

# Economic Policy Institute

Submitted via <https://www.federalregister.gov/documents/2020/11/02/2020-24259/modification-of-registration-requirement-for-petitioners-seeking-to-file-cap-subject-h-1b-petitions>

Charles L. Nimick  
Chief, Business and Foreign Workers Division  
Office of Policy and Strategy, USCIS  
U.S. Department of Homeland Security  
20 Massachusetts Ave. NW, Suite 1100  
Washington, DC 20529-2120

RE: U.S. Citizenship and Immigration Services, Department of Homeland Security, [Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions](#), Notice of proposed rulemaking, CIS Docket No. 2674-20, DHS Docket No. USCIS-2020-001, RIN: 1615-AC61

Dear Charles L. Nimick:

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank established in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-income workers—regardless of immigration status—and assesses policies with respect to how well they further those goals. EPI submits these comments to United States Citizenship and Immigration Services (USCIS), within the U.S. Department of Homeland Security (DHS), in response to their Notice of Proposed Rulemaking (NPRM) regarding the visa allocation process for H-1B visas. The proposed rule takes the current random allocation process—often referred to as the H-1B “lottery”—for visas when more petitions than the number of visas available are filed when the application window opens, and modifies it to allocate H-1B visas to employers based on a ranking according to H-1B prevailing wage levels.

EPI has researched, written, and commented extensively on the U.S. system for labor migration, including in particular, the H-1B program and other temporary work visa programs. EPI recently published a lengthy piece of research detailing the need to improve the way the U.S. Department of Labor (DOL) sets the H-1B wage levels,<sup>1</sup> which we coauthored and have annexed to these public comments. The report, however, did not address the flawed manner in which H-1B visas are allocated; a problem that goes hand-in-hand with H-1B prevailing wage levels that have been set artificially low for many years.

President Donald Trump campaigned on reforming the H-1B program and immediately promised to do so after winning the presidency. Yet, virtually no substantive action was taken until just weeks before the 2020 election. At that time, DOL and USCIS/DHS issued three rules,

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<sup>1</sup> Daniel Costa and Ron Hira, [H-1B visas and prevailing wage levels: A majority of H-1B employers—including major U.S. tech firms—use the program to pay migrant workers well below market wages](#), Economic Policy Institute, May 4, 2020.

a DOL Interim Final Rule (IFR) updating the H-1B prevailing wage levels,<sup>2</sup> a USCIS IFR modifying the definition of H-1B “specialty occupation,”<sup>3</sup> and this NPRM, on the H-1B lottery. While USCIS and DOL have the requisite legal authority to make these regulatory changes, the timing and process of their issuance have made them susceptible to procedural legal challenges. On December 1, 2020, a federal court in California struck down both the DOL prevailing wage IFR and USCIS IFR.<sup>4</sup>

EPI generally supports the main substance of this NPRM and believes it improves the current allocation process for H-1B visas, which is currently random and susceptible to companies that have learned how to “game the system” in order to obtain large numbers of H-1B visas at the expense of other companies seeking to hire H-1B workers. If the NPRM or final rule issued pursuant to this NPRM is challenged in court based on USCIS’s interpretation of the statute that establishes how H-1B visas are allocated, then USCIS should consider alternate methods to achieve the same goal of allocating visas by wage levels. These comments will suggest one alternative way to do it.

This proposed rule will incentivize H-1B employers to pay their migrant worker employees at fair wage rates that are commensurate with local U.S. wage standards and result in rewarding employers that pay higher salaries with additional visas and workers. That in turn will improve the program by reducing the number of H-1B workers who are underpaid according to U.S. wage standards—but without reducing the overall number H-1B visas that are issued—and will also protect the wages of similarly situated U.S. workers. The proposed rule will also increase the overall skill mix and quality of the pool of H-1B workers, thereby boosting the impact of the H-1B program on the U.S. economy. As a result, the proposed rule helps address a major critique EPI has long held about the program—that it is exploited by firms that use it to legally undercut U.S. wage standards—and which Members of Congress from both major parties have attempted to address through proposed bipartisan legislation to reform H-1B, which includes a new preference allocation system for H-1B visas (albeit a preference system that is more detailed and includes additional factors based on other policy priorities, unlike the one in the proposed rule based solely on wage levels).<sup>5</sup>

It must also be noted at the outset of these comments that recent actions taken by federal agencies with respect to wages for migrant workers in temporary work visa programs have been inconsistent and confusing. While DOL recently took action with the aforementioned IFR that—if it had not been struck down—would have raised wage rates for migrant workers in the H-1B, H-1B1, and E-3 visa programs, DOL almost simultaneously issued a new wage rule for the H-2A program that will cut wages for the migrant farmworkers in that program.<sup>6</sup> This

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<sup>2</sup> See, Department of Labor, Employment and Training Administration, [Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States](#), Interim Final Rule DOL Docket No. ETA-2020-0006, RIN: 1205-AC00, October 8, 2020; see also Daniel Costa, [“EPI comments on DOL wage level methodology for H-1B visas and permanent labor certifications for green cards.”](#) Economic Policy Institute (public comments), November 9, 2020.

<sup>3</sup> U.S. Citizenship and Immigration Services, Department of Homeland Security, [Strengthening the H-1B Nonimmigrant Visa Classification Program](#), CIS Docket No. 2658-20, DHS Docket No. USCIS-2020-0018, RIN: 1615-AC13, October 8, 2020.

<sup>4</sup> Michelle Hackman, [“Federal Judge Strikes Down Trump’s H-1B Visa Rules on Highly Skilled Foreign Workers.”](#) *Wall Street Journal*, December 1, 2020.

<sup>5</sup> See, S. 3770, [H-1B and L-1 Visa Reform Act](#), 116th Congress (2019-2020) and H.R. 6993, [H-1B and L-1 Visa Reform Act](#), 116th Congress (2019-2020).

<sup>6</sup> Dave Jamieson, [“Trump is hoping to deliver a parting gift to the agriculture lobby: an effective wage cut for farmworkers.”](#) *Huffington Post*, November 9, 2020.

is troubling and misguided, especially considering the fact that the DHS has determined that farmworkers are part of the U.S.’s critical infrastructure workforce, and the Department of State has designated H-2A workers as “a national security priority”—because of their contribution to stabilizing the food supply chain during the Coronavirus pandemic.

Both DHS and DOL should issue regulations that lead to improved labor standards and higher wages for all work visa programs, and not treat workers differently based on their education levels, occupations, and nationalities. All temporary migrant workers deserve to be paid fairly for their work and no work visa programs should operate as loopholes that allow employers to legally underpay migrant workers.

*The first major section of these comments addresses the flaws in the current H-1B program, and the second section specifically addresses elements of the NPRM.*

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## **I. THE H-1B PROGRAM IS AN IMPORTANT AVENUE FOR ATTRACTING SKILLED, TALENTED WORKERS FROM ABROAD—BUT IS DEEPLY FLAWED AND IN DESPERATE NEED OF REFORM**

The H-1B program provides temporary, nonimmigrant U.S. work visas for college-educated workers and fashion models from abroad. While no one can deny the importance of attracting skilled, talented workers to the United States, the reality is that some of the biggest beneficiaries of the H-1B program are outsourcing companies that have hijacked the system—using it to pay low wages, replace thousands of U.S. workers with much-lower-paid H-1B workers, and to send decent-paying technology jobs abroad. Outsourcing companies, however, are not the only abusers of the system: The vast majority of employers that use H-1B are legally allowed to pay their H-1B workers at wage levels that are below the local average for the occupation.

The major structural, programmatic flaws in H-1B are:

### ***U.S. employers do not have to recruit U.S. workers before hiring H-1B workers***

Employers and corporate lobby groups claim that they use the H-1B primarily to bring in the “best and brightest” workers from abroad to fill labor shortages in science, technology, engineering, and math fields (STEM). But despite this widely held belief, the contrary is true:

- Employers are not required to recruit U.S. workers or prove they are experiencing a labor shortage before hiring H-1B workers.
- “H-1B-dependent” employers—those filling 15% or more of their U.S. jobs with H-1B workers—are required to recruit U.S. workers first, but they get around the requirement with a cheap and easy loophole: they can hire an H-1B worker who holds a master’s degree or pay the H-1B worker an annual salary of over \$60,000. For comparison, \$60,000 per year is \$24,560 *lower* than the national median wage for all workers employed in computer occupations.<sup>7</sup>

### ***U.S. employers can legally underpay H-1B workers***

For years, corporate lobbyists and other H-1B proponents have claimed that H-1B workers cannot be paid less than U.S. workers because employers must pay H-1B workers no less than the “prevailing wage.” That is true in theory, but:

- Before recent DOL IFR that was struck down, employers had the option of paying the prevailing Level 1 “entry-level” wage or Level 2 wage, both of which were well below the median wage (Level 3) that local employers pay workers in similar jobs.
- As we have shown in the annexed report, in 2019, 60% of H-1B jobs were certified by DOL at the two lowest wage levels, both of which are set below the local median wage.
- While the wage level is supposed to correspond to the H-1B worker’s education and experience, in practice the employer gets to choose the wage level and the government doesn’t check unless a lawsuit or a complaint is filed by a worker.

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<sup>7</sup> U.S. Bureau of Labor Statistics, “[15-0000 Computer and Mathematical Occupations \(Major Group\)](#),” Occupational Employment and Wages, May 2019, Occupational Employment Statistics, U.S. Department of Labor.

***H-1B workers are often exploited and arrive to the United States in debt after paying hefty recruitment fees***

H-1B workers sometimes pay large fees to labor recruiters, which means that many arrive virtually indentured to their employer, fearing retaliation and termination if they speak out about workplace abuses or unpaid wages. And widespread abuses have been documented—even human trafficking and severe financial bondage.<sup>8</sup>

***H-1B workers do not have sufficient job mobility between employers and are not allowed to self-petition for lawful permanent residence***

The H-1B visa itself is owned and controlled by the employer; an H-1B worker who is fired or laid off for any reason becomes instantly deportable. This arrangement results in a form of indentured servitude.<sup>9</sup> Thus, H-1B workers have good reason to fear retaliation and deportation if they speak up about wage theft, workplace abuses, or other working conditions like substandard health and safety procedures on the job. While H-1B workers have the ability to switch jobs if they can find another employer willing to petition for a new visa for them, and have 60 days to find a new employer if they are fired, these avenues are not straightforward enough and inadequate to mitigate the power that employers have over the right of their H-1B workers to remain employed in the United States. These protections should be improved upon.

In addition, the ability of H-1B workers to become lawful permanent residents and remain in the United States is entirely up to the whims of their employers. Even after working for an employer for six years in H-1B status, the employer has the power to decide if an H-1B worker can remain in the country—in many cases after an H-1B worker has established firm roots in the United States. That power keeps H-1B workers from complaining and asserting their employment rights. As a result, H-1B workers should be allowed to petition on their own for permanent residence after a short provisional period—no longer than 18 months—and without the involvement of their employer.

***Outsourcing companies are using the H-1B program to underpay H-1B workers, replace U.S. workers, and send tech jobs abroad***

As detailed in the annexed report, 15 of the top 30 employers of H-1B workers in 2019 were not innovative high-tech firms like Apple and Google.<sup>10</sup> Some of the biggest users of the H-1B visa are staffing firms that specialize in information technology (IT) and accounting and that pay H-1B workers the lowest wages legally allowed, and outsource their H-1B employees to third-party firms. Some of those firms also have a business model dependent on sending jobs offshore where labor costs are cheaper.

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<sup>8</sup> See, for example, “[Techsploitation](#),” *Reveal News*, The Center for Investigative Reporting, and Farah Stockman, “[Teacher Trafficking: The Strange Saga of Filipino Workers, American Schools, and H-1B Visas](#),” *Boston Globe*, June 12, 2013.

<sup>9</sup> Christopher Lapinig, “[How U.S. Immigration Law Enables Modern Slavery](#),” *The Atlantic*, June 7, 2017.

<sup>10</sup> Daniel Costa and Ron Hira, “[H-1B visas and prevailing wage levels: A majority of H-1B employers—including major U.S. tech firms—use the program to pay migrant workers well below market wages](#),” Economic Policy Institute, May 4, 2020.

Typically in this scenario, H-1B workers do computer and engineering work at the office of a U.S. employer but are employed by an outsourcing company, some of which are based abroad or have major operations abroad.<sup>11</sup> The many reported cases of U.S. workers being laid off and replaced by H-1B workers have all been facilitated by this arrangement. In multiple incidents, the H-1B workers have been hired with annual wages of around \$30,000 to \$40,000 less than the workers they have replaced. Before they are laid off, the U.S. workers are often forced to train their own H-1B replacements as a condition of their severance packages; this is euphemistically known as “knowledge transfer.” Major, profitable U.S. employers like Disney and Toys “R” Us—as well as public employers and institutions like the University of California and Southern California Edison—have laid off thousands of U.S. workers who were forced to train their own replacements. Eventually, many of the outsourced jobs filled by H-1B workers get moved offshore.<sup>12</sup>

Contrary to the popular narrative proffered by corporations that support expanding and deregulating the H-1B visa program—the staffing firms that use H-1B visas are not using them to keep technology jobs in the United States—instead they are using them precisely to facilitate the offshoring of as many of those jobs as they can. That is in fact, the business model of those firms. News reports, including from the *New York Times*, have shown that outsourcing companies “game the system” in order to obtain a high share of H-1B visas, which leaves fewer available for the firms that directly employ H-1B workers.<sup>13</sup>

***Allowing outsourcing companies to hire H-1B workers lets employers utilize the immigration system to degrade labor standards for skilled workers—as a result, they should be barred from obtaining H-1B visas***

The outsourcing/staffing model of employment generally may increase the incidence of labor law violations by separating the main beneficiary of the labor provided by H-1B workers—the third-party firm that hires the outsourcing firm, i.e. the “lead” employer—from the H-1B workers who perform the work. Firms that rely on outsourced H-1B workers are a textbook (if extreme) example of what former DOL Wage and Hour administrator David Weil calls a “fissured” workplace, where the relationship between the worker and the lead employer is fissured, or broken, via the use of a temp agency or subcontractor<sup>14</sup> (in this case the H-1B outsourcing firm). Research shows that fissuring leads to a wage penalty for workers who are subcontracted, employed as temps, and work for staffing firms,<sup>15</sup> in part because the

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<sup>11</sup> See for example, Senator Richard Durbin, “[How American Jobs are Outsourced](#),” YouTube.com video, April 16, 2016.

<sup>12</sup> See for example, Stef Kight, “[U.S. companies are forcing workers to train their own foreign replacements](#),” *Axios*, December 29, 2019; Julia Preston, “[Pink Slips at Disney. But First, Training Foreign Replacements](#),” *New York Times*, June 3, 2015; Julia Preston, “[Toys ‘R’ Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas](#),” *New York Times*, September 29, 2015; Michael Hiltzik, “[How the University of California Exploited a Visa Loophole to Move Tech Jobs to India](#),” *Los Angeles Times*, January 6, 2017; Patrick Thibodeau, “[Southern California Edison IT Workers ‘Beyond Furious’ over H-1B Replacements](#),” *Computerworld*, February 5, 2015.

<sup>13</sup> Julia Preston, “Large Companies Game H-1B Visa Program, Costing the U.S. Jobs,” *New York Times*, November 10, 2015.

<sup>14</sup> David Weil, *The Fissured Workplace: How Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard, 2014.

<sup>15</sup> A number of studies show a wage penalty for subcontracted/outsourced workers. For example, see Arindrajit Dube and Ethan Kaplan, “[Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards](#),” Cornell University ILR Review, January 1, 2010; Deborah Goldschmidt and Johannes Schmieder, “[The Rise of Domestic Outsourcing and the Evolution of the German Wage Structure](#),” *The Quarterly Journal of Economics*, Oxford University Press, vol. 132(3), 2017, pages 1165-1217; Andres Drenik, Simon Jäger, Pascual Plotkin, and Benjamin Schoefer “[Paying Outsourced](#)



subcontractor keeps a percentage of the wages earned by the workers. It is also common knowledge that employers use this model to avoid paying for benefits like health care, retirement funds, and to avoid liability for labor violations. Because the staffing and outsourcing model contributes to the fissuring of the labor market, it should not be allowed as part of the U.S. immigration system—not in H-1B or in any other temporary or permanent immigration programs.

## **II. ANALYSIS OF THE NPRM, “MODIFICATION OF REGISTRATION REQUIREMENT FOR PETITIONERS SEEKING TO FILE CAP-SUBJECT H-1B PETITIONS”: UPDATING THE H-1B LOTTERY**

We now turn to the NPRM which proposes to update the random lottery allocation system for cap-subject H-1B petitions. The H-1B statute at 8 USC §1184(g)(3) requires that H-1B visas or statuses “be issued ... in the order in which petitions are filed for such visas or status.” However, the practical realities of the H-1B annual numerical limit or “cap” and the way that USCIS receives petitions for H-1B visas, renders this impossible to implement in practice—leaving USCIS little choice other than to propose a rational alternative that is consistent with intent of the H-1B statute.

### ***There is no feasible way for USCIS to meet the statutory requirement of allocating H-1B visas “in the order in which petitions are filed”***

At present, when demand for H-1B visas immediately exceeds the annual limit of 65,000 for cap-subject petitions and annual limit of 20,000 visas reserved for foreign graduates of U.S. universities who have obtained at least a master’s degree—USCIS allocates the visas by a random lottery where each petition has an equal chance of being approved, regardless of occupation, region, or that salary that will be paid to the H-1B worker. This process is utilized because since fiscal year 2014, USCIS has received far more H-1B petitions that are subject to the annual cap in the first five days of the eighteen month application window, than the 85,000 available slots for that fiscal year. Since so many petitions are submitted to USCIS nearly simultaneously, it is impossible for USCIS to determine the order in which the petitions were filed, a necessary prerequisite to adequately comply with the H-1B statute’s requirement that H-1B visas or statuses be allocated to employers “in the order in which [those] petitions [were] filed for such visas or status.” Therefore, USCIS allocates them at random via an electronic lottery, which appears to be a choice of convenience and accident of history rather than a well-reasoned response to a phenomenon unanticipated by the statute. The process, which did not undergo rulemaking, has been in place since fiscal year 2008 and has not been challenged.

However, considering the ambiguity of at 8 USC §1184(g)(3) and the fact that the letter of the statute cannot be adhered to, other interpretations about how to allocate H-1B visas can be equally reasonable so long as they are consistent with the intent of the H-1B statute.

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[Labor: Direct Evidence from Linked Temp Agency-Worker-Client Data](#),” Econometrics Laboratory, University of California, Berkeley, September 2020.

### ***Using a wage prioritization allocation for H-1B visas is reasonable and consistent with the H-1B statute***

USCIS's proposed rule would allocate H-1B visas first to employers who file petitions that pay Level 4 wages—the highest H-1B wage level—and then to petitions with the lower wage levels in descending order (Level 3, Level 2, and then Level 1). Since higher wages are a valid proxy for higher skills in this context,<sup>16</sup> the proposed allocation system by wage levels will result in the highest-skilled and best paid applicants for H-1B visas being selected from the available annual pool of petitions. This will, in addition, result in the selected H-1B workers being paid at higher wage levels, and those higher wages will safeguard U.S. wage standards in major H-1B occupations like information technology and other computer occupations—which in the United States have been seen virtually no real wage growth since the late 1990s.<sup>17</sup> Wage levels are an appropriate proxy for skill since they account for wage variations by geographic location (higher versus lower cost areas) and occupation.

The statutory language at 8 USC §1184(g)(3) is ambiguous and silent as to how visas should be allocated if they cannot be issued in the order that they were filed, and it offers no additional insight into what Congress meant by “filed.” The filing of an H-1B petition is the most reasonable explanation of what “filed” means, but since allocating H-1B visas in the exact order in which they were filed is rendered impracticable by virtue of tens, and even hundreds of thousands of petitions being submitted in one day or over the course of a few days, creating an allocation scheme based on wage levels is more reasonable than creating a random lottery. In addition, a wage level-based allocation scheme is reasonable because it is consistent with the intent of the H-1B visa statute, which is to provide “American businesses” with “highly skilled, specially trained personnel to fill increasingly sophisticated jobs *for which domestic personnel cannot be found*”<sup>18</sup> (emphasis added). Since employers are not required to test the labor market for available U.S. workers before hiring H-1B workers (as discussed in section I), prioritizing higher-skilled, higher-paid H-1B workers also ensures that the employers facing a true shortage of talent—as indicated by the higher wage levels they are willing to pay—have a better chance at obtaining an H-1B visa, which also furthers the goals set out in the statute.

### ***The H-1B random lottery benefits outsourcing companies that pay low wages and game the system, making it more difficult for start-up and direct-hire firms to hire H-1B workers***

The random lottery may give each petition equal odds, but it does not give each firm equal odds. The main beneficiaries of the current random lottery allocation process have been H-1B

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<sup>16</sup> Daniel Costa and Ron Hira, [H-1B visas and prevailing wage levels: A majority of H-1B employers—including major U.S. tech firms—use the program to pay migrant workers well below market wages](#), Economic Policy Institute, May 4, 2020.

<sup>17</sup> See Analysis of Bureau of Labor Statistics data by Hal Salzman and Khudodod Khudododov, “It Ain't Pretty: Wage growth has been low or stagnant for many occupations. Coding skills offer little reprieve,” Figure published in Rachel Rosenthal, [“Tech Companies Want You to Believe America Has a Skills Gap,” Bloomberg Opinion](#), August 4, 2020; Hal Salzman, Daniel Kuehn, and B. Lindsay Lowell, [Guestworkers in the high-skill U.S. labor market: An analysis of supply, employment, and wage trends](#), Economic Policy Institute, April 24, 2013

<sup>18</sup> 85 Fed. Reg. 69238, *citing* H.R. Rep. 101–723(I) (1990), as reprinted in 1990 U.S.C.C.A.N. 6710, 6721 (stating “The U.S. labor market is now faced with two problems that immigration policy can help to correct. The first is the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages”).



employers that are staffing firms, which are more likely to pay H-1B workers at the lowest wage rates.<sup>19</sup> The H-1B staffing firms use an outsourcing model to send their H-1B employees to third-party worksites, and earn their profits by undercutting local wage rates for college-educated workers. These companies, as the *New York Times* reported, “have obtained many thousands of the visas — which are limited to 85,000 a year — by learning to game the H-1B system without breaking the rules.”<sup>20</sup> The “system” the *Times* is referring to is the H-1B random lottery.

Real-world scenarios illustrate how the random lottery has favored outsourcing firms over those seeking truly skilled workers. The outsourcing firms have most of their workforce in low-cost countries such as India, and employ hundreds of thousands of workers. If an outsourcing firm seeks 1,000 approved H-1B petitions in any fiscal year, it will submit 3,000 petitions on behalf of its workers located in India. Since the odds have been roughly one-in-three, the random lottery rewards the outsourcing firm with the 1,000 approved petitions it sought. Since many of the workers the outsourcing firms seek to hire have relatively low skills—as evidenced by being assigned almost exclusively at wage levels 1 and 2—they are largely interchangeable workers, and it matters little to the outsourcing firms which specific one thousand workers are selected. Compare this to a start-up firm seeking to hire a specific engineer with truly special skill set that it is willing to pay a Level 4 wage to obtain; the start-up firm has only a 33% percent chance of winning the lottery. The outsourcing companies, on the other hand, flood the lottery with multiple applications to obtain thousands of visas per year, which crowds out start-up firms and employers with legitimate needs that employ workers directly and pay H-1B workers at higher wage levels.

***Using a wage prioritization allocation for H-1B visas will not reduce the number of H-1B workers, only improve the skill mix***

Many commentators to this proposed rule, especially from the business community and those representing the outsourcing industry, may claim that prioritizing H-1B workers who are paid at higher wage levels may harm the U.S. economy, and lament that the rule will result in excluding some would-be migrants from obtaining H-1B visas to work in entry-level jobs for entry-level wage rates, including recent graduates. There is no evidence to suggest that the H-1B program was designed to fill entry-level jobs at entry-level wages; quite the opposite. On the other hand, prioritizing H-1B petitions at higher wage levels will instead safeguard U.S. wage standards and increase labor market efficiency, making it a worthwhile proposition that outweighs the benefits some H-1B employers may accrue by virtue of hiring H-1B workers for entry-level jobs at lower wage levels.

Employer groups may also claim that higher wages for H-1B workers will lead to fewer H-1B visas being issued. There is no evidence that suggests this; prioritizing H-1B visas in the manner proposed by USCIS will simply take the existing pool of H-1B petitions and allocate them in descending order by wage level—thus changing and improving the skill mix of H-1B workers who are ultimately admitted. In addition, we would like to highlight that while there

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<sup>19</sup> Daniel Costa and Ron Hira, [H-1B visas and prevailing wage levels: A majority of H-1B employers—including major U.S. tech firms—use the program to pay migrant workers well below market wages](#), Economic Policy Institute, May 4, 2020; Ron Hira, [Congressional Testimony before the U.S. Senate Subcommittee on Immigration and the National Interest](#), hearing on “The Impact of High-Skilled Immigration on U.S. Workers,” Economic Policy Institute, February 25, 2016.

<sup>20</sup> Julia Preston, [“Large Companies Game H-1B Visa Program, Costing the U.S. Jobs,”](#) *New York Times*, November 10, 2015.

are 85,000 visas available for H-1B workers in the private sector every year, our report shows that in 2019, there were over 300,000 H-1B jobs certified on LCAs at the two highest prevailing wage levels, Levels 3 and 4.<sup>21</sup> Those applications suggest that there are more than enough H-1B jobs that employers seek to fill at the two highest wage levels. Therefore, prioritizing the higher H-1B wage levels will not undermine the program, but enhance it so that it incentivizes the recruitment and retention of higher-skilled migrant workers, rather than workers who will fill entry-level positions at the lowest wage levels.

***USCIS should consider alternate approaches in case of a legal challenge.***

Some commenters and critics of the proposed H-1B allocation process may contend that the statutory language at 8 USC §1184(g)(3) does not authorize USCIS to update the H-1B allocation process by wage level as detailed in the proposed rule, because USCIS would no longer be issuing H-1B visas in the order in which the petitions were filed. While we disagree with this assessment as discussed herein, USCIS should nevertheless explore alternative methodologies for wage-based allocation that it can propose in a new rulemaking if the proposed rule is the subject of a successful statutory challenge in federal court.

One simple new methodology, for example, could consist of having staggered filing deadlines for petitions by wage levels. 8 USC §1184(g)(3) is silent as to whether there can only be one filing period or whether there can be multiple. Therefore, USCIS could have a first filing period, where only petitions with jobs paying Level 4 are considered. Once all the Level 4 petitions are submitted and approved, then a second filing period at a later date could be set to receive only petitions with jobs paying Level 3 wages. After those are collected and approved, if there are any visas remaining under the H-1B cap, then a filing period for Level 2 wages would be next, and finally a filing period for Level 1. With a process like this, the cap-subject H-1B petitions in a given fiscal year would not all be submitted at once, thereby allowing USCIS to adjudicate and allocate petitions “in the order in which” they were filed, as the statute requires. If there end up being more petitions than available H-1B visas during a filing period for a particular wage level, USCIS could conduct a “mini-lottery” in order to randomly allocate the petitions within that wage level.

### **III. CONCLUSION**

For years, migrant worker advocates, unions, academics, and both Democratic and Republican lawmakers have pointed out the need to change employer incentives by shifting away from the H-1B random lottery towards a true prioritization process in which visas are issued to employers seeking to hire and retain skilled workers by paying them fair wages that reflect market rates. We have urged the Administration and the Congress to explore alternatives to the lottery system that would directly prioritize wages and skills, and thus we support this regulatory effort to implement this change.

The H-1B visa program is the largest temporary work visa program in the United States and an important pathway into the U.S. labor market for skilled migrants from around the

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<sup>21</sup> Daniel Costa and Ron Hira, [\*H-1B visas and prevailing wage levels: A majority of H-1B employers—including major U.S. tech firms—use the program to pay migrant workers well below market wages\*](#), Economic Policy Institute, May 4, 2020.

world—but it is a pathway that has serious deficiencies when it comes to the labor rights of migrant workers and preserving U.S. labor standards. By issuing this proposed rule, DHS has taken an important first step towards fixing a system that has rewarded low-road employers with a business model that hinges on underpaying migrant workers. But as these comments suggest, even more should be done to improve the regulations that should act as safeguards to protect H-1B workers and similarly situated U.S. workers. H-1B workers should be paid fairly, have equal rights, and have an opportunity to become lawful permanent residents within a reasonable period of time.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dan Costa".

Daniel Costa, Esq.  
Director of Immigration Law and Policy Research  
Economic Policy Institute

A handwritten signature in cursive script, appearing to read "Ron Hira".

Ron Hira, Ph.D., P.E.  
Associate Professor  
Department of Political Science  
Howard University