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Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
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Submitted via www.regulations.gov

> **Re: Department of Homeland Security, U.S. Citizenship and Immigration Services, Notice of Proposed Rulemaking; *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions* (DHS Docket No. USCIS-2020-0019; CIS No: 2674-20; RIN 1615-AC61)**

Dear Mr. Nimick and Ms. Deshommes:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) respectfully submit this comment in opposition to the notice of proposed rulemaking published in the Federal Register on November 2, 2020 by the United States Citizenship and Immigration Services (USCIS) amending its regulations governing the process by which USCIS selects H-1B registrations for filing of H-1B cap-subject petitions (or H-1B petitions for any year in which the registration requirement is suspended), DHS Docket No. USCIS-2020-0019, *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions*, 85 FR 69236 (November 2, 2020) ("Proposed Rule").[1] For the reasons discussed below, we urge USCIS to withdraw its notice of proposed rulemaking.

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 and interpretation of U.S. immigration laws. We believe that our members' collective expertise and experience makes us particularly well-qualified to offer views on this matter.

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

[1] 85 FR 69236 (Nov. 2, 2020).

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.

We appreciate the opportunity to provide comments on this proposed rule and strongly recommend that, after reviewing these comments and others made by stakeholders, USCIS withdraw this NPRM. The proposal, which is based on the false premise that salary alone equates with one's value to our economy and society, is yet another misguided and illegal attempt by the Trump administration to weaken our legal immigration system and promote falsities about the workers who, contrary to what this rule implies, strengthen our economy. As discussed in more detail below, AILA and the Council strongly oppose the proposed rule and urge the agency to withdraw it because it 1) is void *ab initio* because Chad Wolf, the purported Acting Secretary of Homeland Security, does not have authority to promulgate this regulation; 2) is *ultra vires* and inconsistent with congressional intent; and 3) will undermine our nation's pipeline of global talent needed to drive innovation and foster economic growth.

AILA and the Council also are concerned that the 30-day comment period is insufficient to allow the regulated public the opportunity to provide meaningful input to USCIS on an economically significant proposal that is central to our nation's economic prosperity. We urge USCIS to extend the comment period by 30 days to provide a full 60-day comment period.

Finally, if USCIS were to finalize this illegal and misguided rule in the coming weeks, we strongly urge USCIS to refrain from implementing it for the upcoming FY2022 H-1B cap filing season in order to allow U.S. businesses, immigration attorneys, and individuals sufficient time to adapt to the new wage-based selection process.

A. The Proposed Regulation is Void *Ab Initio* and Must be Withdrawn Because Chad Wolf, the Purported Acting Secretary of the Department of Homeland Security, Was Unlawfully Appointed and Does Not Have Authority to Promulgate This Regulation

The proposed rule, which is signed by Chad Mizelle, Senior Official Performing the Duties of the General Counsel, following a delegation by the purported Acting Secretary Chad Wolf, is 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."[2] 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

[2] EXECUTIVE ORDER 13,753, AMENDING THE ORDER OF SUCCESSION IN THE DEPARTMENT OF HOMELAND SECURITY, 81 Fed. Reg. 90.667, December 9, 2016.

unavailable to act during a disaster or catastrophic emergency."[3] 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."[4] 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.[5] Mr. McAleenan served as purported Acting Secretary through November 2019, 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.[6]

This action occurred more than the statutorily allowed period of 210 days following Secretary Nielsen's resignation.[7] 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 this proposed regulation 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.[8] Accordingly, the GAO concluded that Mr. Wolf was named Acting Secretary by reference to an ***invalid order of succession***.[9]

Further, federal courts nationwide have held that Mr. Wolf is not lawfully serving as Acting Secretary of Homeland Security under the FVRA and HSA and therefore actions he has taken as Acting Secretary are void.[10]

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[3] *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).
[4] *Id*.
[5] 6 U.S.C. §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").
[6] 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).
[7] *See* 5 U.S.C. §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").
[8] 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.
[9] *Id*. (emphasis added).
[10] *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

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 Secretary[11]or having Mr. Wolf attempt to ratify each of his acts since the day he took office[12] fails to rectify 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, this proposed rule is void *ab initio* and must be withdrawn.

B. The Proposed Regulation Must be Withdrawn as It Is *Ultra Vir*es and Violates Congressional Intent

A regulation cannot modify a statute. But the proposed regulation does just that and is therefore *ultra vires* and must be withdrawn. In determining whether a regulation is *ultra vires*, the U.S. Supreme Court has held that an analysis must be conducted following the principles of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*[13] Under the *Chevron* analysis, the first question is whether Congress has spoken to the question at issue or "has explicitly left a gap for the agency to fill."[14] In determining whether the language is plain or ambiguous, "the text of a statute must be considered in the larger context or structure of the statute in which it is found."[15] If Congress has spoken to the issue unambiguously, then a regulation cannot modify what the statute directs.[16]

The agency's proposed change to the process by which USCIS selects H-1B registrations for filing of H-1B cap-subject petitions (or H-1B petitions for any year in which the registration requirement will be suspended) is *ultra vires* because it improperly imposes an additional manner of allocating H-1B cap numbers beyond those mandated by the statute. Specifically, section 214(g)(3) of the INA clearly states that H-1B cap numbers "shall be issued . . . in the order in which petitions are filed for such visas or status."[17] The statute lists no other criteria, and in particular does not connect allocation in any way toward the rate of pay offered to the H-1B beneficiary or any other factors. Had Congress intended to have something other than the order in which H-1B petitions are filed be a controlling factor in the allocation of the limited H-1B cap

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memorandum that effectively suspended DACA pending DHS's review of the program, following the Supreme Court's decision in *DHS v. Regents of the Univ. of California*); *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).

[11] *See e.g.*, ORDER DESIGNATING THE ORDER OF SUCCESSION FOR THE SECRETARY OF HOMELAND SECURITY, 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, 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.

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

[13] 467 U.S. 837 (1984).

[14] *Id*. at 843-44.

[15] *Alli v. Decker*, 650 F.3d 1007, 1012 (3d Cir. 2011).

[16] *Chevron*, 467 U.S. at 843-44.

[17] INA §214(g)(3).

numbers, it could have done so at the same time the "U.S. advanced degree" exemption from the cap was implemented as part of the American Competitiveness in the 21st Century Act ("AC21").[18]

Congress set the H-1B cap in the Immigration Act of 1990, initially and currently at 65,000 H-1B visa numbers each fiscal year. In 2000, Congress passed AC21 which created the U.S. advanced degree exception to the H-1B cap where 20,000 H-1B visa numbers were made available for individuals possessing an advanced degree from a U.S. college or university. This was an instance where Congress made a specific modification to the way in which H-1B numbers are allocated, choosing to ensure that degree level made it more likely that an H-1B beneficiary would be selected under the H-1B quota. Had Congress intended to make any other changes to the statutory language that H-1B cap numbers "shall be issued . . . in the order in which petitions are filed for such visas or status" it could have done so as part of the AC21 legislation or anytime thereafter. The H-1B cap had been reached before the AC21 legislation was drafted or implemented, so Congress was well aware that the demand for H-1B visa numbers sometimes exceeded the supply. Nevertheless, Congress chose to and continues to leave the language of INA section 214(g)(3) unchanged. DHS does not have authority to now effectively change the statutory language that Congress established.

Based on the plain text of the statute and the statutory context in which it is found, the statute is neither ambiguous, nor silent, and Congress did not leave a gap for regulations to fill.[19] Yet this is exactly what the proposed regulation is attempting to do. It is particularly telling that the agency previously evaluated this very issue in January 2019 and unambiguously concluded that the INA is clear and does not permit the type of prioritization it proposes here. Specifically, DHS concluded that "prioritization of registration selection on factors other than degree level, such as salary, would require ***statutory changes***."[20] Yet DHS now contends, less than two years later, that it has reversed its position without providing any analysis, claiming that upon further review and consideration, the statute is allegedly silent as to how USCIS must select H-1B petitions or registrations.[21] Ultimately, however, no amount of "review and consideration" by the agency can change the fact that the statute is clear and unambiguous with respect to how H-1B cap numbers shall be issued. The agency's claimed legal justification is without merit. The statute does not contemplate other factors to determine the distribution of visa numbers. For the foregoing reasons, the proposed regulation is *ultra vires* and in clear violation of congressional intent and must be withdrawn.

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[18] Pub. L. 106-313, title I, October 17, 2000, 114 Stat. 1251.

[19] *See United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012) ("The fact that a statute is unambiguous means agencies "are not free to create exceptions to statutes" and then claim that "the statute is silent as to whether the exception exists."); *Prestol Espinal v. Attorney General of the United States*, 653 F.3d 213, 220 (3d Cir. 2011) (rejecting effort to "manufacture[] an ambiguity from Congress' failure to specifically foreclose each exception that could possibly be conjured or imagined.").

[20] Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap Subject Aliens, 84 FR 888, 913 (Jan. 31, 2019) (emphasis added). DHS made this statement in response to comments suggesting other changes, including prioritization by salary and years of experience. *Id.*

[21] Proposed Rule, *supra* note 1 at 69244 (noting that "[u]pon further review and consideration of the issue initially raised in comments to the H–1B Registration Proposed Rule (83 FR 62406, December 3, 2018), DHS concludes that the statute is silent as to how USCIS must select H–1B petitions, or registrations, to be filed toward the numerical allocations in years of excess demand.").

C. The Proposed Regulation, Which is Based on a False Premise that Salary Alone Equates with Value, Must be Withdrawn as it Will Undermine Our Nation's Pipeline of Global Talent that Fuels Innovation and Creates Jobs

The proposed regulation is based on the false premise that salary alone equates with value. Although DHS claims that ranking would occur within the relevant SOC code and area of intended employment, this will be nearly impossible to determine fairly and will likely default to USCIS selecting those that are the highest paid overall. The U.S. Department of Labor's four wage levels (Level I, II, III and IV) only tell us who is more highly paid within an occupation. The salaries associated with each wage level do not fully capture an individual's contribution to society. In fact, there is often an inverse correlation. For example, we often see public school teachers, researchers working in the public sector, and nonprofit IT professionals sacrifice high wages in exchange for their service to the community and the public good as compared to other individuals in their Standard Occupational Classification (SOC) or area of intended employment.

If implemented, this regulation would dramatically reduce access to the H-1B visa program for early-career professionals, including those who have completed undergraduate, graduate, and professional degrees at U.S. colleges and universities. USCIS has acknowledged that if this new regulation is implemented, no registrations for individuals who are paid a Level 1 wage would be selected to submit an H-1B cap-subject petition.[22] This proposed change would effectively eliminate the H-1B program as an available visa option for new or recent graduates seeking employment in the United States in an early-career position. This is particularly concerning given that the H-1B visa program is typically the only legal avenue for U.S. employers to employ international students after graduation. Employers will face a difficult choice to either hire recent foreign graduates at a salary level that is significantly higher than similarly situated U.S. graduates or forego hiring foreign entry-level professionals entirely, both of which will cause significant business disruption.

The detrimental impact of this proposed regulation on the ability of U.S. employers to recruit early career professionals, such as international students earning undergraduate, graduate, and professional degrees, and leverage their U.S. education and training will be as profound as it is long lasting. To be competitive in the global economy, nations must possess high-skilled labor forces with strong capabilities in science, technology, engineering, and mathematics (STEM), a key input for innovation and economic growth.[23] It has been widely documented that foreign nationals comprise a significant percentage of U.S. college graduates, at the Bachelor's, Master's and Ph.D. levels, in STEM fields.[24] For example, the majority, and in many cases the vast majority, of graduate students in the fields of Industrial Engineering, Mechanical Engineering, Agricultural Engineering, Chemical Engineering and Pharmaceutical Sciences are foreign students.[25] U.S. employers aggressively recruit the top students from U.S. colleges and

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[22] Proposed Rule, *supra* note 1 at 69253.

[23] Neil G. Ruiz, Jill H. Wilson & Shyamali Choudhury, *The Search for Skills: Demand for H-1B Immigrant Workers in U.S. Metropolitan Areas*, METROPOLITAN POLICY PROGRAM AT BROOKINGS, July 2012.

[24] Elizabeth Redden, *Foreign Students and Graduate STEM Enrollment*, INSIDE HIGHER ED, Oct. 11, 2017.

[25] *Id*. (noting, for example, that "81 percent of full-time graduate students in electrical and petroleum engineering programs at U.S. universities are international students, and 79 percent in computer science are.").

universities to fill early career positions that leverage their skills, such as cutting-edge computational and analytical skills as well as their ability to adopt and master new technologies.[26] Elaborate professional development programs and career paths have been created for these prospective new hires, comprising a significant investment in both financial and human capital, to best leverage their skills. Employers rely upon access to these highly educated and talented professionals, of which foreign students are a critical component, to sustain the research and development pipeline.[27]

By effectively eliminating the ability of U.S. employers to utilize the H-1B visa program to legally hire recent foreign national graduates of U.S. universities and other early-career professionals, this proposed regulation will disrupt business operations across nearly every sector of our economy. New product development, new market expansion efforts and industrial responsiveness in a fast changing, competitive global environment will all be negatively affected. For example, companies in the automotive sector that have committed hundreds of millions of dollars in recent years to developing fuel efficient engines, including hydrogen fuel cell technology, will no longer be able to hire and retain recent graduates via the H-1B visa program who have precisely the academic background necessary to drive innovation.[28] Similarly, many of the companies currently working to develop a vaccine for may no longer be able to rely upon recent graduates in H-1B status to provide critical research and development functions.[29] The agency's over-simplistic attempt to correlate the salary of a worker to their value to the U.S. economy will have the exact opposite effect the agency claims it will achieve: many of the world's "best and brightest" will no longer have an opportunity to continue their career progression in the U.S. and will seek employment opportunities abroad from our global competitors in Canada, Australia, the United Kingdom, China, India, and beyond.

The proposed regulation will also have a monumentally negative effect on U.S. colleges and universities at a time when these institutions are reeling from the impact of the COVID-19 pandemic. The U.S. higher education sector has long been a destination for talented students worldwide. In the 2018-19 academic year there were over one million foreign students in the United States. International students make up 5.5 percent of the total U.S. higher education

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[26] For background on the value of recent graduates to businesses, *see* Carmen Bryant, *Tomorrow's Talent Today: 5 Reasons to Hire Recent Graduates*, INDEED, June 22, 2017.

[27] Michael Roach and John Skrentny, *We must retain foreign Ph.D.s to keep America's innovation advantage***,** THE HILL, Aug. 19, 2020 (noting that "[a]llowing foreign Ph.D.s to remain in the U.S. after graduation is important because they contribute disproportionately to American innovation and entrepreneurship relative to other degrees."); *see also,* David Mikkelson, *Did Trump just say Foreigners Attending College in the US 'Should Not Be Thrown Out'?,* SNOPES, July 8, 2020 (quoting then Presidential candidate Trump as tweeting in 2015, "When foreigners attend our great colleges & want to stay in the U.S., they should not be thrown out of our country.").

[28] Andy East, *PLANNING AHEAD: Cummins "ready" for shift away from fossil fuels*, THE REPUBLIC, Nov. 17, 2020.

[29] *See The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy*, AM. IMMIGRATION COUNCIL, April 2020 (noting that 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) (citing David J. Bier, *Skilled Immigrants Searching for Coronavirus Cures at U.S. Companies*, CATO INSTITUTE, Mar. 12, 2020).

population and contributed $44.7 billion to the U.S. economy in 2018.[30] Yet, the most recent statistics portray an unsettling picture. In the current school year, new enrollment of international students dropped 43% because of COVID-19.[31] Nearly 40,000 students, mostly incoming freshmen, have deferred enrollment at 90% of U.S. institutions to a future term.[32] While COVID-19 has been a major factor in this decline, uncertainty about immigration status and anti-immigrant rhetoric have also impacted enrollment.[33] Compounding these issues with the proposed regulation, which will further destabilize the career progression of foreign students by eliminating a legal pathway to temporary employment opportunities in the U.S. post-graduation, will create a perfect storm that will devastate U.S. college and university system for years to come.[34]

In addition to damaging business operations and ravaging the U.S. college and university system, the proposed regulation will create incentives for corporate leaders to relocate innovation functions offshore. The proposed regulation will create barriers for employers attempting to assemble diverse research and development teams in the U.S. composed of the "best and brightest" talent graduating from our nation's colleges and universities. It will discourage innovation and entrepreneurship in the U.S. by making the cost of employing this foreign talent prohibitive. Companies that rely on high-skilled foreign talent for R&D related functions will outsource more tasks to workers outside the U.S.[35] The negative effect of moving innovation abroad will have disastrous consequences, in both the short and long term, for our economy.

D. The 30-day Notice and Opportunity for Comment is Insufficient and Should be Extended to a Minimum of 60 Days to Allow for Meaningful Input from the Regulated Public

We are concerned that in an effort to rush the implementation of this rule before the Trump administration leaves office on January 20, 2021, USCIS is suppressing the regulated public's ability to provide meaningful input on this proposed regulation by only providing 30 days for public comment. The Executive Orders governing the regulatory process establish unequivocally that the standard time for public comment is 60 days. EO 12866 states that agencies should allow "not less than 60 days" for public comment in most cases, in order to "afford the public a meaningful opportunity to comment on any proposed regulation."[36] EO 13563 states that "[t]o

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[30] *Number of International Students in the United States Hits All-Time High*, INSTITUTE OF INTERNATIONAL EDUCATION, Nov. 18, 2019 (citing the 2019 Open Doors Report on International Educational Exchange, which indicates that "[w]e are happy to see the continued growth in the number of international students in the United States and U.S. students studying abroad . . . [p]romoting international student mobility remains a top priority for the Bureau of Educational and Cultural Affairs and we want even more students in the future to see the United States as the best destination to earn their degrees. International exchange makes our colleges and universities more dynamic for allstudents and an education at a U.S. institution can have a transformative effect for international students, just like study abroad experiences can for U.S. students.").

[31] Kathleen Struck, *New International Student Enrollment Falls 43% in the US*, VOICE OF AMERICA, Nov. 16, 2020.

[32] *Id*.

[33] David L. Di Maria, *US colleges report a 43% decline in new international student enrollment, and not just because of the pandemic*, MSN, Nov. 19, 2020.

[34] Stuart Anderson, *Trump Will End H-1B Visa Lottery*, FORBES, Oct. 29, 2020.

[35] *See generally* Michelle Marks, *Skilled, foreign workers are giving up on their American dreams – and turning to Canada*, BUSINESS INSIDER, Mar. 31, 2019.

[36] Exec. Order 12866, 58 Fed. Reg. 51735 § 6(a)(1) (Oct. 4, 1993).

the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."[37]

The shortened comment period is particularly egregious because the regulated public had no advance notice that this NPRM was forthcoming as the proposed rule was never listed on the Unified Agenda. Indeed, OIRA's own website confirms that this rule has not been published in a Unified Agenda.[38] Further, just last year, the Trump administration conducted notice and comment rulemaking creating a new electronic registration process for H-1B cap-subject filings. In the January 2019 Final Rule entitled "Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap Subject Aliens," USCIS noted that it had considered the very policy now being proposed and unambiguously concluded that such a prioritization scheme was not a permissible agency action and that it would require "statutory changes."[39] As such, stakeholders did not anticipate the need to engage in the sophisticated analysis necessary to assess the policy that is now being proposed in the NPRM.

Thirty days for public comments is also insufficient for the public to conduct the necessary data and legal analysis for a regulation of this magnitude. OMB has designated the proposed rule as an "economically significant" regulatory action.[40] DHS estimates that for a ten year implementation period, the annualized costs to the public would be more than $15.9 million annualized at 3-percent, and more than $16 million annualized at 7-percent.[41] DHS also acknowledges the possibility that this proposed regulation "could result in private sector expenditures exceeding $100 million, adjusted for inflation to $168 million in 2019 dollars, in any 1 year."[42] The costs are likely higher, as the agency has grossly underestimated the time-burden of this proposed regulation, such as suggesting that it will take a mere 20 minutes more to prepare the registration.[43] The costs of this proposal are inconsistent with the aggregate cost savings the agency expected unselected petitioners and the government to realize from registration, ranging from $43.4 million to $62.7 annually (assuming no expansion in the number of registrations).[44] The proposed regulation will also have an adverse impact on U.S. employers and college-educated, foreign-born professionals – and the underlying commercial and not-for-profit activities undertaken by these actors, including significant scientific and other efforts. Indeed, DHS acknowledges in the NPRM that some petitioners might be adversely impacted in

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[37] Exec. Order No. 13563, 76 Fed. Reg. 3821, 3821-22 (Jan. 18, 2011).

[38] *See View Rule*, OFFICE OF INFORMATION & REGULATORY AFFAIRS, OFFICE OF MANAGEMENT & BUDGET, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=&RIN=1615-AC61 (confirming that proposed rule RIN 1615-AC61 "has not been published in a Unified Agenda").

[39] *See* Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap Subject Aliens, 84 FR 888, 913 (Jan. 31, 2019) (noting that "DHS believes that reversing the cap selection order to prioritize beneficiaries with a master's or higher degree from a U.S. institution of higher education is a permissible interpretation of the existing statute, as explained in detail in response to other comments in this preamble. DHS believes, however, that prioritization of selection on other bases such as those suggested by the commenters would require statutory changes.").

[40] Proposed Rule, *supra* note 1 at 69245.

[41] *Id*.

[42] Proposed Rule, *supra* note 1 at 69260.

[43] Proposed Rule, *supra* note 1 at 69256.

[44] Registration Requirement, *supra* note 39, at 890.

terms of the employment, productivity loss, search and hire costs, lost profits resulting from labor turnover and lost productivity, and reduced labor productivity and revenue.[45]

Further, 30 days is insufficient for the public to provide DHS with thoughtful, detailed, and where appropriate, data-based feedback on its proposal, particularly feedback that is responsive to the multiple requests for commenter input that are affirmatively set forth in the NPRM. Specifically the NPRM identifies *at least six separate issues* where the agency itself desires public feedback, such as (1) alternative mechanisms to weigh the agency's consideration of registered H-1B petitions by salary or skill; (2) insights or suggestions as to how to identify or measure those H-1B petitions with the highest valued use to the U.S. economy; (3) whether the new approach will eat in to the time- and cost-saving nature of the registration process; (4) the consequence of tallying registered H-1B petitions solely by skill level without regard to corresponding wage level; (5) better or more accurate means to assess the impact to recruiting and hiring generated by the proposed rule; and (6) a better understanding on how smaller entities or specific types of entities might be impacted by the change.[46] Given the extremely limited time period provided to comment and numerous competing regulatory and policy issues that also require comments within this time frame,[47] we are not able to address these specific issues.

Thirty days for a regulation of this nature, both in terms of the changes proposed, the feedback solicited, and the importance of the subject matter is already short. That the comment period straddled both Thanksgiving, a federal holiday, and the day after Thanksgiving (commonly known as Black Friday), which is a public holiday observed in more than 20 states, shortened the comment period further still and undercuts the purpose of the notice process to invite broad public comment.[48]

In order to allow for meaningful public input, the regulated community requires a minimum of 60 days. To that end, we urge DHS to reopen and extend the comment period by 30 days, granting a full 60-day comment period at least until January 4, 2021, to allow the regulated community adequate time to provide thoughtful, detailed, and where appropriate, data-based feedback on such an important matter that is central to our nation's economic prosperity. We fully endorse and incorporate in our comments a letter requesting a full 60-day period that was sent on November 16, 2020 to the purported DHS Acting Secretary Chad Wolf, and OIRA

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[45] Proposed Rule, *supra* note 1 at 69246.
[46] Proposed Rule, supra note 1 at 69242, 69255, 69256, 69258, 69259, 69260 (November 2, 2020).
[47] *See e.g*., Strengthening the H-1B Nonimmigrant Visa Classification Program Interim Final Rule, 85 Fed, Reg, 63918 (Oct. 8, 2020) (comments due December 7, 2020); Prerequisite of Lawful Admission for Permanent Residence under All Applicable Provisions for Purposes of Naturalization, PA-2020-23, USCIS (Nov. 18, 2020) (comments due December 18, 2020); Use of Discretion for Adjustment of Status, PA-2020-22, USCIS (Nov. 17, 2020) (comments due December 17, 2020); Job Portability after Filing Application to Adjust Status, PA-2020-21, USCIS (Nov. 17, 2020) (comments due December 17, 2020); Civics Educational Requirement for Purposes of Naturalization, PA-2020-20, USCIS (Nov. 13, 2020) (comments due December 14, 2020); Age and "Sought to Acquire" Requirement under Child Status Protection Act, PA-2020-19, USCIS (Nov. 13, 2020) (comments due December 14, 2020).
[48] *See Pangea Legal Services, et al., v. DHS, et al,* Case No. 20-CV-07721-SI, 2020 WL 6802474 (N.D. Cal. 2020).

Administrator Paul Roy, signed by more than 120 employers, associations, coalitions and groups, including AILA and the Council.[49]

E. If This Illegal and Misguided Regulation is Finalized, USCIS Should Delay its Implementation Until at Least the FY2023 H-1B cap filing season

Many U.S. employers and immigration attorneys start preparing for the H-1B cap filing season months in advance, in some cases as early as August depending on the industry.[50] Any changes by USCIS to the H-1B cap filing process this late in the process, particularly as significant as the changes proposed in this NPRM, will have an adverse impact on U.S. employers, immigration attorneys, and workers as recruitment methods, hiring decisions, and filing processes have already been put in place by many U.S. employers and immigration law firms. In particular, the regulated community has reasonably expected the H-1B visa category to continue to be available to allow U.S. employers to hire new professional staff, including early-career professionals and international students earning undergraduate, graduate, and professional degrees at U.S. colleges and universities and has adopted recruiting procedures, hiring decisions, as well as filing processes and procedures accordingly. This NPRM directly upsets these reliance interests without any advance notice that the government was even contemplating such a change prior to its publication. Thus, if USCIS were to finalize this illegal and misguided regulation in the coming weeks, we strongly urge USCIS to delay its implementation until at least the FY2023 H-1B cap filing season in order to allow U.S. businesses, immigration attorneys and individuals sufficient time to adapt their recruitment procedures, hiring decisions, and filing process to the new wage-based selection process. This, in turn, will minimize the cost of this proposed regulation on U.S. employers, immigration attorneys and individuals, costs that the agency itself seeks to minimize.[51] Indeed, USCIS delayed implementation of the H-1B electronic registration final rule to the FY2021 filing season to allow U.S. businesses, immigration attorneys and individuals adequate time to prepare for the change in filing procedures as well as to minimize the costs and expenditures that would have been accrued by U.S. employers, law firms and individuals if USCIS had abruptly implemented the final rule for the FY2020 H-1B cap filing season.[52]

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[49] *AILA and Partners Request DHS and OIRA to Extend Comment Period for H-1B Wage Lottery Proposed Rule*, AM. IMMIGRATION LAWYERS ASS'N (Nov. 16, 2020), *available at* https://www.aila.org/advo-media/aila-correspondence/2020/aila-and-partners-request-dhs-and-oira-to-extend.

[50] *Sign-on Letter to USCIS on H-1B Electronic Registration Tool*, AM. IMMIGRATION LAWYERS ASS'N (Aug. 16, 2019), https://www.aila.org/advo-media/aila-correspondence/2019/sign-on-letter-uscis-h1b-electronic-registr-tool. In an informal survey conducted in July 2019 by the Society for Human Resource Management (SHRM), SHRM members report that in a typical year, they begin their H-1B cap filing process as early as August, and no later than January, depending on the industry. Similarly, based on an informal survey conducted by AILA of a subsection of its members, in a typical year, most immigration attorneys who were surveyed reported being retained by employers to commence preparations for the H-1B cap filing season no later than January and as early as August.

[51] Proposed Rule, *supra* note 1 at 69260. Due to the changes that would be required by the proposed selection process, we find the agency's time estimates for completion of the registration and H-1B petitions unrealistically low. Additional time is required to provide data. *See id*. at 69255-57.

[52] *See* Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 888 (Jan. 31, 2019).

F. Conclusion

High-skilled immigration is a key component of the ongoing ability of U.S. employers to hire and retain global talent needed to drive innovation and create jobs in the United States. Foreign workers fill a critical need in the U.S. labor market, particularly in STEM fields.[53] Research shows that H-1B workers complement U.S. workers, fill employment gaps in many STEM occupations, and expand job opportunities for all.[54] Yet the agency's proposal, which is based on the false premise that salary alone equates with one's value to our economy and society, is *ultra vires* and would be damaging to the economic success of our nation. For the reasons outlined above, AILA and the Council strongly oppose this proposed regulation and urge USCIS to withdraw it.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AMERICAN IMMIGRATION COUNCIL

[53] *The H-1B Visa Program, supra* note 29.
[54] *Id*.