SUNSI Review Complete
Template = ADM-013
E-RIDS=ADM-03
ADD: Mark Resner

PUBLIC SUBMISSION

COMMENT (10)
PUBLICATION DATE:
3/31/2020
CITATION 85 FR 17770

As of: 6/17/20 3:13 PM
Received: June 15, 2020
Status: Pending_Post
Tracking No. 1k4-9h9p-1zd1
Comments Due: June 15, 2020
Submission Type: Web

Docket: NRC-2020-0073
Clarification of Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working At Nuclear Power Plants

Comment On: NRC-2020-0073-0001
Clarification of Personnel Access Authorization Requirements for Non- Immigrant Foreign Nationals Working at Nuclear Power Plants

Document: NRC-2020-0073-DRAFT-0011
Comment on FR Doc # 2020-06473

Submitter Information

Name: William Gross
Address:
1201 F St NW
Suite 1100
Washington, DC, 20004
Email: wrg@nei.org

General Comment

See attached file(s)

Attachments

05-28-20_Industry Comments on DRAFT RIS on Foreign Nationals_FINAL.jxb

WILLIAM R. GROSS
Director, Incident Preparedness
Facility Security Officer

1201 F Street NW, Suite 1100
Washington, DC 20004
P: 202.739.8123
wrg@nei.org
nei.org

NUCLEAR ENERGY INSTITUTE

June 15, 2020

Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
ATTN: Program Management, Announcements and Editing Staff

Submitted via Regulations.gov

Subject: 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

Project Number: 689

Dear Ms. Vietti-Cook:

On behalf of its members, the Nuclear Energy Institute (NEI)[1] appreciates the opportunity to review and comment on the Draft Regulatory Issue Summary (RIS) related to personnel access authorization requirements for non-immigrant foreign nationals working at U.S. nuclear power plants. The draft RIS was published for comment in the *Federal Register* on March 31, 2020.[2] We also appreciated the opportunity to participate in the public meeting held on April 28, 2020. After carefully reviewing the draft RIS, we do not believe that the NRC should finalize the document.

As written, the draft RIS would substantially expand the existing requirement to verify the true identity of non-immigrant foreign nationals that apply for unescorted access[3] to include a detailed validation of the employment eligibility of such individuals. Specifically, the draft RIS states:

> To reiterate, although a non-immigrant foreign national may be employed by a licensee contractor and/or vendor, the licensee granting UA or certifying UAA is responsible for ensuring the non-

[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] "Clarification of Personnel Access Authorization Requirements for Non-Immigrant Foreign Nationals Working at Nuclear Power Plants," 85 Fed. Reg. 17,770 (March 31, 2020).
[3] For purposes of this letter, the term "unescorted access" includes certification of "unescorted access authorization."

> 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.[4]

Both the draft RIS and the associated Enforcement Guidance Memorandum[5] argue that the language in 10 CFR 73.56(d)(3) supports such an expanded interpretation. We disagree.

Industry is committed to complying with the requirements 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.[6]

This general objective is achieved through licensee implementation of security plans and compliance with the substantive requirements of Section 73.56, which include background investigations, psychological assessments, behavioral observations, and self-reporting of legal actions.[7] In addition to the provisions listed above, Section 73.56 includes specific requirements covering granting unescorted access,[8] maintaining unescorted access, access to vital areas, trustworthiness and reliability of background screeners and access authorization personnel, review procedures, protection of information, audits and corrective action, and records management.[9]

Section 73.56(d)(3) fits into this larger regulatory framework as one element of the requirement to conduct background investigations on applicants for unescorted access. 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,"[10] not on performing an exhaustive investigation into the applicant's employment eligibility to ensure "the 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."[11] In order to achieve verification of true identity, the regulations require that, at a minimum, the entity responsible for making an access authorization decision must "validate the claimed non-immigration status that the individual has provided is correct."[12] This provision of the regulations does not require the type of detailed validation of employment eligibility described in the draft RIS. Further, it is our understanding that power reactor licensees do not generally conduct the type of detailed employment eligibility investigation described in the draft RIS as part

---

[4] Draft RIS, at pg. 4.
[5] "Enforcement Guidance Memorandum (EGM) 2020-001, Enforcement Discretion not to Cite Certain Violations of 10 CFR 73.56 Requirements," Feb. 13, 2020 (EGM-20-001).
[6] 10 CFR 73.56(c).
[7] 10 CFR 73.56 (d)(1)-(7), (e), (f), and (g).
[8] For purposes of this letter, the term "unescorted access" includes certification of "unescorted access authorization."
[9] *See* 10 CFR 73.56(h)-(o).
[10] 10 CFR 73.56(d)(3).
[11] Draft RIS, at pg. 4.
[12] 10 CFR 73.56(d)(3).

of their access authorization programs.[13] This includes licensees that are using the Systematic Alien Verification for Entitlements (SAVE) database to verify an applicant's true identity.

The draft RIS seems to point to Supplement 1 of Revision 3 to NEI 03-01, "Nuclear Power Plant Access Authorization Program" as support for the new and expansive interpretation of Section 73.56(d)(3) put forward in the draft RIS. But Supplement 1 does not support this interpretation. First, the language quoted in the draft RIS and attributed to section B.1.c.3 of Supplement 1 appears to simply be quoting section B.1.c.3 of EA-02-261, "Order for Compensatory Measures Related to Access Authorization," issued by the NRC on January 7, 2003. We note that EA-02-261 was rescinded in full on November 28, 2011, and replaced by the requirements in Section 73.56.[14]

Also, 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),"[15] 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."[16] In contrast to the statements in the draft RIS, 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 eligibility confirmations referenced in Supplement 1 were intended to verify the accuracy of information provided by the applicant for unescorted access (*i.e.*, a social security number or alien registration number), which is consistent with the purpose of Section 73.56(d)(3) (*i.e.*, to ensure that the applicant for unescorted access is the person that he or she claims to be).

We agree that "licensees must take reasonable steps to access reliable, independent sources of information, in addition to the information provided by the applicant, to verify the applicant's claimed non-immigration status."[17] As articulated in System Administrator Bulletin 2017-09, which is referenced in the draft RIS, two compliance methodologies have been in place "since the inception of the non-immigration verification performance requirement." Those two methodologies are:

---

[13] Licensees, like other employers, must comply with the requirements of 8 CFR 274a. The point here is that compliance with those requirements are not accomplished via the access authorization program required by 10 CFR 73.56. This issue is discussed in more detail later in these comments.

[14] Letter from E.J. Leeds (NRC), "Rescission of Partial Rescission of Certain Power Reactor Security Orders Applicable to Nuclear Power Plants," November 28, 2011.

[15] Nuclear Power Plant Access Authorization Program (Supplement 1), Rev. 3, May 2009, at pg. 1 (emphasis added).

[16] *Id.* The full statement from Supplement 1 reads: "...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..." *Id.* at pg. 1 (emphasis added). Notably, while the requirement to confirm a foreign national's alien registration number was included in the proposed rule promulgating the current iteration of Section 73.56(d)(3), that language was removed from the final rule and replaced with the current requirement to "validate that the claimed non-immigration status that the individual has provided is correct." Thus, the reference to the alien registration number provided in the rescinded EA-02-261 and in Supplement 1 to NEI-03-01 is no longer contained in the regulations.

[17] Draft RIS, at pg. 1.

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 inspection of passport and visa information identifying the status of the individual upon arrival at the licensee facility.[18]

These two methods continue to be valid, independent means of complying with the requirements of Section 73.56(d)(3). Use of the SAVE database, which is designed to "[allow] federal, state, and local benefit-granting agencies to verify a benefit applicant's immigration status or naturalized/derived citizenship,"[19] is one acceptable method of validating non-immigration status. But, as indicated in System Administrator Bulletin 2017-09, it is not the exclusive method of compliance.

The draft RIS also points to regulations promulgated by the Department of Homeland Security (DHS) that **do** require detailed checks on employment eligibility to be conducted by the *employer that hires a foreign national employee*.[20] 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 terms "hire," "employment," "employer," "employee," and "independent contractor" are all defined in 8 CFR 274a.1 and the regulation clearly distinguishes "employees" and "employers" from "independent contractors." Without providing a detailed exposition of these regulations, it seems clear that to the extent licensees are *hiring* individuals for *employment* – as those terms are defined in section 274a.1 – the requirements contained in 274a.2 would apply. But licensee programs to comply with these requirements are part of the human resources hiring processes, not the process for verification of true identity under the licensee's access authorization program. To the extent, however, that the licensee is securing the services of an independent contractor – as that term is defined in section 274a.1 – the requirements contained in Section 274a.2 would apply to the "independent contractor or contractor and not the person or entity using the contract labor."[21]

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 they serve a different purpose than the NRC's identity verification requirements and, depending on the circumstances, may not even apply to the

---

[18] "System Administrator Bulletin 2017-09 – Verification of Non-Immigrant Status," Nov. 3, 2017. *See also*, Draft RIS, at pg. 2 (citing and describing System Administrator Bulletin 2017-09).
[19] https://www.uscis.gov/save (last accessed May 28, 2020).
[20] *See* Draft RIS, at pg. 4 (describing DHS' regulations found at 8 CFR 274a. "Control of Employment of Aliens").
[21] 8 CFR 274a.1(g)("The term employer means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term employer shall mean the independent contractor or contractor and not the person or entity using the contract labor[.]")(emphasis added); *See also*, 8 CFR 274a.1(f)(" The term employee means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in paragraph (j) of this section. . . .")(emphasis added).

licensee responsible for making the access authorization decision. In our view, the draft RIS inappropriately conflates the requirements in 8 CFR 274a.2 with the access authorization requirements in 10 CFR 76.56(d)(3).

Further, even if the language in Section 73.56(d)(3) could be stretched to accommodate the interpretation provided in the draft RIS, such a reading would clearly constitute "imposition of a regulatory staff position interpreting the Commission's regulations that is either new or different from a previously applicable staff position."[22] This is especially true when the draft RIS is considered in light of EGM-20-001. Specifically, both EGM-20-001 and the draft RIS point to a lack of clarity with respect to appropriate methods of complying with Section 73.56(d)(3).[23] A lack of clarity does not, however, give the agency license to impose new or different interpretations of existing regulations, without first complying with the Commission's backfitting requirements. EGM-20-001 clearly communicates that the NRC's efforts to "clarify" this issue will require changes to the processes used to grant unescorted access,[24] and that the NRC intends to enforce such requirements six months after issuance of new "clarifying" guidance.[25] The Commission's access authorization requirements have existed in their current form for over a decade, and the detailed investigation of employment eligibility described in the draft RIS has simply not been required to meet the requirements of Section 73.56(d)(3) up to this point.

Instead, it appears that the NRC is proceeding to reinterpret and expand those requirements in response to recent operating experience.[26] But if the NRC believes that operating experience requires the imposition of a new or different interpretation of the existing identity verification requirement, which, in turn, will require changes to the current process used by licensees to grant unescorted access (a proposition with which we disagree), then such changes must be properly evaluated and justified pursuant to the requirements of 10 CFR 50.109 prior to being issued to licensees.

---

[22] 10 CFR 50.109(a)(1).

[23] *See, e.g.*, EGM-20-001, at pg. 1 ("[T]he NRC has identified the need to clarify existing regulatory requirements that licensees are required to meet to demonstrate compliance.); Draft RIS, at pg. 1 (entitled "Clarification of Personnel Access Authorization Requirements for Nonimmigrant Foreign Nationals Working at Nuclear Power Plants").

[24] EGM-20-001, at pg. 3. "Recently, the Office of Enforcement has become aware that NRC Inspection Procedure (IP) 71130.01, "Access Authorization," lacks the requisite clarity with which inspectors are required to verify that licensees take the necessary steps to obtain sufficient information to determine the true identity of applicants for UA and UAA. A reevaluation of current UA holders is not expected as a result of this issue. <u>However, moving forward a change to the UA and UAA processes should be implemented for subsequent AA evaluations</u>." *Id.* (emphasis added).

[25] *Id.* "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." (internal quotations omitted).

[26] *See, e.g.*, Draft RIS, at pg. 3 (summarizing the results of NRC's investigation of a specific incident and a resultant "5-year retrospective review of foreign nationals granted UA and UAA at NRC-licensed nuclear power plants."); EGM-20-001, at pg. 1 (explaining that the NRC's Office of Investigations "conducted several investigations into potential violations of NRC regulations and associated wrongdoing by licensees implementing the requirements in 10 CFR 73.56(d)(3), "Verification of true identity." As a result of these efforts, the NRC has identified the need to clarify existing regulatory requirements that licensees are required to meet to demonstrate compliance.).

As the NRC's General Counsel has clarified, in situations where "the NRC staff's expectation that licensees voluntarily adopt . . . guidance constitutes the basis (or a part of the bases) for resolution of a safety or regulatory issue . . . the NRC's policy is that compliance with the Backfit Rule's provisions should not await the imposition of guidance, but should be addressed as part of the preparation and issuance of such guidance."[27] The boilerplate backfitting language in the draft RIS ignores the fact that, as stated in EGM-20-001, the NRC does expect changes to unescorted access processes "going forward,"[28] and those changes will presumably be based upon the "clarifications" provided in the draft RIS and changes to the relevant inspection guidance.[29] Use of boilerplate language is only meaningful where the language accurately describes the facts at hand. That is not the case here. The lack of meaningful consideration of the backfitting implications of the draft RIS is not consistent with NRC's substantial efforts to improve implementation of its backfitting requirements over the past several years and the draft RIS should not be finalized without serious consideration of the Commission's backfitting requirements.

Although we disagree with issuance of the RIS, 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 believe the most appropriate 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, EGM-20-001 can be closed.[30]

If the NRC agrees with this approach, we believe we could have a targeted, draft revision to Supplement 1 to NEI 03-01 ready for discussion within two weeks of the date of this letter. This approach will provide the clarity that the NRC is seeking, while avoiding the backfitting implications posed by the approach provided in EGM-20-001 and the draft RIS.

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

Sincerely,

---

[27] Letter from S.G. Burns (NRC) to E.C. Ginsberg (NEI), July 14, 2010 (internal quotation marks omitted).
[28] EGM-20-001, at pg. 3.
[29] *See* EGM-20-001, at pg. 4. "The Office of Nuclear Security and Incident Response (NSIR) will (1) develop and issue revised guidance describing an acceptable approach for complying with 10 CFR 73.56(d)(3), and (2) update applicable inspection guidance accordingly. To ensure this matter is broadly understood by the nuclear industry, NSIR will also develop and issue a generic communication product to inform or clarify to affected NRC licensees the means by which "true identity" must be validated in accordance with 10 CFR 73.56(d)(3) requirements."
[30] 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 planned revision to NEI 03-01.