November 13, 2026

Submitted via Regulations.gov

Andrew Good, Chief
Office of Policy and Strategy
US Immigration and Citizenship Services
US Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: **Proposed Rule Removing Deference to Prior USCIS Determinations of Eligibility**
DHS Docket No. USCIS-2026-0529
RIN 1615-AD26
Opposition from 14 multisector signatories to proposal creating more uncertainty and unpredictability in adjudications

Dear Chief Good,

The undersigned 14 signatories care about US employers' ability (whether in government, academia, or industry) to employ a high-skilled workforce of both domestic and foreign-born professionals, especially scientists, technologists, and engineers in critical and emerging fields. Representative of the workforce and entrepreneurship, higher ed, and policy sectors, we appreciate the opportunity to comment on the Notice of Proposed Rule Making (NPRM) from US Citizenship and Immigration Services (USCIS) to eliminate agency deference to prior decisions in I-129 petitions for nonimmigrant workers.

Despite differences in priorities, each signatory has found that the ability to hire talented, foreign-born professionals is a key ingredient to American economic prosperity and innovation, and job creation for Americans.

Background and Commenters' Interests

First and foremost, we agree with USCIS that protecting the integrity of immigration adjudications is paramount and that the Immigration and Nationality Act (INA) clearly places the burden of proof on petitioners and applicants seeking immigration benefits, such as the authority to hire a foreign national. For I-129 petitions on behalf of nonimmigrant workers, this burden of proof falls upon the beneficiary noncitizen worker's sponsoring company, nonprofit organization, university, government agency, or other firm.

As USCIS concedes in this rulemaking,[1] there is no inherent inconsistency between a statute that mandates the applicant or petitioner has the burden of proof and giving deference to the agency's prior decision on the same facts. Many federal agencies adjudicate access to benefits and such agencies must generally adopt the previous decision unless there is new and material evidence or a change in the law.[2] Recognizing and validating deference to prior agency decisions merely acknowledges, and take an approach consistent with, the long-accepted and well-recognized principle of administrative law that like cases should be treated differently only with good reason and more specifically that "justice demands that cases with like antecedents should breed like consequences."[3]

Providing deference to prior I-129 case decisions has been standard, and seemingly uncontroversial, USCIS practice until recently. Prior to 2017, USCIS deferred to prior nonimmigrant petition approvals issued by the agency when adjudicating extension requests involving the same employer, same employee, and same underlying facts as the initial determination, absent a material change in fact or legal error by the agency. This policy seemed merely an extension of the binding regulation then on the books, which established that "supporting evidence [for a petition extension] is not required unless requested by the director."[4] (Emphasis added.) A new policy memorandum rescinded all such deference in 2017, but in 2021 that memo was rescinded and the former policy reinstated. In 2024, USCIS codified deference to prior USCIS adjudications after notice and comment rulemaking. In 2026, in the instant rulemaking, USCIS identifies a new justification for eliminating deference: the agency's stated inability to train adjudicators to balance a fulsome petition review with the reality that it is relevant if the same employer and same employee with the same job have previously been before the same agency asking for approval of status in the same nonimmigrant visa classification.[5]

In our experience and research, removing agency deference creates structural inconsistency and unpredictability in decision-making for I-129 petitions on behalf of high-skilled noncitizen professionals. Predictability is a valid and integral reliance interest by the regulated community of employers filing I-129 petitions for nonimmigrant workers. Moreover, we observe that this can cement a chilling effect on the ability of international STEM experts to make important contributions across the US. For example, individuals working in emerging fields like super intelligence are discouraged from taking positions with US firms because it's impossible to know if there will be a burdensome Request For Evidence (RFE) or unexpected denial in order to continue employment in the same occupation with the same firm. Additionally, H-1B employees stuck in decades-long green card backlogs who have held valid H-1B status for a decade or longer often face ambiguity and delays due to unnecessary RFEs that can delay extensions of drivers licenses or documentation of status for dependent spouse and children, or possible denials, requiring their departure from the country and abandonment of their quest for lawful permanent resident status.

Eliminating deference at this juncture requires USCIS to engage in notice and comment rulemaking to remove a section from the codified regulations, 8 CFR 214.1(c)(5). That means, under established Supreme Court case precedent, the "agency must examine the relevant data and articular a satisfactory explanation of its action, including a 'rational connection between the facts found and the choice made.'"[6] While the agency has the prerogative to identify problems it wants to solve, and we respect and applaud the commitment to adjudications integrity, it does not appear that the agency's own data support the effort to remove deference. For that reason, we jointly write in opposition of the proposed rule.

USCIS is Obligated to Consider the Best Available Evidence and has Not Done So

We are joining together to file this comment because federal rulemaking requires DHS to consider the "best available evidence," in order to ensure federal agencies base their regulations on rigorous facts and data rather than speculation or political preference.[7]

The data and analysis methods described in the NPRM seem inadequate in the following ways, among others:

- First, DHS incorrectly suggests that denial rates are not relevant to its assessment of the deference policy because "historical denial rates did not statistically differ during period when the deference policy was in effect compared to when it was not in effect."[8] If true, it absolutely is relevant in assessing a deference policy because it shows that the agency is merely creating a burdensome additional step for employers without changing the outcome of the agency's work. A policy that increases RFE rates but does not change denial rates imposes a clear cost without achieving any benefits in enforcement outcomes. A policy with real costs and no enforcement benefit fails any cost-benefit analysis.

- Second, even focusing solely on RFE rates, it doesn't appear that USCIS reflects consideration of the full data available from the agency in the NPRM.[9] The NPRM's difference-in-differences analysis finds that "the RFE rate increased 2.9 percent more than the RFE rate for the comparison group after the deference policy was rescinded in 2017,"[10] but the analysis does not show that the assumptions that difference-in-differences requires hold; it does not show that the two groups followed parallel trends before 2017, nor does it account for other 2017 policy changes affecting H-1B petitions that coincided with the rescission. Using USCIS data, Stuart Anderson of the National Foundation for American Policy finds much larger increases in RFE rates:

  "DHS does not reference in the Notice of Proposed Rulemaking real-world data published by USCIS that show the percentage of completions with RFEs for H-1B petitions increased from 21.4% in FY 2017—before the deference policy was rescinded—to 38% in FY 2018 and 40.2% in FY 2019, after the deference policy was put in place."[11]

- Third, USCIS claims an RFE response takes approximately 10 minutes, an estimate lacking supporting evidence. Employers in government, industry, and academia report that RFE responses often take many hours to assemble. Even an average response time of 2 hours suggests a cost of at least $250 per RFE according to DHS's methodology,[12] not the $22 identified by the agency – a 10-fold increase in the cost estimate provided by the agency.

These three data and evidence inadequacies create a very shaky foundation for the policy justification offered by DHS for the policy shift to no deference.

Conclusion

The signatories agree with USCIS that agency adjudications should not be an exercise in trying to "get to yes" (or no), and instead should be about determining and validating eligibility. As a practical matter, it is important to look at the best available evidence on the impact of deference, because the ability to hire appropriate, eligible, highly skilled individuals in H-1B, L-1, O-1A, and TN status through I-129 petitions is an important complement to our hiring of professional US workers. As summarized in a consensus 2017 report of economists, including George Borjas: "infusion by high-skilled immigration of human capital has boosted the nation's capacity for innovation, entrepreneurship, and technological change... The prospects for long-run economic growth in the United States would be considerably dimmed without the contributions of high-skilled immigrants."

We oppose the effort by US Citizenship and Immigration Services to eliminate deference from its adjudications because it seems the agency has not fulfilled its obligations for consideration of the best available evidence and data and because we foresee adjudications without deference as facilitating the dimming of American economic growth and prosperity.

There is no reason that recognizing ***both*** the value of international STEM experts and the necessity of adjudications' integrity need to be in conflict. Therefore, we ask that USCIS withdraw its proposal to remove 8 CFR 214.1(c)(5) from the Code of Federal Regulations.

Specifically, we believe that no final rule can be issued based on the rule as proposed without the following three clarifications from the agency, among others, and request USCIS provide the following:

> (1) A detailed explanation why better and more specific adjudicator training could not address the problem USCIS has identified in best ensuring adjudication quality and integrity, especially given that many other federal agencies adjudicate benefit requests and do provide deference to their prior decisions.
> (2) A description why USCIS has no concerns about the negative impact to government agencies, companies, nonprofits, and universities filing I-129 petitions facing no deference, both with regard to predictability in decision-making and increased time that will need to be allocated to respond to increasing RFEs.
> (3) A full accounting of the inconsistency between the data described in USCIS's NPRM and the other agency data described above, where the significant ratio of increased RFEs when there is no deference create costly uncertainty and petitioner response effort.

Should USCIS nevertheless decide to proceed with revisiting the deference regulation, we ask that the agency publish a Supplemental Notice of Proposed Rulemaking that fine-tunes but does not remove deference, with a new 60-day comment period and a revised preamble explanation addressing the concerns about (1) the less burdensome approach of improved adjudicator training, (2) the cost of unpredictability in decision-making, and (3) data inconsistencies in the agency's justification.

Thank you for the opportunity to participate in the notice and comment rulemaking process.

Respectfully filed,

Center for American Entrepreneurship
Center for Strategy and Applied Insights at Fragomen
Compete America: Alliance for a Competitive Workforce
Economic Innovation Group
FWD.us
Eric Garfunkel, Senior International Officer, Rutgers University
Global Detroit
Institute for Progress
International Student Resource Center
Lehigh University
NAFSA: Association of International Educators
National Venture Capital Association (NVCA)
Niskanen Center
Presidents' Alliance on Higher Education and Immigration

[1] See NPRM at p. 65122 (instituting a no deference policy is USCIS's current preference "whether or not the deference regulation is consonant with the statute").
[2] See e.g., SSA Disability Insurance (DI) claims, POMS Section DI 52755.010 (Program Operations Manual System of the Social Security Administration).
[3] See, e.g., pronouncements from "the father of administrative law" and legal scholar Professor Kenneth Culp Davis in Davis, Doctrine of Precedent as Applied to Administrative Decisions, 59 W.Va.L.Rev.111 (1957) and his treatise Davis on Administrative Law (1978).
[4] See, e.g., for the H-1B classification, the regulation previously codified at 8 CFR 214.2(h)(14).
[5] See NPRM at p. 65122-65123.
[6] Motor Vehicle Manufacturers Assoc. v State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43, quoting Burlington Truck Lines, Inc. v United States, 371 U.S. 156, 168 (1962).
[7] For example, the Trump administration has reconfirmed its commitment to utilizing the "best available data" in rulemaking when the Secretary of Transportation published its administrative rulemaking guidance in spring 2025 (90 Fed. Reg. 20956, May 16, 2025). Similarly, the much updated guidance from the Office of Management and Budget on rulemaking, Circular A-4, requires that regulations be supported on the best and most recent available empirical data.
[8] NPRM at 65123.
[9] See e.g., USCIS I-129 Petition Data for H-1B Petitions for FY16 to FY22 (October 1, 2016 to September 30, 2022) from USCIS then Office of Performance and Quality (now Chief Data and Analytics Office), November 2022.
[10] NPRM at p. 65123.
[11] Stuart Anderson on DHS claims in the NPRM, Forbes, October 14, 2026, and on H-1B petition denial and RFE rates, NFAP, November 2025.
[12] See NPRM at p. 65128 at Table 4.