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Submitted via Regulations.gov

Charles L. Nimick, Division Chief
Business and Foreign Workers Division
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: H-1B Modernization NPRM
DHS Docket No. USCIS-2023-0005
RIN 1615-AC70
Eligibility for cap-exempt employment and the definition of specialty occupations

Dear Division Chief Nimick,

This comment from the Institute for Progress (IFP) concerns the H-1B Modernization Notice of Proposed Rulemaking (88 Fed. Reg. 72870). We appreciate the opportunity to offer feedback to the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) on their Notice of Proposed Rulemaking (NPRM) to improve the H-1B pathway, especially as the Biden Administration emphasizes the importance of critical technology fields, such as artificial intelligence (AI). This new rulemaking will influence how adjudicators review H-1B petitions for years to come. It is vital that the new processes contribute to advancing technological research and development into the future.

At the Institute for Progress, a nonpartisan think tank in Washington, DC committed to promoting innovation in the United States, we think that H-1B modernization can support scientific research and technological development, and also help secure the success of regional innovation and tech hubs across the country, particularly the Regional Technology and Innovation Hubs (Tech Hubs) and Regional Innovation Engines and Translation Accelerators launched under the CHIPS and Science Act of 2022, as well as the Regional Clean Hydrogen Hubs, launched as part of the Infrastructure Investment and Jobs Act.

With this in mind, our comment makes two arguments:

- Modernizing eligibility for cap-exempt H-1B employment should reflect the realities of employment relationships within cooperative research efforts like regional hubs.
- Changes to the specialty occupation definition should focus on how the field of study relates to the prospective job duties, not the title of the degree field.

Modernizing eligibility for cap-exempt H-1Bs will help regional hubs recruit the talent necessary to succeed
Regional innovation initiatives are intended to foster R&D ecosystems. Many employers can become third-party petitioners because they are furthering the purposes of both the hubs and their qualifying institutions as participants in regional hubs.

U.S. Citizenship and Immigration Services must not let the visa cap undermine the mission of a qualifying institution by making its essential partners less effective. Instead, modernizing eligibility for cap-exempt H-1B status can help ensure that members of the regional innovation hubs can take advantage of all the talent at their disposal, including talented individuals who were not born in the United States.

**Modernizing the “employed at” exemption**

USCIS has elaborated on the statutory authority for the “employed at” exemption for H-1Bs, noting that “Congress chose to exempt [from H-1B caps]...a broader category than [noncitizens] employed ‘by’ a qualifying institution.” Instead, Congress had the “intent that certain [noncitizens] who are not employed directly by a qualifying institution may nonetheless be treated as cap-exempt when such employment directly and predominantly furthers the essential purposes of the qualifying institution.”

We applaud DHS for clarifying at 8 CFR 214.2(h)(8)(iii)(F)(4) that remote work can count toward the requirement of cap-exempt H-1B beneficiaries working at least half of their time at a qualifying institution, rather than being required to work onsite. We agree that the focus should be on the job duties being performed by the beneficiary, rather than the location of the work being performed.

We also agree with the NPRM’s proposed change at 8 CFR 214.2(h)(8)(iii)(F)(4) that a beneficiary’s work should “directly further an activity that supports or advances one of the fundamental purposes, missions, objectives, or functions” of the qualifying institution, rather than furthering the organization’s “essential purpose, mission, objectives, or functions.” This change would reflect that there are many organizations that support vital research and innovation activities, but that this support is not the only goal of the organization. For the regional innovation hubs specifically, they are designed to form a coalition of regional partners with synergistic missions. As the National Science Foundation (NSF) describes it, “each coalition will develop and implement a comprehensive strategic plan designed to produce a culture of innovation and diversity within the entire innovation ecosystem.” Since hubs and engines are organized with a comprehensive strategic plan designed to foster cooperation, they will have already demonstrated to other agencies that their work furthers the mission of the qualifying institution.

**Recommendations:**
Clarify the proposed change by providing examples, including that a worker’s duties further a fundamental objective of a qualifying institution if those duties pertain to their employer’s role in a regional innovation effort that includes the qualifying institution

Clarify that advancing regional innovation is a “normal, primary, or essential purpose” of any organization officially participating in a federally sponsored regional innovation initiative

Defining a nonprofit organization as a research organization to include a wider variety of organizations that support regional innovation

The sentiment of the above change is also echoed in the proposed change at 8 CFR 214.2(h)(19)(iii)(C), which would replace “primarily engaged,” and “primary mission,” in the definition of a nonprofit research organization with “fundamental activity” to include organizations that are engaged in research but it is not their primary mission. Many partners involved in regional hubs may conduct research in addition to other activities. Even when research is not their primary activity, it is often still a fundamental one. Moreover, the modified regulation should make clear that some government chartered nonprofits involved in hubs, such as the National Semiconductor Technology Center, should be qualifying nonprofit research organizations.

Additionally, to fully support regional innovation, we believe that more stages of research should be included in the activities conducted by qualifying organizations. The NPRM specifies that only organizations conducting activities in basic and applied research can be qualified as a research organization for cap-exempt H-1Bs. However, a key goal of the regional hubs is the commercialization of its earlier stage research. A majority of technologies developed through basic and applied research fail to reach commercialization and subsequently benefit U.S. citizens. The regional hubs will ensure that the important developments created within the hub’s network will be supported through applied research to commercialization. It would be valuable for H-1B regulations to reflect this important support by ensuring that organizations that work on later stages of technology development can still qualify as a research organization.

Recommendations:

- Define research organizations to include nonprofits and government entities that conduct research as part of their role in a regional hub
- Clarify that government chartered nonprofits involved in research through hubs are qualifying nonprofit research organizations
- Clarify that qualifying research includes not only basic and applied research but can also include later stages of research, such as technology development and transfer

Clarifying the relevance of courses of study and job duties, rather than degree label and job title
New phrasing in the NPRM would require that the beneficiary's degree be related to the position, but this is not precisely equivalent to long-established interpretation of the law. Since the Immigration and Nationality Act of 1952, adjudication of H-1B petitions has focused on the skills and knowledge gained from the beneficiary’s course of study, not the name of their degree, and the beneficiary’s prospective job duties, not the name of the position.

Prior to the Immigration Act of 1990 (IMMINT90) revisions to the Immigration and Nationality Act (INA), foreign-born professionals were admitted under the H-1 category for “aliens of distinguished merit and ability,” which included member of the professions, as well individuals who were prominent in any field as well as accomplished and renowned performers, artists, and athletes. While the “specialty occupation” standard adopted by Congress in 1990 and the prior “member of the professions” standard are not identical, when legacy Immigration and Naturalization Service (INS) proposed its legislative rules in 1991 (pgs 31553-31554) to implement the IMMINT90 it explained the significant revisions to H-1B as including “changing the reference to aliens who are members of the professions to aliens in specialty occupations,” the implication being that with respect to the beneficiary’s credentials there was not a significant revision and just a change in referenced name. In addition, in implementing IMMINT90 INS adopted the same four-pronged set of alternatives to define when a position involved a “specialty occupation” as when a position required an individual who was a “member of the professions” under the prior H-1 distinguished merit and ability standard. The four-pronged test was not even discussed by legacy INS in either the proposed or final rule and no commenter questioned these four descriptors.

USCIS acknowledges that this change in the NPRM is for expediency and that adjudicators will separately evaluate the beneficiaries’ actual course of study, but this binding regulation will guide adjudicators for decades to come, over many different presidential administrations, that refers to “degrees” or “positions” in ways that fail to accurately capture the preexisting agency practices. The regulatory text adjudicators are going to rely on should explain these long-standing practices outlined above by using correct references to courses of study and job duties, not degree labels and names of positions.

The change as proposed would likely be a major deviation from current policy at USCIS. Looking at publicly available data on certified PERM applications filed on behalf of H-1B holders, we note that from FY 2019-2023, there were 21,883 PERMs filed on behalf of H-1B holders for jobs accepting a business degree to satisfy education requirements. This was 12 percent of all PERMs certified for H-1B recipients in the period. From FY 2019-2023, there were 21,694 PERMs (also 12 percent) filed on behalf of H-1B holders for jobs accepting any kind of engineering degree. Taken altogether, from FY19-23, there were 37,249 PERMS (21 percent!) which accepted either a business degree, liberal arts or social studies degree, or any kind of engineering degree. Given that this data excludes EB-1s and EB-2 National Interest Waivers, this will be an undercount and the true impact of the change as proposed is likely larger than these figures imply.
Recommendations:

- Do not require a degree field be “directly related” to the job duties for a specialty occupation
- Clarify that “courses of study” are relevant rather than the degree field per se
- Clarify that job duties are relevant rather than the job title of the position per se

Respectfully submitted,

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