


AMERICAN IMMIGRATION LAWYERS ASSOCIATION



American Immigration Council

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Office of Policy and Strategy
U.S. Citizenship and Immigration Service
5900 Capital Gateway Drive
Camp Springs, MD 20746

*Submitted via* http://www.regulations.gov

**Re**: Removing Deference to Prior USCIS Determinations of Eligibility (Docket No. USCIS-2026-0529)

To Whom it May Concern:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) respectfully submit this comment in response to the Notice of Proposed Rule (also referred to as NPRM or proposed rule) published in the Federal Register on October 14, 2026, by the Department of Homeland Security (DHS).

Established in 1946, AILA is a voluntary bar association of nearly 18,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We believe that our members' collective expertise and experience make us particularly well-qualified to offer views on this matter.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws and protect the legal rights of noncitizens. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act (INA) and its implementing regulations.

AILA and the Council oppose the proposed rule because it creates uncertainty for U.S. employers and nonimmigrant workers, creates additional expense for stakeholders and DHS and adds to already lengthy adjudication delays—without changing the adjudication outcome. According to DHS's own data, eliminating deference does not change the denial rate. DHS also fails to give sufficient consideration to the substantial reliance interests of U.S. employers and nonimmigrant workers in consistent adjudication of extension petitions when the conditions for exercising discretion, as set forth in the current regulation, exist. Instead, DHS should retain 8 CFR

214.1(c)(5), under which a petitioner already has the burden to establish eligibility and the adjudicating officer has the authority to review a prior determination for material error, changed circumstances or eligibility requirements, or new material information. Alternatively, DHS could extend or reopen the comment period for at least 60 days, and place in the record additional information to demonstrate bona fide reasons for issuing the proposed rule.

## I. DHS's OWN DATA ILLUSTRATES THAT DEFERENCE DID NOT CHANGE ADJUDICATION OUTCOMES

### *a. The Regulation DHS Proposes to Remove*

The current regulation provides:

> When adjudicating a request filed on Form I-129 involving the same parties and the same underlying facts, USCIS gives deference to its prior determination of the petitioner's, applicant's, or beneficiary's eligibility. However, USCIS need not give deference to a prior approval if: there was a material error involved with a prior approval; there has been a material change in circumstances or eligibility requirements; or there is new, material information that adversely impacts the petitioner's, applicant's, or beneficiary's eligibility.[1]

The regulation is narrow. It applies only where the parties and underlying facts are unchanged, and it yields whenever an officer identifies a material error, a material change, or new adverse information. It does not relieve the petitioner of submitting required initial evidence and evidence of maintained status.[2] When DHS codified the rule, it stated that "deference does not equate to a lack of USCIS review of the petition" and that "[p]etitioners continue to have the burden to present all required and relevant evidence . . ."[3] Deference has been USCIS policy for roughly 19 of the past 22 years: from April 2004 to October 2017, and from April 2021 to the present, with regulatory codification effective January 17, 2025.[4] The 2017 to 2021 interval therefore offers a natural test of what happens when deference is removed. DHS ran that test and its outcome is compelling.

### *b. What DHS Found*

DHS compared petitions it believes were affected by the deference policy with a comparison group of petitions it believes were not affected across the period when deference was in effect (October 1, 2013 to October 11, 2017) and the period when it was not (October 12, 2017 to April 27, 2021).[5]

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[1] 8 CFR 214.1(c)(5).

[2] 8 CFR 103.2(b)(1), 214.1(c)(1), (6).

[3] Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, 89 Fed. Reg. 103054, 103093 (Dec. 18, 2024) (final rule).

[4] USCIS, The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity, HQOPRD 72/11.3 (Apr. 23, 2004) ("2004 Memorandum"); USCIS, Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status, PM-602-0151 (Oct. 23, 2017); USCIS, Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity, Policy Alert PA-2021-05 (Apr. 27, 2021); Modernization Final Rule, 89 FR 103054 (Dec. 18, 2024) (effective Jan. 17, 2025).

[5] NPRM, 91 Fed. Reg. 65127–28 & Table 3.

The data sets are large: 589,272 affected petitions out of 1,224,803 total petitions in the deference period and 653,142 affected petitions out of 1,109,502 total petitions in the no-deference period.[6]

Using that design, DHS estimated that the absence of deference was associated with a 2.9 percentage point increase in the RFE rate for affected petitions relative to the comparison group.[7] DHS then applied the same approach to denial rates and found no corresponding change.[8] Elsewhere, DHS confirms that "historical denial rates did not statistically differ" between periods with and without deference.[9] DHS's regulatory impact analysis, accordingly, does not project any effect on denial rates from the proposed rule.[10]

*c. Why the Absence of an Outcome Effect Is Dispositive*

DHS asserts that deference shifts the burden of proof so that petitions are approved where the petitioner has not established eligibility;[11] that deference "may perpetuate unmeritorious approvals";[12] that it may "increase the risk that erroneous prior approvals continue to serve as the basis for granting extension petitions";[13] that it creates "an environment in which fraudulent and meritless petitions are less likely to be detected before approval";[14] and that removing deference "would ensure that only meritorious filings for non-immigrant workers are approved . . ."[15]

If any of those propositions were true, the previous removal of deference would have changed outcomes. Petitions that would have been approved only because of deference would have been denied once officers undertook the fulsome review DHS describes. Fraudulent or meritless extension filings would have been detected before approval. Instead, DHS found that the denial rate for affected petitions did not change relative to the comparison group. DHS's own data show that removing deference did not change denial rates. To put it plainly, employers did not receive more approvals just because of deference.

The NPRM does not identify a single erroneous approval caused by deference, a single fraudulent petition that was approved because of deference and later detected without it, or a single category of case in which the no-deference period produced a different result. Nor does DHS reconcile its finding of no outcome effect with its assertion that removing deference would ensure that "only meritorious filings" are approved. If outcomes do not change, then the filings approved after this rule will be the same filings approved before it.

DHS also states that removing deference "does not substantively change eligibility for the requested immigration benefit."[16] We agree. But if eligibility does not change and outcomes do

[6] *Id.* at 65128, Table 3.
[7] *Id.*
[8] *Id.* at 65128.
[9] *Id.* at 65123 n.13.
[10] *Id.* at 65128.
[11] *Id.* at 65122–23.
[12] *Id.* at 65121.
[13] *Id.* at 65124.
[14] *Id.* at 65120.
[15] *Id.* at 65126, Table 1.
[16] *Id.* at 65124.

not change, the rule should not change. The proposed rule's only effect is to change the cost and duration of the process by which eligible petitioners obtain the same result.

## II. RESCINDING DEFERENCE IS AN INEFFECTIVE USE OF OFFICER TIME AND RESOURCES

DHS's proposed elimination of deference to prior approvals would require USCIS officers to spend additional time and agency resources to re-adjudicate eligibility issues the agency has already decided. It fits within the adage of re-creating the wheel. USCIS's own experience shows the tremendous cost both in time and dollars. When deference was first rescinded in 2017, petitioners were then required to submit additional documentation to prove that beneficiaries remained qualified for positions they had held for years, though neither the employer nor the position had changed. Adjudicators consequently spent more time reviewing cases, issuing RFEs, and evaluating RFE responses without any change in the underlying facts. Creating unnecessary additional burden on adjudicators does not remedy USCIS's existing and ever-growing backlog, which can adversely impact national security.[17] According to analysis of agency data[18], pending applications and petitions reached 12.1 million in the second quarter of fiscal year (FY) 2026, a 7.2 percent increase over the prior year and the highest level in a dataset beginning in FY2016, even though USCIS received substantially fewer filings. Case completions fell to 1.5 million, the eighth consecutive quarterly decline and less than half the 3.3 million completed in FY2024 Q2. Requiring duplicative review of previously approved cases would divert agency resources from this inventory of cases and delay decisions for every other filer.

In the NPRM, DHS erroneously views deference as interfering with an officer's ability to consider relevant facts and evidence to ensure continued eligibility. DHS fails to account for the time and resources spent in the assessment that already took place in an earlier adjudication. The NPRM does not account for the additional officer time, RFE volume, and processing delays that rescinding deference will predictably generate and pays lip service to the unquantified costs to petitioners and beneficiaries, including the risk of ICE detention for failure to have valid underlying status.

## III. DHS'S EXPLANATION FOR THE ABSENCE OF AN OUTCOME EFFECT CONFIRMS THAT ADDITIONAL RFES WERE UNNECESSARY

DHS offers one possible explanation for its finding: "even when deference did not apply, petitioners may have been able to overcome issues raised in an RFE or NOID by submitting additional evidence or information."[19] That explanation precisely confirms AILA and the Council's point. A petitioner who responds to an RFE and is approved has, by definition, met its burden of proof. If petitions in the no-deference period were ultimately approved at the same rate,

[17] The Homeland Security Act of 2002, Pub. L. 107-296, established USCIS as the agency "to enhance the security and efficiency of national immigration services by focusing exclusively on the administration of benefit applications." *See* Our History at https://www.uscis.gov/about-us/our-history.

[18] *See* https://www.americanimmigrationcouncil.org/blog/uscis-backlog-grows-less-immigration-filings/

[19] *Id.* at 65123 n.13.

the additional RFEs did not identify ineligible petitioners. They required otherwise eligible petitioners to re-document facts USCIS had previously found.

This is precisely the problem that led USCIS to adopt deference in 2004. The 2004 Memorandum responded to a review showing that, in certain instances, adjudicators had been "questioning prior determinations where there is no material change in the underlying facts as a matter of routine."[20] When USCIS reinstated deference in 2021, it stated that the policy "promotes efficient and fair adjudication."[21] And when DHS proposed regulatory deference in 2023, it found that deference "helps promote consistency and efficiency for both USCIS and its stakeholders" and "creates predictability for petitioners and beneficiaries and leads to fairer and more reliable outcomes."[22] The no-deference period is the empirical test of those findings, and the NPRM's outcome data support the conclusion that deference increases efficiency without impacting denial rates.

*a. RFE Rates Cannot Substitute for Outcome Data*

DHS argues that "the impact of the deference policy on officers' fact-finding authority is best reflected in RFE rates rather than approval or denial rates," because "[t]he ultimate adjudicative decision reached by the officer is not reflective of the extent to which an officer's fact-finding authority may have been restricted. . ."[23] This convoluted reasoning inverts the purpose of fact-finding.

Fact-finding is a means, not an end. USCIS requests evidence to decide correctly whether a petitioner is eligible. The value of additional fact-finding lies in its effect on the accuracy of decisions. Where additional RFEs do not change decisions, they have not improved accuracy; they have only increased cost. DHS's own regulatory impact analysis treats the increase in RFEs as a cost to petitioners, not a benefit.[24] DHS cannot count the same RFEs as a cost in its economic analysis and as evidence of the rule's benefit in its policy justification.

Under DHS's reasoning, any policy that increased RFE rates would demonstrate enhanced fact-finding regardless of whether it changed any outcome. That cannot be the measure of sound adjudication policy. USCIS's own regulations provide that when the evidence submitted establishes eligibility, USCIS will approve the request. An RFE is a tool for cases in which required evidence is missing or does not establish eligibility, not a means of demonstrating thoroughness.[25] Moreover, the extension regulations already require initial evidence and evidence of maintained status at filing. A properly filed extension petition already documents continued eligibility and an additional RFE on an unchanged, previously approved petition simply requires the petitioner to re-document that which it has already shown.

DHS asserts that deference is “inconsistent with this Administration’s focus on . . . ensuring that only petitioners and beneficiaries who meet eligibility criteria and demonstrate eligibility are

[20] 2004 Memorandum, *supra* n.4, at 1.
[21] USCIS, USCIS Issues Policy Guidance on Deference to Previous Decisions (Apr. 27, 2021), https://www.uscis.gov/archive/uscis-issues-policy-guidance-on-deference-to-previous-decisions.
[22] Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, 88 FR 72870, 72880 (Oct. 23, 2023) (proposed rule).
[23] NPRM, 91 Fed. Reg. 65123 n.13.
[24] *Id.* at 65126 (Table 1), 65128 (Table 4).
[25] 8 CFR 103.2(b)(8)(i)–(iii).

granted nonimmigrant worker benefits."[26] The proposed rule cannot advance that goal. DHS's own analysis establishes that removing deference did not change adjudicative outcomes. The proposed rule would therefore impose additional RFEs, cost, and delays on employers and workers who are eligible and who will ultimately be approved, while diverting agency resources and adding to backlogs, without any demonstrated improvement in the accuracy or integrity of adjudications. The rule does not ensure that only eligible petitioners are approved. It ensures only that eligible petitioners wait longer and pay more for the same approval.

## IV. DHS FAILS TO ADEQUATELY CONSIDER THE SERIOUS RELIANCE INTERESTS OF INDIVIDUALS AND EMPLOYERS

DHS acknowledges in the proposed rule that U.S. employers and nonimmigrant workers have made business, career, and personal plans in reliance on the continuation of deference but dismisses those interests as "limited" because the current regulation does not guarantee approval and its removal would not change the substantive eligibility requirements.[27] That reasoning misunderstands both the nature of the reliance and the consequences of the proposed rule. Employers and workers do not claim a right to approval without establishing eligibility, or to the continuation of a prior approval that involved material error, changed circumstances, or new adverse information. The current regulation already excludes those cases.[28] The reliance interest is instead the reasonable expectation that, when the parties and material facts remain unchanged and USCIS has already determined that the petition satisfies the governing requirements, the agency will not routinely reopen and re-adjudicate the same eligibility questions without a reason grounded in the record.

That expectation is especially consequential for individuals who have structured their lives around years of lawful employment in the United States. Many H-1B workers have remained in the United States beyond the standard six-year period in lawful H-1B status, relying on congressionally authorized extensions while pursuing permanent residency.[29] Their continued ability to live and work in the United States may depend on successive extension petitions filed over many years. During that time, workers and their families make long-term commitments: they pursue professional advancement, establish homes, enroll children in schools, care for family members, and become established members of their professional and local communities. As AILA and the Council explained when supporting codification of deference in 2023, routine approvals over many years, where the employment facts remain materially the same, create a reasonable and justifiable reliance on the continued availability of extensions.[30]

The NPRM's assurance that removing deference does not itself change eligibility does not answer this concern. Reliance interests may be disrupted by uncertainty, delay, and inconsistent re-adjudication even when the governing eligibility standard is unchanged and the petition is

[26] NPRM, 91 Fed, Reg. at 65124.
[27] 91 Fed. Reg. at 65,124-25.
[28] 8 CFR §214.1(c)(5).
[29] American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, §§ 104(c), 106(a)-(b), 114 Stat. 1251, 1253-54, as amended; see also 8 CFR §214.2(h)(13)(iii)(D)-(E).
[30] AILA and American Immigration Council, Supplemental Comment on Modernizing H-1B Requirements, DHS Docket No. USCIS-2023-0005, at 9-10 (Dec. 22, 2023).

ultimately approved. The NPRM itself recognizes that removing deference is expected to increase RFEs, lengthen adjudications, and increase uncertainty regarding continued employment.[31] DHS further estimates, based on the average of median processing times between FY 2022-FY 2025, that petitions receiving an RFE take 64 days longer to adjudicate than petitions without one.[32] For an individual whose status and employment authorization depend on the timely approval of an extension, that additional uncertainty can affect international travel, professional opportunities, family decisions, and the ability to plan for continued residence in the United States. An ultimate approval does not erase those harms the adjudication process generates.

Employers have parallel and substantial reliance interests. U.S. businesses make hiring, staffing, compensation, succession, project, and client commitments based on the continued employment of workers whom USCIS has already found eligible in the same position and classification. This reliance is not an assumption that every extension will be automatically approved. It is a practical expectation that an unchanged case will be treated consistently unless USCIS identifies a material reason to depart from its prior determination. Predictability is particularly important where an employee has developed specialized institutional knowledge, leads a long-term project, manages critical client relationships, or performs work that cannot be transferred readily without operational disruption. Small employers may be especially vulnerable because the absence or uncertain availability of even one key employee can have an outsized effect on operations.

DHS previously recognized these interests. In proposing to codify deference, DHS explained that the policy promotes consistency and efficiency for USCIS and stakeholders, creates predictability for petitioners and beneficiaries, and leads to fairer and more reliable outcomes.[33] USCIS likewise explained when restoring deference in 2021 that the policy promotes efficient and fair adjudication.[34] DHS reaffirmed those conclusions in the December 2024 final rule, agreeing with many commenters that codifying the deference policy "will help ensure consistent and efficient adjudications and provide greater predictability to the visa petition process . . ."[35] DHS further concluded that extending deference to any Form I-129 request involving the same parties and underlying facts "broadly enhances efficiency and consistency," while emphasizing that petitioners retain the burden of establishing eligibility and officers remain free to revisit a prior determination when material error, changed circumstances or eligibility requirements, or new material information warrants doing so.[36]

Those conclusions were not abstract. They reflected the practical value of allowing employers and workers to rely on an agency determination when the parties and underlying facts remain the same, while preserving USCIS's authority to revisit a case involving material error, material change, or new adverse information. DHS's determination less than two years ago that these principles

[31] 91 Fed. Reg. at 65,125-26, 65,129.
[32] *Id.* at 65,129 n.27.
[33] Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, 88 Fed. Reg. 72,870, 72,880 (Oct. 23, 2023).
[34] USCIS, USCIS Issues Policy Guidance on Deference to Previous Decisions (Apr. 27, 2021), https://www.uscis.gov/archive/uscis-issues-policy-guidance-on-deference-to-previous-decisions.
[35] 89 Fed. Reg. at 103,094. (The final rule described deference as consistent with predictable, reliable, and consistent outcomes and explained that it avoids unnecessary full de novo review of unchanged facts and circumstances.)
[36] *Id.* at 103,093–95.

warranted codification reinforces the reasonableness of the reliance interests that employers and individuals developed under the resulting regulatory framework.

The NPRM now states that those benefits were "overstated," but it does not identify evidence showing that the reliance interests DHS previously recognized have disappeared or materially diminished. It also does not adequately account for the consequences of reversing course so soon after DHS codified the policy. An agency-changing policy must assess serious reliance interests and provide a reasoned explanation for disregarding them, particularly where the prior policy has induced regulated parties to organize their affairs around it.[37] It is not enough to say that approval was never guaranteed. The relevant question is whether employers and workers reasonably relied on a stable adjudicatory framework under which USCIS would treat like cases alike unless a material basis existed to depart from the prior approval. They did, and DHS itself encouraged that reliance by codifying the policy and expressly identifying predictability as one of its benefits.

The proposed rule also draws a false equivalence between reliance on deference and reliance on an erroneous or unsupported approval. No legitimate reliance interest requires USCIS to perpetuate an error or overlook changed facts, and AILA and the Council do not ask DHS to do so. Section 214.1(c)(5) already permits USCIS to decline deference where the prior approval involved material error, circumstances or eligibility requirements have materially changed, or new material information adversely affects eligibility.[38] The regulation therefore protects the very program-integrity interests invoked in the NPRM while preserving consistency in cases where those concerns are absent. Eliminating deference across the board would impose the costs of heightened uncertainty and repeat adjudication on all employers filing extension petitions and the worker-beneficiaries, including those whose prior approvals were correct and whose material facts remain unchanged, because of DHS's generalized concern that some prior approvals might have been erroneous.

## V. CONCLUSION

For the reasons set forth above, AILA and the Council request that DHS withdraw the NPRM and retain 8 CFR 214.1(c)(5). or, in the alternative, extend or reopen the comment period for at least 60 days, and place in the record additional information more clearly justifying the reason for issuing the NPRM. At a minimum, before discarding a recently codified policy that individuals and employers have used for personal and business planning, DHS should meaningfully evaluate the reliance interests at stake and preserve deference where the parties and material facts remain unchanged. Retention would allow USCIS to correct material errors and respond to changed circumstances or new adverse information without subjecting every extension petition to duplicative re-adjudication and the resulting delay, expense, and uncertainty.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION and
THE AMERICAN IMMIGRATION COUNCIL

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[37] *DHS v. Regents of the Univ. of Cal.*, 591 US 1, 30-33 (2020); *FCC v. Fox Television Stations, Inc.*, 556 US 502, 515-16 (2009).
[38] 8 CFR §214.1(c)(5).