SUNI Review Complete
Template=ADM-013
E-RIDS=ADM-03

ADD: Brain Benney, Mark Resner Mary Neely
Comment (1)
Publication Date: 6/513/2022
Citation: 87 FR 35798

PUBLIC SUBMISSION

As of: 8/12/22, 3:14 PM
Received: August 12, 2022
Status: Pending_Post
Tracking No. l6q-t2fi-bpb5
Comments Due: August 12, 2022
Submission Type: Web

Docket: NRC-2022-0119
Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working At Nuclear Power Plants

Comment On: NRC-2022-0119-0001
Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants

Document: NRC-2022-0119-DRAFT-0002
Comment on FR Doc # 2022-12611

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General Comment

Industry Comments on Draft Regulatory Issue Summary 2022–XX, “Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants;” Docket ID NRC–2022-0119

Attachments

08-12-22_Industry Comments on DRAFT RIS on Foreign Nationals_Final_Redacted

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August 12, 2022

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Submitted via Regulations.gov

Subject: Industry Comments on Draft Regulatory Issue Summary 2022–XX, "Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants;" Docket ID NRC–2022-0119

Project Number: 689

Program Management, Announcements and Editing Staff:

On behalf of its members, the Nuclear Energy Institute (NEI)[1] appreciates the opportunity to review and comment on the Draft Regulatory Issue Summary (Draft RIS) related to personnel access authorization requirements for non-immigrant foreign nationals working at U.S. nuclear power plants.[2] A previous iteration of this Draft RIS was published for comment in the *Federal Register* on March 31, 2020,[3] and NEI provided extensive comments expressing concerns with the positions taken in that document.[4] After carefully reviewing the Draft RIS, we continue to believe that the document confuses rather than clarifies the requirement to verify the true identity of foreign nationals contained in 10 CFR 73.56(d)(3). Therefore, we do not believe the NRC should finalize the document without additional clarification.

As stressed in our 2020 Comments, NEI and its members are committed to complying with the requirements

[1] The Nuclear Energy Institute (NEI) is responsible for establishing unified policy on behalf of its members relating to matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect and engineering firms, fuel cycle facilities, nuclear materials licensees, and other organizations involved in the nuclear energy industry

[2] "Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants," 87 Fed. Reg. 35,798 (June 13, 2022)("Draft RIS").

[3] "Clarification of Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants," 85 Fed. Reg. 17,770 (March 31, 2020)("2020 Draft RIS").

[4] Industry Comments on Draft Regulatory Issue Summary 2020-XX, "Clarification of Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants, Docket ID NRC-2020-0073," June 15, 2020 ("2020 Comments").

of 10 CFR 73.56, "Personnel access authorization requirements for nuclear power plants," which are designed to provide high assurance that individuals subject to access authorization programs are trustworthy and reliable, and do not pose an unreasonable risk to public health and safety or the common defense and security. Nothing in these comments or NEI's 2020 Comments should be interpreted as minimizing the importance of meeting the requirements of 10 CFR 73.56(d)(3) or any immigration-related requirements imposed by other Federal agencies. In that vein, we note that the NRC staff have made it clear that the issue being addressed in this RIS does not involve a security threat to the nuclear power fleet "because security programs at nuclear power plants are robust and include many integrated layers of defense (*i.e.*, access authorization, behavioral observation, fitness for duty, insider mitigation, and physical security programs)."[5]

In addition, we recognize the NRC's modification of the 2020 Draft RIS to remove much of the troubling detail that, in our view, expressly conflated the NRC's access authorization requirements with the Department of Homeland Security's (DHS) requirements applicable to employers of foreign nationals and communicated an expanded interpretation of what is required to comply with 10 CFR 73.56(d)(3).[6] Specifically, the 2020 Draft RIS stated that 10 CFR 73.56(d)(3) required licensees to "ensur[e] [that a] non-immigrant foreign national is authorized with the correct visa category to perform the specific work in the United States for which UA or UAA is granted."[7] While this statement is no longer contained in the Draft RIS, neither the Draft RIS or associated Comment Response Document[8] give any indication of whether the NRC is maintaining its position that this type of detailed employment eligibility check is now required by section 73.56(d)(3). We also note that statements to this effect remain in the 2020 Enforcement Guidance Memorandum associated with this issue.[9]

Unfortunately, the Draft RIS provides no insight into, or clarification of, what the NRC believes is required for compliance with 10 CFR 73.56(d)(3). Rather, it simply claims to "remind licensees of the requirement in 10 CFR 73.56(d)(3) . . . and that verifying employment eligibility is an important component of the required

[5] NRC Presentation "Clarification of Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants," Office of Nuclear Security and Incident Response, April 28, 2020, at slide 10. We note, however, that the Draft RIS indicates that verifying employment eligibility of a non-immigrant foreign nationals "is important to ensure that individuals to whom a licensee intends to grant UA to nuclear power plant protected or vital areas or any individual for whom a licensee or applicant intends to certify UAA, are trustworthy and reliable such that they do not constitute an unreasonable risk to public health and safety or the common defense and security, including the potential to commit radiological sabotage." Draft RIS, at pg. 1. Implying that this issue involves a threat to common defense and security or the potential for radiological sabotage is inconsistent with the statements made by the NRC staff that the issue does not involve a security threat to the nuclear power fleet.

[6] *See* 2020 Draft RIS, at pgs. 3-4.

[7] 2020 Draft RIS, at pg. 4. (emphasis added)

[8] "Docket ID: NRC-2020-0073-Draft Regulatory Information Summary (RIS) – Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants" ("Comment Response Document").

[9] "[L]icensees must take additional steps to determine the non-immigrant status of applicants seeking UA or UAA, including that the applicants are legally authorized to carry out the activities for which UA or UAA is sought in accordance with the regulatory requirements associated with their visa . . . issued to them for entry into the US." Enforcement Guidance Memorandum (EGM) 2020-001 Rev. 1, "Enforcement Discretion not to Cite Certain Violations of 10 CFR 73.56 Requirements," Dec. 17, 2020, at pg. 2 ("EGM-20-001, Rev. 1")(emphasis added). In addition, during the public meeting on the Draft RIS held on August 9, 2022, NRC staff seemed to indicate that they continue to believe the position articulated in the 2020 Draft RIS and EGM-20-001 is valid.

[9] "[L]icensees must take additional steps to determine the non-immigrant status of applicants seeking UA or UAA, including that the applicants are legally authorized to carry out the activities for which UA or UAA is sought in accordance with the regulatory requirements associated with their visa . . . issued to them for entry into the US." Enforcement Guidance Memorandum (EGM) 2020-001 Rev. 1, "Enforcement Discretion not to Cite Certain Violations of 10 CFR 73.56 Requirements," Dec. 17, 2020, at pg. 2 ("EGM-20-001, Rev. 1")(emphasis added). In addition, during the public meeting on the Draft RIS held on August 9, 2022, NRC staff seemed to indicate that they continue to believe the position articulated in the 2020 Draft RIS and EGM-20-001 is valid.

validation."[10] Thus, issuance of the Draft RIS in its current form will not provide the clarity necessary to successfully close EGM-20-001[11] and will result in significant enforcement uncertainty for NEI members, including those that currently use the Systematic Alien Verification for Entitlements (SAVE) database as a tool to verify an applicant's true identity. This uncertainty could, in turn, create an unnecessary barrier to recruiting and hiring skilled, non-immigrant foreign nationals to work at US nuclear power plants.

Further, if the position articulated in the 2020 Draft RIS regarding employment eligibility continues to be the agency's position on this matter, then NEI and its members continue to believe and strongly reassert that this new interpretation of section 73.56(d)(3) substantially expands the existing requirement to verify the true identity of non-immigrant foreign nationals that apply for unescorted access and, if imposed on licensees, would constitute an unanalyzed backfit. Read in context, section 73.56(d)(3) and the associated guidance are clearly focused on ensuring "that the applicant is the person that he or she has claimed to be,"[12] not on performing an exhaustive investigation into the applicant's employment eligibility.[13] In addition, as stated in our 2020 Comments, NEI's power reactor licensee members do not conduct the type of detailed employment eligibility investigations described in the 2020 Draft RIS and EGM-20-001 as part of their access authorization programs. This includes licensees that are using the SAVE database to verify an applicant's true identity.

For example, although the document is not mentioned in either EGM-2020-001 or the 2020 Draft RIS, the Draft RIS now relies on "NRC Regulatory Issue Summary 2002-13 Confirmation of Employment Eligibility" (RIS-2002-13) to support the argument that verification of employment eligibility was always expected as a matter of compliance with 10 CFR 73.56(d)(3).[14] But RIS-2002-13 does not support the expansive position explicitly articulated in EGM-2020-001 and the 2020 Draft RIS. Specifically, with respect to the potential future use of SAVE, RIS-2002-13 states that the database would allow licensees and contractors to simply confirm "authorized for employment" status with the Immigration and Naturalization Service (INS). And that is exactly how NEI members that utilize SAVE as part of their access authorization programs use the database today. Simply confirming "authorized for employment" status in SAVE does not equate to "ensuring [that a] non-immigrant foreign national is authorized with the correct visa category to perform the specific work in the United States for which UA or UAA is granted."[15]

Thus, the position that is explicitly articulated in EGM-2020-001 and the 2020 Draft RIS – and potentially still

[10] Draft RIS, at pg. 1.
[11] EGM-20-01, Rev. 1, at pg. 3. "In accordance with Section 3.5, "Violations Involving Special Circumstances," of the NRC Enforcement Policy, the agency will exercise enforcement discretion and will not cite NRC licensees for past or future violations of 10 CFR 73.56(d)(3) as specifically described in this memorandum for a period of six months from the date of issuance of new regulatory guidance."
[12] 10 CFR 73.56(d)(3).
[13] As explained in our 2020 Comments, there are requirements promulgated by the Department of Homeland Security (DHS) that require detailed checks on employment eligibility to be conducted by the employer that hires a foreign national employee. Specifically, Title 8 of the Code of Federal Regulations includes Part 274a, "Control of Employment of Aliens." Subpart A to Part 274a, which is entitled "Employer Requirements," includes section 274a.2, "Verification of identity and employment authorization." In turn, 8 CFR 274a.2(b) imposes requirements on a person or entity that hires an individual to verify that individual's eligibility for employment. The point here is not to diminish the importance of the requirements provided in 8 CFR 274a. They serve an important purpose and employers must comply with them. But the fact that they may compliment the NRC's access authorization regulations does not convert these DHS requirements to NRC requirements.
[14] *See* Draft RIS, at pg. 1-2 (*citing* RIS-2002-13).
[15] 2020 Draft RIS, at pg. 4.

implicit in the current Draft RIS – would require changes to access authorization programs, even for licensees that are currently using SAVE. Imposing this expanded interpretation on power reactor licensees would meet the definition of backfitting in 10 CFR 50.109, which requires that such new or different interpretations be evaluated prior to being imposed on licensees.[16]

More generally, while we agree that confirming that an individual is "authorized for employment" in a government database like SAVE is an acceptable method of validating an applicant's claimed non-immigration status, we do not agree that verification of employment eligibility is required by NRC's access authorization regulations. To the contrary, the information provided in the Comment Response Document issued with the Draft RIS demonstrates that such a requirement is absent from the regulations, and must be read into 10 CFR 73.56(d)(3) based largely on a broad assertion made in a letter – not a rulemaking or an order – issued by the Director of the Office of Nuclear Reactor Regulation over two years after the promulgation of the current requirement articulated in paragraph (d)(3).[17] Indeed, the Draft RIS itself explicitly relies upon the same logic to "find" the requirement to verify employment eligibility in paragraph (d)(3).[18] Imposing a new legally binding requirement to verify employment eligibility requires that the NRC either undertake a rulemaking, or issue orders. *Post hoc* rationalizations like those offered in the Draft RIS and associated Comment Resolution Document cannot be used to impose such a requirement.

We address the rulemaking history described in the Draft RIS and Comment Response Document below.

I. RIS 2002-13 Did Not Impose New Requirements on Power Reactor Licensees.

In the Draft RIS, the NRC now relies upon RIS 2002-13 "Confirmation of Employment Eligibility" (August 27, 2002) to support the position that "confirming a foreign national's employment eligibility was an important element of the background investigation undertaken to verify the true identity of an applicant seeking UA or UAA. . . ."[19] As a threshold matter, we note that RIS-2002-13 is not mentioned in either EGM-2020-001 or the 2020 Draft RIS.[20] In the future, it would increase transparency if the NRC cited to all relevant precedent that it is relying upon when publishing positions in regulatory issue summaries and other generic communications. This is particularly true in situations where the NRC is relying upon generic communications that are not publicly available, such as RIS-2002-13. Increasing transparency in this way allows for a more robust and efficient public comment process.

Paragraphs and corresponding footnotes from this section have been redacted as they contain non-publicly available information from RIS 2002-13. An un-redacted version has been provided to the NRC and have been marked to be withheld from public disclosure.

[16] "Backfitting is defined as the modification or addition to . . . the procedures or organization required to . . . operate a facility . . . which may result from . . . the imposition of a regulatory staff position interpreting the Commission's regulations that is either new or different from a previously applicable staff position. . . ." 10 CFR 50.109(a)(1).
[17] Comment Response Document, at pg. 12.
[18] Draft RIS, at pg. 3.
[19] Draft RIS, at pg. 1-2.
[20] RIS 2002-13 is also not specifically mentioned in the Power Reactor Security Final Rule, which promulgated the current iteration of 10 CFR 73.56(d)(3). "Power Reactor Security Requirements: Final Rule," 74 Fed. Reg. 13,926 (March 27, 2009)("Power Reactor Security Final Rule").

In sum, RIS-2002-13 does not support the positions articulated in EGM 2020-01, the 2020 Draft RIS, or the current Draft RIS regarding the existence of an employment eligibility requirement in section 73.56(d)(3), or the scope of any such requirement.

II. EA-002-261, "Order for Compensatory Measures Related to Access Authorization" (Jan. 7, 2003) and Supplement 1 to NEI 03-01

Just months after issuance of RIS-2002-13, the Commission issued EA-002-261. As discussed in our 2020 Comments the permissive language contained in EA-002-261 regarding confirmation for employment eligibility is quoted in Supplement 1 of NEI 03-01, "Nuclear Power Plant Access Authorization Program." Although the language quoted in Supplement 1 does suggest (using permissive as opposed to mandatory language) that licensees "should confirm eligibility for employment through the U.S. Citizenship and Immigration Service (CIS),"[21] it is clear that the purpose of such confirmation was "to verify and ensure to the extent possible, the accuracy of a social security number [or] alien registration number" provided by the applicant.[22]

The purpose of the eligibility confirmations discussed in Supplement 1 was not to fulfill a licensee obligation to ensure that a non-immigrant's immigration status authorizes that individual to perform specific tasks once unescorted access is granted. Rather, when read fairly, the employment eligibility confirmations referenced in Supplement 1 and EA-02-261 were methods of compliance intended to verify the accuracy of information provided by the applicant for unescorted access (*i.e.*, a social security number or alien registration number). This is consistent with the purpose of section 73.56(d)(3), which is to ensure that the applicant for unescorted access is the person that he or she claims to be.

Regardless, the meaning of the direction provided in EA-02-261 is moot because, as noted in our 2020 Comments, EA-02-261 was rescinded in its entirety on November 28, 2011.[23]

III. The 2009 Power Reactor Security Rule that Codified the Current Version of Section 73.56(d)(3) Did Not Impose a Requirement to Confirm Employment Eligibility.

As discussed in the Draft RIS, the rulemaking history that resulted in the current requirements of section 73.56(d)(3) began with a proposed rule published for public comment on October 26, 2006.[24] The language proposed for paragraph 73.56(d)(3) reads:

> (3) Verification of true identity. Licensees, applicants, and C/Vs shall verify the true identity of an individual who is applying for unescorted access authorization in order to ensure that the applicant is

[21] "Nuclear Power Plant Access Authorization Program (Supplement 1)," NEI 03-01, Rev. 3, at pg. 1 ("NEI 03-01").
[22] *Id.*
[23] Letter from E.J. Leeds (NRC), "Rescission of Partial Rescission of Certain Power Reactor Security Orders Applicable to Nuclear Power Plants," November 28, 2011 ("2011 Rescission Letter").
[24] "Power Reactor Security Requirements: Proposed Rule," 71 Fed. Reg. 62,664 (Oct. 26, 2006)("Power Reactor Security Proposed Rule").

> the person that he or she has claimed to be. At a minimum, licensees, applicants, and C/Vs shall validate the social security number that the individual has provided, and, in the case of foreign nationals, the alien registration number that the individual provides. In addition, licensees, applicants, and C/Vs shall also determine whether the results of the fingerprinting required under §73.21 confirm the individual's claimed identity, if such results are available.

The term "employment eligibility" appears nowhere in this proposed regulation. In fact, there is no discussion of verifying the employment eligibility of non-immigrant foreign nationals in the entire 210-page *Federal Register* notice describing and providing the proposed rule text.

The final rulemaking codifying the current requirements contained in section 73.56(d)(3) was published in the *Federal Register* on March 27, 2009.[25] Agreeing with public comments received on the proposed language quoted above, the Commission stated that it was revising paragraph (d)(3) "to allow licensees and applicants to use an alien registration or an I–94 Form to verify the identity of a foreign national."[26] The current relevant, legally binding requirement promulgated in the 2009 final rule states:

> (3) *Verification of true identity*. Licensees, applicants, and contractors or vendors shall verify the true identity of an individual who is applying for unescorted access or unescorted access authorization in order to ensure that the applicant is the person that he or she has claimed to be. At a minimum, licensees, applicants, and contractors or vendors shall validate that the social security number that the individual has provided is his or hers, and, in the case of foreign nationals, validate the claimed non-immigration status that the individual has provided is correct. In addition, licensees and applicants shall also determine whether the results of the fingerprinting required under § 73.57 confirm the individual's claimed identity, if such results are available.[27]

(emphasis added). The term "employment eligibility" appears nowhere in this regulation. In fact, there is no discussion of verifying the employment eligibility of non-immigrant foreign nationals in the entire 67-page *Federal Register* notice describing and providing the final rule, or in the additional 68-page regulatory and backfitting analysis supporting the final rule.

There is simply no requirement that licensees must confirm the employment eligibility of non-immigrant foreign nationals in the NRC's current access authorization requirements.

IV. The 2011 Rescission of EA-2002-261 did not Amend 10 CFR 73.56(d)(3).

As described in our 2020 Comments, on November 28, 2011, the Director of the Office of Nuclear Reactor Regulation issued a letter rescinding the requirements of EA-02-261 in their entirety. The Merriam-Webster dictionary defines the transitive verb "rescind" as: "to take away: Remove" or to "make void by action of the enacting authority or a superior authority: Repeal."[28] So, it is clear that EA-02-261 ceased having any legal

[25] "Power Reactor Security Requirements: Final Rule," 74 Fed. Reg. 13,926 (March 27, 2009)("Power Reactor Security Final Rule").
[26] Power Reactor Security Final Rule, at pg. 13,947.
[27] 10 CFR 73.56(d)(3).
[28] https://www.merriam-webster.com/dictionary/rescind.

effect on November 28, 2011.

Incredibly, the Draft RIS brushes this fact aside, stating:

> The NRC rescinded NRC Order EA-02-261 by letter dated November 28, 2011 . . . The rescission letter stated that the power reactor security rulemaking (10 CFR 73.56) incorporated all the requirements set forth in the power reactor security order EA-02-261 . . . Thus, the rescission of the NRC Order EA-02-261 did not remove or modify the requirement to verify a foreign national's eligibility of employment.[29]

This assertion is wrong, as a matter of both fact and law.

First, the 2011 Rescission Letter states that "the staff has determined that the generically applicable security requirements set forth in the orders are adequately captured in the applicable regulations with the exception of three requirements from . . . [EA-02-026]."[30] This is hardly an unequivocal assertion that the Director of NRR believed that the permissive language provided in EA-02-261 suggesting that licensees confirm employment eligibility had been included in 10 CFR 73.56(d)(3), despite not being mentioned in that paragraph or anywhere else in the Power Reactor Security Final Rule.

To the contrary, in its Power Reactor Security Final Rule, the Commission stressed the interim nature of the security orders (including EA-02-026) and expressly disagreed with idea that it was simply codifying those orders into a regulation. Specifically, the Commission explained:

> The security orders were issued based on the specific knowledge and threat information available to the Commission at the time the orders were issued. The Commission advised licensees who received those orders that the requirements were interim and that the Commission would eventually undertake a more comprehensive reevaluation of current safeguards and security programs. As noted in the proposed rule, there were a number of objectives for the rulemaking beyond simply making generically applicable security requirements similar to those that were imposed by Commission orders.[31]

In the comment response document associated with the Power Reactor Security Final Rule, the NRC went even further stating that "the suggestion that . . . the primary goal of the rulemaking was to codify the post-9-11 orders into security regulations, as stated by several industry commenters, is misleading and arguably inconsistent with the NRC's obligations under the Administrative Procedure Act (APA)." [32] The agency went on to state that:

> As a legal matter, the APA prevents the agency from simply codifying orders into a regulation, but instead requires that our rules are published for public comment in the Federal Register and be

[29] Draft RIS, at pg. 3 (emphasis added).
[30] 2011 Rescission Letter, at pg. 1 (emphasis added).
[31] Power Reactor Security Final Rule, at pg. 13,932.
[32] "Integrated Comment Responses Supporting Final Rule: Power Reactor Security Requirements," June 2008, at pg. 4.

> subjected to a public process. To suggest that the agency could simply take a set of requirements it imposed as interim measures under extraordinary circumstances and make them into a generic set of regulations is inconsistent with those legal obligations.[33]

Thus, the rulemaking record for the Power Reactor Security Final Rule makes it clear that the Commission was not simply incorporating the post-9-11 security orders, word-for-word, into its regulations. The idea that the then-Director of NRR would have understood the Power Reactor Security Final Rule as doing so is not credible.

Further, as explained above, the suggestion provided in EA-02-261 that licensees "should" confirm eligibility for employment of certain foreign nationals was for the express purpose of verifying and ensuring to the extent possible that the social security or alien registration number provided by the applicant was accurate.[34] The requirement to "validate the claimed non-immigration status that the individual has provided is correct" is the requirement that was carried into and imposed by the Final Power Reactor Security Rule, not the method of achieving that end suggested in EA-02-261 (*i.e.*, verification of employment eligibility). Unlike the position taken in the Draft RIS, this reading of the 2011 Rescission Letter is consistent with the rulemaking history and plain language of the current requirements.

Yet, in the Comment Response Document, the NRC takes the untenable position that the 2011 Rescission Letter effectively amended section 73.56(d)(3) to include the non-existent employment eligibility requirement. Specifically, in response to our 2020 Comments, the Comment Response Document states:

> The requirements in 10 CFR 73.56(d)(3) were promulgated on March 27, 2009. NRC Order EA-02-261 was still in effect at this time and included the requirement to verify a foreign national's employment eligibility. In a November 28, 2011, letter, the NRC rescinded certain security orders, including NRC Order EA-02-261. The letter stated that all of the requirements in Order EA-02-261, including the requirement to verify employment eligibility, were incorporated into the NRC's 2009 Power Reactor Security Requirements rulemaking. The only discussion in the NRC's security regulations of a licensee's responsibility to validate that a foreign national's claimed non-immigration status is correct is found in 10 CFR 73.56(d)(3). Accordingly, consistent with the EA-02-261 requirements incorporated into the NRC's security regulations, the process of validating that a foreign national's non-immigration status is correct includes verifying the foreign national's eligibility for employment. If validating a foreign national's claimed nonimmigration status does not include verifying employment eligibility, then not all the requirements of EA-02-261 will have been incorporated into the NRC's security regulations.[35]

Again, this description of the 2011 Rescission Letter is wrong as a matter of fact. Specifically, although the letter does indicate that all the requirements of EA-02-261 were "adequately captured in the applicable NRC regulations,"[36] it does not state that a requirement to verify employment eligibility was included in EA-02-

[33] *Id.*
[34] NEI 03-01, at pg. 1.
[35] Comment Response Document, at pg. 12.
[36] 2011 Rescission Letter, at 1.

261 or that such a requirement was incorporated into the NRC's regulations in the Power Reactor Security Final Rule. The Comment Response Document simply reads this statement into the 2011 Rescission Letter.

In addition, the circular assertion that – somehow – a broad statement in a letter issued over two years after promulgation of a final rule could amend that rule to add a requirement to verify employment eligibility is wrong as a matter of law. It is a well-worn principle of administrative law that agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[37] That means that the 2011 Rescission Letter could not have modified the requirements contained in section 73.56(d)(3). And, as explained above, neither the current language of 73.56(d)(3), nor the nearly 350 pages of regulatory record associated with the proposed and final rules contains any mention of verifying the employment eligibility of non-immigrant foreign nationals as a legally binding NRC requirement. Simply put, the requirement does not exist in Part 73. The 2011 Rescission Letter did not claim to, and as a matter of law could not have, amended Part 73 to include such a requirement.

V. Visual Verification of Government-Issued Immigration Documents

Finally, the Draft RIS articulates a new position discrediting visual examination of government-issued documents as a method to verify employment eligibility that is not contained in the 2020 Draft RIS or EGM-20-001.[38] NEI disagrees with the categorical statement in the Draft RIS discounting visual verification of government-issued documents to verify identity.

In the 2020 Draft RIS, the NRC cited to and described NEI System Administrator Bulletin 2017-09 "Verification of Non-Immigration Status" to support the positions taken in the RIS. Specifically, the 2020 Draft RIS stated that "[t]he purpose of the bulletin was to provide a reminder to the licensee facilities that the verification of a foreign worker's non-immigration status is an integral part of the industry background investigation program. . . ."[39] The 2020 Draft RIS then quoted a portion of NEI-03-01, which stated that licensees "should confirm eligibility for employment through U.S. Citizenship and Immigration Service (CIS) . . . and thereby verify and ensure to the extent possible, the accuracy of a social security number [or] alien registration number."[40] In our 2020 Comments, NEI pointed out that System Administrator Bulletin 2017-09 actually articulated two methods of compliance with the requirements of 10 CFR 73.56(d)(3), stating:

> Since the inception of the non-immigration verification performance requirement, two methodologies have been in place to satisfy the performance requirement;
>
> (1) The use of the Department of Homeland Security US Citizenship and Immigration Services (DHS-USCIS) Systematic Alien Verification for Entitlements (SAVE) program, and
>
> (2) The licensee's inspection of passport and visa information identifying the status of the individual

[37] *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015); *see also* 5 U.S.C. §§ 551(5), 553(b)-(d).
[38] Draft RIS, at pg. 3 ("A visual examination of documents provided by a foreign national would not enable the licensee to verify employment eligibility.").
[39] 2020 Draft RIS, at pg. 2.
[40] *Id.*

> upon arrival at the licensee facility.[41]

In response to our 2020 Comments describing the compliance options provided in the Bulletin, the Draft RIS reverses course on the value of the document, pointing out that it was not endorsed by the NRC. Consistent with our comments above regarding the NRC's reliance on RIS-2002-13, this approach to issuing generic communications lacks transparency. System Administrator Bulletin 2017-09 – which is just over one page in length – was cited in the 2020 Draft RIS to support the position being taken in that document, with no mention that the Bulletin contained "ambiguous language inconsistent with the Commission's requirement to validate the authenticity of the information provided by" a foreign national applying for UA or UAA.[42] If the NRC believed that System Administrator Bulletin 2017-09 contained ambiguous language that was inconsistent with the agency's requirements, it is unclear why it would have cited to the document to support issuance of a generic communication. In the future, it would increase transparency if the NRC pointed out any major limitations in documents that it is relying upon to support issuance of generic communications. Increasing transparency in this way allows for a more robust and efficient public comment process.

The lack of transparency aside, the position taken in the Draft RIS stating that visual verification of government-issued immigration documents is not a valid method of compliance is inconsistent with the Power Reactor Security Final Rule. The Draft RIS seems to rely on statements in the Power Reactor Security Proposed Rule to support the position on visual verification, stating:

> In the Statement of Consideration's to the October 26, 2006, Power Reactor Security Requirements proposed rule, the Commission made clear that the term "validation" was being used in 10 CFR 73.56(d)(3) "to indicate that licensees, applicants and [Contractors or Vendors] would be required to take steps to access information in addition to that provided by the individual from other reliable sources to ensure that the personal identifying information the individual has provided to the licensee is authentic" (71 FR 62747). The Commission further stated that validation could be accomplished by accessing information from a variety of reliable sources, including but not limited to Federal Government databases.[43]

The full passage in the 2006 Power Reactor Security Proposed Rule reads as follows:

> Proposed § 73.56(d)(3) would expand on the portion of current § 73.56(b)(2)(i) that requires licensees to verify an individual's true identity. The proposed paragraph would require the entities who are subject to this section, at a minimum, to validate the social security number, or in the case of foreign nationals, the alien registration number, that the individual has provided to the licensee, applicant or C/V. The term, "validation," would be used in the proposed paragraph to indicate that licensees, applicants, and C/Vs would be required to take steps to access information in addition to that provided by the individual from other reliable sources to ensure that the personal identifying information the individual has provided to the licensee is authentic. This validation could be achieved

[41] System Administrator Bulletin 2017-09 – Verification of Non-Immigration Status (November 3, 2017), at pg. 1.
[42] Draft RIS, at pg. 3.
[43] Draft RIS, at pg. 2.

> through a variety of means, including, but not limited to, accessing information from databases that are maintained by the Federal Government, or evaluating an accumulation of information, such as comparing the social security number the individual provided to the social security number(s) included in a credit history report and information obtained from other sources.[44]

When read in context, it is not clear at all that this statement would prohibit the use of government-issued immigration documents (an alien registration/greencard, Visa, I-94 Form, *etc*.) provided by the applicant to validate that the alien registration number provided on a Personal History Questionnaire (PHQ) is authentic. For example, it is unclear why examination of a credit history report would be a compliant method of validation, but examination of an authentic, government-issued immigration document would not.

More importantly from a regulatory standpoint, the statement quoted above is not included in the Power Reactor Security Final Rule.[45] In fact, the interpretation regarding the inadequacy of visual verification in the Draft RIS is inconsistent with statements made by the Commission in the final rule. Specifically, as noted above, in responding to public comments the Commission stated that it was revising paragraph (d)(3) "to allow licensees and applicants to use an alien registration or an I–94 Form to verify the identity of a foreign national."[46] Thus, contrary to the new position take in the Draft RIS, the Commission explicitly stated that paragraph (d)(3) was modified in order to allow licensees to rely upon visual verification of alien registrations (*i.e.*, green cards) and I-94 Forms ("Arrival/Departure Record") to validate the claimed non-immigration status that the applicant has provided is correct.

Conclusion

The Draft RIS should not be finalized as currently written. Although the 2020 Draft RIS was problematic, it was clear. Simply removing the problematic statements without clarifying the NRC's position on those statements does not advance the Commission's principles of Efficiency, Clarity, or Reliability. Further, finalizing the Draft RIS as currently written will create significant enforcement uncertainty because the document confuses, rather than clarifies, what actions are required for compliance with section 73.56(d)(3). This confusion and uncertainty could affect the ability to recruit and hire skilled non-immigrant foreign nationals to perform work at U.S. commercial nuclear power plants.

As explained above, the positions taken in the Draft RIS impose an employment eligibility requirement that is not present in section 73.56(d)(3) and articulates a new rigid position prohibiting use of government-issued immigration documents to validate the identity of non-immigrant foreign nationals that is inconsistent with statements in the Commission's Power Reactor Security Final Rule. Imposition of a requirement to confirm employment eligibility as part of the access authorization process must be undertaken via either a rulemaking or issuance of orders and must be evaluated pursuant to the backfitting requirements in 10 CFR 50.109. Likewise, new positions prohibiting the use of government-issued immigration documents to validate the non-immigration status of foreign nationals must be evaluated pursuant to the Commission's backfitting requirements.

[44] Power Reactor Security Proposed Rule, at pg. 62,747.
[45] Statements made in the preambles of proposed Commission regulations that do not appear in the associated final regulations are not definitive statements of Commission policy.
[46] Power Reactor Security Final Rule, at pg. 13,947 (emphasis added).

As stated in our 2020 Comments, NEI and its members are willing to work expeditiously with the NRC to more clearly articulate acceptable methods of complying with section 73.56(d)(3). We continue to believe that the most appropriate and efficient way to achieve additional clarity would be for NEI to revise the current industry guidance provided in Supplement 1 to NEI 03-01 and submit those revisions to the NRC for review and endorsement. The goal would be to consolidate and clearly describe the acceptable methods that licensees are currently using to comply with the requirements of section 73.56(d)(3). Once the changes to NEI 03-01 are endorsed by the NRC, EGM-20-002 could be closed.[47]

If you have any questions or require additional information, please contact Johnny Rogers, at (202) 739-8032 or jdr@nei.org, or me.

Sincerely,

William R. Gross

[47] Although we disagree with many of the assertions made in EGM-20-001 and would prefer that they be corrected to avoid further confusion, at this point in the evolution of this issue we believe it would be prudent to continue the enforcement discretion provided in the EGM until greater clarity is achieved via the proposed revision to NEI 03-01.