BR Business Roundtable

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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 Springs, MD 20746

Dear Mr. Nimick:

Business Roundtable Comments on
"Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers"
Department of Homeland Security Docket No. USCIS–2023–0005

I. INTRODUCTION

Business Roundtable appreciates the opportunity to respond to the Notice of Proposed Rulemaking (NPRM) that U.S. Citizenship and Immigration Services (USCIS) published on October 23, 2023, titled "Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers."

Business Roundtable is an association of more than 200 chief executive officers (CEOs) of America's leading companies, representing every sector of the U.S. economy. Business Roundtable CEOs lead U.S.-based companies that support one in four American jobs and almost a quarter of U.S. GDP. The organization's mission is to promote a thriving U.S. economy and expanded opportunity for all Americans, including through continued efforts to strengthen the pipeline of American workers as well as to ensure lawmakers enact sound immigration policies that support our economy.

Business Roundtable has conducted extensive research and released in-depth reports that examine immigrants' contributions to the American economy,[1] compare U.S. immigration policies to those of other countries[2] and propose practical solutions for fixing the country's immigration system.[3] Business Roundtable continues to encourage Congress to fix our country's broken immigration system on a bipartisan basis.

Business Roundtable appreciates the Department's efforts to improve the H-1B program, and we remain ready to assist and provide additional feedback. We encourage USCIS to:

- Bifurcate the rulemaking by finalizing and implementing proposed changes to the H-1B registration process for the upcoming cap season;
- Adopt changes that minimize employment disruptions, provide flexible pathways to the United States and support skills-based employment practices;
- Not move forward with provisions that would narrow the "specialty occupation" definition or add new review obligations for adjudicators;
- Clarify or amend proposals related to the "deference" policy, paperwork and administrative burdens, and site visits; and
- Take more time to engage with stakeholders on changes to third-party placement and the "use or lose" policy and not finalize those proposals at this time.

II. REQUEST TO BIFURCATE RULEMAKING

USCIS should finalize and implement the beneficiary-centric selection process for the upcoming cap season.

Business Roundtable supports the agency's proposal to change the H-1B registration process to make selections based on the unique beneficiary instead of registrations, and we agree that this proposal should be implemented separately and before the upcoming H-1B cap season in March 2024. The current registration model has proven vulnerable to fraud and misuse, which has driven down selection rates for employers. It is critically important that USCIS resolve this issue as soon as possible.

The current model, which has caused USCIS to conduct multiple registration lotteries – even after the new fiscal year begins – creates uncertainty for employers and makes business planning difficult. We share the government's goal of removing the incentive to "game" the system, and we support the agency's proposal to level the playing field so that beneficiaries with one registration filed on their behalf have the same chance of being selected as a beneficiary with multiple registrations. In turn, our member companies will have a better chance of being able to hire and retain the beneficiaries they seek to employ.

Companies are already well underway in their planning for the upcoming cap season. Business Roundtable asks that the agency address the registration process immediately and consider separately the other proposals in the rule that promise to require more time and analysis, as we explain below. As employers have also completed their budgets, we request that the government maintain the current fee schedule throughout the registration period and all H-1B filing windows for FY 2025.

III. FAVORABLE POLICY CHANGES THAT BUSINESS ROUNDTABLE SUPPORTS

USCIS should implement proposed fixes to minimize employment disruptions and ensure petitions are granted for their full validity period.

Business Roundtable welcomes the agency's proposals to prevent foreign nationals from losing their employment authorization or receiving a truncated validity window due to government case processing delays.

More specifically, our member companies support the extension of the "cap-gap" protection for international students. In recent years, delays associated with multiple registration lotteries and long adjudication timeframes have forced many of our member companies to take employees off payroll because they lost work authorization on October 1. We support the agency's effort to resolve this issue and prevent unnecessary gaps in work authorization for F-1 students.

Similarly, Business Roundtable favors provisions that would allow for flexibility in the start date for certain H-1B cap petitions and enable petitioning employers to adjust the requested validity period if USCIS deems the petition approvable after the initially requested period expires. We also urge USCIS to clarify that a role is not speculative if the delay in activating H-1B status is due to a change in circumstances, a legitimate business need or a request by the foreign beneficiary (e.g., an F-1 employee who seeks to postpone a change of status to maximize utilization of F-1 status). We support the government's efforts to ensure job offers are legitimate, but the currently unpredictable H-1B cap process requires flexibility around the employment start date in this instance as well.

USCIS should finalize provisions to provide more flexible pathways to the United States.

The NPRM includes multiple provisions to promote access to H-1B visas for entrepreneurs, startups and other beneficiary-owned businesses. We welcome these efforts, which should help ensure that innovation and job creation occur in the United States. Business Roundtable also supports the USCIS proposal to clarify, simplify and modernize eligibility for cap-exempt H-1B employment.

USCIS should codify its policy that a position qualifies as a specialty occupation if an employer normally requires a degree (see below for discussion of opposition to other elements of the proposed definition).

Business Roundtable welcomes the agency's acknowledgement of an increasing "skills-first culture" in employment practices. We endorse USCIS' proposal to clarify that a post-secondary degree normally must be required for a position to qualify as a specialty occupation but that a degree need not always be required. In the final rule, USCIS should expressly recognize that an employer can implement a skills-based hiring program without undermining its ability to sponsor H-1B beneficiaries for the same or similar roles.

Additionally, we encourage the agency to solicit feedback from stakeholders on whether to update the degree equivalency standard. Current USCIS policy does not factor in the variety of ways that employers upskill their workforces (e.g., through certificate programs), which creates obstacles for employers who otherwise might expand their skills-based employment practices.

Business Roundtable does have significant concerns about other proposed provisions that would narrow the "specialty occupation" definition, which we explain in detail below.

IV. POLICY CHANGES THAT BUSINESS ROUNDTABLE OPPOSES

USCIS should not narrow the "specialty occupation" definition as doing so would result in inconsistent adjudications and unnecessary denials.

Our member companies have serious concerns with the agency's proposal to narrow H-1B eligibility by stating that "[a] position is not a specialty occupation if the attainment of a general degree, . . . without further specialization, is sufficient to qualify for the position."

This restrictive interpretation, which is incongruous with the rest of the proposed definition and the agency's acknowledgement of the flexibility needed to improve the match between required skills and job duties, would disqualify beneficiaries who have long been eligible for the H-1B classification. The proposed regulatory language places undue emphasis on the title of a degree, rather than the actual substance of a course of study. This ignores the highly specialized and technical coursework that many so-called "general" bachelor's or advanced degree fields encompass (e.g., advanced mathematical and statistical methods and quantitative analysis in a Business Administration program). In the NPRM preamble, USCIS also casts doubt on the applicability of engineering degrees to engineering roles based solely on their title. As written, the proposal encourages adjudicators to make an adverse finding simply due to a mismatch between the label on a position and degree, which is contrary to the statute and does not give employers the necessary latitude to establish the link between their position and a course of study.

Petitioning employers must establish the relationship between the degree field and the job duties (e.g., through evidence of relevant coursework), as they already do. But as proposed, this regulatory language would, at best, lead to inconsistent adjudications and higher rates of Requests for Evidence (RFEs) in cases involving what adjudicators deem general degrees. At worst, it would result in widespread denials, preventing U.S. employers from attracting and retaining needed talent. The proposed definition as drafted will undoubtedly result in arbitrary and capricious application, causing uncertainty for employers and their employees and threatening the future of the H-1B program.

A restrictive application of the specialty occupation definition also could undermine the shared goal of attracting and retaining talent in Artificial Intelligence (AI) and other critical and emerging technologies. Any narrowing of eligibility for H-1B status will make it more difficult for employers to cross-train employees to work on other critical and emerging technologies. The agency should include language in the final rule clarifying that the revised definition should not result in any narrowing of eligibility. Further, it should emphasize that maximum flexibility be given in scenarios where the petitioner intends to employ the beneficiary in a role involving AI or other critical and emerging technologies.

As discussed in more detail below, if USCIS does move forward with a narrower definition of specialty occupation, it is critical that the agency not apply that definition to foreign nationals already in the immigration process.

USCIS should not adopt the proposal relating to DOL LCAs.

USCIS proposes to codify the agency's authority to "determine whether the labor condition application involves a specialty occupation as defined in section 214(i)(1) of the Act and properly corresponds with the petition." The preamble to the NPRM states that in doing this, "USCIS would consider all the information on the Labor Condition Application (LCA), including, but not limited to, the standard occupational classification (SOC) code, wage level (or an independent authoritative source equivalent), and location(s) of employment. USCIS would evaluate whether that information sufficiently aligns with the offered position, as described in the rest of the record of proceeding. In other words, USCIS would compare the information contained in the LCA against the information contained in the petition and supporting evidence. USCIS would not, however, supplant DOL's responsibility with respect to wage determinations. The wage level is not solely determinative of whether the position is a specialty occupation."

Business Roundtable opposes this provision. USCIS lacks authority and expertise to evaluate the LCA that the DOL already has reviewed and certified. Though the preamble states that USCIS would not supplant the DOL's responsibility with respect to wage determinations, it suggests that USCIS could exceed its authority by looking behind the DOL's determinations.

This provision also undermines USCIS' goal of reducing backlogs and improving efficiencies. Requiring adjudicators to consider a new standard that is outside their expertise and legal purview would slow down adjudications and result in more RFEs. Those costs are not addressed or considered in the proposal and likely would result in legal challenges to any final regulation.

V. POLICY CHANGES THAT REQUIRE MORE CLARITY OR AMENDMENT BEFORE FINALIZING

USCIS should codify the "deference" policy but should clarify that it will not apply new standards to foreign nationals already in the immigration process.

We encourage the agency to proceed with codifying its longstanding policy to defer to prior decisions on nonimmigrant extension requests when there has been no material change or error in the prior approval (i.e., the "deference" policy). However, the deference policy as proposed will not protect employees already in the immigration process.

Business Roundtable urges USCIS to make clear that any changes to H-1B eligibility requirements made as a result of this regulation will not apply to employees who are caught in the green card backlog. They have relied upon the current requirements for years or even decades, and they must be able to continue to move through their careers, including accepting promotions and new job offers, under the rules they have relied upon. Applying new standards now could result in their loss of status and removal from the country, harming them and their families.

USCIS can protect these valued employees by ensuring that new H-1B eligibility requirements in the final rule will only apply to beneficiaries of initial petitions filed after the rule's effective date and their subsequent extensions – and *not* current H-1B beneficiaries who are already in the process.

USCIS should do more to reduce paperwork and administrative burdens on employers.

Rather than simply codifying the existing *Matter of Simeio* policy without any changes, we recommend that USCIS clarify in the final rule that a change in the geographic worksite or end-client of an H-1B worker does not constitute a "material change." The agency could propose an alternative, streamlined mechanism to notify USCIS of worksite changes that require a new LCA. Business Roundtable would welcome the opportunity to assist USCIS in these efforts and provide additional feedback.

Business Roundtable has long encouraged the agency to revisit the requirement to file an amended petition for worksite location changes where there has been no substantive change to H-1B eligibility. This is an administrative burden that has caused disruptions and serious hardships for employers and employees, and the significant filing fee increases USCIS proposed in January 2023 make these hurdles even more concerning.

Under the previous Administration, our member companies saw longtime employees receive denials despite no change to their position or eligibility for H-1B status due to a simple worksite location change. Highly skilled foreign nationals were forced to leave the country despite years pursuing permanent residence, building lives in the United States and contributing to the economy. This was the case even though the employer would have obtained a certified LCA from the DOL, complied with all notice obligations and paid the employee the required salary for the new location.

We also continue to encourage the agency to explore additional actions that would reduce backlogs and costs for the government, such as reinstituting "Known Employer." Additionally, USCIS proposes to codify its authority to request contracts, work orders or

similar evidence. Given the highly confidential and sensitive nature of these documents, we urge the agency to clarify that redactions do not impact an officer's ability to evaluate the nature of the relationship between parties.

While we welcome the agency's proposal to eliminate the itinerary requirement, USCIS has additional opportunities to reduce its own workload and lessen burdens on employers and employees with the changes proposed above.

USCIS should clarify the scope of the site visit provision.

Business Roundtable shares the government's goals of maintaining the integrity of the H-1B program and preventing fraud and abuse, and we acknowledge that site visits have been an important tool for USCIS to promote compliance. However, we ask that the agency amend the proposed site visit provision to clarify that site visits will not occur at an employee's home, and to provide a clear process indicating the steps the government would take in the event of an alleged failure or refusal to cooperate. Beneficiary interviews should take place at a company office to alleviate any safety or privacy concerns.

The provision as proposed is overly broad, particularly given the concerns regarding the third-party placement provisions that we outline in detail below, and it is unreasonable to proceed directly to automatic revocation or denial of petitions. There could be many scenarios that do not involve intentional refusal to cooperate, but result in USCIS not being able to verify facts during a site visit. For example, a third-party entity might deny entry due to a misunderstanding of H-1B program requirements or strict limitations on facility access to protect proprietary or sensitive information, given the lack of any confidentiality assurances. A third-party company also would not have access to records that belong to the petitioning employer.

There must be an opportunity to resolve questions that arise during any site visit before USCIS proceeds to an adverse determination. Not allowing an employer to respond would cause undue hardship to H-1B beneficiaries, including those with no relationship to the petitioning employer or the case that was the subject of the site visit.

USCIS should also, absent existing evidence of fraud, provide notice to the attorney of record and the company regarding an upcoming site visit. Doing so will reduce government burdens and allow the government to spend more time on cases of concern. Similarly, USCIS should, absent existing evidence of fraud, allow the beneficiary to have a company representative or counsel present during interviews. USCIS is aware of scams that target or threaten foreign national beneficiaries, and allowing them to have a company representative or attorney present would address their fears and improve relations between USCIS and foreign nationals. Finally, we encourage USCIS to establish a system that reduces the need for or frequency of site visits for employers with a track record of demonstrated compliance.

Furthermore, this provision could potentially be unfairly invoked to raise alleged joint employer concerns regarding a third-party organization's obligation to provide evidence about their own staffing requirements in support of another company's H-1B petition. Requiring an end client to provide evidence to support another employer's petition could be used arbitrarily and artificially to argue a joint-employer relationship exists even though such a relationship does not actually exist.

VI. POLICY CHANGES THAT REQUIRE CONTINUED STAKEHOLDER ENGAGEMENT AND SHOULD NOT BE FINALIZED AT THIS TIME

USCIS should solicit further feedback from stakeholders on provisions relating to third-party placement.

USCIS proposes to overhaul the entire framework for evaluating H-1B petitions involving third-party placement. We ask the agency to solicit further feedback from stakeholders on these provisions before moving forward with the proposed changes.

USCIS proposes to make a distinction "between a beneficiary who is 'staffed' to a third party and a beneficiary who provides services to a third party (whether or not at a third-party location)." This distinction would have significant consequences from an evidentiary standpoint. A "staffed" determination would place the burden on the third-party company to demonstrate that the position qualifies as a specialty occupation, a standard that has proven impossible for USCIS adjudicators to apply without acting in an arbitrary and capricious manner.

The proposed regulatory provision simply defines "staffed" as meaning the beneficiary "will be contracted to fill a position in a third party's organization and becomes part of that third party's organizational hierarchy by filling a position in that hierarchy (and not merely providing services to the third party)." As written, the proposed regulation does not provide any details regarding what standards USCIS would apply.

The NPRM preamble states that "USCIS would make the determination as to whether the beneficiary would be 'staffed' to a third party on a case-by-case basis, taking into consideration the totality of the relevant circumstances." USCIS officers would, therefore, have complete discretion to characterize a work arrangement as "staffed."

We submit that providing this level of discretion to USCIS officers would leave businesses with no clarity regarding the rules or how the agency would apply them and would leave the agency susceptible to legal challenges under the Administrative Procedure Act. That litigation would result in additional costs for the government and uncertainty for the public.

Adopting this part of the proposal as written would undermine other provisions in the regulation that seek to reduce government and private-sector burdens and bring needed clarity to the H-1B process. It would lead to additional RFEs for H-1B petitions involving a third-party company, creating considerable uncertainty. Business Roundtable urges the agency to continue to engage with stakeholders on how to best move forward in this area and not finalize this provision at this time.

USCIS should gather additional feedback on a "use or lose" policy.

The proposal includes a request for preliminary input on a potential "use or lose" policy, which would be triggered if a cap-subject H-1B petition is not activated within a certain amount of time. Business Roundtable shares the government's goal of ensuring that the limited number of H-1B cap-subject visas available each year are used for real job opportunities. However, because there are multiple legitimate reasons why there might be a delay in activating an approved H-1B petition, we recommend that the agency continue to engage with stakeholders on how to best accomplish this goal and not finalize the provision at this time. One such example would be that the cap-subject petition is filed for an employee already present in the United States (e.g., on an F-1, L-1, TN, or E-3 visa), who has a full-time permanent position with a company.

VII. CONCLUSION

Business Roundtable appreciates the opportunity to respond to this NPRM. We encourage USCIS to separate the beneficiary-centric registration process from the other provisions in the NPRM and implement it as soon as possible. We further encourage the agency to adopt changes that minimize employment disruptions, provide flexible entry pathways to the United States and support skills-based employment practices. We ask that USCIS not move forward with provisions that would narrow the "specialty occupation" definition or add new review obligations for adjudicators. Provisions related to the deference policy, paperwork and administrative burdens, and site visits can be improved as specified above. Finally, we urge USCIS to take more time to engage with stakeholders on changes to third-party placement provisions and a "use or lose" policy and not to finalize those proposals at this time.

We look forward to continued communication with the agency on these and other issues surrounding the U.S. immigration system. Please contact Dane Linn, Senior Vice President, Business Roundtable, at dlinn@brt.org if you have any questions.

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[1] Business Roundtable. (2017, September). *Economic effects of immigration policies: A 50-state analysis*. Retrieved from https://s3.amazonaws.com/brt.org/archive/reports/BRT%20Economic%20Effects%20Immigration.pdf. Business Roundtable. (2014, June). *Contributing to American growth: The economic case for immigration reform.* Retrieved from https://s3.amazonaws.com/brt.org/archive/0_immigration_report/2014.06.06%20BRT%20Immigration%20Report.Contributing%20to%20American%20Growth.pdf.

[2] Business Roundtable. (2015, March). *State of immigration: How the United States stacks up in the global talent competition.* Retrieved from https://s3.amazonaws.com/brt.org/BRT-immigrationreport-2.pdf.

[3] Business Roundtable. (2013, April). *Taking action on immigration: Realistic solutions for fixing a broken system.* Retrieved from https://s3.amazonaws.com/brt.org/archive/reports/20130405_Taking_Action_on_Immigration.pdf.