

PRESIDENTS' ALLIANCE | ON HIGHER EDUCATION AND IMMIGRATION

Submitted via www.regulations.gov

December 18, 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 20746

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

Dear Mr. Nimick:

On behalf of The Presidents' Alliance on Higher Education and Immigration ("Presidents' Alliance") I write to provide comment in response to United States Citizenship and Immigration Services' ("USCIS") notice of proposed rulemaking, Modernizing H–1B Requirements, Providing Flexibility in the F–1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, 88 Fed. Reg. 72,870 (Oct. 23, 2023) ("Proposed Rule").

I. The Presidents' Alliance and Higher Education Institutions' Unique Perspectives and Role in the H–1B Program

The nonpartisan, nonprofit Presidents' Alliance on Higher Education and Immigration brings college and university presidents and chancellors together on the immigration issues that impact higher education, our students, campuses, communities, and the nation.¹ As the only national organization exclusively focused on the intersection of higher education and immigration, we work to support immigrant, international, and refugee students and to advance just, forward-looking immigration policies and practices at the federal, state, and campus levels. The Alliance is composed of over 550 leaders of public and private colleges and universities, enrolling over five million students across the United States.²

Colleges and universities are important stakeholders in H–1B policy changes for two reasons: 1) they are employers of H–1B visa holders, including scholars who are integral to our ability to prepare all of our students for the workforce as well as conduct research that leads to significant innovation for our economy and national security, and 2) they educate international students who pursue employment through the H–1B visa program after graduation. Higher education institutions have a uniquely qualified perspective to offer on the relationship between studies and specialty occupations. This is especially true for the continually evolving fields of knowledge

¹ Our Mission, <https://www.presidentsalliance.org/about/mission/> (last visited December 18, 2023).

² Member Presidents and Chancellors, <https://www.presidentsalliance.org/about/?member-presidents-and-chancellors> (last visited December 18, 2023).

that form the cutting edge of science, technology, math, and engineering (“STEM”) fields. American colleges and universities are the major entry points into the United States for STEM talent, through their enrollment of international students.³

II. Comment

A. **The Presidents' Alliance supports the Proposed Rule's increase in flexibilities for F-1 students changing their status to H-1B.**

Upon graduation, many international students and scholars transition to other legal pathways, as employers seek to hire individuals who graduate from U.S. colleges and universities with the knowledge and skills needed in our economy. The Presidents' Alliance supports the Proposed Rule's extension of the automatic “cap-gap” extension to avoid disruption to an F-1 student's employment authorization during the pendency of a qualifying H-1B cap-subject petition.⁴ The period of limbo between an F-1 student's completion of Optional Practical Training and the effective date of H-1B in which employment authorization lapses status serves no practical purpose related to the H-1B program. Instead, it encourages American-trained students not to pursue employment in the United States, taking their skills with them and contributing them elsewhere.

B. **The Presidents' Alliance supports the Proposed Rule's adoption of the more precise “fundamental activity” test for cap-exempt organizations and recognition of the complexity of cap-exempt organizations by making indirectly employed beneficiaries cap-exempt.**

In recognition of the unique role colleges, universities, and nonprofit research organizations play in both training and employing H-1B visa holders, Congress exempted from the annual numerical cap H-1B holders employed at institutions of higher education, their “related or affiliated” nonprofit organizations, and nonprofit research organizations.⁵ The Senate Committee on the Judiciary explained,

The principal reason for the first exemption is that by virtue of what they are doing, people working in universities are necessarily immediately contributing to educating Americans. The more highly qualified educators in specialty occupation fields we have in this country, the more Americans we will have ready to take positions in these fields upon completion of their education.⁶

Nonprofit and governmental research organizations, alongside institutions of higher education, work together to “contribute[] to educating Americans,” attracting and retaining “highly qualified educators.”⁷ Though all part of the same ecosystem, current regulations hold nonprofit and governmental research organizations to a higher and less relevant standard for cap-exemption (“primarily engaged”) than nonprofit entities affiliated with colleges and universities

³ Nat'l Science Bd., International STEM Talent is Crucial for a Robust U.S. Economy (2022), <https://www.nsf.gov/nsb/sei/one-pagers/NSB-International-STEM-Talent-2022.pdf>.

⁴ Proposed Rule at 72,934, 72,957-58 (proposed 8 C.F.R. § 214.2(f)(5)(vi)(A)).

⁵ American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, § 103, 114 Stat. 1251, 1252 (2000) (codified as amended at 8 U.S.C. § 1184(g)(5)(A)-(B)).

⁶ S. Rep. No. 106-260, at 3 (2000), <https://www.congress.gov/106/crpt/srpt260/CRPT-106srpt260.pdf>.

⁷ *Id.*

(“fundamental activity”).⁸ The “fundamental activity” standard focuses on the more precise measure of actual work done by H-1B visa holders relative to an organization’s mission, rather than a measure of work done by H-1B visa holders relative to other work in which an organization engages.⁹ The Proposed Rule’s application of the same standard is less arbitrary and better aligns the regulations with Congress’ intent, which was to “to help keep top graduates and educators in the country.”¹⁰

The Proposed Rule’s treatment of H-1B holders who contribute to the missions of qualifying organizations as cap-exempt, even when they are not directly employed by them, also furthers Congress’ intent of “keep[ing] top graduates and educators in the country.”¹¹ It recognizes the unique role of “partnerships between academia and industry,” which have further catalyzed the translation of research into innovation,” by affording cap-exempt organizations the flexibility to attract and retain talent through varying employment arrangements.¹²

In a letter to Director Jaddou, the Global Entrepreneur-in-Residence (“GEIR”) National Peer Network highlighted that “H-1B cap exemptions will be increasingly relevant to facilitating coordination between higher education institutions and nonprofits, companies, and international . . . talent” and their effective administration is required as colleges and universities “return[] to their roots as engines of regional economic growth.”¹³ These undertakings often require collaborative organizational and employment arrangements that must be able to benefit from the cap-exemption eligibility of its component higher educational institutions and nonprofit organizations. For example, cap-exempt eligibility is necessary for personnel at institutions of higher education supporting these collaborations in an administrative, research, or training capacity.¹⁴

In her response to the letter, Director Jaddou referenced current practices that should be codified along with the changes in the Proposed Rule.¹⁵ Specifically, 1) USCIS’ understanding that there is no length of time of prior collaboration between a university and an affiliated nonprofit required for the purpose of the cap-exemption; 2) USCIS’ understanding that government entities can qualify for cap-exemptions; and 3) USCIS’ recognition of university-government collaborations for training, education, and research purposes.¹⁶

⁸ Compare 8 C.F.R. § 214.2(h)(19)(iii)(C), with Proposed Rule at 72,963 (proposed 8 C.F.R. § 214.2(h)(19)(iii)(C)).

⁹ See Proposed Rule at 72,885-86.

¹⁰ S. Rep. No. 106-260, at 10 (2000), <https://www.congress.gov/106/crpt/srpt260/CRPT-106srpt260.pdf>.

¹¹ *Id.*; Proposed Rule at 72,962 (proposed 8 C.F.R. § 214.2(h)(8)(iii)(F)(4)).

¹² Nat’l Science Bd., NSB-2020-15, Vision 2030 at 23 (May 2020), <https://www.nsf.gov/nsb/publications/2020/nsb202015.pdf>.

¹³ Letter from Jim Baker, Assoc. Vice President for Research, Michigan Technological Univ., at 1-2 (Aug. 16, 2023), <https://www.uscis.gov/sites/default/files/document/foia/H-1BCapExemptions-Baker.pdf>.

¹⁴ *Id.* at 2.

¹⁵ See Letter from Ur M. Jaddou, Dir., USCIS, to Jim Baker, Assoc. Vice President for Research, Michigan Technological Univ., at 3 (Oct. 18, 2023), <https://www.uscis.gov/sites/default/files/document/foia/H-1BCapExemptions-Baker.pdf>.

¹⁶ *Id.* at 3-4.

C. The Presidents' Alliance opposes the Proposed Rule's restrictive changes to the definition of "specialty occupation," which would require extra-statutory and counterproductive square peg in a round hole matching exercises between degrees and specialty occupations.

The Proposed Rule seeks to restrict the definition of "specialty occupation" by, among other things, 1) requiring that a specialty occupation have as a minimum entry requirement a U.S. bachelor's degree "directly related [to the] specific specialty," and 2) adopting a blanket exclusion from the definition of "specialty occupation" any occupation that has as a minimum entry requirement "general degrees, such as business administration or liberal arts."¹⁷ It is disappointing to see the Department recycle the same exclusionary language from the previous administration's interim final rule, Strengthening the H-1B Nonimmigrant Visa Classification Program.¹⁸

USCIS should: 1) remove from the definition of "specialty occupation" the "directly related" standard and the blanket exclusion of "general degree[s], such as business administration or liberal arts" in proposed 8 C.F.R. § 214.2(h)(4)(ii), and 2) remove from the position requirement criteria the "in a directly related specific specialty" standard in proposed 8 C.F.R. § 214.2(h)(4)(iii)(1)-(4).¹⁹

Additionally, USCIS should 1) use "job duties of the position" or "job duties" instead of references to "position" in the definition of "specialty occupation" at proposed 8 C.F.R. § 214.2(h)(4)(ii), and 2) use "course of study" instead of "degree" where appropriate in the definition of "specialty occupation" at proposed 8 C.F.R. § 214.2(h)(4)(ii) and position criteria requirements at 8 C.F.R. § 214.2(h)(4)(iii)(1)-(4).²⁰

1. *The Proposed Rule improperly adopts an arbitrary and extra-statutory "directly related" standard for degrees and specialty occupations.*

The Immigration and Nationality Act of 1990 authorized the admission of H-1B visa holders to perform temporary work in "specialty occupations," defined as those that require, "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."²¹

The Proposed Rule rewrites the statute through regulation to require that the degree which is the minimum requirement for entry into the occupation is "in a directly related specific specialty."²² This "directly related" standard calls for a precise match between degree and occupation that is not found in statute. The Proposed Rule goes further by writing into

¹⁷ Proposed Rule at 72,959-60 (proposed 8 C.F.R. §§ 214.2(h)(4)(ii), (iii)(A)(1)).

¹⁸ 85 Fed. Reg. 63,918, 63,965-65 (Dec. 7, 2020) (proposed 8 C.F.R. §§ 214.2(h)(4)(ii), (iii)(A)(1)); see Stuart Anderson, *Biden Immigration Rule Copies Some Trump Plans To Restrict H-1B Visas*, Forbes (Oct. 23, 2023), <https://www.forbes.com/sites/stuartanderson/2023/10/23/biden-immigration-rule-copies-some-trump-plans-to-restrict-h-1b-visas/>.

¹⁹ Proposed Rule at 72,959-60 (proposed 8 C.F.R. §§ 214.2(h)(4)(ii), (iii)(1)-(4)).

²⁰ *Id.*

²¹ Immigration Act of 1990, Pub. L. No. 101-649, § 205, 104 Stat. 4978, 5020 (1990) (codified as amended at 8 U.S.C. § 1184(i)).

²² Proposed Rule at 72,960 (proposed 8 C.F.R. § 214.2(h)(4)(iii)(A)).

regulation a blanket exclusion on “general degrees, such as business administration or liberal arts.”²³ This is misguided:

The proposed rule seems to latch onto old, outdated notions of a business degree being too generalized to qualify for H-1B classification. If a lawyer can qualify for H-1B classification with a JD degree or its equivalent to take up a position as a tax associate or corporate associate, why does the marketing analyst need a business degree with a specialization in marketing rather than be able to qualify with a broad MBA degree?²⁴

USCIS explains in a footnote that the Proposed Rule’s use of degree titles is a matter of expediency, and that adjudicators would still evaluate the relationship between the “actual course of study [and] . . . the duties of the position.”²⁵ This is of little comfort because the Proposed Rule does not reflect this clarification and does not direct adjudicators to look at the relationship that is truly of interest—the relationship between the duties to be performed and the course of study, which includes the classes taken, skills and training acquired, and knowledge obtained.

This mismatch of language and intention could be misinterpreted as requiring a relationship between the position title and degree name. Colleges and universities have great autonomy over the naming and curricula of their degree programs, names of degree programs evolve, and general degree programs can include specific minors, concentrations, or courses of study that are not reflected in the degree name itself. Basing an evaluation of specialty or skill on the name of a degree program could potentially minimize the qualifications of many knowledgeable graduates.

The Proposed Rule’s matching exercises between degrees and occupations will be arbitrary because they simply will not reflect the reality of the skills required to fill specialized positions, instead forcing round pegs in square holes. As a labor economist explained:

“It is a common mistake to think there is an exact correspondence between field of degree and occupation in the technical labor force,” said labor economist and NFAP Senior Fellow Mark Regets. “In reality, employers often hire workers who have gained the necessary skills through other coursework and experience. It is unclear how closely USCIS intends to require an exact match between occupational and degree titles, but even assuming they use very broad categories, many current workers with temporary work visas might not meet the new criteria.”²⁶

²³ Proposed Rule at 72,959 (proposed 8 C.F.R. § 214.2(h)(4)(ii)).

²⁴ Cyrus Mehta, *While the Proposed H-1B Rules Have Many Positive Features, They May Also Result in Requests for Evidence and Denials*, The Insightful Immigration Blog (Oct. 23, 2023), <https://blog.cyrusmehta.com/2023/10/while-the-proposed-h-1b-rules-have-many-positive-features-they-may-also-result-in-requests-for-evidence-and-denials.html>.

²⁵ Proposed Rule at 72,876 n.25.

²⁶ Stuart Anderson, *Biden Immigration Rule Copies Some Trump Plans To Restrict H-1B Visas*, Forbes (Oct. 23, 2023), <https://www.forbes.com/sites/stuartanderson/2023/10/23/biden-immigration-rule-copies-some-trump-plans-to-restrict-h-1b-visas/>.

2. *The Proposed Rule is counterproductive to attracting and retaining global talent in cutting-edge fields of technology.*

In addition to being arbitrary, the Proposed Rule's matching exercises are also counterproductive to the stated goals of this administration to attract and retain global talent, especially in cutting-edge STEM fields. For example, the President's recent Executive Order on Artificial Intelligence calls for "modernizing immigration pathways for experts in AI."²⁷ But the Proposed Rule's strict degree matching requirement will likely exclude many experts from H-1B eligibility by focusing on the name of their degree and not the sum total of their courses of study and experience:

"There is an inconsistency between the proposed rule and AI executive order," according to Kevin Miner of Fragomen. "Unfortunately, there are several aspects of the proposed H-1B regulation that—if implemented as proposed—will have the exact opposite effect and limit[] the ability of highly skilled temporary visa holders to stay and work in the United States.[]"

"The language in the proposed regulation could be used by adjudicators at USCIS to deny H-1B petitions where the degree field doesn't precisely match what the adjudicator believes would be required to perform the role, and with fast-evolving jobs like those in AI, this can change quickly. USCIS would be far better off focusing on the entire course of study—including specific coursework completed—rather than the degree field."²⁸

These deficiencies in the Proposed Rule's new standards have already been highlighted in previous litigation involving similar regulatory proposals. In a declaration, Amazon noted how many of its employees' H-1b eligibility would not survive strict matching exercises, even while they possessed "substantial relevant coursework and technical experience," citing examples of a "data scientist with a psychology degree and substantial coursework in statistics and economics, a software engineer with a chemical engineering degree; and a senior product and consumer insights manager with public administration, applied economics, and finance degrees."²⁹ Illustrating the wide range of fields involved in Artificial Intelligence, including the liberal arts, Microsoft explained in its declaration how it relies on individuals with backgrounds in computer science, mathematics, linguistics, philosophy, and ethics for its Artificial Intelligence research.³⁰

²⁷ Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, Exec. Order 14110, § 5.1(d)(i), 88 Fed. Reg. 75,191, 75,205 (Nov. 1, 2023).

²⁸ Stuart Anderson, *Biden Executive Order on AI Could Help Immigrant Professionals*, Forbes (Nov. 7, 2023), <https://www.forbes.com/sites/stuartanderson/2023/11/07/biden-executive-order-on-ai-could-help-immigrant-professionals/>.

²⁹ Plaintiffs' Notice of Motion and Motion For Preliminary Injunction to Stay Agency Action or for Partial Summary Judgment at 21, *Chamber of Commerce v. Dep't of Homeland Sec.*, 504 F. Supp. 3d 1077 (N.D. Cal. 2020), <https://www.uschamber.com/assets/documents/Motion20for20Preliminary20Injunction20or20for20Partial20Summary20Judgment20-20U.S.20Chamber20v.20DHS2028N.D.20Cal.29.pdf>.

³⁰ *Id.*; see also Autumn Toney Melissa Flagg, Center for Sec. and Emerging Technology, U.S. Demand for AI-Related Talent Part II: Degree Majors and Skill Assessment 4 (Sept. 2020) ("Interestingly, Business Administration/Management appears in both top five lists [of degrees required for AI-job postings]."), <https://cset.georgetown.edu/wp-content/uploads/CSET-U.S.-Demand-for-AI-Related-Talent-Part-II-1.pdf>.

III. Conclusion

Thank you for undertaking this effort to modernize H-1B regulations. We appreciate the opportunity to provide our perspective, based on the experiences of our many member institutions. Our sincere hope is that USCIS' final rule will encourage highly skilled individuals to invest their time and talents in the United States to the benefit of our communities, economy, and national competitiveness. If you require further information, please do not hesitate to contact Corinne Kentor at [REDACTED]

Sincerely,



Miriam Feldblum
Executive Director
Presidents' Alliance on Higher Education and Immigration