ACEC
American Council of Engineering Companies

December 19, 2023

Ms. Ur M. Jaddou
Director
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue N.W.
Washington, D.C. 20529

RE: USCIS-2023-0005-0001

Dear Director Jaddou:

The American Council of Engineering Companies (ACEC) – the national voice of America's engineering industry – would like to share our comments on the notice of proposed rulemaking (NPRM) regarding modernization of the H-1B visa program.

Founded in 1906, ACEC is a national federation of 51 state and regional organizations representing more than 5,500 engineering firms and nearly 600,000 engineers, surveyors, architects, and other specialists nationwide. ACEC member firms drive the design of America's infrastructure and built environment.

Engineering firms need access to talented, highly skilled workers. Data from the Bureau of Labor Statistics shows that the engineering workforce is already at full employment. The ACEC Research Institute's analysis of the Infrastructure Investment and Jobs Act (IIJA) finds that we will need an additional 82,000 engineers and other professionals to deliver the projects funded under the new program. The Institute also highlighted concerns about capacity in a recent quarterly engineering business sentiment study when it reported that half of firms have turned down work specifically due to workforce shortages.

ACEC supports policies that grow the pool of engineers, such as expanded STEM education programs that are a long-term solution to the workforce needs of engineering firms. At the same time, we need to align the nation's immigration policies in a way that will enable firms to hire global talent when the pool of engineering graduates is not sufficient to meet growing demand.

As the data above indicate, there are not enough U.S. citizens to meet the workforce needs of engineering firms. ACEC member firms use Optional Practical Training (OPT),

H-1B visas, and employment-based green cards to supplement their workforce when qualified Americans are not available.

ACEC supports the proposed modifications of the H-1B visa lottery to become a beneficiary-centric selection system that would improve program integrity and address the problem of multiple entries in the lottery for the same individual. As we discussed in our letter to President Biden on April 20, 2023:

> The electronic registration process that was started in 2020 has important benefits for employers. However, we have also seen a sharp increase in the number of registrations, and it appears that some individuals are being entered in the lottery multiple times by separate companies. Although we expect that there will continue to be more registrations than available visas, prohibiting multiple entries in the lottery for the same individual would better align the lottery process with the number of H-1B visas.

USCIS notes in the proposed rule that 36.5% of registrations for FY23 were for individuals with multiple registrations in the lottery. In addition, over 9,000 individuals had 5 or more registrations in the lottery, including one individual with 83 registrations.

The proposal would allow an individual to have multiple entries in the lottery to account for legitimate job offers from more than one employer but would only weight that individual once in the lottery. This change would restore the intent of the system that only employers with legitimate jobs should register an individual in the H-1B visa lottery.

The proposed rule also takes several steps to mitigate fraud, including barring multiple registrations by related entities, potentially denying registrations with false information, and ensuring that there is a bona fide job offer to work in the United States as of the requested start date. ACEC agrees that, in addition to the beneficiary-centric selection system, these changes would add to the integrity of the H-1B visa system.

ACEC also supports the proposed automatic extension of authorized employment (commonly referred to as cap-gap authorization) for students employed through OPT whose employer has filed an H-1B petition. The earliest date an employer can file an H-1B petition and change of status is April 1, and if the H-1B petition is granted that change of status would take effect on October 1. Many students complete their OPT in spring or summer and then would experience a gap in work authorization until October 1; without cap-gap authorization, these students have 60 days to leave the country.

It has been the practice of DHS to extend employment authorization in these circumstances until October 1. The proposed rule would make this cap-gap authorization automatic and further extend it until April 1. ACEC agrees with DHS that automatic cap-gap authorization for a full year would help avoid disruptions in employment in the case of any delays in adjudication of H-1B petitions. The certainty provided by this proposal would be beneficial to employers and employees.

The proposed rule would codify the existing policy of deference to prior determinations when there are no material changes in circumstances or eligibility in a petition for H-1B visa renewal. ACEC supports codifying the deference policy because it provides certainty to employers and reduces the need for extensive requests for evidence (RFEs) when the facts of the H-1B petition have not changed.

The proposed rule also includes a series of provisions designed to ensure that there is a bona fide job offer for a specialty occupation position. ACEC agrees that it is essential to the integrity of the H-1B visa program that applicants are offered actual jobs and not speculative employment.

At the same time, we want to ensure that USCIS is aware of legitimate business reasons integral to infrastructure design for employees – whether they are U.S. citizens, permanent residents, or H-1B visa holders – to work at a client site. For example, one ACEC member firm described their work as the engineer of record for a transit line project in a major U.S. city. The complexity of the project makes it more efficient and effective for the engineers, contractors, and client to sit together to complete the work. The work of the engineer is dependent upon the work of other contractors on the project and there are better outcomes if the entire team can be together. Other projects may be less complex but the client may still require the engineer of record to sit on site so that they have access to the engineering team for any questions.

It is important to note that it is typically a contractual obligation for the engineering firm to operate at the client site and not a choice. ACEC asks USCIS to contemplate these legitimate business reasons for employees, including H-1B visa holders, to work at a client site before it issues time-consuming RFEs to the employer.

Finally, ACEC wants to take this opportunity to reiterate two additional priorities that we put forward in our April letter to President Biden. Although they are outside the scope of this proposed rule, we hope USCIS will consider them for future rulemakings.

Modify Material Change Amendment Requirements. Filing amended petitions with USCIS is very expensive and time consuming for U.S. employers. Currently, a change in worksite location (outside the already approved metro area) or a minor reduction in hours is deemed a material change requiring an amendment to be filed with USCIS.

Regulations could provide that when an employer files a new LCA with DOL for a new worksite outside the previously approved metro area, where all other pertinent data remain the same, including the job title, job description, and standard occupational classification, an H-1B amendment petition need not be filed with USCIS. USCIS does not certify or confirm prevailing wage, therefore, USCIS's review of such amendment petitions is minimal, and arguably unnecessary. Similarly, a minor reduction in hours can trigger the need for filing a new LCA and amended H-1B petition with USCIS. Regulations could be amended to provide greater "tolerance," perhaps of a certain percentage, that would not trigger the need for new filings in the case of a minor reduction in hours.

Specialty Occupation Guidance for Engineers. In an effort to reduce costs (both monetary and time) associated with unnecessary RFEs, we recommend USCIS issue guidance confirming that any engineering degree will support any engineering position to meet the definition of specialty occupation. RFEs questioning the ties among various engineering major fields are counterproductive, expensive, and may ultimately lead to U.S. employers not finding the talent they require. U.S. employers of engineers know the requirements for the roles they seek to fill, and they are clearly specialty occupations – individuals with degrees in unrelated fields (such as literature, history, sociology, etc.) will not qualify.

ACEC appreciates the work USCIS has done to propose these modernizations and improvements to the H-1B visa process. Thank you for your consideration and please let us know how we can assist in this matter.

Sincerely,

Linda Bauer Darr
President & CEO