December 18, 2023

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

Re: Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, CIS No. 2745-23 DHS Docket No. USCIS- 2023–0005, Proposed rule; NAFSA comment on the proposed rule

VIA: https://www.regulations.gov

Dear Mr. Nimick,

On behalf of NAFSA: Association of International Educators, thank you for the opportunity to comment on the proposed rule, Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers. Our 10,000 individual members located at virtually every U.S. higher education institution across all 50 states and the District of Columbia engage in the daily work of supporting international educational opportunities for students and scholars. As stated by the Departments of State and Education in their Joint Statement of Principles in Support of International Education the United States reaps significant benefits from attracting the best and brightest minds and the next generation of world leaders to America's educational institutions from strengthening our foreign policy and diplomatic efforts to contributing to the nation's economy and competitiveness to bolstering the educational experiences of domestic students. I applaud the necessary effort undertaken by USCIS to modernize the H-1B category and urge USCIS to adopt improvements based on the recommendations in this comment letter to maximize the benefits to the United States, provide necessary flexibility, and advance efficiency.

The proposed changes from F-1 to H-1B "cap-gap" are welcome.

NAFSA welcomes DHS's proposal to revise 8 CFR 214.2(f)(5)(vi)(A) to automatically extend F-1 "cap-gap" duration of status and optional practical training (OPT) and STEM OPT work authorization until April 1 of the fiscal year for which such H-1B status is being requested rather than only until October 1. We also welcome the proposal to apply "cap-gap" benefits to petitions that request an H-1B employment start date any time "in the fiscal year," rather than only to those requesting an October 1 start date. We agree that these changes will help avoid unnecessary disruptions in lawful status and employment authorization for F-1 students while a qualifying H-1B cap-subject petition is pending. This

is particularly important as there has been a second round of H-1B cap selections in August, offering a 90-day window to file an H-1B petition.
NAFSA applauds DHS for taking such actions that improve efficiency without compromising integrity and which are based on real-world realities such as the academic calendar and USCIS workload and processing times.

Beneficiary centric approach to the H-1B cap registration is the appropriate option.

NAFSA supports the beneficiary centric approach to the H-1B cap registration. This approach will benefit international students who have the opportunity to change their status to H-1B after completion of OPT because the proposed rule maintains the option for multiple employers to file on behalf of an international student while putting the decision of where to work in the hands of the international student. Like U.S. citizen students, international students often have multiple job offers after completing a higher education degree. International students selected for an H-1B should be granted the same opportunity to choose among job offers as U.S. citizens.

Address the F-1 60-day grace period in the cap-gap context.

NAFSA also believes that DHS should take the opportunity to directly address the F-1 60-day grace period in the cap-gap context. While we appreciate that DHS notes in the preamble that cap-gap students benefit from the standard 60-day F-1 "grace period" in these circumstances:

- "If the H-1B petition underlying the cap-gap extension is denied before April 1, then, consistent with existing USCIS practice, the F-1 beneficiary of the petition, as well as any F-2 dependents, would generally receive the standard F-1 grace period of 60 days to depart the United States or take other appropriate steps to maintain a lawful status." (88 FR 72887)

- "If the H-1B petition is still pending on April 1, then the beneficiary of the petition is no longer authorized for OPT and the 60-day grace period begins on April 1. The F-1 beneficiary may not work during the 60-day grace period." (88 FR 72887)

NAFSA asks DHS to include this in the regulatory language by adding a new paragraph (E) to 8 CFR 214.2(f)(5)(vi):

"(E) The F-1 beneficiary of the H-1B petition and any F-2 dependents will receive the standard 60-day period referenced in 8 CFR 214.2(f)(5)(iv) or 8 CFR 214.2(f)(10)(ii)(D) to depart the United States or take other appropriate steps to maintain a lawful status:

(i) commencing on the day of such denial, revocation, or withdrawal, if the H-1B petition underlying the cap-gap extension is denied, revoked, or withdrawn before April 1, or

(ii) commencing on April 1, if the H-1B petition underlying the cap-gap extension is still pending on April 1."

Eliminate unnecessary complexity and narrowness in the proposed changes to the definition of "specialty occupation".

DHS proposes committing to fixed regulatory language a series of policies derived from Administrative Appeals Office and federal court decisions. NAFSA believes that some of the proposed language unnecessarily complicates and narrows the definition of "specialty occupation." The current provision at 8 CFR 214.2(h)(4)(ii) defines "specialty occupation" as:

…an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The proposed rule would "call out" certain specialties to require in effect that they specify a specialty within a specialty, defining "specialty occupation" as:

an occupation that requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and that requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States. The required specialized studies must be directly related to the position. A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position. A position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields or each body of highly specialized knowledge is directly related to the position. (88 FR 72959 (emphasis added))

While we agree with DHS's comment in the preamble that a "position for which a bachelor's degree in any field is sufficient to qualify for the position, or for which a bachelor's degree in a wide variety of fields unrelated to the position is sufficient to qualify, would not be considered a specialty occupation," we disagree that degrees in business administration are not sufficiently specialized in themselves to constitute the basis for a specialty occupation if such a degree is required for entry into an occupation. Many universities have entire "schools" or "colleges" of business, and admission to their rigorous

degree programs, regardless of the sub-specialty focus within them, is extraordinarily competitive and even their core curricula are highly specialized. The same can be said for engineering curricula. For that matter, a degree in liberal arts may indeed be the exact specialty an employer could require for a position charged with developing a humanities data set for an artificial intelligence application.

Because of this, NAFSA urges DHS to delete from any final rule the following sentence: "A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position." (88 FR 72959) In any case, DHS should not call out certain fields of endeavor in regulatory language, as doing so casts an unwarranted chilling effect on students, schools, employers, and even on USCIS adjudicators.

Additionally, although we agree that in determining whether a position involves a specialty occupation logic dictates that the degree in question must be rationally related to the duties of the position, we believe that peppering the regulatory language with a requirement that the degree be "directly related" will insert unnecessary complexity into employers' use of the H-1B category and USCIS adjudicators' determinations and should be removed.

If any term is used, we believe the term "rationally related" is a better indicator than "directly related." This flexibility is needed particularly in today's fast-paced environment, where occupations that are obviously "specialties," like artificial intelligence (AI), are rapidly morphing and require comprehensive sets of expertise to be researched, developed, implemented, and marketed even before degrees, statutes, regulations, and government policy can adapt.

President Biden's recent Executive Order 14110, Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (November 1, 2023) directs DHS to "continue its rulemaking process to modernize the H-1B program and enhance its integrity and usage, including by experts in AI and other critical and emerging technologies," and to use its "discretionary authorities to support and attract foreign nationals with special skills in AI and other critical and emerging technologies seeking to work, study, or conduct research in the United States." Saddling the H-1B framework with a "direct relationship" requirement in the regulation will hinder AI initiatives like this as well as other initiatives needed now, and in the future, to ensure American competitiveness and security.

Change H-1B compliance verification of facts standard and home site visit requirement.

DHS proposes to add a new provision that would penalize an employer due to USCIS's "inability to verify facts." The provision describes the facts to be verified as "facts related to the adjudication of the petition." Given the complexity of the H-1B petition, this provision should specify that severe penalties such as denial or revocation of a petition due to USCIS's inability to verify facts be limited to inability to verify material facts rather than simply relevant facts. This standard provides needed limits to the scope of USCIS authority and is a wiser use of resources. To accomplish this revision, we suggest that

DHS make the following changes to the proposed language:

- At 8 CFR 214.2(h)(4)(i)(B)(2)(i), change: “to verify facts related to the adjudication of the petition and compliance with H-1B petition requirements” to “to verify material facts related to the adjudication of the petition and substantial compliance with H-1B petition requirements”

- At 8 CFR 214.2(h)(10)(ii), change: “were inaccurate” to “were materially inaccurate”

- At 8 CFR 214.2(h)(11)(iii)(A)(2), change: “inaccurate” to “materially inaccurate”

Finally, regarding site visits at the homes of H-1B workers who are teleworking or telecommuting should not be done without proper notice. H-1B petitioners or beneficiaries should not be subject to any adverse consequences or findings for not responding to an unanticipated “knock on the door.” In fact, DHS should not require beneficiaries to open their homes to a visit from a government official at all. Any needed verification could easily take place by DHS pre-arranging a live video interaction with the beneficiary instead.

The immigration system is in dire need of modernization. NAFSA supports the cap-gap provisions in the proposed rule that addresses the adjudication processing time for international students who seek to continue to contribute to the United States by remaining to work here in H-1B status. Updating and implementing efficiencies in the immigration process is necessary to continue to attract and retain the talented international students the United States needs and to create an immigration system that is worthy of this nation.

Thank you again for the opportunity to comment.

Sincerely,

[Signature Redacted]

Fanta Aw, PhD
Executive Director & CEO