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RE-RANKING THE LOTTERY:
STATUTORY LIMITS ON WAGE-WEIGHTED H-1B SELECTION

❖ Note ❖

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I. INTRODUCTION

For more than three decades, the H-1B program has operated within a statutory framework governing eligibility, wage protections, and numerical limits. The Immigration Act of 1990 created the modern H-1B classification for “specialty occupations.”¹ The statute defines a “specialty occupation” in qualitative and educational terms, requiring both the theoretical and practical application of highly specialized knowledge and at least a bachelor’s degree in a specific field.² When demand exceeds the annual cap, visas are allocated among otherwise eligible beneficiaries.³

On December 29, 2025, the Department of Homeland Security (“DHS”) issued a final rule modifying that allocation process.⁴ Beginning February 27, 2026, DHS implemented a wage-weighted selection system that assigns additional entries based on the prevailing wage level associated with the offered position.⁵ Under the rule, beneficiaries offered positions classified at Wage Level IV receive four entries, Level III three, Level II two, and Level I one.⁶ Although DHS continues to

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¹ Immigration Act of 1990, Pub. L. No. 101-649, § 205, 104 Stat. 4978, 5020–21 (codified as amended at 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1184(i), 1184(g) (2022)).

² 8 U.S.C. § 1184(i)(1) (2022).

³ *Id.* § 1184(g).

⁴ Weighted Selection Process for Registrants and Petitioners Seeking To File Cap-Subject H-1B Petitions, 90 Fed. Reg. 60,864 (Dec. 29, 2025).

⁵ *Id.* at 60,866.

⁶ *Id.* at 60,866–67.

conduct a random draw, selection probability now varies by prevailing wage level.⁷ DHS characterizes the rule as an integrity measure designed to prioritize “higher-skilled and higher-paid” workers and align selection with program objectives.⁸ Because prevailing wage levels reflect compensation classifications rather than statutory eligibility, the rule alters selection probability after eligibility is established. Employers able to offer higher-tier wages receive improved odds of selection, while those operating with lower wage budgets face reduced odds.

The central legal question is whether the Immigration and Nationality Act (“INA”) clearly authorizes DHS to incorporate prevailing wage levels into the allocation of H-1B cap numbers. The statutory framework separates three core components of the H-1B program: § 1184(i) defines eligibility, § 1182(n) governs wage protections, and § 1184(g) imposes the numerical cap.⁹ The statute does not expressly connect prevailing wage tiers to the cap-allocation mechanism. Administrative agencies exercise only the authority Congress confers, and that authority must be exercised consistently with statutory text and structure.¹⁰

This Note argues that the 2026 wage-weighted selection rule exceeds the limits of the INA by incorporating prevailing wage tiers—developed as compliance safeguards—into cap allocation without clear statutory authorization. That shift carries consequences beyond immigration administration, extending into labor markets and firm competition. In high-growth sectors, H-1B allocation affects which firms access talent. A system tying selection probability to wage-setting capacity may influence market entry and competition.

This Note proceeds in five parts. Part II describes the statutory and regulatory architecture of the H-1B program.¹¹ Part III evaluates the wage-weighted rule under principles of statutory interpretation and administrative law.¹² Part IV proposes a narrower, statute-consistent regulatory alternative.¹³ Part V concludes that, absent clearer congressional authorization, the wage-weighted rule presents substantial legal concerns and conflicts with the statutory structure.¹⁴

⁷ *Id.* at 60,865–67.

⁸ *Id.* at 60,865.

⁹ 8 U.S.C. §§ 1184(i)(1), 1184(g)(1)(A), 1182(n)(1)(A).

¹⁰ *West Virginia v. EPA*, 597 U.S. 697, 721 (2022); *King v. Burwell*, 576 U.S. 473, 486 (2015).

¹¹ *See infra* Part II.

¹² *See infra* Part III.

¹³ *See infra* Part IV.

¹⁴ *See infra* Part V.

II. BACKGROUND

A. Congressional Design of the H-1B Classification

Congress created the modern H-1B classification in the Immigration Act of 1990, authorizing the temporary admission of foreign nationals to perform services in a “specialty occupation.”¹⁵ The INA defines a “specialty occupation” as requiring both specialized knowledge applied in theory and practice and at least a bachelor’s degree in a specific field.¹⁶ Section 1184(i) establishes the eligibility standard governing whether a position qualifies and whether the beneficiary meets the educational requirements.¹⁷

Congress separately imposed an annual numerical cap on H-1B visas.¹⁸ Section 1184(g)(1)(A) provides that the total number of aliens who may be issued H-1B visas or otherwise provided H-1B status “may not exceed” 65,000 in a fiscal year, subject to specified exemptions.¹⁹ Congress later added an advanced-degree exemption allowing up to 20,000 additional beneficiaries who hold U.S. master’s degrees or higher.²⁰ The INA thus separates eligibility and numerical limits into distinct provisions: § 1184(i) governs who qualifies, while § 1184(g) governs how many may be admitted.²¹ The statute does not specify a detailed mechanism for allocating cap numbers when demand exceeds supply.²²

B. Administrative Responses to Cap Oversubscription

When cap-subject petitions exceed the statutory limit, DHS allocates available visa numbers in practice among otherwise eligible beneficiaries.²³ Section 1184(g)(3) provides that visas “shall be issued ... in the order in which petitions are filed.”²⁴ In practice, demand has frequently exceeded the cap during the initial filing period, making strict chronological processing infeasible.²⁵ In response, U.S. Citizenship and Immigration Services (“USCIS”), a component of DHS, historically conducted a computer-generated random selection process among

¹⁵ Immigration Act of 1990, Pub. L. No. 101-649, § 205, 104 Stat. 4978, 5020–21.

¹⁶ 8 U.S.C. § 1184(i)(1).

¹⁷ *Id.* § 1184(i)(1)–(2).

¹⁸ *Id.* § 1184(g)(1)(A).

¹⁹ *Id.*

²⁰ *Id.* § 1184(g)(5)(C).

²¹ *Id.* §§ 1184(i), 1184(g).

²² *See id.* § 1184(g).

²³ *Id.* § 1184(g)(1)(A)–(3); Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 888, 890–91 (Jan. 31, 2019).

²⁴ 8 U.S.C. § 1184(g)(3).

²⁵ 84 Fed. Reg. at 890–91.

timely filed petitions.²⁶ DHS explained that random selection provided an administratively workable solution when filings exceeded available visa numbers.²⁷

In 2019, DHS formalized this approach through an electronic registration system.²⁸ Under the registration rule, prospective petitioners submit electronic registrations during a designated period, and USCIS conducts a selection process if registrations exceed available numbers.²⁹ The rule retained random selection while modifying how advanced-degree beneficiaries were counted.³⁰ In 2024, DHS implemented a beneficiary-centric selection framework under which each unique beneficiary is entered once into the selection pool regardless of the number of registrations submitted.³¹ DHS explained that the change was intended to reduce distortions associated with multiple registrations and to strengthen program integrity.³² After the 2024 revision, each beneficiary had an equal probability of selection, subject to the statutory advanced-degree exemption.³³ These approaches resolve oversubscription through neutral selection rather than substantive ranking.

C. Prevailing Wage Compliance and the 2026 Wage-Weighted Rule

Separate from eligibility and numerical limits is the wage-protection regime codified at § 1182(n). Before filing an H-1B petition, an employer must submit a Labor Condition Application (“LCA”) to the Department of Labor certifying that it will pay the higher of the actual wage or the prevailing wage for the occupational classification and geographic area.³⁴ Congress directed the Secretary of Labor to establish the methodology for determining prevailing wages, and the Department of Labor assigns wage levels across four tiers reflecting experience and job complexity.³⁵ These wage classifications are designed to prevent adverse effects on U.S. workers and to ensure that foreign labor is not used to undercut domestic wages.³⁶

On December 29, 2025, DHS adopted a final rule that modifies the cap-allocation process.³⁷ Beginning February 27, 2026, the rule assigns weighted entries based on the prevailing wage level associated with the offered position,

²⁶ *Id.* at 890.

²⁷ *Id.*

²⁸ *Id.* at 894–95.

²⁹ *Id.*

³⁰ *Id.* at 889–90.

³¹ Registration Requirement for Petitioners Seeking To File H-1B Petitions, 89 Fed. Reg. 7,456, 7,470–71 (Feb. 2, 2024).

³² *Id.* at 7,470.

³³ 89 Fed. Reg. at 7,470–71.

³⁴ 8 U.S.C. § 1182(n)(1)(A).

³⁵ *Id.* § 1182(p); 20 C.F.R. § 655.731(a)(2) (2024).

³⁶ *See* 8 U.S.C. § 1182(n)(1)(A)(i)–(ii).

³⁷ 90 Fed. Reg. at 60,864.

increasing the likelihood of selection for higher-wage classifications.³⁸ Beneficiaries at Wage Level IV receive four entries, Level III receive three, Level II receive two, and Level I receive one.³⁹ USCIS continues to conduct a random draw, but the number of entries varies according to wage level.⁴⁰ The rule further provides that when multiple registrations are submitted for the same beneficiary at different wage levels, DHS assigns weighting based on the lowest wage level, a feature intended to discourage manipulation of wage classifications.⁴¹ The rule links wage compliance to visa allocation.⁴²

III. ANALYSIS

A. The INA Does Not Authorize DHS to Re-Rank Otherwise Eligible Beneficiaries Based on Prevailing Wage Classifications

The starting point in any dispute concerning agency authority is the statutory text.⁴³ Administrative agencies “possess only the authority that Congress has provided,” and that principle carries particular force where an agency action has significant economic consequences, in which case courts expect clear congressional authorization.⁴⁴ Courts interpret statutes according to their text, structure, and context, exercising independent judgment in determining the best reading of the law.⁴⁵ Where Congress separates statutory functions into distinct provisions, those structural boundaries constrain agency authority.⁴⁶

DHS does not contend that the INA expressly authorizes wage-weighted selection. Instead, it relies on its authority to administer the cap under § 1184(g) and its general rulemaking authority under § 1103(a).⁴⁷ DHS further maintains that random selection is not required by statute and that alternative allocation mechanisms are permissible when demand exceeds supply.⁴⁸ These arguments have policy appeal. The rule reflects a judgment that wage level may serve as a proxy for skill, productivity, or labor-market value. But that premise does not resolve the statutory question: whether the INA authorizes the agency to use prevailing wage

³⁸ *Id.* at 60,866.

³⁹ *Id.*

⁴⁰ *Id.* at 60,866–67.

⁴¹ 90 Fed. Reg. at 60,866–67.

⁴² *Id.*

⁴³ *See, e.g., West Virginia*, 597 U.S. at 721.

⁴⁴ *Id.*

⁴⁵ *King*, 576 U.S. at 486; *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394–96 (2024).

⁴⁶ *See West Virginia*, 597 U.S. at 721; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000).

⁴⁷ 90 Fed. Reg. at 60,865–66.

⁴⁸ *Id.* at 60,866–67.

classifications developed for a distinct regulatory purpose as a basis for allocating limited visa numbers.⁴⁹

The structure of the INA suggests otherwise. Congress addressed the H-1B program through separate provisions that perform distinct functions.⁵⁰ Section 1184(i) defines eligibility in qualitative and educational terms.⁵¹ Section 1182(n) regulates wages and working conditions, requiring employers to pay at least the prevailing or actual wage and to avoid adverse effects on United States workers.⁵² Section 1184(g) imposes the numerical limitation on admissions.⁵³ This design reflects a deliberate allocation of responsibilities: Congress used § 1184(i) to determine who qualifies, § 1182(n) to regulate compensation, and § 1184(g) governs the number of admissions permitted.⁵⁴ Nothing in the statutory text links prevailing wage levels to cap allocation or suggests they should influence priority among eligible beneficiaries.

That absence is significant. Under *expressio unius est exclusio alterius*, when Congress includes specific criteria in one part of a statute while omitting them from another, courts generally presume the omission is intentional.⁵⁵ Here, Congress required compliance with prevailing wage obligations under § 1182(n), but it did not incorporate wage level into cap allocation under § 1184(g).⁵⁶ The statute likewise identifies a specific prioritization mechanism—the advanced-degree exemption—without authorizing additional forms of prioritization based on compensation.⁵⁷ That express prioritization reinforces the inference that Congress did not intend additional wage-based hierarchies.

The wage-weighted rule is difficult to reconcile with that statutory structure. By assigning additional entries based on prevailing wage level, the rule alters the probability that otherwise qualified beneficiaries will receive H-1B status.⁵⁸ It converts a compliance-oriented classification designed to prevent labor-market harm into a mechanism for determining access to the program itself. That transformation reorders the eligible pool using a criterion Congress assigned to a different purpose. This disconnect is particularly evident for entry-level positions. Beneficiaries who satisfy the statutory definition of a specialty occupation, including recent graduates with advanced degrees, may be classified at lower wage

⁴⁹ *Id.* at 60,865–66; *see also Brown & Williamson*, 529 U.S. at 132–33.

⁵⁰ *See* 8 U.S.C. §§ 1184(i), 1182(n), 1184(g).

⁵¹ *Id.* § 1184(i)(1).

⁵² *Id.* § 1182(n)(1)(A).

⁵³ *Id.* § 1184(g)(1)(A).

⁵⁴ *See id.* §§ 1184(i), 1182(n), 1184(g).

⁵⁵ *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

⁵⁶ *See* 8 U.S.C. §§ 1182(n), 1184(g).

⁵⁷ *Id.* § 1184(g)(5)(C).

⁵⁸ 90 Fed. Reg. at 60,866.

levels, reflecting experience rather than specialized knowledge.⁵⁹ By reducing their selection probability, the rule disadvantages statutorily qualified beneficiaries without any indication that Congress intended such differentiation. The same concern arises from the employer perspective. Firms with greater wage-setting capacity are likely to improve their odds of selection, while smaller or resource-constrained employers may face reduced access. Although DHS acknowledges that the rule may have differential effects across employers and industries, it largely treats those effects as incidental to its policy goals.⁶⁰

DHS retains discretion to administer the cap, but that discretion is not unlimited. A limiting principle separates procedural mechanisms from substantive criteria. DHS may adopt neutral selection tools, such as registration systems or random lotteries, that determine the order in which qualified applicants receive visas.⁶¹ Those mechanisms allocate scarce visa numbers among otherwise equally situated beneficiaries without introducing new criteria that alter their relative ranking. Random selection, for example, does not privilege one class of eligible applicants over another; it distributes limited visas under conditions of simultaneity. By contrast, wage-weighting introduces a comparative hierarchy among eligible beneficiaries based on a criterion Congress assigned to a separate statutory function. The relevant distinction is therefore not whether a mechanism affects outcomes, but whether it does so through neutral allocation or through substantive re-ranking.

What DHS may not do, absent clear congressional authorization, is introduce new criteria that alter the relative position of applicants within the eligible pool based on factors Congress assigned to separate statutory provisions. Incorporating prevailing wage levels into the allocation process crosses that line. It transforms administration of the cap into a form of substantive prioritization untethered to the statutory scheme, raising concerns where the agency asserts authority to reshape access to a major statutory program without clear congressional authorization.⁶² Because the rule assigns differential selection probabilities within a class of otherwise qualified beneficiaries, it exceeds the bounds of permissible administration under § 1184(g).⁶³ Although DHS retains discretion to administer the cap, that discretion does not extend to introducing new substantive criteria that alter the relative priority of statutorily eligible beneficiaries.

⁵⁹ 20 C.F.R. § 655.731(a)(2)(i)–(iv).

⁶⁰ 90 Fed. Reg. at 60,866–69.

⁶¹ 84 Fed. Reg. at 890–91.

⁶² *West Virginia*, 597 U.S. at 721.

⁶³ *Id.*

B. The Wage-Weighted Rule Raises Arbitrary and Capricious Concerns

Even if § 1184(g) grants DHS discretion over allocation mechanics, the rule must satisfy the Administrative Procedure Act (“APA”).⁶⁴ The APA requires courts to set aside agency action that is “arbitrary” or “capricious.”⁶⁵ An agency acts arbitrarily if it relies on factors Congress did not intend it to consider, fails to consider an important aspect of the problem, or fails to articulate a rational connection between the facts found and the choice made.⁶⁶ Each of those concerns is implicated by the wage-weighted rule. Although DHS addressed a range of comments, its explanation leaves unresolved tensions between wage-based selection and the statutory framework. The rule presents three related problems under *State Farm*: it relies on a factor Congress did not intend to govern allocation, fails to establish a rational connection between wage levels and statutory eligibility, and inadequately addresses foreseeable reliance and market effects.⁶⁷

That concern is not merely theoretical. Independent analysis has identified significant limitations in the data underlying DHS’s assumptions. Transactional Records Access Clearinghouse (“TRAC”) data highlights that DHS relied on post-selection LCA data to estimate wage-level distribution.⁶⁸ Because prevailing wage determinations depend on occupational classifications, geographic location, and employer-specific reporting, the relationship between wage level and skill is not consistently predictive across occupations and regions.⁶⁹ These limitations matter under the APA: where an agency relies on empirical assumptions, it must ensure that those assumptions are supported by the record. If the data does not reliably measure the asserted relationship, the agency’s conclusions lack a sufficient empirical foundation.

1. Wage Levels as a Proxy

The wage-weighted rule assumes that prevailing wage level serves as a proxy for skill or labor-market value.⁷⁰ Yet wage tiers measure experience and labor-

⁶⁴ 5 U.S.C. § 706(2)(A) (2022).

⁶⁵ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Transactional Records Access Clearinghouse, *Data Limitations in H-1B Wage-Level Selection* (2026), <https://tracreports.org/reports/768/> (last visited Apr. 27, 2026) (explaining that DHS relied on post-selection LCA data and that such data may not accurately represent the full population of H-1B registrants).

⁶⁹ See 20 C.F.R. § 655.731(a) (2024); U.S. Dep’t of Labor, Emp. & Training Admin., *Prevailing Wage Determination Policy Guidance: Nonagricultural Immigration Programs* (rev. Nov. 2009), https://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last visited Apr. 27, 2026).

⁷⁰ 90 Fed. Reg. at 60,865–67.

market positioning, not statutory qualification, creating a disconnect between the regulatory proxy and the statutory standard.⁷¹ A newly graduated Ph.D. in fields such as artificial intelligence or biomedical engineering may qualify as a specialty occupation while being classified at Wage Level I. Conversely, a higher wage classification may reflect tenure or managerial responsibilities rather than specialized knowledge. Without a demonstrated connection between wage level and statutory eligibility, the rule risks substituting administrative preference for statutory criteria.

Early empirical analysis underscores this mismatch. The Penn Wharton Budget Model analysis indicates that wage-weighted selection may not reliably prioritize higher-skilled workers, as employers can reclassify positions into related occupations to obtain more favorable wage-level classifications, undermining the rule's ability to reliably align selection outcomes with the statutory objective of prioritizing higher-skilled workers.⁷² This weakens the rule's premise that wage level is a stable proxy. If DHS intends wage level to function as a proxy for skill, it must explain why a compensation-based classification system designed for wage protection meaningfully advances the statutory definition of specialty occupation.⁷³ The APA requires a reasoned connection between the factor relied upon and the statutory objective.⁷⁴ That instability further complicates the required connection. DHS offers a rationale for its approach, but it does not adequately explain how wage levels map onto the statutory definition of a specialty occupation in a consistent and predictable way, leaving a gap between the factor relied upon and the statutory objective.

2. Competitive Redistribution and Startup Barriers

Because selection weight increases with wage level, the rule systematically advantages employers capable of offering higher salaries.⁷⁵ Department of Labor data suggests concentration among a relatively small number of employers, many

⁷¹ 20 C.F.R. § 655.731(a)(2).

⁷² See Penn Wharton Budget Model, *How Strategic Reclassification Can Undercut the New H-1B Lottery Design* (Mar. 6, 2026), <https://budgetmodel.wharton.upenn.edu/p/2026-03-04-how-strategic-reclassification-can-undercut-the-new-h-1b-lottery-design/> (explaining that employers can increase lottery weight by reclassifying positions into related occupations with different wage thresholds); Penn Wharton Budget Model, *The Impact of Higher Prevailing Wages on the H-1B Visa Lottery* (Apr. 8, 2026), <https://budgetmodel.wharton.upenn.edu/p/2026-04-08-the-impact-of-higher-prevailing-wages-on-the-h-1b-visa-lottery/>.

⁷³ *State Farm*, 463 U.S. at 43.

⁷⁴ *Id.*

⁷⁵ 90 Fed. Reg. at 60,866–67.

of which operate at scale and can absorb higher labor costs.⁷⁶ Venture-backed startups and smaller firms, by contrast, typically operate under constrained payroll budgets and may rely on equity compensation or staged salary growth.⁷⁷ Under the weighted regime, these firms may face systematically reduced access to H-1B visas, even where they seek to hire highly specialized workers.

Foreseeable redistribution of competitive access constitutes an important aspect of the problem under the APA.⁷⁸ DHS acknowledges that the rule may have differential effects across employers and industries, but its response does not fully engage with the implications of those effects.⁷⁹ Because these consequences are both foreseeable and central to how the rule operates, the agency must address them rather than treating them as incidental.⁸⁰ Commenters likewise warned that wage-weighting could disadvantage sectors such as healthcare and education, where compensation structures differ from those in large technology firms.⁸¹ These concerns highlight that wage-tier prioritization reflects sector-specific compensation structures rather than statutory merit. The failure to grapple with these concerns further supports a finding of arbitrary decision-making.

3. Reliance Interests and the 2024 Beneficiary-Centric Reform

The APA also requires agencies to consider serious reliance interests before departing from established regulatory frameworks.⁸² In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court emphasized that agencies must account for reliance interests that their prior policies have engendered.⁸³ Similarly, in *FCC v. Fox Television Stations, Inc.*, the Court held that an agency must provide a reasoned explanation when its prior policy has created expectations that would be disrupted by change.⁸⁴ In *Encino Motorcars, LLC v. Navarro*, the Court reiterated that unexplained inconsistency in agency policy can render a rule arbitrary and capricious.⁸⁵ In 2024, DHS adopted a beneficiary-centric registration model designed to ensure equal selection probability among unique

⁷⁶ U.S. DEP'T OF LABOR, OFFICE OF FOREIGN LAB. CERTIFICATION, *H-1B EMPLOYER DATA HUB* (FY 2023), <https://www.dol.gov/agencies/eta/foreign-labor/performance>.

⁷⁷ NAT'L VENTURE CAPITAL ASS'N, *VENTURE MONITOR Q4 2023 REPORT* (2024); Steven J. Davis et al., *The Lifecycle of Young Firms*, 129 Q.J. ECON. 581, 582–86 (2014).

⁷⁸ *State Farm*, 463 U.S. at 43.

⁷⁹ 90 Fed. Reg. at 60,866–69.

⁸⁰ *State Farm*, 463 U.S. at 43.

⁸¹ Letter from Am. Hosp. Ass'n to Dep't of Homeland Sec. (Oct. 24, 2025), <https://www.aha.org/lettercomment/2025-10-24-aha-comments-dhs-proposed-h-1b-visa-weighted-selection-process>.

⁸² *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016).

⁸³ *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 29–30 (2020).

⁸⁴ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009).

⁸⁵ *Encino Motorcars*, 579 U.S. at 221–22.

beneficiaries.⁸⁶ Employers and practitioners structured their practices around that framework. A shift from neutrality to wage-tier weighting alters those expectations by introducing a new determinant of selection probability.⁸⁷ DHS acknowledges the policy change but provides limited discussion of reliance interests associated with the prior system.⁸⁸ Absent such explanation, the change risks appearing insufficiently reasoned.⁸⁹

4. Proxy Drift and Statutory Fit

Prevailing wage tiers were developed to prevent wage undercutting and protect domestic labor markets.⁹⁰ Cap allocation, by contrast, determines access to a limited number of visas among statutorily eligible applicants.⁹¹ When an agency imports a compliance safeguard into a distinct allocation function, it must demonstrate that the borrowed factor meaningfully advances the statutory objective.⁹² DHS has articulated policy reasons for its approach, but it has not adequately explained how wage regulation aligns with eligibility determination. Nor does the rule identify limiting principles that would prevent further expansion of wage-based prioritization beyond the statutory framework. These deficiencies demonstrate that DHS has not provided the reasoned explanation required to justify reliance on wage level as a selection criterion.

IV. RECOMMENDATIONS

The preceding analysis does not suggest that DHS lacks authority to refine cap-allocation mechanics. The cap is real, oversubscription is chronic, and § 1184(g) necessitates an administrable selection mechanism.⁹³ The question is how far “administering” the cap permits the agency to go. Reform can advance program integrity without re-ranking the eligible pool based on non-statutory criteria. A statute-consistent approach should pursue three objectives: preserve the INA’s structural separation between eligibility, wage safeguards, and numerical limits; deter speculative or manipulative registrations; and maintain regulatory predictability in innovation-driven sectors. These goals do not require converting wage compliance into an allocation hierarchy.

⁸⁶ 89 Fed. Reg. at 7,470–71.

⁸⁷ 90 Fed. Reg. at 60,865–67.

⁸⁸ *Id.*

⁸⁹ *Fox Television Stations*, 556 U.S. at 515–16.

⁹⁰ 8 U.S.C. § 1182(p)(4).

⁹¹ *See id.* § 1182(n)(1)(A)(i)–(ii).

⁹² *State Farm*, 463 U.S. at 43.

⁹³ 8 U.S.C. § 1184(g)(1)(A); 84 Fed. Reg. at 890–91.

A. Neutral Selection as the Structural Baseline

Section 1184(g) establishes a numerical ceiling but does not prescribe a substantive hierarchy among eligible beneficiaries.⁹⁴ Where oversubscription makes strict chronological processing infeasible, DHS has historically relied on neutral random selection as a procedural solution to simultaneity rather than a merits ranking.⁹⁵ The registration system formalized that approach by preserving random selection while shifting intake to a lower-cost front-end process.⁹⁶ Neutral selection reflects Congress's division of labor within the H-1B provisions. Congress defined "specialty occupation" in § 1184(i) and assigned prevailing wage protections to §§ 1182(n) and 1182(p).⁹⁷ Treating wage tier as a determinant of selection probability collapses these distinct functions. Neutral selection preserves the statutory architecture by maintaining wage compliance as a threshold safeguard rather than a comparative sorting device.

By allocating scarce visas without altering the relative priority of eligible applicants, neutral selection maintains the statutory baseline. It also reduces incentives for artificial compensation signaling. A wage-weighted system encourages firms to adjust compensation structures not solely for labor-market reasons but to improve selection odds, thereby distorting hiring decisions.⁹⁸ Neutral selection limits that distortion while maintaining administrative feasibility.

B. Prioritization Only Where Congress Expressly Provided It

Congress created one explicit prioritization mechanism within the cap: the advanced-degree exemption.⁹⁹ DHS may implement that distinction because it is grounded in the statutory text. Beyond that express carveout, however, the INA does not authorize additional prioritization based on compensation or other non-statutory factors.¹⁰⁰ Where Congress specifies a priority, agencies may implement it; where Congress is silent, agencies may not substitute their own preferences for those of the legislature. A statute-consistent allocation system must therefore respect the limited set of priorities Congress has chosen to enact.

C. A Pre-Filing Verification System Under § 1103(a)

⁹⁴ 8 U.S.C. § 1184(g)(1)(A).

⁹⁵ 84 Fed. Reg. at 890–91.

⁹⁶ *Id.* at 889–90.

⁹⁷ 8 U.S.C. §§ 1184(i)(1), 1182(n)(1)(A), 1182(p)(4); 20 C.F.R. § 655.731(a)(2).

⁹⁸ Penn Wharton Budget Model, *supra* note 72.

⁹⁹ 8 U.S.C. § 1184(g)(5)(C).

¹⁰⁰ *See id.*; 8 U.S.C. § 1184(g)(1)(A).

DHS has defended wage-weighting in part as an integrity measure, aimed at discouraging speculative registrations and improving program quality.¹⁰¹ If integrity is the core concern, however, more direct and less distortive tools are available. A more targeted alternative is a pre-filing verification system grounded in DHS's authority to administer the INA.¹⁰² Instead of weighting entries based on wage level, DHS could require documentation demonstrating that a bona fide job offer exists at the time of registration. Verification could include a signed offer letter, internal authorization confirming that the position is approved and funded, and certification that the employer intends to file promptly if selected. DHS could also require representation that a Labor Condition Application can be filed immediately upon selection. These requirements would apply across firm types without privileging employers based on wage-setting capacity. By focusing on the authenticity of job offers rather than compensation levels, a verification-based approach directly targets abuse while preserving neutrality in selection.

D. Compliance Costs, Investment Stability, and Predictability

H-1B participation carries meaningful compliance costs, including filing fees, legal expenses, and administrative burdens associated with prevailing-wage determinations and Labor Condition Applications.¹⁰³ These costs are unevenly distributed, with smaller firms often facing greater relative burdens than large employers.¹⁰⁴ In 2024, DHS adopted a beneficiary-centric registration model designed to promote fairness by equalizing selection probability among beneficiaries.¹⁰⁵ Employers and practitioners adjusted their behavior in reliance on that framework. A shift to wage-weighting imposes additional adjustment costs by introducing a new determinant of selection probability and encouraging compensation-based signaling. By contrast, a verification-based model imposes a targeted documentation burden without requiring firms to restructure compensation practices. Such an approach promotes stability while addressing integrity concerns more directly.

E. Administrative Feasibility and Enforcement Leverage

Administrative feasibility does not justify wage-weighted selection. DHS already collects substantial information through the registration and petition

¹⁰¹ 90 Fed. Reg. at 60,865.

¹⁰² See 8 U.S.C. § 1103(a)(1).

¹⁰³ U.S. Gov't Accountability Off., GAO-11-26, *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program* (2011).

¹⁰⁴ Davis et al., *supra* note 77, at 583–86.

¹⁰⁵ 89 Fed. Reg. at 7,470–71.

processes, and verification requirements could be implemented using existing infrastructure. Although additional documentation may increase administrative workload, that burden is limited and more directly tied to the agency’s stated integrity objectives. By contrast, wage-weighting introduces complexity without ensuring a closer connection to statutory criteria. A neutral selection system combined with targeted verification strikes a more appropriate balance between administrative efficiency and statutory fidelity.

F. Preserving Statutory Structure While Avoiding Market Distortion

DHS can pursue integrity and efficiency without converting prevailing wage tiers into allocation weights. A statute-consistent framework would (1) maintain neutral selection among verified, eligible beneficiaries, (2) respect the limited prioritization Congress expressly adopted, and (3) address abuse through targeted verification rather than compensation-based proxies. Such a framework preserves the INA’s structure and avoids turning cap allocation into a market-allocation mechanism. It also aligns administrative practice with statutory design, ensuring that allocation decisions remain grounded in the criteria Congress chose to enact.

V. CONCLUSION

The H-1B program reflects a deliberate statutory architecture: Congress defined “specialty occupation” in qualitative terms, imposed a numerical cap, and assigned prevailing wage requirements a labor-protection function.¹⁰⁶ The INA does not link wage tiers to cap allocation, yet the 2026 rule imports those classifications into selection, assigning different probabilities among otherwise eligible beneficiaries.¹⁰⁷ Although DHS retains discretion to administer the cap, that discretion is bounded by statutory text and structure; where Congress separates eligibility, wage safeguards, and numerical limits, those divisions constrain allocation authority.¹⁰⁸ By converting wage levels into a ranking device, the rule reshapes access to high-skilled labor. This Note advances a narrower claim: absent clear congressional authorization, wage-based re-ranking of otherwise eligible beneficiaries exceeds DHS’s authority under the INA. A system grounded in neutral selection among verified, eligible beneficiaries—honoring only express statutory priorities—better preserves administrative limits and the statutory equilibrium governing high-skilled immigration.

¹⁰⁶ 8 U.S.C. §§ 1184(i), 1184(g), 1182(n).

¹⁰⁷ See 90 Fed. Reg. at 60,866–67.

¹⁰⁸ *West Virginia*, 597 U.S. at 721.