

Economic Policy Institute

Submitted online via <https://www.federalregister.gov/documents/2023/10/23/2023-23381/modernizing-h-1b-requirements-providing-flexibility-in-the-f-1-program-and-program-improvements>

Alejandro Mayorkas
Secretary, U.S. Department of Homeland Security

Charles L. Nimick
Chief, Business and Foreign Workers Division
Office of Policy and Strategy, USCIS
U.S. Department of Homeland Security

RE: U.S. Department of Homeland Security, [Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers](#), Notice of proposed rulemaking, CIS No. 2745-23, DHS Docket No. USCIS-2023-0005, RIN: 1615-AC70, 88 Fed. Reg. 72870 (October 23, 2023).

Dear Secretary Mayorkas and Chief 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 people, 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 the U.S. Department of Homeland Security (DHS), in response to their Notice of Proposed Rulemaking (NPRM) regarding the changes proposed to the H-1B program as well as other related nonimmigrant visa programs.

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. In recent years, EPI has published research on various deficiencies and labor standards protection gaps in the H-1B program, including the need to improve the way the U.S. Department of Labor (DOL) sets the H-1B wage levels,¹ reporting on evidence of massive and systematic wage theft of migrant workers in H-1B status,² and the exploitation of the H-1B program by offshore outsourcing companies,³ which have a business model tailored to game U.S. laws and regulations in order to pay the lowest wages allowed by law to their H-1B workers, as well as to replace incumbent U.S. workers with lower-paid H-1B workers, and to send decent-paying U.S. jobs offshore.

¹ 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.

² Ron Hira and Daniel Costa, [New evidence of widespread wage theft in the H-1B visa program: Corporate document reveals how tech firms ignore the law and systematically rob migrant workers](#), Economic Policy Institute, December 9, 2021.

³ Daniel Costa and Ron Hira, [“Tech and outsourcing companies continue to exploit the H-1B visa program at a time of mass layoffs: The top 30 H-1B employers hired 34,000 new H-1B workers in 2022 and laid off at least 85,000 workers in 2022 and early 2023.”](#) Working Economics blog (Economic Policy Institute), April 11, 2023.

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I) THE ADMINISTRATION HAS FAILED TO IMPLEMENT THE NECESSARY REFORMS TO FIX LABOR STANDARDS PROTECTIONS IN THE H-1B PROGRAM, AND THIS PROPOSED RULE REPRESENTS A MINOR CHANGE TO THE STATUS QUO IN THAT REGARD.

At the outset of these comments, we wish to express our extreme disappointment with the Biden administration’s failure to address the severe flaws and lack of basic labor standards protections in the H-1B program. Before winning the presidency, candidate Biden was explicit about his support for reforming work visa programs, with his immigration plan committing to “strong safeguards that require employers to pay a fair calculation of the prevailing wage” as well as to “reform temporary visas to establish a wage-based allocation process and establish enforcement mechanisms to ensure they are aligned with the labor market and not used to undermine wages.”⁴

If President Biden had truly been committed to fixing the U.S.’s largest temporary work visa program as stated in his campaign promises—to ensure that the program is used to fill labor shortages instead of offshoring U.S. jobs, and that 600,000 skilled migrant workers are treated and paid fairly—there were a number of actions his administration could have taken that did not require Congressional approval or new legislation. Unfortunately, to the detriment of U.S. and migrant workers, none of those actions were taken. Instead, this proposed “H-1B Modernization” rule will be the only proposal of any significance on H-1B to be issued during four years of the Biden administration. But the H-1B Modernization rule only tinkers at the edges of improving program integrity, but fails terribly to tackle any of the real problems that have been documented by investigative news reports, government audits, and researchers like ourselves—while simultaneously proposing to dramatically expand the size of an H-1B program that remains vulnerable to rampant fraud and abuse.

⁴ Biden-Harris campaign website, “The Biden plan for securing our values as a nation of immigrants,” last visited March 22, 2022 [no longer available online but [archived at epi.org](https://www.bidenharris.com/immigration)].

Some of the key essential reforms that Biden administration should have implemented—and had the clear authority to, but chose not to—were the following, which would have restored integrity and fairness to the H-1B program:

- **Implementing DOL’s delayed H-1B prevailing wage methodology rule**,⁵ so that H-1B workers are paid a fair wage and employers are prevented from undercutting U.S. wage standards. The rule appeared on the White House’s regulatory agenda for some time but it no longer appears that the rule will ever be proposed during the current presidential term.
- **Issuing an updated version of USCIS’s H-1B visa allocation rule**,⁶ which would distribute H-1B visas by wage level rather than random lottery. A rule like this would ensure that the highest-skilled H-1B workers are awarded visas and it also has bipartisan support.⁷
- **Fixing the outsourcing loophole by issuing policy guidance from DOL that requires secondary employers of H-1B workers (the companies that hire outsourcing firms to provide contract workers) to file labor condition applications.** Guidance to require this was considered early in the administration but never finalized,⁸ which would prevent firms like Disney from replacing their U.S. employees with contracted H-1B workers.⁹
- **Directing the Wage and Hour Division to enforce the requirement in the H-1B labor condition application for employers to pay the “actual wage” rate they pay to other employees with similar experience and qualifications.**¹⁰ Particular attention should be focused on firms that continue to hire large numbers of H-1B workers after conducting mass layoffs.

The Biden administration had the authority to make these changes a reality by issuing new regulations, policy guidance, and taking other subregulatory actions that would have preserved and created good middle-class jobs, increased productivity by attracting skilled migrant workers who complement the U.S. labor force, and ensured that migrant workers

⁵ See regulatory history at, Office of Information and Regulatory Affairs, “[Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States](#),” DOL/ETA, RIN: 1205-AC00, Office of Management and Budget.

⁶ U.S. Department of Homeland Security, [Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions, Implementation of Vacatur](#), Document Number 2021-27714, RIN: 1615-AC61, 88 Fed. Reg. 72516 (December 22, 2021).

⁷ Senators Richard Durbin and Chuck Grassley, “[Durbin, Grassley To DHS: Implement H-1B Visa Program Reforms](#),” Press Release, March 3, 2021.

⁸ See U.S. Department of Labor, “[U.S. Department of Labor Revises Interpretation, Issues New Guidance Clarifying Filing, Compliance Requirements in H-1B Visa Program](#),” Press Release, January 15, 2021.

⁹ 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.

¹⁰ See Wage and Hour Division, “[Fact Sheet #62G: Must an H-1B worker be paid a guaranteed wage?](#)” U.S. Department of Labor, revised July 2008.

were paid fairly according to U.S. standards. Last year, the Congressional Progressive Caucus reminded the Biden administration of this by calling on President Biden to fix the H-1B program through the use of his executive powers.¹¹

Promulgating a new H-1B wage methodology rule through DOL with updated wage levels would have been the most important action the administration could have taken to improve the program, with a DHS regulation to create a wage-based prioritization scheme to allocate visas as a replacement for the random lottery being an essential complementary component. Together, those two rules would have gone far to fix the H-1B program and likely ensured that both U.S. and nonimmigrant workers were treated and paid fairly, and would have begun to stamp out most of the abuse by outsourcing firms that pay the lowest wages and are likely robbing H-1B workers of hundreds of millions of dollars per year. We urge the administration that these reforms be put on DOL and DHS's regulatory agendas and be proposed and implemented as soon as possible.

NOTE: The following section of this comment addresses the flaws in the current H-1B program, and the third section specifically addresses elements of the NPRM.

II) 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 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 sections below discuss the major structural and programmatic flaws of the H-1B program.

A) 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 (aka STEM) fields. But despite the widely held belief that employers must demonstrate that a shortage exists before hiring through the H-1B program, 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.

¹¹ Congressional Progressive Caucus, “[Congressional Progressive Caucus Issues Executive Action Agenda for Biden Administration](#),” Press Release, March 17, 2023.

- “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 are exempt from the requirement by exploiting 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 \$40,440 less than the national median wage for all workers employed in computer occupations.¹²

B) 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 can only be true if the prevailing wage reflected the true market wages of U.S. workers who are similarly situated. The reality is that the prevailing wage is set far below the true market wage:

- Employers have the option of paying the prevailing Level 1 “entry-level” wage or Level 2 wage, both of which are below the median wage (Level 3) that local employers pay workers in similar jobs.
- As we have shown in our report published in 2020, 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.
- Data from DHS in the preamble to the proposed rule published in November 2020 to create a wage-based prioritization to replace the H-1B lottery system provides overwhelming evidence to support the claim that the vast majority—nearly all—H-1B visas are issued to workers earning at the two lowest wage levels. Table 7 of the preamble of that proposed rule shows the two-year average of the number of H-1B petitions that were selected, according to wage levels 1-4, for fiscal years 2019 and 2020.¹³ It reveals that **85% of petitions went to employers paying at wage level 1 or 2**—which are the 17th and 34th percentile wage, respectively, for the occupation and region according to data from the Occupational Employment and Wages Statistics survey.¹⁴ In addition, 90% of petitions for the advanced degree exemption were awarded to employers paying at wage Levels 1 and 2.
- 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.

¹² U.S. Bureau of Labor Statistics, “[15-0000 Computer and Mathematical Occupations \(Major Group\)](#),” Occupational Employment and Wage Statistics, May 2022, Occupational Employment Statistics, U.S. Department of Labor.

¹³ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, [Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions](#), Proposed Rule, Agency/Docket Numbers: CIS No. 2674-20 and DHS Docket No. USCIS-2020-0019, 86 Fed. Reg. 1676 at 1720, Table 7 (November 2, 2020). See our comments on the proposed rule at Daniel Costa and Ron Hira, “[EPI comments on USCIS preference allocation system for H-1B visas by prevailing wage level](#),” Economic Policy Institute, December 2, 2020.

¹⁴ This includes H-1B petitions set by other sources including private wage surveys which are likely to be even lower than what Levels 1 or 2 require.

C) H-1B workers are often exploited and arrive to the United States 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.¹⁵

D) 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 deportable after a short period if they cannot quickly secure new employment. This arrangement results in a form of indentured servitude.¹⁶ 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 (but must hope that the visa with the new employer is not rejected), 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. There were numerous pieces of reporting that illustrated the difficult circumstances that H-1B workers were faced with during the recent wave of mass layoffs by major employers in the tech sector.¹⁷ Laid-off H-1B workers desperately took any job they were offered, even when the wages and working conditions offered were far below what they would have commanded in a fair and open market. Thus, existing protections for H-1B workers 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 labor and employment rights. In a statement submitted for the record for a U.S. House Judiciary Committee hearing, the leading advocacy group representing H-1B workers, Immigration Voice, describes H-1B workers' status as "indentured servitude."¹⁸ 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.

¹⁵ 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.

¹⁶ Christopher Lapinig, "[How U.S. Immigration Law Enables Modern Slavery](#)," *The Atlantic*, June 7, 2017.

¹⁷ See for example, Michel Martin, "[Tech layoffs put extra strain on H-1B visa holders](#)," *All Things Considered*, *NPR*, February 18, 2023; Carolyn Said, "[Tech layoffs wallop H-1B visa holders: 'It's not just dollars and a job. It's our entire life.'](#)" *San Francisco Chronicle*, January 26, 2023.

¹⁸ Immigration Voice, "[Immigration Voice's Statement for record on the House hearing 'Why Don't They Just Get in Line? Barriers to Legal Immigration'](#)," April 27, 2021.

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

As we have documented for many years, many of the biggest employers of H-1B workers are not innovative high-tech firms like Apple and Google.¹⁹ In 2022, as we showed, 13 of the top 30 H-1B employers were outsourcing firms and staffing firms that specialize in information technology (IT) and accounting and consulting services²⁰ 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.

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.²¹ 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.²²

Contrary to the popular narrative proffered by corporations that support expanding and deregulating the H-1B visa program—the staffing firms are not using H-1B visas 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 and explained how

¹⁹ 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.

²⁰ Daniel Costa and Ron Hira, [“Tech and outsourcing companies continue to exploit the H-1B visa program at a time of mass layoffs: The top 30 H-1B employers hired 34,000 new H-1B workers in 2022 and laid off at least 85,000 workers in 2022 and early 2023,”](#) *Working Economics* blog (Economic Policy Institute), April 11, 2022.

²¹ See for example, Senator Richard Durbin, [“How American Jobs are Outsourced,”](#) YouTube.com video, April 16, 2016.

²² 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.

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.²³

F) There is evidence of widespread wage theft in the H-1B program and DOL is failing to enforce the legal requirement that employers pay H-1B workers the “actual wage” they pay their similarly situated U.S. worker employees.

In late 2021, we published a report detailing how thousands of skilled migrants with H-1B visas working as subcontractors at well-known corporations like Disney, FedEx, Google, and others appear to have been underpaid by at least \$95 million in one single year.²⁴ The victims likely included not only the H-1B workers but also the U.S. workers who were either displaced or whose wages and working conditions were degraded when employers were allowed to underpay skilled migrant workers with impunity. The workers in question were employed by HCL Technologies, an India-based IT staffing firm that earned \$11 billion in revenue in 2020. As discussed in the previous section, companies like HCL profit by subcontracting and placing the H-1B workers they hire at many top companies.

The H-1B statute requires that all employers, including outsourcing firms like HCL, pay their H-1B workers no less than the actual wage paid to their similarly employed U.S. workers. But our analysis of an internal HCL document, released as part of a whistleblower lawsuit against the firm, suggests that HCL—and perhaps other firms with similar business models—are not paying the legally required amount that corresponds to what is being paid to U.S. workers at HCL. The HCL document revealed that the large-scale illegal underpayment of H-1B workers that appears to be occurring is a core part of the HCL’s competitive strategy, and likely facilitated \$95 million in stolen wages from HCL’s H-1B employees in just one year. Such abuses are surely widespread among H-1B employers because DOL has done virtually nothing to ensure program integrity by enforcing the wage rules, in particular the actual wage rule.

G) Allowing outsourcing companies to hire H-1B workers lets employers utilize the immigration system to degrade labor standards for skilled workers.

The outsourcing/staffing model of employment generally may increase the incidence of labor and employment 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 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 subcontractor²⁵ (in this case the H-1B

²³ Julia Preston, “[Large Companies Game H-1B Visa Program, Costing the U.S. Jobs](#),” *New York Times*, November 10, 2015.

²⁴ Ron Hira and Daniel Costa, [New evidence of widespread wage theft in the H-1B visa program: Corporate document reveals how tech firms ignore the law and systematically rob migrant workers](#), Economic Policy Institute, December 9, 2021. See also, news coverage of our report, for example, Lauren Kaori Gurley, “[Analysis Claims Migrant Tech Workers Have Been Underpaid by Tens of Millions](#),” Vice News, December 9, 2021.

²⁵ David Weil, [The Fissured Workplace: How Work Became So Bad for So Many and What Can Be Done to Improve It](#), Harvard, 2014.

outsourcing firm). Research shows that fissuring leads to a wage penalty for workers who are subcontracted, employed as temps, and work for staffing firms,²⁶ in part because the 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 and is associated with lower wages and higher rates of legal violations, 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.

III) COMMENTS ON THE NPRM, “MODERNIZING H-1B REQUIREMENTS.”

A) Speculative employment fraud is far more rampant than recognized by the NPRM and more must be done to identify and combat it.

The proposed rule rightly identifies the urgent need for DHS to safeguard program integrity and strengthen accountability. For years, the H-1B program has been riddled with large-scale fraud yet the agency failed to take adequate fraud-prevention measures. The integrity efforts proposed in the NPRM are welcome, but even if fully implemented, would address only a fraction of the fraud.

Speculative employment is a common and widespread type of fraud in the H-1B program. Evidence from federal lawsuits and this NPRM show that employers submit tens of thousands of *fraudulent* registrations yet virtually all are approved by DHS. Employers are required to have a bona fide job for the beneficiary at the requested start date before they submit a registration. Despite this requirement, employers commonly file registrations for speculative employment. And despite this, DHS approves nearly all registrations without scrutiny or oversight.

While the rule acknowledges vulnerabilities in the registration process, it identifies only a single source of potential fraud: multiple registrations for a single beneficiary. By doing so DHS is ignoring what is likely to be a much larger source of fraudulent registrations. Firms with an H-1B offshoring business model (aka “outsourcing firms”) are filing thousands of registrations for jobs that don’t exist, won’t exist at the requested start dates, and for jobs that firm executives know do not yet exist and will never materialize. Firms file excess registrations to rig the lottery system and win a larger share of H-1B petitions. These are

²⁶ 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 Labor: Direct Evidence from Linked Temp Agency-Worker-Client Data](#),” Econometrics Laboratory, University of California, Berkeley, September 2020.

single registrations for single beneficiaries so they cannot be captured by the fraud-prevention efforts described in the NPRM.

We documented this practice in recent Congressional testimony:²⁷

Federal Lawsuits Shed New Light on the H-1B Program's Exploitation by Outsourcing Firms

Two recent federal lawsuits provide unprecedented and extraordinary details about how crucial the H-1B visa is to the business model. One lawsuit involves HCL and the other involves Cognizant.^{28,29} HCL is an India based IT outsourcing firm that was the number seventh ranked H-1B employer in 2022. It has been involved in at least two public scandals, as a lead outsourcer along with Cognizant in replacing the Disney workers with H-1B workers and as the lead firm replacing about 90 University of California workers with H-1B workers.³⁰ The University of California case was featured by the television newsmagazine *60 Minutes* in a segment titled "You're Fired."³¹

The following practices appear to be common amongst the outsourcing firms:

- Outsourcing firms file applications for far more visas in a year than they forecast they will have positions available. They do this to game the random lottery selection process to ensure they receive all the visas they could ever need in a given year. If the lottery odds are 33%, or one-in-three, and the firm estimates it will need 2,000 new visa workers then it applies for 6,000 new visas with the expectation that 2,000 will be selected in the lottery. By gaming the lottery, it turns its odds from 33% to 100%. This practice is a violation of the law since an employer must have a bona fide position available before applying for a new visa with USCIS. But the firm does not have jobs for 6,000 workers. USCIS should investigate this illegal practice that is widespread. Such practices crowd out the legitimate users of the H-1B visa program.

²⁷ Ron Hira, [Congressional Testimony before the U.S. Senate Committee on the Budget](#), hearing on "Unlocking America's Potential: How Immigration Fuels Economic Growth and Our Competitive Advantage," September 13, 2023.

²⁸ United States of America, ex rel. Ralph Billington, Michael Aceves, and Sharon Dorman (Plaintiffs) v. HCL Technologies LTD. and HCL America, INC. (Defendants). Fourth Amended Complaint for Violations of the False Claims Act. United States District Court for the District of Connecticut. Civil Action No. 3:19-CV-1185 (MPS), available at <https://files.epi.org/uploads/HCL-whistleblower-complaint-48-Fourth-Amended-Complaint-redacted.pdf>.

²⁹ Christy Palmer et al v. Cognizant Technology Solutions Corporation et al. Case Number: 2:17-cv-06848.

³⁰ Michael Hiltzik, "[Column: How the University of California exploited a visa loophole to move tech jobs to India](#)," *Los Angeles Times*, January 6, 2017.

³¹ Bill Whitaker, "[Are U.S. jobs vulnerable to workers with H-1B visas?](#)" *60 Minutes*, CBS News, March 19, 2017.

The scale of this type of registration fraud is enormous: for the past twenty years the top H-1B employers are these very outsourcing firms.³² Yet the NPRM never mentions this well-documented type of registration fraud.

Combating such fraud will require DHS to take active measures. Such measures should include requiring employers to document in its registration application that it has a non-speculative position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the registration. The NPRM proposes such a requirement at the petition stage but not at the registration stage, but provides no rationale for its choice. Omitting the bona fide job requirement at the registration stage undermines the integrity of the lottery system because it gives a green light to rampant speculative employment fraud. Such fraud, left unfettered, allows the largest H-1B employers to rig the lottery process to their favor and at the expense of every other employer. It is an unfair and unjust, and fraudulent, gaming of the lottery system. The non-speculative documentation must be extended to the registration stage, coupled with audits to ensure compliance, if the agency is serious about combatting registration fraud.

All registrant firms with more than ten registrations should be audited. To combat this type of fraud, the audits must examine the entire batch of registrations submitted by individual employers. For example, if a specific employer files five-hundred registrations then it must provide evidence it has a corresponding five-hundred bona fide jobs available. All five-hundred registrations must correspond to a unique and bona fide job for each registration. We urge DHS to create effective tools to identify and deter registration fraud, and to punish it when it is found. Punishments must be strong enough to deter fraudulent behavior. Given the severity of the harm caused by this fraud, debarment from the program is appropriate.

Speculative employment fraud also occurs at the petition stage and afterwards. Firms win visas for speculative work, and then stockpile thousands of workers with valid visas overseas until actual billable work appears. Another form of this type of fraud occurs when firms rotate visa workers to overseas locations until business picks up and then rotate them back into the United States when billable work reappears. These common practices, used by the largest H-1B employers, harm program integrity and directly undercut U.S. workers and labor standards. This is such a common business practice that the industry has created terms-of-art, such as *travel-ready* and *visa-ready*, for managing the fraud.

As we recently testified before the U.S. Senate:³³

- Outsourcing firms stockpile thousands of workers with valid H-1B visas abroad to support projected future growth – that is, to wait until actual positions materialize in

³² Daniel Costa and Ron Hira, "[Tech and outsourcing companies continue to exploit the H-1B visa program at a time of mass layoffs: The top 30 H-1B employers hired 34,000 new H-1B workers in 2022 and laid off at least 85,000 workers in 2022 and early 2023](#)," *Working Economics* blog (Economic Policy Institute), April 11, 2022.

³³ Ron Hira, [Congressional Testimony before the U.S. Senate Committee on the Budget](#), hearing on "Unlocking America's Potential: How Immigration Fuels Economic Growth and Our Competitive Advantage," September 13, 2023.

the U.S. They refer to such H-1B workers as *travel-ready* or *visa-ready*. This practice is illegal, again because there was no bona fide position available for the worker at the time the visa applications were submitted to the government.

- Outsourcing firms meticulously monitor and manage utilization rates of visa-ready workers. They maximize their use of visa-ready workers by prioritizing them for projects over incumbent U.S. workers they employ, and ensuring they remain in the U.S. for the longest time period permitted by the visa. Strong preferences for visa over U.S. workers appear in disparate employment patterns for hiring, promotion, and termination.
- Outsourcing firms map their H-1B applications to positions where it can save the most on labor costs compared to what it pays its U.S. employees. Paying H-1B visa workers less than what it pays similarly employed U.S. workers is a clear violation of the *actual wage* attestation the firm makes in its Labor Condition Application submitted to the Department of Labor. Simply put, the firms are practicing rampant wage theft from their H-1B workers who are required to be paid as least as much as their similarly situated non-visa counterparts. In the case of HCL, we estimate this to be \$95 million per year.³⁴

These findings are corroborated by evidence presented in NPRM at Table 9, showing that between fiscal years 2017 and 2022 (excluding 2021), on average, “43 percent of cap-subject beneficiaries of petitions that selected consular processing... did not enter the United States in H-1B status within six months of the requested employment start date on the H-1B petition or the H-1B petition approval date, whichever was later.” The evidence from the federal lawsuits demonstrates that most of the approved H-1B visa workers who remain offshore are not needed because no bona fide job exists for them. Such rampant fraud warrants immediate agency action, outside of and beyond what is proposed in this NPRM. DHS should review the public documents from the federal lawsuits where the visa-ready and travel-ready strategies are openly discussed by executives, and then audit all firms with large numbers of workers with valid H-1B visas who have not come to the United States, and those with H-1B workers who have left the United States and not returned in more than thirty days.

One of DHS’s proposed solutions to remedy this abuse in the “Use or Lose” section of the NPRM is to establish a “deadline for admission or a reporting deadline” for employers to report to DHS when their H-1B employees do not enter the United States, so that DHS can consider whether to revoke the petition. While requiring employers to report as already required under current 8 CFR 214.2(h)(8)(ii)(B)—but now establishing a deadline as proposed—would be a better rule than the status quo, the reality is that in many (if not most) cases, the H-1B worker may be residing outside of the United States because their employer is requiring them to remain there due to the lack of a bona fide employment opportunity being

³⁴ Ron Hira and Daniel Costa, [New evidence of widespread wage theft in the H-1B visa program: Corporate document reveals how tech firms ignore the law and systematically rob migrant workers](#), Economic Policy Institute, December 9, 2021.

available at a third-party employer. DHS is in essence, proposing to require employers to report their own fraud to DHS.

In addition, why is DHS proposing that employers report this by a set deadline? DHS already possesses this information, as they show in the NPRM in Tables 9 and 10. Thus, DHS should systematically check to see which petitions are associated with workers who have not entered the country after 90 days or six months, and take appropriate action.

In addition, even if employers were to somehow self-report their own fraud or if DHS reviewed petitions for this evidence of fraud, the only enforcement action being considered by DHS is the revocation of petitions. But a simple revocation will not have a deterrent effect; that will require further punitive action, such as rejecting any future petitions by the employer, whether for H-1B or other nonimmigrant visas, such as L-1.

As a result DHS's proposed solution in the "Use or Lose" section is no solution at all. It will neither identify current, nor prevent future, fraud. Firms will continue their current practices. Instead, firms found to be stockpiling *visa-ready* or *travel-ready* workers should be debarred from the program entirely.

We welcome consultation with DHS to discuss our findings, the business models, and strategies to combat speculative employment fraud.

B) There is no valid or compelling reason—and DHS has not shown a valid or compelling reason—to circumvent the statutory cap via unilateral administrative action as proposed in the NPRM.

Congress placed a statutory annual numerical limit or "cap" on the number of newly issued H-1B visas to protect U.S. workers. The hard cap is, and has been, the subject of clear Congressional intent and action. The DHS proposes a back door expansion of the cap through administrative action.

According to the fiscal year 2022 *Characteristics of Specialty Occupations* report, USCIS approved 132,429 petitions for initial employment even though the cap was 85,000. That implies that as many as 47,429 initial petitions were cap-exempt.³⁵ There is no compelling reason that we know of—and DHS has not adequately shown a compelling reason in the NPRM—to expand those numbers even further. Cap-exempt petitions already account for an amount that represents more than 50% of the petitions that are subject to the cap.

Congress made it clear through statutory language that only a narrow set of employers and workers should be exempted from the cap. In the NPRM, DHS proposes to radically expand these narrow exemptions through two methods, which we explain below.

First, DHS will dramatically expand the number of cap-exempt employers by redefining organizational eligibility standards. DHS proposes to loosen the definition of nonprofit

³⁵ USCIS, [Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2022 Annual Report to Congress](#), U.S. Department of Homeland Security, March 13, 2023.

research entities for the express purpose of expanding eligibility, and for no other purpose. The newly proposed language—i.e. that an organization becomes eligible if one of its many “fundamental activities” is research—is so expansive that virtually any nonprofit organization will become newly eligible for cap-exemption. All nonprofits do some activity they could be labeled as or considered to be *research*—whether it is a k-12 school that conducts student assessments or an industry association that does market research. DHS has not defined *research* and has no expertise in reviewing what does and does not constitute research. On the other hand, the current standard, that the organization primarily conduct *basic or applied research*, has a clear standard that is defined by the National Science Foundation and can be easily discerned. DHS has no expertise in defining or identifying what constitutes *research*.

While DHS claims that the new eligibility definition provides a “meaningful limiting standard,” in reality DHS provides no clear bright-line criteria to identify eligibility. What is, and is not, a “fundamental activity?” The sole example of a newly cap-exempt organization provided is, “a nonprofit organization with a mission to eradicate malaria that engages in lobbying, public awareness, funding medical research, and performing its own research on the efficacy of various preventative measures.” Such a hypothetical example does not describe the clear boundaries for establishing which organizations will be eligible or ineligible under the new cap exemption.

Further, DHS must provide the public with a detailed analysis of how the change will impact the H-1B program and the scale of those impacts. This needs to be done at the NPRM stage. Instead, DHS imprecisely claims that the changes, “may somewhat expand who is eligible for the cap exemption.” But it provides no estimate of what “somewhat expand” will be and nothing to support the claim that the impact of the expansion will be limited to “somewhat.” The public should have a fair opportunity, as required under the Administrative Procedure Act, to understand the ramifications of such a radical change, and a fair opportunity to comment on it after receiving the detailed analysis. How many, and which, organizations will become cap-exempt? How many additional H-1B visas will be issued each year? These are the most basic questions that need to be answered before anyone, including DHS, can make an informed judgement about whether the change should be made.

In addition, DHS provides no substantive rationale for making such a drastic change to the statutory cap. It hides behind vague claims that it will “clarify, simplify, and modernize eligibility for cap-exempt H-1B employment.” Claiming the program will be “modernized” conveys no substantive meaning whatsoever.

Rather than clarify, simplify, or modernize, the proposed rule will bust the statutory cap wide open—and because basic labor standards protections are severely lacking in H-1B, as we have described above and through our numerous publications—the foreseeable result of an expanded H-1B program without adequate safeguards will be to degrade U.S. labor standards and harm U.S. workers by reducing their wages and job opportunities, while also leaving migrant workers underpaid and vulnerable to wage theft and countless other abuses. In prior rules, DHS has acknowledged how the program undercuts U.S. workers’ wages and the rampant wage-theft of H-1B workers’ wages. And it cited reports of U.S. workers being forced to train their H-1B replacements, who were paid much lower wages than the U.S. workers their employers replaced. DHS is now completely ignoring its own documentary evidence of

how the H-1B program harms U.S. workers and labor standards. An expansion of the H-1B program, by expanding cap-exempt status in this haphazard, irrational, and unreasonable way, will further harm wages and working conditions for all workers.

Rather than clarify, the proposed definitional change will create an adjudication and litigation nightmare for DHS. Almost no nonprofit organization could reasonably be excluded from the cap-exempt status, and if an adjudicator denies a cap-exempt claim, DHS will face a barrage of lawsuits. Given that DHS has no criteria for exclusion, it will likely lose in court.

DHS's true aim appears to be political, something that only elected members of Congress have the authority to decide. The NPRM states that the definitional change will, "facilitat[e] U.S. employers' access to high-skilled workers." In other words, DHS's goal is, not to simplify or clarify, but instead it is to circumvent the statutory cap and expand the H-1B program.

The second expansion of the H-1B cap-exemption we wish to highlight centers on which contracted H-1B workers may receive cap-exemptions. The proposed rule dilutes the standards so that virtually any contracted or outsourced worker who spends at least 50% of their time working for a cap-exempt employer becomes cap-exempt themselves regardless of the tasks and duties of the worker. DHS provides no rationale for why such a radical dilution of standards is necessary. Nor does DHS predict or project how many H-1B workers will become newly cap-exempt as a result of the proposal.

The abuse of the H-1B program by outsourcing firms is rampant. The proposed rule will encourage that very abuse by subsidizing it. The 2017 case of University of California (UC) forcing its U.S. workers to train their H-1B replacements illustrates why.³⁶ The case was featured by the television newsmagazine *60 Minutes* in a segment titled "You're Fired," where one U.S. worker described training their H-1B replacement as akin to digging their own grave, stabbing themselves in the heart, and falling into the grave.³⁷ DHS and DOL greenlit the abuse by taking no action to stop this practice then, or to keep it from happening in the future. There was no NPRM in response to the UC case.

As an institution of higher education, UC is cap-exempt. UC administrators, including the then-President of the UC system, former DHS Secretary Janet Napolitano, chose to replace 90 of its U.S. information technology workers with H-1B workers who were hired by the outsourcing firm HCL. HCL and those H-1B workers were subject to the cap because they were not involved in or performing, "job duties [that] directly and predominately further the essential purpose, mission, objectives of the qualifying institution." However, the new rule loosens that standard and would extend UC's cap-exempt status to the HCL H-1B workers. Such cap-exempt status would subsidize HCL's ability to hire more H-1B workers that will be paid much less than similarly situated U.S. workers, which will ultimately allow organizations like UC to replace their workforce with H-1B workers. This rule change proposed in the NPRM means

³⁶ Michael Hiltzik, "[Column: How the University of California exploited a visa loophole to move tech jobs to India](#)," *Los Angeles Times*, January 6, 2017.

³⁷ Bill Whitaker, "[Are U.S. jobs vulnerable to workers with H-1B visas?](#)" *60 Minutes*, CBS News, March 19, 2017.

DHS will be in the position of further subsidizing, and facilitating the replacement of U.S. workers with H-1B workers by outsourcing firms.

C) We support the proposed changes to the H-1B Registration System—in particular the proposal to make it “beneficiary centric”—but suggest that a better system that would root out low-road employers would be the implementation of a wage-level-based prioritization system for H-1B allocation.

Like USCIS, we are concerned about attempts by employers to manipulate the H-1B Registration System in order to increase their chances of being selected in the lottery. DHS’s discussion and the evidence they’ve gathered and presented in the NPRM on the multiple registrations that have been submitted for the same job or petitioner is compelling and we agree with DHS and support the proposal to modify the System so that is “beneficiary centric” and believe this may help reduce fraud and collusion among employers.

However, we believe that H-1B Registration System is far from the best method available to DHS for allocating the limited number of H-1B visas when they are oversubscribed. A better system that would root out low-road employers would be the implementation of a wage-level-based prioritization system for H-1B allocation. DHS has in fact proposed such a rule, but it was delayed and then never implemented. The rule was challenged in federal court on procedural grounds, but the substance of the rule was never ruled on. We discuss our recommendation and analysis regarding a wage-level-based prioritization system for H-1B allocation in detail in Section IV of this comment.

D) DHS should expand the H-1B Registration System to include a front-end screening process that reviews the labor and employment law records of employers; those that have violated certain laws in the previous five years should be prohibited from hiring through the H-1B program.

In addition to our support for the proposed beneficiary-centric changes to the H-1B Registration System which are noted in the preceding section, we recommend that DHS go further and expand the H-1B Registration System so that it can function as more than a mere streamlining tool for employers. We believe that instead of simply being a tool to manage the lottery and H-1B annual cap, DHS should expand the H-1B Registration System to include a front-end screening process that reviews the labor and employment law records of employers. If employers have violated certain laws, they should be prohibited from hiring through the H-1B program. DHS should consult with DOL to develop a list of key laws and operate the system jointly with DOL, and ideally, operate the updated registration process jointly with DOL.

In the recently proposed rule, *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*,³⁸ DHS proposed to create or expand several additional bars to approval of new petitions filed by H-2 petitioners who have previously committed legal violations related to

³⁸ U.S. Department of Homeland Security, [Modernizing H-2 Program Requirements, Oversight, and Worker Protections](#), Notice of Proposed Rulemaking, CIS No. 2740-23 and DHS Docket No. USCIS-2023-0012, RIN: 1615-AC76, 88 Fed. Reg. 65040 (September 20, 2023).

the H-2 programs. EPI submitted comments generally supporting the proposed changes, which if adequately implemented will help curb abusive employers' exploitation of the H-2 programs and will level the playing field for employers that obey the law. However, EPI commented that employers that commit serious violations repeatedly should be permanently banned from the H-2 programs, as they have demonstrated their inability or unwillingness to comply with the programs' requirements.

In those comments EPI additionally recommended that the DHS strengthen section 214.2(h)(10)(iii)(3), which addresses violations of "any applicable employment-related laws and regulations" by expanding it to include a number of other violations and making denial of petitions mandatory—rather than discretionary—if employers have violated any of those laws in the preceding five years.³⁹

We believe DHS should consider similar provisions for employers seeking to hire through the H-1B program because there have been numerous credible accusations of lawbreaking against H-1B employers, as well as investigations and litigation, finding that H-1B employers and recruiters that have been guilty of wage theft, financial bondage, and even human trafficking. The reality is that DOL has limited resources and severely legal constrained authority to investigate H-1B employers and it is difficult in practice for H-1B workers to come forward and complain about employer lawbreaking—because they could face retaliation and lose their status, and possibly the opportunity to become lawful permanent residents—which means DOL likely receives fewer complaints than they otherwise would. And even when DOL does receive complaints, as numerous reports have shown, DOL often lacks the resources to investigate and take action against lawbreaking employers.⁴⁰

Thus, at a minimum, to keep lawbreaking employers out of the H-1B program, DHS should have its own list of legal violations and deny any petition for an employer that has violated any of the laws on the list in the preceding five years. That would act as a backstop to prevent lawbreaking employers from hiring through the H-1B program. At present, as DHS rightly points out in the November 2023 Modernizing H-2 Program NPRM, even some of the worst violators of the law are allowed to recruit and hire H-2 workers. We know that this is also the case in the H-1B program. In fact, in the H-1B program, some of the biggest users of the program are also the most egregious violators, receiving thousands of H-1B petition approvals per year. And then after they violate the law, H-1B employees are afraid to complain to authorities because their immigration status is tied to their employer, and even if they are brave enough to lodge a complaint, as noted above, DOL may lack the resources to investigate violations and hold the employer accountable.

As EPI also recommended in the H-2 NPRM, DHS should go further to implement this by also cooperating with DOL to develop a front-end screening process that takes place at the labor condition application (LCA) stage, to vet the labor and employment law records of employers

³⁹ See EPI comment on the H-2 programs in the comment submitted to DHS in November 2023; Daniel Costa, [EPI comments on DHS's proposed rule on "Modernizing H-2 Program Requirements, Oversight, and Worker Protections."](#) Economic Policy Institute, November 20, 2023.

⁴⁰ See for example, Rebecca Rainey, "[Inadequate Labor Department Resources Stymie Enforcement Efforts,](#)" *Bloomberg Law*, November 7, 2023.

before they can be allowed to hire through the H-1B program. In multiple EPI reports and in recent comments in response to NPRMs, EPI has made a similar proposal—namely, that a front-end screening process should be created to prohibit employers with track records of wage and hour, labor, and other legal violations from hiring through the H visa programs.

To make a front-end screening process a reality, ideally, DOL should require employers to register for eligibility to use the H-1B program at the LCA level, so employer records on compliance with labor and employment laws can be screened up front, before getting to the registration or petition stage. DOL could set up a registration process in which employers list basic information about their business and the purported need for H-1B workers (as is already done via the DOL temporary labor certification forms). As part of that new process, employers could be required to attest, under penalty of perjury and of being banned from hiring through the H-1B and other visa programs, that they have not been found to have violated any of the listed labor, employment, wage and hour, civil rights, disability, anti-trafficking, or anti-discrimination laws during the past five years. DOL could then attempt to verify by cross-referencing enforcement data and other relevant records—and could cooperate with other worker protection agencies like the NLRB and EEOC—and ultimately certify employers that have not violated the applicable laws.

To break established patterns of abuse, employers that have violated any labor, employment, wage and hour, civil rights, disability, anti-trafficking or anti-discrimination laws should be prohibited from submitting an LCA and hiring H-1B workers. Employers that are certified by DOL could then continue on with the labor certification process.

Given the present and likely future reality that WHD and other worker protection agencies will continue to be vastly underfunded and understaffed,⁴¹ such a screening process on the front end of the H-1B application process could act as a useful and efficient tool to prevent cycles of abuse without WHD having to go through lengthy and costly investigations on the back end, after workers have arrived in the United States and been robbed or otherwise exploited.

At the petition level, if a new screening process at DOL before the LCA stage is not created, DHS should, at a minimum and as noted above, build on proposed section 8 C.F.R. 214.2(h)(10)(iii)(B) for H-2 petitions by creating a list of key labor, employment, wage and hour, civil rights, disability, anti-trafficking, and anti-discrimination laws, the violation of which would establish strong evidence that an employer does not treat their employees well and is unlikely to follow employment and immigration laws with respect to their H-1B employees. Although this would work best in tandem with a front-end screening process at the LCA level, DHS could make significant progress in keeping lawbreaking employers out of the H-1B programs by mandating that any employer that has violated any of the listed laws will be prohibited from having a petition approved for hiring H-1B workers.

⁴¹ See for example, Daniel Costa and Philip Martin, [*Record-low number of federal wage and hour investigations of farms in 2022: Congress must increase funding for labor standards enforcement to protect farmworkers*](#), Economic Policy Institute, August 22, 2023; Ihna Mangundayao, Celine McNicholas, and Margaret Poydock, “[Worker protection agencies need more funding to enforce labor laws and protect workers](#),” *Working Economics* blog (Economic Policy Institute), July 29, 2021.

Another option would be for DHS to modify the existing H-1B Registration System so that it also screens the records of employers. That way DHS could use it to both manage the annual cap and to assess and certify whether employers are eligible to hire through H-1B based on their past legal violations. Employers could be required to attest, under penalty of perjury and of being banned from hiring through the H-1B and other visa programs, that they have not been found to have violated any of the listed labor, employment, wage and hour, civil rights, disability, anti-trafficking, or anti-discrimination laws during the past five years. USCIS could work to verify the employer attestation, although ideally DOL should partner with to do this, by cross-referencing DOL enforcement data and other relevant records—preferably also in partnership with other worker protection agencies like the NLRB and EEOC—and would then ultimately certify employers that have not violated the applicable laws, allowing them to continue with the registration process.

E) High rates of fraud found during site visits by FDNS suggest closer scrutiny of petitions is needed, and that additional audits and enforcement are necessary—but primary funding and responsibility for audits should shift to DOL.

We appreciate that DHS is proposing regulations regarding site visits by USCIS's Fraud Detection and National Security (FDNS) Directorate that will “clarify the scope of inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections,” which will provide transparency for petitioners and the public about site visits and related actions by FDNS. With respect to this section of the NPRM, we wish to make two main points.

First, we wish to highlight that FDNS inspections over the years have found astonishingly high rates of fraud, which we believe justifies additional scrutiny of petitions and additional oversight and auditing, and a close review and reconsideration of USCIS's adjudicatory practices.

In 2008, USCIS published a report, “H-1B Benefit Fraud & Compliance Assessment,” which found “a total of 51 cases within the sample of 246 H-1B petitions that were confirmed as representing fraud, a technical violation, and/or multiple technical violations,” resulting in an overall violation rate of 20.7%, with 13.4% of the violations being fraud and 7.3% representing technical violations.⁴² A 2011 GAO report later described that “During fiscal year 2010, USCIS oversaw 14,433 H-1B site inspections, which resulted in 1,176 adverse actions...” which “can include the revocation or denial of benefits, and may involve referral of a case for criminal investigation.”⁴³ The report did not provide further information about the overall cases of fraud or technical violations that were detected, only the number of cases that resulted in an “adverse action.” The percentage of cases that resulted in adverse actions, nevertheless, was 8.1%, which is not a trivial share. In 2018, USCIS published another report,

⁴² United States Citizenship and Immigration Services, “[USCIS H-1B Benefit Fraud and Compliance Assessment](#),” September 1, 2008, available at American Immigration Lawyers Association, AILA Doc. No. 08100965 (posted October 9, 2008).

⁴³ U.S. Government Accountability Office, [H-1B VISA PROGRAM: Reforms Are Needed to Minimize the Risks and Costs of Current Program](#), GAO-11-26, January 2011.

“H-1B and L-1A Compliance Review Site Visits,” which discussed the results of FDNS site visits between fiscal years 2013 to 2016.⁴⁴ That report found that “Of the 30,786 H-1B compliance reviews, USCIS determined that 26,975 (88 percent) were compliant and 3,811 (12 percent) were noncompliant,” in other words USCIS detected a fraud rate of 12%.

The most recent FDNS data available, posted by DHS in the current NPRM at Table 42, shows a total fraud/noncompliance rate of 19% for the four fiscal years of 2019 through 2022 (USCIS conducted 27,062 total site visits with 5,037 that found fraud or other noncompliance). This represents more than a 50% increase in the fraud rate as compared to the 2013-16 period.

By DHS’s own admission in the NPRM, “The site visits... have uncovered a significant amount of noncompliance in the H-1B program.” Indeed, if we assume a fraud rate of 19% and extrapolate for the total population of H-1B workers that USCIS estimates is roughly 600,000, that would amount to fraud or other forms of noncompliance being associated with the petitions of 114,000 H-1B workers. While the recent data provided in the NPRM does not disaggregate violations that were fraud or technical violations, this is nevertheless a shockingly high rate of fraud and noncompliance, and calls into question DHS’s ability to adequately review and assess the petitions it adjudicates when determining whether positions are bona fide and whether employer-petitioners are conducting legitimate business operations.

We urge that DHS take action with respect to the instances of fraud it has detected. Employers that were found to have engaged in fraudulent behavior should be banned from the H-1B program and should not have future petitions approved if the fraud represented more than a minor technical violation (for instance if an employer listed incorrect information on a petition that did not have a significant impact on wages and working conditions or other attestations made). H-1B workers who are associated with the fraudulent petitions, if they are not suspected to have participated in the fraud, should be considered for deferred action and work authorization issuance or other forms of protection, in order to avoid punishing H-1B workers for the actions of their lawbreaking employers and to incentivize the reporting of fraudulent behavior by employers, which will protect labor standards for all workers.

In addition, we were not surprised to read in the NPRM that “when disaggregated by worksite location, the noncompliance rate was found to be higher for workers placed at an off-site or third-party location,” which is consistent with the many examples of lawbreaking and abuses committed by outsourcing and staffing firms that use the H-1B program that have been reported on in the public domain and that we have written about in our research. We agree with USCIS’s current practice of additional scrutiny of outsourcing/staffing companies and believe it should continue to be a main focus of future FDNS site visits.

But our second, broader point about enforcement in the H-1B program is that we would prefer that site visits and increased oversight and enforcement be conducted by federal agencies that have a primary mandate to set and enforce labor standards and the staff

⁴⁴ United States Citizenship and Immigration Services, “[H-1B and L-1A Compliance Review Site Visits](#),” Fraud Detection and National Security Compliance Review Data (October 1, 2012, to September 30, 2016), Fiscal Year 2017 Report to Congress, U.S. Department of Homeland Security, January 17, 2018.

expertise to carry out that mandate. As EPI has shown in multiple reports and commentaries, Congress funds immigration enforcement at a rate that is 12 times more than what it appropriates for all labor standards enforcement agencies combined,⁴⁵ despite the fact that those agencies are in charge of protecting 165 million workers in the United States.

We would prefer to see funds be directed towards DOL to facilitate additional labor standards enforcement instead of increased immigration enforcement. Because DHS lacks the appropriate subject-matter expertise on topics such as outsourcing business models, the employer-employee relationship, wage theft, and employer retaliation, enhancing and increasing immigration-only enforcement by FDNS and other DHS subagencies risks putting workers at risk of being harmed, when instead, the enforcement and oversight focus should be squarely on accountability for employers and ensuring that all workers are adequately protected.

F) DHS should provide H-1B and other nonimmigrant workers with a mechanism to verify their own immigration status.

In the NPRM, DHS seeks input on “ways to provide H-1B and other Form I-129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf.” Unfortunately, as the NPRM also notes, “USCIS does not currently provide notices directly to Form I-129 beneficiaries.” We wish to write in support of notifications being provided to H-1B and other nonimmigrant workers and are disappointed that DHS did not develop a concrete proposal to do so in the current NPRM.

Allowing workers in H-1B and other nonimmigrant statuses to access information about their immigration status from USCIS is of utmost importance because the practice of withholding I-129 petition information from beneficiaries means that between one and two million temporary migrant workers must rely on their employers to provide accurate immigration status documentation and information to them every time those employers take actions that implicate their employees’ visa status. Workers are unable to independently confirm their own immigration status during the pendency of the petition—including petitions to change employers or extend stays—or upon its approval. This process disempowers workers and leaves them vulnerable to exploitation. When workers have to rely entirely upon their employers’ representations for information about their status, it can allow unscrupulous employers and labor contractors to deceive their workers, putting those workers at risk of severe labor exploitation, abuse, and trafficking.

In March 2022, the CIS Ombudsman recommended that current practice be changed to require any notice be sent to the worker, and that USCIS allow workers to be able to track

⁴⁵ See for example, Daniel Costa, [*Threatening migrants and shortchanging workers: Immigration is the government's top federal law enforcement priority, while labor standards enforcement agencies are starved for funding and too understaffed to adequately protect workers*](#), Economic Policy Institute, December 15, 2022.

their cases online and access receipt and approval notices online.⁴⁶ Thus, DHS received a recommendation to do this from the USCIS Ombudsman nearly two years ago—for what should be a relatively straightforward process—but did not manage to even craft a simple proposal that would clearly help workers in time for this NPRM.

In its detailed formal recommendation to USCIS—its first in several years—the Ombudsman not only noted several legal deficiencies with USCIS’s current practice but also recommended several practical, low-cost options for the agency to remedy the issue. We additionally recommend that DHS consider communicating this information directly to worker-beneficiaries’ cell phones through text and the commonly used mobile app, WhatsApp, because of its popularity and because it relies on the internet rather than phone service, making it more accessible to workers located in remote areas and/or with limited cell service.

IV) DHS SHOULD HAVE DEVELOPED AND FINALIZED A PROPOSAL TO REPLACE THE H-1B REGISTRATION SYSTEM AND LOTTERY WITH A WAGE-LEVEL-BASED PRIORITIZATION SYSTEM FOR H-1B ALLOCATION.

As noted above, we believe that instead of proposing this H-1B Modernization rule, DHS should have focused on updating and finalizing a proposal that would have replaced the H-1B Registration System and lottery with a wage-level-based prioritization system for H-1B allocation. Such a system would reduce the usage of the H-1B program by low-road employers and outsourcing firms that pay their H-1B workers the lowest wages and that contract with U.S. companies to replace incumbent U.S. workers with lower-paid H-1B workers. In this section, we provide a detailed discussion about the rationale for a wage-level-based prioritization system, address some of the main criticisms levied against it, and address the legal authority for it, which we believe DHS clearly possesses.

A) 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 20,000 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 that is facilitated by the H-1B Registration System, and 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.”

⁴⁶ Office of the Citizenship and Immigration Services Ombudsman, “[Recommendation to Remove a Barrier Pursuant to Executive Order 14012: Improving U.S. Citizenship and Immigration Services From I-129 Notification Procedures](#),” U.S. Department of Homeland Security, March 31, 2022.

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 has been in place since fiscal year 2008.

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.

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

The rule that USCIS proposed and then finalized in 2020 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,⁴⁷ 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.⁴⁸ 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*

⁴⁷ 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.

⁴⁸ See for example Ron Hira, [*Is There Really a STEM Workforce Shortage?*](#) Issues in Science and Technology, Vol. XXXVIII, No. 4, Summer 2022; 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

*personnel cannot be found*⁴⁹ (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.

C) *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 employers that are staffing firms, which are more likely to pay H-1B workers at the lowest wage rates.⁵⁰ The H-1B staffing firms use an outsourcing model to send their H-1B employers 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.”⁵¹ 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 lower skills—as evidenced by being assigned almost exclusively at wage levels 1 and 2—at those skill and wage levels they are largely interchangeable workers, and it matters little to the outsourcing firms that employer tens or even hundreds of thousands of workers, which specific one thousand workers are selected from their employee pool. 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

⁴⁹ 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”).

⁵⁰ 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.

⁵¹ Julia Preston, [“Large Companies Game H-1B Visa Program, Costing the U.S. Jobs,”](#) *New York Times*, November 10, 2015.

employers with legitimate needs that employ workers directly and pay H-1B workers at higher wage levels.

D) The random lottery allocation of H-1B petitions mainly benefits large outsourcing firms and employers that pay the lowest wages to H-1B workers—in fact, in 2019 and 2020, 85% of H-1B workers were hired at salaries that were well below the local median wage for the occupation.

As we discussed in our public comments submitted for the Notice of Proposed Rulemaking issued on November 2, 2020,⁵² the current selection process of using a random lottery *guarantees* a lower-skilled and lower-paid cohort of H-1B workers will be selected from among the available petitions. Data from DHS in the preamble to the 2020 NPRM provides overwhelming evidence to support this. Table 7 of the preamble shows the two-year average of the number of H-1B petitions that were selected, according to wage levels 1-4, for fiscal years 2019 and 2020.⁵³ It reveals that **85% of petitions went to employers paying at wage Level 1 or 2**—which are the 17th and 34th percentile wage, respectively, for the occupation and region according to data from the Occupational Employment Statistics survey.⁵⁴ In addition, **90% of petitions for the advanced degree exemption were awarded to employers paying at wage Levels 1 and 2**. Since H-1B wage Level 3 is set at the local median wage, and Level 4 is set at the 67th percentile, this means that nearly all H-1Bs during those two years were issued to workers being paid at wage levels that are below the local median wage for the occupation (i.e., Levels 1 and 2).

E) Firms are currently incentivized to game the system to hire entry-level H-1B workers at the lowest wage rates, which puts downward pressure on median U.S. wages.

The current random lottery allocation system *advantages* outsourcing employers that pay lower wages and send their H-1B employees to work to third-party worksites—using a fissured business model—and ultimately abuse the H-1B program by using it to offshore U.S. jobs. Such outsourcing firms have large workforces overseas and flood the H-1B application system with many thousands of applications each year in order to game the system. As the *New York Times* reported, “Many of the visas are given out through a lottery, and a small number of giant global outsourcing companies had flooded the system with applications, significantly increasing their chances of success.”⁵⁵

⁵² Daniel Costa and Ron Hira, “[EPI comments on USCIS preference allocation system for H-1B visas by prevailing wage level](#),” Economic Policy Institute, December 2, 2020.

⁵³ U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, [Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions](#), Proposed Rule, Agency/Docket Numbers: CIS No. 2674-20 and DHS Docket No. USCIS-2020-0019, 86 Fed. Reg. 1676 at 1720, Table 7 (November 2, 2020).

⁵⁴ This includes H-1B petitions set by other sources including private wage surveys which are likely to be even lower than what Levels 1 or 2 require.

⁵⁵ Julia Preston, “[Large Companies Game H-1B Visa Program, Costing the U.S. Jobs](#),” *New York Times*, November 10, 2015.

How does this play out in practice? As described already above, if a firm wants 5,000 H-1B workers—since the lottery odds are roughly one-in-three—that firm can easily, and inexpensively, file 15,000 H-1B applications, which will result in 5,000 approved petitions. The strategy is straightforward and has been used by outsourcing firms for at least a decade.

The employers that favor the random allocation of H-1B visas pay relatively lower wages and utilize a fissured business model, and have received most of the allocated visas by gaming the system,⁵⁶ a reality that has existed and persists to fiscal year 2023 according to the most recent data available.⁵⁷ NASSCOM, the India-based trade group that represents many of the outsourcing firms that have been the biggest beneficiaries of the current H-1B random lottery allocation, offered high praise to DHS for the delay of the final rule that would have created a wage-level-based allocation system.⁵⁸ NASSCOM supported a delay of the final rule, likely because its member firms profit handsomely from the lottery, which occurs at the expense of smaller firms that are crowded out of the H-1B program, as well as higher-skilled H-1B applicants and U.S. workers in major H-1B occupations.

The current lottery and registration process is unfair to the employers that intend to use the H-1B program in order to hire migrant workers who are truly high-skilled workers and who are paid fair wages that are commensurate with their abilities. In fact, the current process virtually guarantees that outsourcing firms win the lottery, crowding out highly skilled and higher-paid applicants with lower-skilled and lower-paid ones. A wage-level selection process is much fairer to employers and will level the playing field between large employers and smaller businesses.

F) Opponents of a wage-level-based allocation system claim it will disadvantage recent college graduates but the claim does not hold up to scrutiny—in fact, the final rule aligns the H-1B program with its purpose of filling labor shortages in high-skill jobs.

One of the principal arguments made by opponents of a wage-level-based allocation of H-1B petitions is that recent college graduates with little or no work experience will have little chance of having their petition selected and being issued an H-1B visa. This is a flawed argument that does not hold up to scrutiny.

⁵⁶ Julia Preston, “[Large Companies Game H-1B Visa Program, Costing the U.S. Jobs](#),” *New York Times*, November 10, 2015.

⁵⁷ See for example, 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, “[Top 10 users of H-1B guest worker program are all offshore outsourcing firms](#),” *Working Economics* blog (Economic Policy Institute), February 14, 2013; [Bridge to Immigration or Cheap Temporary Labor? The H-1B & L-1 Visa Programs Are a Source of Both](#), Economic Policy Institute, February 17, 2010; Daniel Costa and Ron Hira, “[Tech and outsourcing companies continue to exploit the H-1B visa program at a time of mass layoffs: The top 30 H-1B employers hired 34,000 new H-1B workers in 2022 and laid off at least 85,000 workers in 2022 and early 2023](#),” *Working Economics* blog (Economic Policy Institute), April 11, 2022.

⁵⁸ See for example, Neha Alawadhi, “[Nasscom hails ten-month delay in implementing Trump’s H-1B allotment rule: Dept of Homeland Security will now push date of the rule March 9 to December 31, will review it as a whole for potential changes or for rescinding it](#),” *Business Standard*, February 6, 2021.

At a minimum and according to the Labor Department’s skill level guidance, H-1B applicants with advanced degrees should be at least offered salaries at Level 2. Given the likely distribution of petitions—as the final rule’s analysis shows—Level 2 petitions will still be considered for approval, although they would be allocated via lottery at the Level 2 wage due to the high number of petitions offering Level 2 wages. Thus, petitions at Level 2 will be in a situation similar to the one under the current random allocation process. This is also true for those petitions for H-1B workers with only a bachelor’s degree: since most recent graduates will have at least one year of U.S. workforce experience through the Optional Practical Training program (OPT), one year of U.S. work experience with a bachelor’s will warrant that the H-1B worker be paid at least at Level 2. The graduates employed through the STEM OPT program—which allows them to gain three years of U.S. work experience—will have gained enough work experience and developed enough skills during those three years to justify being employed at Level 3 or Level 4 wage rates. (Being offered a Level 3 or Level 4 wage will essentially guarantee that their petition is selected.)

In addition, the best and brightest recent graduates should in fact be paid at least at the local median wage for the occupation. There is nothing preventing employers from offering Level 3 and Level 4 wage rates to talented recent graduates. DOL’s guidance on skill levels does not establish a ceiling on what can be offered and paid, instead, it sets a floor.

The intent of the H-1B program is to fill labor shortages, not to provide guaranteed labor market access to every international student who graduates with a U.S. degree. This final rule will strengthen a market-based approach to selecting skilled workers that contribute to America’s technological strength while also protecting both the migrant workers who are hired and the U.S. workers seeking jobs in major H-1B occupations. This final rule prioritizes the highest skilled applicants and thus encourages employers to use market mechanisms to obtain needed skills—by offering fair salaries that are commensurate with the skills they value—and discourages the use of the H-1B program as a means to hire entry-level workers almost exclusively and as a way to access a lower-paid source of labor.

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

Opponents of a wage-level-based allocation system, 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. First, 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. And second, 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 by wage

level 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 are 85,000 visas available for H-1B workers in the private sector every year, there are roughly one million positions certified by DOL for H-1B jobs, and 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 4.⁵⁹ Those applications suggest that there are more than enough H-1B jobs that employers seek to fill at just the two highest wage levels to utilize the entire annual cap. 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.

H) A wage-level-based allocation system is an important substantive reform with bipartisan support.

The creation of an H-1B wage-level-based allocation system would be the most needed and substantive reform to the H-1B program that DHS could make. The current wage levels are artificially set far too low and thus allow U.S. employers to take advantage of H-1B workers from abroad as lower-cost alternatives to U.S. workers.⁶⁰ The large profits earned from this has created financial incentives for employers to hire H-1B workers, not because they brought in specialized skills, but instead because employers could legally pay H-1B workers less. Employers enjoy these financial benefits on top of the less quantifiable, but still very significant benefits they get by having a workforce that is indentured to them by virtue of their temporary visa status, and the hopes of many H-1B workers that their employer will eventually sponsor them for lawful permanent residence, which keeps workers from complaining when their employers break the law or treat them unfairly. The effects of these factors have had serious and wide-ranging corrosive impacts. The employment of H-1B workers who are vastly and unfairly underpaid at below-market wage rates has undermined labor standards and placed downward pressure on wages in H-1B occupations, reduced job opportunities for U.S. workers, and undermined working conditions.

And finally, we wish to note that a wage-level-based H-1B allocation system has wide-ranging support from academics and think tanks.⁶¹ Importantly, it also has strong bipartisan support, including from Senators Richard Durbin and Chuck Grassley, the current and former chairs of the Senate Judiciary Committee.⁶²

⁵⁹ 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.

⁶⁰ 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.

⁶¹ See for example, William Kerr, Harvard Business School professor and author of *The Gift of Global Talent*, “[A Harvard professor’s suggestions for fixing the broken H-1B visa system](#),” Quartz India; Chad Sparber, CATO Institute, [An Alternative to the H-1B Lottery](#), September 6, 2017; Jeremy L. Neufeld, Niskanen Center, “[Trump’s One Immigration Reform That Biden Should Keep](#)” January, 21, 2021.

⁶² Senators Richard Durbin and Chuck Grassley, “[Grassley, Durbin to DHS: Implement H-1B Visa Program](#),” Press Release, March 3, 2021.

V) CONCLUSION

For years, migrant worker advocates, unions, academics, and both Democratic and Republican lawmakers have pointed out the need to change employer incentives in H-1B, so that visas are issued to employers seeking to hire and retain skilled workers by paying them fair wages that reflect market rates. We have urged both the Administration and the Congress to improve the prevailing wage methodology, explore alternatives to the lottery system that would directly prioritize wages and skills, and improve labor standards enforcement and protections for workers. The executive branch on its own, however, has ample authority to vastly improve the H-1B program in ways that ensure basic fairness and protect labor standards, as we have outlined in various reports and commentaries, as well as in this response to DHS's NPRM. Although it does not appear that those reforms will be made during the current presidential term, we nevertheless urge DHS and DOL to propose and implement them.

Sincerely,

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