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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
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: H-1B Modernization NPRM
DHS Docket No. USCIS- 2023-0005
RIN 1615-AC70
Specialty occupation definition and criteria for specialty occupation positions

Dear Division Chief Nimick,

The undersigned associations, coalitions, institutions, firms, and groups represent, and are representative of, the Business, Science, State and Local Economic Development, Higher Education, and Policy sectors. We come to you jointly to express our serious concerns about the new proposed changes to sections 214.2(h)(4)(ii) and (iii) in Title 8 of the Code of Federal Regulations. These are the proposed regulatory changes on the specialty occupation definition and position criteria published in the H-1B Modernization Notice of Proposed Rulemaking (88 Fed. Reg. 72870 at 72959-60) on October 23, 2023.

Despite differences in priorities, sector, and membership, each signatory has found that high-skilled immigration is a key component of the ongoing ability of the United States to continue to innovate and create jobs. It is that agreement in perspective that drives our shared fear about the specialty occupation definition and criteria for specialty occupation positions described in the agency's NPRM, which impact *all* H-1B petitioners and status holders. As proposed, the new specialty occupation approach will create uncertainty for H-1B professionals (whether they are entrepreneurs, technologists, or in other specialty occupations) and their dependent family members; international students at U.S. higher ed institutions who are assessing their opportunity to seek H-1B status in the future; and employers in both academia and industry, including all cap-exempt petitioners.ⁱ We say this even though we welcome the new regulatory subsection that establishes as binding for adjudicators that what is normally required to perform the job duties of a position does not equate to an "always" requirement.

The agency's long-standing approach has been that the H-1B petitioning employer is responsible for proving the connection between the beneficiary's course of study and the offered job duties, as well as proving that the latter requires the former. However, in the agency's rewording in the H-1B Modernization NPRM, USCIS's effort to codify these standards has gone awry. Specifically, USCIS:

1. Inappropriately added a separate element of proof on a "direct relationship" between studies and the offered job; and
2. Mistakenly substituted the degree label instead of the necessary focus on the course of study.

The regulatory text proposed by USCIS on specialty occupation definition and criteria for specialty occupation positions would permit an era of adjudications where the agency no longer focuses on job duties and courses of study as the controlling statute requires. While imperfect, data from the Department of Labor's PERM Labor Certification program suggest that large numbers of H-1B professionals and their employers would be negatively impacted by the change the agency proposes.

The PERM data show that a large percentage, more than 20% of H-1B holders that have employers sponsoring them for green card status through Labor Certification, hold jobs that USCIS has confirmed are specialty occupations where (a) the minimum requirements are the type of knowledge obtained through completion of *any* engineering degree or (b) they entail job duties for which a business administration degree is expected.ⁱⁱ These are amongⁱⁱⁱ the H-1B beneficiaries that could be excluded under the regulatory text and NPRM preamble proposed by USCIS – belying the agency’s suggestion that it is merely proposing regulatory text that codifies current practice. Specifically, for the five year period FY2019-2023, there were 21,694 PERMs approved on behalf of H-1B holders for jobs accepting any kind of engineering degree as the minimum requirement. This was 12 percent of all PERMs certified for H-1B recipients in the period. From FY2019-2023, there were also 21,883 PERMs (also 12 percent) approved on behalf of H-1B status holders for jobs accepting a business degree to satisfy education requirements.

The New “Directly Related” Degree Mandate Must Be Abandoned

In today’s hiring, it is often indispensable to select professionals with complementary specialties to form diverse, interdisciplinary teams. This practice is important in academia, but also across industry – particularly in emerging science and technology fields, like artificial intelligence (AI) and quantum technologies.

Further, AI and quantum, among others, are clear examples of how **emerging technologies change much faster than degree programs**. And, such technologies change much faster than our conventional understanding of what fields are directly related to such emerging technologies. USCIS’s proposal on specialty occupation (definition and position criteria) makes it less likely, if not impossible, for the mandates of section 5.1 of recent Executive Order 14410^{iv} to be satisfied, particularly those provisions directing the Department of Homeland Security to facilitate the attraction and retention of foreign-born STEM experts working in AI *and* other critical and emerging technologies.^v

In studying the AI workforce, experts have found that primary degrees required for *core* AI job duties are business administration, computer science, engineering, mathematics, and statistics.^{vi} Yet, USCIS has chosen to provide an example in the preamble explanation of the NPRM cautioning employers about requiring the type of quantitative and problem-solving skills developed in an engineering degree as unlikely to be “directly related” to a qualifying H-1B position, and has proposed codifying in regulation that business administration studies should *not* be expected to qualify for H-1B status. The proposed changes would create unnecessary hurdles for employers engaging in on-campus recruitment in the U.S. where international students account for more than 50% of graduate engineering degrees^{vii} and numerous international students complete a Master of Business Administration or Bachelor of Business Administration.^{viii}

Moreover, though, AI is applicable in many endeavors such as weather forecasting, medicine, logistics, and agriculture, and in order to integrate AI into these fields, companies need to hire people with field-relevant expertise, rather than just the core jobs which create the AI application itself. In fact, 89 percent of new hiring in AI is for the positions that integrate AI into *other* adjacent fields^{ix} that may or may not be presumed to be “directly related” by a USCIS adjudicator.

Adding a new direct relatedness requirement to H-1B adjudications can only serve to create uncertainty and complexity for employers creating their interdisciplinary teams. This change is not best described as a mere continuation of the agency’s long-time requirements.

Our request: Strike as a separate requirement in the new H-1B rule that a specialty occupation requires proof that a degree is “directly related” to the position, by omitting the words “directly

related” in the definition of Specialty Occupation at 8 CFR 214.2(h)(4)(ii) and from the Position Criteria Requirements at 8 CFR 214.2(h)(4)(iii)(A)(1)-(4).

References to Degrees and Positions Should be Reworded to Focus on Courses of Study and Job Duties

As written in the H-1B Modernization NPRM, the new phrasing for the specialty occupation definition and criteria for specialty occupation positions is not precisely equivalent to the agency’s long-established interpretation. Instead, it sets up an impractical standard for employers. The H-1 visa classification has existed for over 70 years 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 course of study.^x

USCIS explains in the new NPRM that referring to the title of the degree is only for “expediency” and that the agency separately evaluates the beneficiary’s actual course of study, “rather than merely the title of the degree.” This practice, if followed, would be consistent with university practices in reporting degrees conferred.^{xi} USCIS further states that while some fields of university study may be more generalized than others, the degree’s label cannot determine how general the course of study is. USCIS states in the NPRM preamble that as part of the H-1B adjudication, the agency looks at whether the individual has completed a minor, major, concentration, or specialization of courses related to the position offered by the employer.^{xii}

Nevertheless, USCIS has now proposed a binding regulation that will guide adjudicators for decades to come, over many different presidential administrations, that specifically refers to “degrees” and “positions” in ways that *fail* to accurately capture the contours of preexisting agency practices. The agency can achieve its goal through revised regulatory text that communicates that adjudicators are required to examine the job duties of the position offered by the employer and the courses completed in a degree-granting program (U.S. baccalaureate or higher, or equivalent) to confirm that a specific body of knowledge is required to perform the job duties and that the beneficiary has attained that body of knowledge.

The agency should of course refer to “degrees” or “positions” where necessary to correctly restate the statutory standard, but in an effort to *modernize* the regulatory text, the agency should explain USCIS’s longstanding practices by excluding references to specific degrees (such as business administration) and adding references to *courses of study* and *job duties*.

The new subsection (5) on criteria for specialty occupation positions, that establishes once and for all that what is normally required to perform the job duties of a position does not mean always, is welcomed and is fully consistent with the agency’s longstanding practices as well as the revisions we suggest.

Our request: Strike references that identify particular types of degrees or courses of study as being too general in the Specialty Occupation definition at 8 CFR 214.2(h)(4)(ii); where appropriate substitute “job duties of the position” or “job duties” for references to “the position” in the Specialty Occupation definition at 8 CFR 214.2(h)(4)(ii) and Position Criteria Requirements at 8 CFR 214.2(h)(4)(iii)(A)(1)-(4); where appropriate add course of study for “degree” references in the Specialty Occupation definition at 8 CFR 214.2(h)(4)(ii) and Position Criteria Requirements at 8 CFR 214.2(h)(4)(iii)(A)(1)-(4).

Conclusion

The undersigned all agree that the Department's proposed regulatory text on specialty occupation definition and criteria for specialty occupation positions creates substantial uncertainty and suggests support for a significant departure from prior agency practice.

We believe the aforementioned revisions, documented through example edited regulatory text in our Appendix, would help USCIS clearly communicate H-1B adjudications standards consistent with the statute as well as long-standing agency practice. We look forward to seeing a careful response from USCIS to these requests, and thank you for the opportunity to participate in the rulemaking process.

Respectfully submitted,

Higher Education

Association of American Universities
Association of Public and Land-grant Universities
Catholic University of America
College and University Professional Assoc for Human Resources
College for Creative Studies
Dominican University of California
Foothill-De Anza Community College District
NAFSA: Association of International Educators
Presidents' Alliance on Higher Education and Immigration
University of California System
University of Illinois System

Business

American Staffing Association
Cellens, Inc
Compete America Coalition
Columbia Group LLLP
Flux Marine Ltd
gener8tor
Kaas Wilson Architects, LLC
Leadz Study Abroad
Open Avenues Foundation
Pearson Education, Inc.
PassiveBolt
TechNet
U.S. Chamber of Commerce
Y Combinator

State and Local Economic Development

Buffalo Niagara Partnership
Cedar Rapids Metro Economic Alliance
Cincinnati Compass
Columbus Chamber of Commerce
Detroit Regional Partnership
Dubuque Area Chamber of Commerce
El Paso Chamber
Flint and Genesee Group
Global Cleveland
Global Detroit
Grand Rapids Chamber
Great Lakes Bay Regional Alliance

Science

American Chemical Society
American Physical Society
Federation of American Scientists
Optica (formerly OSA), Advancing Optics and Photonics Worldwide
Quantum Economic Development Consortium (QED-C), managed by SRI Intl
SPIE, the international society for optics and photonics

Policy

American Immigration Council
American Immigration Lawyers Association
Engine
FWD.us
Institute for Progress
National Immigration Forum
South Asian Bar Association of North America
Talent Beyond Boundaries (TBB)
UNITE-LA

State and Local Economic Development

Greater Hamilton Chamber of Commerce
Greater Houston Partnership
Greater Kansas City Chamber of Commerce
Greater Louisville Inc. – The Metro Chamber of Commerce
Greater St. Louis, Inc.
Hispanic Chamber Cincinnati USA
Illinois Science and Technology Coalition
InvestUP
Kentucky Chamber of Commerce
Keystone Community Corporation
Lancaster Chamber
Longview Chamber of Commerce
Michigan Works! Association
Minneapolis Regional Chamber of Commerce
North Texas Commission
Ohio Hotel & Lodging Association
Quad Cities Chamber of Commerce
Saginaw County Chamber of Commerce
St. Louis Mosaic Project
Texas Association of Business
Vail Valley Partnership
Washington Technology Industry Association

APPENDIX
EXEMPLAR OF REVISIONS TO NPRM IN TRACKED CHANGES
ONE OPTION TO ADDRESS CONCERNS OF MULTI-SECTOR COMMENT FROM XX ORGANIZATIONS

Example of revision to 8 CFR 214.2(h)(4)(ii), 88 Fed. Reg. 72870 at p. 72959

(ii) * * *

Specialty occupation means an occupation that requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and that requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States **and for performing the job duties of the offered position.** ~~The required specialized studies must be directly related to the position. A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position. A specialty~~ **occupation** position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields or each body of highly specialized knowledge **is** ~~is~~ **qualifies an individual to perform the job duties of** ~~directly related to~~ the position.

Example of revision to 8 CFR 214.2(h)(4)(iii), 88 Fed. Reg. 72870 at p. 72959-60

(iii) *General H-1B requirements*—(A) *Criteria for specialty occupation position.* A position does not meet the definition of specialty occupation in paragraph (h)(4)(ii) of this section unless it also satisfies at least one of the following criteria at paragraphs (h)(4)(iii)(A)(1) through (4) of this section:

(1) A U.S. baccalaureate or higher degree, or its equivalent, **with a course of study** in **one or more** ~~a directly related~~ specific specialties ~~ies~~ is normally the minimum requirement for entry into the particular occupation;

(2) A U.S. baccalaureate or higher degree, or its equivalent, **with a course of study** in **one or more** ~~a directly related~~ specific specialties ~~ies~~ is normally required for parallel **job duties** ~~positions~~ among similar organizations in the employer's United States industry;

(3) The employer, or third party if the beneficiary will be staffed to that third party, normally requires a U.S. baccalaureate or higher degree, or its equivalent, **with a course of study** in **one or more** ~~a directly related~~ specific specialties ~~ies~~, **in hiring** for the **job duties of the** position; or

(4) The specific duties of the proffered position are so specialized, complex, or unique that the knowledge required to perform the duties are normally associated with the attainment of a U.S. baccalaureate or higher degree, or equivalent, **with a course of study** in **one or more** ~~a directly related~~ specific specialties ~~ies~~.

(5) For purposes of the criteria at paragraphs (h)(4)(iii)(A)(1) through (4) of this section, normally means conforming to a type, standard, or regular pattern, and is characterized by that which is considered usual, typical, common, or routine. Normally does not mean always.

ENDNOTES

ⁱ The potential ramifications of commenters' concerns is sizeable, impacting entrepreneurs, rural health care providers, major research universities, nonprofits hiring economic advisors, financial services firms hiring quantitative analysts, innovation hubs facilitating industry-academia-government collaboration, to say nothing of the vast ecosystem where computer-related professionals and engineers are hired across sectors. DHS has indicated that about 49,820 unique employers receive H-1B approvals annually, including initial cap-subject and cap-exempt filings, and amendments and extensions. See [H-1B Employer Data Hub](#) files previously provided by USCIS. The Department has also estimated that about 583,420 H-1B professionals are authorized to work in the United States. See [H-1B Authorized-To-Work Population Estimate](#) (June 2020), USCIS.

ⁱⁱ A review was undertaken of all PERM applications approved on behalf of H-1B status holders by the Department of Labor FY19-23 (from [DOL's Performance Data](#)), which won't be a fully representative sample of all H-1Bs but is a relevant and statistically valid place to start given the publicly available data.

ⁱⁱⁱ The PERM data cannot be representative of all H-1Bs pursuing employment-based (EB) green card status because it excludes EB2 National Interest Waiver and EB1 cases, which often are also on behalf of H-1B professionals, and thus the PERM-based numbers will be an undercount. Moreover, there are many other current and future H-1B beneficiaries and their employers engaged in many other fields besides business or engineering that could be impacted by the uncertainty generated by the agency's proposal.

^{iv} [EO 14410 \(October 30, 2023\)](#) on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.

^v Id. at section 5.1(d)((ii), and section 3(h), which cites the [Critical and Emerging Technologies List Update](#) (February 2022), National Science and Technology Council.

^{vi} Autumn Toney and Melissa Flagg, [U.S. Demand for AI-Related Talent Part II: Degree Majors and Skill Assessment](#) (September 2020), Center for Security and Emerging Technology, p. 3.

^{vii} See e.g., National Science Foundation, Science & Engineering Indicators 2022, ["International S&E Higher Education and Student Mobility,"](#) which reported that students on temporary visas earned 50% of engineering Master's degrees in the United States and over half of U.S. doctoral degrees in engineering (State of U.S. Science & Engineering 2022, National Science Board).

^{viii} Higher-ed institutions commonly offer four different types of Business degrees: Bachelor of Arts or Bachelor of Science degrees in Business, which have different distribution requirements and different options for "specialization" as compared to a Bachelor in Business Administration and a Master in Business Administration. The proposed regulatory text would permit an adjudicator to start with a presumption that a Bachelors or Masters in Business Administration cannot be qualifying, based on the label of the degree, and by default ignore a completed minor or concentration, for example, as not being a "specialization," without obligating the adjudicator in all cases to review and give weight to the transcript.

^{ix} Autumn Toney and Melissa Flagg, [U.S. Demand for AI-Related Talent](#) (August 2020), Center for Security and Emerging Technology, p. 3.

^x See e.g., 56 Fed. Reg. 31553, July 11, 1991 (proposed rule implementing H-1B provisions of IMMACT90) where legacy INS explained it was "changing the *reference* to aliens who are members of the professions to aliens in specialty occupations," the implication being that there was not a significant change to the beneficiary's required credentials and instead just a change in referenced name because no corresponding changes to the criteria for qualifying positions were proposed (at p. 31554). In other words, with the passage of the Immigration Act of 1990 (IMMACT90), this category has been subject to numerical limits and a Labor Condition Application to protect the U.S. labor market, but the basic standards and agency approach for identifying qualifying positions has remained similar.

^{xi} 88 Fed. Reg. 72870 at 72876, October 23, 2023. Examining the actual transcript documenting the courses completed aligns with the reality that when U.S. universities and colleges report awarded degrees to the National Center for Education Statistics at the Department of Education there are a variety of institutional reasons why the Classification of Instructional Program code (CIP code) for the degree label does not always directly reflect all aspects of the completed course of study. For example, degrees might be reported as Business Administration even though a duly designated major in Management Science was completed or reported as Urban Planning even though a major in Sustainability Studies was fulfilled.

^{xii} 88 Fed. Reg. 72870 at 72874, October 23, 2023.