



December 19, 2023

Electronically submitted via [www.regulations.gov](http://www.regulations.gov)  
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Attn: Charles L. Nimick, Office of Policy and Strategy  
5900 Capital Gateway Dr.  
Camp Springs, MD 20588-0009

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

Dear Mr. Nimick:

I appreciate 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” published in the Federal Register on October 23, 2023. The following comments are submitted on behalf of the members of the National Association of Regional Councils, a membership organization representing the nation’s metropolitan and regional planning organizations.

The nation’s metropolitan and regional planning organizations perform vital research for their member jurisdictions, both generally and in developing plans in areas such as transportation, economic development, housing, and more. Most of our members are also Metropolitan Planning Organizations (MPOs) as defined by the US Department of Transportation, and most also perform critical research functions for state and federal agencies. Furthermore, many of our members are designated as Economic Development Districts by the Economic Development Administration of the US Department of Commerce.

Our members have historically used the H-1B program to attract employees with expertise in specialty occupations including transportation modeling; transportation and land use planning; quantitative and mixed-methods research using digital and geospatial data; transportation data development; basic research of planning and development patterns; and public health impact assessments. These employees include transportation, land use, and economic development analysts, data analysts and data scientists, GIS analysts, public health research specialists, among other similar specialty occupations. Changes made to the H-1B program in 2017 have made it far more difficult or impossible to retain H-1B employees in some cases, and in others has cost significant time and money to file for individual approvals on an employee-by-

employee basis. The result is that the positions most often remain unfilled by the domestic labor market, leaving mission-critical positions vacant and governmental organizations unable to fulfill federal and local obligations.

### **Research organizations - 8 CFR 214.2(h)(19)(iii)(C)**

**We support replacing the existing requirement that an organization must be “primarily engaged” in research to be considered a nonprofit research institution with a revised requirement that conducting research be a “fundamental activity” of the organization to qualify.** Prior to the adoption of the “primarily engaged” requirement in January 2017, Metropolitan Planning Organizations (MPOs) and regional planning organizations generally (under several names including councils of governments, regional planning commissions, planning councils, associations of governments, and others) were exempt organizations for purposes of the H-1B program. We anticipate that the adoption of “fundamental activity” as this rulemaking proposes would once again make regional planning organizations eligible to pursue the cap exemptions in the H-1B program. Moreover, the proposed revision eliminates the need for a subjective analysis of an organization’s primary function, since many research organizations have multiple interconnected purposes for public benefit. The revision would result in the rightful focus on an organization’s overall mission which often includes multiple fundamental activities that work together to accomplish an overall public mission. In the case of NARC members, this mission is to engage in intergovernmental cooperation for purposes of data development and research to support regional planning to equitably address a variety of local issues (regional housing, employment, transportation, et al.) Research in the public interest is almost always a fundamental activity of regional agencies, even if it is not always the “primary” activity.

### **Nonprofit or tax exempt organization - 8 CFR 214.2(h)(19)(iv)**

The American Competitiveness in the 21<sup>st</sup> Century Act (“AC21”), which first introduced the cap exemption for affiliated nonprofit entities and nonprofit research organizations at Sections 214(g)(5)(A) and B of the Immigration and Nationality Act, included *all* nonprofit entities. We are unaware of any Congressional intent to include specified types of nonprofit entities and exclude others. The proposed definition of a “nonprofit or tax exempt organization” –reserved only for organizations that are organized under sections 501(c)(3), (c)(4), and (c)(6) of the Internal Revenue Code of 1986. This proposal is therefore contrary to law and impermissibly excludes several categories of nonprofit organizations, including public nonprofit organizations. Our members are all tax exempt but are organized in a variety of ways. They may be tax exempt pursuant to

their organization under the tax code or due to the fact that they are local government public agencies organized under state law, fulfilling statutory requirements and a public purpose. No matter how they are organized, in every case they are tax exempt, public-focused entities all performing many of the same basic functions – including research – that support their local member jurisdictions. In addition, each of our members are guided by a board of local elected officials, further demonstrating the public nature of their work. **We recommend removing the reference to sections 501(c)(3), (c)(4), and (c)(6) of the IRS code** to avoid promulgating a regulation that is *ultra vires*.

### **Deference – 8 CFR 214.1(c)(5)**

We support the NPRM’s proposed codification of the current deference policy, and we recommend extending it to include deference to determinations of H-1B cap exemptions. Our member agencies report inconsistent and perplexing decisions about the processing of I-129 petitions involving cap exemptions. We understand the agency’s approach to case-by-case determinations of cap exemptions, and we propose that once the USCIS determines one of our member organizations is exempt from the cap, the Service should defer to that determination for a reasonable period of time. USCIS could consider defining the duration of that reasonable period, and we recommend that USCIS should annotate I-797A and I-797B approval notices to confirm that USCIS has granted a cap exemption.

USCIS seeks to provide predictability for petitioners and “fairer and more reliable outcomes.” See NPRM at 72,880. Nothing could be more unpredictable or more unfair than a single petitioner providing identical information in separate petitions only to receive an approval of one and denial of another. It is moreover inefficient for multiple immigration services officers to digest hundreds of pages of evidence only to reach inconsistent decisions. The current process requires our members, who are all nonprofits, to needlessly expend resources and time responding to Requests for Evidence and Notices of Intent to Deny on this one issue.

Our proposal to defer to prior USCIS cap exemption determinations is in harmony with the NPRM’s replacement of the policy to grant deference in the case of an “extension of petition validity” by the proposed codification of deference to a prior “request filed on Form I-129”. That is USCIS appears to suggest with this nuanced deference policy that deference need not be restricted only to the same petitioner and beneficiary in the same job at the same worksite, and instead the Service may extend deference to particular facts repeated consistently in several petitions filed by the same petitioner, as for example, facts relating to a petitioner’s eligibility for an exemption from the H-1B numerical limitation, We appreciate the opportunity to provide comment to the proposed



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revisions to the H-1B program. We are happy to continue this dialogue if we can be of assistance going forward.

Sincerely,

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Deputy Director