February 29, 2015

Ms. Laura Dawkins
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

Submitted via Federal eRulemaking Portal: www.regulations.gov

Re: USCIS Docket No. USCIS-2015-0008
Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers
80 Federal Register 81900 (Dec. 31, 2015)

Dear Ms. Dawkins:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Immigration Council) submit the following comments in response to the proposed rule, "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," published in the Federal Register on December 31, 2015.

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of the U.S. immigration laws. We appreciate the opportunity to comment on the proposed rules and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council has played an instrumental role in highlighting the important economic contributions of immigrants at the local and federal levels. In addition, through its work on the economic benefits of immigration reform,

AILA Doc. No. 16030102. (Posted 03/01/16)

the Immigration Council has helped to establish baseline standards for understanding the important role immigration plays in shaping and driving a twenty-first century American economy.

The Department of Homeland Security (DHS) is proposing to amend its regulations as they pertain to certain employment-based nonimmigrant and immigrant visa classifications with the intent to benefit U.S. employers and foreign workers by "streamlining the processes for employer sponsorship of nonimmigrant workers for lawful permanent resident (LPR) status, increasing job portability and otherwise providing stability and flexibility for such workers …."[1] We applaud DHS for issuing this notice of proposed rulemaking, which we have eagerly anticipated since President Obama and DHS Secretary Jeh Johnson announced their intention to introduce administrative reforms to the employment-based immigration system on November 20, 2014.[2]

While many of the proposed provisions will go far in clarifying and solidifying current policies and will bring much needed relief to many high-skilled workers and employers who have long-struggled with the uncertainties created by our outdated immigration system, a number of provisions could go further to provide even broader relief, while others, as currently drafted, could ultimately do more harm than good. Moreover, we strongly oppose the proposed elimination of the rule requiring interim employment authorization if DHS does not adjudicate an application for an employment authorization document (EAD) within 90 days. Not only would the elimination of this provision result in hardship to thousands, the inclusion of this proposal within this broad set of rules that is intended to benefit employers and employees is misplaced. While we welcome the proposed provisions that would automatically extend employment authorization for many categories of EAD renewal applicants, and encourage DHS to expand the categories of applicants that would be eligible for an automatic extension, the current rule mandating adjudication of an EAD application within 90 days should be retained. If DHS desires to eliminate it, it should do so in a separate rulemaking so that the public has proper notice and the opportunity to comment.

Proposed Implementation of AC21 and ACWIA

As described in the preamble, DHS is proposing significant amendments to the regulations in an effort to "clarify and improve longstanding agency policies and procedures" that were established over the last decade and a half in response to certain sections of the American Competitiveness in the 21st Century Act (AC21) and the American Competitiveness and Workforce Improvement Act (ACWIA).[3]

Proposed 8 CFR §214.2(h)(13)(iii)(E): H-1B Extensions for Individuals Affected by the Per-Country Limitations

Section 104(c) of AC21 authorizes approval of H-1B status beyond the general 6-year maximum for the beneficiaries of approved immigrant visa petitions in the employment-

[1] 80 Fed. Reg. 81900, 81901 (Dec. 31, 2015).
[2] President Barack Obama, "Remarks by the President in Address to the Nation on Immigration" (Nov. 20, 2014), available at: https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration; DHS Secretary Jeh Charles Johnson, "Policies Supporting U.S. High-Skilled Businesses and Workers" (Nov. 20, 2014), available on www.AILA.org at Doc. No. 14112009.
[3] 80 Fed. Reg. at 81912.

based first, second, and third preference categories, where an immigrant visa is not available due to excessive demand in the beneficiary's visa classification and country of chargeability. In accordance with long-standing practice and as codified in proposed 8 CFR §214.2(h)(13)(iii)(E)(1), USCIS may grant extensions of H-1B status in accordance with AC21 §104(c) in three-year increments.

The proposed rules clarify the policies that USCIS has generally followed for years and are welcomed by employers and workers. Subsection (E)(3) very helpfully clarifies that individuals need not be in the United States in H-1B status in order to benefit from these provisions. This is particularly important for employees who may have been required to temporarily depart the United States while awaiting adjudication of a labor certification application or immigrant visa petition, and who may not otherwise qualify for a one year H-1B extension under AC21 §106(a) and (b), and the proposed regulation at 8 CFR §214.2(h)(13)(iii)(D). Though this section largely codifies existing policy and practice, this clarification is important and should eliminate inconsistent adjudications on this issue.

Subsection (E)(4) clarifies that the H-1B petitioner seeking to extend the individual's H-1B status need not be the same employer that filed the underlying immigrant visa petition. This provision enhances the stated purpose of AC21 and the proposed regulation as noted in the introductory comments:

> These sections were intended, among other things, to provide greater flexibility and job portability to certain nonimmigrant workers, particularly those who have been sponsored for LPR status as an employment-based immigrant, while enhancing opportunities for innovation and expansion, maintaining U.S. competitiveness, and protecting U.S. workers.[4]

The linking of an individual's ability to immigrate to the petitioning employer and the certified position, coupled with the very lengthy immigrant visa backlogs, particularly for India and China, has for years had the unintended effect of inhibiting career growth and job flexibility, and by extension, limiting economic growth and the wages of both immigrant and U.S. workers. This provision will provide relief from the otherwise very rigid requirement that binds a nonimmigrant worker to a specific position. The interplay of this provision and proposed 8 CFR §205.1(a)(3)(iii)(C), which states that an employer's withdrawal of the I-140 immigrant visa petition shall not interfere with the ability of a subsequent employer to file an H-1B extension unless the I-140 was revoked due to fraud or misrepresentation, provides much needed certainty for individuals who naturally pursue professional growth by changing employers or accepting more senior positions.

However, we object to proposed 8 CFR §214.2(h)(13)(iii)(E)(6) which would limit AC21 §104(c) extensions to principal beneficiaries and specifically exclude derivative beneficiaries who may also hold H-1B status from this benefit. Though this would align with current practice, this is an unnecessarily narrow interpretation of AC21 and should be removed from the final rule.

In explaining this provision, DHS points out that AC21 §104(c) is limited to "the beneficiary of a petition filed under section 204(a) of [the INA] for a preference status under paragraph

[4] *Id.* at 81901.

(1), (2), or (3) of section 203(b) [of the INA]" and that INA §203(b) "applies to principal beneficiaries … but not derivatives who are separately addressed in section 203(d) of the INA."[5] However, DHS's position is contradicted by the text of INA §203(d), which provides:

> **Treatment of family members**.—A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), *be entitled to the same status, and the same order of consideration provided in the respective subsection*, if accompanying or following to join, the spouse or parent.[6]

Thus, while the proposed rule interprets the term "beneficiary" to exclude derivative beneficiaries, Congress has already determined that family members are "entitled to the same status" as the spouse or parent.

In enacting AC21, Congress recognized the instability and economic dislocation caused by the outmoded statutory scheme. AC21 was designed to address the problems that plague American businesses due to delays in H-1B processing, the unavailability of H-1B visas, and delays in processing permanent residence applications for individuals in H-1B status. A review of the legislative history tells us that one of the primary motivating factors for §104(c) was the need to minimize or eliminate unnecessary disruptions to U.S. businesses that would otherwise result if H-1B status were abruptly cut off:

> This section [104(c)] also affords transitional protection for individuals on H-1B visas with approved petitions for permanent employment visas but whom the per-country limit is preventing from obtaining a permanent resident visa to stay until such a visa becomes available. These immigrants would otherwise be forced to return home at the conclusion of their allotted time in H-1B status, disrupting projects and American workers. The provision enables these individuals to remain in H-1B status until they are able to receive an immigrant visa and adjust their status within the United States, thus limiting the disruption to American businesses.[7]

This analysis applies equally to derivative family members who also hold H-1B status. Congress did not distinguish between principal and derivative beneficiaries in the statute and there is no logical reason to do so in the implementing regulations. The same policy considerations that compelled Congress to enact this statute should compel DHS to treat derivative family members in H-1B status the same as the principal and allow them to benefit from an AC21 §104(c) extension.

DHS states that while a derivative spouse in this situation "may no longer be eligible to be employed as an H-1B nonimmigrant, certain H-4 spouses may be eligible to apply for and obtain work authorization pursuant to 8 CFR §214.2(h)(9)(iv)."[8]

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[5] *Id*. at 81913.
[6] Emphasis added.
[7] 4 U.S. Code Congressional and Administrative News, 106th Congress, 2d Session, 2000, Legislative History of American Competitiveness in the Twenty-First Century Act of 2000, P.L. 106-313, 114 Stat. 1251 at 954.
[8] 80 Fed. Reg. at 81914.

While we recognize that this rule would help alleviate some of the hardships to nonimmigrant families and U.S. businesses, adjudication delays will prevent some spouses on H-1B status from timely receiving an H-4-based EAD after changing status. In addition, there are situations where it may be advantageous for a derivative spouse to remain in valid H-1B status rather than changing status to H-4 and applying for employment authorization.

Consider the following example: A husband and wife are both in their sixth year of H-1B status, but only the husband has an approved immigrant visa petition. The couple has a child and decides that one spouse should stay home to care for the child for an extended period of time. Even though the wife's job provides better pay and benefits, and the couple would like the husband to stay home to care for the child after she completes her maternity leave, the couple is forced to abandon those plans because the wife has no independent means to obtain a §104(c) H-1B extension, and the husband would therefore also be unable to maintain H-4 status. Thus, the unintended effect of the exclusion of derivative family members from §104(c) benefits is to dictate who will provide primary child care. The same analysis would apply in other situations, where temporary care of an elderly parent or other family member is necessary. While we cannot claim to know all of the situations in which it will be important for a derivative spouse to maintain independent H-1B status, because the wait time for an immigrant visa can very easily stretch to a decade or longer, there will be a wide variety of family situations that will be governed by this restrictive regulation.

The adverse impact of this inflexible regulation extends to U.S. employers whose businesses are disrupted when an employee is lost. Moreover, it is unnecessary and wasteful for the government to expend significant time and resources to adjudicate PERM labor certification applications and I-140 petitions for both parties when one would suffice. This also impacts the Department of State's ability to determine monthly visa allocations. Congress has determined on many occasions that the broader economy functions better and productivity is enhanced when workers are able to balance family and careers. The preamble to the proposed rule, the statute upon which it is based, and the rule granting employment authorization to H-4 spouses, all seek to ameliorate the restrictive effects of the visa backlogs. This provision should be amended so that it too provides greater flexibility to families and employers.

Proposed 8 CFR §245.25: Job Portability under AC21 for Certain Applicants for Adjustment of Status

Section 106(c) of AC21 added section 204(j) to the Immigration and Nationality Act (INA), which provides that an employment-based immigrant visa petition filed for EB-1 (other than "extraordinary ability"), EB-2, or EB-3 classification, will remain valid with respect to a new qualifying job offer when the worker changes jobs or employers if an application for adjustment of status has been pending for 180 days or more, and the new job is in the same or a similar occupational classification as the job for which the original immigrant visa petition was filed.

We applaud DHS's efforts to bring uniformity and clarification to the method by which employment-based adjustment applicants may demonstrate they have a continuing offer of employment in the same or a similar occupation to that which formed the basis for the original visa petition. We also support the agency's efforts to enhance the ability of certain workers to change jobs or employers during the long wait for permanent residency.

As indicated in our comments to the USCIS Draft Policy Memorandum, "Demonstrating Whether a New Job is in the 'Same or Similar Occupational Classification' for Purposes of Section 204(j) Job Portability" (PM-602-0122), dated January 4, 2016, we reiterate that AILA members overwhelmingly report few issues with the current process that has been in place for more than 15 years.[9] However, we appreciate the need to reduce uncertainty in the process, and support DHS's efforts to implement regulations that reflect the spirit of flexibility and stability that Congress intended when it enacted AC21.

As an initial matter, we encourage DHS to include the appropriate standard of proof that applies to the determination of "same or similar," as it has done in PM-602-0122. That standard of proof is "preponderance of the evidence," which, we note, is a lower standard than "clear and convincing," or "beyond a reasonable doubt." The inclusion of the standard of proof in proposed 8 CFR §245.25 would provide uniformity in the evaluation of evidence across adjudicators.

DHS proposes that an applicant for adjustment of status "may affirmatively" demonstrate that a new offer of employment is the "same or similar" to the original employment offer by having the new employer make an attestation on a designated form.[10] While we support the idea of uniform processes, we ask DHS to clarify that there is no affirmative filing *requirement* for this form, and to state that use of the form is restricted to circumstances where USCIS reviews an application for adjustment of status and issues a Request for Evidence (RFE) seeking clarification regarding the applicant's current employment. While USCIS has stated there is an expectation that adjustment applicants will advise USCIS of any changes in employment, an affirmative requirement to complete a form upon any change in employment could easily result in the filing of multiple forms by an individual given the lengthy immigrant visa backlogs that affect so many. An affirmative filing requirement would negate the "flexibility and stability" that is desired under the proposed regulation, and would increase the burden on USCIS which could easily trickle down to impact processing times not only for adjustment applications but for other applications as well.

Furthermore, we are concerned with proposed 8 CFR §245.25(b)(2)(ii), which requires "[a]n explanation from the new employer establishing that the new employment offer and the employment offer under the approved petition are in the same or similar occupational classification…." This requirement imposes on employers an untenable duty to know and understand the details of the previous employer's position. Successor employers will likely not be willing to attest to information that is not their own, and should not be forced to do so. Again, the goal of achieving job flexibility is compromised by imposing such a requirement on successor employers. Only the employee should be involved in filing this form.

Finally, as stated in our comments to PM-602-0122, while we agree that the Standard Occupational Classification (SOC) code is a reasonable baseline to analyze whether a position is the "same or similar," the regulation should also incorporate the Dictionary of Occupational Titles (DOT) as a viable resource. In cases involving labor certification, when the SOC for the labor certification position also fits the new position, there should be no need for further inquiry and the position should be found to be "the same." Recognizing, however,

[9] AILA/American Immigration Council Comments on Same or Similar Draft Policy Memorandum, published on www.AILA.org at Doc. No. 16010430 (Jan. 4, 2016).
[10] Proposed 8 CFR §245.25(a).

that the SOC codes were not established for the purpose of comparing positions, there will be instances where the SOC codes will not be instructive. In addition, DOL occasionally assigns an incorrect or unsuitable SOC code to a prevailing wage determination, a prerequisite to the labor certification process, and in some instances, where the employer is unable to obtain a new or corrected prevailing wage determination the employer must file the labor certification with an inappropriate SOC code. Moreover, in the case of emerging occupations, such as those in the technology and health care sectors, employers are often forced to rely on inappropriate SOC codes due to the DOL's reluctance to assign a code to an occupation that rightly falls under an "All Other" detailed occupation code. Finally, for many individuals who have been stuck in the immigrant visa backlogs for years, (and for whom portability will be most attractive), the SOC code certified by DOL may no longer exist. Thus, we ask that the final regulation include language to emphasize the relevance of any evidence that would clearly articulate whether the job duties, skills, and education are similar. This can include the DOT, SOC codes, and all relevant and probative evidence to meet the preponderance of the evidence standard.

Proposed 8 CFR §214.2(h)(2)(i)(H): Job Portability for H-1B Nonimmigrant Workers

AC21 §105(a), codified at INA §214(n), permits H-1B nonimmigrants to commence new or concurrent employment upon the filing of a non-frivolous H-1B petition by a new employer. This provision set aside the previous rule that the individual could only accept employment upon approval of an H-1B petition filed by a new employer. Under this section, there are three elements that are relevant to determining whether an individual can take advantage of H-1B portability. In addition to having been previously issued a visa or otherwise provided H-1B status, an individual must fulfill the following conditions in order to accept new employment with the prospective employer:

(1) The beneficiary must have been lawfully admitted to the United States;

(2) The beneficiary must have a non-frivolous H-1B petition for new employment filed on his or her behalf prior to the expiration of the nonimmigrant period of stay; and

(3) The beneficiary must not have been employed without authorization after lawful admission and before the filing of the subject H-1B petition.[11]

The preamble states that proposed 8 CFR §214.2(h)(2)(i)(H) is intended to clarify and improve policies related to H-1B portability, including the filing of successive H-1B portability petitions, or "bridge petitions."[12] While we support DHS's efforts in this regard, we are concerned that the rules, as drafted, limit AC21 §105(a) in an important way. Proposed 8 CFR §214.2(h)(2)(i)(H)(1)(ii) requires that the petitioner file an H-1B petition for new employment before the "H-1B nonimmigrant's period of stay authorized by the Secretary of Homeland Security expires." However, INA §214(n) plainly states that H-1B portability is available to any "nonimmigrant alien … who was *previously* issued [an H-1B] visa or otherwise provided [H-1B] nonimmigrant status …." who was (1) lawfully admitted to the United States; (2) is the beneficiary of a non-frivolous petition for new employment filed prior to the expiration of his or her authorized period of stay; and (3) who has not

[11] INA §214(n)(2).
[12] 80 Fed. Reg. at 81917.

engaged in unauthorized employment after having been lawfully admitted (emphasis added). There is no requirement that an individual currently be in H-1B status to take advantage of H-1B portability. Therefore, a nonimmigrant who was previously in H-1B status but who is now in F-1, H-4, or some other nonimmigrant status, should be able to take advantage of the H-1B portability provisions assuming they meet all of the other statutory criteria.

Though the drafters of AC21 could have explicitly stated that maintenance of H-1B status was required, they did not. The goal of the AC21 H-1B portability provisions was to enhance the mobility of H-1B workers and ease the burdens on employers caused by administrative processing delays, a concern that is highlighted by the fact that it is currently taking about 8 months for H-1B extension petitions to be adjudicated. Congressional intent seems to have been motivated by a pragmatic sense that unnecessarily limiting the mobility of human capital affects both the individual worker and the employer. Because there is no statutory limitation requiring the worker to be currently maintaining H-1B status to benefit from H-1B portability, the final regulations should be amended to reflect this.

Proposed 8 CFR §214.2(h)(13)(iii)(C): Calculating the H-1B Admission Period

Proposed 8 CFR §214.2(h)(13)(iii)(C) sets forth detailed provisions regarding the calculation of the maximum H-1B admission period, including recapture of "unused" H-1B time. These recapture provisions clarify that time spent physically outside the United States exceeding 24 hours will not be counted towards the total period of authorized H-1B admission, and provide guidance regarding the types of documents that may be submitted to support a request for recapture of unused H-1B time. Though these provisions are very helpful, we urge DHS to take the opportunity that this Notice of Proposed Rulemaking provides to clarify that there is no "statute of limitations" on recapture.

AILA members have observed RFEs issued by USCIS that take an unnecessarily narrow view of INA §214(g)(7) to suggest that recapture is not appropriate when a recapture petition is filed more than six years after the original H-1B petition was approved. INA §214(g)(7) states:

> Any alien who has already been counted, within the 6 years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.

Under the plain meaning of INA §214(g)(7), a beneficiary who has been counted against the H-1B cap for a given fiscal year shall not again be subject to the cap until he or she has exhausted the full six years of available H-1B time. When the beneficiary has been outside the United States for a full year, he or she may apply for a new six-year H-1B period, and once again be counted against the cap, or apply to recapture unused H-1B time from the prior six year period, and not be counted against the cap. Nothing in INA §214(g)(7) *restricts* USCIS from granting unused H-1B time based on the fact that the request is made more than six years after the initial grant of the H-1B petition. This interpretation is supported by the December 5, 2006 Michael Aytes memorandum, which sets forth guidance for determining

periods of admission in a variety of contexts, including H-1B recapture.[13] The Aytes memorandum does not articulate any time limit in which H-1B recapture time must be claimed.

For these reasons, and in order to avoid unnecessary delays and confusion for adjudicators and stakeholders, we urge DHS to include a provision in this section of the regulations to clarify that there is no temporal limitation on eligibility to recapture unused H-1B time.

Proposed 8 CFR §214.2(h)(8)(ii)(F)(1–2): Cap Exemption Based on Affiliation or Relationship

The preamble to the proposed regulations states a clear intention to "provide much needed flexibility" in the definition of the terms "related to" or "affiliated with," for purposes of H-1B cap-exemption, underscoring the importance of recognizing "bona fide affiliation contracts or agreements."[14] However, rather than codifying this intent, the proposed language presents additional impediments to the very nonprofit entities it seeks to assist. In particular, the proposed language emphasizes "ownership and control" of the qualifying entity by the institution of higher education, or vice versa, which completely undercuts Congressional intent.

Many of the nonprofit entities that qualified for cap exemption prior to the June 2006 memorandum on H-1B cap exemption,[15] and which continued to qualify under the deference standard announced in the April 2011 memorandum,[16] would no longer qualify under the proposed language. For example, a nonprofit entity that provides social services and has an agreement with an institution of higher education to train its social work students is not owned, controlled, or operated by the institution of higher education and is very unlikely to be attached to the institution of higher education as a member, branch, cooperative, or subsidiary. Similarly, nonprofit hospitals through which medical residents rotate, with very few exceptions, will not meet this restrictive standard of corporate ownership and control.

Nevertheless, these entities *are* affiliated with or related to institutions of higher education and are contributing to educating Americans. Like universities, such entities are on a fixed hiring schedule and are unable to hire H-1B nonimmigrants who are subject to the cap. Because of restrictions on the academic year for medical students, teaching hospitals hire physicians on a July 1 to June 30 employment cycle. Similarly, elementary and secondary schools need teachers to start work in August or September. Because the start dates for employment for these occupations by necessity must start well in advance of October 1, teaching hospitals, universities, and schools often miss out on hiring individuals who are subject to the H-1B cap.

We therefore urge DHS to amend proposed 8 CFR §214.2(h)(8)(ii)(F)(2) in its entirety to read:

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[13] "Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year" (Dec. 5, 2006), available on www.AILA.org at Doc. No. 06122063.

[14] 80 Fed. Reg. at 81919.

[15] Michael Aytes, Associate Director for Domestic Operations, "Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)" (June 6, 2006) (hereinafter "2006 Aytes Memo"), posted on www.AILA.org at Doc. No. 06060861.

[16] "Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation" (Apr. 28, 2011), posted on www.AILA.org at Doc. No. 11050130.

(2) A nonprofit entity shall be considered to be related to or affiliated with an institution of higher education if it meets any one of the following:

(i) The nonprofit entity has been accredited by a federal, state or local educational accrediting agency for an educational purpose based on its affiliation or relationship with an institution of higher education; *or*

(ii) The nonprofit entity has been recognized or approved as related to or affiliated with an institution of higher education by another federal or state agency for *any* purpose; *or*

(iii) The nonprofit entity has entered into a currently valid affiliation agreement with an institution of higher education that defines the respective rights and responsibilities of cooperating entities; *or*

(iv) The nonprofit entity is otherwise related to or affiliated with an institution of higher education based on the totality of facts presented by the nonprofit entity and consistent with the plain meaning of the terms "related" or "affiliated."

Should DHS reject some or all the above language, we offer the following commentary and suggested revisions:

Proposed 8 CFR §214.2(h)(8)(ii)(F)(2)(i)-(iii) and 8 CFR §214.2(h)(19)(iii)(B)(4)

Proposed 8 CFR §214.2(h)(8)(ii)(F)(2)(i-iii) formalizes the June 2006 memo even though the April 2011 guidance recognized the need to review the policy articulated in that memo. The restrictive and limiting language of the June 2006 memo prohibits H-1B cap exemption for many nonprofit entities with a bona fide relationship or affiliation with an institution of higher education. As discussed above, very few nonprofit entities related to or affiliated with colleges and universities have a direct relationship with the educational institution that is based on "shared ownership or control" or are attached to the educational institution as a "member, branch, cooperative or subsidiary." To suggest otherwise is to eviscerate the plain language of the statute. For this reason, if DHS opts not to replace proposed 8 CFR §214.2(h)(8)(ii)(F)(2) with the language set forth above, DHS should at the very least, amend the regulation as follows and clearly articulate, as it does with the proposed fee exemption rule at 8 CFR §214.2(h)(19)(iii)(B)(4), that a nonprofit entity need only meet one of the stated criteria (new language in **bold**):

(2) A nonprofit entity **(including but not limited to hospitals and medical or research institutions)** shall be considered to be related to or affiliated with an institution of higher education if **it meets any one of the following**:

(i) The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or control by the same board or federation; **or**

(ii) The nonprofit entity is operated by an institution of higher education; **or**

(iii) The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative or subsidiary; or…

The above suggestions clarify that the three subparts are to be read disjunctively rather than collectively. Without this clarification, adjudicators could mistakenly require nonprofit entities to satisfy *all three* subparts in order to qualify for H-1B cap exemption. For similar reasons, we urge DHS to revise proposed 8 CFR §214.2(h)(19)(iii)(B) to mirror the suggested revisions to proposed 8 CFR §214.2(h)(8)(ii)(F)(2).

Proposed 8 CFR §214.2(h)(8)(ii)(F)(2)(iv)

Proposed 8 CFR §214.2(h)(8)(ii)(F)(2)(iv) goes beyond prior guidance to add an alternative basis for demonstrating a qualifying relationship under INA §214(g)(5)(A). Unfortunately, it is far more restrictive than current guidance, adding to the requirement of a formal written agreement with an institution of higher education the additional burden to prove that "a primary purpose of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education." To continue with the examples referenced above, a nonprofit entity that provides social services and has an agreement with an institution of higher education to train their social work students does not have a "primary purpose" of directly contributing to the research or educational mission of the institution. Rather, its primary purpose is to provide social services. Similarly, nonprofit hospitals through which medical residents rotate will not meet the "primary purpose" standard, since the primary purpose of a hospital is to provide medical care.

The suggestion that the nonprofit entity must exist primarily for the benefit of the institution of higher education runs counter to the intent and purpose of the statute. Moreover, it conflates current guidance on "affiliation" with that of "employed at" discussed below. The intent of Congress is clear from the plain language of the statute: under INA §214(g)(5)(A), the H-1B numerical limitation **should not** apply to a nonimmigrant alien who "is employed (or has received an offer of employment) at an institution of higher education …, or a related or affiliated nonprofit entity." There is nothing in the statute that even remotely suggests that the related or affiliated nonprofit entity must have a "primary purpose" that contributes to the mission of the qualifying institution. Congress could certainly have imposed such conditions and restrictions, but it did not. Thus, proposed 8 CFR §214.2(h)(8)(ii)(F)(2) is *ultra vires* and should be replaced with the language suggested above. Should DHS decline to implement the language suggested above, we respectfully submit the following revisions to proposed 8 CFR §214.2(h)(8)(ii)(F)(2)(iv) in order to avoid exceeding the bounds of the authorizing statute:

> (iv) the nonprofit entity has**~~, absent shared ownership or control,~~** entered into a**n ~~formal written~~** affiliation **~~agreement~~** with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education **~~for the purposes research and/or education, and a primary purpose of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education~~**.

Proposed 8 CFR §214.2(h)(8)(ii)(3): Definition of "Nonprofit," "Nonprofit Research Organization," and "Governmental Research Organization"

Proposed 8 CFR §214.2(h)(8)(ii)(F)(3) adopts the definition of nonprofit or governmental research organization found at 8 CFR §214.2(h)(19)(iii)(C). This definition is inappropriately limited to nonprofit organizations or U.S. (federal) government organizations that are

"primarily" engaged in research. Moreover, the proposed rule relies on the definition of "nonprofit organization or entity" as it appears in the ACWIA fee exemption rule at 8 CFR §214.2(h)(19)(iv) to conclude that "governmental research organizations" are limited to federal government research organizations. However, there is no reason to believe that Congress intended the word "governmental" to have anything other than its plain meaning: "of, pertaining to, or proceeding from government."[17] Elsewhere in the INA, where Congress intended the word "government" or "governmental" to be limited to the federal government, the word "Government" or "Governmental" is capitalized to signify this limitation.[18]

The Department of Labor (DOL) confirmed the distinction between "Governmental" and "governmental" when it published its final ACWIA prevailing wage rules. In response to an argument advanced by AILA and others that the "governmental research organizations" for whom Congress mandated separate prevailing wages included state and local as well as federal government research institutions, the DOL stated:

> The Department has concluded that by Congress' use of the initial capital "G" in the word "Governmental" in the statute, Congress intended to limit the provision to the Federal research organizations. In the INA, the words "Government" and "government" appear numerous times. It appears that only when a small "g" is used, does the term include state and local as well as Federal government agencies. *See the discussion in* C. Stine, "Out of the Shadows: Defining 'Known to the Government' in the Immigration Reform and Control Act of 1986," 11 Fordham Int'l L.J. 641, 653 (Spring 1988); *see also Kalaw* v. *Ferro,* 651 F. Supp. 1163 1169–70 (W.D.N.Y. 1987). Furthermore, throughout the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (Oct. 21, 1998), of which the ACWIA is a part, it appears that a capital "G" is used to mean the United States government or the government of a foreign nation, while a small "g" is used to refer to state, local, and tribal governments (unless the complete term "Federal government" is used). *See also*, *State Bank of Albany* v. *United States*, 530 F.2d 1379, 1382 (Ct. CL. 1976).[19]

The DOL made it clear that it had consulted with legacy INS on the definition of "governmental research organization" because the same types of employers requiring segregated prevailing wage data under ACWIA are also exempt from certain H-1B filing fees as specified at 8 CFR §214.2(h)(19)(iv), the same provision that DHS now seeks to apply to the AC21 cap-exemption provisions. The enabling statute at INA §214(g)(5)(B) refers to "governmental research organizations," not "Governmental research organizations." Accordingly, the statute must be interpreted to give "governmental" its adjectival meaning, i.e., describing the type of research organization as of or pertaining to any government entity. The term may not be reasonably interpreted as a noun, referring to the U.S. federal government. For this reason, we propose that the current definition of "nonprofit or governmental research organization" at 8 CFR §214.2(h)(19)(iii)(C) be amended to read:

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[17] Black's Law Dictionary (6th Ed. 1990).

[18] For example: INA §105(a) which authorizes the Commissioner to maintain liaison with the Director of the FBI and CIA and 'with other internal security officers of the Government…"; INA §212(e)(i), which imposes the two-year foreign residence requirement on exchange visitors whose participation in a program was financed by "an agency of the Government of the United States"; INA §204(f)(3)(A), a provision for preferential treatment for children fathered by U.S. citizens and born in certain Asian countries which directs the Attorney General to "consult with appropriate governmental officials and officials of private voluntary organizations in the country of the alien's birth."

[19] 65 Fed. Reg. 80,183 (Dec. 20, 2000).

> A nonprofit research organization or governmental research organization. A nonprofit research organization is an organization that is **~~primarily~~** engaged in basic research and/or applied research. A governmental research organization is a federal, state or local **~~United States G g~~**overnment entity whose **~~primary~~** mission ~~is~~ includes the performance or promotion of basic and/or applied research….

Deference Policy Formalized

Given the confusion surrounding the "related to or affiliated with" standard, and the work-around that USCIS established in 2011, DHS should include in the final regulations instructions to adjudicators to give deference to prior adjudications on cap exemption under INA §214(g)(5)(A). The lack of a deference rule has led to instability and unpredictability for employers seeking to hire H-1B workers, as adjudicators reviewing the same facts can – and often do – come to opposite conclusions. We therefore ask that DHS formalize as part of its proposed rule USCIS's current policy of deferring to its own prior determinations of affiliation-based cap exemption.

In order to foster greater predictability and transparency in the process, we also urge DHS to publish a list of cap-exempt employers and annotate H-1B approval notices to indicate whether the petitioning employer is exempt from the H-1B quota. This will aid employers in planning and will assist H-1B workers who may not always be aware of whether they have been counted against the cap when they are contemplating a move from one employer to another.

We therefore propose adding a new subsection, 8 CFR §214.2(h)(8)(ii)(F)(2)(v):

> Once a determination is made that a nonprofit entity is related to or affiliated with an institution of higher education under INA §214(g)(5)(A), upon establishment by the petitioner that the qualifying relationship continues to exist, DHS shall defer to that determination in future H-1B petitions. DHS shall publish electronically a list of entities that have been determined to be exempt from the H-1B cap under 8 CFR §214.2(h)(8)(ii)(F) and shall update this list periodically, at least semi-annually. In addition, approval notices for H-1B petitions approved under INA §214(g)(5)(A) or (B) shall be annotated as "cap exempt."

Proposed 8 CFR §214.2(h)(8)(ii)(F)(4): "Employed At" Cap Exemption

The June 2006 memorandum recognized that "Congressional intent was to exempt from the H-1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of Institutions of Higher Education and related nonprofit entities."[20] This is perhaps in recognition that any professional "employed at" a qualifying entity clearly contributes to the goals of those institutions, and that such contributions come in many forms. The 2006 memo correctly noted that the statute says that any worker who would be "employed at" (rather than directly by) a non-profit entity that was related to or affiliated with a nonprofit entity would also qualify for an exemption from the H-1B cap.

However, the guidance proved to be more limiting than the plain language of the statute, requiring those "employed at" a qualifying entity to show more than those "employed by" such

[20] 2006 Aytes Memo at 3.

an institution. In addition to evidence of the qualifying relationship, "employed at" petitioners were required to demonstrate that the beneficiary's work "directly and predominantly furthers the essential purposes of the qualifying institution." This requirement does not appear anywhere in the statute, or in the AC21 legislative history. Instead, this requirement is based on language taken from an April 2000 Senate report which states:

> This section exempts from the numerical limitation (1) individuals who are employed or receive offers of employment from an institution of higher education, affiliated entity, nonprofit research organization or governmental research organization and (2) individuals who have a petition filed between 90 days before and 180 days after receiving a master's degree or higher from a U.S. institution of higher education. **The principal reason for the first exemption is that by virtue of what they are doing, people *working in* universities are necessarily immediately contributing to educating Americans.** The more highly qualified educators in specialty occupation fields we have in this country, the more Americans we will have ready to take positions in these fields upon completion of their education. Additionally, U.S. universities are on a different hiring cycle from other employers. The H-1B cap has hit them hard because they often do not hire until the numbers have been used up; and because of the academic calendar, they cannot wait until October 1, the new fiscal year, to start a class.[21]

The June 2006 memo takes this single phrase "…*by virtue of what they are doing*…" and frames it as a requirement. In the context of the paragraph, this phrase recognizes the benefits offered by *all individuals* working in universities and thus explains that working in a university (or affiliated nonprofit) in and of itself justifies exemption from the cap. There is nothing in the legislative history that suggests that Congress intended petitioners filing "employed at" cases be held to a higher standard by proving that the job duties of the H-1B worker will "directly and predominately further the essential purpose, mission, objectives or function" of the qualifying institution.

Proposed 8 CFR §214.2(h)(8)(ii)(F)(4) would exclude many individuals who should be deemed cap-exempt based on the plain language of the statute. The proposed regulation must correct the error of the 2006 guidance by implementing the law as Congress wrote it and not by adding a "nexus" requirement to the cap exemption where none exists. Congress did not differentiate in INA §214(g)(5) between H-1B workers employed (or offered employment) at an educational institution and those at a nonprofit or governmental research organization. Congress instead clearly found that educational institutions and research institutions, in and of themselves, benefitted the nation and did not distinguish any categories of employment when it determined that an individual employed (or offered employment) "at" either should be cap-exempt. For example, a mechanical engineer who works with HVAC systems at an academic or research institution under the employment of a contractor provides the same support as a mechanical engineer providing the same HVAC engineering services under the direct employment of the academic or research institution. Similarly, a finance specialist working at an academic or research institution for a contractor provides the same support as the finance specialist working for the institution in direct employment. Each of those positions supports the function of the academic or research institution. Congress made no distinction and each should be treated as exempt from the H-1B cap.

[21] S. Rep. No. 106-260, at 21-22 (2000) (emphasis added).

For similar reasons, the requirement that the "beneficiary will spend the majority of his or her work time performing job duties at a qualifying institution," is also inappropriate. There is neither a requirement in the statute nor any suggestion in the legislative history that Congress intended to limit H-1B cap exemption solely to nonprofit entities employing H-1B workers who would be spending the majority of their time at the qualifying institution. Therefore, 8 CFR §214.2(h)(8)(ii)(F)(4) should be amended to read:

> (*4*) An H-1B beneficiary shall qualify for an exemption under section 214(g)(5)(A) or (B) of the Act if the H-1B beneficiary will perform job duties at a qualifying institution, organization or entity.

If DHS refuses to adopt this standard, the proposed rule should be amended to clarify that the "employed at" petitioner need only show a "logical nexus" between the essential purpose, mission, objectives or functions of the qualifying institution and not that the work will "directly and predominately" further that purpose. The proposed rule could be revised to read:

> (*4*) An H–1B beneficiary ~~**who is not directly employed by a qualifying institution, organization or entity identified in sections 214(g)(5)(A) or (B) of the Act**~~ shall qualify for an exemption under ~~**such**~~ section **214(g)(5)(A) or (B) of the Act** if the H–1B beneficiary will ~~**spend the majority of his or her work time**~~ perform**~~ing~~** job duties at a qualifying institution, organization or entity **for which there is a logical nexus between** those job duties ~~**directly and predominately further the**~~ **and the** essential purpose, mission, objectives or functions of the qualifying institution, organization or entity, ~~**namely, either higher education, nonprofit research or government research**~~. The burden is on the H–1B petitioner to establish that there is a nexus between the duties to be performed by the H–1B beneficiary and the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity.

Proposed 8 CFR §214.2(h)(8)(ii)(F)(6): Concurrent Employment

We appreciate the codification of the rule that concurrent employment in a cap-subject position qualifies for cap exemption, as well as the need to differentiate between bona fide concurrent employment and those seeking an end-run around the cap. However, the proposed rule does not strike the necessary balance, as the restrictions on the validity period and the need for one petitioner to document the intentions of another are overly burdensome. There is no requirement that employment for the cap-exempt petitioner and the cap-subject petitioner be related, and it may be simply that they are on different cycles. Tying the validity period of an unrelated cap-exempt petition to the validity of a concurrent cap-subject petition places needless limitations on the cap-subject petitioner that could necessitate the expenditure of additional fees and costs for extensions, and result in administrative burdens on DHS. For example, where there is a cap-exempt petition that begins July 1, 2015 and expires June 30, 2017, and a cap-subject petitioner seeking concurrent employment beginning January 1, 2017, the cap-subject petitioner would only be able to request a 6 month validity period before it would be required to file an extension. Moreover, any concerns that the cap-exempt petition would simply serve as a launching pad for a cap-subject petition is addressed by proposed 8 CFR §214.2(h)(8)(ii)(F)(5). Thus, 8 CFR §214.2(h)(8)(ii)(F)(6)(i)-(ii) are unnecessary and redundant and should be eliminated from the regulations.

Proposed 8 CFR §214.2(h)(20): Whistleblower Protections in the H-1B Program

AILA recognizes that proposed 8 CFR §214.2(h)(20) codifies current guidance regarding "extraordinary circumstances" for failure to maintain H-1B status when an employee has filed a complaint regarding Labor Condition Application violations. We are concerned, however, that requiring the new employer to present the DOL complaint and evidence of retaliatory action may infringe upon the privacy of an employee-victim of retaliation, and discourage the H-1B worker from taking advantage of the statutory protections of INA §212(n)(2)(C)(v). The facts and circumstances that led to the whistleblower complaint and retaliatory action are not the business of the new employer and may be of a personal or sensitive nature. Therefore, we suggest that the beneficiary be provided with the option of submitting documentary evidence in a sealed envelope with the H-1B petition, or in some other way that protects his or her privacy.

Additional Changes to Further Improve Stability and Job Flexibility for Certain Workers

Proposed 8 CFR §205.1(a)(3)(iii)(C) and (D): Revocation of Approved Employment-Based Immigrant Visa Petitions; and Proposed 8 CFR §204.5(d) and (e): Priority Date Retention

We strongly support the proposed regulations regarding priority date retention and revocation where the petitioning employer withdraws the underlying visa petition. The proposed rule would recognize the ability of the beneficiary to retain his or her priority date immediately upon petition approval "even if the petition's approval is thereafter revoked based on petition withdrawal or business termination less than 180 days after approval."[22] We also welcome provisions that clarify that petitions approved for 180 days or more would no longer be subject to automatic revocation based only on withdrawal by the employer or termination of the business. In such cases, as long as the petition approval is not revoked for fraud, material misrepresentation, invalidation or revocation of the labor certification, or USCIS error, the petition will remain valid for a variety of purposes including: (1) priority date retention; (2) job portability to a "same or similar" occupation under INA §204(j); and (3) AC21 extensions of H-1B status beyond the general six-year limitation.[23]

Taken in combination, these provisions clarify USCIS policy in areas where there has been great uncertainty for many years. Once implemented, the proposed rule will also usher in a welcome change from the current practice of denying AC21 H-1B extensions in these circumstances, a practice which has the effect of forcing employees to remain in positions against their will: by threatening withdrawal of the approved petition, an employer is able to control the ability of the employee to seek other work. These negative effects, which can include an oppressive work atmosphere, and a feeling of helplessness on the part of the affected employee, also negatively impact U.S. workers, who may find their own job mobility limited as a result. Thus, the proposed rule provides opportunities for foreign nationals who have begun the process of becoming permanent residents to exert better control over their employment opportunities and livelihoods by enhancing job mobility and fostering a more market-based environment.

[22] 80 Fed. Reg. at 81923.
[23] *See generally id*. at 81921.

We suggest, however, that DHS take this opportunity to revise the grounds upon which an approved petition can be revoked. We agree that fraud or misrepresentation in a visa petition, as well as fraud or misrepresentation that becomes the basis for revoking an approved labor certification logically forms a basis for revocation of an approved petition. However, we urge DHS to revisit its current practice of invoking "USCIS error" to initiate revocation proceedings. We have seen the far reaching impact of the broad use of "USCIS error" to revoke petitions that were approved as long as 7 or 8 years prior to the issuance of the notice of intent to revoke, when what is actually prompting revocation is a new or different interpretation of the statute or regulations from what was well-accepted at the time of approval. In such situations, the principle of res judicata should apply in recognition of the long-standing reliance of petitioners and beneficiaries on the correctness of the underlying decision and the life consequences that necessarily unfolded as a result.

By way of example, we note the impact that the approval of an immigrant visa petition has upon individuals, particularly from India or China, who must wait many years for an available visa. We have seen cases where the priority date was established and relied upon for years by the individual and by subsequent employers in making important business and life decisions. Then, without any misrepresentation or fraudulent act by either the intending immigrant or the petitioning employer, USCIS decides to take a second look at the case under the lens of a new theory, or decides to reinterpret the quality of the beneficiary's prior experience, the degree equivalency, or other evidence, thus spurring a notice of intent to revoke. The individual has relied upon the priority date, has "played by the rules," and waited years when suddenly, an examiner reviews the file and concludes that the prior examiner made a mistake. This so-called "USCIS error" then becomes the basis for revocation and if ultimately revoked, the priority date will be lost along with all other benefits. The immigrant must now start the process over or return to his or her home country. This is fundamentally unfair and contrary to the values that should guide our immigration system.

A revocation under such circumstances can be disruptive to an employer as well, whether an original employer who has come to rely on a long-term employee, an employer that has relied upon the experienced and qualified employee who ported years before, or a potential employer to whom that employee intends to port. Neither intending immigrants working their way through the legal immigration process nor their employers should be subject to a "gotcha" mentality. Once approved, the visa petition should be subject to revocation only for wrongdoing on the part of the individual or employer.

For these reasons, we urge DHS to revise 8 CFR §205.2(a) to read:

> **General**. Any Service officer authorized to approve a petition under section 204 of the Act may, upon notice to the petitioner, revoke the approval of that petition for fraud, material misrepresentation, or the invalidation or revocation of a labor certification.

Beneficiary Standing to Challenge Visa Petition Revocation

Absent from the proposed rule, and in particular in the section regarding revocation of approved employment-based petitions, is any discussion or provision regarding the rights of beneficiaries in employment-based proceedings. The regulations at 8 CFR §§103.2(a)(3) and 103.3(a)(1)(iii)(B) preclude recognition of a beneficiary as an interested party in proceedings before USCIS for purposes of representation, notice, and the right to appeal. Promulgated in

1990, then INS explained the exclusion of beneficiaries from the definition of "party" stating simply, "a visa petition proceeding has long been a proceeding between the petitioner and the Service."[24]

However, there are numerous instances in which a visa petition beneficiary has interests equal to or even greater than the petitioner, such as the priority date recapture provisions at 8 CFR §204.5(e), visa petition denials that implicate future bars to relief under INA §204(c) or §212(a)(6)(C)(ii), grandfathering under INA §245(i), and notably, the revocation provisions at 8 CFR §205.1. In addition, the changes in the law brought about by AC21 significantly altered the analysis of who should be deemed an interested party in proceedings before USCIS. These changes include the ability to extend H-1B status beyond the six-year maximum under AC21 §104(c) and §106(a) and (b), and permanent portability to a "same or similar" occupation under INA §204(j).

Several federal courts have recognized the obvious and clear interests of beneficiaries in the outcome of visa petitions filed on their behalf. For example, in *Patel v. USCIS*, the Sixth Circuit held that the beneficiary had standing to challenge the denial of an I-140 petition when the employer was not a party to the suit.[25] In so holding, the court explained, "[s]imply stated, under [INA §203(b)(3)] it is the alien, not the employer, who is entitled to an employment visa; and that makes unavoidable the conclusion that the alien's interests are among those 'protected or regulated by the statute[.]'" In 2014, the Eleventh Circuit in *Kurapati v. BCIS* concluded that a beneficiary who attempted to port to new employment had standing to challenge the agency's failure to give him notice and an opportunity to participate before revoking the I-140 petition.[26]

More recently, in *Mantena v. Johnson*, the Second Circuit concluded that the beneficiary, who had ported years before to a new employer, had standing to challenge in federal district court USCIS's failure to give notice and an opportunity to participate before revoking the I-140 petition filed by her prior employer.[27] In so holding, the court noted that the INA, as amended by AC21, "requires some form of such notice for post-porting beneficiaries, at least to those aliens who have notified USCIS of their change in employment…."[28]

A lack of beneficiary notice raises a number of concerns, not the least of which include the ability to check the status of a pending petition and the ability to provide evidence of an approved I-140 petition when and if the beneficiary seeks to avail him or herself of the AC21 permanent portability provisions. However, the most significant concern presented by the lack of notice arises when the prior employer of the beneficiary of an approved I-140 petition takes steps to revoke that petition. When a beneficiary ports to new employment, the petitioner ordinarily will have no ongoing interest in the petition and no reason to inform the beneficiary of any subsequent actions by the petitioner or agency with regard to the petition. Under USCIS's current practice, the beneficiary will be unaware of any issues with the I-140 filed by the prior employer until the adjustment application is denied solely because the I-140 was revoked. This lack of notice and opportunity to respond raises very serious issues of

[24] 55 Fed. Reg. 20,767, 20,768 (May 21, 1990).
[25] 732 F.3d 633 (6th Cir. 2013).
[26] 775 F.3d 1255 (11th Cir. 2014) (per curiam).
[27] No. 14-2476 (2d Cir. Dec. 30, 2015). The Second Circuit remanded to the District Court to determine whether the beneficiary or the new employer should receive notice.
[28] *Id.*

fundamental fairness which could be remedied in the short-term by permitting AC21 beneficiaries to participate in visa petition proceedings. This interpretation of the ambiguities in the existing regulations would be consistent with Congress's intent when it enacted AC21. In the long-term, we urge DHS to undertake a rulemaking to bring its standing regulations in line with the realities of today's statutory scheme.[29]

Proposed 8 CFR §214.1: Nonimmigrant Grace Periods

Proposed 8 CFR §214.1(l) would permit the admission of an alien in E-1, E-2, E-3, H-1B, L-1, or TN status up to 10 days prior to the commencement of the validity period of the underlying petition and provide a 10-day "grace period" at the end of the petition validity period for the named nonimmigrant classifications. While the rationale for extending the 10-day grace period currently afforded to H nonimmigrants to those admitted in E, L, and TN status is to provide greater flexibility, stability, and job portability, the language used in the proposed regulation is far more limiting than that which is articulated in the current rule. Whereas the current rule at 8 CFR §214.2(h)(13)(i)(A) states that an H beneficiary "**shall** be admitted … for the validity period of the petition, plus a period of up to 10 days," proposed 8 CFR §214.1(l) states that the listed nonimmigrants, "**may** be admitted … for the validity period of the petition … plus an additional period of up to 10 days." DHS also proposes to amend 8 CFR §214.2(h)(13)(i)(A) to specifically exclude H-1B beneficiaries from the mandatory 10-day grace period. Thus, it appears that if these changes are implemented, H-1B nonimmigrants would be eligible for a discretionary ("may") 10-day grace period, whereas H-1B1, H-2B, and H-3 nonimmigrants would be eligible for a mandatory ("shall") grace period. DHS fails to explain in the preamble or elsewhere its justification for this disparate treatment.

We would be remiss if we failed to point out that despite the mandatory language of 8 CFR §214.2(h)(13)(i)(A), the 10-day grace period has never been properly implemented or consistently applied. In order to give effect to the regulation, the 10-day period must be annotated on the beneficiary's Form I-94 Arrival-Departure Record, or electronic I-94 record, as this is what dictates the beneficiary's period of authorized stay.[30] Under INA §212(a)(9)(B)(ii), "unlawful presence" is defined as presence in the United States after expiration of the period of authorized stay. As such, nonimmigrants face serious consequences if the period of authorized stay is misunderstood or miscalculated. Despite this, the 10-day grace period has never been included on I-94s issued by USCIS on Form I-797A (in connection with an extension or change of status), and has very rarely been included on I-94s issued by U.S. Customs and Border Protection (CBP). As a result, not only do very few nonimmigrants actually benefit from the grace period, it also puts others - who thought they were given an "automatic" grace period - at risk of accumulating unlawful presence.

By changing the word "may" to "shall" in 8 CFR §214.1, and adding language confirming that the listed nonimmigrants are deemed to be in an authorized period of stay during the 10-day grace period, DHS can ensure that congressional intent is satisfied. DHS should also consider directing both CBP and USCIS to include mandatory language on Forms I-94 (both paper and electronic versions) confirming the 10 day grace period, thus eliminating the

[29] *See* AILA/Immigration Council Amicus Brief on Notice to Employment-Based Beneficiaries Seeking Adjustment of Status, filed with the AAO on May 22, 2015, available on www.AILA.org at Doc. No. 15052807.
[30] "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009), available on www.AILA.org at Doc. No. 09051468.

confusion and risks created by the current and proposed language. In addition, rather than having two separate regulations regarding the 10-day grace period, we propose a single regulation that covers all nonimmigrant classifications currently afforded a 10-day grace period, plus the new categories proposed by DHS, and O and P nonimmigrants. We propose the following language:

> (l) Period of stay. (1) An alien admissible in E-1, E-2, E-3, H-1B, **H-1B1, H-2B, H-3**, L–1, **O-1, P** or TN classification and his or her dependents **shall** be admitted to the United States for the validity period of the petition, or for a validity period otherwise authorized **~~for the E–1, E–2, E–3, and TN classifications~~**, plus an additional period of up to 10 days before the validity period begins and a 10-day period following the expiration of the validity period to prepare for departure from the United States or to seek an extension or change of status based on a subsequent offer of employment. **This 10-day period shall be included in any Form I-94, in any format, whether issued by USCIS or CBP.** Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period.

Proposed 8 CFR 214.1(2) would provide a one-time period of up to 60 days or until the end of the nonimmigrant's authorized validity period, whichever is shorter, during which time E-1, E-2, E-3, H-1B, H-1B1, L-1 and TN nonimmigrants and their dependents would not be considered to have failed to maintain nonimmigrant status solely on the basis of the principal nonimmigrant's cessation of employment. While an official grace period to find and change jobs is a welcome addition to the regulations, we urge DHS to remove the "one-time" limitation in this proposed regulation. Workers in today's economy demand greater mobility as companies are built and then bought, or sometimes fail at a much more rapid pace than in years past. Provisions in other areas of the regulations, such as H-1B portability and permanent portability, are not so limited so it seems arbitrary to suddenly limit to a one-time occurrence a grace period that is intended to provide greater stability and flexibility to workers. The final rule should give USCIS the discretion to approve this grace period each time a nonimmigrant ceases work for the petitioning employer. In addition, the final rule should extend the 60-day grace period to O and P nonimmigrants.

Proposed 8 CFR §204.5(p) and 8 CFR §274a.12(c)(36): Eligibility for Employment Authorization in Compelling Circumstances

DHS is proposing to give certain employment-based intending immigrants greater flexibility by allowing them to apply for an EAD. Specifically, proposed 8 CFR §204.5(p)(1) would permit such individuals to apply for employment authorization for one year if they: (1) are currently in the United States in valid E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status; (2) are the beneficiary of an approved EB-1, EB-2, or EB-3 immigrant visa petition; (3) do not have an immigrant visa immediately available; and (4) can demonstrate "compelling circumstances" to justify an independent grant of employment authorization. If granted, the applicant would be required to relinquish his or her nonimmigrant status, which would eliminate the ability to change nonimmigrant status and would, in most cases, eliminate his or her ability to adjust status

to permanent residence when an immigrant visa number becomes available.[31] Such individuals would generally be required to seek an immigrant visa at a consular post abroad.

DHS has declined to propose a definition of "compelling circumstances" but specifically notes in the preamble that approaching or reaching the statutory maximum time period for the relevant nonimmigrant status is not enough.[32] DHS has, however, identified four circumstances which may rise to the level of "compelling": (1) serious illness or disability; (2) employer retaliation; (3) other substantial harm to the applicant; (4) significant disruption to the employer.[33]

Though we are well aware that many stakeholders will express disappointment at the narrowness of this rule, we first want to point out that the proposal itself presents a number of unanswered questions and potential pitfalls:

- **Status**: As noted, a grant of employment authorization under this provision would require the individual to relinquish his or her underlying nonimmigrant status. This begs the question: what, if any, "status" would the individual have? Along with employment authorization, DACA recipients are given a period of "deferred action" during which time they receive a temporary reprieve from removal or other enforcement action. Will (c)(36) EAD applicants be given a similar guarantee that they will not be subject to removal?

- **Travel**. Will (c)(36) EAD recipients be eligible to travel on advance parole and will they be given much-needed flexibility to travel for legitimate business reasons?

- **Unlawful Presence**: Will (c)(36) EAD recipients accrue unlawful presence? It is extremely important that the final rule clarify that (c)(36) EAD holders will not accrue unlawful presence, otherwise, by virtue of spending one full year in the U.S. on a (c)(36) EAD, such individuals would be subject to the ten-year bar to admission under INA §212(a)(9)(B)(i)(II), which would be triggered when the individual departs the U.S. to consular process after an immigrant visa becomes available. The ten year bar may only be waived if the immigrant can show that refusal of the visa would result in extreme hardship to a U.S. citizen or permanent resident spouse or parent. Most employment-based immigrants will not qualify for such a waiver due to the lack of a qualifying relative. Unless DHS clarifies that unlawful presence does not accrue, this rule could very easily do more harm than good.

The population that will be drawn to this proposal is individuals who have an approved immigrant petition but who are unable to apply for adjustment of status due to the long visa backlogs. However, it must be made clear to this population that the beneficiary of an approved employment-based petition must have a valid offer of employment based on a valid petition, and that the applicant must intend to accept such offer of employment at the time of adjusting to permanent resident status (in cases where that option remains available) or entering the U.S. on an immigrant visa. It is assumed that most (c)(36) EAD applicants would be compelled to apply

[31] INA §245(c)(2) prohibits adjustment of status for individuals who have, *inter alia*, failed "to maintain continuously a lawful status since entry into the United States," though INA §245(k) makes an exception for employment-based immigrants who fail to continuously maintain lawful status for an aggregate period of 180 days or less.
[32] 80 Fed. Reg. at 81924.
[33] *Id*. at 81924-25.

for independent work authorization to change jobs, employers, or even professions, and not to simply stay with their current employer. Therefore, (c)(36) EAD recipients must either have an arrangement with the petitioning employer to resume or assume the position articulated in the approved I-140 petition when the priority date becomes current, or they must make alternative arrangements with a new employer to commence the immigrant visa process anew. Though (c)(36) EAD recipients would be able to retain the priority date from the original petition (unless it is revoked due to fraud, misrepresentation, etc.), they would still need an approved petition with an employer intending to hire them on a permanent basis in order to obtain permanent residence.

Admittedly, DHS has broad authority, under INA §274A(h)(3), to determine who may be authorized to work in the United States. Thus, expansion of unrestricted employment authorization to a broader population is fully within its discretion. With clarification and favorable resolution of the points noted above, and clear guidance on the potential consequences of relinquishing nonimmigrant status in favor of a (c)(36) EAD, we encourage DHS to implement a final rule with terms more generous than those which are proposed. At a minimum, DHS should interpret "compelling circumstances" generously, consider eliminating the priority date restriction, and consider terms that would permit unrestricted (c)(36) EAD renewals once compelling circumstances have been established.

Proposed 8 CFR §214.2(h)(4)(v)(C): H-1B Licensing Requirements

Proposed 8 CFR §214.2(h)(4)(v)(C)(2) purports to formalize existing agency guidance on H-1B licensing. The rule would permit approval of an H-1B petition for up to one year on behalf of an unlicensed beneficiary for a position where a license is otherwise required to perform the duties of the position provided that:

(i) The petitioner proves that the license would otherwise be approvable but for the lack of H-1B approval or the issuance of a Social Security card; and

(ii) The beneficiary has filed an application for the required license (unless the jurisdiction in which the license is sought does not permit submission of the application prior to H-1B approval).

Proposed 8 CFR §214.2(h)(4)(v)(C)(1) also expressly acknowledges that in certain states, licensed occupations may legally be performed without a license so long as the individual engaged in the occupation will be supervised. The rule would permit USCIS to approve H-1B petitions in such cases following an examination by USCIS of "the nature of the duties and the level at which they are performed, as well as evidence provided by the petitioner as to the identity, physical location, and credentials of the individual(s) who will supervise the alien."

We appreciate DHS's efforts to acknowledge and address the problems that many licensed professionals face in filing H-1B petitions. We respectfully suggest the following additions and amendments to this section of the proposed rule.

H-1B Petitions Filed without a License:

Consistent with prior guidance, the proposed rule would permit approval of an H-1B petition filed without a license for one year, where the petitioner demonstrates that the license cannot

be obtained without the issuance of a Social Security number, evidence of employment authorization, or both. However, since the proposed rule requires the beneficiary to have applied for the license at the time of filing (if possible) and for the petitioner to have submitted evidence that the license is approvable but for lack of approval of the H-1B petition, limiting the duration of H-1B status to 12 months seems both arbitrary and unnecessary. In almost all cases, evidence provided with the initial filing will demonstrate that the license will be approved shortly after H-1B approval. Further, as acknowledged in the March 21, 2008 memorandum and update to the Adjudicator's Field Manual (AFM),[34] approval of the H-1B petition – whether for 12 months or 36 months – does not authorize an H-1B worker to engage in an occupation for which he does not hold an appropriate state license. So, if the required license is not approved, the H-1B beneficiary would not be legally employable notwithstanding the approved H-1B petition.

For these reasons, it is unreasonable to limit the validity of the initial H-1B to 12 months. Doing so results in disparate treatment of licensed H-1B workers depending upon the state in which they will be employed and imposes an unnecessary financial burden on petitioners. We therefore urge DHS to amend proposed 8 CFR §214.2(h)(4)(v)(C)(2) as follows:

> (2) An H-1B petition filed on behalf of an alien who does not have a valid State or local license, where a license is otherwise required to fully perform the duties in that occupation may be approved **up to the full validity period requested on the petition but no more than 3 years ~~for a period of up to 1 year~~**, if…

Proposed 8 CFR §214.2(h)(4)(v)(C)(2)(ii) acknowledges that it is impossible for an H-1B beneficiary to obtain a license before the H-1B petition is filed where the state requires evidence of work authorization or proof of a Social Security card as a prerequisite for licensure. Though we appreciate DHS's efforts to address this dilemma, we note that there are other circumstances in which an H-1B beneficiary may be unable to obtain a license before he or she is otherwise obliged to seek H-1B status. For example, physicians who complete their graduate medical education in H-1B status often do so using a limited or restricted license. Once they complete training, they must apply for an unrestricted license in order to transition employment to a new H-1B employer. We respectfully request that the language of the proposed rule be expanded to permit the possibility of other scenarios that would also necessitate the filing of an H-1B petition where the beneficiary is not yet licensed. We suggest that proposed 8 CFR §214.2(h)(4)(v)(C)(2)(ii) be modified as follows:

> (ii) The petitioner demonstrates, through evidence from the State or local licensing authority, that the only obstacle to the issuance of licensure is the lack of a social security number, a lack of employment authorization, or **other requirement that the beneficiary is unable to meet until after the date that the H-1B petition must be filed ~~both~~**.

[34] Donald Neufeld, Deputy Associate Director, Domestic Operations, *"Adjudicator's Field Manual Update: Chapter 31: Accepting and Adjudicating H-1B Petitions When a Required License is not Available Due to State Licensing Requirements Mandating Possession of a Valid Immigration Document as Evidence of Employment Authorization*," (Mar. 21, 2008), posted on www.AILA.org at Doc. No. 08032432. ("USCIS' approval of an H-1B petition on the alien beneficiary's behalf in such cases is not authorization for the beneficiary to practice his or her profession without the required license. It is merely a means to facilitate the State or local licensing authority's issuance of such a license to the alien, provided all other requirements are satisfied.").

Unlicensed Employment under Supervision

We appreciate DHS's acknowledgement that some states permit unlicensed individuals to work in a licensed field so long as that person is supervised. However, we are concerned by the language in the proposed rule that invites adjudicators to assess the sufficiency of the supervision that the beneficiary will receive and the qualifications of the supervisors. The quality and nature of the supervision is within the province of the medical licensing board within the state of intended employment. USCIS must not be permitted to substitute its judgment for that of the state licensing authority. As written, the proposed rule could result in denials of H-1B petitions filed for unlicensed workers whose supervision the state has deemed adequate. Therefore, we urge the following revisions to proposed 8 CFR §214.2(h)(4)(v)(C)(1):

> Duties without licensure: (1) In certain occupations which generally require licensure, a State may allow an individual without licensure to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, USCIS shall examine the nature of the duties and the level at which they are performed, as well as evidence provided by the petitioner **from the state licensing authority supporting the employment**. ~~**as to the identity, physical location, and credentials of the individual(s) who will supervise the alien**~~. If the facts demonstrate that the alien under supervision will fully perform the duties of the occupation, H classification may be granted.

Similarly, the existing regulation at 8 CFR §214.2(h)(4)(v)(B) on temporary licensure should be modified to remove any suggestion that USCIS may second guess the issuance or validity of a temporary license by the relevant state authority. If the license has been issued, the only remaining analysis for USCIS to perform is whether the position otherwise meets the requirements for H-1B classification as a specialty occupation. It is not for USCIS to question the level at which duties are performed or the degree of supervision received.

Clarification Regarding Unrestricted Extendable Licenses:

The proposed rule does not reference the most recent guidance in this area, issued on May 20, 2009, which acknowledges that some medical professionals may hold an unrestricted license that requires periodic renewal and that the license may expire prior to the requested duration of the H-1B petition.[35] The May 2009 memo states that H-1B approvals in such instances should be for the full duration of time requested on the petition notwithstanding the renewal date on the license, so long as the requested period does not exceed three years or the validity of the Labor Condition Application (LCA) and the petition is otherwise approvable. This memo is frequently cited by attorneys when filing H-1B petitions on behalf of medical professionals who hold an unrestricted medical license that is subject to periodic renewal, though the point made is equally applicable to other types of licensed occupations. Accordingly, we ask that the following language, derived from the May 2009 memo, be added to the final text of 8 CFR §214.2(h)(4)(v)(A):

[35] Barbara Q. Velarde, Chief, Service Center Operations, "Requirements for H-1B Beneficiaries Seeking to Practice in a Health Care Occupation" (May 20, 2009), posted on www.AILA.org at Doc. No. 09052766.

> Most states require occupational licenses to be renewed periodically. If the beneficiary is in possession of an unrestricted license that is required for the occupation in which the petitioner seeks to employ the beneficiary and the petition is otherwise approvable, the petition shall be approved for the full H-1B period requested – up to three years – regardless of whether the occupational license is subject to renewal before the requested petition expiration date.

Proposed 8 CFR §274a.13(d): Processing of Applications for Employment Authorization

We strongly oppose the proposal to eliminate the longstanding requirement, articulated in current 8 CFR §274a.13(d), that USCIS adjudicate applications for employment authorization within 90 days of filing the application or provide an interim EAD for up to 240 days to certain applicants for immigration benefits. Rather than alerting the public to this significant proposed change through the title of this rulemaking, DHS buried it at the end of a very lengthy and detailed Notice of Proposed Rulemaking that in most other respects seeks to ease the burdens on the employment of qualified nonimmigrant and immigrant workers. Unlike those provisions, the proposed amendments to 8 CFR §274a.13(d) would eliminate a definite adjudicatory time frame and common sense remedy to the potential detriment of thousands of individuals. Many businesses and individuals may not even realize that this proposed rule contains a provision that will adversely affect them. Though the Notice of Proposed Rulemaking is titled, "Retention of EB-1, E-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," the pool of applicants who would be affected by the elimination of this rule includes not just high-skilled workers but also lesser-skilled but essential workers and many applicants for employment authorization under the family-based and other categories. We ask DHS to withdraw the proposal to eliminate the 90 day adjudication and interim EAD rule from this proposal and, if necessary, make this the subject of a separate Notice of Proposed Rulemaking that would give the public proper notice and an opportunity to comment.

In justifying the proposed changes, DHS notes in the preamble that the 90-day adjudicatory timeframe was adopted more than twenty years ago and these provisions are "outdated and no longer reflect the operational realities of the Department, including its adoption of improved processes and technological advances in document production to reduce fraud and address threats to national security."[36] However, while DHS may have centralized card production and implemented technological advances to improve document security over the years, today's reality is that each year, thousands of EAD applications, both initial and renewal, are not adjudicated within 90 days, causing serious repercussions for numerous parties on a number of levels. Delays cause financial hardship to applicants resulting from the loss of employment opportunities and/or interruption or termination of employment, the loss of driver's licenses in many states, and the loss of benefits. Similarly, the family members of EAD applicants, many of whom are U.S. citizens, suffer from a reduction in household income and benefits, and employers are left to make workforce adjustments to fill positions that have been temporarily abandoned for lack of employment authorization.

Though DHS states that it "remains committed to the current 90-day processing goal …,"[37] a statement of this nature is not enough. A regulatory processing time provides a solid benchmark for adjudicators and the public that this vague policy statement lacks. AILA members are all too

[36] 80 Fed. Reg. at 81929.
[37] *Id.*

aware of the constant ebb and flow of processing times and attendant backlogs as USCIS shifts resources from one product line to the next. With the elimination of the 90-day regulatory adjudication timeframe, we are deeply concerned that the I-765 product line, like so many product lines, will eventually succumb to the pressures of resource limitations and reallocation and become even more backlogged to the detriment of thousands.[38]

DHS also proposes to amend 8 CFR §274a.13(d) to provide for an automatic extension of employment authorization for individuals who timely file an extension application under the same eligibility category and "whose eligibility to apply for employment authorization continues notwithstanding expiration of the [EAD] and is based on an employment authorization category that does not require adjudication of an underlying application or petition before adjudication of the renewal application…."[39] Based on these parameters, DHS has identified 15 categories of EAD renewal applicants who would be eligible for the 180-day automatic extension. These include: refugees, asylees, TPS beneficiaries, adjustment of status applicants, asylum applicants, and individuals who have been granted withholding of deportation or removal.[40] Noticeably excluded from this list are H-4 EAD applicants, and DACA renewal applicants, among others. While we support the proposed automatic extension of employment authorization for these categories of applicants, the elimination of the 90 day adjudication and interim EAD rule leaves all initial applicants and those not eligible for an automatic extension in limbo and at the mercy of USCIS whenever processing slows for any reason.

Therefore, should DHS proceed with eliminating the 90-day rule, the final regulation should include a provision permitting the filing of EAD renewal applications up to 6 months in advance of the expiration of the current EAD. At present, USCIS will not accept an EAD renewal application that is filed more than 120 days prior to the current expiration date.[41] The 120-day "rule" is unnecessarily restrictive, particularly given the penchant for USCIS processing delays. To alleviate any negative impacts resulting from lengthy delays, USCIS should permit filing up to 6 months in advance and include this filing rule in the final regulation, rather than posting a notice on its website. Though this would not help initial applicants whose applications are delayed, it would give extension applicants who are not eligible for the 180-day automatic extension a greater chance of having their applications adjudicated before their EAD expires. We would also urge DHS to include interim employment authorization in the final regulation for initial applications, for renewal applications in categories not entitled to an automatic extension and for renewal applications that remain pending even after the automatic 180-day extension has expired. Experience shows that USCIS is subject to workflow disruptions, that not all applicants receive their EADs timely, and that great hardship results when people lack work authorization.

Clarification on Employment Authorized Incident to Status

We also ask DHS to take this opportunity to amend 8 CFR §274a.12(a) to confirm that aliens authorized for employment incident to status do not need to obtain an EAD, and to amend

[38] For example, in 2012-2013, the adjudication of I-130 immediate relative petitions became severely backlogged. *See* "USCIS Update on Processing Times for Immediate Relative Form I-130s," available on www.AILA.org at Doc. No. 13112052. In addition, DACA renewal applications were backlogged in 2014-15 (see "Letter to Director Rodríguez on DACA Renewal Processing Times, available on www.AILA.org at Doc. No. 15011441), and we are currently experiencing a backlog of 8 months or more for H-1B extensions.
[39] Proposed 8 CFR §274a.13(d)(1)(iii).
[40] 80 Fed. Reg. at 81928.
[41] https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document.

Form I-9 and the instructions to conform to this amendment. It defies logic to establish by law an employment-authorized status and then take that benefit away by regulation. This clarification will become even more important if the 90-day adjudication rule is eliminated. While 8 CFR 274a.12(a), "Aliens authorized employment incident to status," provides many examples of the absurdity of the current rules, the impact on K nonimmigrants stands out. Under INA §101(a)(15)(K)(i), a K-1 nonimmigrant must seek to enter the United States "solely to conclude a valid marriage with the petitioner within 90 days of admission." The regulations at 8 CFR §274a.12(a)(6) provide employment authorization for a K-1 fiancé during the 90-day period of admission but only "as evidenced by an employment authorization document issued by the Service." With EAD processing times taking months, if not 90 days or more, the requirement that the fiancé obtain an EAD completely negates the intent of the employment authorization provision and is a waste of USCIS resources.

The absurdity is carried further in the case of spouses of E-1/E-2/E-3 nonimmigrants and spouses of L-1 nonimmigrants. These individuals are authorized for employment by law[42] but, according to USCIS guidance, must apply for an EAD that when issued, refers to fictitious regulatory sections, 8 CFR §§274a.12(a)(17) and (18), respectively.[43] USCIS must amend all relevant subsections of 8 CFR §274a.12(a) to remove any requirement for an EAD for aliens authorized for employment incident to status.

Relief for EB-5 Investors Subject to Processing Delays and Caught in the Visa Backlog

Absent from the proposed rule are any provisions to address the extensive delays in processing Forms I-924 (Application For Regional Center Under the Immigrant Investor Pilot Program) and Forms I-526 (Immigrant Petition by Alien Entrepreneur), and the priority date retrogression in the EB-5 China classification, currently estimated at approximately 8 years.[44] It is imperative that DHS take immediate steps to implement provisions, through rulemaking or otherwise, that would permit investors to continue to run their U.S. investments while waiting for their visa numbers to become current. Below are recommendations for addressing the processing delays and severe visa retrogression for EB-5 investors.

Significant Public Benefit Parole for Entrepreneurs. According to the DHS Unified Agenda, DHS intends to propose a program that would allow parole, on a case-by-case basis, of certain inventors, researchers, and entrepreneurs who will establish a U.S. start-up entity, and who have been awarded substantial U.S. investor financing or otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting edge research.[45] DHS should include in this rule, provisions that would permit parole for individuals who have filed an I-526 petition or are exploring EB-5 options.[46] The proposed rule should include:

[42] INA §214(e)(6) and INA §214(c)(2)(E).
[43] "Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions" (Feb. 22, 2002), available on www.AILA.org at Doc. No. 02022832.
[44] Eighty-five percent of EB-5 investors are nationals of China.
[45] http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=1615-AC04.
[46] Chinese investors are not eligible for an E visa because of the lack of a bilateral investment treaty, and most will not be eligible for H or L visas. These individuals are required to manage their businesses and are expected to create jobs within 30 months of approval of the I-526 and have no way of doing this without parole.

- Provisions allowing EB-5 investors to be paroled into the United States upon the filing of an I-526 petition. As an I-526 petitioner has made a significant foreign direct investment that will create jobs for U.S. workers, the Attorney General may deem the investment and the filing of an I-526 petition a "significant public benefit" pursuant to INA §212(d)(5).

- Provisions subjecting these parolees to the same background checks as those seeking nonimmigrant visas.

- Provisions confirming that employment authorization under 8 CFR §274a.12(c)(11) is permitted. This would allow the EB-5 petitioner to remain in the U.S. and manage his or her investment during the adjudication of the I-526 petition, and upon approval of the I-526 petition until the investor and his or her dependents obtain immigrant visas abroad or file for adjustment of status.

Concurrent Filing. At present, I-526 petitions are not eligible for "concurrent filing"; thus, the adjustment of status application (I-485) for conditional permanent residence may not be filed until the I-526 is approved. As the current I-526 processing time is more than 14 months, many EB-5 applicants must leave the U.S. while the I-526 remains pending. Those outside the United States who will apply for an immigrant visa at a U.S. consulate are often unable to come to the United States to tend to their investments, as it is difficult to obtain a visitor visa once the I-526 petition is filed. Therefore, DHS should take immediate steps to implement concurrent filing of the I-526 petition with the I-485 application for adjustment of status for investors who are not subject to visa retrogression and are maintaining a valid nonimmigrant status in the U.S. The regulations permit intending immigrants in a number of classifications to concurrently file Form I-485 with an underlying visa petition, provided that at the time of filing, a visa would be immediately available at the time of approval.[47] This should be expanded to EB-5 investors in appropriate circumstances.

At the time 8 CFR §245.2(a)(2)(i)(B) was promulgated, INS reasoned that it was "necessary to improve both efficiency and customer service, and to support the Service's long-established goals for filing of petitions and applications via direct mail."[48] As the regulations then required Form I-140 to be approved prior to filing Form I-485, INS acknowledged that "there has been a delay from the time the Form I–140 is filed with the Service until the alien worker, for whom a visa is otherwise immediately available, can properly file Form I–485 with the Service. The most practical and efficient way to eliminate this [delay] is to permit concurrent filing of Form I–485 together with Form I–140 in cases in which a visa is immediately available."

Legacy INS further reasoned that concurrent filing would "allow the Service to issue Employment Authorization Documentation (EAD) and advance parole authorization … within substantially less time than at present. In being able to apply for employment authorization and advance parole, the alien may avoid the adverse consequences of accrual of unlawful presence."[49]

[47] *See* 8 CFR §245.2(a)(2)(i)(B).
[48] "Allowing in Certain Circumstances for the Filing of Form I–140 Visa Petition Concurrently With a Form I–485 Application," 67 Fed. Reg. 49561 (July 31, 2002).
[49] 67 Fed. Reg. at 49562.

The concerns motivating INS to implement concurrent filing more than a decade ago are present today with EB-5 petitioners. According to the USCIS processing times published February 11, 2016, I-526 adjudications are taking 16 months.[50] Unlike Form I-140 (for most classifications), premium processing is not available for I-526 petitions. Moreover, allowing concurrent filing of Form I-526 and Form I-485 is good policy for several reasons, including:

- The lengthy I-526 processing times exacerbate beneficiary concerns regarding falling out of status and unlawful presence. This same factor motivated the concurrent filing regulation to be promulgated. Allowing EB-5 immigrants to concurrently file will address this issue.

- Allowing I-485 concurrent filing would permit entrepreneurs to obtain employment authorization which would allow them to manage their new commercial enterprises without risk of violating the terms of their admission and foreclosing the ability to adjust status by engaging in unauthorized employment.[51]

- As many EB-5 petitioners and/or beneficiaries are in F-1 status, concurrent filing and employment authorization would reduce the demand for H-1B visas.

Amend B Visa Provisions. Currently, it is difficult for an investor to obtain a visitor visa following the filing of an I-526 petition and after an actual investment is made. DHS should consult with the Department of State about amending the Foreign Affairs Manual at 9 FAM 41.31 N9.7 to allow EB-5 investors with pending or approved I-526s to apply for and obtain a B-1 visitor visa for the purpose of monitoring their investments. DHS should also create a presumption that if the investor enters the U.S. on the B visa to monitor the investment and the I-526 is approved after such admission, the investor entered with valid nonimmigrant intent and is thereafter eligible for adjustment of status.

Conclusion

We appreciate the opportunity to offer these comments on the proposed rules and look forward to continuing to engage with DHS on this important issue.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL

[50] http://www.aila.org/infonet/processing-time-reports/eb-5/2016/eb-5-ptr-02-11-16.
[51] *Cf.* INA §245(k) (exception to bar on adjustment for unauthorized employment for employment-based beneficiaries, inapplicable to EB-5).