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Re: Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, DHS Docket No. USCIS- 2023-0005, RIN 1615-AC70

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation—many founded and led by immigrants—to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. Immigrant entrepreneurs and talent play a critical role in the U.S. startup ecosystem. The statistics regarding successful U.S. startups are impressive—55 percent of unicorn startups are founded or co-founded by at least one immigrant.¹ And as the role of artificial intelligence companies only increases in importance, 65 percent of U.S. based AI companies are founded or co-founded by immigrants.² In short, immigrants are using their skills to solve global problems at U.S.-based companies daily.

But the U.S. does not make it easy for immigrant talent to lend their skills to the country's innovation ecosystem. While we have made some effort to retain foreign STEM graduates of U.S. universities,³ the simple truth is that we need more immigrant talent to meet the needs of our innovation ecosystem, particularly in light of the passage of the CHIPS and Science Act.⁴ And, we do not have enough pathways, like graduation greencards for foreign STEM graduates⁵ or an adequate amount of H-1B visas to follow the Optional Practical Training Program (OPT), to allow this talent to stay. And stories

¹ Steven I. Weiss, *More than Half of America's Unicorns have Immigrant Founders, Inc.*, <https://www.inc.com/steven-i-weiss/immigrant-unicorns.html>.

² Stuart Anderson, *65% of Top AI Companies have Immigrant Founders*, Forbes (July 9, 2023), <https://www.forbes.com/sites/stuartanderson/2023/07/09/65-of-top-ai-companies-have-immigrant-founders/?sh=1c0eb018339d>.

³ Suzanne Monyak, *U.S. Expands Work Program to Retain More Foreign STEM Students* (Jan. 24, 2022), <https://rollcall.com/2022/01/24/us-expands-work-program-to-retain-more-foreign-stem-students/>.

⁴ Proposed Rule: Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, 88 FR 72870 (proposed Oct. 23, 2023).

⁵ John R. Dearie, *The CHIP Act's Next-Generation Ambitions Require a Modern Workforce* (Jan. 4, 2023), <https://thehill.com/opinion/technology/3798576-the-chip-acts-next-generation-ambitions-require-a-modern-workforce/>.

from startups bear this out. As Andre Wegner, CEO and Founder of Philadelphia, PA-based startup, Authentise told us:⁶

The U.S. visa process stops us from bringing people onto our U.S. payroll and growing our company, full stop. For example, we were trying to hire a prospective employee who is an Indian citizen that graduated from the University of Pennsylvania. He applied for his H-1B visa three times and was repeatedly denied. We had already gone through the few months-long process to get the license to apply for visas in the UK. So instead, we decided to employ him in the UK and were able to get his employment visa in just a week.

If I had just devoted multiple years of my life in a country for my education and then was denied a visa for three separate applications, I know I would feel ready to leave and take my skills elsewhere. We want to have core teams that can work collaboratively, but to have that, you need a certain number of people working in the same place. Because of the challenges we have faced in obtaining work visas in the U.S., we dropped from 15 to six employees in the country, while our UK headcount has increased from zero to 14. Authentise was founded in the U.S. and was entirely based in the U.S. until a few years ago.

And for founders, the pathways are even more limiting. While many founders are able to pursue O-1 visas, it may be challenging, particularly for immigrants from underserved backgrounds, to meet the criteria, like securing awards or having work published. And though the Biden Administration must be commended for implementation of the International Entrepreneur Rule, the parole program (IEP) does not appear to have received enough support to be successful. It is reported that only a small number of cases have been filed for entrepreneurs, with one practitioner signaling she has not had success in securing IEP parole for founders she has worked with.⁷ Moreover, thus far the program appears to have a significant processing timeline—upwards of a year or more—which isn't attractive to startup founders who need to be nimble to see success. And ultimately, IEP is a temporary solution for founders in search of permanency as they grow their companies—a dedicated startup visa is still needed.

The U.S. may still be the prime destination for skilled talent and startup founders from across the globe, but that position is far from guaranteed as other countries seek to lure top talent away from the U.S., capitalizing on issues in our immigration system. And founders are grappling with setting up offices abroad, offshoring employees, or moving altogether. And many startups simply do not have the resources to pursue H-1B visas for needed talent. Rishi Ranjan, Founder and CEO of Mountain View, CA-based startup GridRaster told us:⁸

⁶ Ian Rutledge, *#StartupsEverywhere Profile: Andre Wegner, CEO & Founder, Authentise*, Engine (Nov. 5, 2021), <https://www.engine.is/news/startupseverywhere-philadelphia-pa-authentise>.

⁷ Zoya Hasan, *Is the Administration's Entrepreneur Rule Shortchanging the American Dream?*, Inc (April 20, 2023), <https://www.inc.com/zoya-hasan/-is-the-administrations-entrepreneur-rule-shortchanging-the-american-dream.html>.

⁸ Porter Enstrom, *#StartupsEverywhere profile: Rishi Ranjan, Founder & CEO, GridRaster*, Engine (July 2, 2021), <https://www.engine.is/news/startupseverywhere-mountainview-ca-gridraster>.

We are seeing the same challenges with GridRaster because we do cutting-edge research on computer vision, deep learning, AR, and VR. We have some very good talent, but we have not been able to secure H-1B visas for everyone. One of our employees has an M.S. and is critical to our research and development efforts, but their OPT visa expires early next year. We are extremely worried that we will not be able to keep that person on board. We could open an office outside of the U.S. but these team members don't want to leave because they have great opportunities here—that's why people come. A lot of our customers are in defense or aerospace, so apart from hurting the company, this challenge also hurts the country that we serve. We train these people, who spend five or 10 years earning a Ph.D., and then we lose them... The ability of many immigrants to stay in the U.S. really depends on a company's resources. It's a huge struggle for people who are trying to really contribute, especially to startups.

And despite dozens of countries enacting some form of an entrepreneur or innovator visa, the U.S. still lacks a dedicated startup visa. We also lack streamlined, permanent pathways for top STEM talent educated in the U.S. And countries like Canada are actively luring founders and tech workers away from the U.S., advertising on billboards in Silicon Valley.⁹ For the future of the vibrancy of our innovation ecosystem, it is critical the administration (and Congress) act to reform our skilled immigration pathways.

We are pleased USCIS is dedicating time to exploring how to improve the H-1B visa process and pathways for startup talent. With respect to the proposed rule, some provisions represent wins for the innovation ecosystem, while others are unnecessary and could pose a threat to the already-too-small talent pool in the U.S. An analysis of the impacts of segments of the proposed rule follows:

I. Affirming and expanding pathways for foreign startup founders would bolster the startup ecosystem and expand U.S. innovation

As previously mentioned, the U.S. may fall behind many of its competitors because we lack a dedicated startup visa. While some visa and parole pathways exist for founders, these can have lengthy application timelines and complex requirements and are not a one-size fits all approach for foreign founders seeking to launch and grow companies in the U.S. Engine welcomes the proposed rule's efforts to acknowledge the contributions of immigrant founders to this ecosystem and the approach taken under the proposed rule to help beneficiary-controlled businesses to participate in the H-1B program.

Easing barriers for foreign founders to come to the U.S. and launch and grow startups is a net positive. As mentioned, the majority of billion dollar startups have at least one immigrant founder. These companies generate trillions of dollars in revenue and create thousands of U.S. based jobs, strengthening our economy and our communities. While Engine is still broadly supportive of a startup visa, clarifying that founders with controlling ownership and/or voting power over their companies

⁹ Chris Powell, *Path to Canada Targets Tech Workers in the U.S. with Billboard Campaign* (May 10, 2022), <https://the-message.ca/2022/05/10/path-to-canada-targets-tech-workers-in-the-u-s-with-billboard-campaign/>.

(beneficiary-owners) are eligible for H-1Bs, without ceding that control, and encouraging beneficiary-controlled businesses to participate in the program, would represent a solid step in supporting more pathways for foreign founders to launch and grow their companies in the U.S. That being said, USCIS should consider easing pathways, via the H-1B program or other programs, for startup founders/owners that do not have a controlling interest in their companies to come to and remain in the U.S. and grow their companies. As startups seek outside funding and expand, founders often relinquish equity in their businesses—often through securing venture capital investment. Growing their businesses is the goal, and many of these companies become significant job creators. Facilitating pathways only for those with controlling ownership of their startups may force founders to decide between expansion, which often comes with relinquishing majority ownership, or retaining equity for visa purposes, which could ultimately limit companies' contribution to the U.S. economy and job market.

Of critical importance is the proposed provision to allow founders to engage in other activities outside of the direct scope of their specialty occupation. Startups often have significant capital needs—hiring, product development, research and development—these things are all costly and often require outside sources of capital, like venture capital and angel investment. Allowing beneficiaries to perform other duties that fall outside of the scope of their 'specialty occupation' is critical for founders and would enable them to engage in the other aspects inherent to building a startup, like seeking out investors.

Though the provisions regarding beneficiary-owners and their company's participation in the H-1B program are positive, limitation of the initial visa length and first renewal of 18 months is far too restrictive. The standard H-1B visa length is three years. In support of the changes and clarifications made with respect to beneficiary-owners, USCIS details the benefits of attracting foreign entrepreneurs to the U.S., but then takes the unfortunate position that initial visa terms should be limited due to concerns about fraud, though the proposed rule also includes changes to the lottery process to crack down on fraudulent petitions.

Launching and growing a startup requires significant time and capital. It may take years for a startup to turn a profit—certainly often more than 18 months. Navigating the complexities of growing an early-stage startup—raising investment, R&D, building a product—while having to repeatedly renavigate the immigration system (including its costs) is a significant burden for founders and their companies—who should be rightfully focused on building a company that contributes to the U.S. economy and job growth. Immigrant founders already face added challenges in the U.S. startup ecosystem—in part because investors may feel more confident when immigrant founders have security in their immigration status.¹⁰ Requiring more frequent H-1B renewals, at least initially, is not clearly necessary and could ultimately be harmful for founders, especially as they try to secure investors, and in terms of cost. Particularly as the administration has indicated support for founders to have lengthier

¹⁰ Engine, *Immigrant Founder Roundtable: What We Heard* (Feb. 2023), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/645a543d825dd571f198a823/1683641406045/Innovation+for+All+_+Immigrant+Startup+Leaders+Roundtable_+What+we+Heard.pdf.

stays in the U.S., as is seen in the 30 month parole period under International Entrepreneur Parole, support for an 18 month limit for initial visas is unwarranted.

When implementing a final rule(s), USCIS should proceed with enabling immigrant founders to obtain H-1Bs and undertake other activities necessary to growing a startup, but should rethink efforts to restrict initial visa duration to 18 months.

II. The proposed redefinition of ‘specialty occupation’ stands to narrow the pool of available immigrant talent for startups and other companies

Efforts under the proposed rule to redefine ‘specialty occupation’ could have a significant negative impact on the innovation ecosystem. The proposal veers from the current standard by requiring a degree “in a directly related specific specialty or its equivalent” and necessitating that “specialized studies...be directly related to the position.”¹¹ It further goes on to exclude “general” degrees including those in business administration or liberal arts.¹² This language represents a page out of the Trump Administration’s posture in issuing its interim final rule, “Strengthening the H-1B Nonimmigrant Visa Classification Program.”¹³ As Engine Stated in 2020, H-1B positions “already have high skills burdens, requiring ‘theoretical and practical application of a body of highly specialized knowledge.’”¹⁴ Requiring a degree to be ‘directly related’ specific specialty is absent from the Immigration and Nationality Act¹⁵ and will expressly limit the ability of companies, including startups, to consider other relevant degrees, and perhaps more importantly, significant hands-on work experience, when making hiring decisions under the program.¹⁶ It further may exclude candidates that might have done significant coursework in related fields, but ultimately pursued an unrelated degree—the attainment of which does not negate the knowledge gained in their related classes. The proposed rule also overlooks the degree to which individuals gain experience in and work in fields outside of their university degree field—according to one study, “more than half (51%) of U.S.-born individuals and 18% of temporary visa holders working in computer occupations have a degree other than computer science or electrical engineering.”¹⁷

At the core of the U.S. startup ecosystem is innovation—cutting edge solutions to the world’s toughest problems. Many of the startups in today’s ecosystem operate in new and burgeoning fields and interdisciplinary fields that may not have even existed just ten years ago. These fields that are only just in their nascent stages or have not yet been discovered may not even have clear, directly related degrees,

¹¹ Proposed Rule, *supra* note 4.

¹² *Id.*

¹³ Interim Final Rule: *Strengthening the H-1B Nonimmigrant Visa Classification Program*, DHS Docket No. USCIS-2020-0018, RIN 1615-AC13.

¹⁴ See comments of Engine Advocacy available at:

<https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5ff8a0dc95ad1c152036e2bf/1610129628124/Engine+Advocacy+December+7+2020.pdf>

¹⁵ Stuart Anderson, *Biden Immigration Rule Copies Some Trump Plans to Restrict H-1B Visas*, Forbes (Oct. 23, 2023),

<https://www.forbes.com/sites/stuartanderson/2023/10/23/biden-immigration-rule-copies-some-trump-plans-to-restrict-h-1b-visas/?sh=452b4097588d>.

¹⁶ *Id.*

¹⁷ *Id.*

with workers instead honing their necessary skills across a multitude of disciplines.¹⁸ Unnecessarily restricting the definition of ‘specialty occupation’ thus could limit a startup’s ability to innovate because these fields—like artificial intelligence—grow and develop without specific adherence to university degree requirements and because they are honed by workers with interdisciplinary backgrounds. As the American Immigration Lawyers Association and the American Immigration Council stated in comments to the Trump Administration on the relatively new career field of data science:¹⁹

This occupation did not exist 10 years ago but has developed as the next generation of the application and benefit of computer operations...As with computer science in the past, degree programs vary as many colleges and universities do not have data science departments. Students seeking the specialized knowledge required to enter this new occupation must take courses in a variety of academic departments. The knowledge for data science careers often requires expertise in statistics, applied mathematics, computer programming, and database operations. Students are graduating with degrees in such diverse fields as mathematics, engineering, statistics, or computer science in which they may have studied all of these fields. There is a body of highly specialized knowledge that must be acquired for this new occupation, but it may not be in a specific degree as degrees in data science are just now beginning to be developed and likely will not be widely available for several more years.

As previously stated, while our innovation ecosystem remains a world leader, significant efforts are underway to strip that status from the U.S. Narrowing the definition of specialty occupation will hamstring employers and stands to significantly limit the eligible talent pool, including for cross-disciplinary fields where qualified candidates could have an array of degrees.²⁰ This could result in a drain of talent and research and development activities to other countries, and founders taking advantage of the startup visas and employment visas with simpler pathways that other governments may offer.

III. Modifications to the selection process would lead to more fairness for workers and companies

The proposed rule’s provisions to modify the selection process, favoring selection of unique beneficiaries over registrations, is a likely positive step. One of the chief concerns stated about the H-1B program is fraud in the selection process,²¹ particularly as registrations may not always be tied to legitimate job offers. Shifting to selection based on beneficiary will empower the worker to choose the company best suited to their needs when they have multiple registrations filed on their behalf, may cut down on fraudulent registrations, and will help level the playing field for smaller companies not able to

¹⁸ See comments to the Trump Administration from the American Immigration Lawyers Association and the American Immigration Council, available at: [https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/comments_filed_to_address_substantiv e_flaws_in_proposed_h-1b_regulatory_changes.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/comments_filed_to_address_substantive_flaws_in_proposed_h-1b_regulatory_changes.pdf).

¹⁹ *Id.*

²⁰ Anderson, *supra* note 15.

²¹ Amy L. Peck, *H-1B Update: Suspecting Fraud, USCIS Challenges, Denies Some Petitions, and Foreign Nationals Sue* (Aug. 29, 2023), <https://www.natlawreview.com/article/h-1b-update-suspecting-fraud-uscis-challenges-denies-some-petitions-and-foreign>.

flood the system with numerous registrations. But, while this shift will likely have a positive impact, it fails to address the ever growing need for more H-1B talent in the U.S., especially as “H-1B registrations with only one employer increased by 66% between FY 2022 and FY 2024.”²² USCIS should work with lawmakers to shape the program, including through a potential cap increase, to address the considerable skilled talent needs of the innovation ecosystem.

IV. Extending the cap gap for F-1 students will help bridge processing delays

F-1 students, many of whom pursue the OPT program, represent an important source of talent for the innovation ecosystem. But students shifting from F-1 visas to H-1B visas are often met with significant processing delays (as are many throughout our immigration system). The six month extension offered to those transitioning from F-1 visas to H-1B visas is a welcome change to help prevent “disruptions to lawful status.”²³ While the provision will certainly benefit students in the innovation ecosystem, USCIS and policymakers should continue to work and pursue efforts to substantially reduce and eliminate backlogs and processing delays in pursuit of a better functioning immigration system.

V. Conclusion

The innovation ecosystem relies on skilled foreign talent for a diversity of ideas, to grow startups, and to fill outstanding talent gaps, particularly in STEM fields. While the proposed rule includes provisions that will help support and grow the U.S. startup ecosystem, we encourage the agency to, in particular, reconsider efforts to narrow the definition of ‘specialty occupation’ and limit the initial visa length for beneficiary-owner petitions. Engine is available to answer any questions, both on the proposed rule and the broader immigration needs to the U.S. startup ecosystem.

Sincerely,

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²² Stuart Anderson, *USCIS Changes H-1B Visa Lottery, Extends Cap-Gap For Students*, Forbes (Oct. 23, 2023), <https://www.forbes.com/sites/stuartanderson/2023/10/23/uscis-changes-h-1b-visa-lottery-extends-cap-gap-for-students/?sh=2f3740e21215>.

²³ Proposed Rule, *supra* note 4.