering Indicators 2022, "International S&E Higher Education and Student Mobility," which reported that students on temporary visas earned 50% of engineering Master's degrees in the United States and over half of U.S. doctoral degrees in engineering (State of U.S. Science & Engineering 2022, National Science Board).

[iii] Higher-ed institutions commonly offer four different types of Business degrees: Bachelor of Arts or Bachelor of Science degrees in Business, which have different distribution requirements and different options for "specialization" as compared to a Bachelor's in Business Administration, and a Master's in Business Administration. The proposed regulatory text would permit an adjudicator to start with a presumption that a Bachelor's or Master's in Business Administration cannot be qualifying, based on the label of the degree, and by default ignore a completed minor or concentration, for example, as not being a "specialization," without obligating the adjudicator in all cases to review and give weight to the transcript.