Compete **America**

The Alliance for a Competitive Workforce

December 21, 2023

Charles L. Nimick
Chief, Business and Foreign Workers Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 2074

Re: **Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers**
Notice of Proposed Rulemaking
Department of Homeland Security Docket No. USCIS–2023–0005

Dear Chief Nimick:

The Compete America coalition advocates for ensuring that the United States has the capacity to educate domestic sources of professional talent and to obtain and retain the foreign talent necessary for U.S. employers to continue innovating and creating jobs in the United States. Our coalition members include higher education associations, industry associations, the nation's largest business and trade associations, and individual employers — all working together to advance access to science, technology, engineering, and mathematics (STEM) talent, grow U.S. workforce development and improve the U.S. high-skilled immigration system. For more than 20 years, Compete America has worked with successive administrations and Congress on issues critical to the professional global mobility of talent, as well as the functionality and integrity of the U.S. employment-based immigration system.

Members of our coalition are among the nation's foremost creators of jobs for U.S. workers. Our members contribute to the nation's economic strength and global competitiveness. In addition to the U.S. workers who comprise the vast proportion of their workforces, our members also leverage the talents of well-educated and highly skilled professionals from abroad, including professionals working in STEM fields. Many of these highly sought-after professionals have been drawn to this country not only by the vast opportunities for innovation and growth offered by U.S. employers, but also by America's unmatched higher education system and world-class research and development enterprise. Compete America therefore has a strong interest in ensuring that the U.S. immigration system functions efficiently and effectively.

We welcome the opportunity to provide a response to the Notice of Proposed Rulemaking (NPRM) U.S. Citizenship and Immigration Services (USCIS) published on October 23, 2023, "Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers." On December 5, Compete America submitted a preliminary comment urging the Department of Homeland Security (DHS) to bifurcate this rulemaking and implement H-1B registration changes for the upcoming cap season.[1] The additional comments that follow address other provisions of the NPRM. We encourage DHS to take a thoughtful and measured approach to the remainder of the proposal.

IMMIGRATION POLICY AND PROCESS RECOMMENDATIONS

Compete America appreciates the government's efforts to improve the H-1B nonimmigrant program. Though the NPRM includes multiple positive changes that Compete America supports and encourages DHS to finalize, it also includes provisions that we do not believe the agency should implement at this time without significant changes. We provide comments and recommendations below.

Positive Reforms

Codification of deference policy with critical modifications

In the NPRM, DHS proposes to codify the "deference" policy, under which USCIS gives deference to its prior determination of eligibility when adjudicating a Form I-129 involving the same parties and underlying facts. This had been the agency's policy for many years until the prior administration rescinded it in 2017. In 2021, Compete America commended USCIS for reinstating the longstanding policy of deferring to prior visa approvals when no material change in fact has occurred and there was no error in the prior approval.[2] We now urge USCIS to formalize it in the regulations – with modifications that are critical to accomplishing the agency's policy goal.

DHS must expressly provide in the final rule that new H-1B eligibility requirements and standards would only apply to individuals whose initial H-1B petitions are filed after the final rule takes effect. This clarification ensures fair and consistent adjudications.

Due to the limited number of employment-based green cards available each year combined with the per-country limits, highly skilled foreign nationals seeking permanent residence in the United States face decades-long wait times. Their employers must regularly file petitions with USCIS to extend their nonimmigrant status. Changing the rules on individuals to whom USCIS has granted H-1B nonimmigrant status before the final rule takes effect would cause serious

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[1] Comment ID No. USCIS-2023-0005-0934, available at https://www.regulations.gov/comment/USCIS-2023-0005-0934.

[2] Comment ID No. USCIS-2021-0004-7264, available at https://www.regulations.gov/comment/USCIS-2021-0004-7264.

harm to our member companies' employees and their families, particularly those who have been waiting for years in the green card backlog. It would create an extremely unpredictable adjudication environment and harm the country's economy by undermining U.S. companies' ability to plan and staff their business operations. To this end, we also recommend that DHS remove the phrase "or eligibility requirements" from the proposed deference provision, to reduce the likelihood that future policy changes unfairly impact foreign nationals who have received approvals.

We also respectfully request that DHS clarify how the policy applies to scenarios involving more than one adjudicating agency – for example, the blanket L-1 visa process. When an employee receives an L-1 approval at a U.S. consulate abroad, the employee and their employer experience major disruptions if USCIS issues a Request for Additional Evidence (RFE) on their extension application where there has been no material change to the underlying petition. Additional clarity in this area regarding how USCIS evaluates applications involving the same parties and facts could reduce burdens on employers and their employees, as well as enable efficacy in the adjudicatory process.

Clarification regarding "specialty occupation" normally requiring degree

For a position to qualify as a specialty occupation, the employer must normally require a degree, but need not always require one. Compete America supports DHS's proposal to formalize this existing policy in the regulations. The NPRM specifically recognizes that "[a]s 21st century employers strive to generate better hiring outcomes, improving the match between required skills and job duties, employers have increasingly become more aware of a skills-first culture, led by the Federal Government's commitment to attract and hire individuals well-suited to available jobs. The flexibility inherent in H-1B adjudications to identify job duties and particular positions where a bachelor's or higher degree in a specific specialty, or its equivalent, is normally required, allows employers to explore where skills-based hiring is acceptable."

We commend DHS for acknowledging the flexibility needed here. We respectfully request that the agency also examine degree equivalency standards, considering new ways employees obtain needed skills outside the traditional 4-year degree paradigm, including employer certificate programs, apprenticeship programs, and college-level courses. Additionally, we encourage the agency to consider ways to help employers distinguish skills-based hiring roles from degreed roles at all points in the employment ecosystem – from recruitment, onboarding, progression in career, and at the engagement level. Providing additional clarification in this space will enable employers to broaden skills-based hiring initiatives (e.g., hiring U.S. veterans and underrepresented minorities) while balancing the same with the coexistence of the H-1B standards.

Though Compete America supports the agency's proposal to codify current policy regarding a degree normally being required, we outline our opposition below to other restrictive elements of the proposed "specialty occupation" definition that would be a departure from existing policy and the immigration statute.

Cap-gap extension

Compete America encourages DHS to finalize its proposal to extend "cap-gap" relief for F-1 students from October 1 to April 1. International students have experienced gaps in their status and work authorization due to circumstances outside their control, including agency processing delays and multiple registration lotteries pushing H-1B cap adjudications past the start of the fiscal year. For employers, this has disrupted business operations and created new administrative and cost burdens associated with premium processing, taking employees off of payroll, and complying with additional Form I-9 obligations. We fully support this proposal to prevent gaps in employment authorization that are outside the foreign national's control.

Start date flexibility

Processing delays and a registration selection process that stretches past October 1 have also created challenges with H-1B employees' start dates. For example, in many cases, USCIS does not adjudicate an H-1B petition until after the requested October 1 start date, and beneficiaries end up with a shortened validity period. We encourage the agency to implement its proposals to allow flexibility in employee start date in certain circumstances, including when a requested validity period ends before the petitioner receives the approval.

Elimination of itinerary requirement

Compete America has long urged DHS to explore all options to create efficiencies in case processing, both for applicants and the agency itself. We support the provision to eliminate the requirement to provide a detailed itinerary in the H-1B petition. However, we discuss in more detail below further steps the agency should take to reduce administrative burdens and costs.

Cap exemptions for nonprofit research

DHS proposes to revise the definitions of "nonprofit research organization" and "governmental research organization" in order to "clarify, simplify, and modernize eligibility for cap-exempt H-1B employment, so that they are less restrictive and better reflect modern employment relationships." The NPRM also states that DHS seeks to "provide additional flexibility to petitioners to better implement Congress's intent to exempt from the annual H-1B cap certain H-1B beneficiaries who are employed at a qualifying institution, organization, or entity." We encourage DHS to finalize these provisions, which should provide additional flexibility and reduce unwarranted pressure on the H-1B cap.

Areas of Opposition

Narrowing of "specialty occupation" definition

DHS has proposed to limit the definition of "specialty occupation" such that "[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." Compete America opposes this restrictive definition, which is both contrary to law and longstanding policy and inconsistent with the agency's acknowledgements elsewhere in the NPRM regarding modern hiring practices.

In discussing degree requirements in the NPRM preamble, DHS itself acknowledges that its "examples refer to the educational credentials by the title of the degree for expediency. However, USCIS separately evaluates whether the beneficiary's actual course of study is directly related to the duties of the position, rather than merely the title of the degree." But the proposed regulatory provision appears to direct USCIS officers to disqualify any position that requires a "general degree" based on the title of the position and degree program. The proposed provision makes no mention of job duties or content of the course of study being analyzed by the adjudicator to determine if the "further specialization" requirement has been met.

The NPRM erroneously describes the proposed regulatory language as simply codifying current practice – when it is in fact a major departure from current USCIS practice. Compete America urges DHS to include language in the actual regulatory text to codify current practice under which adjudicators consider evidence from petitioning employers regarding coursework and job duties.

Degree programs the NPRM describes as "general" frequently include highly technical coursework, and employers are in the best position to determine whether a course of study qualifies an applicant to perform required job duties. Since coursework can vary by university even within the same degree program, adjudicators must consider the actual content of a program and not simply its title.

American companies routinely hire highly skilled professionals with business degrees from the nation's top schools when they determine their coursework provides the specialized knowledge and skills required for a position. For example, students in business degree programs complete advanced coursework in analytics, mathematical and statistical methods, quantitative analysis, or finance, which prepares them for careers in technical fields. We also dispute the agency's suggestion in the NPRM that an engineering degree title must exactly match the title of an engineering position, for the two to relate. Companies frequently hire individuals with degrees in other STEM fields as well for engineer positions, based on the knowledge and skillsets they gain through those programs.

As a matter of course, USCIS adjudicators evaluate evidence employers provide regarding the substance behind a degree program and the relationship to the job duties, and today USCIS does approve petitions involving these so-called "general" degrees. Compete America companies have regularly received H-1B approvals for individuals with generalized degrees – for example, H-1B petitions have been approved for employees who fall under the Standard Occupational Codes (SOC) of 13-1111 (Management Analysts) or 15-2031 (Operations Research Analysts) who have a master's in business administration (MBA), without specialization, due to

coursework they may take in finance and analytics. A National Foundation for American Policy (NFAP) analysis found that "within one to ten years of earning a master's degree in business, 79% of foreign-born and 70% of U.S.-born work in management and management-related occupations in the United States, and . . . 94% of individuals say their work in a management and management-related occupation is related to their degree."[3]

The proposed new, restrictive eligibility standard would not only lead to increased RFEs and denials in the near term, but also would open the door to even narrower interpretations of H-1B eligibility under future administrations. Narrowing H-1B eligibility is contrary to the agency's stated goals elsewhere in the NPRM to provide clarity and flexibility to employers. It would also be in direct opposition to the Biden administration's directive to DHS and the State Department in the recent Executive Order on artificial intelligence (AI), to "use their discretionary authorities to support and attract foreign nationals with special skills in AI and other critical and emerging technologies seeking to work, study, or conduct research in the United States."

Given the critical nature of the H-1B program, we ask DHS not to implement these provisions as written at this time, and to reconsider them in light of this feedback. At a minimum, we recommend that DHS delete the reference to "business administration" in the proposed regulatory provision and add language codifying current practices in this area – including language requiring adjudicators to consider coursework underlying a degree and an employer's explanation as to why a potential beneficiary's degree is directly related to the position described in the H-1B petition.

Amended petition requirement

Compete America has, on multiple occasions, encouraged USCIS to reevaluate the definition of "material change" and rescind its policy of requiring companies to file a new or amended H-1B petition solely for a change in worksite,[4] in situations where there is no change in the job or position in the underlying, approved petition and the employer has secured a certified Labor Condition Application (LCA) for the additional work location.

We were heartened to see that the regulatory agenda description of the NPRM suggested DHS would "streamline" this requirement. The agency has now proposed to simply codify existing policy with no changes. Given that employers already file a new LCA with the Department of Labor (DOL) and comply with all of their wage and notice obligations under the law, we believe the amended petition requirement is duplicative and overly burdensome.

The requirement to file an amendment with USCIS in this circumstance has created significant paperwork and cost burdens for employers, especially given that the petition process remains

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[3] Comment ID No. USCIS-2023-0005-1068, available at https://www.regulations.gov/comment/USCIS-2023-0005-1068.

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

paper-based. We anticipate costs will increase dramatically under the new fee schedule USCIS is in the process of finalizing. This policy also adds an unnecessary and burdensome work stream for USCIS officers, when the agency should be prioritizing finding efficiencies in adjudications.

For our member companies' employees, the amended petition requirement has led to unnecessary uncertainty and fear. During the years when the deference policy was not in place, unexpected denials forced employees and their families to leave the United States, when there had been no change to the employee's eligibility for H-1B status and the company was simply documenting a worksite move.

Compete America again requests that DHS eliminate the amended petition requirement for mere worksite changes. Should the agency propose an alternative means to be notified of worksite changes, we would welcome the opportunity to offer feedback and recommendations. We continue to encourage DHS to pursue all means within its authority to reduce paperwork obligations on petitioners and applicants and eliminate unnecessary USCIS work streams.

LCA review

DHS has proposed to add language to the regulations regarding USCIS review of the LCA and information contained in it. The NPRM states that "USCIS would consider all the information on the LCA, including, but not limited to, the standard occupational classification (SOC) code, wage level (or an independent authoritative source equivalent), and location(s) of employment. USCIS would evaluate whether that information sufficiently aligns with the offered position, as described in the rest of the record of proceeding. In other words, USCIS would compare the information contained in the LCA against the information contained in the petition and supporting evidence."

Compete America opposes these provisions as drafted, which could be read to expand USCIS's role with regard to the LCA beyond the simple review it conducts today in adjudicating the H-1B petition. Though the NPRM states this would be "consistent with current practice," USCIS does not have that authority today under the law or regulations to reassess DOL's determination in the LCA or expand the scope of LCA review permitted by USCIS. Any language in the final rule relating to the LCA must clearly state that while USCIS can verify that the LCA corresponds to the specialty occupation in the petition, it cannot undermine DOL's determination or in any way re-adjudicate the LCA. USCIS does not have jurisdiction or legal authority to second-guess the DOL's certification of the LCA, and DHS does not articulate a policy justification in the NPRM to add this new step to H-1B adjudications.

USCIS still faces staggering case backlogs, and long processing times create real challenges for our members and their employees. Placing *additional* requirements on USCIS officers adjudicating petitions, particularly in an area that is under the jurisdiction and expertise of another government agency, is contrary to USCIS's stated goals of restoring reasonable case processing timelines.

Third-party placement

DHS is proposing to reshape the adjudications landscape for H-1B petitions involving third-party placement, in a way that would create significant uncertainty for H-1B employers that work with third-party clients and U.S. employers that leverage their services.

The proposed framework hinges upon a discretionary determination by a USCIS officer of whether an H-1B beneficiary will be "staffed" to a third-party company or will be "providing services." The NPRM defines "staffed" as "meaning they will be contracted to fill a position in a third party's organization and becomes part of that third party's organizational hierarchy by filling a position in that hierarchy (and not merely providing services to the third party)." This is a completely new definition that neither adjudicators nor H-1B employer companies have experience with in any other context, and does not have any basis in immigration law.

The proposal does not articulate any clear criteria an adjudicator would apply to these cases, and simply states that "USCIS would make the determination as to whether the beneficiary would be 'staffed' to a third party on a case-by-case basis, taking into consideration the totality of the relevant circumstances." Based on this discretionary determination by USCIS that a beneficiary will be "staffed" to a third-party company, the NPRM would then shift the obligation to prove the position is a specialty occupation from the petitioning employer to that third-party company, a practice that would be extremely burdensome and difficult to implement for the third-party company that is not privy to the underlying H-1B petition or the adjudications process.

This new framework would leave petitioning employers – and the USCIS officers adjudicating their petitions – with no clear legal standards or guidance. At minimum, this proposal would lead to inconsistent adjudications, high RFE rates, and overall confusion among employers and their employees. It would also almost certainly lead to litigation. Compete America therefore requests that DHS refrain from finalizing these provisions at this time, and continue to pursue stakeholder engagement to determine next steps on these issues.

Site visits

Though administrative site visits help the government evaluate compliance and promote the integrity of the H-1B program, the site visit provisions in the NPRM raise serious concerns for our coalition members as currently drafted.

The NPRM states "If USCIS is unable to verify facts, including due to the failure or refusal of the petitioner or a third party to cooperate in an inspection or other compliance review, then such inability to verify facts, including due to failure or refusal to cooperate, may result in denial or revocation of any H-1B petition for H-1B workers performing services at the location or locations that are a subject of inspection or compliance review, including any third party worksites."

This provision fails to provide due process and could create unnecessary disruptions for employers and H-1B beneficiaries. Compete America asks that in the final rule, DHS include a mechanism to notify the petitioner and their attorney of record in advance of a site visit and give them the opportunity to respond. DHS should not proceed directly to a denial or revocation without affording the petitioning employer an opportunity to provide additional information to the government.

The breadth of the site visit provision is particularly concerning when viewed in the context of the third-party placement framework in the NPRM. When third-party worksites are involved, security and confidentiality policies, or even lack of knowledge of the agency's site visit authority, may create hurdles to accessing information a site visit inspector seeks to review. The petitioning employer must be given the opportunity to address the government's concerns. Furthermore, other H-1B beneficiaries at a third-party worksite who have no relationship to the petitioning employer or the petition subject to the site visit should not be unfairly impacted.

Additionally, while we welcome DHS's recognition that H-1B employment may involve telework, remote work, or other off-site work within the United States, our members have serious concerns regarding beneficiaries potentially being subject to government site visits in their homes. If a beneficiary is not comfortable allowing a site visit inspector into their home for safety or privacy reasons, this should not lead to a denial or revocation. Furthermore, such an authority could be misused under an administration that is hostile to immigration. To mitigate these safety and privacy concerns, we ask that DHS require the government to provide advance notice to both the employer and beneficiary, and allow visits with beneficiaries to take place at a designated time at a mutually agreed-upon safe location (e.g., the employer's place of business).

Compete America also encourages DHS to provide in the final rule that the beneficiary may have a representative from their employer or an attorney present during any interview with a site visit inspector. Our members are committed to complying with all legal requirements of the H-1B program, and we respectfully request that the government not place an undue burden on our employees or create unnecessary stress within our workforces.

Preliminary input on future actions/proposals

Potential "use or lose" measures

In the NPRM, DHS states it is considering measures "to prevent petitioners from receiving approval for speculative H-1B employment, and to curtail the practice of delaying H-1B cap-subject beneficiary's employment in the United States until a bona fide job opportunity materializes." These include requiring petitioners to notify USCIS if an H-1B petition is not activated within a certain amount of time and making failure to report a basis for revocation, or creating a rebuttable presumption of speculative employment if entry is delayed or the petitioner files an amended petition before the beneficiary's admission to the U.S.

DHS acknowledges that these options "could have a broad reach and potentially include petitions for beneficiaries whose admission into the United States was delayed for legitimate reasons beyond their control." Compete America agrees with the agency's conclusion that these proposals have not been sufficiently vetted such that their benefit would outweigh the potential negative consequences. For example, there are many legitimate reasons why an individual employee might prefer to wait to activate H-1B status, if they have remaining time in L-1 nonimmigrant status or F-1 Optional Practical Training (OPT), or have family members working pursuant to their L-2 status. We encourage the agency to continue to gather feedback on this issue, including the various legitimate reasons for such a delay, before moving forward with policy changes.

Beneficiary notification

DHS is also seeking preliminary input on ways to provide Form I-129 beneficiaries with notice of USCIS actions on petitions filed on their behalf. We would like to better understand the agency's policy goals and would welcome the opportunity to discuss potential solutions with DHS that would strike a balance with the government's objectives without placing an undue burden and risk on the petitioner.

Regarding these areas where DHS has sought preliminary input, we ask the agency to continue to comply with its obligations under the Administrative Procedure Act (APA) and provide notice and an opportunity to comment on proposed policy changes.

CONCLUSION

Compete America appreciates the agency's consideration of the feedback and recommendations we have provided through this comment and our previous response regarding the proposed H-1B registration provisions. We look forward to continued dialogue with DHS on solutions that will ensure the H-1B process operates efficiently and effectively and will continue working with Congress and the Administration to advocate for reforms to the United States immigration system.

Respectfully submitted,

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Compete America Coalition