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U.S. Citizenship and Immigration Services
Department of Homeland Security
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Submitted via www.regulations.gov

**Re: Department of Homeland Security, U.S. Citizenship and Immigration Services,
Interim Final Rule; *Strengthening the H-1B Nonimmigrant Visa Classification
Program* (DHS Docket No. USCIS-2020-0018; RIN 1615-AC13)**

Dear Mr. Nimick and Mrs. Deshommes:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) respectfully submit this comment in opposition to the Interim Final Rule (IFR) published in the Federal Register on October 8, 2020 by the Department of Homeland Security (DHS) amending certain regulations implementing the H-1B nonimmigrant visa program, DHS Docket No. USCIS-2020-0018, Strengthening the H-1B Nonimmigrant Visa Classification Program, 85 FR 63918 (October 8, 2020) (“Interim Final Rule” or “IFR”).¹ On December 1, a federal district court set aside the IFR because the agency failed to demonstrate the requisite “good cause” to issue the rule without complying with the notice and comment requirements of the Administrative Procedure Act.² Despite this event, we submit these comments to address the substantive flaws in the agency’s proposed changes as we are concerned that DHS will try to move forward with them. For the reasons discussed below, we urge DHS to neither reissue the rule nor finalize the rule based on the comments received in response to the IFR.

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application

¹ 85 Fed. Reg. 63,918 (Oct. 8, 2020).

² *Chamber of Commerce of the United States v. Dep’t of Homeland Sec.*, No. 4:20-cv-07331-JSW, Order Granting Plaintiffs’ Partial Motion for Summary Judgment and Denying Defendants’ Cross-Motion, Dkt. 73 (N.D. Cal. Dec. 1, 2020).

and interpretation of U.S. immigration laws. Our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act and its implementing regulations.

The provisions of this rule, in conjunction with the Department of Labor (DOL) IFR on wage requirements for the H-1B and PERM programs³, create eligibility requirements that will effectively eliminate the H-1B visa program, in direct contravention of congressional intent. It is an abuse of DHS's authority to attempt to invalidate a nonimmigrant visa program created by Congress through the implementation of regulatory requirements that will prevent U.S. employers from hiring temporary professional workers essential to U.S. competitiveness in the global economy. For the reasons discussed below, we urge DHS to neither reissue this rule nor finalize the rule based on the comments received in response to the IFR.

A. The IFR Violated the Administrative Procedure Act

In issuing its IFR, DHS bypassed the standard notice-and-comment rulemaking process, while claiming that it may invoke the APA's "good cause" exception.⁴ The rule was scheduled to become effective on December 7, 2020, without the agency first reviewing and considering all comments submitted by affected parties and stakeholders addressing the harmful impact that this regulation would have on U.S. employers of all sizes and in all industries, from health care to technology, from higher education to charitable foundations, from manufacturing to logistics as well as on foreign nationals. This includes those already in H-1B status who will require an extension of their H-1B status, as well as those for whom U.S. employers will file H-1B cap-subject petitions in the upcoming FY2022 H-1B lottery.

On December 1, 2020, the U.S. District Court for the Northern District of California granted plaintiffs' partial motion for summary judgment setting aside the IFR on the basis that the attempt by DHS to evoke the good cause exception to the notice and comment requirement of the APA was improper.⁵ As noted by the court, "[w]ithout any consultation with interested parties about the impact on American employers, DHS and DOL made changes to policies on which plaintiffs and their members have relied for years and which are creating uncertainty in their planning and budgeting . . . The court cannot countenance — reluctantly or otherwise — defendants' reliance on the COVID-19 pandemic to invoke the good cause exception."⁶

³ Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States, 85 Fed. Reg. 63,872 (October 8, 2020), also set aside by the federal district court. *See Chamber of Commerce, supra* n.2.

⁴ 5 USC §553(b)(B).

⁵ *Chamber of Commerce, supra* n.2.

⁶ *Id.* at p.18.

Accordingly, the court concluded, “[d]efendants have not met their burden to show that providing advance notice would have had consequences so dire that notice and comment would not have served the public interest.”⁷

We agree with the District Court’s December 1, 2020 finding that this IFR was issued in violation of the APA. Notice and comment is such a critical component of rulemaking that Congress only allows an agency to forego this procedure in the narrowest circumstances when the agency, for good cause, finds that it is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates this finding and reasons therefore in the rules issued.⁸

B. The IFR was Void *Ab Initio* and No Other Rule Should be Issued Because Chad Wolf, the Purported Acting Secretary of the Department of Homeland Security, was Unlawfully Appointed and Does Not Have Authority to Promulgate Regulations

The IFR, which was signed by Chad Mizelle, Senior Official Performing the Duties of the General Counsel, following a delegation by the purported Acting Secretary Chad Wolf, was void *ab initio* because Mr. Wolf was unlawfully appointed and therefore does not have authority to promulgate this regulation. On December 9, 2016, Executive Order 13753 was issued, establishing the default order of succession at DHS “[i]n case of the Secretary’s death, resignation, or inability to perform the functions of the Office.”⁹ Under this Executive Order, the Commissioner of U.S. Customs and Border Protection (CBP) was seventh in line for succession in the case of the Secretary’s resignation, after both the Under Secretary for National Protection and Programs and the Under Secretary for Intelligence and Analysis.

On April 10, 2019, DHS Secretary Kirstjen Nielsen exercised her authority to amend the order of succession, issuing a memorandum delegating a new line of succession “in the event I am unavailable to act during a disaster or catastrophic emergency.”¹⁰ This memorandum, however, did not change the line of succession “in the case of ... resignation,” making clear that following a resignation, “the orderly succession of officials is governed by Executive Order 13753, amended on December 9, 2016.”¹¹ Secretary Nielsen then resigned that same day. Following Secretary Nielsen’s resignation, the next-in-line successor for the Acting Secretary role, under her memorandum and Executive Order 13753, was the Under Secretary for National Protection and Programs. Nevertheless, DHS purported to install the CBP Commissioner, Kevin McAleenan, as the Acting Secretary, despite no lawful authority permitting him to be installed in that position.¹² Mr. McAleenan served as purported Acting Secretary through November 2019,

⁷ *Id.* at p.22.

⁸ 5 USC §553(b)(3)(B).

⁹ EXECUTIVE ORDER 13,753, AMENDING THE ORDER OF SUCCESSION IN THE DEPARTMENT OF HOMELAND SECURITY, 81 Fed. Reg. 90,667, December 9, 2016.

¹⁰ See DHS ORDERS OF SUCCESSION & DELEGATIONS OF AUTHORITIES FOR NAMED POSITIONS, DEP’T OF HOMELAND SECURITY, DHS DELEGATION No. 00106, Updated April 10, 2019, *available at* <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf> (attached to the letter as Enclosure B).

¹¹ *Id.*

¹² 6 USC §113(g)(2) (“Notwithstanding chapter 33 of title 5, the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary”).

when he claimed to amend the line of succession to allow Mr. Wolf, the Under Secretary for Strategy, Policy, and Plans, to serve as Acting Secretary following his own resignation.¹³

This action occurred more than the statutorily allowed period of 210 days following Secretary Nielsen's resignation.¹⁴ This timing means that even if Commissioner McAleenan was properly designated as Acting Secretary on April 10, 2019, under the Federal Vacancies Reform Act (FVRA) and not the Homeland Security Act of 2002 (HSA), he no longer held that authority by November 8, 2019, and could not have lawfully exercised the authority of an Acting Secretary to amend the DHS line of succession. Therefore, Mr. Wolf is not lawfully the Acting Secretary of DHS under either the HSA or the FVRA and lacks authority to promulgate proposed regulations on its behalf.

The U.S. Government Accountability Office (GAO) recently investigated the legality of Mr. Wolf's service as Acting Secretary and determined that the appointment of Mr. Wolf did not follow the processes outlined in the FVRA and the HSA.¹⁵ Accordingly, the GAO concluded that Mr. Wolf was named Acting Secretary by reference to an *invalid order of succession*.¹⁶

Further, federal courts nationwide have held that Mr. Wolf is not lawfully serving as Acting Secretary of Homeland Security and therefore actions he has taken as Acting Secretary are void.¹⁷

The agency's recent *ex post facto* attempts to "self-correct" its egregious failure to follow established procedure, such as by having Pete Gaynor, Senate-confirmed FEMA administrator, temporarily exercise the authority of DHS Secretary¹⁸ or having Mr. Wolf attempt to ratify each

¹³ AMENDMENT TO THE ORDER OF SUCCESSION FOR THE SECRETARY OF HOMELAND SECURITY (Nov. 8, 2019), available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf> (attached to the letter as Enclosure A).

¹⁴ See 5 USC §3346(a)(1) ("Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office ... for no longer than 210 days beginning on the date the vacancy occurs.").

¹⁵ DEP'T OF HOMELAND SECURITY—LEGALITY OF SERVICE OF ACTING SECRETARY OF HOMELAND SECURITY & SERVICE OF SENIOR OFFICIAL PERFORMING THE DUTIES OF DEPUTY SECRETARY OF HOMELAND SECURITY, B-331650, U.S. GOV'T ACCOUNTABILITY OFFICE (Aug. 14, 2020), www.gao.gov/assets/710/708830.pdf.

¹⁶ *Id.* (emphasis added).

¹⁷ See e.g., *Batalla Vidal, et al., v. Wolf*, No. 1:16-CV-04756-NGG-VMS (E.D.N.Y. Nov. 14, 2020) (holding that Mr. Wolf was not lawfully serving as Acting Secretary of DHS and therefore did not have authority to issue a memorandum that effectively suspended DACA pending DHS's review of the program); *Northwest Immigrant Rights Project v. U. S. Citizenship and Immigration Services*, No. CV 19-3283 (RDM), 2020 WL 5995206 (D.D.C. Oct. 8, 2020); *Immigrant Legal Res. Cir. v. Wolf*, No. 20-CV-05883-JSW, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020); *Casa de Maryland, Inc. v. Wolf*, 8:20-CV-02118-PX, 2020 WL 5500165 (D. Md. Sept. 11, 2020) (holding that Mr. Wolf's appointment was invalid and that actions he has taken as Acting Secretary are void).

¹⁸ See e.g., ORDER DESIGNATING [THE ORDER OF SUCCESSION FOR THE SECRETARY OF HOMELAND SECURITY](https://www.dhs.gov/sites/default/files/publications/20_1114_gaynor-order.pdf), DEP'T OF HOMELAND SECURITY, PETER T. GAYNOR (Sept. 10, 2020), available at <https://www.courtlistener.com/recap/gov.uscourts.nyed.390395/gov.uscourts.nyed.390395.324.1.pdf> at Exhibit 6; ORDER DESIGNATING [THE ORDER OF SUCCESSION FOR THE SECRETARY OF HOMELAND SECURITY](https://www.dhs.gov/sites/default/files/publications/20_1114_gaynor-order.pdf), DEP'T OF HOMELAND SECURITY, PETER T. GAYNOR (Nov. 14, 2020), available at https://www.dhs.gov/sites/default/files/publications/20_1114_gaynor-order.pdf.

of his acts since the day he took office¹⁹ fails to correct Mr. Wolf’s fundamentally flawed and unlawful appointment to the position of Acting Secretary. For the reasons outlined above, as Mr. Wolf is not lawfully the Acting Secretary under either the HSA or the FVRA, any regulations he issues are void *ab initio*.

C. The IFR is Based Upon a Skewed Analysis and Flawed Understanding of the Impact of H-1B Workers on the U.S. Labor Market

For more than sixty years, Congress has recognized that the U.S. economy benefits from supplementing the domestic workforce with foreign talent. The Immigration and Nationality Act of 1952 established the H-1 program, which authorized the admission of temporary professional workers when sufficient U.S. workers were unavailable.²⁰ Throughout the next several decades, “high-skilled individuals entered through a single broad category,” the H-1 for temporary professional workers, “which included health occupations, entertainers, athletes, professors, and other professions requiring advanced knowledge in a particular field.”²¹

This statutory structure remained largely unchanged until Congress passed the Immigration Act of 1990,²² which re-engineered the visa classification scheme for temporary workers and, in particular, created the H-1B visa classification, which applied to foreign nationals who are members of “specialty occupations” rather than members of professions.²³ The statute allocated 65,000 visas to foreign nationals who could be issued H-1B visas or granted H-1B status. At the same time, Congress established U.S. worker protections by requiring that petitioners attest, *inter alia*, to the wages and working conditions of H-1B workers.²⁴

Since 1990, Congress has amended the H-1B program on several occasions, temporarily increasing the H-1B cap,²⁵ making more visas available for certain foreign nationals with advanced degrees,²⁶ implementing additional H-1B fees designed to provide education and

¹⁹ See RATIFICATION OF ACTIONS TAKEN BY THE ACTING SECRETARY OF HOMELAND SECURITY, 85 Fed. Reg. 59,651, 59,654 (Sept. 23, 2020).

²⁰ Maia Jachimowicz & Deborah Waller Meyers, *Temporary High-Skilled Migration*, MIGRATION POLICY INSTITUTE (Nov. 1, 2002), <https://www.migrationpolicy.org/article/temporary-high-skilled-migration>.

²¹ *Id.* The H-1 category in the 1952 Act was for “individuals of distinguished merit and ability”. 1952 Act, § 101(a)(15)(H)(i), 8 USC § 1101(a)(15)(H)(i). Eligibility could be established by being a member of the professions, *Matter of Gen. Atomic Co.*, 17 I&N Dec. 532, 532 (Comm’r 1980) or by being prominent or renowned in the person’s field, *Matter of Shaw*, 11 I&N Dec. 277, 277 (Dist. Dir. 1965).

²² Pub. L. 101–649, 104 Stat. 4978 (enacted Nov. 29, 1990).

²³ Under the 1990 Act, a “specialty occupation” is defined as requiring 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. INA §214(i)(1). 8 USC §1184(i)(1). Members of the professions are considered to be working in specialty occupations. See INA §101(a)(32), 8 USC §1101(a)(32) (definition of “profession”); 8 CFR §214.2(h)(4)(ii) (“specialty occupation” definition); IFR, 85 Fed. Reg. at 63,964 (proposed to be codified at 8 CFR §214.2(h)(4)(ii) (“specialty occupation” definition)).

²⁴ See INA §212(n)(1), 8 USC §1182(n)(1).

²⁵ See, e.g., The American Competitiveness in the Twenty-First Century Act, Pub. L. 106-313, 114 STAT. 1251 (enacted Oct. 17, 2000) which raised the annual cap to 195,000 for fiscal years 2001, 2002, and 2003, and exempted certain categories of H-1B petitions from being counted against the cap, codified at INA §§214(g)(1)(A)(iv)-(vi), 214(g)(5), 8 USC §§1184(g)(1)(A)(iv)-(vi), 1184(g)(5).

²⁶ L-1 Visa and H-1B Visa Reform Act, Pub. L. 108-447, div. J, title IV, 118 Stat. 3351, enacted Dec. 8, 2004.

training for U.S. workers²⁷ and adding compliance and enforcement mechanisms.²⁸ Throughout this period, Congress has attempted to improve the program through changes designed to make the H-1B category responsive and relevant to the changing needs of the United States and our economy while ensuring that appropriate compliance protocols exist to protect the domestic workforce. The current H-1B program is the product of a complex and reoccurring dialogue among all interested parties, including Congress, the administrative agencies, labor unions, and the regulated public, conducted over the course of several decades.

In contrast, this IFR, which was scheduled to take effect on December 7, 2020, without an opportunity for such dialogue between the agency and the regulated public, is an obvious attempt to fast-track implementation of this rule before the administration leaves office, evade meaningful review²⁹, circumvent congressional intent and ignore over sixty years of evidence that temporary professional workers benefit the U.S. economy. Quite simply, the provisions of this IFR, and the accompanying DOL IFR, will have a more profound impact on the H-1B visa program than any legislatively-negotiated change over the past thirty years, illegally over-regulating the category out of existence.

In attempting to justify its heavy-handed attempt to write the H-1B category out of the INA, the agency relies upon an imbalanced and incomplete analysis of the H-1B category's effect on U.S. workers. DHS attempts to construct a pseudo-academic critique of the H-1B category, yet fails to acknowledge the existence of a substantial body of scholarly research documenting that H-1B workers complement U.S. workers, fill employment gaps in many STEM occupations, and expand overall economic opportunities.³⁰ In particular, outdated allegations in the IFR that H-1B workers adversely affect the wages and working conditions of U.S. workers have been refuted in

²⁷ See The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Pub. L. 105-277, 112 Stat. 2681 (enacted October 21, 1998).

²⁸ For example, Section 412 of ACWIA created the term “H-1B dependent employers” and placed additional labor condition application obligations and other restrictions on their use of the H-1B program.

²⁹ We note the highly unusual and unexplained decision of the Office of Information and Regulatory Affairs (OIRA) to waive statutory review of this IFR. Under E.O. 12866, any rulemaking that “is likely to result in a rule that may have “an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities” requires further review by OIRA. Executive Order 12866 of September 30, 1993, 58 FR 51,735 (Oct. 4, 1993). As part of this review process, OIRA or the rulemaking agency must disclose certain elements of the review process to the public, including the changes made at OIRA’s recommendation. OIRA may waive review, though this waiver is discretionary. However, historically, such a waiver has not been employed for DHS rulemaking. Even as late as October 2019, OIRA noted that agencies may request that review be waived due to “exigency, safety, or other compelling cause” but that a “senior policy official must explain the nature of the emergency and why following normal clearance procedures would result in specific harm.” MEMORANDUM FOR REGULATORY POLICY OFFICERS AT EXEC. DEP’T’S & AGENCIES & MANAGING & EXEC. DIRECTORS OF CERTAIN AGENCIES & COMMISSIONS, M-20-2, OFFICE OF MGMT. & BUDGET (Oct. 31, 2019). The guidance further provides that the OIRA Administrator will determine “whether granting such a request is appropriate”. *Id.* Yet, on September 30, 2020, the OIRA website was updated to show that OIRA had concluded its review of DHS’s IFR and that DHS withdrew its rule from OIRA consideration. It was later found that this was a result of OIRA waiving its review pursuant to Section 6(a)(3)(A) of Executive Order 12866. No explanation for the use of this waiver has been provided to the public by either OIRA or the agency, contrary to the Administration policy, as discussed above. Aside from the information on its website, OIRA does not publicly provide information on rules that have been withdrawn from OIRA review or the basis of any waivers OIRA provides.

³⁰ For a thorough analysis highlighting the flaws of many of the conclusions referenced in the IFR, See *H-1B Professionals and Wages, Setting the Record Straight*, NAT’L FOUNDATION FOR AMERICAN POLICY (March 2006).

recent research documenting that most H-1B employers offer above average market wages.³¹ Similarly, scholarly research demonstrates that the time-worn, “zero-sum” arguments that H-1B workers negatively impact domestic worker employment opportunities are at best inaccurate, if not misleading.³²

DHS further attempts to justify these regulatory changes by inferring a vague and unsubstantiated correlation between an increase in the number of H-1B workers in the technology sector and alleged detrimental effects upon domestic technology workers. Referencing outdated reports that were published between nine and seventeen years ago buttressed by anecdotal information of recent violations, the essence of the implied rationale is that foreign-born technology workers are allegedly underpaid as compared to their domestic counterparts and that, if there are more H-1B workers in this sector, U.S. technology workers’ wages decrease. Without substantive analysis to support this canard, the agency then pivots to a generalized analysis of the technology consulting industry that, *inter alia*, disparages these companies for not paying all H-1B workers in excess of the market (median) wage, a concept not required by statute or regulation. Rather than engaging in a meaningful dialogue with the regulated public and other interested parties on how best to improve the H-1B category, DHS begins with the conclusion that the H-1B program is deeply flawed and then constructs a series of contorted arguments to justify regulating the program out of existence.

The agency’s skewed perspective is further demonstrated by its singular emphasis on the technology industry and IT staffing companies, ignoring the significant contributions made by H-1B workers in the fields of architecture, engineering, education, accounting, economics, medicine, law, etc. For example, it has been recently documented that many of the companies currently working to develop a coronavirus vaccine rely upon H-1B workers to provide critical research and development functions.³³ Although the IFR has a myopic focus on the technology sector, its unlawful attempt to restrict the H-1B category will impede innovation, diminish investment and decrease job opportunities in every sector of the U.S. economy.

The agency also alleges pervasive abuse and substantial gaps in H-1B enforcement yet recent DOL data suggests otherwise. DHS stated that the 5-year average annual number of H-1B petitions approved outside the numerical limitations established by Congress is approximately 214,371.³⁴ DHS also estimates that, as of September 30, 2019, the total H-1B authorized-to-work

³¹ David J. Bier, *100% of H-1B Employers Offer Average Market Wages – 78% Offer More*, CATO INSTITUTE (May 18, 2020).

³² *The H-1B Employment Effect*, PARTNERSHIP FOR A NEW AMERICAN ECONOMY (Apr. 1, 2015).

³³ See *The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy*, AMERICAN IMMIGRATION COUNCIL (April 2020) (noting “over the past decade (FY 2010-FY 2019), eight companies that are currently trying to develop a coronavirus vaccine—Gilead Sciences, Moderna Therapeutics, GlaxoSmithKline, Inovio, Johnson and Johnson Pharmaceuticals, Regeneron, Vir Therapeutics, and Sanofi—received approvals for 3,310 biochemists, biophysicists, chemists, and other scientists through the H-1B program.”) *Id.* at page 3 (citing David J. Bier, *Skilled Immigrants Searching for Coronavirus Cures at U.S. Companies*, CATO INSTITUTE, Mar. 12, 2020, <https://www.cato.org/blog/skilled-immigrants-searching-coronavirus-cures-us-companies>).

³⁴ Interim Final Rule *supra* note 1 at 63,921. This number does not include the 85,000 cap-subject petitions adjudicated each year, which would increase the estimated total annual approval rate to 299,371. Using this figure to estimate the noncompliance rate for FY2019 would only increase the percentage to 0.36%.

population was approximately 583,420.³⁵ While most of the government data referenced in the IFR relating to H-1B rule violations is either outdated or anecdotal, the DOL Wage and Hour Division’s enforcement data for FY2019, the most recent data available, reported a total of 138 violations with 1,076 employees receiving back wages.³⁶ When compared to the estimated total H-1B work-authorized population, this represents a per employee noncompliance rate of 0.18% for FY2019. In addition, the DOL’s willful violators list is currently comprised of a grand total of 16 employers.³⁷ Rather than documenting pervasive abuse of the H-1B program, recent data supports a conclusion that H-1B program compliance is overwhelming (99.8%) and that the proffered regulatory changes are, therefore, little more than an ill-conceived solution desperately in search of a problem.

D. The IFR’s Revised Definition of Specialty Occupation is *Ultra Vires* and Will be Detrimental to Innovation, Job Creation, and the U.S. Economy.

DHS lacks the authority to drastically alter the statutorily defined term “specialty occupation” to require a “U.S. bachelor’s degree or higher in a *directly related* specific specialty”³⁸ This addition impermissibly alters the statutory definition, which contains no such restriction. Specifically, the agency ignores existing congressionally mandated statutory language, creating an inherent conflict. A “specialty occupation” requires the “theoretical and practical application of a body of highly specialized knowledge.”³⁹ This knowledge is attained either through “a bachelor’s or higher degree in the specific specialty” or “its equivalent.”⁴⁰ The statute refers to the “body of knowledge” and not an academic major. Which fields of study form “the specific specialty (or its equivalent)” is already circumscribed by the knowledge requirement.

In some occupations, such as accountant, physician, or lawyer, the degree requirement may be clear and is often governed by laws regulating the profession. In these examples, there are external requirements that define the academic degrees that supply the body of highly specialized knowledge. But in other fields where the practice of the profession is not governed by licensing requirements, the knowledge requirement for the occupation is more likely to be available in a variety of academic disciplines. The agency’s imposition of a new and undefined “directly related” requirement is an obvious invitation to its adjudicators to deny occupations that do not come with narrow, already-established degrees.

The proposed rule also severely restricts the ability of employers to hire educated professionals in emerging fields that may have an inter-disciplinary approach to problem solving,

³⁵ *Id.*

³⁶ *H-1B*, Wage and Hour Division, U.S. Dep’t of Labor, <https://www.dol.gov/agencies/whd/data/charts/h-1b>. While there are other types of H-1B rule violations that could trigger a complaint (e.g., failure to post a required notice or provide the H-1B worker with a copy of the labor condition application), failure to pay the required wage is the most relevant violation in terms of the issues raised in this IFR. Further, even though most of DOL’s H-1B enforcement authority is compliance driven, the extraordinarily low violation rate in FY2019 is strong evidence of overwhelming compliance within the H-1B program.

³⁷ *H-1B Willful Violator List of Employers*, Wage & Hour Division, U.S. Dep’t of Labor, <https://www.dol.gov/agencies/whd/immigration/h1b/willful-violator-list>.

³⁸ Interim Final Rule, *supra* note 1 at 63,964 (to be codified at 8 CFR §214.2(h)(4)(ii)) (emphasis added).

³⁹ INA §214(I)(1)(A).

⁴⁰ INA §214(i)(1)(B).

notwithstanding the core principles and base of knowledge required for the occupation. DHS has repackaged an approach that courts have already rejected as unduly restricting the statutory definition of “specialty occupation.”⁴¹ In the commentary to the IFR, DHS also objects to an occupation requiring a general engineering degree as being approvable as a specialty occupation.⁴² This too is contrary to the statutory definition of “specialty occupation” and an unreasonable interpretation.⁴³ The INA defines the term “profession” to include, but not be limited to, “architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.”⁴⁴ The INA defines “profession” at a categorical level such as lawyers rather than “tax lawyer.” Similarly, the law does not define an engineer any narrower. It would thus be an erroneous and impermissible interpretation of the INA if the proposed regulation provided the basis for denying H-1B classification if the position requires only an engineering degree.⁴⁵

Of all of the flaws of the proposed rule, one of its most egregious aspects is that it will stifle the application of knowledge in new and innovative ways. Indeed, some examples from both past and current industry trends illustrate the impropriety of USCIS’s new definition and the way in which it will suffocate innovation. In the years following World War II, when the H-1 category was created, the use of computers developed slowly as scientists and mathematicians in academia, government and industry learned how to program and develop both the hardware and software for computer operations. While bachelor’s or higher degrees in computer science are widely available today from U.S. colleges and universities, that was not always the case. The development of computers was initially driven by the innovated application of advanced mathematics and engineering principles. But as the industry developed, there was more demand for graduates with this body of high specialized knowledge. Universities did not have computer science departments, as it was an emerging technology, but as that knowledge and technology developed, different institutions took different approaches to teaching this new field. At some

⁴¹ See, e.g., *RELX, Inc. v. Baran*, 397 F. Supp. 3d, 41, 44 (D.D.C. 2019) (“[I]f the position requires the beneficiary to apply practical and theoretical specialized knowledge and a higher education degree it meets the requirements.”); *Chung Song Ja Corp. v. U.S. Citizenship and Immigration Servs.*, 96 F. Supp. 3d 1191, 1198 (W.D. Wash. 2015) (by including “or equivalent [“specific specialty (or its equivalent)”] in INA § 214(i), the “needs of a specialty occupation can be met even where a specifically tailored baccalaureate program is not typically available”); *Residential Fin. Corp. v. U.S. Citizenship and Immigration Servs.*, 839 F. Supp. 2d 985, 997 (S.D. Ohio 2012) (“Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentials indicating possession of that knowledge.”); *Tapis Int’l v. Immigration and Naturalization Serv.*, 94 F. Supp.2d 172, 176 (D. Mass. 2000) (“For the ‘equivalent’ language to have any reasonable meaning, it must encompass . . . various combinations of academic and experience based training. It defies logic to read the bachelor’s requirement of ‘specialty occupation’ to include only those positions where a specific bachelor’s degree is offered.”) (internal citation omitted).

⁴² See Interim Final Rule, *supra* note 1 at 63,925-26.

⁴³ See *InspectionXpert Corp. v. Cuccinelli*, No 1:19cv65. 2020 WL 1062821, at *26 (M.D.N.C. Mar. 5, 2020), *report and recommendations adopted*, 2020 WL 3470341 (M.D.N.C. Mar. 31, 2020) (agency interpretation of the regulatory criteria for a specialty occupation was unreasonable when it excluded an engineering degree requirement as “too generalized”).

⁴⁴ INA §101(a)(32), 8 USC §1101(a)(32).

⁴⁵ See *InspectionXpert Corp.*, *supra* n.56, 2020 WL 1062821 at *26 (“[T]he INA defines professions — the basis of the H-1B specialty occupation requirement in the regulation — at the categorical level (e.g., ‘lawyers’ and ‘teachers,’ 8 USC §1101(a)(32), rather than ‘tax lawyer’ or ‘college English professor,’ *see id.*) and specifically includes ‘engineers’.”).

institutions, students would take courses in several departments. At others, the new discipline was placed in mathematics, engineering, or the physical sciences departments, resulting in graduates who today might have acquired the required body of computer science knowledge but with degrees from a variety of academic departments such as electrical engineering, mechanical engineering or physics.

In all of these programs, however, the common denominator is the body of highly specialized knowledge of the mathematical and engineering concepts behind the operation of computers that graduates acquired in attaining their respective degrees “in the specific specialty (or its equivalent).” While the knowledge base is always related to computers, there are different approaches to this knowledge base, resulting today in different degrees such as computer engineering, mechanical engineering, computer science, or management information sciences. All of these fields have the common body of knowledge, but they may reflect slightly different approaches to the scientific challenge of designing a computer to operate in a manner that will enhance the business operations of the employer. The INA requires the application of a body of knowledge but does not mandate the academic major in which the body of knowledge was acquired.

Today, the fast-growing field of data science provides a similar example. This occupation did not exist 10 years ago but has developed as the next generation of the application and benefit of computer operations. What were formerly called databases with varied business data are now called data warehouses, reflecting the vast amount of data now collected in the course of business operations. The field of data science developed to analyze large quantities of data to determine trends and patterns. Businesses and governments are learning new and innovative ways to improve operations in applications as diverse as marketing or finding trends in criminal activity to aid law enforcement.

As with computer science in the past, degree programs vary as many colleges and universities do not have data science departments. Students seeking the specialized knowledge required to enter this new occupation must take courses in a variety of academic departments. The knowledge for data science careers often requires expertise in statistics, applied mathematics, computer programming, and database operations. Students are graduating with degrees in such diverse fields as mathematics, engineering, statistics, or computer science in which they may have studied all of these fields. There is a body of highly specialized knowledge that must be acquired for this new occupation, but it may not be in a specific degree as degrees in data science are just now beginning to be developed and likely will not be widely available for several more years. The proposed rule would stifle innovation such as we have seen in the development of the fields of computer science and data science.

For the foregoing reasons, the agency’s addition of a requirement of a “directly related specific specialty” to the regulatory criteria for demonstrating that a job is in a specialty occupation is *ultra vires* and thus this proposed regulatory change should be abandoned.

E. The IFR’s Proposed Definition of “Employer-Employee Relationship” Will Create a Byzantine Analytical Structure Inconsistent with Corresponding DOL Regulations and Add Uncertainty and Inconsistency to H-1B Adjudications

Through issuance of this IFR, DHS proposes to resurrect the 2010 USCIS Policy Memorandum⁴⁶ regarding the determination of the employer-employee relationship for H-1B petitions. The proposed changes incorporate and expand its content to address a perceived imbalance created in the ability to establish an employer/employee relationship based on a “right to control.” DHS asserts that it is “making clear” that all factors must be taken into consideration to the extent applicable and appropriate to the facts of the specific case. Rather than providing clarity, DHS has created an impossibly complex rubric of factors that adjudicators “may consider” to determine the existence of an employer-employee relationship. In addition, DHS dismisses the need for consistency to foster compliance between DHS’s definition of “employment” and DOL’s definition of “employment” required for the H-1B labor condition application process. DHS “believes that this new regulation is **not necessarily inconsistent** with the DOL definition of ‘[e]mployed, employed by the employer, or employment relationship’ at 20 CFR § 655.715” yet acknowledges that “[t]o the extent there are inconsistencies” its definition is proper.⁴⁷ Despite DHS’ lukewarm denial of inconsistency, the proposed definition will lead to increased arbitrary and subjective decisions that will inevitably conflict with DOL regulations.

The INA states that “[t]he admission to the United States of any [foreign national] as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe”⁴⁸ The statute continues:

The question of importing any [foreign national] as a nonimmigrant under subparagraph (H) . . . of this title . . . in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe.⁴⁹

This reference that the petition must be submitted by “the importing employer” resulted in the requirement of an employer-employee relationship between the petitioning employer and the foreign worker. The H-1B petition process, which involves two government agencies, DOL and DHS, requires the agencies to develop consistent standards in order for employers to have clear guidance and a realistic ability to comply.

The agency’s focus on its proposed labyrinthine analysis of when an employee-employer relationship can be determined underscores the conflict between the DOL definition and the definition DHS has proposed, which can only result in confusion and difficulty for employers

⁴⁶ DETERMINING EMPLOYER-EMPLOYEE RELATIONSHIP FOR ADJUDICATION OF H-1B PETITIONS, INCLUDING THIRD PARTY SITE PLACEMENTS, POLICY MEMORANDUM HQ 70/6.2.8, USCIS (Jan. 8, 2010). Although this policy memorandum has been superseded and archived, reference to its location may be found at Interim Final Rule, *supra* note 1 at 63,931, n. 85.

⁴⁷ Interim Final Rule, *supra* note 1 at 63,932-33 n. 102 (emphasis added).

⁴⁸ INA §214(a)(1), 8 USC §1184(a)(1).

⁴⁹ INA §214(c)(1), 8 USC §1184(c)(1).

attempting to comply. In addition, it guarantees that USCIS adjudicators will have greater difficulty in applying the numerous suggested “considerations” noted in the IFR. In other existing regulations for nonimmigrant categories with a complex list of options to qualify for the visa status, such as the O-1 regulations,⁵⁰ at least USCIS provides an expected standard of “at least three of the following forms of documentation.”⁵¹ No such guidance is supplied here, creating uncertainty for both employers or adjudicators, particularly as DHS uses the language “may consider” which could be interpreted to mean that USCIS adjudicators do not necessarily have to give weight to a factor that may be present.

Contrary to more than a decade of policy in determining whether an H-1B petitioner and beneficiary will have an employer-employee relationship, DHS’s purported “additional clarification” of the 2010 policy memorandum⁵² is an attempt to eliminate the central test of whether the petitioner will have the “right to control” the beneficiary’s work. It is replacing this long-standing policy founded upon the common law with a new unrealistic test that would require that the petitioner have actual control of the beneficiary’s day-to-day work. In analyzing the employer-employee relationship, the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, stated:

In determining whether a hired party is an employee under the general common law of agency, we consider ***the hiring party’s right to control the manner and means by which the product is accomplished***. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.⁵³

The test as laid out by the Supreme Court does not focus on whether the employer controls how the employee works on a day-to-day basis, but rather focuses on the employer’s control of the ultimate service or product. The other factors listed in this test relate to determining the “manner and means by which the work was accomplished”, not the right to control.⁵⁴ Similarly, DHS’s reliance on the *Clackamas* factors is misplaced for the majority of employment situations for H-1B petitioners and beneficiaries, as those factors were specifically designed to address a situation where an employee was also a shareholder of the petitioner.⁵⁵

⁵⁰ 8 CFR §214.2(o)(3)(iii).

⁵¹ *Id.*

⁵² Interim Final Rule, *supra* note 1 at 63,931.

⁵³ 503 U.S. 318, 323-24 (1992) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (footnotes omitted)) (emphasis added).

⁵⁴ *Id.*

⁵⁵ In *Clackamas Gastroenterology Assocs., P.C. v. Wells*, the Supreme Court agreed with the Equal Opportunity Commission’s consideration of six factors for determining if a shareholder-director is an employee, which involves different issues than control of the ultimate service or product. 538 U.S. 440, 449-50 (2003).

In their totality, these changes to the definition of the employer-employee relationship are unquestionably designed to completely prevent consulting and professional services firms from accessing the H-1B visa program. As such, DHS has engaged in an *ultra vires* attempt to usurp the role of Congress by using the regulatory process to preclude these firms from legally using a nonimmigrant visa category of the INA that is contrary to the common law.

Moreover, even though DHS recognizes that the employer-employee relationship may be satisfied by a beneficiary that possesses ownership interest in the petitioner, the revised definition places significant restraints on innovation and entrepreneurship, which USCIS has previously recognized as an important use for the H-1B category.⁵⁶

The IFR states that

Absent unusual factual circumstances, a beneficiary who is the sole or majority shareholder of the petitioning entity, does not report to anyone higher within the organization, is not subject to the decisions made by a separate board of directors, and has veto power over decisions made by others on behalf of the organization, will likely not be considered an “employee” of that entity for H-1B purposes. On the other hand, if a beneficiary is bound by decisions (including the decision to terminate the beneficiary’s position) made by a separate board of directors or similar managing authority, and does not have veto power (including negative veto power) over those decisions, then the mere fact of his or her ownership interest will not necessarily preclude the beneficiary from being considered an employee.⁵⁷

The proposed additional factors listed in the IFR that are to be considered when the H-1B petitioner has “any ownership interest” in the petitioner provide a much more restricted path for any H-1B entrepreneur. For example, if the H-1B beneficiary must report to a governing board of directors and a shareholder’s agreement states that he or she may be removed even by a minority vote of shareholders or members of the company, how does the USCIS adjudicator weigh his or her “influence” on corporate decisions? We recommend that this analysis should focus more on the impact of the company’s operations on the U.S. economy and that the addition of separate “additional factors” in the presence of an ownership interest by the H-1B petitioner is not necessary.⁵⁸ In addition, requiring petitioners to address the ownership interest of the H-1B beneficiary, when the individual has an obvious non-controlling interest in the company, adds unnecessary complexity to an already confusing analytical process.

⁵⁶ For example, on August 2, 2011, Secretary of Homeland Security Janet Napolitano, and USCIS Director Alejandro Mayorkas outlined a series of policy, operational, and outreach efforts to fuel the nation’s economy and stimulate investment. *Secretary Napolitano Announces Initiative to Promote Startup Enterprises and Spur Job Creation*, U.S. CITIZENSHIP & IMM. SERVICES (Aug. 2, 2011) <https://www.dhs.gov/news/2011/08/02/secretary-napolitano-announces-initiatives-promote-startup-enterprises-and-spur-job>.

⁵⁷ Interim Final Rule, *supra* note 1 at 63,933.

⁵⁸ Even the IFR acknowledges that DHS has long recognized the separate existence of the corporation from its shareholders and the ability of the corporation without more to employ a shareholder for a nonimmigrant visa classification. *See Matter of Aphrodite Invs. Ltd.* 17 I&N Dec. 530 (Comm’r 1980).

F. The IFR's Revision of the Regulatory Criteria for Establishing the Existence of a Specialty Occupation is *Ultra Vires* in That It Creates an Impossible Standard That Cannot Be Met

Of all of the impractical and illegal changes to the H-1B classification that DHS has proposed, the most egregious may be the attempt to impose an impossible burden of proof on petitioners in proving a position qualifies as a specialty occupation.⁵⁹ Abandoning any connection to reality and real-world business practices whatsoever, the IFR establishes that petitioners will no longer be able to document that a job qualifies as a specialty occupation by providing substantial, credible and probative evidence of what is normally, commonly or usually required for the job. Rather, employers will need to venture through a proverbial crystal ball where job requirements may be established 100% of the time with 100% certainty. As DHS stated:

This change means that the petitioner will have to establish that the bachelor's degree in a specific specialty or its equivalent is a minimum requirement for entry into the occupation in the United States by showing that this is **always** the requirement for the occupation as a whole, the occupational requirement within the relevant industry, the petitioner's particularized requirement, or because the position is so specialized, complex, or unique that it is necessarily required to perform the duties of the specific position. ... It will no longer be sufficient to show that a degree is normally, commonly, or usually required.⁶⁰

DHS attempts to justify writing common sense out of this part of the regulation through a strained "strawman" argument⁶¹ that culminates in the conclusory and unsubstantiated assertion that a position cannot possibly qualify as a specialty occupation if only the majority of employers, and not all, require a bachelor's degree or its equivalent for that position. DHS finishes its analysis of this section with an attempt to extoll the virtue of this revision by noting that this change will likely lead to fewer RFEs, presumptively signaling an intent to normally, commonly and usually deny most H-1B petitions, limiting how the visa classification was intended to be used by Congress.

The impact of the IFR's change on each of the current criteria at 8 CFR section 214.2(h)(4)(iii)(A) is set forth in more detail below.

i. The IFR's first criterion

DHS claims that it is removing "normally" required from the first regulatory criterion because the statutory definition of "specialty occupation" does not include this word.⁶² This change

⁵⁹ See proposed changes to 8 CFR §214.2(h)(4)(iii)(A). Interim Final Rule, *supra* note 1 at 63,926.

⁶⁰ *Id.* (emphasis added).

⁶¹ A strawman argument is a fallacious argument that distorts an opposing stance in order to make it easier to attack. Essentially, the person using the strawman pretends to attack their opponent's stance, while in reality they are actually attacking a distorted version of that stance, which their opponent doesn't necessarily support. See *Straw man*, Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/straw%20man>.

⁶² See Interim Final Rule, *supra* note 1 at 63,926. (It must also be noted that the statutory definition of specialty occupation does not include the word "always.").

disregards the plain language of the statute in yet another obvious attempt to unduly restrict petitioners' ability to demonstrate that an occupation is a specialty occupation.

DHS recognizes that the first regulatory criterion is based on the occupation, moving from the “general to the specific,” with the second criterion being the industry, the third being what the petitioner requires, and the fourth being the specific job.⁶³ The new first regulatory criterion is fundamentally flawed in its requirement of a showing that “all positions” within the occupational category, which the agency says it “generally determines” from the standard occupational classification (SOC) code, “have a qualifying minimum degree requirement.”⁶⁴ Very few, if any, occupations could meet this requirement. Even in fields such as architecture, not everyone in the profession has an architecture degree. A physician may also qualify through either a Doctor of Medicine (MD) degree or through a Doctor of Osteopathic Medicine (DO). Based on the proposed language, petitioners will be required to prove a double negative (i.e., that there is **no** worker in the specialty occupation who does **not** possess the required degree) – a requirement no occupation could realistically meet to qualify for H-1B classification. The statutory definition of “specialty occupation” does not require this, instead providing for “a bachelor’s or higher degree in the specific specialty (or its equivalent).”⁶⁵ A new criterion for which limited, if any documentation would be available, and for which few occupations would qualify is not consistent with the law and is yet another *ultra vires* provision that DHS should not pursue.

DHS also claims that the word “normally” in the current first regulatory criterion is “ambiguous.”⁶⁶ The agency cites to dictionary definitions of “usually, or in most cases,” with “usually” meaning “most.”⁶⁷ DHS then offers the flawed argument that, if “merely 51% of positions within an occupation require a certain bachelor’s degree” that “runs contrary” to the specialty occupation definition.⁶⁸ But if most positions require at least a bachelor’s degree “in the specific specialty (or its equivalent),” then logic, precedent and common sense would seem to indicate that the position would satisfy the statutory requirement. Courts have had no problem understanding “normally” and have not found the current regulation to be in conflict with the statute.⁶⁹ The elimination of the adjective “normally” suggests that if there is a single person anywhere in the country working in the designated occupation without the specific degree, no H-1B petition can be approved for that occupation. Such an extreme outcome is neither supported by the plain language of the statute nor judicial interpretation. This provision is contrary to the intent of Congress as it would effectively eliminate most occupations from H-1B classification.

⁶³ See *id.* at 63,927.

⁶⁴ See *id.* & n. 62.

⁶⁵ INA §214(i)(1)(B), 8 USC §1184(i)(1)(B).

⁶⁶ Interim Final Rule, *supra* note 1 at 63,926.

⁶⁷ *Id.* (citations omitted).

⁶⁸ *Id.*

⁶⁹ See *Taylor Made Software, Inc. v. Cuccinelli*, 453 F. Supp. 3d 237, 246 (D.D.C. 2020) (for computer systems analyst occupation, USCIS is not rationally reading the OOH or the first regulatory criterion when the agency “wants to discount OOH evidence indicating *both* that a specialty degree requirement is ‘common’ and that ‘most’ people in the position have a degree in a computer-related field” by relying on the OOH’s “recognition” of what some employers accept) (emphasis in original); *Next Generation Tech., Inc. v. Johnson*, 328 F. Supp. 3d 252, 267 (S.D.N.Y. 2017) (no “rational connection” between USCIS’ determination that “computer programmers *are not normally required to have a bachelor’s degree*” and OOH’s statement that “[m]ost computer programmers *have a bachelor’s degree*”) (emphasis in original)).

ii. The IFR's second criterion

DHS's second criterion requires a petitioner to demonstrate that the "specialty degree requirement is the minimum entry requirement for (1) parallel positions (2) at similar organizations (3) within the employer's industry in the United States."⁷⁰ When read in conjunction with the removal of the qualifying word, "common", from this criterion, a petitioner would need to demonstrate that *every* parallel position at similar organizations within the employer's industry requires a bachelor's degree or higher, or its equivalent. This standard is not just unnecessarily high and unattainable, it is contrary to the plain language of the criterion. The term "parallel" is defined as "something very similar to something else, or similarity between two things".⁷¹ Parallel positions thus are not identical positions with identical requirements and, by incorporating such an absolute requirement into the criterion, the IFR is effectively removing it from the regulation. On its face, DHS allows for a petitioner to satisfy this second criterion by demonstrating that the specialty degree requirement is the industry norm for *similar positions*, which would logically include those that are close or comparable to the proffered position, though not exactly the same. Unfortunately, DHS also makes the conflicting statement that this new second criterion "is intended for the subset of positions with minimum entry requirements that are determined . . . by specific industry standards."⁷² But industry standards are typically determined by the actions of a majority of the industry's members and if that majority determines, as is likely as a matter of common sense, that the industry standards are those that are common, normal and usual, as opposed to absolute, that standard must be the basis for determining eligibility.

The IFR then proceeds to refer to registered nurses or RNs, who, it ironically indicates, "**generally** do not qualify for H-1B classification because **most** RN positions **normally** do not require a U.S. bachelor's or higher degree in nursing (or a directly related field) . . . as the minimum for entry."⁷³ To support these assertions, DHS cites to the Occupational Outlook Handbook (OOH) section for registered nurses.⁷⁴ The OOH does, however, indicate that "[m]ost registered nurses begin as staff nurses in hospitals or community health settings", and explains further that "employers, particularly those in hospitals, may require a bachelor's degree."

By interpreting this criterion to require specialty occupation positions to be established by determining whether industry standards require the specific bachelor's degree in every circumstance, without allowing for what is the common, usual, typical, normal, or generally accepted practice within the industry, DHS is effectively striking this criterion from the regulation.

⁷⁰ See Interim Final Rule, *supra* note 1 at 63,297.

⁷¹ See Cambridge Dictionary, *available at* <https://dictionary.cambridge.org/us/dictionary/english/parallel>.

⁷² Interim Final Rule, *supra* note 1 at 63,928.

⁷³ *Id.* (emphasis added). Apparently, DHS would like to deny H-1B petitions that normally do, and normally do not, require a bachelor's degree. If even statutorily recognized specialty occupations like medicine and law do not have absolute degree requirements, this IFR will effectively eliminate the H-1B visa program from being accessible to U.S. employers.

⁷⁴ *Registered Nurses*, U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, <https://www.bls.gov/ooh/healthcare/registered-nurses.htm> (last modified Sept. 1, 2020).

iii. The IFR's third criterion

DHS has indicated that the “third criterion . . . essentially will remain the same, other than the deletion of ‘normally.’”⁷⁵ Incredulously, DHS seeks to minimize the impact of removing the word “normally” from this criterion and the significance of illegally refocusing USCIS’s evaluation of whether an employer always requires a bachelor’s degree or higher, or its equivalent, for the position. Likewise, DHS attempts to minimize the significant negative impact of adding language that a petitioner must “establish that the proffered position requires such a directly related specialty degree, or its equivalent, to perform its duties,”⁷⁶ presumably creating a “double absolute” standard. The combination of removing the standard that the employer normally requires a bachelor’s degree, while at the same time adding language requiring the petitioner to demonstrate that the position always requires a directly related specialty degree, or equivalent, creates an inquiry less focused on determining the employer’s real-world requirements, than requiring petitioners to meet an inflexible and impractical burden of proof.

DHS’s revisions to this criterion appear to be based upon its erroneous reading of *Defensor v. Meissner*.⁷⁷ *Defensor*, however, is a unique case with limited facts that should not be applied broadly. At issue in *Defensor* was whether a third-party placement firm focusing on nurses, qualified as an “employer” under the INA, and more specifically, whether its practice of only hiring nurses with bachelor’s degrees satisfied the third criterion. The Fifth Circuit upheld the district court’s ruling, finding that (1) the hospitals at which the nurses were placed were the employers; and (2) a review of the evidence in the record lacked information regarding hospital employment practices.

Whereas the parties in *Defensor* were nurses and a nurse-staffing agency, the nursing profession comprises a small percentage of the H-1B population, with the majority of H-1B petitions currently filed by firms in the technology and consulting sectors. Thus, the current H-1B program is distinguishable from *Defensor*. For example, and unlike the employees in *Defensor*, the position of a software engineer or similar positions normally requires a bachelor’s degree or higher, or its equivalent, in one or more particular fields of the computer sciences. There is no “associate” or “diploma” credential that would allow for an individual to qualify for the position.⁷⁸ *Defensor* is distinguishable in that its business model was uniquely linked to the nursing profession. When an IT or consulting firm is the petitioner, the industry practice is for one or more members of the firm’s staff to be placed onsite to manage the H-1B beneficiaries. This is unlike the agency in *Defensor*, which the Fifth Circuit described as a “token employer”, due to its only role being to hire and pay the employees. In its discussion, the Fifth Circuit opined that “merely being able to ‘hire’ or ‘pay’ an employee, by itself, would be insufficient to grant employer status to an entity that does not also supervise or actually control the employee’s work”, which is an interpretation of the statutory language that “accords better with the commonsense notion of employer”.⁷⁹

⁷⁵ See Interim Final Rule, *supra* note 1 at 63,297.

⁷⁶ *Id.*

⁷⁷ 201 F.3d 384 (5th Cir. 2000).

⁷⁸ See *Software Developers: How to Become a Software Developer*, BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, <https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm#tab-4>.

⁷⁹ *Defensor*, *supra* note 77, 201 F.3d at 388.

Therefore, because of the remarkably limited scope of *Defensor*, and its limited application to the general H-1B program, DHS's reliance on the Court's discussion in *Defensor* is misplaced, misleading, and erroneous.

iv. The IFR's fourth criterion

Although we do not have an objection to removing the second prong of the second criterion and adding it to the fourth criterion, thus allowing a petitioner to demonstrate that the duties are "so specialized, complex or unique", we object to the requirement that these duties can only be performed by an individual with a baccalaureate or higher degree in a "directly related specific specialty, or its equivalent." The current fourth criterion requires a demonstration that knowledge to perform the specialized and complex duties is "usually associated with the attainment of a baccalaureate degree". This is reasonable as written and should not be changed. The current rule requires a demonstration of knowledge emanating from a degree rather than demonstrating that only one degree will equip the worker to perform the complex and specialized duties. The fourth criterion already has a demanding standard, i.e., the duties must be "so specialized, complex or unique", that the additional requirement of demonstrating that these duties can only be performed in a "directly related specialty" would make it impossible to comply.

The fourth criterion is a way for the petitioner to demonstrate that the position qualifies for H-1B classification if the first criterion cannot be met in the event that the OOH does not readily support that the occupation requires a degree in a specific specialty. Petitioners can thus demonstrate under the fourth criterion that the duties required to perform the position within their organization, and in the context of their business, are specialized, complex and unique. If a petitioner can demonstrate that the duties are so specialized, complex or unique through a preponderance of the evidence, the DHS must readily accept the employer's explanation that "knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree."

G. The regulatory criteria at 8 CFR 214.2(h)(4)(iii)(A) for establishing the existence of a specialty occupation are "necessary and sufficient" as "necessary" alone is confusing, ambiguous, and harmful to American employers

Beyond its flawed and harmful reworking of the four eligibility criteria, DHS's reliance on the rationale in *Defensor* also adds a totality of circumstances element to the review process that runs against established precedent and norms.

In *Defensor*, the Fifth Circuit wrestled with the meaning and application of "to qualify as" in the regulations, struggling to determine whether demonstration of each of the four criteria is "necessary and sufficient" for a position "to qualify as a specialty occupation", or if each of those criteria are solely "necessary" conditions. Despite acknowledging and affirming that "[i]n common usage, this phrase ("to qualify as") suggests that whatever conditions follow are both necessary and sufficient conditions", the Fifth Circuit settled on the interpretation that each of the four criteria are only "necessary" conditions to demonstrate that the position is within a specialty occupation.

Still, the Fifth Circuit’s interpretation was mere dicta since the court gave the petitioner the benefit of the doubt by assuming *arguendo* that the regulatory criteria created necessary and sufficient conditions for establishing the position as a specialty occupation.⁸⁰ Even under this analysis, the Fifth Circuit found that the petitioner was not able to establish the specialty occupation under the third prong.⁸¹ Therefore, it is inappropriate to interpret the four criteria as only “necessary” conditions and not as “necessary and sufficient” conditions as the USCIS should be able to make an appropriate decision, just as the Fifth Circuit did, as it can evaluate the four criteria and the merits of a petitioner’s argument based on the preponderance of the evidence standard. Layering a totality of circumstances analysis on top of this already rigorous review will add confusion for both adjudicators and petitioners while increasing subjectivity and inconsistency of adjudications.

Not all cases follow the Fifth Circuit’s interpretation of this language, and its opinion has limited application to the H-1B category. For example, in *RELX, Inc. v. Baran*, the U.S. District Court for the District of Columbia completely disregarded USCIS’ argument that the four criteria mentioned in the regulation are necessary but not sufficient to establish that a position is a specialty occupation and rejected the narrow interpretation of “specialty occupation” used by the USCIS, under which only a single academic discipline could be the requirement for an H1-B position.⁸² As the facts and discussion in *Defensor* relate only to a small subgroup of employers, applying this fact-specific and nuanced case generally to the H-1B regulations would not provide clarity or simplify the adjudication process. Instead, it will only serve to confound petitioners and adjudicators and decrease the quality and consistency of H-1B adjudications.

H. The one-year limitation of validity period for H-1B petitions and extensions for third-party worksites is harmful to U.S. employers

Of particular concern is the new definition of “third-party worksite” and the newly imposed one-year limit on H-1B status validity. The proposed change defines “third-party worksite” as “a worksite, other than the beneficiary’s residence in the United States, that is not owned or leased, and not operated, by the petitioner.”⁸³ The IFR states that a one-year maximum validity period will apply whenever the beneficiary will be working at a third-party worksite. Further, the new site visit provisions state that inspections may include any third-party worksites, as applicable.⁸⁴

We support the inclusion of a reference to a beneficiary’s residence in the definition of a “worksite” in light of the current COVID-19 pandemic and the growing interest of U.S.

⁸⁰ *Id.* at 387.

⁸¹ *Id.*

⁸² *RELX*, 397 F. Supp. 3d at 55 (“What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge) (citing *Residential Fin. Corp. v. U.S. Citizenship & Immigration Servs.*, 839 F. Supp. 2d 985, 997 (S.D. Ohio 2012) (“The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge.”); *Tapis Int’l v. I.N.S.*, 94 F. Supp. 2d 172, 175-76 (D. Mass. 2000) (rejecting agency’s argument because it “precludes any position from satisfying the ‘specialty occupation’ requirements where a specific degree is not available in that field”)).

⁸³ See IFR, *supra* note 1, at 63,964 (to be codified at 8 CFR §214.2(h)(4)(ii)).

⁸⁴ See *supra* note 1, at 63,963-64 (to be codified at 8 CFR §214.2(h)(4)(i)(B)(7)).

employers to move away from the traditional office model and incorporate the work-from-home (WFH) model as an industry standard in the rapidly evolving business world.⁸⁵ We ask that DHS coordinate its inclusion of a beneficiary's residence in the "worksite" definition with the DOL to ensure harmonious definitions. While the IFR does not address the impact when an H-1B beneficiary changes home addresses, we believe this should not affect the regulatory analysis.

We do, however, take issue with the rest of the new definition of "third-party worksite," as it creates uncertainty, unpredictability, and significantly increased costs for petitioners. Limiting H-1B approvals to one year will have a significant adverse effect on a number of industries that may not have been contemplated by the agency when drafting the IFR. For instance, this definition of a "third-party workplace" and the resulting one-year H-1B validity period will have a devastating effect on the healthcare industry, where it is a common industry standard for clinicians to be employed by a practice group or a healthcare staffing company while treating patients at a hospital (i.e., hospitalist physicians). This is also a major issue for physicians who work in private practice but perform patient rounds at hospitals; or specialist physicians such as nephrologists who treat their patients at dialysis centers that may not be owned/controlled by the physician's employing practice group. Additionally, there is major concern for medical residents and fellows who traditionally rotate through several locations, as necessitated by their specialty, patient load, and other factors. This new rule will adversely affect a variety of other professionals where it is industry standard to work at more than one location or at a third-party site (e.g., architect working on location at a construction site, an attorney, accountant or auditor working at a client's site on a long-term matter, an engineer working at a third-party location pursuant to a multi-year service agreement).

We understand that DHS is concerned with fraud and believes that, by requiring petitioners who wish to place beneficiaries at third-party sites to file H-1B petitions annually, it will reduce the incidence of fraud. Despite the fact that the agency has presented no data in the IFR to support a questionable conclusion that requiring petitioners to file H-1B extensions annually will directly reduce fraud, we concur that reducing fraudulent H-1B petitions benefits all legitimate petitioners. Accordingly, we propose that, instead of limiting all H-1Bs for third-party locations to one-year increments, that USCIS and DOL leverage, and where necessary enhance, existing enforcement mechanisms to investigate fraud on a case-by-case basis.

The IFR third-party worksite provision will negatively impact USCIS in that it will add a substantial volume of petitions to the already overwhelming backlog of cases to be adjudicated by an already overburdened agency. It will also harm U.S. employers by requiring increased expenditures of funds and administrative effort by human resource personnel. It will be burdensome to and will interfere with productive time of H-1B employees. In the healthcare sector specifically, the IFR may impede accessibility to healthcare services during a widespread pandemic if USCIS processing delays create gaps in employment authorization. This provision also conflicts with the three-year service requirement of J-1 physicians who receive waivers of the two-year foreign residence requirement based on committing to work in medically underserved areas and must complete three years of service solely in H-1B status. In addition, the IFR places an undue burden on the emerging healthcare industry practice of staffing

⁸⁵ See Prithwiraj (Raj) Choudhury, *Our Work-from-Anywhere Future*, HARVARD BUSINESS REVIEW, <https://hbr.org/2020/11/our-work-from-anywhere-future>.

“hospitalist” physicians for in-patient care. Under industry practice, hospitalist physicians are directly employed by physician practices or medical staffing companies, with physicians working at hospitals which fall within the new definition of third-party worksites.⁸⁶

There are several sectors of the U.S. economy that will be adversely affected by the third-party worksite provisions, but none as much as the U.S. information technology industry. Currently, the U.S. information technology industry (IT) is the largest in the world.⁸⁷ Due to the very fluid and dynamic nature of the IT industry and the rapid technological demands of IT customers, the staffing of IT workers at third-party worksites is an essential and common practice of the industry. Many IT teams in the United States are composed of U.S. workers and H-1B workers stationed side-by-side and many of the H-1B IT workers are U.S. educated and trained. This typical practice enables U.S. IT companies and their customers to access optimal combinations and synergies of IT talent and experience. The third-party worksite provisions of the IFR, which require annual applications for extension of status for H-1B workers, will severely impact business strategies in the technology and consulting sectors and likely result in lost employment opportunities for both U.S. workers and H-1B employees as companies in these sectors make the business decision to further dismantle U.S.-based information technology teams and relocate them abroad to more accommodative venues.⁸⁸

If DHS is concerned about nonavailability of work for the entire duration of the validity period, Congress already addressed this issue through the enactment of INA §212(n)(2)(C)(vii)(III), which allows employers to place H-1B workers in nonproductive status so long as the H-1B worker is paid the required wage.⁸⁹ The DHS’s imposition of a blanket 1-year validity period for H-1B workers at third party sites is contrary to INA §212(n)(2)(C)(vii)(III). As noted previously,

⁸⁶ Society of Hospital Medicine letter to DHS Secretary Wolf, October 26, 2020, https://www.hospitalmedicine.org/globalassets/policy-and-advocacy/letters-to-policymakers-pdf/shm_comments_j1visa_dhs_oct2020_final.pdf (noting that “[h]ospitalists are clinicians whose professional focus is the general medical care of hospitalized patients. They manage the inpatient clinical care of their patients while working to enhance the performance of their hospitals and health systems. Due to their focus on providing care in the hospital setting, hospitalists have been the backbone of the nation’s COVID-19 response, caring for hospitalized COVID-19 patients throughout the country. Many hospitalists are international medical graduates who trained in the U.S. under J-1 visas. Immigrant hospitalists provide high quality and lifesaving medical care to patients throughout the country and are an essential part of the hospital medicine workforce.”).

⁸⁷ Makada Henry-Nickie, Kwadwo Frimpong, and Hao Sun, *Trends in the information Technology sector*, BROOKINGS (Mar. 29, 2019), <https://www.brookings.edu/research/trends-in-the-information-technology-sector/> (noting that “[t]he U.S. leads the global landscape in technology innovation. The country’s competitive edge, according to the World Economic Forum’s 2018 Global Competitive Index, is due to its business dynamism, strong institutional pillars, financing mechanisms, and vibrant innovation ecosystem. Innovation is a trademark feature of American competitiveness and has powered its global dominance since the post-World-War industrial revolution. Countries that lead the world in generating advanced technologies and leveraging the full productive capacity of their digital economies can gain a strategic competitive advantage. Digital technologies have risen to prominence as a critical determinant of economic growth, national security, and international competitiveness. The digital economy has a profound influence on the world’s trajectory and the societal well-being of ordinary citizens. It affects everything from resource allocation to income distribution and growth.”).

⁸⁸ *Id.* (noting that “[r]ecently implemented administrative changes to the H-1B visa lottery compound the effects of anti-immigrant labor market policies . . . To that end, heightened workforce pressures across the ICT [information and communications technology] industry will likely cause many IT firms to relocate more operations offshore to compensate for the shortfall in domestic-based foreign talent if workforce training efforts cannot meet the industry’s demand for highly skilled workers.”).

⁸⁹ See *ITServe Alliance v. Cissna*, No. 1:18-cv-2350-RMC, Dkt. 24, at 39 (D.D.C. Mar. 10, 2020).

this proposal will also adversely impact certain industries such as IT consulting that have been recognized as a legitimate business model under the H-1B visa program.⁹⁰

For the above reasons, we request that DHS refrain from changing the definition of third-party worksite, while implementing the inclusion of a beneficiary's residence as a standard worksite. We also request that DHS withdraw the proposed one-year limit on H-1B approvals for beneficiaries who will perform services at third-party worksites.

I. The proposed regulatory changes will irreparably damage the valid reliance interests of H-1B petitioners and beneficiaries in every sector of the U.S. economy

Finally, DHS must not proceed with this rule because the profound and unprecedented proposed changes to long-established H-1B policy will harm the U.S. economy, U.S. employers and H-1B workers who have become integral members of their local communities. DHS intended to apply the IFR to H-1B renewal petitions.⁹¹ If enacted as proposed, this will inevitably result in the denial of petitions that have been approved in the past. DHS further asserts that employers' reliance on years of H-1B practices, policies, and adjudicatory standards is far outweighed by the government's interest in this new, restrictive definition of specialty occupation. In doing so, DHS ignores the business dislocation and disruption for numerous U.S. employers as well as the fundamental cruelty of upending the lives of thousands of individuals who have followed the rules, many of whom have been waiting patiently for their applications for permanent resident status to be processed for a decade or longer. These individuals have relied upon and followed the rules that have been in place for 30 years. They have purchased homes, started families, participated in community-based church, civic and service organizations, and advanced in their careers while working within the existing legal system with an expectation that the U.S. government would not change the rules while they wait.

As we have noted on multiple occasions throughout these comments, American employers have relied upon foreign talent through use of the H-1B visa program to explore and apply emerging technologies and business practices to improve the efficiency and profitability of their business operations. This technological innovation has occurred as these employers have hired, employed, promoted and relied upon a highly skilled and U.S.-educated workforce, many of whom are H-1B workers who have been in H-1B status for many years. They have done so at significant expense, managing statutory and regulatory compliance programs applicable to the H-1B program with a justifiable expectation that the H-1B employee would be allowed to complete the immigration process.⁹² The backlog in immigrant visa applications resulting from per-country limitations results in a system that has left a significant population in long term H-1B status. But for this antiquated immigrant visa allocation system, most of these long-term H-1B workers would already be lawful permanent residents. Congress recognized the problem of immigrant

⁹⁰ *Serenity Info Tech. Inc. v. Cuccinelli*, 461 F. Supp. 3d 1271,1287-88 (N.D. Ga. 2020) (“[C]ongress did not expect USCIS to analyze the day-to-day activities of H-1B applicants to determine whether the occupation is a specialty occupation, but instead provided guidance for defining specialty occupation categorically based in large part on the qualifications required for the occupations”); see also *ITServe Alliance v. Cissna*, *supra* note 89 at 36.

⁹¹ Interim Final Rule, *supra* note 1 at 63,928.

⁹² In addition to the H-1B compliance regime, it must also be noted that U.S. employers of long-term H-1B workers have also successfully navigated the rigors of the labor certification process and have obtained USCIS approval of employment-based immigrant visa petitions for these H-1B workers.

visa backlogs, and the impact it had on employers who relied upon H-1B workers who had exhausted their six-year limit of H-1B eligibility, by enacting the American Competitiveness in the Twenty First Century Act (AC21).⁹³ Sections 104(c) and 106(a) of AC21 directly addressed the reliance interests of employers regarding the need for long term stability and predictability in their H-1B workforce by creating additional H-1B validity periods for certain H-1B visa beneficiaries who are in the permanent residence process. In addition to being *ultra vires* with respect to the H-1B visa category as enacted by Congress, the proposed changes undermine congressional intent inherent in the above-referenced provisions of AC21.

DHS provides no explanation or justification for summarily dismissing the legitimate reliance interests of U.S. employers and their current H-1B workers beyond its interest in crafting a new regulatory scheme that will effectively eliminate the H-1B visa classification from the INA. This dismissive approach to the interests of U.S. employers and the cohort of well trained and critical employees, who have abided by the complex rules and regulations of the H-1B program, is not only contrary to basic principles of fairness, it will also impose significant hardship and disruption for employers, employees and families alike. Contrary to the overarching theme of the IFR, the H-1B nonimmigrant classification is not a problem and the agency's obvious attempt to regulate it out of existence will neither increase wages, enhance employment nor improve economic opportunity for workers in the United States. The IFR is an attempt to scapegoat a discrete and particularly vulnerable group of individuals for problems not of their creation. As such, DHS should not continue with these proposed changes.

J. Conclusion

Foreign professionals are vital to the United States' economic growth and prosperity. They complement U.S. workers, fill employment gaps in many STEM occupations, and expand job opportunities for all.⁹⁴ Yet continuing with this baseless rule will undermine high-skilled immigration to the U.S., devastate companies across various industries, inhibit innovation and economic growth and impede our nation's economic recovery in the midst of a global pandemic. For all the reasons outlined above, AILA and the Council urge DHS to neither reissue the rule nor finalize the rule based on the comments received in response to the IFR.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AMERICAN IMMIGRATION COUNCIL

⁹³ P.L. 106-313, (October 17, 2000) (AC21).

⁹⁴ See *The H-1B Visa Program*, *supra* note 33.