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American Council of Engineering Companies

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The Honorable Kristi Noem
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

The Honorable Joseph B. Edlow
Director
U.S. Citizenship and Immigration Services
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: "Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject H-1B Petitions" (USCIS-2025-0040-0001)

Dear Secretary Noem and Director Edlow:

The American Council of Engineering Companies ("ACEC") submits this letter in response to the Department of Homeland Security's ("DHS" or "the Department") Notice of Proposed Rulemaking, "Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject H-1B Petitions," published in the Federal Register on September 24, 2025 ("NPRM").

Founded in 1906, ACEC is a national federation of 51 state and regional organizations representing more than 5,500 engineering firms and over 600,000 engineers, surveyors, architects, and other specialists nationwide. ACEC member firms drive the design of America's infrastructure and built environment, including roads, bridges, water and wastewater systems, energy, aviation, commercial buildings, and data centers. According to the ACEC Research Institute, the engineering industry contributed $685 billion to U.S. GDP in 2024, including $262

billion in direct value added and $423 billion from supply chain and household spending impacts.[1]

The proposed rule seeks to overhaul the U.S. Citizenship and Immigration Services ("USCIS") selection process for registrations for H-1B cap-subject petitions by transitioning away from a random selection process ("the lottery") to a weighted system that favors petitions with a higher prevailing wage level. Under the proposed rule, each H-1B registration would be assigned a number of entries into the H-1B selection pool based on Department of Labor Occupational Employment and Wage Statistics (OEWS) wage levels, with a Level IV receiving four entries and a Level I receiving one entry. While each beneficiary would still only be selected once, the odds of selection would heavily favor more senior roles.

The proposed rule creates a significant bias that favors occupations where employers can more easily reach Wage Levels III and IV. These employers are more likely to be large multinational technology corporations. By contrast, engineers, surveyors, and architects are more likely to have their wages grouped at Levels I or II, as the NPRM itself acknowledges.

The Department should refrain from finalizing the proposed rule. Not only will the proposed rule lead to adverse outcomes for ACEC's member firms and their ability to support the growing need for critical American infrastructure, but it also undermines Congress's intent that the H-1B visa program address labor shortages across a variety of industries, including engineering. Congress has not given the Department authorization to eliminate the lottery system and replace it with a weighted system, or to prioritize certain industries or wage levels over others. The Department's interpretation of the Immigration and Nationality Act (the "INA") is not afforded deference, and its interpretation runs counter to the express wording of the statute. Terminating or modifying the lottery system is a question of economic importance that only Congress can decide. Finally, the proposed rule is arbitrary and capricious, harming an engineering industry largely composed of small businesses that is vital to U.S. national security and economic growth.

I. BACKGROUND

Among ACEC's member firms, 75 percent have 50 or fewer employees and only 10 percent have more than 100 employees, thus making many of ACEC's members small businesses under applicable definitions. These small and mid-size engineering firms face the same workforce shortages as larger member firms.

According to the ACEC Research Institute engineering business sentiment survey for the third quarter of 2025, 89 percent of firms have at least one job opening, with the median number of

[1] ACEC Research Institute, *2025 Economic Impact of the Engineering and Design Services Industry* (https://www.acec.org/resource/2025-economic-assessment-forecast/?yokoSso=BkNXVsUT09)

open positions being five.[2] According to the Bureau of Labor Statistics, the median salary for a civil engineer in 2024 was almost $100,000, and ACEC members offer excellent benefits as well as highly competitive salaries.[3]

There are around half a million H-1B workers in the United States and about forty thousand of them work in architecture, engineering, and surveying.[4] As the law requires, ACEC members seek to hire qualified Americans before turning to tools such as H-1B visas. When ACEC member firms employ an H-1B visa holder, they comply fully with the law and pay the required compensation for that position. Because of the critical shortage of engineers in this country, H-1B and other employment-based visa programs allow engineering firms to pursue their vital work of building the nation's infrastructure and safeguarding national security when Americans are not available to fill these jobs.

II. ACEC'S COMMENTS ON THE PROPOSED RULEMAKING

A. Congress already carefully designed the H-1B program to both attract highly skilled workers *and* protect U.S. workers.

Congress established the H-1B visa program to allow American employers to hire non-U.S. workers in specialty occupations to fill labor shortages in specialized fields.[5] This statutory scheme has been repeatedly modified and changed by Congress over the last 35 years to balance two goals: (1) to attract highly skilled workers to the United States to fill labor shortages, and (2) protect American workers from depressed wages, hiring discrimination, and exploitation. The INA sets forth a comprehensive and detailed scheme for the H-1B visa program.

Congress has specified qualitative and quantitative limits on the number of H-1B visas granted. A "specialty occupation" "requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor," such as architecture and engineering.[6] The occupation must require a bachelor's degree or higher degree in a directly related specific specialty as a minimum for entry.[7] Congress established a statutory cap on the number of H-1B visas available per fiscal year: 65,000 H-1B visas and an additional 20,000 H-1B visas only available to individuals who have earned a master's degree or higher from a U.S. higher learning

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[2] ACEC Research Institute, *Engineering Business Sentiment Q3 2025* (https://www.acec.org/wp-content/uploads/2025/09/ACEC-Research-Institute-Engineering-Business-Sentiment-Q3-2025-Final.pdf)
[3] U.S. Bureau of Labor Statistics, *Civil Engineers*, Aug, 28, 2025 (https://www.bls.gov/ooh/architecture-and-engineering/civil-engineers.htm).
[4] Maham Javaid & Adrian Blanco Ramos, *Where H1-B visa holders are from, who hires them, and what they earn*, Wash. Post (Sept. 24, 2025), https://perma.cc/4YEH-DGLY.
[5] 144 Cong. Rec. S10877 (daily ed. Sept. 24, 1998); 8 U.S.C. § 1101(a)(15)(H)(i)(b1); 8 C.F.R. § 214.2(h)(1)(i).
[6] 8 C.F.R. § 214.2(h)(4)(ii); 8 U.S.C. § 1184(i)(1).
[7] *Id.*

institution.[8] An employer of an H-1B worker must pay either the higher of (1) the actual wage the employer already pays to similar workers in that occupation, or (2) the prevailing wage for the occupation in the geographic area of intended employment.[9]

The prevailing wage is just one of the anti-discrimination provisions Congress has enacted. Congress has also provided that the Department of Labor must certify that the hiring of an H-1B worker has not adversely affected the working conditions of similarly employed U.S. workers.[10] Likewise, an employer may not bring in H-1B workers during a strike or lockout[11] or discriminate against U.S. workers based on citizenship status.[12] Finally, Congress has explicitly provided that employers may not displace U.S. workers in order to bring on H-1B workers.[13] Congress has set forth standards for addressing employer fraud and abuse in the H-1B program. Noncompliant employers can face orders to pay back wages, the imposition of civil monetary fines, and debarment.[14] A debarred employer will not receive approval for future H-1B petitions and other employment-based visa petitions.[15] The executive branch has frequently enforced these antifraud and antidiscrimination requirements. For example, earlier this fall, the Department of Labor announced the launch of H-1B enforcement initiative "Project Firewall." Through this project, the Department will conduct Secretary-certified investigations of employers.[16]

Congress has also specified the standards for approving an H-1B petition and fees charged to petitioning employers. To petition for H-1B status, an employer must register the prospective employees in an annual lottery.[17] USCIS then performs a computer-generated lottery selection and notifies the lottery "winners" that they are eligible to file their H-1B petition.[18] Next, the employer must submit a Labor Condition Application to the Department of Labor and attest that it will follow the wage and working condition requirements.[19] Upon the Department of Labor's certification, the employer must file a Form I-129 petition with USCIS to classify the prospective employee as an H-1B nonimmigrant.[20] Congress has limited the fees that the Department of Homeland Security may charge for adjudication of H-1B petitions: "fees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services . . . Such fees may also be set at a level that will recover any

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[8] 8 U.S.C. § 1184(g)(1)(A)(vii), (5)(C).
[9] *Id.* § 1182(t)(1)(A)(i); 20 C.F.R. § 655.731(a).
[10] 8 U.S.C. §§ 1101(a)(15)(H)(i)(B), 1182(t)(1)(A)(ii).
[11] 8 U.S.C. § 1182(t)(1)(C); 20 C.F.R. § 655.733.
[12] 8 U.S.C. § 1324b(a)(1).
[13] *See* 8 U.S.C. § 1182(n)(3)(A), 1182(n)(1)(E)-(F); 20 C.F.R. § 655.736(a), 655.738(c)-(d).
[14] 8 U.S.C. § 1182(n)(2); 20 C.F.R. § 655.810.
[15] 8 U.S.C. § 1182(n)(2)(c); 20 C.F.R. § 655.810(d).
[16] US Department of Labor launches Project Firewall to protect America's highly skilled workforce, Sept. 19, 2025 (https://www.dol.gov/newsroom/releases/osec/osec20250919).
[17] 8 C.F.R. § 214.2(h)(8)(iii).
[18] *Id.* § 214.2(h)(8)(iii).
[19] 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.730.
[20] *See* 6 U.S.C. § 271(b)(5); 8 U.S.C. § 1184(c)(1); 8 C.F.R. §§ 103.2(a)(1); 214.2(h)(l)(i), (2)(i)(A).

additional costs associated with the administration of fees collected."[21] The adjudication fees are historically discounted for small employers with twenty-five or fewer full-time employees.[22] The full amount of regulatory and statutory fees that an employer would have to pay without any discount is $7,595.[23]

B. The H-1B visa program is essential to building the nation's infrastructure, promoting economic growth, and safeguarding national security.

Because of the critical shortage of engineers in this country, H-1B and other employment-based visa programs allow engineering firms to pursue their vital work of building the nation's infrastructure and safeguarding national security when American citizens are not available to fill these jobs. According to both the American Society for Engineering Education and the National Center for Education Statistics, the number of civil, mechanical, and electrical engineering graduates has declined in recent years. For example, in 2019, there were nearly 214,000 total engineering graduates in the U.S., about 11,000 more than in 2022.[24] This challenge is exacerbated by the fact that nearly 26 percent of A/E/C workers are over the age of 55 and nearing retirement according to the ACEC Research Institute.[25] It is also important to note that many other industries, such as tech and manufacturing, compete for the same declining number of engineering graduates.

ACEC is responding to this challenge in several ways. Our Workforce Committee created tools for our state organizations and member firms as they engage with local schools and universities to expand interest in engineering careers. ACEC joined with the American Society of Civil Engineers and the American Public Works Association to lead the Engineering Workforce Consortium, which brings together members from government, industry, and academia to pool resources and amplify the need to expand the STEM workforce. Finally, ACEC collaborates with other organizations and our member firms to offer nearly one million dollars in engineering and land surveying scholarships to college students annually.

Many engineering firms work for governmental clients including federal agencies, state departments of transportation and municipal water agencies and thus must work within the allowable compensation structures established by the government for public infrastructure work. These public compensation structures as well as the engineering firms' own financial capacities limit the firms' ability to offer higher wages to prospective U.S. workers as well as prospective H-1B workers.

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[21] 8 U.S.C. § 1356(m).
[22] 8 C.F.R. § 106.2(a)(3), (c)(13).
[23] *See* 8 C.F.R. § 106.2(a)(3), (c)(11), (c)(13); 8 U.S.C. § 1184(c)(9)-(14); 8 C.F.R. § 106.2(c)(8).
[24] ACEC Research Institute, *Engineering the Future Workforce: Balancing Supply, Experience, and Expectation*.
[25] ACEC Research Institute, *Engineering the Future Workforce: Balancing Supply, Experience, and Expectation*.

For example, one of ACEC's member firms is a 70-person engineering firm. This firm pointed out that hiring talent under the H-1B visa program is already complicated and costly to an employer. Those factors make it a difficult path to fill staffing needs, but it is an important option. In the last three years, this firm sponsored two H-1B applicants, not because they wanted to, but because no American engineers applied for positions that required specific technical skills.

The proposed rule will further reduce an already limited candidate pool of engineers and lengthen the time it takes to hire. Most engineering firms report that their most successful recruitment occurs through partnerships with the engineering programs at colleges and universities, from which they draw paid interns. These interns or co-op students often continue working for the firm once they graduate, and firms use H-1B visas to keep international engineering graduates on their team. The inability to fill workforce gaps with tools such as H-1B visas will create a cascading effect of added pressure on existing staff, leading to burnout and retention challenges.

American infrastructure networks such as the electric grid, bridges, drinking water pipes, and hazardous waste systems have been deteriorating for decades with devastating economic impacts. By 2039, without safe and reliable infrastructure networks, the U.S. GDP is expected to lose over $10 trillion, Americans will lose $9 trillion in disposable income, and 3 million jobs will be lost.[26]

With gaps in their workforce, engineering firms will not be able to serve as many clients and meet growing infrastructure design needs. Smaller municipalities may have a harder time accessing engineering services and their residents will face longer waiting periods for vital infrastructure improvements such as repairs to failing bridges and upgrades to drinking water systems. Restricting the ability of engineering firms to do their critical work of protecting the public through infrastructure design will also impact national security. Many ACEC member firms work directly for agencies such as the U.S. Army Corps of Engineers and support their vital work of designing and maintaining levees. Safe, viable infrastructure is essential to the global competitiveness of the American economy.

C. The proposed rule is unlawful and contrary to Congressional intent.

The Department should refrain from finalizing the proposal, not only for the sound policy reasons outlined above, but also because the proposed rule is contrary to law. Policy judgments

[26] Emily Feenstra, *America's Aging Infrastructure Needs Our Support*, Harvard Advanced Leadership Initiative Social Impact Review, Jun. 30, 2021 (https://www.sir.advancedleadership.harvard.edu/articles/americas-aging-infrastructure-needs-our-support).

not rooted in statutory language cannot form the basis of agency action.[27] Congress has not delegated authority to the Department to implement a wage-weighted selection process in place of the H-1B lottery system. The Department's interpretation of the INA is not afforded deference. Moreover, termination of the lottery system is a question of political and economic importance under the Major Questions Doctrine, so only Congress can decide to terminate it.

First, the INA clearly provides for the selection process of H-1B applicants: "aliens who are subject to the numerical limitations . . . shall be issued visas (or otherwise provided nonimmigrant status) *in the order in which petitions are filed* for such visas or status."[28] The proposed rule would allocate H-1B cap petitions based on wages and not "the order in which [they] are filed."[29] The proposed rule therefore directly contradicts the INA's plain meaning and statutory mandate, and the Department's contrary interpretation of the INA is not afforded deference. As an initial matter, the statute is clear and it precludes the approach set forth in the proposed rule, as it prescribes a plainly contrary approach that the Department must take does not even satisfy the remaining step of *Chevron*, let alone the less deferential standard set forth by *Loper Bright*. But even if there was any ambiguity after applying the traditional tools of statutory construction, courts no longer give deference to an agency's interpretation of its own regulatory authority.[30] Instead, courts may only consider the agency's views for its persuasive value, which depends on the following factors: (1) the thoroughness of the agency's consideration, (2) the validity of the agency's reasoning, and (3) the consistency of the agency's interpretation with earlier and later pronouncements.[31] The Department argues that the proposed rule is a permissible gap-filling measure because the statute does not define what it means to "file" a petition or how to order petitions that are filed during the same time frame. Courts routinely use standard dictionary definitions to uncover a statute's plain and commonly understood meaning. It is plainly understood that "to file" simply means "to submit" or to "deposit something in an organized retention system."[32] Because there is no ambiguity here, there is no need for the Department to fill in gaps or interpret the statute. The plain language of the statute controls, and the statute does not provide any other method for allocating or processing H-1B petitions. In fact, the Department had previously admitted that "selection on other factors, such as salary, would require statutory changes."[33] This inconsistency weighs against the Department's interpretation of the INA.

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[27] *Massachusetts v. EPA*, 549 U.S. 497 (2007).
[28] 8 U.S.C. § 1184(G)(3) (emphasis added).
[29] *Id.*
[30] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).
[31] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
[32] File Definition, *Black's Law Dictionary* (12th ed. 2024), *available at* Westlaw.
[33] *Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens*, 84 Fed. Reg. 888, 914 (Jan. 31, 2019).

Not only is Congress's authority over this issue rooted in the INA as a plain textual matter, but the Major Questions Doctrine serves as an additional defense against the proposed changes to the H-1B program. The Supreme Court has consistently held that on certain matters of "economic and political significance," agencies can act only with "clear congressional authorization."[34] For example, in 2023 the Supreme Court struck down the Biden administration's federal student loan debt forgiveness program, holding that the Secretary of Education did not have the power to waive student loans under the HEROES Act.[35] This holding relied on, in part, the "staggering" economic and political significance of the program, because "a decision of such magnitude and consequence" must "res[t] with Congress itself."[36] Here, the economic significance of these proposed changes is clear. In the proposed rule, the Department acknowledges that the proposed rule "would result in a significant impact on 5,193 small entities"[37] and that the total annual cost of the proposed rule would be $30 million for fiscal year 2026 through fiscal year 2035.[38]

Finally, Congress has made it clear that it is the sole branch of government with the authority to terminate the lottery. On September 29, 2025, Senators Grassley and Durbin introduced bipartisan legislation to reform the H-1B visa program.[39] The proposed legislation would authorize the Department to process H-1B petitions based on proposed wages, which is exactly what the Department is trying to achieve through this rulemaking.[40] Notably, this bill was introduced four days after the Department the proposed rule at issue here. If Congress thought that the Department could implement these changes to the H-1B program on its own, it would not legislate on the identical issue.

D. Even if the Department had the requisite legal authority, the proposed rule is arbitrary and capricious.

Even if the Department had legal authority to implement the wage weighted system (which it does not), the Department's proposed rule would constitute an arbitrary and capricious exercise of that authority. As detailed extensively above, the Department's consideration has not been thorough. The Department has not mitigated the harm that terminating the program will do to employers such as ACEC's member firms and consequently on American infrastructure, national security, and economic growth. Rather, the Department's decision is arbitrary and capricious.

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[34] *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022).
[35] *Biden v. Nebraska*, 600 U.S. 477 (2023).
[36] *Id.* at 504 (cleaned up).
[37] 90 Fed. Reg. 45986 at 46016 (Sept. 24, 2025).
[38] *Id.* at 45996.
[39] U.S. Senate Committee on the Judiciary, *Grassley, Durbin Propose Bipartisan H-1B and L-1 Visa Reforms to Protect American Workers and Stop Outsourcing Jobs*, Sept. 29, 2025 (https://www.judiciary.senate.gov/press/rep/releases/grassley-durbin-propose-bipartisan-h-1b-and-l-1-visa-reforms-to-protect-american-workers-and-stop-outsourcing-jobs).
[40] Sandrine Dehaeze and Christina M. Gonzaga, *H-1B and L-1 Visa Reforms bill reintroduced in the Senate*, Clark Hill, Oct. 7, 2025 (https://www.clarkhill.com/news-events/news/h-1b-l-1-visa-reforms-bill-reintroduced-in-senate/).

The proposed rule acknowledges that it "would reduce the number of selected H-1B registrations for Civil Engineers and Architects by up to 48 percent."[41] The fact that the proposed rule concedes a significant impact on the engineering field without comprehensive economic analysis and an assessment of the impacts of likely labor shortages on infrastructure and national security, is the quintessence of arbitrary and capricious agency action. Furthermore, ACEC member firms rely on the H-1B program to pursue their vital work of building the nation's infrastructure and safeguarding national security when Americans are not available to fill these jobs. The Department must "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account"[42] and that it "would be arbitrary and capricious to ignore such matters."[43]

Furthermore, the Department contends that the proposed rule "would better ensure that the H-1B cap selection process favors relatively higher-skilled, higher-valued, or higher-paid foreign workers rather than continuing to allow numerically-limited cap numbers to be allocated predominantly to workers in lower skilled or lowed paid positions."[44] However, the Department does not offer a rational explanation how wages alone accurately reflect a worker's skill or value. Even if it were to offer such an explanation, Congress designed the H-1B visa for high-skilled "specialty occupation" workers at all compensation levels. While wages can provide a measure of a worker's market value, wages to a particular employer or even in a particular market are not necessarily indicative of that worker's value to the United States' interests. To understand a worker's value to American interests, the Department must also consider the relative importance of industries, such as critical infrastructure, where there is labor scarcity. As outlined above, the work carried out by ACEC's member firms is essential to American infrastructure and national security, proving that wages are not commensurate with value.

For the foregoing reasons, the Department's proposed rule is without legal authority, contrary to law, and is arbitrary and capricious.

III. CONCLUSION

Thank you for your consideration of this important matter to ACEC and its member firms. The proposed rule will practically shut ACEC's member firms out of the H-1B program, exacerbating

[41] 90 Fed. Reg. 45986 at 46008 (Sept. 24, 2025).
[42] *Encino Motorcars LLC v. Navarro*, 579 U.S. 211, 212 (2016).
[43] *FCC v. Fox Television Studios*, 556 U.S. 502, 515 (2009).
[44] 90 Fed. Reg. 45986 at 45990 (Sept. 24, 2025).

our member firms' difficulty in finding enough engineers to build America's infrastructure. ACEC appreciates the opportunity to comment on the proposed rulemaking and requests for the reasons outlined above that the department refrain from finalizing it.

Sincerely,

Linda Bauer Darr
President & CEO
American Council of Engineering Companies