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OF THE
UNITED STATES OF AMERICA

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Chief Charles L. Nimick
Business and Foreign Workers Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20259

By electronic submission: www.regulations.gov

RE: Strengthening the H-1B Nonimmigrant Visa Classification Program
85 Fed. Reg. 63918 (October 8, 2020)
RIN 1615-AC13

Dear Chief Nimick:

The U.S. Chamber of Commerce submits the following comments regarding the interim final rule (IFR) referenced above. Companies across various industries are very concerned about the operational disruptions this rule would impose upon their businesses. The various provisions contained within this IFR inject a significant amount of uncertainty into whether a company will be able to continue meeting its workforce needs in the U.S.

A key contributing factor as to why American companies are anxious about the impact this rule will have on their businesses is due to the manner in which the IFR was promulgated. DHS chose to bypass the typical notice-and-comment process prescribed by the Administrative Procedure Act and published this rule as an Interim Final Rule, citing the imperative of addressing the "economic crises, including high unemployment" caused by COVID-19.[1] The attempted imposition of these significant changes to the H-1B program's operation without affording stakeholder a meaningful opportunity to provide feedback was so troubling for many companies that the Chamber and many others filed suit against the federal government to prevent this rule from taking effect. While the Federal District Court for the Northern District of California recently decided to set this rule aside and prevent its implementation,[2] companies remain worried about the impact this rule will have on their companies should DHS seek to finalize the IFR in the coming weeks.

[1] *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Federal Register 63918, 63940 (Oct. 8, 2020).
[2] *U.S. Chamber of Commerce et al. v. DHS,* (20-cv-07331), p. 23, (Dec. 1, 2020).

It is our understanding that DHS intends to issue a final Strengthening the H-1B rule soon. We implore the agency to halt its plans to finalize this rule hastily and withdraw this rule in its entirety.

The myriad changes made by the IFR would impose significant burdens on employers that rely upon H-1B workers for their critical workforce needs. The restrictive eligibility standards, the arbitrary compliance obligations imposed upon companies that place their H-1B workers at third-party worksites, and onerous paperwork burdens are significant concerns to many Chamber members, as these provisions would disrupt their business operations in a manner that inhibits economic growth and job creation in the U.S.

THE CHANGES TO "SPECIALTY OCCUPATION" DEFINITION AND CRITERIA EXCEED CONGRESSIONAL AUTHORITY

The changes DHS made to the "specialty occupation" definition significantly narrow the types of people who can qualify as an H-1B worker in a manner that is inconsistent with the statutory text governing the H-1B program's operation. The relevant text of the Immigration and Nationality Act (INA) states that a "specialty occupation" is one 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."[3]

DHS asserts the changes contemplated in the IFR ae being made to ensure conformity with the statutory definition and promote consistent adjudication.[4] However, the rule rewrites the relevant regulatory text in a manner that significantly restricts eligibility for an H-1B visa in a manner that was never contemplated by Congress. DHS adds further clarifying language in two key sections that define the contours of the "specialty occupation" definition that limits program eligibility by requiring that the college degree that a prospective H-1B worker must possess has to be in a "directly related" specific specialty.[5]

With regard to the "specialty occupation" definition, the statutory text only refers to an H-1B worker having to possess a "bachelor's degree in the specific specialty (or its equivalent)" and the new "directly-related" qualifier inserted in the "specialty occupation" definition operates to constrain H-1B eligibility to a greater extent that what Congress desired when it crafted these provisions of the INA.[6] DHS argues that this regulatory text should not be "misconstrued as necessarily requiring a singular field of study,"[7] but it is difficult for many employers to see how USCIS adjudicators would implement these regulatory changes in a manner that wouldn't result in that happening in many circumstances. DHS provided examples on degrees in engineering or

[3] See INA § 214(i), 8 U.S.C. §1184(i).
[4] 85 Fed. Reg. 63918, 63926 (Oct. 8, 2020).
[5] See Proposed 8 C.F.R. §214.2(h)(4)(ii) and Proposed 8 C.F.R. §214.2(h)(4)(iii), 85 Fed. Reg. 69318, 63964-63965 (Oct. 8, 2020).
[6] INA §214(i), 8 U.S.C. §1184(i).
[7] 85 Fed. Reg. 63918, 63925 (Oct. 8, 2020).

quantitative fields not being sufficient to meet the "specialty occupation" because those fields are not "directly related" to the job in the IFR's preamble, and many employers fear that DHS would follow a similar approach in how it adjudicates these questions for many other types of H-1B workers that they need for their companies.[8]

Many companies expressed to us similar anxiety regarding the IFR's changes in the criteria used by USCIS to determine whether a position offered by an employer is in a "specialty occupation."[9] DHS claims that the current regulatory text, which uses they qualifying terms "normally," "common," or "usually" with respect to the degree that the H-1B employee possesses, e.g. a degree is "normally" required for a particular position.[10] DHS further argues that the current regulatory text creates ambiguity and that since the aforementioned qualifying words are not contained in the statute, then they should be eliminated from the governing regulations.[11] The agency's logic here is questionable. On the one hand, DHS seeks to not simply eliminate the modifying language that it believes is inconsistent with the statute. However, on the other hand, DHS proposes to add its own qualifying language with its "directly related" references. In this regard, the words "directly related," just like the current qualifying references to "normally," "common," and "usually," appear nowhere in INA §214(i); as such, if DHS were being logically consistent, it's preferred modifying language to the criteria also has no place in the governing regulations either.

More importantly, the current text used in the governing regulations does not create ambiguity – what it does is create flexibility for the agency to adjudicate petitions in the way that Congress intended. The executive branch agency that has been responsible for adjudicating H-1B petitions has changed with the passage of tie, but DHS's IFR is the first example of any federal agency seeking to constrain the H-1B program's application in a manner that is more restrictive than what Congress authorized under the INA.[12] While DHS officials may have misgivings about the current regulatory text, the Department cannot seek to replace the current regulatory text with language that is more restrictive than what is contained in the statute. That would be an impermissible exercise because doing so requires DHS to invoke authority that it does not possess. Simply put, the Department cannot restrict program eligibility beyond what Congress intended by substituting its judgment on its preferred policy for the policy set forth by the legislative branch.

THE CHANGES TO THE "SPECIALTY OCCUPATION" DEFINITION AND CRITERIA CAUSE SIGNIFICANT BUSINESS DISRUPTIONS

An all-but-certain result from these new restrictive definitions and criteria is that many prospective H-1B recipients will be ineligible to work in the U.S. This affects not only prospective H-1B workers currently outside the U.S., but also prevent many H-1B employees from continuing to

[8] 85 Fed. Reg. 63918, 63926 (Oct. 8, 2020).
[9] 85 Fed. Reg. 63918, 63965 (Oct. 8, 2020).
[10] See 85 Fed. Reg. 63918, 63926 (Oct. 8, 2020) and 8 C.F.R. §214.2(h)(4)(iii).
[11] 85 Fed. Reg. 63918, 63926 (Oct. 8, 2020).
[12] INA §214(i), 8 U.S.C. §1184(i).

work in the U.S. This latter concern was expressed to us by many companies, including technology firms, financial services companies, manufacturers, retailers, among many others.

Regarding the disruptions to current business operations, many employers have relied upon the H-1B program's operations to their detriment, as they've made business plans and expended limited company resources to ensure workforce continuity. Relatedly, the H-1B workers and their families have relied upon the rules as they currently exist and made various decisions to remain in the U.S. To that end, many current H-1B workers have accepted offers from their employers to work in the U.S. permanently and began the process of being sponsored for lawful permanent resident status through their employer. The significant changes that DHS seeks to impose through this IFR pulls the rug out from under U.S. companies, their H-1B workers, and the worker's families in an incredibly disruptive fashion.

From a practical standpoint, if these new rules allowed to stand, these provisions would be the proximate cause for various operational disruptions for many different companies e.g. delayed R&D initiatives, ongoing projects halted, work being moved offshore to follow workers that must leave the U.S. The uncertainty and disruption caused by these changes will increase business' operational costs and diminish productive capacity and efficiency, leading to slower business growth and job creation. Lastly, the costs that companies would need to incur to replace the workers they can no longer employ in the U.S. would be significant, as companies would be forced to recruit and train new workers, assuming that willing, able, qualified, and available U.S. workers can be found to fill these newly-created job vacancies. Many companies are worried that if many of their current H-1B workers cannot extend their status due to these regulatory changes, they will be unable to fill these openings.

Another concern our members is how these disruptive these new changes will be to companies in industries that contain new and emerging fields of employment. Oftentimes, degree programs at many U.S. universities simply don't offer one specific degree in a field that would fit into the IFR's new "directly-related specific specialty" rubric with respect to the job being offered to the H-1B worker. For example, a notable health care provider from the western part of the country informed us about their concern regarding the new important field of bioinformatics. Individuals seeking employment in this field could have degrees in computer science, biology, or engineering, but none of those fields are not "bioinformatics." This presents a risk to this employer in that if the company needs an H-1B worker in this field, it might not be able to obtain said worker due to the rigid new definition and criteria language being established by DHS in this IFR. Stakeholders in many other industries, such as financial technology firms, manufacturers, among others, have similar concerns. These concerns are all tied to their respective company's ability to innovate and create new products and services. In these emerging fields, employers oftentimes need workers with a mix of skills that don't fit cleanly into an existing occupational classification. If businesses are not confident that they can meet these critical workforce needs, it affects all sorts of other important decisions that influence whether companies expand their U.S. operations and drive domestic job creation. We strongly urge DHS to refrain from finalizing this rule, or any future rule, with these or similar provisions contained within it.

EMPLOYERS NEED FURTHER CLARITY ON HOW THE SPECIALTY OCCUPATION CRITERIA WILL BE ADJUDICATED

Many companies have expressed reservations over the manner in which DHS sought to impose the specialty occupation criteria. In the rule's preamble, DHS explicitly states that even though an employer must meet at least one of the criteria set forth in the new regulatory text, meeting that criteria might nevertheless be insufficient for the purposes of showing that the job is in a specialty occupation. The prospect of DHS holding different employers to different standards for program eligibility has many businesses concerned that USCIS is reserving the authority to adjudicate H-1B petitions inconsistently and arbitrarily.[13]

DHS claims that these changes eliminate any confusion that the interpretation of these provisions have caused for stakeholders, but these changes will likely cause confusion for businesses and their H-1B workers. Many of the H-1B petitions that American employers file are for their current workers, many of whom have an approved I-140 Immigrant Petition for Alien Worker and are patiently waiting for their green card while they work in the U.S. Given these new criteria have became more stringent under the IFR and DHS stated that a petitioner may need to meet more than one of these criteria for their H-1B worker to be eligible for a visa,[14] the future employment of that H-1B worker in the U.S. becomes significantly less certain. The lack of clarity on how these criteria will be adjudicated by USCIS will create more confusion for stakeholders, as these provisions provide no meaningful guidance to employers with respect to what standards(s) they will be held to as they seek visas for their H-1B workers. The IFR's lack of any meaningful assurances to stakeholders with regard to how their H-1B petitions will be adjudicated needlessly increases the uncertainty companies must face in order to meet their workforce and maintain their productivity levels. We implore the Department to discard the approach in the IFR and embrace the prior criteria that have been in place for several years. If an H-1B petitioner shows that the company meets one of the four listed criteria, that evidence should be treated as both necessary and sufficient for satisfying the burden of proving to the government that the worker will be employed in a specialty occupation.

ARBITRARY VISA VALIDITY LIMITATIONS FOR H-1B WORKERS AT THIRD-PARTY WORKSITES WILL HARM EMPLOYERS

DHS seeks to limit the visa validity period for an H-1B worker that will be working at a third-party client's worksite to just one year in duration.[15] The Department justifies this decision in large part on its assertions that companies that place their workers at third-party sites are more likely to commit H-1B fraud and abuse. DHS used a Department analysis that sampled the compliance review of certain H-1B employers as evidence to back up this point.[16]

[13] 85 Fed. Reg. 63918, 63926-63927 (Oct. 8, 2020).
[14] 85 Fed. Reg. 63918, 63926 (Oct. 8, 2020).
[15] 85 Fed. Reg. 63918, 63965 (Oct. 8, 2020).
[16] 85 Fed. Reg. 63918, 63936 (Oct. 8, 2020).

The Chamber acknowledges that combating fraud and abuse in the H-1B program is a legitimate government objective. However, limiting the visa validity period for certain H-1B workers simply because their employer places them at a third-party client worksite is another arbitrary decision by the Department to substitute its judgment for that of an American employer. Given DHS' insistence on H-1B employers providing USCIS with corroborating evidence of work in a specialty occupation at the time of filing, it is illogical for the government to prevent an employer from employing an H-1B worker at a third-party client site for one year if the employer can show they have concrete, non-speculative work for the employee for a period in excess of one year.[17] While USCIS's site visit data suggests that companies engaging in third-party placements have significantly higher noncompliance rates than companies that do not engage in this practice, the agency provides no evidence to reasonably infer that requiring these employers to file more petitions for their workers would lead to increased program compliance.

These visa validity limitations will have a significant impact on affected employers. The costs associated with maintaining their workforce capacity in the U.S. will increase substantially due to the need to file more immigration petitions to maintain workforce continuity. The impact of these changes will be most acute on firms that have 50 or more employees and 50% of their aggregate workforce are either H-1B or L-1 workers, who will have to an additional $4,000 per worker should USCIS' Final Fee Schedule Rule take effect.[18] In addition, this provision will cause an increases in the overall filing of H-1B petitions, which could easily exacerbate the current problems USCIS faces with case processing delays and backlogs.

DHS should not single out certain companies and impose this unique compliance burden upon them, as this will harm companies in various industries. Many think these additional paperwork and cost burdens will only apply to IT services companies or accounting firms that employ a third-party services business model, but there are many health care providers who place foreign national physicians at multiple health care facilities. There is no indication in the IFR's text that would indicate that DHS considered how many companies, and in what industries, would be negatively impacted by these new compliance burdens.

EMPLOYERS NEED MORE SPECIFICITY WITH REGARD TO DHS' CORROBORATING EVIDENCE AND SITE VISIT REQUIREMENTS

The IFR requires that at the time of filing an H-1B petition, the employer must establish that it has actual work in a specialty occupation available for the beneficiary as of the start date of the validity period requested on the H-1B petition.[19] The IFR further expands the types of corroborating evidence that petitioners must submit if their workers are to be placed at third-

[17] See 85 Fed. Reg. 63918, 63933 (Oct. 8, 2020), where the Department states that speculative employment is not permitted under the program. If a company that will place its worker at a third-party client site can prove to the satisfaction of USCIS that it has non-speculative employment for that worker for greater than a one-year period, the employer should be treated like all other H-1B employers and be subject to the same program limitations.
[18] *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Requests*, 85 Fed. Reg. 46788 (Aug. 3, 2020)
[19] 85 Fed. Reg. 63918, 63933 (Oct. 8, 2020).

party client sites. In creating these additional evidentiary burdens for certain companies, DHS takes the position that the current, longstanding requirements for statements by employers are not sufficient to establish work in a specialty occupation. Specifically, the IFR require employers to submit contracts, work orders, "or other similar evidence," and that "the totality of the evidence submitted by the petitioner must be detailed enough to provide a sufficiently comprehensive view of the work available and substantiate, by a preponderance of the evidence, the terms and conditions under which the work will be performed."[20]

Increasing the paperwork burden for certain employers in this manner will raise the costs that affected employers must bear to file H-1B petitions, with the potential for significant disruptive impacts on a company's ability to maintain the H-1B workers it currently employs in the U.S. DHS provides no clarity as to what exactly an employer must provide to meet this burden, aside from the assertion that the evidence "must be detailed enough to provide a sufficiently comprehensive view of the work available and substantiate, by a preponderance of the evidence, the terms and conditions" of employment.[21] Furthermore, USCIS will make these determinations on a case-by-case basis.[22]

It is incumbent upon DHS to notify stakeholders what is required of them to meet this burden with a reasonable degree of specificity. Several Chambers members view the language used by DHS as notifying stakeholders that "the burden is whatever we feel it should be," which leaves employers subject to these requirements in a precarious position of having to guess what exactly constitutes enough information for the government to render a favorable decision.

A similar lack of clarity and certainty is present in the Department's site visit authority contained in the IFR. The regulatory language crafted in the IFR is, in the view of many companies, very open-ended and provides little in the way of guidance to an employer as to what actions they would need to take in order for USCIS to find that the employer complied with the agency's request to verify the information contained within an H-1B petition.[23] The sweeping authority claimed by the agency provides USCIS with an opportunity to treat employers with unchecked authority to engage in on-site inspections and delay the adjudication of H-1B visa petitions indefinitely.[24] While the Chamber appreciates the Department's view that site visits are important to maintaining program integrity, the Department cannot claim unchecked authority to engage in these visits. If USCIS wants to conduct site visits, then USCIS must establish procedures that will govern these investigations and provide employers with the type of due process to ensure that everyone's interests in this system are properly upheld.

[20] 85 Fed. Reg. 63918, 63934 (Oct. 8, 2020).
[21] *Id.*
[22] *Id.*
[23] See proposed 8 C.F.R. §214.2(h)(4)(i)(B)(7), 85 Fed. Reg. 69318, 63963 (Oct. 8, 2020).
[24] See proposed 8 C.F.R. §214.2(h)(4)(i)(B)(7)(ii), stating that satisfactory completion of an on-site inspection will be a condition for approval of any petition. This language appears to provide USCIS with the ability to hold up any petition, not merely any H-1B petition. 85 Fed. Reg. 63918, 63964 (Oct. 8, 2020).

CONCLUSION

Businesses across multiple sectors of the U.S. economy are extremely concerned about the operational disruptions their companies would experience should this IFR, or a substantially similar rule, be implemented in the near future. This IFR suffers from many critical flaws and we implore the Department to withdraw this rule.

Thank you for considering our views.

Sincerely,

Jonathan Baselice
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U.S. Chamber of Commerce