AMERICAN IMMIGRATION LAWYERS ASSOCIATION

December 21, 2020

Megan Herndon, Senior Regulatory Coordinator
Office of Visa Services
Bureau of Consular Affairs
U.S. Department of State
600 19th Street, N.W.
Washington, DC 20006

Submitted via the Internet at regulations.gov

Docket ID No. DOS-2020-0041

RE: AILA Comments to Notice of Proposed Rulemaking, Visas: Temporary Visitors for Business or Pleasure RIN 1400-AE95

Dear Ms. Herndon:

The American Immigration Lawyers Association (AILA) respectfully submits the following comments in opposition to the above-referenced notice and request for comments on the Notice of Proposed Rulemaking Visas: Temporary Visitors for Business for Pleasure (herein "NPRM" or "Proposed Rule", published in the Federal Register on October 21, 2020.[1]

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, 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 make us particularly well-qualified to offer views that will benefit the public and the government as it relates to the Department's proposals concerning the "B-1 in lieu of H" policy.

I. Background and Legal Authority for Business Visitor Travel

Section 101(a)(15)(B) of the Immigration and Nationality Act (INA) authorizes business visitors to travel to the U.S. In relevant part, it allows "an alien (other than one coming for the purpose . . . of performing

[1] 85 FR. 66878 (Oct.21, 2020).

skilled or unskilled labor . . .) having a residence in a country which he has no intention of abandoning and who is visiting the United States temporarily for business . . ."

While the statute clearly prohibits the performance of skilled or unskilled labor on a B-1 visitor visa, it does not define when certain productive activities might constitute B-1 appropriate business activities. The Department of State's (DOS) regulation at 22 CFR 41.31(b)(1), Temporary Visitors for Business or Pleasure, lists visits to attend "conventions, conferences, consultations and other legitimate activities of a commercial or professional nature" as being B-1 appropriate while underscoring that "local employment or labor for hire" do not constitute B-1 appropriate activities. The regulation further notes that building or construction work (but not the supervision thereof) constitute local employment or labor for hire.[2]

DOS now proposes to strip out two critical sentences from this definition. The first sentence clarifies that a business visitor coming to perform services pursuant to a contract or other prearrangement must satisfy requirements at 22 CFR 41.53. The second sentence allows individuals of distinguished merit and ability to enter as a business visitor. Together, this results in the elimination of long-standing policy which has allowed business visitors to use the B-1 to provide temporary services in specialty occupations or as individuals of distinguished merit and ability and participate in training on a short-term basis. The removal of these provisions is unnecessary to achieve DOS's stated policy goals and will unnecessarily hamstring businesses and hurt the U.S. economy. Rather than finalizing 22 CFR 41.31(b)(1) as proposed, AILA recommends that DOS codify the standards set forth in the June 21, 2012 State Department Cable 063795 (hereinafter "B-1 in lieu of H Cable") to meet its stated goals without exasperating our fragile economy.[3]

II. Eliminating the Proposed Regulatory Text Does Not Achieve the Stated Purpose of Providing Clarity but Instead Will Have the Effect of Limiting Use of the B-1 Category Beyond That Which Is Authorized Under the Statute and Longstanding Precedent

Although the proposed rule's stated goal is to eliminate confusion and provide clarity as to what activities are B-1 appropriate, it fails to provide criteria or list additional examples of what "other legitimate activities of a commercial or professional nature" may be appropriate under the statute. Instead, it merely strikes the remaining language, effectively eliminating the B-1 in lieu of H construct, together with long-accepted business visitor activities of individuals of distinguished merit or ability. The State Department offers numerous justifications in the proposed rule for eliminating the "B-1 in lieu of H" policy, many of which are not substantiated by evidence, while at the same time acknowledging that consular officers issue these visas in very narrow circumstances amounting to 6,000 to 8,000 per year (out of 5,364,109 B visas issued in 2019 or 6,470,961 if you include border crossing cards).[4] Such a revision to the regulation is unnecessary and undermines DOS's policy goal of promoting travel for economic purposes.

---

[2] This language incorporates *Int'l Union of Bricklayers and Allied Craftsman v. Meese*, 761 F.2d 798 (D.C. Cir. 1985)

[3] *See* June 21, 2012 State Department Cable 063795, available here: https://www.aila.org/infonet/dos-issues-cable-b-1-in-lieu-of-h-1b-and-h-3

[4] *See* Table XVI(A) Classes of Nonimmigrants Issued Visas (Including Border Crossing Cards) Fiscal Years 2015-2019, available here: https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport-TableXVI-A.pdf

The Proposed Rule is Unnecessary Because Safeguards for U.S. Workers Already Exist in DOS Guidance and Should Be Codified in the Regulations.

The proposed rule seeks to eliminate two sentences, the first of which is--

> An alien seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or other prearrangement is required to qualify under the provisions of § 41.53 (*i.e.*, H-1B or H-3 classifications).

This sentence is implemented through 9 FAM 402.2-5(f), which states that "(t)here are cases in which aliens who qualify for H1 or H3 visas may more appropriately be classified as B-1 visa applicants in certain circumstances; *e.g.*, a qualified H1 or H3 visa applicant coming to the United States to perform H1 services or to participate in a training program."

The Foreign Affairs Manual (FAM) already provides significant safeguards to ensure that the B-1 in lieu of H visa applicant is employed by a foreign firm, continues to be renumerated by the foreign firm (with payroll dispense from abroad) and receives no money from a U.S. source, thus confirming the applicant is NOT a "local hire." Rather than removing this sentence from the regulation, DOS should instead incorporate the FAM guidance into the regulation.

Contrary to DOS's justification for its proposal to remove this sentence, this language is neither confusing nor contradictory to the statutory framework.

The INA defines B-1 appropriate business activities as not including "*local* employment or labor for hire" (emphasis added). This is distinguishable from § 41.53, which reads, "employment or labor *pursuant to a contract or other prearrangement*." The removal of the word "local" is key to understanding the distinction between business activities that promote international trade and commerce (*i.e.*, the purpose of the B-1) and local employment or labor for hire.

9 FAM 402.2-2(a) states that "(t)he policy of the U.S. Government is to facilitate and *promote legitimate international travel* and the free movement of people of all nationalities to the United States, consistent with nationality security and public safety concerns, both for the cultural and social value to the world and *for economic purposes.*" (Emphasis added)." Removing this sentence would focus the analysis solely on the policy goal of protecting U.S. labor without taking into account the equally important policy goal of promoting legitimate international travel for economic purposes. To further understand the distinction, the B-1 in lieu of H Cable[5] creates a 5-prong test to allow the Officer to differentiate between "local" employment in the U.S. and nonimmigrant travel for "employment pursuant to a contract or other prearrangement" that promotes international trade and commerce.

Rather than remove this sentence from the regulation, we recommend that the Department instead incorporate the B-1 in lieu of H Cable into 9 FAM**,** by adding the following criteria to the regulations:

1. **The visa applicant will not receive salary or payment from a United States source.** The overseas entity must disperse its payroll from abroad. The applicant will remain an employee of

[5] *See* June 21, 2012 State Department Cable 063795.

their overseas employer, which will continue to pay their salary and bear all expenses during their brief visit to the United States. The visa applicant will receive no remuneration from any other U.S. source.

2. **The visa applicant is regularly employed overseas, will return overseas at the conclusion of their assignment in the United States, and has strong ties to the country overseas.** The visa applicant must be and remain employed by an overseas entity.
3. **The visa applicant must plan to engage in H activity**, *i.e.*, they will perform duties in the specialty occupation of "DOL Category" and be qualified to perform such duties. The visa applicant is qualified for the specialty occupation due to their bachelor's degree in a related field to the duties to be performed.
4. **The placement is not long term**. The visa should only be issued for activity in the U.S. that is normally for *less than six months duration* (emphasis added).
5. **The activity to be performed in the United States by the visa applicant will be under the supervision and control of the overseas employer, cannot be performed by a U.S. worker, and benefits the overseas employer**.

Incorporating the B-1 in lieu of H Cable into the regulations better provides the consular officer, U.S. immigration attorneys and their clients, overseas businesses, with clear guidance for distinguishing between "local" hire arrangements that require a work visa and legally appropriate B-1 in lieu of H duties.

"Local hires" are ineligible for the B-1 classification and are easy to identify in that the visa applicant would be paid locally, in the U.S.; a person in non-specialized profession without the required credentials would not have the skills or expertise needed to perform the limited duties outlined under the B-1 in lieu Cable; and a local hire would not intend to imminently return to their home country.

Additionally, 9 FAM 402.2-5(f) provides significant safeguards to ensure that the B-1 in lieu of H visa applicant is employed by a foreign firm, continues to be renumerated by the foreign firm (with payroll dispensed from abroad) and receives no money from a U.S. source thus confirming the applicant is NOT a "local hire." Rather than removing language from the regulation, incorporating these factors from the FAM into the regulation would better achieve the desired clarity.

Caselaw reaffirms that these criteria are helpful to articulating what business activities are legally legitimate on a B-1.

- ***a. U.S. ex rel. Krawitt v Infosys Technologies Ltd***[6]: The sentence is not meaningless as argued by DOS in the proposed rule at 85 FR 66879. This court found that there was an "ambiguity in the allowable uses of B-1 visas arising out of differences in interpretation of the relevant immigration laws and regulation", not that it was meaningless.
- **b. *In the Matter of Duckett***[7]: The BIA has repeatedly held that business does not include *local* employment or the regular performance of services in the US not performed as an incident to any international commercial activity. Again, this reaffirms the distinction. B-1 in lieu of H activity is not "local" employment (it is foreign) and it is incident to

[6] 72 F.Supp. 3d 1078, 1086 (N.D. Cal 2019)
[7] 19 I. & N. Dec. 493, 498 (BIA 1987)

international commercial activity (by way of the safeguards in 9 FAM and the B-1 in lieu of H Cable).

c. ***Matter of Hira***[8]**:** The safeguards in 9 FAM and the B-1 in lieu of H Cable also reaffirm *Matter of Hira* including that the principal foreign place of business and the principal location of accrual of profits is abroad.

Notably, the proposed regulation will harm U.S. economic interests, rather than promote them, especially in situations where specialized knowledge of a foreign worker is needed on a short-term basis that may not be amenable to using an H-1B visa. The hypothetical identified by DOS at 85 FR 66883 would not be one that would be eligible for a B-1 under the current standards, as the U.S. architecture firm would be paying the foreign workers as "local hires". A U.S. firm that enters a contract with a Foreign Firm to innovate the use of natural gas to deliver safe, sustainable fuel savings for customers in the U.S.is a better example of how this category does help U.S. economic interests. The natural gas is in the U.S., but the technology and equipment to convert it to high density compressed gas sits with the Foreign Firm. The Foreign Firm needs to send an Engineer who developed the patents to the technology and equipment to the U.S. to oversee the execution of the project. They are not coming to the U.S. to install, service, or repair the commercial or industrial equipment or machinery or to train U.S. workers to perform such services, but rather to provide their specific specialized knowledge as an Engineer with extensive knowledge of the technology and equipment and oversee the on-site testing and commissioning of the site. They are only required for 4 months at which time the transition will be complete and the joint venture finished. The foreign employee would take no direction from the U.S. firm (which knows nothing of their expertise) or receive any income from the U.S. firm (they would remain an employee of the foreign firm and remain on foreign payroll).

The Proposed Rule's Attempt to Justify Eliminating Sentence 1 Due To U.S. Tax Considerations Is Misplaced.

The proposed rule asserts that new technology, including electronic salary deposits, has led to companies using the B-1 in lieu of H to exploit local wage and hour laws as a justification for striking the B-1 in lieu of H language from the regulations.[9] The Department asserts without evidence that it "believes some stakeholders may have come to believe the B-1 in lieu policy permits issuance of B-1 visas for broad categories of skilled labor…"

We have found the opposite to be true. With new technology comes more visibility. Foreign employers who send foreign workers to the U.S. to perform B-1 in lieu of H activities are more likely to seek out U.S. tax advice for these employees and are more likely to pay U.S. payroll tax where applicable and have their employees pay U.S. income tax. Many major foreign corporations now run their Global Mobility programs through a tax and immigration provider. There is a longstanding tax compliance procedure for the B-1 in lieu of H visa classification that the IRS confirmed in 2005. Thus, when the U.S. immigration lawyer recommends this classification, tax advisors and payroll providers are informed and have all the necessary tools to ensure that the U.S. tax obligations of both employer and employee are satisfied fully. Indeed, the formality of the B-1 visa is a good mechanism for compliance with not only U.S. immigration law, but also with U.S. federal and state tax laws in all material respects.

[8] 11 I&N 824 (BIA 1965; A.G. 1966),
[9] See 85 FR 66882.

The Law Does Not Completely Exclude From B-1 Eligibility All Individuals Coming To The U.S. To Perform Skilled or Unskilled Labor

The Department is not accurately representing the scope of the use of the B-1. The proposed rule states that "…the requirement [sentence 1] is under-inclusive, because INA…prohibits skilled or unskilled labor in the B nonimmigrant visa classification *categorically*, whether or not pursuant to a contract or other prearrangement."[10] (Emphasis added). However, there are over 10 pages of exceptions to this rule in the FAM based on caselaw and longstanding practice, which means it is not categorically prohibited. The nature of B-1 visa travel is so varied and fact-specific that a U.S. consular officer requires the discretion to interview and access the specific case to determine the appropriateness of the classification. Preserving officer discretion to determine this nuance is critical to the Department fulfilling its purpose to "facilitate and promote legitimate international travel…for economic purposes." For example, the proposed rule excludes professional athletes from falling under the first sentence proposed to be stricken, noting that the allowance carved out for professional athletes is consistent with *Matter of Hira.*[11] This is true of the B-1 in lieu of H construct generally as well. The safeguards in 9 FAM and the B-1 in lieu of H Cable reaffirm *Matter of Hira* including that the principal foreign place of business and the principal location of accrual of profits is abroad. Again, incorporating this nuanced FAM guidance into the regulation would provide significantly more clarity than striking existing regulatory text.

Legislative History from A 30-Year-Old Statute Is Not A Persuasive Justification for Eliminating The B-1 In Lieu Of H Construct

Although a number of immigration-related statutes were passed since the 1966 *Matter of Hira* decision, none of them altered the language of INA 101(a)(15)(B), nor the legal precedent defining legitimate business visitor activities. The State Department attempts to justify its proposed rule by asserting that IMMACT 90's legislative history exhibits a Congressional intention to narrowly construe the B-1 classification. AILA strongly disagrees that legislative history from a thirty-year-old statute is appropriate justification for this rule. If Congress wanted to curtail the B-1 in lieu of H concept in any way, they could have done so in the legislative text of IMMACT 90 or in a number of other immigration-related statutes passed since that time. IMMACT 90 was passed thirty years ago. If Congress were concerned that the B-1 in lieu of H construct were being improperly applied, they had numerous opportunities over the span of three decades to modify INA 101(a)(15)(B) or to legislate away the B-1 in lieu of H construct. In fact, some members of Congress did attempt legislation to limit or eliminate its use, but it was not met with general support. Given that Congress chose not to limit use of the B-1 in these intervening thirty years, referencing legislative history from a thirty-year-old statute cannot justify deleting this regulatory language. If anything, reminding us that this construct has endured for so many decades without Congressional action further underscores the need to maintain the current regulatory language.

The Rule of Law Requires That Statutes and Long-Standing Legal Precedent Have Priority Over Policies Of A Particular Administration and reliance on EO 13788 is misplaced.

The proposed rule notes that "the continuation of the policy would not align with Administration policy." The rule of law requires that where, as here, the statute and precedent caselaw support issuance of B-1

[10] *See* 85 FR 66880
[11] *See* 85 FR 66881

visas for short term business visits in which the H regulatory criteria are met, a particular administration's policy cannot override the law; such an action would be considered *ultra vires*.

Moreover, the Department's attempt to justify this proposed rule on the basis that it would protect the U.S. labor market and fulfill the policy articulated in EO 13788 Buy American and Hire American are misplaced.

As discussed above, the B-1 in lieu of H Cable, 9 FAM and the above-mentioned caselaw provide significant safeguards to ensure only a very narrow group of visa applicants should even apply for this visa classification. This is borne out by the Department's own statistics.

The proposed rule states that "(t)he Department *believes* [removing the sentence] will better protect U.S. workers' economic interests…"[12] Without proof this statement is meaningless. There is absolutely no evidence that eliminating the B-1 in lieu of H criteria will "create higher wages and employment rates for workers in the United States and protect their economic interests," and belief is insufficient grounds for changing a rule in effect since 1952. By definition, those who qualify for B-1 in lieu of H do not perform local labor in the U.S. and thus do not impact the wages or employment of U.S. workers.

The proposed rule spends much time comparing the B-1 in lieu of H to the H-1B classification, but this comparison is misplaced since the two are not interchangeable. We submit that there is no foreign employer that would substitute the B-1 in lieu of H classification for the H-1B, not because they are trying to avoid paying the appropriate wage, but because (1) they have no U.S. entity and thus no ability to execute U.S. payroll or pay from a U.S. entity; (2) if they did have a U.S. entity, the H-1B program is out of touch with current business reality; foreign employers who use this classification need their workers in the U.S. at a moment's notice; they don't have time to for the H-1B program to unfold, sometimes years later; and (3) there are already alternative U.S. immigration options in place to protect U.S. workers against foreign workers undercutting their jobs

III. Striking the Language Referencing B-1 In Lieu Of H-3 is Unnecessary and Unjustified

AILA opposes the elimination of the B-1 in lieu of H-3 construct as it is unnecessary and unjustified.

Elimination of the B-1 In Lieu Of H-3 Construct will Not Result in Increased Wages for U.S. Workers as Alleged in the Proposed Rule

Without providing any evidence in support of its assertion, the proposed rule alleges that removing the language allowing for the B-1 in lieu of H "will lead to an increase in wages for U.S. workers."[13] AILA disagrees with this assertion. This justification is fundamentally flawed because the activities engaged in by foreign nationals who travel to the U.S. for training that satisfies the in lieu of H criteria are not engaging in skilled or unskilled labor, local labor, or labor for hire which are prohibited by the statute and regulations.

Where proposed training is not available in the individual's home country; the individual will not be placed in a position which is in the normal operation of the business and in which U.S. citizens and resident workers are regularly employed; the individual will only engage in productive employment to the extent that the productive activities are incidental and necessary to the training; and the training will

[12] 85 FR 66879
[13] 85 FR 66880.

benefit the beneficiary in pursuing a career outside the United States, the individual is not providing local labor or labor for hire. In such a case, they are thus not competing with the local workforce and their training in the U.S. is not in competition with, and therefore does not impact U.S. wages.

It Would Be Inefficient to Require H-3 Petitions for Individuals Eligible For B-1 In Lieu Of H-3

In contrast to the H-1B discussion above, the B-1 in lieu of H-3 could be considered as interchangeable with the H-3. The nature of activities allowed in both of these contexts do not constitute local labor or labor for hire that would require an H-1B or other work visa. International commerce demands efficiency and agility. Brief training trips that satisfy *Hira* support continuing the B-1 in lieu of H-3 construct. To require an H-3 petition filing with USCIS for brief training of less than 6 months duration would be inefficient, wasteful and legally unnecessary. While USCIS has a legitimate interest in assessing the *bona fides* of long-term training programs with durations in excess of six months to two years, the State Department remains the most appropriate agency to assess whether a short-term training program aligns with the B-1 statute.[14] For brief business trips, the State Department can best protect U.S. labor while simultaneously ensuring that legitimate international commerce is not unnecessarily inhibited.

Subsequent Changes to The INA Did Not Undermine the Continued Legal Validity nor the Need for The B-1 In Lieu Of H-3 Construct

The proposed rule asserts that it is necessary to strike language in the existing regulatory text because changes to the INA since the B-1 in lieu of H construct was first adopted warrant eliminating it. It references the Immigration Act of 1990's (IMMACT 90) imposition of a quota on H-1Bs, its modification of the standard applicable to aliens seeking admission from "distinguished merit and ability" to "specialty occupation", and its institution of an LCA requirement. Note that none of these changes in any way reference the H-3 classification or the B-1 in lieu of H-3 construct, and thus are not a justification for eliminating this construct.

This rationale is also misplaced to the extent that it attempts to curtail the B-1 in lieu of H-1B construct and the provision relating to individuals of distinguished merit or ability. There is a clear delineation between legitimate business visitor activities and impermissible skilled and unskilled labor, local employment and labor for hire. Activities which satisfy the *Matter of Hira* factors are by definition legitimate business visitor activities and do not constitute the labor or local employment that would require an H-1B or other work visa. Simply put, B-1 and H-1B are not interchangeable visa classifications. The fact that there are numerical limits on certain types of H-1Bs and an LCA requirement does not support doing away with the B-1 in lieu of H construct, since the types of "business activities" under *Matter of Hira* entitled to B-1 classification are clearly distinguishable from the productive work activities/local employment that require an H-1B visa. None of the immigration laws passed since the B-1 in lieu of H construct was introduced attempted to eliminate it. The referenced statutory changes made to the H-1B classification, as well as the creation of the O and P nonimmigrant categories, do not replace or eliminate the B-1 business activities allowed by the statute or 60-year-old caselaw. As such, it is important to retain the regulatory language intended to be stricken. If anything, incorporating the *Hira* factors or the B-1 in lieu of H Cable into the regulation would better achieve the Department's stated goals.

[14] See *Hira* and *Int'l Union of Bricklayers and Allied Craftsman v. Meese*, 761 F.2d 798 (D.C. Cir. 1985).

Fears Over Potential and Uncited Abuse Cannot Eliminate Legal Constructs That Have Existed for Decades

The proposed rule notes that IMMACT 90 limited the H-3 program to exclude training programs "intended primarily to provide productive employment." AILA agrees with this statement. Since the standard for B-1 in lieu of H-3 also limits productive activities to those that are "incidental and necessary," this construct neither conflicts with the H-3 statute, nor with the B-1 statute. The State Department nevertheless expresses a desire to eliminate B-1 in lieu of H-3 because "petitioners who cannot obtain H-1 or H-2B use the H-3 as a workaround." A concern of potential abuse by a few bad actors should not dictate eliminating this construct, as doing so would unjustly prejudice compliant companies and hinder international commerce. Given the vastly different character of activities allowed under *Matter of Hira* relative to local employment and labor for hire, AILA is confident that consular officers in the context of the visa interview possess the skills necessary to distinguish between the two and are best qualified among the agencies to make such a determination. Their ability to do so will be further enhanced if rather than striking text, the final rule adds the *Hira* factors to the regulation.

The State Department further asserts that "some employers have misused the B-1 in lieu of H policy to bypass the important protections built into the H-3 classification and described above."[15] By the government's own estimates, only a fraction of visas issued annually, a mere 6,000-8,000 visa applications, would be impacted by this regulation annually. Although this is not strictly broken down to account for B-1 in lieu of H-3 applications, they estimate that "up to 28 percent" are applications for B-1 in lieu of H-1B for small entities, and thus the number of impacted B-1 in lieu of H-3 applications diminishes even more.[16]

Given the relatively small number of applications, and with the presumption that most applicants act in good faith, coupled with consular officers' ability to making these determinations at an in-person interview, the actual number of fraudulent cases should be negligible. The fear of potential misuse of the category should not derail use of this legally available construct by legitimate companies.

The Regulation Should Call Out B-1 In Lieu Of H-3 As Per Se Compliant Under Matter of Hira

Calling out in the regulations that business visits that meet the B-1 in lieu of H-3 are *per se* appropriate under *Matter of Hira* would help in achieving the stated goal of "eliminating the gray area," and would have the effect of protecting local labor while facilitating international commerce, as intended by the INA. AILA further urges the State Department to add detailed guidance as to what constitutes "other legitimate activities of a commercial or professional nature" under *Hira*, as opposed to merely striking existing regulatory text.

[15] 85 FR 66884.
[16] 85 FR 66885.

IV. Striking the Sentence Regarding "Distinguished Merit and Ability" Is Unnecessary and Inconsistent with the Proposed Rule's Purpose

The second sentence the proposed rule seeks to eliminate is--

> An alien of distinguished merit and ability seeking to enter the United States temporarily with the idea of performing temporary services of an exceptional nature requiring such merit and ability, but having no contract or other prearranged employment, may be classified as a nonimmigrant temporary visitor for business.

This sentence is implemented through several examples offered in 9 FAM 402.2, many of which are included in the NPRM which both limit and define the appropriate uses for a B-1 or B-2 visa as "business" relates to athletes, entertainer and artists. The mechanism by which these legacy aliens of distinguished merit and ability are able to enter the U.S. in well-defined but limited circumstances with a business visa is through 22 CFR 41.31. Removing this provision is unnecessary and would actually have the adverse of effect of the Notice's goal, which would be to cause more confusion and uncertainty.

The NPRM reads that "the Department has long interpreted 'business' activities permissible in the B-1 classification to exclude the activities of members of the entertainment profession seeking to perform services within the scope of their profession" but this is without merit and directly contradicts the Department's own further explanation.

The proposed rule references IMMACT 90's creation of the O-1 and P-1 categories as a justification for eliminating the regulatory language relating to use of the B-1 by individuals of distinguished merit and ability. The proposed rule further provides that the current carve-outs in the FAM of permissible B-1 and B-2 uses for entertainers, athletes and other legacy aliens of "distinguished merit and ability" are protected by *Matter of Hira*, but without this explicit language, this is flimsy protection. In an argument that is circular, the NPRM reads that the removal of the "distinguished merit and ability" language will not impact the permissible use of a B-1 for foreign-based athletic teams since it is in the FAM. However, it is explicitly in the FAM because of the "distinguished merit and ability" inclusion for "business." *Matter of Hira* makes no reference to artists, entertainers or athletes. As B-1 visits are typically limited to short durations of just a few weeks, the fact that Congress created nonimmigrant visa classifications that allow for longer-term activities that constitute labor or local employment does not obviate the proper use of the B-1 by these individuals where *Matter of Hira* is satisfied.

The proposed rule states that the Department's existing guidance to consular officers provides some scenarios in which professional athletes, artists and entertainers may qualify for B-1 visas and that these scenarios do not "rely on the regulatory language the Department proposes to remove."

9 FAM 402.2 includes a long list of permissible activities for athletes, entertainers and artists to conduct whilst on a B-1 (and sometimes B-2 visa). The FAM provides numerous explicit permissible uses for B-1s for athletes, entertainers and artists. Over the course of several decades, the uses have been defined and serve as a useful exception to when an O or P visa is required. For example, 9 FAM 402.2(G)(1) and 9 FAM 402.2-5(C)(4), which are also cited in the NPRM.

The proposed rule indicates that these FAM provisions are protected by *Matter of Hira*, but while *Matter of Hira* is the overarching policy for these enumerated permissible uses, the FAM is explicit in its guidance as a result of including aliens of distinguished merit and ability for specific B-1 activities.

The inclusion of the language "aliens of distinguished merit and ability" specifically allows for certain activities of athletes, entertainers and artists to be performed on a B-1 visa. These are consistent and are protected by *Matter of Hira*, but the specific language of "aliens of distinguished merit and ability," serves all interested parties in the interest of avoiding confusion. The FAM, which is continuously updated and changed, can provide the greatest clarity as to which activities are permissible on a B-1 visa with respect to the legacy alien of distinguished merit and ability. There is no reason to remove this provision from the regulations to assist with clarity when a contrary result is almost guaranteed.

V. Consular Officers are Best Positioned to Adjudicate Requests for Visas Involving Short-Term Employment or Training

While the law gives primacy to DHS in its interpretation of immigration law, in recent years there appears to be a troubling trend of diminishing the State Department's role in visa matters vis-à-vis USCIS's role as it relates to adjudications. This perceived trend fails to appreciate the keen judgment of our highly educated U.S. consular officers and the many nuanced factors that they uniquely are capable of discerning during their in-person interviews. Consular officers' intensive training and global orientation allow them to protect U.S. citizen business travel against potential reciprocal actions. Consular officer are highly qualified to properly discern face-to-face in interviews appropriate B-1 visitor activities that facilitate international commerce as opposed to local employment/labor for hire arrangements. Consular officers are also best-placed to understand local country conditions and whether the need for US-based training is necessary and will benefit the applicant outside of the U.S. – two of the conditions of the annotated visa. Removing the B-1 in lieu of H construct will further erode consular officers' authority with regard to short-term business travel, which is an area in which they are better suited to operate than USCIS.

VI. Comment to Analysis and Underlying Assumptions to Executive Orders 12866 and 13563

The Department speculates and provides irregular data and hypotheticals to further the proposed rulemaking, which fails to establish a reasonable justification to move forward with this regulation. We provide comment to the following points made by the Department:

- At 85 FR 66885: "The purpose of travel is often to provide services in a specialty occupation for one or more U.S. based clients." As noted above, the 9 FAM and B-1 in lieu Cable specifically notes that source of income cannot come from a U.S. source. Thus, if implemented correctly, the purpose of travel cannot be to provide client deliverables in the U.S. as the source of income would then be the U.S. client.
- At 85 FR 66885: "The Department estimates that up to 28 percent of the approximately 8,000 annual B-1 visa issuances under the B-1 in lieu of H policy were to aliens who applied for a visa to perform services in a specialty occupation for a small entity in the United States" The evidence given for this calculation cannot be relied upon. Using the "U.S. Point of Contact" to determine, after the fact, where the person will be performing services is a shot in the dark. While some of these points of contact could be for the foreign entity's joint venture partner or other allowable partner under the B-1 in lieu of H classification, they could also be a friend's employer or family

member's employer or a business associate not related to the B-1 in lieu of H activities. The best way going forward to gather this evidence is for the consular officer to read and scan the employment letter from the Foreign Entity, which should clearly articulate the 5-prong test under the B-1 in lieu of H Cable or at the minimum the requirements in 9 FAM.

- At 85 FR 66885: The Department hypothesizes that U.S. entities indirectly affected by this proposal will likely hire U.S. workers to perform the requires services is also not backed by evidence. The Department "*believes* that the benefits of this proposal outweigh the costs." In our hypothetical above of the Engineer, that project would simply have not moved ahead and the U.S. natural gas company would have been left without the latest technology or equipment, passing on continued outdated technology and higher costs to their U.S. customers.
- Throughout the proposed rule DOS compares the B-1 in lieu of H policy to an H-1B inappropriately. We reiterate that the foreign employers who utilize this classification typically cannot use the H-1B. An H-1B petitioner must be a U.S. entity. Moreover, petitioning for an H-1B worker is too costly and time prohibitive for a short-term project.
- At 85 FR 66887: The Department provides calculations of additional annual cost of this proposal to U.S. employers and makes assumptions that users of this policy would be working 40-hour weeks for 50 weeks per year. First, B-1 nonimmigrants are rarely, if ever, admitted to the U.S. for 12 months; the norm is six months. Second, the B-1 in lieu of H Cable specifies that this classification should not be used for more than six months. Finally, there are several areas where the Department makes assumptions about hourly workers. As stated throughout, the safeguards are already built into the requirements.
- At 85 FR 66887: A final note on the use of hourly rates. Most professionals that would qualify as specialized knowledge employees are paid annual salaries and must work as their employers require. The calculations used falsely assume that U.S. employers will simply hire U.S. workers at hourly rates higher than a foreign employer would pay the foreign employee. In reality, a likely outcome of a project not moving ahead is not that a new U.S. worker will be hired, but as many of us can attest, the existing U.S. workers will simply be asked to perform more work for the same pay.

VII. Conclusion

AILA appreciates the opportunity to comment on this proposed rule. We hope that our organization's comments underscore that retaining the current regulatory language sought to be stricken and further incorporating criteria from 9 FAM and the B-1 in lieu of H Cable would best achieve the Department's goal of improving clarity with regard to permissible B-1 visitor activities.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION