December 21, 2023

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

Submitted electronically via www.regulations.gov

Re: Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, DHS Docket No. USCIS–2023–0005

Dear Chief Nimick:

The Technology Councils of North America (TECNA) represents more than 60 technology business-serving councils and serves as the collective voice for regional technology organizations. Our members represent 22,000 small- to medium-sized technology companies across North America. Many of our members' companies are startups and are heavily dependent on uniquely-skilled, creative talent, both to survive in a rapidly changing environment and hopefully to drive that change in desired directions for company growth.

Access to a highly-skilled pipeline of talent is a key component of the ongoing ability of the United States to continue to innovate and create jobs. H-1B visas allow small- to medium-sized companies (SMBs) to bring in talent with specific skills and experience needed to continue to innovate and create jobs in the United States. To the extent that government H-1B guidelines were to unduly reduce the functionality of the U.S. employment-based immigration system and restrict the mobility of key talent in the U.S., it would have a significant harmful impact on the U.S. economy and would drive increased employment of talent *outside* of the U.S. for roles originally intended to be based *inside* the country.

We thank the Department of Homeland Security (DHS) for affording us an opportunity to comment on the H-1B requirements and respectfully offer for your consideration the following comments:

Approval of Changes to the Lottery System and H-1B Cap Exemptions

TECNA commends the proposed changes to link H-1B registrations to each *unique beneficiary* identified in the registration pool as opposed to each registration. This would ensure that each foreign national would receive no more than a single entry in the lottery, regardless of how many job offers that individual receives, addressing the issue of multiple H-1B cap lottery registrations. In addition, it would require the individual to have a valid passport, thus limiting the potential for bad actors to game the system. These changes provide a more equitable advantage for all applicants and strengthen the integrity of the registration process.

Additionally, broadening the definition of "nonprofit research organization" and "governmental research organization" expands the H-1B cap-exempt criteria and enables a broader range of nonprofit research entities, institutions and governmental research organizations to qualify.

Definition of Specialty Occupation is Unduly Restrictive

The proposed rule significantly modifies the regulatory definition of a "specialty occupation", the standard used to determine if a position qualifies for H-1B sponsorship. Specifically, it adds a separate element of proof on a "direct relationship" between the required degree field(s) and the duties of the position, and no longer focuses on courses of study as the controlling statute requires. The proposed text as written is subject to various interpretations and could cause significant confusion and inconsistencies in the adjudication process.

Further, a specialty occupation will not qualify for H-1B if it solely requires a general degree, such as business administration, without further specialization. USCIS gives an example in the proposed rule, saying that a petition with the requirement of "any engineering degree" in any field of engineering for the position of software developer will generally not satisfy the eligibility requirement.

TECNA agrees that an applicant's learned skill set must be related to the role and agrees with the Agency's long-standing approach that the H-1B petitioning employer is responsible for proving the connection between the beneficiary's course of study and the offered job duties. However, the proposed rule fails to acknowledge the specific, highly-technical coursework that is associated with many degree programs, including some described as "general" by the proposed rule. For example, a chemical engineering program could include a significant amount of software engineering as part of the coursework. Adjudicators, however, may apply the proposed rule more narrowly and reject the degree that would be acceptable under current practice.

In a rapidly changing environment, flexibility is needed. "Duties of the position" can change very rapidly, while "required degree fields" are a slow-to-change, retroactive analysis that is dependent on many factors irrelevant to the "duties of the position". As

DHS works to enhance the STEM workforce pipeline and foster innovation, it should consider the degree field alongside relevant coursework, skills and experience in its decision-making. Specifically, DHS should eliminate the "directly related specific specialty" degree requirement and/or modify the language to codify existing USCIS practice fully (that is, to allow occupations that require generalized degrees, as well as specialized experience and training, to qualify as specialty occupations).

Impact on Startups and Entrepreneurs:

Immigrants are disproportionately responsible for U.S. startups valued at $1 billion or more, according to research by the National Foundation for American Policy. In fact, nearly two-thirds (64%) of U.S. billion-dollar companies ("unicorns") were founded or cofounded by immigrants or the children of immigrants, and almost 80% of the unicorns have an immigrant founder or an immigrant in a key leadership role.[1]

TECNA supports the rule's proposed changes to allow entrepreneurs (petitioners that own a controlling interest in a petition entity) to perform duties directly related to owning and directing the business – including duties that are non-specialty occupation duties. However, the rule includes the aforementioned problematic "directly related" provisions and reduces the initial validity period to a proposed 18-month (instead of a 36 months), placing an undue burden on the entrepreneur. Furthermore, it places an undue financial and administrative burden on startups – which already face liquidity challenges – as DHS will require them to pay double the filings and fess of other petitioners. This financial burden contradicts the spirit of including entrepreneurs in the H-1B program and may incentivize startup founders to take their new technologies and innovation outside of the United States.

Restrictions Do Not Comport with AI Executive Order

President Biden's October 2023 Executive Order (EO) on "Safe, Secure and Trustworthy Development and Use of Artificial Intelligence," directs the Secretary of State and Secretary of Homeland Security to take appropriate steps to promote innovation and competition by attracting AI talent to the United States. In the EO, President Biden underscores the importance for a pathway to citizenship for specialty occupation holders and states that "Across the Federal Government, my Administration will support programs to provide Americans the skills they need for the age of AI and attract the world's AI talent to our shores — not just to study, but to stay — so that the companies and technologies of the future are made in America."[2] Unfortunately, the "directly related specific specialty" language in the proposed regulation runs counter to this by potentially encouraging adjudicators to deny H-1B petitions where the degree field does not precisely match what the adjudicator believes would be required to perform the role.

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[1] Immigrant Entrepreneurs and U.S. Billion-Dollar Companies - NFAP

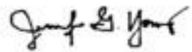
[2] Sec. 2(b) of Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/

Conclusion

> As the tech sector continues to morph and grow, the U.S. needs to ensure that our talent-based visa system continues to attract the best and brightest, driving greater innovation and creating more jobs and higher wages for Americans. Technology employers are assembling multi-disciplinary teams to drive rapid change in critical and emerging technologies, including AI. Flexibility and creativity are at a premium in assembling such teams. It would be a mistake to burden this process with any potentially unnecessary or subjective language that could cause confusion and inconsistency in the adjudication process. This is especially true if it runs counter to both the long-standing agency procedures (course-of-study and experience practices) and recent Executive action (President Biden's Executive Order on AI).

We thank DHS for affording us and other stakeholders the opportunity to comment. Should you have any questions about the comments or any of the information contained herein, please contact me at 412-545-3493 or at jyoung@tecna.org.

Respectfully Submitted,



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