CENTER FOR STRATEGY & APPLIED INSIGHTS

Bo Cooper
Executive Director
Direct: +1 202 380 1087
bcooper@fragomen.com

Leah L. Rogal
Senior Director
Direct: +1 202 380 1080
lrogal@fragomen.com

FRAGOMEN

ATTORNEYS AT LAW

Fragomen, Del Rey, Bernsen & Loewy, LLP
1101 15th St NW STE 700
Washington, DC 20005

T +1 202 223 5515
F +1 202 371 2898

www.fragomen.com

October 24, 2025

Submitted via regulations.gov

Samantha Deshommes, Chief Regulatory Officer
Office of Policy & Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject H-1B Petitions (CIS No. 2820-25; DHS Docket No. USCIS-2025-0040).

Dear Chief Deshommes:

The Center for Strategy and Applied Insights at Fragomen (the Center) appreciates the opportunity to comment on the Department of Homeland Security's (DHS or Department) notice of proposed rulemaking titled "Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject H-1B Petitions."[1]

Drawing on lessons learned from the Fragomen firm's long experience as an immigration advisor to employers in the United States and around the world, the Center seeks to identify and analyze issues and trends key in immigration systems, and to offer insight-based suggestions to help those systems function fairly, transparently, and efficiently.

We urge the Department to withdraw this proposed rule while it reconsiders the relevant statutory authorities, properly evaluates the economic impact, and reevaluates the policy considerations. The proposed rule's reliance on wage levels as a basis for allocating H-1B registrations raises serious legal, practical, and economic concerns. First, the Immigration and

[1] Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject H-1B Petitions, 90 Fed. Reg. 45986 (proposed Sept. 24, 2025) (to be codified at 8 C.F.R. pt. 214).

Nationality Act (INA) does not authorize the proposed weighted allocations in the H-1B registration and lottery process. Second, wage levels are an inadequate proxy for skill and value across diverse occupations and across different career stages. Nor is prioritizing higher wage levels in the registration process necessary to ensure that the H-1B classification is used to attract and hire the best candidates. Third, the economic analysis in the proposed rule is deficient, overlooking the significant negative impact that the proposed approach would have on the U.S. economy and the national interest. The proposed weighted allocations would critically impede the hiring of early career high-skilled professionals and would disrupt the talent pipelines employers rely on to drive innovation, fuel research, expand economic growth, remain competitive, and respond to the relative scarcity of certain skill sets and expertise.

The Failed 2020 Attempt to Introduce Prioritized Registrations and Lottery Selections

There is recent history offering lessons about the value of expending government and stakeholder resources to attempt to create by regulation a wage-based H-1B allocation system. In 2020, DHS sought to regulate a similar change to establish an H-1B preference selection system relying on wage levels. It received over 1,100 comments. The vast weight of those comments fell in opposition to the rule, for reasons that bear equally on the current proposal.[2] The concerns then raised by commenters focused on the disproportionate negative impact on small businesses and start-ups; reduced access to entry-level professionals and recent graduates from U.S. schools; increased burdens on petitioners to provide additional details at the registration stage; and legal and procedural deficiencies. When the rule was finalized, it was immediately challenged in court as beyond the agency's authority, never went into effect, and ultimately was vacated for procedural reasons.

The INA Does Not Authorize Weighted Allocations in the H-1B Registration and Lottery Process

It is certainly not at all irrational to wish to allocate ration the limited number of H-1B visas, amid a demand from the American economy that far exceeds supply, by some method more well considered than a random lottery. Putting aside whether the method proposed is a wise one, flexibility to revise the system in this way is something that Congress simply has not provided. The governing statute specifically establishes that H-1B cap-subject visas "shall be issued... in the order in which petitions are filed."[3]

This restriction is well understood. When the first Trump administration initially established the pre-registration requirement and the relative consideration of the restricted (20,000) cap for graduates with a U.S. master's degree or higher, and the unrestricted (65,000) cap, many commenters requested that DHS find ways to consider organizing distribution of cap-subject

[2] Modification of Registration Requirements for Petitioners Seeking to File Cap Subject H-1B petitions, 86 Fed. Reg. 1676 (Jan. 8, 2021) (codified at 8 C.F.R. pt. 214).
[3] 8 U.S.C. § 1184(g)(3).

petitions by industry, wages, and various other kinds of quotas.[4] DHS responded to such comments definitively, stating unequivocally that such prioritization schemes were not statutorily permitted. "DHS believes, however, that prioritization of selection on other bases such as those suggested by the commenters would require statutory changes. DHS believes that implementing a quota would be inconsistent with the existing statute, as Congress has implemented quotas in other contexts when it has intended to do so."[5]

Nor was this the first time that the responsible immigration agency concluded that Congress has not allowed for H-1B visa allocation methods that departed from statutorily established standards and processes. In earlier rulemaking processes, the legacy Immigration and Naturalization Service considered comments suggesting the idea of limiting the eligibility of early career professionals. The agency specifically concluded that Congress had already made and codified its choice, from which the agency had no authority to depart. "Several labor organizations and a nonprofit organization objected to entry- level professionals being considered aliens of distinguished merit and ability [then the statutory standard for H-1B eligibility]. These organizations also asserted that the Service's policy that recently-graduated engineers, computer programmers, teachers who have just received a teaching certificate, and nurses who have just passed a state board examination are persons of distinguished merit and ability is contrary to the plain meaning of the statutory language. The Service believes that a Congressional amendment to the statute would be required to change the current interpretation after such a long time."[6]

In a footnote in the proposed rule here, as it did in the 2020 rulemaking, DHS acknowledges plainly that it had previously interpreted the statute to mean "that prioritization of registration selection on factors other than degree level, such as salary, would require statutory changes."[7] Without explaining why, though, DHS simply states—just as it did in its 2020 rulemaking, that its "interpretation of the statute has changed."[8]

Agencies do, of course, have some leeway to depart from prior interpretations of a statute, but such departures must live within the language of the statute itself. It is difficult to find the statutory leeway here to assert the position taken in the proposed rule. The proposed rule appears to assume that, since it is permitted to allocate H-1B registration by random lottery, a weighted prioritization of registrations is also permitted.[9] But this view does not follow at all from the clear and unambiguous statutory language. That language mandates that H-1Bs "*shall* be issued... in the order in which petitions are filed." This formulation does not leave space for USCIS to choose by regulation to prioritize petitions based on wage levels or any other criteria.

---

[4] Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 888 (Jan. 31, 2019) (codified at 8 C.F.R. pt. 214).

[5] *Id*. at 913.

[6] Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 Fed. Reg. 2606, 2608-2609 (Jan. 26, 1990).

[7] Proposed rule at 45990, n. 20 (citing 85 Fed. Reg. at 69244, in turn citing to 83 Fed. Reg. at 914).

[8] *Id*.

[9] *See* proposed rule at 45990 (stating that "while the current random selection of petitions or registrations is reasonable. DHS believes it is neither optimal, nor the exclusive method of selecting registrations or petitions …").

To be sure, courts have recognized the leeway to allocate the year's H-1B supply by lottery when, as has become the case annually, it is immediately oversubscribed. This has been seen as a legitimate way to fulfil the statutory "order of filing" mandate when requests for the entire year's supply of H-1Bs are in effect filed simultaneously.[10] In interpreting what it means to "file" a petition and how to handle simultaneously-filed petitions, a content-neutral lottery among all petitions is a valid interpretation of the statute. But this does not at all lead to the conclusion that there is also authority for the agency to go farther and refer to or consider any beneficiary-specific content of the petition as part of determining what the statute means by the phrase "*the order in which petitions are filed*."

Although the proposed rule asserts policy arguments to support a wage level prioritization in the selection among registrations, DHS does not provide any legal argument in support of its changed interpretation that it has statutory authority to do so. Nor in view of the points above, is it clear what that statutory argument might be. The proposed rule therefore seems extremely vulnerable to rejection on judicial review. That likelihood is especially great given the recent shifts in the standard for judicial review of agency action. In its *Loper Bright* decision, the Supreme Court dramatically changed the way that courts review agency regulatory initiatives, eliminating the deference to agency decision making that had long been a part of administrative law.[11] *Loper Bright* calls on courts to "independently interpret the statute and effectuate the will of Congress."[12] An agency may fill the gaps where a statute is ambiguous only where Congress has explicitly delegated the authority to do so.[13] That is not the case here. The statute states plainly that H-1B visas "shall be issued … in the order in which petitions are filed." As the Supreme Court emphasized in *Loper Bright*, it "makes no sense to speak of a 'permissible' interpretation that is not one the court … concludes is best."[14] The interpretation underlying the proposed rule is not even an available reading of the statute, much less the "best" one.

Wage Levels are not an Appropriate Proxy for Skill Levels Across Occupations

The proposed rule's weighted allocation is based on the flawed premise that "a higher wage level is generally a reasonable proxy for the higher level of skill."[15] Wage levels are not designed to facilitate comparisons across occupations. Instead, they serve as a measure of experience, education, and supervisory level within a given occupation and geographic location. Even if there were statutory authority to do so, the proposed rule's use of higher wage levels as a proxy for higher skill is faulty. This approach does not take into account the many factors that

[10] *See Walker Macy LLC v. U.S. Citizenship & Immigration Servs.,* 243 F. Supp. 3d 1176 (D. Or. 2017).
[11] *Loper Bright Enters. v. Raimondo, 603 U.S. 369, 371 (2024)* (holding that "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the [Administrative Procedure Act] is [to] recogniz[e] constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries").
[12] *Id*.
[13] *Id*.
[14] *Id*. at 373.
[15] Proposed rule at 45990.

determine wage levels. Wage levels are influenced not only by skill but also by geographic location, employer size, industry norms, and job title classifications.

Moreover, the economic analysis underpinning the proposed rule overrelies on outdated studies,[16] and does not account with sufficient care for USCIS's own recent statistics. For example, figure 1 in the proposed rule clearly shows that the vast majority of H-1B petitions for positions within the most relevant SOC codes are filed at wage level I and II, with the overwhelming majority of computer and mathematical occupations filed at level II.[17] But presenting the wage level selection effect proposed by DHS by looking only at the two-digit SOC code, which breaks occupations down only into broad, "major" groups, is itself misleading because wage levels are provided for H-1B by the Department of Labor (DOL) based on six-digit SOC codes, which breaks the classification down much further into detailed, specific jobs. Thus, while wage level II jobs in Computer and Mathematical Occupations in two-digit category "15" represent the highest number and percentage of H-1B petitions year after year, those wage level II jobs are divided among more than 20 different individual occupations for H-1B. The wage level construct does not allow for effective comparison or ordering among specific, detailed occupations.

DHS does not explain why employers would suddenly shift established recruitment strategies to prioritize candidates at wage levels III or IV, nor does it provide evidence to support the assumption that employers would simply choose to boost wages to improve lottery odds.[18] In fact, the proposed rule assumes that "some employers may choose to offer a higher proffered wage to a certain beneficiary" to gain an advantage in the selection process.[19] DHS concedes that in such cases "the proffered wage may not necessarily reflect the skill level," but rather "a reasonable reflection of the value the employer has placed on that specific beneficiary."[20] This assumption is not supported by data and does not reflect actual labor market behavior or recruitment practices.

In particular, DHS does not adequately address how the proposed prioritization would function in practice. If most H-1B petitions are filed at wage level II, it follows that most registrants would receive two entries in the lottery. This would effectively dilute the advantage of higher wage level registrants, contrary to the proposed rule's stated goal. The proposed handling of beneficiaries with multiple offers—that is, that a beneficiary's lower-level offer will determine the lottery positioning of all of that beneficiary's petitions—reflects another inherent inconsistency in the rule. For example, using the illustration provided in the proposed rule,[21] a software developer with offers in both Sacramento (exceeding wage level IV) and San Francisco (at wage level II) would be entered into the lottery as a wage level II registrant, reducing the chances of selection despite having a higher wage level offer. DHS explains that this is necessary

[16] *See, e.g.,* proposed rule at 45990-92 (citing to articles and reports dated in 2008, 2013, and 2020).
[17] Proposed rule at 46007; *see also* proposed rule at 46005, Table 12 (showing the distribution of H-1B cap-subject petition receipts by wage level, reflecting only 12 and 5 percent for levels III and IV, respectively).
[18] Proposed rule at 45992.
[19] *Id*.
[20] *Id*.
[21] *Id.*

"to prevent gaming of the weighted selection process,"[22] assuming that an employer would submit registrations with multiple wage levels but ultimately hire at the lowest one. In reality, employers make salary and hiring decisions based on their business needs and labor market conditions. The proposed rule's explanations, instead of considering how most employers recruit professional talent, underscore the flawed assumptions in the rule.

Recent studies help demonstrate that wage level prioritization would "favor companies sponsoring older workers with longer seniority, even in lower-skill jobs, over genuinely high-wage, high-skill roles."[23] For example, a specialized surgeon earning $300,000 would be certified as a level I and a PhD working at a high tech company earning $280,000 would be certified at a level II, whereas an acupuncturist earning $41,600 is considered level III and a landscape architect with a $36,000 salary is certified as level IV. Under the proposed rule, the specialized surgeon is going into the lottery with one ticket, while the landscape architect is getting four.

Perhaps most important, the proposed rule would have extremely negative effects on the ability to make crucial hires at the entry level. The proposed rule fails to account for recent graduates who may receive competitive salaries but who properly fall into lower wage levels because of their limited experience.[24] Such candidates often bring cutting-edge research and innovation to their employers and contribute significantly to the U.S. economy. By conflating wage level with skill, the proposed rule risks excluding this vital talent pool and undermines the core objective of the H-1B program: attracting and retaining global expertise.

The Proposed Rule Fails to Consider Properly the Significant Negative Impact to the U.S. Economy and the National Interest

The proposed rule would result in significant adverse economic impacts that were not adequately considered in the rulemaking process. As a primary matter, it would disproportionately affect international students nearing the end of their period of student status, particularly those transitioning from F-1 status through Optional Practical Training (OPT) or STEM OPT extensions. The uncertainty of H-1B selection is already a major source of instability for these individuals and their U.S. employers. A wage-weighted selection system would further disadvantage this group, many of whom occupy entry-level or research positions that nonetheless drive innovation. This dynamic would have a chilling effect on U.S. higher education institutions' ability to attract global talent—a vital source of tuition revenue and a key pipeline for high-growth industries.

[22] Proposed rule at 45993.
[23] Jeremy Neufeld, *The "Wage Level" Mirage: How DHS's H-1B Proposal Could Help Outsourcers and Hurt U.S.-Trained Talent*, Inst. for Progress (Sept. 24, 2025), https://ifp.org/the-wage-level-mirage/.
[24] *Id*. (showing how international students seeking H-1B status are offered higher salaries but are likely to be placed at the lowest wage levels because they are early career professionals).

The proposed rule would also have broader macroeconomic consequences.[25] Early-career professionals—particularly recent U.S. graduates—are integral to the innovation economy and to addressing skill shortages in critical STEM fields. Limiting their access to H-1B visas would reduce the flow of new ideas, constrain entrepreneurship, and slow wage growth in high-productivity sectors. Studies have shown that each H-1B position filled by a high-skilled worker generates additional domestic employment opportunities, and that U.S. firms employing international graduates are more likely to expand research and development.[26] A wage-based selection mechanism would therefore not only fail to achieve fairness but would also dampen economic dynamism and U.S. competitiveness.

The proposed rule's reliance on salary as a measure of merit overlooks the very spirit that has long defined American success—the willingness to take risks, to create, and to persevere. It discounts those who choose opportunity over security: the individual who accepts a modest paycheck today because they believe in their ability to turn an idea into something extraordinary. That mindset—the courage to bet on oneself and build something from nothing—is the essence of American ingenuity. The United States should continue to attract and reward such individuals. They deserve more opportunities in the immigration system, not fewer because they create jobs for Americans.

The proposed rule fails to consider these crucial impacts in its cost-benefit analysis.[27]

Wage Level Prioritization in Registration Selection is Unnecessary

The proposed rule does not account for recently implemented H-1B Modernization Rule and the beneficiary-centric registration system, which have significantly strengthened the integrity of the H-1B program. The modernization rule codifies long-standing USCIS practices, clarifies the definition of "specialty occupation," and reinforces the requirement that H-1B positions must be tied to a body of highly specialized knowledge acquired through a specific degree field. Simultaneously, the beneficiary-centric registration system ensures that each individual is entered into the lottery only once, regardless of how many employers submit registrations on their behalf. This reform directly addresses past concerns about system gaming and duplicate filings, making the process more equitable, more fraud-resistant, and more tightly focused on ensuring that the jobs at issue qualify as "specialty occupations." Moreover, employers are still required to pay the higher of the DOL prevailing wage or the actual wage paid to similarly

[25] *See* Comment by Michael Clemens, Jeremy Neufeld & Amy Nice to the U.S. Citizenship & Immigration Servs., proposed rule, *Modernizing H-1B Requirements and Oversight*, USCIS-2025-0040 (Oct. 23, 2025), https://www.regulations.gov/comment/USCIS-2025-0040-1681 (noting that reducing the talent pipeline in this manner "might reach an annual loss as compared to today of as much as $72–145 billion by ten years into the future") (citing Michael A. Clemens, Jeremy Neufeld & Amy M. Nice, *Brain Freeze: How International Student Exclusion Will Shape the STEM Workforce and Economic Growth in the United States* (Nat'l Acads. Press 2025), https://nap.nationalacademies.org/resource/29283/BrainFreeze_Working_Paper_Clemens-Neufeld-Nice.pdf).

[26] *Id.*

[27] *Id.* (demonstrating how the proposed rule "fails to meet minimal standards of quality demanded of economic analysis by qualified experts in cost-benefit analysis").

situated U.S. workers—an enforceable existing safeguard against the use of H-1B workers to undercut the wages of U.S. workers.

In addition to these recent reforms, the President issued a Proclamation seeking to impose a $100,000 surcharge on certain H-1B petitions for beneficiaries outside the United States. Although the Proclamation faces legal and implementation challenges, its stated goal is to impose a substantial enough surcharge such that it limits H-1B petitions to beneficiaries who are "very valuable to the company and America."

DHS should allow time to measure the impact of these recent changes on the H-1B program without further complicating it with a weighted registration that is neither going to achieve its stated goal, nor is necessary to enhance transparency, reduce abuse, or ensure that the H-1B program continues to serve its intended purpose of allowing American employers access to needed , attracting highly skilled talent.

Conclusion

We urge DHS to withdraw this proposed rule. In order to maintain our country's competitiveness, U.S. businesses across industries need flexibility and predictability in their talent pipeline. Access to early career professionals is key to driving innovation, fueling research, expanding economic growth, and remaining competitive.

Our concern is amplified by ongoing discussions around emerging obstacles in the international student process, such as by limiting or terminating the OPT program and expanding student visa monitoring under SEVIS. These overlapping policy pressures create significant uncertainty for both employers and the international graduates they seek to hire. By further narrowing access to H-1B opportunities, the proposed rule would compound these systemic challenges, discourage foreign enrollment in U.S. universities, and shift talent and innovation to competitor economies such as Canada, the U.K., and Australia.

As conceived, the wage prioritization framework in the proposed rule would greatly disrupt the talent pipeline for employers and should therefore be withdrawn and reconsidered.

Respectfully,

Center for Strategy and Applied Insights at Fragomen

Bo Cooper
Executive Director

Leah Rogal
Senior Director