AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

November 9, 2020

Charles L. Nimick, Chief, Business and Foreign Workers Division
Samantha Deshommes, Chief, Regulatory Coordination Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
Office of Policy and Strategy
Chief, Regulatory Coordination Division
20 Massachusetts Avenue, NW
Washington, DC 20529-2120

Submitted via www.regulations.gov
DHS Docket No. USCIS-2020-0018

Re: OMB Control Number: 1615-0009
USCIS Paperwork Reduction Act 30-Day Notice and Request for Comments on Proposed Revisions to Form I-129, Petition for a Nonimmigrant Worker

Dear Mr. Nimick and Ms. Deshommes:

The American Immigration Lawyers Association (AILA) respectfully submits the following comments in response to the above-referenced 30-day notice and request for comments on proposed revisions to Form I-129, Petition for a Nonimmigrant Worker and its accompanying instructions, published in the Federal Register on October 8, 2020.[1]

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. Our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

The proposed revisions to Form I-129 and its instructions are predicated on an IFR that violates the APA, are unnecessary, *ultra vires*, and inconsistent with the Paperwork Reduction Act

AILA recognizes prior efforts by U.S. Citizenship and Immigration Services (USCIS) to improve Form I-129 so that it is user friendly, more intuitive, and less burdensome on petitioners. Unfortunately, USCIS's decision to rush implementation of changes to the H-1B process, by

[1] 85 FR 63918 (October 8, 2020).

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issuing an Interim Final Rule (IFR) without prior notice and opportunity to comment, is a significant step backward in terms of improving Form I-129 and the H-1B petition process. The proposed changes to the current version of Form I-129 are *ultra vires* modifications to the already oversized and overly complicated H-1B petition form.

Further, the additional information that USCIS is proposing to collect on Form I-129, such as the "special skills" required to qualify for the position, is unnecessary under the law and lacks practical utility to the adjudication of H-1B petitions, in contravention of the Paperwork Reduction Act, which was enacted to minimize the burden on the public to provide information to the federal government.

A. The proposed revisions to Form I-129 are predicated on an IFR which was issued in violation of the Administrative Procedure Act

The proposed revisions to Form I-129, which are based on the IFR, are contrary to well established law. By issuing the IFR without prior notice and opportunity to comment, as required by the Administrative Procedure Act (APA),[2] USCIS has prevented interested parties from providing critical input on the proposed rule, which in turn would have better informed the agency's proposed changes to Form I-129 and its instructions. The changes to the H-1B process set forth in the IFR and incorporated into the form will have an adverse impact on the H-1B visa program as established by Congress, eliminating the visa program's availability to scientists, engineers, health care workers and a myriad of other professionals with skills that are complementary to the U.S. workforce and essential to our nation's economy.[3] Yet, USCIS has failed to provide the public with a reasonable and meaningful opportunity to participate in the rulemaking process through the submission of data, views and arguments, as required by the APA, prior to issuing the IFR, which in turn, would have better informed the agency's revisions to the Form I-129 and instructions.

In attempting to justify its circumvention of proper statutory procedure, USCIS invoked the APA's good cause exception to the notice and comment process, based on outdated claims respecting the unemployment situation caused by the COVID-19 pandemic and a fundamental misunderstanding of the impact of H-1B workers on the U.S. labor market.[4] As is currently being litigated in federal court,[5] the good cause exception is not appropriate in this instance in which there is not an emergent situation justifying the exceptional action of dispensing with the notice and comment process.[6]

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[2], 5 U.S.C. §553(c).
[3] *See The H-1B Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy,* AM. IMMIGRATION COUNCIL (Apr. 2, 2020), https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet.
[4] *See e.g*., *Restrictions On H-1B Visas Found To Push Jobs Out Of The U.S.,* FORBES (Oct. 2,2020), https://www.forbes.com/sites/stuartanderson/2019/10/02/restrictions-on-h-1b-visas-found-to-push-jobs-out-of-the-us/?sh=4cf35c5e5a85. *See also The H-1B program, supra* note 3.
[5] *See Chamber of Commerce et al. v. DHS et al*., Case No. 4:20 –cv-7331-JSW (N.D Cal. Oct. 19, 2020) (challenging the IFR for violating APA notice and comment procedures, being arbitrary and capricious and in excess of statutory authority).
[6]*See, e.g.,* Statement dated October 27, 2020 from The White House, Office of Science and Technology Policy suggesting that it has ended the COVID-19 pandemic, https://www.politico.com/f/?id=00000175-6bc5-d2df-adff-6fdfff5c0000.

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Similarly, USCIS is attempting to rush the proposed form and instruction revisions into implementation, by providing the public with only a 30-day comment period, instead of the standard 60-day comment period for information collections.[7] In the past, even in instances where USCIS has had a shortened comment period for a rulemaking, the agency has regularly provided a 60-day comment period for information collections. For example, in May 2019, USCIS and the Department of Labor issued a joint temporary final rule authorizing the immediate issuance of additional H-2B visas for the remainder of the fiscal year.[8] Despite the urgent, time sensitive nature of this rule, USCIS and DOL provided the public with a 60-day comment period in connection with the information collection, Form ETA-9142B-CAA-3 associated with this rule.[9]

Because the agency lacks good cause to bypass the notice and comment process, the proposed regulation and accompanying form revisions are in violation of the APA and Paperwork Reduction Act and must be withdrawn.

B. The proposed changes to Form I-129 are beyond the scope of statutory authority, in contravention of congressional intent, impair the quality, utility, and clarity of the information to be collected and unnecessarily increase the burden of the collection of information on respondents

AILA is deeply concerned that the instructions to Form I-129, Petition for Nonimmigrant Worker, contain definitions of terms and related information that are *ultra vires,* contrary to long-established practices and unnecessary for the proper performance of agency functions. In the context of this Paperwork Reduction Act comment, these changes, because they are not consistent with sound adjudications practices and the plain language of the statute, neither enhance the quality of the information collected nor minimize the burden of information collection on those who are to respond. AILA's concerns with these modifications are summarized below and will be explained in more detail in our substantive comments to the IFR, to be submitted on or before December 7, 2020. Our concerns are as follows:

1. The changes to the instructions for Form I-129 at page #11, as well as the H Classification Supplement to Form I-129 at Section 1, items #1-6, are based on unlawfully promulgated rule that amends the regulatory definition of "specialty occupation" to dramatically restrict the categories of jobs that will qualify for H-1B classification as specialty occupations. The rule contradicts congressional intent and decades of precedent by creating a requirement that the attainment of a U.S. bachelor's degree or higher in a **directly related** specific specialty, or its equivalent, is a minimum requirement for entry into the occupation. By requiring that the field of study must be **directly related** to the position, USCIS eliminates the flexibility required to adjudicate petitions for many specialty occupations where there is no single educational preparation path, particularly emerging professions that are increasingly common in a digital economy. For example, emerging specialized occupations such as Data Scientist and Machine Learning Engineer require a core academic background in a combination

[7] *See* 44 U.S.C. §3506(c)(2)(A).
[8] *See* 84 Fed. Reg. 20005.
[9] *Id.*

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of quantitative fields, such as Mathematics, Computer Science, Software Engineering and Statistics, which may evolve to include other fields of study over time as technology and business applications evolve. Likewise, many scientific or engineering occupations could be performed by individuals with a range of degrees, which could potentially disqualify them from the new definition of a specialty occupation. As such, the form changes should not be finalized as proposed.

2. The changes to the instructions for Form I-129 at pages #11-17, as well as the H Classification Supplement to Form I-129 at Section 1, questions #3-6, are based on a rule that is also inconsistent with congressional intent for the H-1B program by eliminating from H-1B eligibility occupations for which a bachelor's degree is normally, commonly or usually required. The rule requires, again without statutory predicate, petitioners to establish that a bachelor's degree is **always** required for the occupation. This heightened burden of proof effectively requires petitioners to perform the nearly impossible task of proving a double negative (i.e., that there is no person in the occupation who does not have the required degree). This is an impractical task, which cannot be met by employers, and it will exclude significant numbers of professional occupations from H-1B eligibility, as many professional, specialized occupations can be performed with more than one degree; and

3. The changes to the instructions to Form I-129 at pages #11-17 are based on a rule unlawfully that attempts to preclude employers in the consulting and professional services sectors from utilizing the H-1B category by defining the term "employer-employee relationship" to require additional evidence when an employee will be assigned to a third-party worksite and by setting a 1-year maximum validity period for all H-1B petitions in which the beneficiary will be working at a third-party worksite. This will have a significant negative effect, for instance, on the healthcare industry, where it is a common industry standard for clinicians to be employed by a practice group while treating patients at multiple clinics and hospitals.

The changes to Form I-129 and the H Classification Supplement exceed the scope of information required for adjudication, will create confusion among respondents regarding the information required and increase the burden on H-1B petitioners and legal representatives. For example, the additional questions added to Section 1 utilize open text fields which will impair USCIS's ability to streamline processing in the future by digitizing the H-1B petition. We note for example that, in Section 4 of the Supplement, USCIS has modified several questions relating to third-party worksites that elicit a yes/no answer. We encourage USCIS to follow this simplified yes/no information collection model so that petitioners will have a clear understanding of how to respond appropriately and the agency will have a more streamlined information collection process.

AILA's specific concerns with respect to the Form I-129 and H Classification Supplement are as follows:

a. **H Classification Supplement to Form I-129, Section 1, Question 2.** Although this question has only a minor revision, the information requested with respect to the beneficiary's past or present work experience is not directly relevant to

H-1B eligibility, as the statutory and regulatory framework is predicated on attainment of academic credentials, typically a bachelor's degree. In entry-level professional positions, it may be common for the beneficiary to have minimal experience. To improve clarity and enhance simplicity for petitioners, we recommend removing this question. In the alternative, we recommend revising the question so that a simple Yes/No answer is required, such as:

i. Does the beneficiary of this petition possess appropriate experience for the position offered? (Yes/No)

b. **H Classification Supplement to Form I-129, Section 1, Question 3.** This question requests petitioners to confirm the appropriate level of education required for the job. Typically, petitioners provide USCIS with a detailed description of the job offered to the beneficiary, including the minimum education required, as part of its statement in support of the petition. Providing such an explanation in the space provided on the Supplement is not practical and invites incomplete and/or ambiguous responses. We recommend removing this question. In the alternative, we propose rewriting the question as follows:

    i. Does the position require an academic level of at least a Bachelor's degree to perform the duties of the job? (Please attach an explanation to this petition establishing the academic requirement for the position.)Yes/No)

c. **H Classification Supplement to Form I-129, Section 1, Question 4.** This question asks petitioners to list the required fields of study for the position. Again, information correlating the petitioner's academic requirements to the job is generally provided by petitioners in a detailed supporting statement that accompanies the H-1B petition that cannot be replicated in the space provided on the Supplement. Because this question requests a plural response (fields of study), it also invites petitioners to provide generalized, vague responses. We recommend removing this question. In the alternative, we propose rewriting the question as follows:

    i. Does the beneficiary of this petition possess at least a Bachelor's degree in a field of study required for this position? (Please attach an explanation to this petition establishing the beneficiary's qualifications for the position.) (Yes/No)

d. **H Classification Supplement to Form I-129, Section 1, Question 5.** This question asks petitioners to confirm the number of years of experience, if any, that are required to qualify for the position. As previously noted, work experience is not directly relevant to a determination of H-1B eligibility and, as such, this question is not required for adjudication. Moreover, by filing a petition for H-1B classification for the beneficiary, the petitioner has documented that it believes the beneficiary is fully qualified to perform the duties of the specialty occupation. As such, the question is neither required nor relevant to H-1B adjudication. While 8 CFR §214.2(h)(4)(iii)(D)(5) recognizes that work experience may be utilized to establish degree equivalency, this

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question asks for much broader and more generalized information than appropriate. AILA believes this question should be removed from the form. In the alternative, we propose replacing it with the following:

i. If the answer to Question 4 above is No, does the beneficiary have education, specialized training, and/or progressively responsible experience that is equivalent to completion of at least a United States baccalaureate degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty? (Please attach an explanation.) (Yes/No)

e. **H Classification Supplement to Form I-129, Section 1, Question 6.** This question asks petitioners to describe the special skills, if any, that are required in order to qualify for the position. Possession of special skills is not required by statute or regulation to qualify for H-1B classification. Inasmuch as the term "special skills" is not defined or described in either the form, its accompanying instructions, or the regulations, the question will elicit vague and generalized information lacking any utility in determining H-1B eligibility. As this question does not have practical utility to the adjudication of H-1B petitions, USCIS should delete this question.

C. The average time per response estimated by USCIS for Form I-129 is inaccurate

USCIS estimates that the average time per response for nonimmigrant visa petitioners to complete Form I-129 is 2.84 hours. For the H Classification Supplement, the estimate is 2.5 hours and for the H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement, the estimate is 1 hour. Although USCIS does not explain how it calculated the average response time or describe the process steps that were included in its estimation, the estimate, at a minimum, should have taken into consideration the time the public spends researching the information required for the form, gathering necessary documentation, preparing the information and documentation required for the form, completing the form and assembling the form, and all supporting documentation, for submission. Because of the inherent complexity of the H-1B petition process in general and the substantially enhanced scrutiny of H-1B petitions over the past few years in particular, these estimated average response times are extremely low and appear to be a miscalculation of the amount of time it will realistically require petitioners to complete the Form I-129 and related supplement.

For example, petitioners will need at least several hours to review degree requirements and fields of study for the occupation that is the basis for the H-1B petition to confirm that the position qualifies as a specialty occupation as defined by USCIS for the purpose for completing Form I-129 and Supplements. Additional time will also be required to research the beneficiary's background to demonstrate on Form I-129 that he/she qualifies for the specialty occupation under the regulations. The significant documentation requirements for petitioners with employees at third party worksites will add further time to form preparation in that scenario. Accordingly, AILA anticipates that it will take petitioners well in excess of the USCIS aggregate estimate 6.34 hours

to complete the Form I-129 and Supplements. Thus, AILA recommends that USCIS review, reconsider and revise the average time per response for this proposed information collection, taking into consideration the factors discussed above.

D. The proposed additional information at Page #3, General Filing Instructions, regarding Blank Spaces on the Form I-129 is indicative of USCIS's recent policy to reject or deny petitions that leave nonmaterial spaces blank

Over the past several months, USCIS has radically changed long-standing practice and, without any notice to stakeholders, has been rejecting forms that have left questions blank or did not use specific terminology to indicate that a question was inapplicable.[10] This has led to capricious rejections of many humanitarian benefit applications, such as Form I-589, Application for Asylum and for Withholding of Removal, Form I-918, Petition for U Nonimmigrant Status and Form I-914, Application for T Nonimmigrant Status.[11] These rejections are particularly egregious, as the majority of rejected applications left spaces blank for information that was not relevant to an individual's eligibility, such as leaving blank the space asking for an individual's name in a native alphabet when the native alphabet was the same as English.[12] These "no blank space" rejections, which can affect eligibility for primary and ancillary benefits, have created unnecessary hardships and processing delays for vulnerable individuals as well as increased costs and inefficiencies for USCIS.[13]

Given this background, AILA is deeply concerned that USCIS is proposing to include similar language to Form I-129. Specifically, the proposed instruction indicates,

> Answer all questions fully and accurately. If an item is not applicable (for example, if you have never been married and the question asks, "Provide the name of your current spouse"), type or print "N/A." If your answer to a question which requires a numeric response is zero or none (for example, "How many children do you have" or "How many times have you departed the United States"), type or print "None" unless otherwise directed.

While seemingly benign in terms of the Paperwork Reduction Act's goal of enhancing the quality, utility, and clarity of the information collected, the insertion of this language, when the form already contains an instruction to answer all questions fully and accurately, raises serious concerns that the agency may intend to expand its no blank space rejection policy to Form I-129. In particular, as the instructions themselves use different terminology that can be used in different situations, rather than allowing maximum flexibility to petitioners to indicate that a question is not applicable to the case at hand. Inasmuch as H-1B petitions selected for filing through the H-1B cap registration process now have a limited 90-day filing window, a rejection on this basis could have disastrous consequences for petitioners and beneficiaries if the return of the rejected petition

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[10] *See AILA Policy Brief: USCIS's "No Blank Space" Policy Leads to Capricious Rejections of Benefits Requests*, AM. IMMIGRATION LAWYERS ASS'N (Oct. 22, 2020), https://www.aila.org/advo-media/aila-policy-briefs/uscis-no-blank-space.
[11] *Id*.
[12] *Id*.
[13] *Id*.

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is delayed by USCIS. AILA therefore urges USCIS to rescind its blank space policy and to refrain from expanding this policy to Form I-129, to prevent even greater numbers of petitioners from having their benefit requests rejected for immaterial and non-substantive omissions.

Conclusion

We appreciate the opportunity to comment on the proposed revisions to Forms I-129 and its instructions. We look forward to a continuing dialogue with USCIS on these issues and related matters. If you require any additional information or clarification, please contact Diane Rish at (202) 507-7642 or by email at drish@aila.org.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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