talent everywhere
2001 K STREET, NW, #300
WASHINGTON, DC. 20006 USA

December 22, 2023

Charles L. Nimick
Chief, Business and Foreign Workers Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Subject: Comment to "Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers" [DHS Docket No. USCIS-2023-0005]

Dear Mr. Nimick:

The Worldwide Employee Relocation Council (WERC) represents talent mobility professionals representing over 2,500 enterprises, including corporations and government agencies moving employees across the United States and around the world. Our membership is also comprised of the many service providers who support the move, such as relocation management companies, movers, real estate brokerages, tax and legal experts, and destination service providers. We are bringing our industry together, helping global mobility and relocation professionals navigate current and emerging sustainability issues and forging the future for our industry and our world.

WERC greatly appreciates the opportunity to provide our comments, which incorporate input directly received from our membership, to U.S. Citizenship and Immigration Services on "Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers." WERC is supportive of the intent of USCIS to streamline the requirements and processes for obtaining and maintaining a H-1B visa. However, the details of implementation of the proposed changes will be instrumental to the success of the program and we have concerns with certain proposed revisions. This comment letter outlines the primary areas of focus of the proposed rule and where we have specific recommendations for modifications or are supportive of the proposed change.

Recommended Changes and Areas of Particular Support for Proposed Rule

Specialty Occupations

WERC is concerned that USCIS' effort to refine the definition of 'speciality occupation' to codify the connection between the degree field and the position duties will unintentionally result in negative impacts for U.S. employers and the U.S. economy if the approach is not changed before the rule is finalized.

General degree titles are common within the U.S. educational system, and as a result U.S. employers regularly recruit and hire both U.S. citizen and foreign national candidates possessing such degrees. It is common practice for companies to have relationships with U.S. academic institutions as part of their talent recruitment strategies to have pipelines for recruiting candidates possessing generalized degrees, including but certainly

not limited to, business administration, engineering, and computer science. Many U.S. programs for such degrees do not currently allow for a specific 'specialization' to be declared along the lines of what is being expected under the proposed rule, and instead such specialization is obtained and demonstrated via the scope of coursework selected by the student during the course of their studies.

Under existing practices that USCIS has permitted related to the H-1B visa, individuals with such degrees have been able to provide documentation to demonstrate their specialized knowledge through means such as their scope of coursework. The rigidity of the definition proposed in this rule, however, closes the door on this ability and applies a narrow parameter for consideration of individuals that does not account for the realities of U.S. employers operating within today's U.S. educational system.

There are regularly situations where a speciality occupation can be best filled by a worker who has a more general degree but either a minor or academic experience that makes them well-suited for the position and the required duties. For example, one of our members has used the H-1B for workers who have Master's and Bachelor's degrees in Business Administration who provide professional services, including consulting, tax and audit functions. Another WERC member shared that their organization has hired foreign-born talent via the H-1B with general degrees in business administration and engineering to be part of teams to join teams focused on expanding and enhancing U.S. semiconductor manufacturing. These professionals have an understanding of quantitative analysis and other specialized skills important for supporting these areas and for advancing priorities critical to U.S. economic and national security interests. Even with a general degree as identified under this proposed rule, they are uniquely qualified to fill a position where there are a relatively small number of eligible applicants.

Another example of where limiting a position to a specialized degree becomes problematic is within the continually burgeoning technology sector. With the growth of generative artificial intelligence (GenAI) and the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, the U.S. is looking to take a leadership role on the technology and will need additional professionals. However, GenAI professionals will often have a more general degree in technology or engineering but not specialized in GenAI.

Reinforcing existing practices permitting demonstration of the specialized knowledge through coursework and other comparable means will permit USCIS to balance the intent of showing clear connection with the position duties while allowing employers to navigate the realities of the U.S. educational systems and the talent recruitment strategies commonplace across U.S. employers. This, in turn, would provide employers with both the flexibility they need and the predictability of process that is critical for both petitioners and beneficiaries.

Beneficiary-Centric Registration Support

WERC and our members strongly support USCIS' intent to revamp the H-1B registration process to be beneficiary-focused, with registration selection being pegged to the beneficiary while also still permitting multiple employers to submit registrations related to an individual. However, these changes need to include a clearly defined systemic mechanism that allows employers to know how to submit the sponsoring petition if a beneficiary has had multiple employers submit a registration on their behalf. This clarified process and notification will improve the experience for both petitioners and beneficiaries by eliminating the need for employers to solely rely on their beneficiaries to share this information, and ultimately this will streamline the process for USCIS as well.

Expand Site Visit Authority

While we understand the intent that the agency has in codifying its authority to conduct site visits, our members have flagged that the approach outlined in the proposed rule does not fully reflect current workplace realities, particularly related to cases involving any component of remote work or engagement at a third-party site.

Under the proposed rule, the petioner of the H-1B is not afforded any due process in regard to the site visit of the worker or the denial or revocation of their petition. While the third party would be aware of the site visit, the petitioner would not receive a direct notification from USCIS of the site visit. If the third party denies the visit for whatever reason, the petioner would not be made aware until the potential revocation of the petition. WERC recommends modifying the language to ensure advance notification to the petioner of the site visit and then follow up communication as to the findings of the visit.

WERC also recommends that USCIS revisit protocols related to site visits that involve inspecting a remote work location such as the home of the worker. A site visit at a home must take into consideration the feeling of personal security of the worker, as well as address any health issues or concerns of the worker. Workers should also be provided the opportunity, except in extreme cases where an immediate visit may be required, to have the visit occur at the place of business instead of at a home location. We recommend that USCIS seek further input from stakeholders as to how best to take into consideration the dynamics of workers increasingly working remotely.

Amendments for Geographic Changes

WERC opposes the proposed clarification in which a change in the place of employment of a worker would trigger the need to file an amended or new petition. The amendment would add an unnessary additional burden of paperwork, cost, and time on both the petitioner and USCIS, with little to no benefit for the additional requirement as the agency looks to streamline and not further complicate the H-1B program. Should the agency want notification of a change in employement, we recommend USCIS leverage materials already filed to secure information on a change of location. This could be done, for example, by obtaining directly from the U.S. Department of Labor a copy of the Labor Condition Application (LCA). Alternatively, we would recommend that USCIS create a standard mechanism for notification, along the lines of what the agency already does in the context of the Alien's Change of Address Card (AR-11), that can provide notification without need for a formal amendment to be filed.

Codifying Deference of Prior Approval

WERC supports USCIS' overall intent to codify its existing deference policy, but we would encourage the agency to also include some additional parameters around what is meant by this deference. In particular, it will be important for the agency to outline how matters will be addressed when you have changes in requirements during the intervening period between an initial H-1B approval and the time for when a request involving submission of a new Form I-129 is filed. This will particularly be necessary given the scope of changes outlined in this proposed rule and the potential impacts once a final rule on this is released and finalized in the future.

LCA Review by USCIS

WERC opposes the DHS proposed change 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." The language would add an unnessary additional burden of paperwork, cost, and time on both the petitioner and USCIS, with little to no benefit for the additional requirement as the agency looks to streamline and not further complicate the H-1B program. We recommend eliminating the requirement.

Ban Speculative Employment

WERC is concerned that the proposed change requiring that the petitioner establish that the organization has an actual, non-sepectulative position in a speciality occupation for the worker on a specific start date could cause unintended negative consequences for the worker. The provision, as outlined in the proposed rule, is extremely broad and does not take into consideration situations where it may not be in the best interest of the worker to begin under the petitioned H-1B as of the requested start date. While we understand the intent of USCIS with the proposed clarification, the potential consequences due to the broad nature of the change outweigh the potential benefit of the underlying reasons for the proposed change.

Third-Party Standard

Another area of potential concern is that the clarification for the third party organziation to determine whether a position is a specialty occupation could create confusion amongst the petitioner, third party and worker as to relationship of the job duties and specialty occupation criteria. This confusion would lead to the issue being resolved by the adjudication officer who would have complete discretion and leaves much uncertainty for all the parties involved. As a result, USCIS would likely see a high level of requests for evidence and appeals in cases involving workers being placed with third party organizaitons.

Additionally, U.S. employers currently manage their third party relationships, which can encompass contingent workers and/or full-time employees on-site supporting client orgnaizations, via internal teams and protocols that can vary widely depending on how each employer is structured. This will result in a range of stakeholders needing to ensure compliance with any third party-related elements of this rule, and both employers and USCIS would be well served by taking additional time to explore this area to clearly identify potential ramifications and considerations for the range of situations that fall within the context of third parties for employers.

We recommend that USCIS issue a proposed rule specifically on this issue and others previously identified to seek additional stakeholder input and avoid any unintended consequences stemming from the proposed clarification.

Cap Exemption for Nonprofit Research and Extend Cap Gap

WERC and our members support the proposed changes to the definition of employers who are exempt from the annual H-1B statutory limit as well as the extension of the duration of F-1 status and certain employment

authorization until April 1. We applaud USCIS for these proposed changes to better align the status durations and authorizations dates to current conditions as they pertain to adjudications.

Timing of Final Rule

We recommend further clarification about the timing of the effective date of the rule in relation to the impact on the upcoming H-1B cap season as well as the rule on the proposed increases in fees. Timing of both this rule and a final rule on fee increases will have a significant impact on employers navigating the FY 2025 H-1B season. We encourage USCIS to coordinate its planning and implementation around both rules to account for how they will impact petitioners and benefificaries and to clearly communicate expectations and timing on what will, or will not, be expected related to the FY 2025 H-1B season as soon as possible to provide advance planning time for all parties.

Conclusion

In looking at the proposed rule in its totality, we commend USCIS for releasing a rule that is focused on addressing the areas of concern that have been consistently raised by U.S. employers and its associated stakeholders, including WERC. Transforming the registration process to remedy the challenges seen in recent years is the top priority for the vast majority of our members, and the agency's decision to transition to a beneficiary-focused registration approach clearly demonstrates that the agency has incorporate feedback from its stakeholders and is a significant step that will benefit both beneficiaries and employers. As we have identified throughout this letter, there remain a number of areas that we believe USCIS, as well as employers and, importantly, beneficiaries, would be best served by soliciting further feedback and/or adopting additional changes prior to releasing a final rule in 2024, and we stand ready to support the agency in addressing these items.

Again, WERC greatly appreciates the opportunity to provide comments on the proposed rule.

Should you have any questions regarding our comments, please do not hesitate to reach out to me by email at mjackson@worldwideerc.org or phone at 703-842-3400.

Sincerely,

Michael T. Jackson
Vice President of Member Engagement and Public Policy
WERC

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