Comment-Resolution Document – "Draft Regulatory Information Summary 2022-XX Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants" (May 2022)

The U.S. Nuclear Regulatory Commission (NRC) published a notice in the *Federal Register* on June 13, 2022 (87 FR 35798) requesting public comment on a "Draft NRC Regulatory Information Summary (RIS) 2022-XX Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants," dated May 27, 2022 (May 2022 Draft RIS). The May 2022 Draft RIS is available in the NRC's Agency Documents Access and Management System (ADAMS) under Accession No. ML22157A366. On August 9, 2022, the NRC held a public meeting to facilitate stakeholder comment on the May 2022 Draft RIS; the transcript of this meeting is available at ML22252A174.

The NRC received letters commenting on the May 2022 Draft RIS from three stakeholders:

- Nuclear Energy Institute (NEI) (ML23088A115)
- NextEra (ML22228A138)
- The Breakthrough Institute (ML22228A137)

This comment-resolution document contains 14 excerpts from comments provided on the May 2022 Draft RIS in the three stakeholder letters, along with an NRC staff response to each comment. Some comment excerpts and NRC staff responses may also reference the first draft of this RIS (2020 Draft RIS, ML20008D562).

Previously, the NRC had requested public comment on the 2020 Draft RIS in a *Federal Register* notice published on March 31, 2020 (85 FR 17770). The NRC's comment-resolution document addressing stakeholder comments on the 2020 Draft RIS is available at ML22147A097.

The NRC also published a third draft of this RIS dated December 20, 2022 (December 2022 Draft RIS, ML22354A108). A request for public was not noticed in the *Federal Register*; instead, the NRC held a public meeting on January 12, 2023, to facilitate stakeholder comment on the December 2022 Draft RIS. This comment-resolution document also reflects the NRC's consideration of stakeholder feedback received on the December 2022 Draft RIS during the January 2023 public meeting. The NRC staff note in this comment-resolution document instances where language in the RIS has been revised to address stakeholder feedback (i.e., specific to employment eligibility verification).

Comment 1 (Source: NEI-A)

"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 [unescorted access] UA or [unescorted access authorization] 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]"

[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."

NRC Response to Comment 1

The NRC agrees with this comment. The May 2022 Draft RIS did not include the statement, "ensure 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," which was inconsistent with the NRC position on this issue as described in the 2020 Draft RIS and EGM-20-001. Accordingly, the following sentence was added into the December 2022 Draft RIS (ML22354A108, **emphasis added**):

> "One acceptable method to comply with 10 CFR 73.56(d)(3), including the requirement to verify employment eligibility, would include the licensee's visual verification of documents provided by the non-immigrant foreign national, including the official government issued photo identification (e.g., passport, Work Authorization Document, or visa), along with the use of the [Systematic Alien Verification for Entitlements] SAVE database **and review of the visa category**."

However, after considering stakeholder feedback received during the January 2023 public meeting on the December 2022 Draft RIS, the NRC has updated the RIS to clarify that a review of the visa category is not necessary to comply with the requirements of 10 CFR 73.56(d)(3). Rather, licensees need only confirm employment eligibility (i.e., whether the non-immigrant foreign national is eligible to work in the U.S., and not the specific type of work that the non-immigrant foreign national is authorized to perform). As such, while the language "and review of the visa category" was included in the December 2022 Draft RIS statement, it has not been included in the Final RIS (MLXXXXXXXXX).

The NRC notes that EGM-20-001 includes the following language:

> An applicant's non-immigration status directly impacts the types of work activities that an applicant is legally permitted to perform while in the U.S. The regulatory requirement in 10 CFR 73.56(d)(3) is for the licensee to validate that the applicant's claimed non-immigration status is correct. Determining that an applicant has a valid visa is a necessary first step in the validation process. However, licensees must take additional steps to determine the non-immigration 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, e.g., work visa or tourist visa, issued to them for entry into the U.S.

The NRC agrees that the additional step—verifying the specific work activities that an individual is permitted to perform—is not necessary to grant UA or UAA. In validating the claimed non-immigration status of an applicant, licensees need only determine that the applicant is authorized to work in the U.S., regardless of permitted work activities. This clarification is reflected in the Final RIS. With the issuance of the Final RIS and associated updates to NRC inspection procedures, the NRC considers the unresolved issues addressed by the EGM to be resolved. NRC staff therefore plan to update the EGM to reflect the clarification provided in the Final RIS, and the NRC staff will consider the path forward for closing out the EGM after an

appropriate period of time has elapsed to allow licensees to implement any necessary changes to their programs.

Comment 2 (Source: NEI-B)

"Unfortunately, the [May 2022]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 validation.'[10] Thus, issuance of the [May 2022] 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."

[10] Draft RIS, at pg. 1.

[11] EGM-20-001, 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."

NRC Response to Comment 2

The NRC agrees, in part, with this comment. The NRC response to Comment 1 (NEI-A) in this comment-resolution document describes the changes that the NRC is making in the RIS to further clarify what is necessary to comply with the requirements.

Specifically, the Final RIS now includes the following statement, regarding what is required under 10 CFR 73.56(d)(3) (**emphasis added**):

> The SAVE database prompts a user to enter appropriate demographic and other information on the foreign national being considered for UA or UAA. A user typically receives a response from the SAVE database within minutes. One response might be "Non-Immigrant – Not Employment Authorized." In the event of this type of response, the foreign national cannot be granted UA or certified UAA if the purpose of granting such access is to allow the foreign national to work in the protected area. A second type of SAVE response might be "Non-Immigrant – Temporary Employment Authorized." This response meets the access authorization requirement in 10 CFR 73.56(d)(3) to validate the non-immigration status of a foreign national. **A further review of the foreign national's employment eligibility, to verify the type of work the foreign national is authorized to perform under the specific visa category, is not required to meet the regulatory requirement in 10 CFR 73.56(d)(3).**

This statement is intended to provide greater clarity on this matter.

Comment 3 (Source: NEI-C)

"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."

[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.

NRC Response to Comment 3

As discussed above in response to Comment 1 (NEI-A), the NRC agrees that 10 CFR 73.56(d)(3) does not require licensee review of the specific work activities that an individual is permitted to perform, and the NRC has clarified the RIS accordingly. However, the position that licensees must independently verify employment eligibility (regardless of the type of work to be performed) does not reflect a new requirement or interpretation of the existing 10 CFR 73.56(d)(3) requirement.

The Final RIS reminds nuclear power plant licensees of the long-standing true-identity requirement codified in 10 CFR 73.56(d)(3), which requires licensees to validate that the claimed non-immigration status provided by a foreign national is correct. The draft RIS reminds licensees that an important component of validating that the claimed non-immigration status of a foreign national is correct is by confirming employment eligibility.

The regulatory history underlying the NRC's position on the 10 CFR 73.56(d)(3) true-identity requirement began with the issuance of RIS 2002-13, "Confirmation of Employment Eligibility" on August 27, 2002 (ML021720225). RIS 2002-13 was issued to all holders of operating licenses for nuclear power plants in response to a security breach that resulted in an individual being granted UA to the protected and vital areas of a nuclear power plant through the use of a fraudulent social security number and an alien registration card. The NRC determined that as a result of this lapse in security, and given the existing threat environment, it was crucial that licensees exercise greater diligence in implementing their access authorization programs. RIS 2002-13 made clear that confirming employment eligibility was an important element of the background investigation undertaken to verify an applicant's true identity.

Approximately 6 months after issuing RIS 2002-13, the Commission issued NRC Order EA-02-261, "Order for Compensatory Measures for Access Authorization" on January 7, 2003 (ML030060360). Section B.1.3(c) in Attachment 2 of NRC Order EA-02-261 required licensees to "confirm eligibility for employment through INS [U.S. Immigration and Naturalization Service] and thereby verify and ensure to the extent possible, the accuracy of the social security number

or alien registration number" for foreign nationals seeking UA or UAA to NRC-licensed nuclear power plants. This order requirement demonstrates that verifying employment eligibility is an important component for ensuring the integrity of a licensee's access authorization program and determining an applicant's true identity. The March 27, 2009, Power Reactor Security Requirements final rule (74 FR 13926) codified the requirements in NRC Order EA-02-261; and, as a result, the NRC rescinded NRC Order EA-02-261, in full, on November 28, 2011 (ML111220447).

In the October 26, 2006, Power Reactor Security Requirements proposed rule, the Commission indicated that licensees, applicants, and contractors/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." The Commission further stated that "validation could be achieved through a variety of means, including, but not limited to, accessing information from databases that are maintained by the Federal government." This discussion clearly explains that a licensee cannot solely rely on the information presented by an applicant for granting UA or certifying UAA, and that a licensee must obtain additional information to independently authenticate that a foreign national's claimed non-immigration status is correct. This approach of accessing information from another source, independent of that provided by the non-immigrant foreign national, is also consistent with RIS 2002-13 and NRC Order EA 02-261.

This regulatory history demonstrates a consistent NRC position that also aligns with the industry's communicated understanding of the 10 CFR 73.56(d)(3) requirement promulgated in the 2009 Power Reactor Security Requirements final rule. Specifically, in May 2009, NEI issued guidance document NEI 03-01, "Nuclear Power Plant Access Authorization Program," Revision 3, Supplement 1. Supplement 1 recommends that licensees use the USCIS SAVE program to confirm the eligibility of foreign nationals for employment in the U.S. In October 2011, the NRC endorsed NEI 03-01, Revision 3, with the issuance of Regulatory Guide 5.66, "Access Authorization Program for Nuclear Power Plants," Revision 2 (ML112060028).

The comment also states that the requirements in 10 CFR 73.56(d)(3) are focused on ensuring "that the applicant is the person that he or she has claimed to be," and "not on performing an exhaustive investigation into the applicant's employment eligibility." The NRC, however, does not require an exhaustive investigation into a non-immigrant foreign national's employment eligibility, but rather a simple verification that the individual is authorized for employment in the U.S. The claimed non-immigration status is identified on the visa (or in a Federal database) as the visa category. The visa category denotes whether employment in the U.S. is authorized.

Additional information on obtaining employment eligibility information using SAVE is included in the NRC response to Comment 2 (NEI-1B) above. To assist in clarifying acceptable steps to verify employment eligibility, the NRC also included an enclosure to the December 2022 Draft RIS providing licensees with guidance on using the SAVE database to validate that the claimed non-immigration status of a foreign national is correct, including verifying employment eligibility. This enclosure is also included in the Final RIS.

Comment 4 (Source: NEI-D)

"For example, although the document is not mentioned in either EGM-2020-001 or the 2020 Draft RIS, the [May 2022] 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]"

[14] *See* Draft RIS, at pg. 1-2 (*citing* RIS-2002-13).
[15] 2020 Draft RIS, at pg. 4.

NRC Response to Comment 4

The NRC agrees with this comment. Please see the NRC response to Comment 1 (NEI-1A) above, which reflects the NRC's clarification on employment eligibility verification.

Comment 5 (Source: NEI-E)

"[T]he position that is explicitly articulated in EGM-2020-001 and the 2020 Draft RIS – and potentially still implicit in the current [May 2022] 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]"

[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).

NRC Response to Comment 5

The NRC disagrees, in part, with this comment. As discussed in the NRC Response to Comment 3 (NEI-C), the NRC agrees that 10 CFR 73.56(d)(3) does not require licensee review of the specific work activities that a non-immigrant foreign national is permitted to perform. The NRC has clarified the RIS accordingly; and, as described in the NRC Response to Comment 1 (NEI-A), the NRC staff will also update the EGM to reflect the clarification provided in the Final RIS. However, also as discussed above in the NRC response to Comment 1 (NEI-A), the NRC's position on employment eligibility verification, as clarified in the Final RIS, does not reflect a new requirement or interpretation of the existing 10 CFR 73.56(d)(3) requirement, and therefore does not constitute backfitting or affect the issue finality of an approval under 10 CFR Part 52.

Comment 6 (Source: NEI-F)

"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."

[17] Comment Response Document, at pg. 12.
[18] Draft RIS, at pg. 3.

NRC Response to Comment 6

The NRC disagrees with this comment. As stated in the NRC response to Comment 10 on the 2020 Draft RIS, NRC Order EA-02-261 remained in effect at the time that 10 CFR 73.56(d)(3) was promulgated, including the requirement that licensees work with INS to verify a foreign national's employment eligibility. On November 28, 2011, the NRC issued a letter (ML111220447) to the licensees of operating power reactors that rescinded certain security orders, including NRC Order EA-02-261. The letter stated that all the requirements in NRC Order EA-02-261, which included the requirement to verify employment eligibility, were incorporated into the 2009 Power Reactor Security Requirements final rule. The sole requirement in the NRC's security regulations specifying a licensee's responsibility to validate that a foreign national's claimed non-immigration status is correct is in 10 CFR 73.56(d)(3). Therefore, consistent with the statement that all of the NRC Order EA-02-261 requirements were incorporated into the NRC's security regulations promulgated in the 2009 Power Reactor Security Requirements final rule, the requirement to verify a foreign national's employment eligibility has been a part of 10 CFR 73.56(d)(3). This view was only reinforced by the NRC's endorsement of the position in NEI 03-01 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. Thus, the Final RIS does not articulate a new or different staff position and is consistent with the NRC's backfitting requirements in 10 CFR 50.109. Therefore, there is no need for the NRC to either undertake rulemaking or issue orders as the comment suggests.

Comment 7 (Source: NEI-G)

"Based on this plain language, RIS-2002-13 is clearly focused on explaining the immigration and access authorization requirements applicable to licensee employees and prospective employees. As explained in NEI's 2020 Comments, NEI and our members acknowledge the DHS requirements provided in 8 CFR 274a and understand the applicability of those requirements. But those requirements are found in Title 8 of the Code of Federal Regulations, not in 10 CFR Part 73. They are DHS, not NRC requirements. And RIS-2002-13 was careful to distinguish between the two sets of independent regulatory requirements. The fact that the employment eligibility requirements imposed by other Federal agencies are complimentary to the NRC's access authorization regulations does not convert those requirements to NRC requirements.[23]"

[23] The Comment Response Document seems to miss this point. Instead, it sets up and knocks down a strawman argument never made in NEI's 2020 Comments – namely, that the NRC is prohibited from promulgating requirements that are duplicative of the DHS requirements that address employment eligibility. Comment Response Document, at pg. 14. The point is not the NRC is legally prohibited from imposing duplicative requirements on licensees and contractors (although we believe that would be a poor policy decision). The point is that the NRC's current requirements, promulgated in the Power Reactor Security Final Rule, simply do not impose generic legally binding requirements on licensees to verify employment

eligibility as part of their access authorization programs. Imposition of such a requirement would require a rulemaking or the issuance of orders.

NRC Response to Comment 7

The NRC disagrees with this comment. The comment points to the discussion in the 2020 Draft RIS of the 8 CFR Part 274a regulatory requirements promulgated by DHS that, in part, require employers to verify the identity and employment eligibility of foreign nationals. The fact that another Federal agency has promulgated regulatory requirements addressing an issue does not, absent some specific statutory provision, prohibit the NRC from promulgating regulatory requirements on that same issue, provided that the issue is within the scope of the NRC's regulatory jurisdiction.

However, the NRC did remove the discussion on 8 CFR Part 274a in the May 2022 Draft RIS to focus on a licensee's responsibility under 10 CFR 73.56(d)(3). The NRC distinguishes compliance with 8 CFR Part 274a as separate from a licensee's access authorization program under 10 CFR Part 73, and the DHS regulatory requirements serve purposes different from protecting the integrity of a licensee's access authorization program. Ensuring the integrity of licensee access authorization programs is within the scope of the NRC's regulatory jurisdiction.

See the NRC response to Comment 3 (NEI-C) in this document for a discussion of the NRC's clarification on employment eligibility verification. Accordingly, no change was made in the Final RIS in response to this comment.

Comment 8 (Source: NEI-H)

"RIS-2002-13 also discusses identity validation for prospective employees. In this section, the NRC pointed out that it was working towards an agreement with INS to provide reactor licensees access to the SAVE database. The NRC described the SAVE database as giving licensees and contractors the ability to confirm an UA/UAA applicant's 'authorized for employment' status with INS.[26] As discussed above, while confirmation of authorized for employment status can be a valuable part of a licensee's access authorization program, it does not accomplish the searching review necessary to verify employment eligibility explicitly described in the 2020 Draft RIS and EGM 2020-01, and still implicit in the Draft RIS.

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."

[26] *Id.* [RIS 2002-13] at 2.

NRC Response to Comment 8

The NRC disagrees with this comment. Please see the NRC response to Comment 3 (NEI-C) in this document.

Comment 9 (Source: NEI-I)

"Just months after issuance of RIS-2002-13, the Commission issued EA-002-261[sic]. As discussed in our 2020 Comments the permissive language contained in EA-002-261 [sic] 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]"

[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").

NRC Response to Comment 9

The NRC disagrees with this comment, for the reasons explained above in response to Comment 6. Accordingly, no change was made in the Final RIS in response to this comment.

Comment 10 (Source: NEI-J)

"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."

[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).

NRC Response to Comment 10

The NRC disagrees with this comment. The NRC responses to Comment 3 (NEI-C) and Comment 6 (NEI-F) in this document present the regulatory history on verifying the true identity of non-immigrant foreign nationals and why the requirement encompasses confirmation of employment eligibility.

Accordingly, no change was made in the Final RIS in response to this comment.

Comment 11 (Source: NEI-K)

"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 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]

[28] https://www.merriam-webster.com/dictionary/rescind.
[29] Draft RIS, at pg. 3 (emphasis added).

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.

[30] 2011 Rescission Letter, at pg. 1 (emphasis added).

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 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]"

[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.
[33] *Id.*

NRC Response to Comment 11

The NRC disagrees with this comment. While the NRC agrees with the observation that the Power Reactor Security Requirements rulemaking involved more than "simply codifying" prior security orders, the requirements of the final rule remained consistent with the NRC's position regarding the need for licensees to confirm employment eligibility as part of validating a foreign national's claimed non-immigration status, as explained above (e.g., in response to Comments 1 (NEI-A), 3 (NEI-C), and 6 (NEI-F)). The regulatory history reflects that it was not the NRC's intent in 10 CFR 73.56(d)(3) for a licensee to verify the true identity of an individual based only on the visual examination of information provided by an individual applying for UA or UAA to a nuclear power plant. For example, validation of a social security number requires that the information and documents provided by the non-immigrant foreign national be checked against other reliable sources independent of what the foreign national has provided. In addition, determining the correct non-immigrant status also required by 10 CFR 73.56(d)(3) cannot be validated only by visual examination of the documents provided by the individual, including the official government issued photo identification (e.g., passport, visa, Work Authorization Document, Green Card (officially known as a Permanent Resident Card)) and an I-94 "Arrival/Departure Record" U.S. Customs and Border Protection form.

Non-immigrant status applies to foreign nationals who enter the U.S. on a temporary basis for an activity or purpose such as tourism, business, work, or study. A person entering the U.S. in non-immigrant status may not be eligible for work in the U.S., and this will be specified by their visa. Use of USCIS SAVE is one acceptable means to validate that the claimed non-immigration status of a foreign national is correct.

Comment 12 (Source: NEI-L)

"More importantly from a regulatory standpoint, the statement quoted above is not included in the Power Reactor Security Final Rule.[51] 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.'[52] Thus, contrary to the new position take [sic] 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."

[51] 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.
[52] Power Reactor Security Final Rule, at pg. 13,947 (emphasis added).

NRC Response to Comment 12

The NRC disagrees with this comment. In the preamble to the 2006 Power Reactor Security Requirements proposed rule, the Commission described the meaning of the term "validation" with respect to 10 CFR 73.56(d)(3). In the Commission's words, validation would require that licensees access information other than that provided by the individual to ensure that the information provided is authentic. The Commission further stated that validation could be accomplished by a variety of means, including accessing information from databases maintained by the Federal government. It is clear from this discussion that the Commission expected licensees to take steps to obtain additional information to independently authenticate a foreign national's claimed non-immigration status.

Section III, "Discussion of Substantive Changes and Responses to Significant Comments" in the 2009 Power Reactor Security Requirements final rule included the following discussion on changes made to the proposed 10 CFR 73.56(d)(3):

> "The Commission received comments that the requirements set forth in proposed § 73.56(d)(3) regarding identity verification requirements, did not properly consider the North America Free Trade Agreement, which allows Canadian citizens performing certain services to enter the United States without either an alien registration or an I–94 Form. […] The Commission agrees with the received comments and revised the proposed rule text to allow licensees and applicants to use an alien registration or an I–94 Form to verify the identity of a foreign national." [74 FR 13947]

The change made to 10 CFR 73.56(d)(3) replaced the language—

> 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.

with the language—

> 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.

This change was made to ensure that 10 CFR 73.56(d)(3) accommodated all types of immigration documents that a foreign national may present when claiming their immigration status (e.g., an I-94 Form, and not necessarily an alien registration number). Nothing in the 2009 final rule indicates that this change was intended to contradict the explanation in the 2006 proposed rule of the meaning of the term "validation" with respect to 10 CFR 73.56(d)(3). Furthermore, no other statement appears in the 2009 final rule indicating that visual verification of a credential alone would be a sufficient means for validating the claimed non-immigration status of a foreign national.

The NRC response to Comment 3 (NEI-C) describes the NRC's position on verifying the true identity of non-immigrant foreign nationals.

Accordingly, no change was made in the Final RIS in response to this comment.

Comment 13 (Source: NextEra)

"NextEra currently uses the SAVE program to comply with the requirement in 10 CFR 73.56(d)(3), 'Verification of true identity' to validate the claimed non-immigration status that the individual has provided is correct. In other words, NextEra uses SAVE to help ensure that an applicant who is applying for unescorted access or unescorted access authorization is the person that he or she has claimed to be by confirming that the individual has a valid non-immigrant work visa that corresponds to the paperwork that the individual provided. NextEra has no issue with continuing to perform this activity[1] as: (a) it is within the SAVE capability; and (b) it is required by the regulation. NextEra has concerns with conflating this requirement with a requirement to validate that an individual actually is authorized to do the work to be performed because: (a) it is not within the SAVE capability; and (b) the regulation does not require that.

The NRC's regulation at issue (10 CFR 73.56(d)(3)), does not mention validating employment authorization. In the Draft RIS, it appears that the NRC acknowledges this by describing that the NRC's 2003 Order EA-02-261, 'Order for Compensatory Measures Related to Access Authorization,' included a requirement that licensees confirm employment eligibility.[2]

[1] This support is despite the difficulties NextEra has encountered in using the SAVE program, which in some circumstances recently has taken up to 30 days to return an answer. This has resulted in certain individuals to miss entire refueling outages.

[2] NextEra incorporates its discussion of the **limited historical scope** of this provision and the applicability of the backfit rule from its 2020 comment letter."

…Regardless of the regulatory history, SAVE cannot tell a licensee's access authorization staff whether a contractors' employee is authorized to perform the particular work planned at the site. All SAVE provides is a statement that the paperwork presented is valid. The US immigration laws are complicated and the mere fact that a visa is valid does not provide verification of employment authorization for any particular job task. There are numerous exceptions, nuances, or special circumstances that are not explained through SAVE or made intelligible to the access authorization staff. Having a valid visa does not necessarily mean that an individual can perform the work expected at a nuclear plant. In some circumstances, this is straightforward, but in many situations, it is not."

NRC Response to Comment 13

The NRC agrees with this comment regarding whether 10 CFR 73.56(d)(3) requires licensees to validate that an individual is authorized to perform specific work activities. The NRC response to Comment 1 (NEI-A) in this comment-resolution document describes the NRC's clarification on employment eligibility verification.

<u>Comment 14</u> (Source: The Breakthrough Institute)

"I write to reiterate concern regarding the U.S. Nuclear Regulatory Commission (NRC) staff's use of the term 'high assurance' in regulatory documents governing nuclear security (in general) and in the subject RIS (specifically). It is not clear why the NRC staff feels compelled to remind licensees of their obligations under Title 10 *Code of Federal Regulations* (CFR) 73.56 – almost 20 years after the regulation was codified – other than to take issue with 'ambiguous language' in Personnel Access Data System (PADS) Administrator Bulletin 2017-09. The Nuclear Energy Institute (NEI) issued the bulletin on November 3, 2017, to establish guidance for meeting § 73.56. That guidance has been accepted tacitly and applied during the intervening five years. The RIS not only introduces regulatory instability; it does so in a quest for 'high assurance.' The RIS concludes: 'Licensees must have an access authorization program that provides ***high assurance*** [emphasis added] that individuals granted UA or certified UAA are trustworthy and reliable.'"

NRC Response to Comment 14

The NRC disagrees with this comment. The 2020 and May 2022 versions of the Draft RIS remind licensees of the existing 10 CFR 73.56(d)(3) requirement that was promulgated in the 2009 Power Reactor Security Requirements final rule, and which has not been changed since promulgation. The term "high assurance," which is contained in the 10 CFR 73.56(c), "General performance objective" for the personnel access authorization requirements for nuclear power plants, appeared in the conclusion section of the May 2022 Draft RIS and was footnoted as follows:

> "[3] In Staff Requirements Memorandum (SRM) SRM-SECY-16-0073, Options and Recommendations for the Force-on-Force Inspection Program in Response to SRM-SECY-14-0088, the Commission stated that "the concept of 'high assurance' of adequate protection found in our security regulations is equivalent to 'reasonable assurance' when it comes to determining what level of regulation is appropriate" (ADAMS Accession No. ML16279A345)."

The NRC also disagrees with the comment that the NRC has tacitly accepted the guidance in the PADS Administrative Bulletin 2017-09. The two compliance methods described in Bulletin 2017-09 as being in use "since the inception of the non-immigration verification performance requirement" include:

1. The use of the Department of Homeland Security U.S. Citizenship and Immigration Services (DHS-USCIS) Systematic Alien Verification for Entitlements (SAVE) program; and

2. The licensee's [visual] inspection of passport and Visa information identifying the status of the individual upon arrival at the licensee facility.

The NRC did not endorse Bulletin 2017-09. The visual inspection of passport and visa information alone (i.e., compliance method 2 in Bulletin 2017-09), would not comply with the

verification of true-identity requirement in 10 CFR 73.56(d)(3). As described in the preamble of the 2006 Power Reactor Security Requirements proposed rule discussion on 10 CFR 73.56(d)(3), “licensees, applicants and C/Vs [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 that the individual has provided to the licenses is authentic,” such as by “accessing information from databases that are maintained by the Federal Government.”

Consistent with 10 CFR 73.56(a)(4), a licensee may accept, in part or whole, an access authorization program implemented by a contractor or vendor to satisfy appropriate elements of the licensee’s access authorization program, including verification of the true identity of a non-immigrant foreign national and the validation that their claimed non-immigration status is correct. However, only a licensee may grant UA or certify UAA, and before doing so a licensee would need to ensure that the contractor or vendor has performed the necessary steps to independently validate a foreign national’s claimed non-immigration status. A contractor or vendor can do so by using an appropriate system available to them, such as E-Verify.

E-Verify is a web-based program administered by USCIS and the U.S. Social Security Administration (SSA) and is available to enrolled employers by accessing the website: https://www.e-verify.gov. Private sector employers in all 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, and Commonwealth of Northern Mariana Islands can use E-Verify to electronically confirm the employment eligibility of their employees to work in the U.S. E-Verify electronically matches information provided on the employee’s completed USCIS Form I-9, “Employment Eligibility Verification,” with records available to DHS and SSA. The E-Verify program provides an option available for private sector entities, and it is comparable to a licensee’s use of the SAVE program.

Accordingly, no change was made in the Final RIS in response to this comment.