U.S. Chamber of Commerce

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Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject HJ-1B Petitions.
CIS No. 2820-25DHS Docket No. USCIS-2025-0040
RIN: 1615-AD01, 90 Fed. Reg. 45986 (Sept. 24, 2025)

Dear Sir or Madam:

The U.S. Chamber of Commerce (U.S. Chamber), the world's largest business organization representing employers of every size and across every sector of the economy, respectfully submits the following comment in response to the above-captioned Notice of Proposed Rulemaking (NPRM or proposed regulation), published by the Department of Homeland Security (the Department or DHS), U.S. Citizenship and Immigration Services (USCIS), on September 24, 2025. According to the NPRM, comments from the public are due to USCIS 30 days from the date of publication.

As a threshold matter, the U.S. Chamber supports the Department's objectives to ensure the integrity of our nation's immigration system and prevent abuse of the H-1B and other visa programs. Just as the Trump administration's efforts have led to a secure border, integrity to our immigration and visa system is also possible through rational enforcement policies.

For reasons stated in this letter, the proposed changes to the H-1B visa lottery system are outside of what Congress intended and not permissible under immigration law. The changes also will disadvantage small businesses, impede growth and innovation, and even harm U.S. workers and the U.S. economy. Finally, instead of deterring fraud, these changes actually may encourage unscrupulous behavior.

Therefore, the U.S. Chamber asks that the NPRM be withdrawn. The Department and USCIS must consider first the input from the stakeholders and economists before making such drastic change to the current system. Alternatively, the U.S. Chamber asks for an additional 30 days for the business community to gather more data and submit more robust analyses that would help the Department achieve its policy goals while minimizing the collateral harm.

## *BACKGROUND*

The proposed regulation would implement a new method to allocate the H-1B quota based on the Department of Labor's Occupational Employment and Wage Statistics (OEWS) wage levels—ranging from Level 1 to Level 4, Level 4 being the highest. As proposed, an employee/beneficiary whose offered wage corresponds to Level 4 would be entered into the selection pool four times; Level 3, three times; Level 2, two times; and Level 1, just once.

The OEWS wage level is determined by, *inter alia*, job duty, relevant work experience, education and management, and supervisory duties. The qualifications of the employee/beneficiary is not a factor in determining the wage level. Employers would be required to indicate the appropriate occupational code, the OEWS wage level, and the area of employment in each candidate's registration for the H-1B cap lottery.

If finalized as proposed, the regulation would limit employers' access to some candidates, particularly those offered a wage corresponding to Level 1, the entry-level tier of the DOL wage system.

## *DISCUSSION*

### I. The proposed regulation exceeds DHS' statutory authority.

Federal immigration law imposes an H-1B visa quota of 65,000 per fiscal year, 8 U.S.C. § 1184(g)(1)(A), with an additional 20,000 visas reserved for beneficiaries who earned a master's or higher degree from a U.S. university. *Id.* at § 1184(g)(5). In anticipation of more applications than available visas, the Department must issue visas ". . . in the order in which petitions are filed for such visas . . . ." *Id.* § 1184(g)(3). Note here that the statute says "shall," underscoring that this is a statutory mandate not subject to the discretion of the agency.

In 2005, because the demand had always outnumbered the visa quota, USCIS began using a random, computer-generated lottery to determine which petitions would be eligible to receive an H-1B visa. In 2008, USCIS instituted a five-day "initial filing period" for intending employers to submit the visa petitions. To date, USCIS has adhered to the congressional mandate and has not added any other selection criterion to determine visa eligibility. By imposing the "wage" factor into the H-1B cap selection process, the Department would exceed the intent of Congress for the H-1B visa program. Considering the clear language of § 1184(g)(3), legislation would be necessary to make this change.

To justify the proposed regulation, the Department asserts that "Congress left to the discretion of USCIS how to handle simultaneous submissions," and that "USCIS has discretion to decide how best to order those petitions." *See Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H–1B Petitions*. 90 Fed. Reg. 45986, 45989 (September 24, 2025), *citing Walker Macy LLC* v. *USCIS,* 243 F. Supp. 3d 1156 (D. Or. 2017). The Department's reliance on *Walker Macy*, however, is misplaced. There, the district court held that USCIS could use a random computer-generated selection process for simultaneously submitted H-1B visa petitions. Because of the high demand that far outnumbered the available quota and the brief window to submit all petitions vying for the relatively few visas, it would have been

impractical, if not impossible, for the agency to allot visas in the order the petitions were received. Therefore, the district court opined, "Plaintiffs offer no suggestion of how to order 150,000 petitions being delivered on the same day that is less arbitrary than a random computer selection. If a carrier delivers bags of envelopes containing petitions, it is just as arbitrary to order them based on how the envelopes are removed from the delivery bag as it is to randomly select the petitions from a computer." 243 F. Supp. 3d at 1174.

While the *Walker Macy* decision upheld USCIS' prerogative to issue visas through a random lottery, it does not support the Department's introduction of a new requirement—wage-based preference—to determine eligibility or priority.

## II. The proposed regulation harms the U.S. economy and U.S. workers.

The U.S. Chamber agrees with the Department's generalization that "facilitating the admission of higher skilled workers would benefit the economy and increase the United States' competitive edge in attracting the best and the brightest in the global labor market, consistent with the goals of the H–1B program." 90 Fed. Reg. 45991 (internal quotations omitted). Nevertheless, the U.S. Chamber does not agree with the Department's assertion that it can accomplish this objective "[b]y engaging in a wage-level-based weighting of registrations . . ." to " . . . ensure that initial H–1B visas and status grants would more likely go to the highest skilled or highest paid beneficiaries[.]" *Id.*[1]

The underpinning of the proposed regulation assumes that higher wages paid to H-1B employees represent a benefit to the U.S. economy and, accordingly, the value of an employee is reflected entirely by the amount the employer is willing to pay that employee. Respectfully but vehemently, the U.S. Chamber disagrees with the Department's assumption. The OEWS wage level has no direct correlation to the qualification of the individual H-1B visa beneficiary and depends almost entirely on the requirements of the position. *See* 20 C.F.R. § 655.731 *et seq*. Specifically, the OEWS wage level is determined principally by factors such as the minimum education, training, skills, and experience required for the position. The wage level also depends on the management and supervisory responsibilities that come with the position.

Given the emphasis the proposed regulation places on the wage level, a very likely result is that U.S. employers will be able to hire more senior managers through the H-1B visa. However, they will have a much smaller chance of retaining the most talented early and midcareer professionals and foreign students who graduate at the top of the class in the best U.S. universities.

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[1] The preamble cites the work of Muzaffar Chishti & Stephen Yale-Loehr, immigration-law scholars at New York University and Cornell Law Schools, respectively, to support this theory. *See* Migration Policy Institute, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later* (July 2016), available at https://www.migrationpolicy.org/sites/default/files/publications/1990-Act_2016_FINAL.pdf. Professors Chishti's and Yale-Loehr's article, however, neither references (much less endorses) a wage-based visa-selection process, nor even suggests that prioritizing the highest wage earners in visa allocation will promote U.S. innovation and competitiveness.

### A. U.S. economic interest encompasses much more than the amount of salary paid to H-1B visa holders.

The Department estimates the proposed regulation would yield an annual total benefit of approximately $502 million in FY2026, $1.04 billion in FY2027, $1.51 billion in FY2028, and $2.01 billion in each year from FY2029 through FY2035. The Department arrived at these figures by estimating the difference between the wage paid to the higher wage level and lower wage level H-1B workers. 90 Fed. Reg. 45994. The Department further says that "[b]y engaging in a wage-level-based weighting of registrations for unique beneficiaries, DHS would better ensure that initial H-1B visas and status grants would more likely go to the higher-skilled or higher-paid beneficiaries. Facilitating the admission of higher-skilled workers would benefit the economy and increase the United States' competitive edge in attracting the best and the brightest' in the global labor market[.]'' *Id.* (internal quotations removed).

The U.S. Chamber disagrees with equating increased wages paid to H-1B visa holders alone with benefits to the U.S. economy. The Department postulates that higher wages paid to H-1B workers would lead to more money in the U.S. economy and higher tax revenue for the U.S. Treasury. However, any theoretical benefit of the proposed regulation is outweighed by the practical, real-world consequence of U.S. employers not having access to necessary skills, which can delay productivity and innovation and disrupt delivery of essential services to the American public. The inability to access the necessary skills also can cause employers to abandon projects or move the projects to where the necessary talent is—even if that is outside the United States. All of these consequences carry a cost to the American economy.

### B. Wage level is not dispositive of the contribution of the employee.

The proposed regulation, by its very design, would diminish significantly the chance for early-career or midlevel professionals to obtain an H-1B visa. Notwithstanding the Department's view that Level 4 and Level 3 professionals are more valuable *per se* than those paid at Levels 2 and 1, the reality is that there are important roles for employees at every level. Certainly, there is a role for senior managers and professionals with many years of experience and/or who manage large teams of other skilled professionals. But midlevel professionals and even new graduates from U.S. universities—who likely fall under Levels 2 and 1, respectively—also play a critical role in the U.S. economy. For example, a Level 2 professional may be uniquely qualified to lead a critical project involving cutting-edge technology. A foreign student who graduates at the top of her class from a prestigious U.S. university may only be a Level 1, yet this person may possess the very skill necessary to advance the company's research and development. In either case, the categorization as Level 1 or 2 in no way diminishes an employee's importance to the company.[2]

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[2] The Department opines in the preamble that "an employer who offers a higher wage than required by the prevailing wage level does so because that higher wage is a clear reflection of the beneficiary's value to the employer, which, even if not related to the position's skill level *per se,* reflects the unique qualities the beneficiary possesses. Accordingly, the changes proposed in this rule would better ensure that the H-1B cap selection process favors relatively higher-skilled, higher-valued, or higher paid foreign workers

For this reason, limiting employers' access to foreign talent at the two lower levels is not sound economic policy, and the resulting detriment would be greater than any benefit derived from the higher wages paid to Levels 3 and 4 H-1B employees.

## III. The proposed regulation harms small businesses and rural communities.

While much of the attention, especially from critics of the H-1B program, has been on America's largest companies, the Department's own data show that 76 percent of all H-1B petitioners are small business owners. The Department acknowledges that the proposed regulation would "result in a significant impact on 5,193 small entities, or 30 percent of the 17,069 small entities affected by the proposed rule." 90 Fed. Reg. 46016. In fact, the preamble states that "2,665 small businesses would experience a cost increase that is greater than 5 percent of its revenue[,]" and that "5,193 small entities would experience a cost increase that is greater than 1 percent of its revenue[.]" The Department further concedes that "the proposed changes in this proposed rule would have a significant economic impact on a substantial number of small entities that file H–1B cap-subject petitions." *Id.*

The preamble then justifies the proposed regulation by saying that the proposed regulation "would also benefit small entities that are applying for higher earning employees as they would have a greater chance of their employees being selected compared to the current lottery system." *Id.* However, the preamble fails to address the fact that small businesses drive two thirds of net job creation and anchor innovation clusters in secondary cities. *See* McKinsey Global Institute, A Microscope on Small Businesses: Spotting Opportunities to Boost Productivity (May 2, 2024). Small businesses also create most of the American jobs. *See* U.S. Bureau of Labor Statistics, Small Businesses Continue to Outpace Large Businesses in Job Creation (May 8, 2025). As such, imposing such heavy financial burden on small businesses -- or pricing them out of the global talent market altogether and impeding their research and development -- is against U.S. national interest.

Moreover, contrary to the common notion that the H-1B program only affects the professional services and information sectors, the program is actually used by a wide range of employers, including many healthcare providers in underserved rural areas. These medical facilities—many of which are small businesses—rely on the H-1B program to hire new foreign physicians who deliver critically needed medical care to patients in these rural or otherwise underserved areas. Requiring these small-town clinics and other nonprofit entities to overpay for

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rather than continuing to allow numerically-limited cap numbers to be allocated predominantly to workers in lower skilled or lower paid positions." 90 Fed. Reg. 45990.

The Department appears to say that, if an employer pays a Level 1 employee a wage that is equal in amount to a Level 4 salary, then that employee would have the same chance as any Level 4 employee to be selected to receive an H-1B visa. This practice may expose the employer to a "disparate treatment" allegation by U.S. workers who perform the same Level 1 role for less pay. *See generally* 8 U.S.C. § 1324b. This also would lead to out-of-control wage inflation, which would be especially burdensome to small businesses and nonprofit petitioners.

talent is especially onerous. Ultimately, the American people in these rural and underserved communities would have to pay the price for the proposed regulation, —in the form of either higher medical bills or compromised services.

## IV. The 30-day notice-and-comment period is insufficient.

As explained earlier , this proposed rule should be withdrawn because of all its unintended harm to the U.S. economy and the disproportionate burden placed on, *inter alia*, small businesses and healthcare facilities in underserved areas. The U.S. Chamber and other employer organizations will be happy to work with the Department to address its compliance concerns and protect the interest of U.S. workers.

If the Department does not agree to withdraw this proposed regulation at this time, the U.S. Chamber asks the Department to extend the comment period by another 30 days, to Monday, November 24, 2025. The proposed rule comprises more than 120 pages of text (36 pages in the three-column format as published in the Federal Register) with multiple charts and tables and complex economic analyses. The public will need more than 30 days to study the information and comment constructively. *See* Regulatory Planning and Review, Exec. Order 12866, 58 Fed. Reg. 51735 (October 4, 1993) ("each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.").

For the foregoing reasons, the U.S. Chamber requests that the Department rescind the proposed regulation. The Department can address its concerns by collaborating with qualified economists and private-sector stakeholders without compromising our nation's competitiveness and without harming the U.S. economy and U.S. workers. If the Department declines to withdraw the proposed regulation, it should extend the deadline for the public to comment by another 30 days, until November 24, 2025.

Respectfully submitted,

Vice President, Immigration Policy
U.S. Chamber of Commerce