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Submitted via Regulations.gov

Charles L. Nimick, Division Chief
Business and Foreign Workers Division
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Suite 1100
Washington DC 20529

Re: DHS Docket No. USCIS-2020-0019
RIN 1615-AC61

Dear Division Chief Nimick,

The undersigned associations, coalitions, and groups come to you jointly to express our concern that the Department of Homeland Security's (hereafter referred to as DHS or Department) Notice of Proposed Rulemaking entitled "Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions" (hereafter referred to as the NPRM or H-1B Wage Prioritization proposal) puts forward a policy shift that is not permitted under the Immigration and Nationality Act's (INA) statutory language and, even if lawful, proposes a prioritization construct that would be damaging to the economic success of the nation.

In order to address the important underlying issues the Department raises in its NPRM preamble explanation, many of the undersigned organizations would welcome the opportunity to engage in informal dialogue with the Department and/or to formally participate in an Advance Notice of Proposed Rulemaking process that would allow the private sector time to develop and provide more information or data to help DHS determine whether a rule is needed, what regulation to develop, and what alternative suggestions are most viable, especially in light of the limitations of the governing statute.

Commenters' Interests

Signatories to this comment have a keen interest in helping to ensure that the U.S. immigration process effectively promotes – with appropriate integrity and security safeguards – the desirability and ability of high-skilled foreign-born professionals to be employed in our country.

Despite differences in approach, sector, and membership, each signatory has found that **high-skilled immigration is a key component of the ongoing ability of the United States to obtain and retain the talent necessary for the U.S. economy to continue to innovate and create jobs in the United States**.

To maintain the nation's strength and competitiveness, many of the nation's employers hire the talents of well-educated and highly skilled professionals who happen to be foreign-born along with the vast preponderance of U.S. workers that make up their workforce. The ability to hire appropriate, eligible individuals in H-1B visa status is an important tool to bring that workforce together. Established in the 1952 rewrite of the nation's immigration laws, for over **65** years the H-1 visa classification has existed to allow U.S. employers to hire professionals born outside our country working in an occupation that typically requires the type of knowledge only obtained through completion of a university education. Since 1990, this category has been subject to numerical limits and a Labor Condition Application to protect the U.S. labor market, and designated as the H-1B visa. Our members reasonably expected the

H-1B visa category to continue to be available to allow U.S. employers to hire new professional staff, including early-career professionals and international students earning undergraduate, graduate, and professional degrees at U.S. institutions of higher education. DHS's NPRM directly upsets these reliance interests.

Having been provided no advance notice of DHS's intent to publish this proposal, employers have not long considered alternatives or done advance work collecting information to assess impacts. The procedural foul of not noting this rulemaking on the Department's Unified Agenda was exacerbated by DHS's refusal to provide the normal 60-day comment period. Given our limited opportunity to assemble a fully responsive comment, our primary concerns about the NPRM may be summarized as follows.

Wage Prioritization is Not Permitted Under the INA

Congress spoke directly and clearly by stating that H-1B petitions were subject to a numerical limit and would be considered not by order of skill or wage levels, by relative value to the U.S. economy, or by any other prioritizing criterion other than filing order. This is unambiguous in the statute where the INA establishes that consideration for an H-1B visa or status "shall" be "in the order in which petitions are filed."[1] This clarity from Congress is utterly consistent with the simple fact that Congress understood the H-1B classification as the sole nonimmigrant category designed to allow any U.S. employer in any sector to hire a specialty occupation professional, from early-career post-doctoral researchers to late-career executives. Reasonably, since 2005 DHS has had a regulation on the books that treated petitions submitted at the outset of the filing window for cap-subject H-1B petitions as simultaneously submitted and then conducted a random lottery among those simultaneously-submitted. The agency's regulations first established a mechanism for identifying simultaneously-filed H-1B petitions during the first five business days of the filing window and then, more recently, transitioned in March 2020 to an electronic registration process where the governing regulation allowed random lottery consideration of all cap-subject H-1B petitions duly registered during a registration window. These reasonable rules, logic-compelled, do not in any way validate or necessitate the new H-1B Wage Prioritization proposal.

Indeed, it appears that DHS understands that the INA is clear and does not permit the type of prioritization it proposes here. It reached that exact conclusion just last year when it published the underlying H-1B Registration Requirement regulation it now seeks to modify. In January 2019, in response to commenters' suggestions to consider quotas or prioritization of certain H-1B petitions based on salary or sector of employer activity or other criteria, the Department explained in the final rule such options were unavailable under the statute. "DHS believes, however, that prioritization of selection on other bases such as those suggested by the commenters would require statutory changes. DHS believes that implementing a quota would be inconsistent with the existing statute, as Congress has implemented quotas in other contexts when it has intended to do so."[2] Similarly, when the agency first codified its implementation of the current statutory language, in December 1991, the final rule preamble simply and clearly stated "the statute requires that aliens are to be issued visas in the order in which petitions are filed."[3]

[1] INA §214(g)(3).
[2] 84 Fed. Reg. 888 at 913 (January 31, 2019).
[3] 56 Fed. Reg. 61111 at 61112 (December 2, 1991). When explaining H-1B provisions in the INA as amended by IMMACT90, legacy INS included the imperative to adjudicate H-1B petitions in the order filed and the new numerical cap established by Congress as both being *equally clear*. "The Service has no authority to raise the cap beyond the limits imposed by Congress. … Further, the statute requires that aliens are to be issued visas in the order in which petitions are filed."

We believe the statutory directive to order H-1B petition consideration "in the order in which petitions are filed" is clear-cut and that the Department's claimed legal justification is without merit.

Early-Career Master's or Bachelor's Graduates Cannot be Excluded

There is significant economic literature in peer-reviewed publications extolling the benefits of high-skilled immigration to the United States[4] that DHS left unmentioned and unconsidered – presumably because the Department does not appear to see the harm its NPRM does to these benefits. Yet, the NPRM's faulty policy choices create a regulatory framework that aggressively obstructs these national benefits in innovation and economic activity.

The harm from the NPRM flows from the fact that the proposal does *not* allow well-compensated but early-career professionals that happen to be foreign-born to be hired by compliant U.S. employers paying competitive wages, including international students recently completing undergraduate, graduate, or professional degrees from American colleges and universities.

The OES levels DHS relies upon for its new H-1B prioritization scheme are intended to be *skill* levels.[5] DHS states it is trying to prioritize registered H-1B petitions by skill level,[6] but then admits throughout its preamble explanation[7] that it expects the result of the proposal would be to incentivize employers to offer *either* higher wage jobs or higher skilled positions to H-1B workers. In fact, though, neither is the case and we believe it is clear that the proposal merely awards tenure or seniority.

In the real-world U.S. labor market for professionals, employers value professionals at *all* skill levels and the most highly skilled might still be early-career professionals. Consider, for example, a newly-minted PhD in Cyber Physical Systems, who would be compensated at OES Level 1 or 2 because for the occupation in which she is hired she is an entry-level staffer. Compare the skill set of this PhD STEM professional with an experienced, supervisory auditor or accountant with a Bachelor's degree who must reference many years of prior employment to perform her job duties and would be classified under OES Level 4. It is not evident, obvious, clear, certain or otherwise known – or knowable from a formula – that the Level 4 auditor is more highly-skilled than the PhD STEM professional.

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[4] A sampling of the peer-reviewed literature that the Department failed to evaluate includes: A Journal of Economic Perspectives study on Global Talent Flows (Fall 2016) found very little displacement of U.S.-born innovators and high-skilled professionals by high-skilled immigrants, while also identifying significant boosts to innovation and productivity by such immigrants. In a Handbook of Regional and Urban Economics (2015), economists found that foreign-born workers boost productivity of native-born Americans at the local level. In a study in the Labour Economics journal (December 2019), economists found that the foreign-born share of STEM professionals in the United States increased from about 16% to 24% over the period 2000 to 2015 creating an estimated benefit of $103 billion for American workers almost all "attributed to the generation of ideas associated with high-skilled STEM immigration which promotes the development of new technologies that increase the productivity and wages of U.S.-born workers." A July 2018 economic study on High-Skill Immigration, Innovation, and Creative Destruction concluded from firm-level analysis that H-1B visa petitions are associated with higher rates of product reallocation for American firms (entry of new products and exit of outdated products). See also, e.g., Alex Nowrasteh, Don't Ban H-1B Workers: They Are Worth Their Weight in Innovation (Cato Institute, May 14, 2020), for a summary of the peer-reviewed economic literature about the value of H-1B professionals and high-skilled foreign-born workers in the United States economy that DHS did not identify or consider in developing or explaining its approach to the H-1B Wage Prioritization proposal.

[5] See, Department of Labor Prevailing Wage Determination Policy Guidance at pp. 7, 9-13, and Appendix A (last updated November 2009).

[6] See, e.g., 85 Fed. Reg. 69236 at 69239 (November 2, 2020).

[7] See, e.g., id. at 69240.

Moreover, continuing the example, it is not knowable if, relative to her skill level, the Level 4 auditor is more highly-compensated than the Level 1 or 2 PhD STEM professional. And, we do know the Level 4 auditor in many geographies across the country would *not* receive a salary that is higher in dollar value than a Level 1 or 2 STEM professional in certain other job locations. There is no single metric that could, would, or should measure the value of a particular professional or position in all situations. Most fundamentally, though, it is simply incorrect that tenure or seniority, the only thing measured in DHS's H-1B Prioritization proposal, can reliably identify the most highly-skilled or most highly-paid as DHS purports is the purpose of its proposal.

The Department's NPRM, in effect, would *prevent* the hire of early-career, foreign-born professionals with either undergraduate, graduate, or professional training, including those earning degrees from United States colleges and universities and including the very U.S. Masters and above recipients for which Congress set-aside 20,000 of the 85,000 cap-subject new H-1B initial-approval petitions each year. Yet, U.S. employers have, properly, relied on the ability to hire early-career professionals under the statute. International students are aware of these opportunities, too, and in part that is what drives the highest-achieving foreign-born students to seek a U.S. university degree, especially in graduate-level STEM-centric programs.[8] It is not far-fetched to worry about how the Department's proposal here could further drive away such talent, harming the U.S. higher education and business communities and the U.S. role in cutting edge activities. Indeed, in a recent survey, 46% of foreign-born graduates of U.S. PhD programs in Artificial Intelligence who were still in the United States reported that immigration difficulties were making them more likely to leave.[9]

Furthermore, throughout the U.S. economy there are entire staffing, recruitment, and training models *and* business unit long-term and short-term planning that rely on access to early-career professionals. It is not untoward that some foreign-born professionals are also in this cohort. As directly permissible under the governing INA,[10] 63% of Labor Condition Applications necessary for H-1B sponsorship are filed for early-career professionals (49% at level 2, 14% at level 1) – many of which are international students earning degrees at U.S. colleges and universities, especially at the graduate level.

For at least the last 50 years, this agency and its predecessor have consistently recognized that this category is appropriate for professionals at all skill levels. Under the predecessor "H-1" classification, individuals with "distinguished merit and ability" included "members of the professions," comparable to the current "specialty occupation" delineation. Questions arose as to whether the agency had authority to exclude "entry-level professionals." INS explained that the inclusion of entry-level members of a profession had been well-established before 1970 and concluded in 1990 "that a Congressional amendment to the statute would be required to change the current interpretation after such a long time."[11]

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[8] About 53% of STEM Master's and 43% of STEM PhD graduates from U.S. institutions are international students, while only 7% of undergraduate STEM degrees in the U.S. go to international students. See, National Center for Educational Statistics, Digest of Education Statistics 2018 (U.S. Department of Education, 2019) at Table 318.45; *accord*, Madeline Zavodny, International Students, STEM OPT and the U.S. STEM Workforce (National Foundation for American Policy, March 2019) at p. 11.

[9] Catherine Aiken, James Dunham and Remco Zwetsloot, Immigration Pathways and Plans of AI Talent (Center for Security and Emerging Technology, September 2020).

[10] INA Section 214(i)(1). See, e.g., Matter of B-C Inc. (decided January 25, 2018) confirming that the skill level required for the job duties (skill level 1, 2, 3, or 4) does not control whether it is in a qualifying specialty occupation.

[11] See 55 Fed. Reg. 2606 at 2608-2609 (January 26, 1990).

No such statutory amendment barring early-career professionals has occurred. Nothing in the INA contemplates or suggests that DHS could ever take a position to disfavor early-career professionals from securing H-1B status by working at a Skill Level 1 or 2 in a specialty occupation. We believe that the Department's H-1B Wage Prioritization proposal does exactly that and for that reason must be discarded.

Insufficient Factual Basis to Propose a New Regulation

In numerous places throughout the NPRM, DHS communicates its failures to gather sufficient underlying information before publication of its proposal. DHS states it only possesses OES leveling information for slightly more than half of H-1B petitions the last two fiscal years,[12] yet feels the Department can legitimately create a cost-benefit analysis of a proposal that limits H-1B access by OES level. And, there are numerous places in the NPRM where the Department delineates critical inquiries for public input about which it appears the Department has not yet undertaken analysis before publishing its proposal.[13]

Similarly, DHS states that it believes it will take H-1B employers, or their counsel, 19.8 minutes to undertake the complex new analysis needed to complete the electronic registration for each potential H-1B petition to add the new OES leveling information[14] – which is an absurd understatement. DHS does not explain that H-1B employers, or their counsel, will need to complete in full many of the key elements of the preparation of the underlying H-1B petition in order to settle on the OES leveling that will now be required to register. Given that the primary basis of the H-1B Registration Requirement rule finalized January 2019 was cost savings and the promise that petitioners would *not* have to prepare H-1B petitions in order to register, this is a blatant failing of the instant proposal. For this reason, we ask that, even if finalized, H-1B Wage Prioritization should not be applied to the March 2021 registration period for cap-subject H-1B petitions in FY2022. Employers are already deep into the process of converting fall offers of employment into registered H-1B beneficiaries, in anticipation of the March 2021 registration period. It would be chaotic to now insert a new prioritization into what was advertised as a cost-saving process where little preliminary work was supposed to be needed to register H-1B petitions.

DHS proceeded apace to get this NPRM published without ever placing it on the Department's Unified Agenda and *without* the normal undergirding agencies are expected to establish under the Administrative Procedure Act when proposing rules. DHS appears to be operating under the misconception that "anything" can be published as an NPRM and the burden then shifts to the regulated public to figure out and document the possible impact of the proposal. In fact, though, the Administrative Conference of the United States recently confirmed otherwise. In December 2018 the Administrative Conference of the United States adopted new recommendations to enhance public engagement in rulemaking, in order to avoid agencies proceeding with regulatory proposals that do not first assemble the necessary, comprehensive information needed to tackle complex problems.[15] The new recommendations were intended to better ensure agencies obtain "situated knowledge" as part of rulemaking efforts – an acknowledgement that public officials benefit from having access to knowledge that is widely dispersed among stakeholders.[16] "In particular, agencies need information from the industries they regulate, other

[12] 85 Fed. Reg. 69236 at 69250 (November 2, 2020), where DHS explains it has no information on the distribution of OES leveling on the 44% of H-1B petitions that were not selected in the lottery over the last two fiscal years.
[13] Id. at 69242, 69255, 69256, 69258, 69259, 69260 (November 2, 2020).
[14] Id. at 69256.
[15] 84 Fed. Reg. 2139 at 2146-2148 (February 6, 2019), Administrative Conference Recommendation 2018-7, Public Engagement in Rulemaking (adopted December 14, 2018).
[16] M. Sant'Ambrogio and G. Staszewski, Michigan State University, Public Engagement with Agency Rulemaking (Administrative Conference of the United States, November 19, 2018) at p. 3.

experts, and citizens with situated knowledge of the field in order to understand the problems they seek to address, the potential regulatory solutions, their attendant costs, and the likelihood of achieving satisfactory compliance."[17]

It is evident to us that DHS did not have sufficient specifics, data, or facts to proceed with this rulemaking. DHS should not attempt to finalize the H-1B Wage Prioritization proposal and instead should gather more background before restarting the regulatory process with both informal outreach with representative stakeholders followed by an Advance Notice of Proposed Rulemaking (ANPRM) process to inform development of a new NPRM.

Conclusion

We value the opportunity to participate in the rulemaking as well as policy development and implementation processes.

We urge DHS to take no further steps to finalize the NPRM, and we ask that DHS not restart the regulatory process on this initiative without first conducting government data-gathering, stakeholder meetings, and an ANPRM process.

While prioritization schemes are not permitted under the current statutory language of the INA, many of the signatories here stand ready to work with the Department to constructively address the important issues raised in the NPRM's preamble, including through an ANPRM that is accompanied by ample time for the public to conduct surveys and studies to provide useful responses.

Respectfully submitted,

American Chemical Society
American Immigration Council
American Immigration Lawyers Association
American Society of Nephrology
Association of American Universities
Association of Public and Land-grant Universities
BSA | The Software Alliance
Compete America Coalition
FWD.us
HR Policy Association
Information Technology Industry Council (ITI)
International Medical Graduate Taskforce
Internet Association
NAFSA: Association of International Educators
National Immigration Forum
TechNet
U.S. Chamber of Commerce
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[17] Id. at p. 10.