March 10, 2021

Charles L. Nimick
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U.S. Citizenship and Immigration Services
5900 Capital Gateway Drive
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Submitted via www.regulations.gov

Re: Department of Homeland Security, U.S. Citizenship and Immigration Services, Final Rule; Delay of Effective Date; Request for Comments; *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions* (DHS Docket No. USCIS-2020-0019; CIS No. 2680-21)

Dear Mr. Nimick:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) respectfully submit this comment in response to the above-referenced request for comments regarding the delayed effective date of the January 8, 2021 final rule, *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions*. The U.S. Citizenship and Immigration Services (USCIS) is delaying the effective date of this final rule until December 31, 2021.[1] USCIS justifies delaying the effective date until December 31, 2021 on the basis that USCIS "will not have adequate time to complete system development, thoroughly test the modifications, train staff, and conduct public outreach needed to ensure an effective and orderly implementation of the H-1B Selection Final Rule by the time the initial registration period will be open for the fiscal year (FY) 2022 H-1B cap season."[2] USCIS further provides that during the delay, while USCIS works through issues associated with implementation of the rule, "DHS leadership will also evaluate the [final] rule and its associated policies, as is typical of agencies at the beginning of a new Administration."[3] For the reasons outlined below, we not only strongly support USCIS's decision to delay the effective date of this final rule until December 31, 2021, but we also urge the administration to rescind the final rule because it is based on a flawed premise, is detrimental to our economy and society, is *void ab initio*, and is *ultra vires.*

[1] 86 Fed. Reg. 8543 (Feb. 8, 2021).
[2] *Id*.
[3] *Id*.

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 naturalization 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.

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.

A. A delayed effective date until December 31, 2021 is merited to allow USCIS adequate time to ensure an effective and orderly implementation of the final rule

AILA and the Council support USCIS's decision to delay the effective date of the final rule until December 31, 2021 to ensure that USCIS has adequate time to complete development of the H-1B registration system, rigorously test the modifications, train its staff, and conduct outreach to stakeholders to ensure effective and orderly implementation if the final rule is not rescinded. An attempt by USCIS to rush implementation of the final rule right before this year's H-1B cap filing season would not only be detrimental to stakeholders but it would also disrupt their reliance interests.

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.[4] Any changes by USCIS to the H-1B cap filing process this close to the initial registration and filing period, particularly as significant as the changes set forth in the final rule, would 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. Thus, we support USCIS's decision to delay the effective date of the final rule until December 31, 2021 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 regulation on U.S. employers, immigration attorneys and individuals, in particular on small businesses, the economic impact upon which the agency itself has indicated it seeks to minimize.[5] Indeed,

[4] *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.

[5] *See, e.g.*, Final Rule, *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions*, 86 Fed. Reg. 1676, 1728 (Jan. 8, 2021). Due to the changes that would be required by the proposed

USCIS delayed implementation of the H-1B electronic registration final rule, which was published in January 2019, until the following year.[6] Moreover, USCIS said that it needed to delay the implementation of the H-1B electronic registration final rule to fully test the new system and to do public outreach and training on the changes. Such reasoning is equally applicable to this final rule. A delay until at least the end of this calendar year, if not until the FY 2023 H-1B cap season, is also necessary to ensure that different rules do not apply to H-1B petitioners during the same fiscal year which would cause inequity amongst petitioners and confusion for stakeholders.

Relatedly, in light of USCIS's February 8, 2021 announcement notifying the public that the agency intends to delay the effective date of this final rule until December 31, 2021, the regulated community has reasonably expected the H-1B visa category to continue to be available this H-1B cap filing season 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. Any changes at this stage of the process to the effective date of the final rule would directly disrupt these reliance interests. Accordingly, we urge USCIS to maintain the delayed effective date of the final rule until at least December 31, 2021, given that stakeholders have already begun to prepare for the FY2022 H-1B cap filing season, including starting to submit H-1B electronic registrations as of March 9, 2021, based on a reliance that the agency will delay the effective date of this final rule until December 2021.

B. A delayed effective date until December 31, 2021 is merited to allow DHS leadership adequate time to evaluate the regulation and its associated policies, as its typical of agencies at the beginning of a new Administration

AILA and the Council support USCIS's decision todelay the effective date of the final rule until December 31, 2021 to allow DHS leadership adequate time to evaluate the regulation and its associated policies, as its typical of agencies at the beginning of a new Administration. While the final rule included some responses to comments, the responses were often superficial rather than reflective of careful consideration, dismissing the opposing comments without evidence.[7] In particular, we believe that further evaluation of the rule, and ultimately rescission of the rule is needed, as it is based upon the flawed premise that the amount a worker is paid – and that element alone – determines the value that a worker provides to the United States. In reality, the U.S. Department of Labor's four wage levels (Level I, II, III and IV) tell us only who is more

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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 1725-27.

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

[7] *See, e.g.*, Final Rule *supra* note 5 at 1682 (DHS responded to comments that the rule will preclude recent graduates from obtaining H-1B status by saying an employer could offer a recent foreign graduate a wage at or above a different wage level); at 1710 (DHS responded to comments that the rule should not be implemented for FY2022 registration with its belief that the rule was being published with sufficient time for employer planning and disbelief that H-1B petitioners would "face significant adverse impacts with the implementation of this change in the selection process.").

highly paid within an occupation, not who is the best and/or brightest even within the occupation, let alone within our society at large. 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 information technology (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) in the area of intended employment.

As a result of the false premise upon which the final regulation is based, the regulation is poised to harm the United States, in particular by depriving the country of much needed healthcare workers, including dentists and other allied health care providers, medical and pharmaceutical researchers, and other scientific professionals. Many of these occupations fall in "Job Zone 5" occupations. These "Job Zone 5" professionals typically hold Master of Science or higher degrees in highly specialized scientific disciplines, yet are considered entry-level (and therefore paid at a Level 1 wage) when they first enter the U.S. workforce. U.S. employers would be unable to hire this talented pool of individuals in H-1B status. This result, contrary to the stated purpose of the rule, would be to allocate these visa numbers to other types of businesses, which may or may not serve the public good to the same extent.

The occupation of epidemiologists, for instance, is an apt and timely example of the very problem this rule creates. Under the Department of Labor's O*NET occupations guidance, the occupation of Epidemiologist is a Job Zone 5 with a normal entry requirement of at least a Master's degree. O*NET explains that

> "most [Job Zone 5] occupations require graduate school . . . [as well as] extensive skill, knowledge, and experience . . . Many require more than five years of experience."[8]

This means that a pharmaceutical company hiring an Epidemiologist who has graduated from a top U.S. university with a Master's degree and is joining as a COVID vaccine researcher would most likely be classified at OES Wage Level 1 – because O*NET already recognizes that it is normal for the role to require advanced education and significant training and experience. However, USCIS has acknowledged that "[n]one of the registrations with a proffered wage that corresponds to OES wage level I or below would be selected" for an H-1B under the rule.[9] As a result, by USCIS's own estimates, this rule would effectively shut out graduates of U.S. universities entering the workforce as epidemiologists, thus shutting out the very researchers, scientists, and technologists who are critical to the United States' recovery from the COVID-19 pandemic.

Additionally, many healthcare related occupations are not eligible for STEM extensions to Optional Practical Training (OPT). For example, a Doctor of Dental Medicine (DMD) or Doctor of Dental Surgery (DDS) graduate is eligible for only a one-year grant of OPT. This means that

[8] *Summary Report for: 19-1041.00 – Epidemiologists,* O*NET ONLINE, https://www.onetonline.org/link/summary/19-1041.00.
[9] Final Rule, *supra* note 5 at 1711.

an employer filing an H-1B petition for a U.S. graduate of a DDS or DMD program is likely to be filing for an entry-level position. If the wage-based selection process is implemented, this would effectively shut off the ability for U.S. dental practices to hire foreign-born U.S. educated dentists.

The regulation is also poised to harm the U.S. higher education system. If implemented, this regulation would dramatically reduce access to the H-1B visa program for early-career professionals, including those who have recently completed undergraduate, graduate, and professional degrees at U.S. colleges and universities and do not have the years of experience that would place them at a Level III or IV wage. 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 from a U.S. college or university. 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 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 to the benefit of the U.S. economy 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.[10] 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.[11] 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.[12] U.S. employers aggressively recruit the top students from U.S. colleges and 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.[13] 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.[14]

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[10] 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.

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

[12] *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.").

[13] 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.

[14] 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.").

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 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.[15] Similarly, many of the companies currently working to develop a vaccine against COVID-19 may no longer be able to rely upon recent graduates in H-1B status to provide critical research and development functions.[16] 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 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 population and contributed $44.7 billion to the U.S. economy in 2018.[17] 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.[18] Nearly 40,000 students, mostly incoming freshmen, have deferred enrollment at 90% of U.S. institutions to a future term.[19] While COVID-19 has been a major factor in this decline, uncertainty about immigration status and anti-immigrant rhetoric have also impacted enrollment.[20] Compounding these issues with the final regulation, which will further

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

[16] *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).

[17] *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.").

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

[19] *Id*.

[20] 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.

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 the U.S. college and university system for years to come.[21] And, again, the rule would not have the effect of retaining the best and the brightest, but instead would divert some of the world's best and brightest to other countries.

In addition to damaging business operations, depriving the U.S. population of needed healthcare workers, and ravaging the U.S. college and university system, this regulation will create incentives for corporate leaders to relocate innovation functions offshore. The 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.[22] The negative effect of moving innovation abroad will have disastrous consequences, in both the short and long term, for our economy.

In addition, the rule is based on the erroneous belief that every H-1B beneficiary is "taking" a job from an American worker. The overwhelming data demonstrates just the opposite. A study completed by the National Foundation for American Policy in May 2020 demonstrates that H-1B workers actually cause an increase in the overall level of employment in H-1B occupations – not a decrease.[23]

The study found:

- An increase in the share of workers with an H-1B visa within an occupation, on average, reduces the unemployment rate in that occupation;
- the presence of more H-1B visa holders leads to faster earnings growth for U.S. workers;
- There is no evidence that no evidence that recent college graduates have worse labor market outcomes if there are more H-1B visa holders in jobs closely related to their college major; and
- The presence of H-1B visa holders increases innovation, productivity and profits at H-1B employers and boosts total productivity and innovation in the United States.[24]

A rule that artificially creates a significant increase in required wage rates such that employers who rely on highly skilled foreign nationals to supplement their workforce has the effect of destroying the very innovation, productivity, and economic growth that the H-1B program fosters. The delayed effective date of this rule is vital as it will allow USCIS to reconsider the

[21] Stuart Anderson, *Trump Will End H-1B Visa Lottery*, FORBES, Oct. 29, 2020.
[22] *See generally* Michelle Marks, *Skilled, foreign workers are giving up on their American dreams – and turning to Canada*, BUSINESS INSIDER, Mar. 31, 2019.
[23] Madeline Zavodny, *The Impact of H-1B Visa Holders on the U.S. Workforce*, NAT'L FOUNDATION FOR AMERICAN POLICY (May 2020), https://nfap.com/wp-content/uploads/2020/05/The-Impact-of-H-1B-Visa-Holders-on-the-U.S.-Workforce.NFAP-Policy-Brief.May-2020.pdf.
[24] *Id*.

underlying basis of this rule and whether it is ultimately helpful or harmful to the United States economy and American workers.

Notably, in the February 2, 2021 Executive Order "Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans" the Biden Administration acknowledged the tremendous economic contributions made by immigrants to this country.[25] That Executive Order states:

> New Americans and their children fuel our economy, working in every industry, including healthcare, construction, caregiving, manufacturing, service, and agriculture. They open and successfully run businesses at high rates, creating jobs for millions, and they contribute to our arts, culture, and government, providing new traditions, customs, and viewpoints. They are essential workers helping to keep our economy afloat and providing important services to Americans during a global pandemic. They have helped the United States lead the world in science, technology, and innovation. And they are on the frontlines of research to develop coronavirus disease 2019 (COVID-19) vaccines and treatments for those afflicted with the deadly disease.

Nowhere in the Executive Order did this Administration state that only "highly paid" essential workers keep our economy afloat or that only "highly paid" foreign nationals have helped lead the world in science, technology, and innovation. Given this strong endorsement by the current administration of the economic value of immigration to the United States, we urge DHS leadership to conduct a more detailed assessment of whether this regulation achieves its intended objective. In particular, we urge DHS to conduct a more detailed analysis of the practical effects of the regulation, such as on the U.S. healthcare system and the higher education system, among others.

C. The Regulation Is Void As It Was Issued By Unlawfully Appointed Officers

While we support USCIS's decision to delay the effective date of the final rule until December 31, 2021, we urge USCIS to rescind the regulation as it is void because it was issued by unlawfully appointed officers who lacked authority to issue it. Specifically, on January 8, 2021, Mr. Chad Wolf, who was purporting to serve as the Acting Secretary of the Department of Homeland Security, "reviewed and approved" the final rule and delegated "the authority to electronically sign this document to Ian J. Brekke" who was purporting to serve as Senior Official Performing the Duties of the General Counsel for DHS."[26] Neither individual was properly appointed nor had the legal and valid authority to promulgate the final rule.

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[25] *See* Executive Order 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans (Feb. 2, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-restoring-faith-in-our-legal-immigration-systems-and-strengthening-integration-and-inclusion-efforts-for-new-americans/.

[26] Final Rule *supra* note 5 at 1731.

Both the Secretary and the General Counsel for DHS require Presidential appointment and advice and consent of the Senate.[27] The Senate never confirmed Mr. Wolf or Mr. Brekke to their purported positions. Relatedly, neither Mr. Wolf nor Mr. Brekke had authority under the various statutes that govern the appointment of acting officials, including the Federal Vacancies Reform Act (FVRA) and the Homeland Security Act (HSA), a DHS-specific statute. Therefore, neither Mr. Wolf, nor Mr. Brekke served in a lawful capacity at the time of issuing the final rule.

The FVRA specifies the categories and tenures of individuals who may serve in an acting capacity when a Senate-confirmed position, such as DHS Secretary or General Counsel, is vacant.[28] Under the FVRA, the "first assistant" to the vacant office automatically assumes the acting role unless the President designates another official in accordance with the Act's requirements.[29] Unless a limited exception applies, an acting official may not serve beyond 210 days after the position becomes vacant.[30] One exception is that an official may serve in an acting capacity "once a . . . nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate."[31] Once the allotted period has elapsed, the FVRA mandates that "the office shall remain vacant."[32] Unless a limited exception applies, an individual whose nomination is pending in the Senate may not serve pursuant to the FVRA in an acting capacity in the office for which their nomination is pending.[33] Actions taken by officers acting in violation of the FVRA "shall have no force or effect" and "may not be ratified."[34] The FVRA is the "exclusive means" for designating acting officials for Senate-confirmed positions, unless another statute "expressly" authorizes another mechanism.[35] The HSA sets out the order of succession for vacancies arising in the position of Secretary of Homeland Security.[36] The Deputy Secretary and then the Under Secretary for Management are each designated as "first assistant" to their immediate superiors and thus remain first and second in line to serve as Acting Secretary.[37] Furthermore, "the Secretary may designate" other DHS officers "in a further order of succession to serve as Acting Secretary" if the first two offices in the order of succession are vacant.[38] An Acting Secretary may perform the duties of a principal officer for a limited period. An Acting Secretary, as an inferior officer, may not lawfully designate another Acting Secretary.

Until the confirmation of DHS Secretary Alejandro Mayorkas on February 2, 2021, there had not been a Senate-confirmed DHS Secretary since the departure of former Secretary Kirstjen Nielsen on April 10, 2019. On September 10, 2020, President Trump nominated Mr. Wolf to serve as DHS Secretary and submitted his nomination for Senate confirmation. The White House later announced the withdrawal of Wolf's nomination on January 7, 2021, and Wolf thereafter

[27] 6 U.S.C. §§ 112(a)(1) (Secretary DHS), 113(a)(1)(J)(General Counsel).
[28] *See* 5 U.S.C. §§ 3345-3349d.
[29] 5 U.S.C. § 3345(a)(1).
[30] 5 U.S.C. § 3346(a).
[31] 5 U.S.C. § 3346(a)(2).
[32] *See* 5 U.S.C. § 3348(b).
[33] 5 U.S.C. § 3345(b)(1)(B).
[34] 5 U.S.C. § 3348(d).
[35] 5 U.S.C.§ 3347(a).
[36] 6 U.S.C. §§ 113(a)(1)(A), (F); § 113(g).
[37] 6 U.S.C. §§ 113(a)(1)(F), (g)(1).
[38] 6 U.S.C. § 113(g)(2)

resigned, effective January 11, 2021, at 11:59 P.M. Mr. Wolf never served as the first assistant to the DHS Secretary, and thus he could not lawfully serve as Acting DHS Secretary during the pendency of his nomination under the FVRA.[39] Relatedly, Mr. Wolf was never appropriately designated as Acting Secretary under the HSA because his predecessors failed to properly modify the order of succession under the HSA to place him in line for the role. At least six district courts have held that Mr. Wolf and his purported predecessor, Kevin K. McAleenan, lacked authority to serve as Acting DHS Secretary.[40] The agency's *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[41] or having Mr. Wolf attempt to ratify each of his acts since the day he took office[42] failed to rectify Mr. Wolf's fundamentally flawed and unlawful appointment to the position of Acting Secretary. As Mr. Wolf was not lawfully serving as Acting Secretary, his approval of this final rule is contrary to law.

Similarly, Mr. Brekke who signed the final rule as the Senior Official Performing the Duties of the General Counsel for DHS also lacked the authority to do so. Any vacancy in the office of General Counsel for DHS is subject to the FVRA's requirements, including the statute's 210-day limit on the service of acting officers.[43] The most recent Senate-confirmed General Counsel for DHS, John Mitnick, was fired on September 17, 2019. The 210-day period during which an acting official may discharge the duties of General Counsel therefore elapsed on April 15, 2020. Mr. Brekke who signed the final rule as the Senior Official Performing the Duties of the General Counsel for DHS lacked the authority to do so and received the duty from Mr. Wolf who had no authority to make such a delegation. Mr. Brekke's signature on the Final Rule is without force and effect, and the final rule was published in the Federal Register without the requisite authority.[44]As neither Mr. Wolf nor Mr. Brekke had the lawful authority to promulgate the final rule, the regulation is void and must be rescinded.

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[39] *See* 5 U.S.C. § 3345(b)(1).

[40] *See Pangea Legal Services v. DHS*, No. 20-cv9253, 2021 WL 75756, at *5 (N.D. Cal. Jan. 8, 2021); *La Clinica De La Raza v. Trump*, No. 19-cv4980, 2020 WL 7053313, at *6-7 (N.D. Cal. Nov. 25, 2020); *Batalla Vidal v. Wolf*, No. 16-cv-4756,2020 WL 6695076, at *8 (E.D.N.Y. Nov. 14, 2020); Nw. Immigrant Rights Project v. USCIS, No.19-cv-3283, 2020 WL 5995206, at *24 (D.D.C. Oct. 8, 2020); *Immigrant Legal Resource Center(ILRC) v. Wolf*, No. 20-cv-5883, 2020 WL 5798269, at *7-9 (N.D. Cal. Sept. 29, 2020); *Casa de Maryland, Inc. v. Wolf*, No. 20-cv-2118, 2020 WL 5500165, at *23 (D. Md. Sept. 11, 2020).

[41] *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.

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

[43] U.S.C. § 3345(a) (making FVRA applicable to any office for which an appointment "is required to be made by the President, by and with the advice and consent of the Senate"); *id*. § 3346 (providing an aggregate limit of 210 days for service by acting officers, starting from the date of the vacancy).

[44] *See* 5 U.S.C. § 553(d) (substantive rules may not take effect until at least 30 days after required publication). No officer had the lawful authority to promulgate the final rule.

D. The Regulation Must be Rescinded as It Is *Ultra Vir*es and Violates Congressional Intent

DHS must reevaluate this rule and rescind it as it impermissibly modifies a statute and is therefore *ultra vires*. Whether a regulation is *ultra vires* of a statute is determined following the principles of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*.[45] Step 1 of *Chevron* is whether Congress has spoken to the question at issue unambiguously – reading the plain meaning of the language in context – or "has explicitly left a gap for the agency to fill."[46] If Congress has spoken to the issue unambiguously, then a regulation cannot modify what the statute directs.[47]

The agency's addition of a high wage preference factor to the H-1B lottery is *ultra vires* because it is directly contrary to section 214(g)(3) of the INA which unambiguously states H-1B cap numbers "shall be issued . . . in the order in which petitions are filed for such visas or status."[48] The statute lists no other criteria. 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 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").[49]

In 2000, Congress passed AC21 which created the U.S. advanced degree exception to the H-1B cap adding 20,000 H-1B visa numbers for individuals with an advanced degree from a U.S. college or university. With AC21, Congress modified the manner in which H-1B numbers are allocated to favor advanced degree beneficiaries. Had Congress intended to make any other changes to H-1B lottery selection criteria it could have done so as part of the AC21 legislation or anytime thereafter. This is especially true because, in 2000, and subsequently, Congress was well aware the demand for H-1B visa numbers regularly exceeded the supply. Nevertheless, Congress has left INA section 214(g)(3) unchanged.

Based on the plain text of the statute in context, the statute is neither ambiguous, nor silent, and Congress did not leave a gap for regulations to fill.[50] DHS does not have authority to now effectively change the statutory language that Congress established and has consciously retained. DHS evaluated this very issue in January 2019 and concluded that "prioritization of registration selection on factors other than degree level, such as salary, would require ***statutory changes***."[51]

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[45] 467 U.S. 837 (1984).
[46] *Id*. at 843-44; *Alli v. Decker*, 650 F.3d 1007, 1012 (3d Cir. 2011).
[47] *Chevron*, 467 U.S. at 843-44.
[48] INA §214(g)(3).
[49] Pub. L. 106-313, title I, October 17, 2000, 114 Stat. 1251.
[50] *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.").
[51] 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*.

Congress and the Biden Administration also seem to recognize that DHS did not have the statutory authority to issue this regulation, because it seeks to give DHS post facto authority in Section 3407 of the U.S. Citizenship Act of 2021 to regulate in this exact manner. DHS cannot contend, less than two years later and without providing any analysis, that the statute is silent as to how USCIS must select H-1B petitions or registrations.[52] Ultimately, however, no amount of "review and consideration" can change the fact that the statute is clear and unambiguous on its face. The statute contemplates only one factor – order of submission - to determine the distribution of visa numbers. Therefore, the regulation is *ultra vires* and must be rescinded.

E. Conclusion

AILA and the Council appreciate the opportunity to comment on the delayed effective date of the final rule. For the reasons outlined above, we not only support USCIS's decision to delay the effective date of this final rule until December 31, 2021, but we urge the administration to ultimately rescind the final rule as it is based on a flawed premise, is *voidab initio*, and is *ultra vires*.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AMERICAN IMMIGRATION COUNCIL

[52] Final Rule, *supra* note 5 at 1693 ("[T]he statute is silent as to how USCIS must select H-1B petitions, or regulations, to be filed toward the numerical allocations in years of excess demand; the [statutory] term "filed" . . . is ambiguous; and these changes are reasonable and within DHS' general authority.").