



**9111-97**

**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Parts 204, 205, 214, 245 and 274a**

**[CIS No. 2571-15; DHS Docket No. USCIS-2015-0008]**

**RIN 1615-AC05**

**Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program  
Improvements Affecting High-Skilled Nonimmigrant Workers**

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Homeland Security (DHS) is proposing to amend its regulations related to certain employment-based immigrant and nonimmigrant visa programs. The proposed amendments would provide various benefits to participants in those programs, including: improved processes for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers, greater stability and job flexibility for such workers, and increased transparency and consistency in the application of agency policy related to affected classifications. Many of these changes are primarily aimed at improving the ability of U.S. employers to hire and retain high-skilled workers who are beneficiaries of approved employment-based immigrant visa petitions and are waiting to become lawful permanent residents (LPRs), while increasing the ability of such workers to seek promotions, accept lateral positions with current employers, change employers, or pursue other employment options.

First, DHS proposes to amend its regulations consistent with certain worker portability and other provisions in the American Competitiveness in the Twenty-first

Century Act of 2000 (AC21), as amended, as well as the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). These proposed amendments would clarify and improve longstanding agency policies and procedures—previously articulated in agency memoranda and precedent decisions—implementing sections of AC21 and ACWIA related to certain foreign workers, including sections specific to workers who have been sponsored for LPR status by their employers. In so doing, the proposed rule would enhance consistency among agency adjudicators and provide a primary repository of governing rules for the regulated community. In addition, the proposed rule would clarify several interpretive questions raised by AC21 and ACWIA.

Second, consistent with existing DHS authorities and the goals of AC21 and ACWIA, DHS proposes to amend its regulations governing certain employment-based immigrant and nonimmigrant visa programs to provide additional stability and flexibility to employers and workers in those programs. The proposed rule would, among other things: improve job portability for certain beneficiaries of approved employment-based immigrant visa petitions by limiting the grounds for automatic revocation of petition approval; further enhance job portability for such beneficiaries by increasing their ability to retain their priority dates for use with subsequently approved employment-based immigrant visa petitions; establish or extend grace periods for certain high-skilled nonimmigrant workers so that they may more easily maintain their nonimmigrant status when changing employment opportunities; and provide additional stability and flexibility to certain high-skilled workers by allowing those who are working in the United States in certain nonimmigrant statuses, are the beneficiaries of approved employment-based immigrant visa petitions, are subject to immigrant visa backlogs, and demonstrate

compelling circumstances to independently apply for employment authorization for a limited period. These and other proposed changes would provide much needed flexibility to the beneficiaries of employment-based immigrant visa petitions, as well as the U.S. employers who employ and sponsor them for permanent residence.

Finally, to provide additional certainty and stability to certain employment-authorized individuals and their U.S. employers, DHS is also proposing changes to its regulations governing the processing of applications for employment authorization to minimize the risk of any gaps in such authorization. These changes would provide for the automatic extension of the validity of certain Employment Authorization Documents (EADs or Forms I-766) for an interim period upon the timely filing of an application to renew such documents. At the same time, in light of national security and fraud concerns, DHS is proposing to remove regulations that provide a 90-day processing timeline for EAD applications and that require the issuance of interim EADs if processing extends beyond the 90-day mark.

**DATES:** Written comments must be received on or before [Insert date 60 days from date of publication in the FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by DHS Docket No. USCIS-2015-0008, by one of the following methods:

- Federal eRulemaking Portal: You may submit comments to USCIS by visiting <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: You may submit comments directly to USCIS by e-mailing them to: [USCISFRComment@dhs.gov](mailto:USCISFRComment@dhs.gov). Please include DHS Docket No. USCIS-2015-0008 in the subject line of the message.

- Mail: You may submit comments directly to USCIS by mailing them to: 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, D.C. 20529. This mailing address may be used for paper, disk, or CD-ROM submissions. To ensure proper handling, please reference DHS Docket No. USCIS-2015-0008 on your correspondence.
- Hand Delivery/Courier: You may submit comments directly to USCIS by hand delivery or courier to: Laura Dawkins, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, N.W., Washington, DC 20529. The contact telephone number is (202) 272-8377. To ensure proper handling, please reference DHS Docket No. USCIS-2015-0008 on your delivery.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Angustia or Nikki Lomax-Larson, Adjudications Officers (Policy), Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, D.C. 20529. The contact telephone number is (202) 272-8377.

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## **I. Public Participation**

All interested parties are invited to participate in this rulemaking by submitting written data, views, or comments on all aspects of this proposed rule. DHS and USCIS also invite comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. To provide the most assistance to USCIS in implementing these changes, comments should reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that supports such recommended change.

**Instructions:** All submissions must include the agency name and DHS Docket No. USCIS-2015-0008 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Submitted information will be made public. You may thus wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold

information provided in comments from public viewing if DHS determines that such information is offensive or may impact the privacy of an individual. For additional information, please read the Privacy Act notice that is available via the link in the footer of <http://www.regulations.gov>.

**Docket:** For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and enter this rulemaking's eDocket number: USCIS-2015-0008.

## **II. Executive Summary**

### **A. Purpose and Summary of the Regulatory Action**

DHS is proposing to amend its regulations related to certain employment-based immigrant and nonimmigrant visa programs. The proposed rule is intended to benefit U.S. employers and foreign workers participating in these programs, 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, and providing additional transparency and consistency in the application of agency policies and procedures related to these programs. These changes are primarily intended to better enable U.S. employers to employ and retain high-skilled workers who are beneficiaries of employment-based immigrant visa petitions, while increasing the ability of such workers to further their careers by accepting promotions, changing positions with current employers, changing employers, and pursuing other employment opportunities.

First, this proposed rule would largely conform DHS regulations to longstanding agency policies and procedures established in response to certain sections of the

American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Public Law 105-277, div. C, tit. IV, 112 Stat. 2681, and the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106-313, 114 Stat. 1251, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, 116 Stat. 1758 (2002). 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. The proposed rule would further clarify and improve agency policies and procedures in this area—policies and procedures that have long been set through a series of policy memoranda and a precedent decision of the USCIS Administrative Appeals Office. By clarifying such policies in regulation, DHS would provide greater transparency and certainty to affected employers and workers, while increasing consistency among agency adjudications. In addition, the proposed rule would clarify several interpretive questions raised by AC21 and ACWIA.

Specifically, this proposed rule would clarify and improve policies and practices related to:

- The ability of H-1B nonimmigrant workers who are being sponsored for lawful permanent residence (and their dependents in H-4 nonimmigrant status) to extend their nonimmigrant status beyond the otherwise-applicable 6-year limit pursuant to AC21.



- The ability of certain workers who have pending applications for adjustment of status to change employers or jobs without endangering the approved employment-based immigrant visa petitions filed on their behalf.
- The ability of H-1B nonimmigrant workers to change jobs or employers, including: (1) the ability to begin employment with new H-1B employers that have filed non-frivolous petitions for new H-1B employment; and (2) the ability of H-1B employers to file successive H-1B portability petitions (often referred to as “bridge petitions”) and how these petitions affect lawful status and work authorization.
- The way in which H-1B nonimmigrant workers are counted against the annual H-1B numerical cap, including: (1) the method for calculating when such workers may access so-called “remainder time” (i.e., time when they were physically outside the United States), thus allowing them to use their full period of H-1B status; and (2) the method for determining which H-1B nonimmigrant workers are “cap-exempt” as a result of previously being counted against the cap.
- The method for determining which H-1B nonimmigrant workers are exempt from the H-1B numerical cap due to their employment with an institution of higher education, a nonprofit entity related to or affiliated with such an institution, or a governmental or nonprofit research organization, including a revision to the definition of the term “related or affiliated nonprofit entity” for such purposes.
- The ability of H-1B nonimmigrant workers who are disclosing information in aid of, or otherwise participating in, investigations regarding alleged violations of Labor Condition Application obligations in the H-1B program to provide

documentary evidence to USCIS to demonstrate that their resulting failure to maintain H-1B status was due to “extraordinary circumstances.”

Except where changes to current policies and practices are noted in the preamble of this proposed rule, DHS intends these proposals to effectively capture the longstanding policies and procedures that have developed since enactment of AC21 and ACWIA. The Department welcomes comments that identify any such proposals that commenters believe are unintentionally inconsistent with current practices, so that any such inconsistencies can be resolved in the final rule.

Second, this rulemaking builds on the provisions listed above by proposing additional changes consistent with the immigration laws to further provide stability and flexibility in certain immigrant and nonimmigrant visa categories. These provisions would improve the ability of certain foreign workers, particularly those who are successfully sponsored for LPR status by their employers, to accept new employment opportunities, pursue normal career progression, better establish their lives in the United States, and contribute more fully to the U.S. economy. The changes would also provide certainty in the regulated community and improve consistency across agency adjudications, thereby enhancing the agency’s ability to fulfill its responsibilities related to U.S. employers and certain foreign workers. Specifically, this proposed rule would provide the following:

- **Retention of employment-based immigrant visa petitions.** DHS proposes to enhance job portability for certain workers who have approved immigrant visa petitions in the employment-based first preference (EB-1), second preference (EB-2), and third preference (EB-3) categories but who are unable to obtain those

visas in the foreseeable future due to significant immigrant visa backlogs.

Specifically, DHS proposes to amend its automatic revocation regulations so that immigrant visa petitions that have been approved for 180 days or more would no longer be subject to automatic revocation based solely on withdrawal by the petitioner or termination of the petitioner's business. As long as the petition approval has not been revoked for fraud, material misrepresentation, the invalidation or revocation of a labor certification, or USCIS error, the petition will generally continue to be valid to the beneficiary for various job portability and status extension purposes under the immigration laws. Such a beneficiary, however, must obtain a new job offer and may need another immigrant visa petition approved on his or her behalf to ultimately obtain status as an LPR.

- **Retention of priority dates.** DHS proposes to further enhance job portability for workers with approved EB-1, EB-2, and EB-3 immigrant visa petitions by providing greater clarity regarding when they may retain the priority dates assigned to those petitions and effectively transfer those dates to new and subsequently approved employment-based immigrant visa petitions. As with the immediately preceding provision, priority date retention generally would be available so long as the initial immigrant visa petition was approved and this approval has not been revoked for fraud, material misrepresentation, the invalidation or revocation of a labor certification, or USCIS error. This provision would improve the ability of certain workers to accept promotions, change employers, or accept other employment opportunities without fear of losing their

place in line for immigrant visas based on the skills they contribute to the U.S. economy.

- **Nonimmigrant grace periods.** To enhance job portability for certain high-skilled nonimmigrants, DHS proposes to generally establish a one-time grace period, during an authorized validity period, of up to 60 days whenever employment ends for individuals holding E-1, E-2, E-3, H-1B, H-1B1, L-1, or TN nonimmigrant status. This proposal would allow these high-skilled workers to more readily pursue new employment should they be eligible for other employer-sponsored nonimmigrant classifications or for the same classification with a new employer. Conversely, the proposal allows U.S. employers to more easily facilitate changes in employment for existing or newly recruited nonimmigrant workers. The individual may not work during the grace period, unless otherwise authorized by regulation. As needed, DHS in its discretion may eliminate or shorten the 60-day period on a case-by-case basis.
- **Eligibility for employment authorization in compelling circumstances.** DHS also proposes to provide additional stability and flexibility to certain high-skilled nonimmigrant workers in the United States who are the beneficiaries of approved employment-based immigrant visa petitions but who cannot obtain an immigrant visa number due to statutory limits on immigrant visa issuance and are experiencing compelling circumstances. Specifically, DHS proposes to allow such beneficiaries in the United States on E-3, H-1B, H-1B1, L-1, or O-1 nonimmigrant status to apply for separate employment authorization for a limited period if there are compelling circumstances that, in the discretionary

determination of DHS, justify the consideration of such employment authorization.

- **H-1B licensing.** DHS proposes to clarify exceptions to the requirement that make approval of an H-1B petition contingent upon licensure where such licensure is required to fully perform the duties of the specialty occupation. The proposed rule would generally allow a petitioning employer that has filed an H-1B petition for an unlicensed worker to meet the licensure requirement by demonstrating that the worker has filed a request for such license but is unable to obtain it, or is unable to file a request for such a license, because a state or locality requires a social security number or the issuance of employment authorization before accepting or approving such requests. The proposed rule also clarifies that DHS may approve an H-1B petition on behalf of an unlicensed worker if he or she will work in a State that allows such individuals to be employed in the occupation under the supervision of licensed senior or supervisory personnel.

As noted above, these changes would help improve various employment-based immigrant and nonimmigrant visa classifications, including by making it easier to hire and retain nonimmigrant workers who have approved immigrant visa petitions and giving such workers additional career options as they wait for immigrant visa numbers to become available. These improvements are increasingly important considering the lengthy and growing backlogs of immigrant visas.

Finally, to provide additional stability and certainty to U.S. employers and individuals eligible for employment authorization in the United States, DHS is also proposing several changes to its regulations governing its processing of applications for

employment authorization. First, to minimize the risk of any gaps in employment authorization, DHS proposes to automatically extend the validity of Employment Authorization Documents (EADs or Forms I-766) in certain circumstances based on the timely filing of an application to renew such EADs. Specifically, DHS would automatically extend the employment authorization and validity of existing EADs issued to certain employment-eligible individuals for up to 180 days from the date of the cards' expiration, so long as: (1) a renewal application is filed based on the same employment authorization category as the previously issued EAD (or the renewal application is for an individual approved for Temporary Protected Status (TPS) whose EAD was issued pursuant to 8 CFR 274a.12(c)(19)); (2) such renewal application is timely filed prior to the expiration of the EAD and remains pending; and (3) the individual's eligibility for employment authorization continues beyond the expiration of his or her EAD, and an independent adjudication of the individual's underlying eligibility is not a prerequisite to the extension of employment authorization. At the same time, DHS would eliminate the current regulatory provisions that require adjudication of EAD applications within 90 days of filing and that authorize interim EADs in cases where such adjudications are not conducted within the 90-day timeframe. These changes would provide enhanced stability and certainty to employment-authorized individuals and their employers, while reducing opportunities for fraud and protecting the security-related processes undertaken for each EAD application.

## **B. Legal Authority**

The authority of the Secretary of Homeland Security (Secretary) for these regulatory amendments is found in various sections of the Immigration and Nationality

Act (INA), 8 U.S.C. 1101 et seq., ACWIA, AC21, and the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 101 et seq. General authority for issuing the proposed rule is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws, as well as section 102 of the HSA, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the Secretary to issue regulations. Further authority for the regulatory amendments in the proposed rule is found in:

- Section 205 of the INA, 8 U.S.C. 1155, which grants the Secretary broad discretion in determining whether and how to revoke any immigrant visa petition approved under section 204 of the INA, 8 U.S.C. 1154;
- Section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe by regulation the terms and conditions of the admission of nonimmigrants;
- Section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B), which recognizes the Secretary's authority to extend employment authorization to noncitizens in the United States;
- Section 413(a) of ACWIA, which amended Section 212(n)(2)(C) of the INA, 8 U.S.C. 1182(n)(2)(C), to authorize the Secretary to provide certain whistleblower protections to H-1B nonimmigrant workers;
- Section 414 of ACWIA, which added section 214(c)(9) of the INA, 8 U.S.C. 1184(c)(9), to authorize the Secretary to impose a fee on certain H-1B petitioners to fund the training and education of U.S. workers;

- Section 103 of AC21, which amended section 214(g) of the INA, 8 U.S.C. 1184(g), to provide: (1) an exemption from the H-1B numerical cap for certain H-1B nonimmigrant workers employed at institutions of higher education, nonprofit entities related to or affiliated with such institutions, and nonprofit or governmental research organizations; and (2) that a worker who has been counted against the H-1B numerical cap within the 6 years prior to petition approval will not again be counted against the cap unless the individual would be eligible for a new 6-year period of authorized H-1B admission.
- Section 104(c) of AC21, which authorizes the extension of H-1B status beyond the general 6-year maximum for H-1B nonimmigrant workers who have approved EB-1, EB-2, or EB-3 immigrant visa petitions but are subject to backlogs due to application of certain “per-country” limitations on immigrant visas;
- Section 105 of AC21, which added what is now section 214(n) of the INA, 8 U.S.C. 1184(n),<sup>1</sup> to allow an H-1B nonimmigrant worker to begin concurrent or new H-1B employment upon the filing of a timely, non-frivolous H-1B petition;
- Sections 106(a) and (b) of AC21, which, as amended, authorize the extension of H-1B status beyond the general 6-year maximum for H-1B nonimmigrant workers who have been sponsored for permanent residence by their employers and who are subject to certain lengthy adjudication or processing delays;
- Section 106(c) of AC21, which added section 204(j) of the INA, 8 U.S.C. 1154(j), to authorize certain beneficiaries of approved EB-1, EB-2, and EB-3 immigrant

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<sup>1</sup> Section 8(a)(3) of the Trafficking Victims Protection Reauthorization Act of 2003, Public Law 108-193, (Dec. 19, 2003), redesignated section 214(m) of the INA, 8 U.S.C. 1184(m), as section 214(n) of the INA, 8 U.S.C. 1184(n).



visa petitions who have filed applications for adjustment of status to change jobs or employers without invalidating their approved petitions; and

- Section 101(b)(1)(F) of the HSA, 6 U.S.C. 111(b)(1)(F), which establishes as a primary mission of DHS the duty to “ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.”

### **C. Costs and Benefits**

Taken together, the proposed amendments aim to reduce unnecessary disruption to businesses and families caused by immigrant visa backlogs, as described in Section III.E. The benefits from these proposed amendments add value to the U.S. economy by retaining high-skilled workers who make important contributions to the U.S. economy, including technological advances and research and development endeavors, which are highly correlated with overall economic growth and job creation.<sup>2</sup> For more information, the public may consult the Regulatory Impact Analysis, reflecting that although there may be short-term negative or neutral impacts, the addition of high-skilled workers presents long-term benefits to the U.S. economy.<sup>3</sup>

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<sup>2</sup> Hart, David, et al., “High-tech Immigrant Entrepreneurship in the United States,” Small Business Administration Office of Advocacy (July 2009), available at: [https://www.sba.gov/sites/default/files/rs349tot\\_0.pdf](https://www.sba.gov/sites/default/files/rs349tot_0.pdf). See also Fairlie, Robert., “Open for Business: How Immigrants are Driving Small Business Creation in the United States,” The Partnership for a New American Economy (August 2012), available at: <http://www.renewoureconomy.org/sites/all/themes/pnae/openforbusiness.pdf>; “Immigrant Small Business Owners a Significant and Growing Part of the Economy,” Fiscal Policy Institute (June 2012), available at: <http://www.fiscalspolicy.org/immigrant-small-business-owners-FPI-20120614.pdf>; Anderson, Stuart, “American Made 2.0 How Immigrant Entrepreneurs Continue to Contribute to the U.S. Economy,” National Venture Capital Association (June 2013), available at: <http://nvca.org/research/stats-studies/>.  
<sup>3</sup> “The Economic Impact of S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act,” June 18, 2013, available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/44346-Immigration.pdf>.

DHS has analyzed potential costs of these proposed regulations and has determined that the changes proposed by DHS have direct impacts to individual beneficiaries of employment-based nonimmigrant and immigrant visa petitions in the form of filing costs, consular processing costs, and potential for longer processing times for EAD applications during filing surges, among other costs. Due to the fact that some of these petitions are filed by a sponsoring employer, this rule also has indirect effects on employers in the form of employee replacement costs.

The proposed amendments would clarify and amend policies and practices in various employment-based immigrant and nonimmigrant visa programs, with the primary aim of providing additional stability and flexibility to both foreign workers and U.S. employers participating in those programs. In part, the proposed rule clarifies and improves upon longstanding policies adopted in response to the enactment of ACWIA and AC21 to ensure greater consistency across agency adjudications and provide greater certainty to regulated employers and workers. These changes would provide various benefits to U.S. employers and certain foreign workers, including the enhanced ability of such workers to accept promotions or change positions with their employers, as well as change employers or pursue other employment opportunities. These proposals also benefit the regulated community by providing instructive rules governing: extensions of stay for certain H-1B nonimmigrant workers facing long delays in the immigrant visa process; the ability of workers who have been sponsored by their employers for LPR status to change jobs or employers 180 days after they file applications for adjustment of status; the circumstances under which H-1B nonimmigrant workers may begin employment with a new employer; how H-1B nonimmigrant workers count time toward

maximum periods of stay; which entities are properly considered related to or affiliated with institutions of higher education for purposes of the H-1B program; and when H-1B nonimmigrant workers can claim whistleblower protections. The increased clarity provided by these rules will enhance the ability of these workers to take advantage of the job portability and related provisions in AC21 and ACWIA.

The proposed rule would also amend the current regulatory scheme governing certain immigrant and nonimmigrant visa programs to enhance job portability for certain workers and improve the ability of U.S. businesses to retain highly valued individuals. These benefits are achieved by: proposing a revised method to retain the approval of employment-based immigrant visa petitions already adjudicated by DHS and to retain priority dates of these approved petitions for purposes of immigrant visa or adjustment of status processing; providing a grace period to certain nonimmigrants to enhance their ability to seek an authorized change of employment; establishing a means for certain nonimmigrant workers with approved employment-based immigrant visa petitions to directly request separate employment authorization for a limited time when facing compelling circumstances; and identifying exceptions to licensing requirements applicable to certain H-1B nonimmigrant workers.

Finally, the proposed rule would also amend current regulations governing the processing of applications for employment authorization to provide additional stability to certain employment-authorized individuals in the United States while addressing fraud and national security concerns. To prevent gaps in employment for such individuals and their employers, the proposed rule would provide for the automatic extension of EADs (and, where necessary, employment authorization) upon the timely filing of a renewal

application. To protect against fraud and other abuses, the proposed rule would also eliminate current regulatory provisions that require adjudication of applications for employment authorization in 90 days and that authorize interim EADs when that timeframe is not met.

DHS has prepared a full costs and benefits analysis of the proposed regulation, which can be found on [regulations.gov](https://www.regulations.gov).

### **III. Background**

#### **A. Permanent Employment-Based Immigration**

##### **1. Employment-Based Immigrant Visa Preference Categories**

Current employment-based immigrant visa (i.e., permanent visa)<sup>4</sup> levels were set 25 years ago with the enactment of the Immigration Act of 1990 (“IMMACT 90”), Public Law 101–649, 104 Stat. 4978. As amended by IMMACT 90, the INA generally makes 140,000 employment-based immigrant visas available each fiscal year, plus any family-sponsored immigrant visas authorized under section 203(a) of the INA, 8 U.S.C. 1153(a) that went unused during the previous fiscal year. See INA section 201(d), 8 U.S.C. 1151(d). The INA allots the minimum 140,000 immigrant visas per fiscal year through five separate employment-based (EB) “preference categories” as follows:

- **First Preference (EB-1) Category:** 40,040 immigrant visas for so-called “priority workers,” including (1) “aliens with extraordinary ability,” (2) “outstanding professors and researchers,” and (3) “certain multinational executives and managers.” INA section 203(b)(1), 8 U.S.C. 1153(b)(1).

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<sup>4</sup> Immigrant visas are essentially permanent visas that lead to LPR status. The employment-based immigration process discussed here focuses on the process through which an individual may obtain LPR status in the United States through an employment-based immigration category.

- **Second Preference (EB-2) Category:** 40,040 immigrant visas for (1) “members of the professions holding advanced degrees” and (2) “aliens of exceptional ability.” INA section 203(b)(2), 8 U.S.C. 1153(b)(2).
- **Third Preference (EB-3) Category:** 40,040 immigrant visas for (1) “skilled workers” (workers with at least 2 years of training or experience), (2) “professionals” (members of the professions holding baccalaureate degrees), and (3) “other workers” (unskilled workers of less than 2 years of training or experience). INA section 203(b)(3), 8 U.S.C. 1153(b)(3).
- **Fourth Preference (EB-4) Category:** 9,940 immigrant visas for certain “special immigrants” described in section 101(a)(27) of the INA, 8 U.S.C. 1101(a)(27). INA section 203(b)(4), 8 U.S.C. 1153(b)(4).
- **Fifth Preference (EB-5) Category:** 9,940 immigrant visas for employment-creation immigrant investors seeking to enter the United States for the purpose of engaging in a “new commercial enterprise.” INA section 203(b)(5), 8 U.S.C. 1153(b)(5).<sup>5</sup>

The INA further provides that immigrant visa numbers authorized in one preference category may be moved to other preference categories when demand for visas in the original preference category is insufficient to use all available visas. See generally INA section 203(b), 8 U.S.C. 1153(b).

Although the INA makes the above minimum number of employment-based immigrant visas available each fiscal year, the INA requires that no more than 27 percent

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<sup>5</sup> This proposed rule largely does not affect individuals applying for immigrant visas in the EB-4 and EB-5 preference categories. Accordingly, the remainder of this section concerns only individuals seeking immigrant visas under the EB-1, EB-2, and EB-3 preference categories.

of the available number be issued in any of the first 3 quarters of the fiscal year. See INA section 201(a)(2), 8 U.S.C. 1151(a)(2). Moreover, these immigrant visa numbers are subject to what are known as “per-country” limitations. See INA section 202(a)(2), 8 U.S.C. 1152(a)(2). Generally, in any fiscal year, individuals born in any given country may be allocated no more than 7 percent of the total number of immigrant visas. As discussed further below, depending on the level of demand in the governing preference category, the individual’s country of birth, and the applicability of any statutory exceptions to these limitations, an individual may be subject to lengthy delays in the employment-based immigration process due to lack of immigrant visa availability.

## **2. The Employment-Based Immigrant Visa Process**

Individuals seeking to obtain LPR status in the United States through the EB-1, EB-2, or EB-3 preference categories must often go through a complex, multi-step process. With respect to most individuals described in the EB-2 and EB-3 categories, the immigrant visa process normally begins when a U.S. employer seeks to obtain a labor certification from the U.S. Department of Labor (DOL).<sup>6</sup> See INA section 212(a)(5), 8 U.S.C. 1182(a)(5); 8 CFR 204.5. Generally, the U.S. employer is required to test the U.S. labor market for the offered position by advertising the position and attempting to recruit qualified U.S. workers in the area of intended employment. See 20 CFR 656.17. In the alternative, the employer may provide evidence to USCIS that the position to be filled by the worker qualifies for what is known as a “Schedule A” designation due to a shortage of U.S. workers in a specific occupation. See 20 CFR 656.5, 656.15. Schedule

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<sup>6</sup> Labor certifications are unnecessary for petitions seeking EB-1 classification and for petitions seeking a “national interest waiver” under the EB-2 category. See INA sections 203(b)(2)(B) and 212(a)(5)(D), 8 U.S.C. 1153(b)(2)(B) and 1182(a)(5)(D); 8 CFR 204.5(h)(5), (i)(3)(iii), (j)(5), (k)(4)(ii).

A applications are not required to obtain labor certification through DOL prior to petitioning USCIS. Id.

Upon completion of the recruitment process (if recruitment is required), the employer files an “Application for Permanent Employment Certification” (ETA Form 9089) with DOL’s Office of Foreign Labor Certification. See 20 CFR 656.17(a). The application constitutes a request for DOL to certify, among other things, that (1) there “are not sufficient workers who are able, willing, qualified . . . , and available” to perform the advertised job, and (2) the individual’s admission to the United States “will not adversely affect the wages and working conditions” of U.S. workers. INA section 212(a)(5)(A)(i), 8 U.S.C. 1182(a)(5)(A)(i). For immigrant visa petitions that require an approved permanent labor certification from DOL, the date the application for labor certification is accepted by DOL for processing is the employee’s “priority date.” See 8 CFR 204.5(d). The priority date sets an individual’s place in the queue for the allocation of employment-based immigrant visas.

After obtaining an approved permanent labor certification from DOL, or if no such certification is required for the classification sought, the U.S. employer files an immigrant visa petition with USCIS on behalf of the worker (or “beneficiary”).<sup>7</sup> See INA section 204(a)(1)(F), 8 U.S.C. 1154(a)(1)(F). Such petition is known as an “Immigrant Petition for Alien Worker,” or USCIS Form I-140. The purpose of the petition is to demonstrate that the job offered and the beneficiary’s qualifications meet

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<sup>7</sup> Individuals seeking immigrant visas through the EB-1 preference category as workers with extraordinary ability (rather than as outstanding professors and researchers or multinational executives and managers), or through the EB-2 preference category with “national interest waivers,” may file immigrant visa petitions on their own behalf and thus do not require sponsorship by a U.S. employer. See INA sections 203(b)(1)(B), (b)(1)(C), and (b)(2)(B)(i), 8 U.S.C. 1153(b)(1)(B), (b)(1)(C), and (b)(2)(B)(i).

the requirements of the requested immigrant visa classification under section 203(b) of the INA, 8 U.S.C. 1153(b), and pertinent regulatory requirements, see 8 CFR 204.5. If no labor certification was required, the employee's priority date (i.e., place in the queue for an employment-based immigrant visa) is the date the immigrant visa petition is properly filed with USCIS. See 8 CFR 204.5(d); see also 22 CFR 42.53(a).

If the immigrant visa petition is approved, the beneficiary must take additional steps to obtain LPR status, by either requesting an immigrant visa to enter the United States from abroad or filing an application for adjustment of status while in the United States. The ability to take such steps, however, is limited by the number of immigrant visas authorized for issuance and any superseding demand for such visas. As mentioned above, the beneficiary's priority date determines the duration of that beneficiary's wait for an immigrant visa by positioning the beneficiary behind individuals with earlier priority dates in the same employment-based preference category and country of birth. In certain situations, the beneficiary of an approved EB-1, EB-2, or EB-3 immigrant visa petition may retain the priority date listed in the approved petition for use in a subsequent immigrant visa petition. See 8 CFR 204.5(e).

The beneficiary of an approved immigrant visa petition may be able to obtain LPR status in one of two ways. The beneficiary may apply at a U.S. consular post abroad for an immigrant visa, which, once received, would allow the beneficiary to apply for admission to the United States as an LPR.<sup>8</sup> Such a beneficiary must generally wait to receive visa application instructions from the U.S. Department of State (DOS) National Visa Center. After receiving these instructions, the beneficiary collects required

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<sup>8</sup> INA sections 203, 221 and 222; 8 U.S.C. 1153, 1201 and 1202.



information and files the immigrant visa application with DOS. Depending on the demand for immigrant visas in the beneficiary's preference category and country of birth, the beneficiary may be required to wait further for visa issuance. Once DOS allocates visa numbers to be issued to applicants in the relevant preference category and country of birth with the beneficiary's priority date, DOS contacts the beneficiary for an immigrant visa interview. If the beneficiary's application is ultimately approved, he or she is issued an immigrant visa and, on the date of admission to the United States, obtains LPR status. DOS publishes a monthly "Visa Bulletin" that indicates when individuals may expect to receive their visa application instructions, as well as whether they are currently authorized to be issued immigrant visas by DOS consular offices abroad. See INA sections 203(e) and (g), 245(a), 8 U.S.C. 1153(e) and (g), 1255(a); see also 8 CFR 245.1(g)(1) and 245.2(a)(2)(i)(B), 22 CFR 42.51 through 42.55.

In the alternative, a beneficiary who is in the United States in lawful nonimmigrant status, with limited exception, may seek LPR status by filing with USCIS an application for adjustment of status to that of a lawful permanent resident ("application for adjustment of status") in accordance with section 245 of the INA, 8 U.S.C. 1255. Before filing such an application, however, the beneficiary must wait until an immigrant visa is "immediately available" to him or her. See INA section 245(a), 8 U.S.C. 1255(a); 8 CFR 245.2(a)(2)(i)(B) and (C). An immigrant visa is considered "immediately available" to the beneficiary if his or her priority date for the preference category is earlier than the relevant cut-off date indicated in the monthly DOS Visa

Bulletin.<sup>9</sup> See 8 CFR 245.1(g)(1) and 245.2(a)(2)(i)(B). These dates allow individuals to determine—based on their priority dates, countries of birth, and preference categories—whether they can file applications for adjustment of status and when they may expect to have their status adjusted to that of an LPR.

After the application for adjustment of status is filed, USCIS commences its adjudication. It is possible, however, that while the application is pending, higher than expected demand for immigrant visas will cause DOS to determine that immigrant visas that previously were available are no longer available to the applicant and cannot be authorized for issuance to him or her. This is often referred to as “visa retrogression.” In such cases, USCIS may not approve the application until an immigrant visa is again available and authorized for issuance to the applicant under the Visa Bulletin. USCIS will place these cases on “hold” in the interim. Similarly, retrogression may cause a DOS consular post abroad to no longer be able to issue an immigrant visa to an overseas applicant.

## **B. Nonimmigrant Visa Classifications**

Prior to being sponsored for an immigrant visa by a U.S. employer, many foreign national employees first come to the United States pursuant to a nonimmigrant visa, such as an H-1B visa for “specialty occupation workers” or an L-1 visa for “intracompany transferees.” These and other nonimmigrant visa classifications allow these individuals to be employed in the United States for temporary periods. Each classification has its own eligibility requirements, as well as requirements related to duration of status, ability

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<sup>9</sup> The Visa Bulletin, which is issued monthly, is available at [http://travel.state.gov/visa/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/bulletin/bulletin_1360.html).

to renew status, ability to change jobs or employers, minimum wages, and worker protections.

### **1. The H-1B Nonimmigrant Visa Classification**

A U.S. employer seeking to temporarily employ a foreign national in the United States in a “specialty occupation” may file a petition to obtain H-1B nonimmigrant classification on behalf of the individual.<sup>10</sup> See INA section 101(a)(15)(H)(i)(B), 8 U.S.C. 1101(a)(15)(H)(i)(B). A specialty occupation is defined as an occupation that requires (1) “theoretical and practical application of a body of highly specialized knowledge” and (2) “the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum qualification for entry into the occupation in the United States.” See INA section 214(i)(1), 8 U.S.C. 1184(i)(1). Subject to certain exemptions, the total number of individuals who may be issued H-1B visas or otherwise accorded H-1B status in a fiscal year may not exceed 65,000. See INA section 214(g)(1)(A)(vii), 8 U.S.C. 1184(g)(1)(A)(vii). Employers eligible to file H-1B petitions include the actual employer of the worker as well as certain agents that satisfy DHS regulatory requirements. See 8 CFR 214.2(h)(2)(i)(A) and (F).

Before filing an H-1B petition, the U.S. employer (or “petitioner”) generally must first file a Labor Condition Application (LCA) with DOL that covers the proposed dates of H-1B employment.<sup>11</sup> See INA sections 101(a)(15)(H)(i)(B) and 212(n), 8 U.S.C. 1101(a)(15)(H)(i)(B) and 1182(n). Among other things, the LCA requires the petitioner

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<sup>10</sup> An H-1B petition can be filed for a foreign national to perform services in a specialty occupation, services relating to a Department of Defense (DOD) cooperative research and development project or coproduction project, or services of distinguished merit and ability in the field of fashion modeling. 8 CFR 214.2(h)(4)(i)(A).

<sup>11</sup> Petitions for H-1B visas relating to Department of Defense cooperative research, development, and coproduction projects do not require petitioners to file a Labor Condition Application. See 8 CFR 214.2(h)(4)(vi).

to attest to the occupational classification in which the worker will be employed, the wage to be paid to the worker, and the location(s) where the employment will occur. See INA section 212(n), 8 U.S.C. 1182(n); see also 20 CFR 655.730(c)(4). If DOL certifies the LCA, the petitioner may then file a Petition for a Nonimmigrant Worker (Form I-129) with USCIS seeking approval of H-1B classification for the worker (or “beneficiary”).<sup>12</sup> See INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(4)(i)(B)(1). If the H-1B position requires a state or local license to fully perform the job duties, the H-1B petition may not be approved unless the beneficiary possesses the required license. See 8 CFR 214.2(h)(4)(v)(A).

If the H-1B petition is approved, H-1B classification may generally be issued for a period of up to 3 years but may not exceed the validity period of the LCA.<sup>13</sup> See 8 CFR 214.2(h)(9)(iii)(A)(1). Subsequently, the original petitioner or a different petitioner may petition USCIS to authorize continued or new employment of the beneficiary as an H-1B nonimmigrant worker. Such a renewal petition may, if the H-1B nonimmigrant worker is in the United States and (with limited exception) maintaining H-1B status at the time the petition is filed, include a request to extend his or her stay in H-1B status. See 8 CFR 214.1(c)(1) and 214.2(h)(2)(i)(D), (h)(14) and (h)(15).

The maximum period of authorized admission of an individual in the H-1B classification is generally limited to 6 years. See INA section 214(g)(4), 8 U.S.C.

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<sup>12</sup> In such case, the worker would be considered the beneficiary of the H-1B petition.

<sup>13</sup> H-1B visas relating to Department of Defense cooperative research, development, and coproduction projects may be issued for up to 5 years, and they may be renewed for a maximum H-1B period of 10 years. See Public Law 101–649, section 222(a)(2), 104 Stat. 4978 (Nov. 29, 1990); 8 CFR 214.2(h)(9)(iii)(A)(2).

1184(g)(4).<sup>14</sup> Typically, an H-1B petition may not be approved for a beneficiary who has stayed for the maximum allowable amount of time in the United States as an H-1B (or L-1<sup>15</sup>) nonimmigrant worker, unless the beneficiary has resided and been physically present outside the United States for the immediate prior year. See 8 CFR 214.2(h)(13)(iii)(A). The INA defines the terms “admission” and “admitted” to mean “the lawful entry of the [foreign national] into the United States after inspection and authorization by an immigration officer.” See INA section 101(a)(13), 8 U.S.C. 1101(a)(13). Therefore, DHS calculates an H-1B nonimmigrant worker’s period of authorized admission by excluding time spent outside the United States during the validity of an H-1B petition. Such “remainder time” is effectively added back to the period of stay allowed the individual as an H-1B nonimmigrant worker. Reclaiming this time is referred to as “recapture” of H-1B time (i.e., the time allowed an individual to be employed in H-1B status within the 6-year period of authorized admission).<sup>16</sup>

Spouses and minor, unmarried children of an H-1B nonimmigrant worker are eligible for H-4 nonimmigrant status subject to the same period of admission and limits as the H-1B nonimmigrant. See 8 CFR 214.2(h)(9)(iv). H-1B nonimmigrant workers and their H-4 nonimmigrant dependents are currently afforded a grace period of up to 10 days to remain in the United States after the end of the petition validity period. See 8

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<sup>14</sup> The maximum period of authorized admission for Department of Defense H-1B nonimmigrant workers is 10 years. As explained in detail below, AC21, as amended, contains two provisions that allow for USCIS to approve H-1B petitions for beneficiaries beyond the otherwise applicable statutory 6-year maximum period of authorized admission.

<sup>15</sup> The L-1 nonimmigrant classification is described further below.

<sup>16</sup> See USCIS Memorandum from Michael Aytes, “Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants,” (Oct. 21, 2005) (“Aytes Memo Oct. 2005”).

CFR 214.2(h)(13)(i)(A). During any such grace period, the H-1B nonimmigrant worker is considered “admitted to the United States,” but not authorized to work. Id.

Generally, a request for an extension of H-1B stay may be filed only if the individual’s H-1B status has not expired. See 8 CFR 214.1(c)(4) and 214.2(h)(14).

Under certain circumstances, failure to file a request for an extension of H-1B stay before H-1B nonimmigrant status has expired may be excused. Id. In such cases, the petitioner must demonstrate that:

- The delay was due to extraordinary circumstances beyond the control of the foreign national or petitioner, and USCIS finds the delay commensurate with the circumstances;
- The foreign national has not otherwise violated his or her nonimmigrant status;
- The foreign national remains a bona fide nonimmigrant; and
- The foreign national is not the subject of deportation proceedings under section 242 of the INA, 8 U.S.C. 1252 (prior to April 1, 1997), or removal proceedings under section 240 of the INA, 8 U.S.C. 1229a.

Id. If such a request for an extension of H-1B stay is approved, the extension may be granted from the date the previously authorized stay expired. Id.

## **2. Other Relevant Nonimmigrant Visa Classifications**

Foreign nationals may also work in the United States in other temporary nonimmigrant statuses. The employment-based nonimmigrant statuses that are relevant to this proposed rule are described below.

**E-1 classification.** The E-1 nonimmigrant classification allows nationals of certain “treaty countries” to be admitted to the United States solely to engage in

international trade on his or her own behalf. To qualify for E-1 classification, the “treaty trader” must: (1) be a national of a country with which the United States maintains a qualifying treaty; and (2) carry on substantial trade, principally between the United States and the treaty country that qualifies the treaty trader for E-1 classification. See 8 CFR 214.2(e)(1). Certain employees of such a person or of a qualifying organization may also be eligible for this classification. A treaty trader or employee may only engage in the trade activity or work in the employment for which he or she was approved at the time the classification was granted. See 8 CFR 214.2(e)(8)(i). An E-1 employee, however, may also work for the treaty organization’s parent company or one of its subsidiaries in certain circumstances. See 8 CFR 214.2(e)(8)(ii). Treaty traders may be admitted in E-1 nonimmigrant status for a period of up to 2 years, and such status may be renewed indefinitely so long as the individual continues to meet the relevant qualifications. See 8 CFR 214.2(e)(19) and (20).

**E-2 classification.** The E-2 nonimmigrant classification concerns nationals of treaty countries who invest a substantial amount of capital in a U.S. enterprise. To qualify for E-2 classification, the “treaty investor” must: (1) be a national of a country with which the United States maintains a qualifying treaty; (2) have invested, or be actively in the process of investing, a substantial amount of capital in a bona fide enterprise in the United States; and (3) be seeking to enter the United States solely to develop and direct the enterprise. Certain employees of such a person or of a qualifying organization may also be eligible for this classification. A “treaty investor” or employee in E-2 nonimmigrant status may only engage in the investment activity or work in the employment for which he or she was approved at the time the classification was granted.

See 8 CFR 214.2(e)(8)(i). An E-2 nonimmigrant employee, however, may also work for the treaty organization's parent company or one of its subsidiaries in certain circumstances. See 8 CFR 214.2(e)(8)(ii). Treaty investors may be admitted in E-2 nonimmigrant status for a period of 2 years, and such status may be renewed indefinitely so long as the individual continues to meet the relevant qualifications. See 8 CFR 214.2(e)(19) and (20).

**E-3 classification.** The E-3 nonimmigrant visa classification concerns specialty occupation workers who are nationals of the Commonwealth of Australia. See INA section 101(a)(15)(E)(iii), 8 U.S.C. 1101(a)(15)(E)(iii). The definition of the term "specialty occupation" is the same for E-3 classification as that for the H-1B classification. See INA section 214(i)(1), 8 U.S.C. 1184(i)(1). To qualify for E-3 classification, the applicant must present a Labor Condition Application in accordance with section 212(t)(1) of the INA, 8 U.S.C. 1182(t)(1). The total number of Australian nationals who may be accorded E-3 nonimmigrant status in a fiscal year is capped at 10,500. See INA section 214(g)(11)(B), 8 U.S.C. 1184(g)(11)(B). E-3 nonimmigrant workers may be admitted initially for a period not to exceed the validity period of the accompanying LCA (granted for 2 years) and may be granted indefinite extensions of stay in increments of up to 2 years. See 20 CFR 655.750(a)(2).<sup>17</sup>

**H-1B1 classification.** Similar to the H-1B and E-3 classifications, the H-1B1 classification is for specialty occupation workers, but is limited to temporary workers from Chile and Singapore. See INA sections 101(a)(15)(H)(i)(b)(1) and 214(i), 8 U.S.C.

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<sup>17</sup> See Michael Aytes Memorandum: Processing Guidelines for E-3 Australian Specialty Occupation Workers and Employment Authorization for E-3 Dependent Spouses (Dec. 15, 2005), available at [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2005/e3polgdnc\\_121505.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/e3polgdnc_121505.pdf).



1101(a)(15)(H)(i)(b)(1) and 1184(i). Consistent with Free Trade Agreements with Chile and Singapore, up to 1,400 nationals from Chile and 5,400 nationals from Singapore may enter the United States annually in the H-1B1 classification to perform specialty occupation work. See INA section 214(g)(8)(B), 8 U.S.C. 1184(g)(8)(B). Individuals admitted in such status are counted against the overall H-1B annual numerical limitation of 65,000. Id. The H-1B1 nonimmigrant classification requires the filing of an LCA certified by DOL. See INA sections 101(a)(15)(H)(i)(B)(1) and 212(t), 8 U.S.C. 1101(a)(15)(H)(i)(B)(1) and 1182(t). H-1B1 nonimmigrants may be admitted for a period of up to 1 year, and may extend their period of stay in the United States in up to 1-year increments. See INA section 214(g)(8)(C), 8 U.S.C. 1184(g)(8)(C).

**L-1 classification.** The L-1 nonimmigrant visa classification concerns “intracompany transferees” of multinational entities who are executives, managers, or employees with specialized knowledge and who are transferring from an office abroad to a qualifying office in the United States. See INA section 101(a)(15)(L), 8 U.S.C. 1101(a)(15)(L). Executive and managerial employees qualify for L-1A status and are admitted for a maximum initial stay of 3 years, with extensions of stay granted in increments of up to 2 years, until the employee has reached the maximum limit of 7 years. See INA section 214(c)(1)(D)(i), 8 U.S.C. 1184(c)(1)(D)(i); see also 8 CFR 214.2(l)(12)(i) and (15)(ii). Specialized knowledge employees qualify for L-1B status and are admitted for a maximum initial stay of 3 years, with extensions of stay granted in increments of up to 2 years, until the employee has reached the maximum limit of 5 years. See INA section 214(c)(1)(D)(ii); see also 8 CFR 214.2(l)(12)(i) and (15)(ii).

**O-1 classification.** The O-1 nonimmigrant visa classification includes individuals who either: (1) have “extraordinary ability” in the sciences, arts, education, business or athletics, as demonstrated by sustained national or international acclaim; or (2) have a demonstrated record of extraordinary achievements in the motion picture or television industry, as recognized in the field through extensive documentation. See INA section 101(a)(15)(O), 8 U.S.C. 1101(a)(15)(O). O-1 nonimmigrants must be coming temporarily to the United States to continue work in the relevant area of extraordinary ability or achievement. Id. O-1 nonimmigrants may be admitted to the United States for up to 3 years, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. See 8 CFR 214.2(o)(6)(iii)(A) and (o)(10). Extensions of status may be authorized in increments of up to 1 year, and such status may be renewed indefinitely so long as the individual continues to meet the relevant qualifications. See 8 CFR 214.2(o)(12)(ii).

**TN Classification.** The TN nonimmigrant classification, established in the North American Free Trade Agreement,<sup>18</sup> permits qualified Canadian and Mexican citizens to seek temporary entry into the United States to engage in business activities at a professional level. See INA section 214(e), 8 U.S.C. 1184(e); see also 8 CFR 214.6(b). The TN nonimmigrant worker may not intend to establish a business in the United States or be self-employed in this country, and he or she must be arriving pursuant to a prearranged agreement with a U.S. employer. Id. The TN nonimmigrant worker must also demonstrate that he or she possesses at least the minimum qualification prescribed for his or her respective profession and that he or she intends to remain in the United

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<sup>18</sup> See 58 FR 69205 (Dec. 30, 1993); 58 FR 68526 (Dec. 28, 1993).

States temporarily. See 8 CFR 214.6(a), (d)(3)(ii). An eligible alien seeking TN classification may be granted TN status for an initial period not to exceed 3 years. See 8 CFR 214.6(e). Extensions of stay may be granted for periods not to exceed 3 years at a time. See 8 CFR 214.6(h)(1)(iii). TN is a temporary nonimmigrant classification, although there is no specific limit on the total period of time an alien may remain in the United States in TN status as long as he or she continues to be engaged in TN business activities for a U.S. employer or entity at a professional level, and otherwise continues to properly maintain TN status. See 8 CFR 214.6(h)(1)(iv).

### **C. ACWIA and AC21**

#### **1. The American Competitiveness and Workforce Improvement Act of 1998**

ACWIA was enacted on October 21, 1998. Among other things, ACWIA was intended to address shortages of workers in the U.S. high-technology sector. To increase the number of such workers in the United States, section 411 of ACWIA increased the annual numerical cap on H-1B visas from 65,000 to 115,000 in each of fiscal years (FY) 1999 and 2000, and to 107,500 in FY 2001.<sup>19</sup> See ACWIA section 411 (amending INA section 214(g)(1), codified at 8 U.S.C. 1184(g)(1)). The congressional statements accompanying ACWIA recognized that the continued competitiveness of the U.S. high-technology sector is “crucial for [U.S.] economic well-being as a nation, and for increased economic opportunity for American workers.” See 144 CONG. REC. S12,741, S12,749 (daily ed. Oct. 21, 1998) (statement of Sen. Spencer Abraham); see also id. (“This issue is not only about shortages, it is about opportunities for innovation and expansion,

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<sup>19</sup> Section 102(a) of AC21 further amended INA section 214(g)(1) by increasing the annual numerical cap on H-1B visas to 195,000 for each of the fiscal years 2001, 2002, 2003.

since people with valuable skills, whatever their national origin, will always benefit our nation by creating more jobs for everyone.”).<sup>20</sup>

ACWIA also included several measures intended to improve protections for U.S. and H-1B nonimmigrant workers. Section 413 of the act provided enhanced penalties for employer violations of LCA obligations, as well as willful misrepresentations by employers in LCAs. See ACWIA section 413 (creating INA section 212(n)(2)(C), codified at 8 U.S.C. 1182(n)(2)(C)). Such enhancements included increased monetary penalties, as well as temporary prohibitions on the approval of certain types of petitions, such as H-1B petitions and employment-based immigrant visa petitions.<sup>21</sup> Id. This prohibition against petition approval is often referred to as “debarment.” The severity of the penalty awarded to an employer depends upon the seriousness of the employer’s violation, as determined by DOL. See INA section 212(n)(2)(C)(i)-(iii), 8 U.S.C. 1182(n)(2)(C)(i)-(iii). DOL is required to notify USCIS of the entities determined to be subject to debarment. See 20 CFR 655.855 and 656.31(f)(2).

Section 413 of ACWIA also made it a violation for an H-1B employer to retaliate against an employee for providing information to the employer or other persons, or for cooperating in an investigation, related to an employer’s violation of its LCA attestations and obligations. Employers are prohibited from taking retaliatory action in such situations, including any action “to intimidate, threaten, restrain, coerce, blacklist,

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<sup>20</sup> Senator Abraham drafted and sponsored the original Senate bill for ACWIA, then titled the American Competitiveness Act, S. 1723, 105<sup>th</sup> Cong. (1998), which passed the full Senate by a 78-20 margin on May 18, 1998. 144 CONG. REC. as S12,748-49 (daily ed. Oct. 21, 1998). He negotiated with the House of Representatives on a compromise ACWIA bill and was deputized to negotiate in talks between Congress and the White House to finalize the bill.

<sup>21</sup> Legal Opinion: INS Procedure for Processing Debarment of Employer Pursuant to Sec. 212(n)(2)(C)(ii) of the INA, Genco Op. No. 94-21, 1994 WL 1753125 (Apr. 12, 1994) (concluding that the determination of whether a section 212(n)(2)(C)(ii) violation has occurred rests solely with DOL, and that DHS must accept that determination).

discharge, or in any other manner discriminate” against an employee for “disclos[ing] information to the employer, or to any other person, that the employee reasonably believes evidences [an LCA] violation, any rule or regulation pertaining to the statutory LCA attestation requirements, or for cooperating, or attempting to cooperate, in an investigation or proceeding pertaining to the employer’s LCA compliance.” See INA section 212(n)(2)(C)(iv), 8 U.S.C. 1182(n)(2)(C)(iv). Section 413 further required the development of a process to enable H-1B nonimmigrant workers who file complaints with DOL regarding such illegal retaliation, and are otherwise eligible to remain and work in the United States, to seek other appropriate employment in the United States. See INA section 212(n)(2)(C)(v), 8 U.S.C. 1182(n)(2)(C)(v).

Section 412 of ACWIA created additional requirements for U.S. employers deemed to be “H-1B dependent,” see INA section 212(n)(3)(A), 8 U.S.C. 1182(n)(3)(A), and those that have willfully failed to comply with their LCA obligations or who have misrepresented material facts in an LCA, see INA section 212(n)(1)(E)-(G), 8 U.S.C. 1182(n)(1)(E)-(G). These U.S. employers are required to attest that they will not displace U.S. workers to fill a prospective position with an H-1B nonimmigrant worker, and that they took good faith steps to recruit qualified U.S. workers for the prospective H-1B position. Id. Employers are not subject to these additional non-displacement requirements, however, with regard to petitions for H-1B nonimmigrant workers who receive at least \$60,000 in annual wages or have attained a master’s or higher degree in a specialty related to the relevant employment. See ACWIA section 412 (creating INA section 212(n)(1)(E)(ii) and (n)(3)(B), codified at 8 U.S.C. 1182(n)(1)(E)(ii) and (n)(3)(B)).

Section 414 of ACWIA imposed a temporary fee on certain H-1B employers to fund, among other things, job training of U.S. workers and scholarships in the science, technology, engineering, and mathematics (STEM) fields. See ACWIA section 414 (creating INA section 214(c)(9), codified at 8 U.S.C. 1184(c)(9)). The ACWIA fee was initially scheduled to sunset on September 30, 2001. Public Law 106-311, however, increased the fee from \$500 to \$1,000 and extended the sunset provision to September 30, 2003. Public Law 106-311 also amended section 214(c)(9)(A) of the INA, 8 U.S.C. 1184(c)(9), by specifying additional employers that are exempt from the ACWIA fee (i.e., employers in addition to the exempt employers described in section 212(p)(1) of the INA, 8 U.S.C. 1182(p)(1)). Exempt employers currently include institutions of higher education, nonprofit entities related or affiliated with such institutions, and nonprofit or governmental research organizations, among others. See INA section 214(c)(9)(A), 8 U.S.C. 1184(c)(9)(A). Subsequently, the H-1B Visa Reform Act of 2004, enacted as part of the Consolidated Appropriations Act, 2005, Public Law 108-447, div. J, tit. IV, made the ACWIA fee permanent and raised it from \$1,000 to \$1,500 per qualifying petition filed with USCIS after December 8, 2004. This fee was also reduced to \$750 for employers with no more than 25 full-time equivalent employees employed in the United States (including employees employed by any affiliate or subsidiary of such employer).

## **2. The American Competitiveness in the Twenty-first Century Act of 2000**

AC21 was enacted on October 17, 2000. It made numerous changes to the INA designed, among other things, to improve the U.S. economy in both the short and long term. First, AC21 sought to positively impact economic growth and job creation by immediately increasing the United States' access to high-skilled workers. See S. Rep.

No. 260, at 10 (“[A]rtificially limiting companies’ ability to hire skilled foreign professionals will stymie our country’s economic growth and thereby partially atrophy its creation of new jobs . . . . American workers’ interests are advanced, rather than impeded, by raising the H-1B cap”). Second, AC21 sought to improve the education and training of U.S. workers in high-skilled sectors, and thereby produce a U.S. workforce better equipped to fill the need in such sectors, through the funding of scholarships and high-skilled training programs. See AC21 section 111. As noted by the accompanying Senate Report, foreign-born high-skilled individuals have played an important role in U.S. economic prosperity and the competitiveness of U.S. companies in numerous fields. Id. AC21 sought to provide such benefits by making improvements to both the employment-based immigrant visa process and the H-1B specialty occupation worker program.

**a. AC21 Provisions Relating to Employment-Based Immigrant Visas**

To improve the immigrant visa process for certain workers, AC21 contained several provisions designed to improve access to employment-based immigrant visas. Section 104 of AC21, for example, sought to ameliorate the impact on intending immigrants of the per-country limitations, which, as noted earlier, generally limit the number of immigrant visas that may be issued to the nationals of any one country to no more than 7 percent of the total number of such visas. See INA section 202(a)(2), 8 U.S.C. 1152(a)(2). Sections 104(a) and (b) of AC21 amended the INA to excuse application of the per country limitations when such application would result in immigrant visas going unused in any quarter of the fiscal year. Specifically, these sections amended the INA so that when the number of employment-based immigrant visas authorized for issuance in a calendar quarter exceeds the number of qualified

immigrants who may otherwise be issued such visas, the visas may be issued in the same quarter without regard to per-country limitations. See AC21 sections 104(a) and (b) (amending INA section 202(a)(5), codified at 8 U.S.C. 1152(a)(5)); see also S. Rep. No. 260, 106th Cong., 2nd Sess. at 2. This provision recognized “the discriminatory effects of [the per-country limitations] on nationals from certain Asian Pacific nations,” specifically Chinese and Indian nationals, which “prevent[ed] an employer from hiring or sponsoring someone permanently simply because he or she is Chinese or Indian, even though the individual meets all other legal criteria.” S. Rep. No. 260, at 22.

Section 104(c) of AC21 was designed to further ameliorate the impact of the per-country limitations on H-1B nonimmigrant workers who are the beneficiaries of approved EB-1, EB-2, or EB-3 immigrant visa petitions. Specifically, section 104(c) authorized the extension of H-1B status beyond the statutory 6-year maximum for such individuals if immigrant visa numbers are not immediately available to them because the relevant preference category is already over-subscribed for that foreign national’s country of birth. See AC21 section 104(c). In support of this provision, Congress noted that “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.” See S. Rep. No. 260, at 22. Section 104(c) “enables these foreign nationals 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.” Id.

AC21 also sought to more generally ameliorate the impact of the lack of employment-based immigrant visas on the high-skilled beneficiaries of approved immigrant visa petitions. Sections 106(a) and (b) of AC21, as amended by section



11030A of the 21<sup>st</sup> Century DOJ Appropriations Act, Public Law 107-273(2002), authorized the extension of H-1B status beyond the statutory 6-year maximum for H-1B nonimmigrant workers who are being sponsored for LPR status by U.S. employers and are subject to lengthy adjudication or processing delays. Specifically, these provisions exempted H-1B nonimmigrant workers from the 6-year limitation on H-1B status contained in INA section 214(g)(4), 8 U.S.C. 1184(g)(4), if 365 days or more have elapsed since the filing of a labor certification application (if such certification is required under INA section 212(a)(5), 8 U.S.C. 1182(a)(5)), or an immigrant visa petition under INA section 203(b), 8 U.S.C. 1153(b). These provisions were intended to allow such high-skilled individuals to remain in the United States as H-1B nonimmigrant workers, rather than being forced to leave the country and disrupt their employers due to a long pending labor certification application or immigrant visa petition. See S. Rep. No. 260, at 23.

Finally, to provide stability and flexibility to beneficiaries of approved immigrant visa petitions subject to immigrant visa backlogs and processing delays, AC21 also provided certain workers the improved ability to change jobs or employers without losing their position in the immigrant visa queue. Specifically, section 106(c) of AC21 provides that certain immigrant visa petitions filed under the EB-1, EB-2, and EB-3 preference categories will remain valid with respect to a new qualifying job offer if the beneficiary changes jobs or employers, provided an application for adjustment of status has been filed and such application has been pending for 180 days or more. See AC21 section 106(c) (creating INA section 204(j), codified at 8 U.S.C. 1154(j)). In such cases, the new

job offer must be in the same or a similar occupational classification as the job for which the original immigrant visa petition was filed. Id.

**b. AC21 Provisions Seeking to Improve the H-1B Nonimmigrant Worker Classification**

As noted above, one of the principle purposes for the enactment of AC21 was to improve the country's access to high-skilled workers. As such, AC21 contains several additional provisions intended to expand and strengthen the H-1B program.

**i. Exemptions from the H-1B Numerical Cap**

Section 103 of AC21 amended the INA to create an exemption from the H-1B numerical cap for those H-1B nonimmigrant workers who are employed or offered employment at an institution of higher education, a nonprofit entity related or affiliated to such an institution, or a nonprofit research or governmental research organization. See INA section 214(g)(5)(A) and (B); 8 U.S.C. 1184(g)(5)(A) and (B).<sup>22</sup> Congress deemed such employment advantageous to the United States. Among other things, Congress recognized a short- and long-term need to increase the number of workers in specialty occupation fields, and it determined that increasing the number of high-skilled foreign nationals working in specialty occupations at U.S. institutions of higher education would increase the number of Americans who will be ready to fill specialty occupation positions upon completion of their education. See S. Rep. No. 260, at 21-22. Congress reasoned that “by virtue of what they are doing, people working in universities are necessarily immediately contributing to educating Americans.” Id. at 21. Congress also recognized that U.S. institutions of higher education are on a different hiring cycle from other U.S.

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<sup>22</sup> See USCIS Memorandum from Michael Aytes, “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) 2-4 (June 6, 2006)” (“Aytes Memo June 2006”).

employers, and in years of high H-1B demand, these institutions would be unable to hire cap-subject H-1B nonimmigrant workers. Id. at 22.

For purposes of this H-1B numerical cap exemption, the term “institution of higher education” is given the same meaning as that set forth in section 101(a) of the Higher Education Act of 1965, Public Law 89-329, 79 Stat. 1224 (1965), as amended (codified at 20 U.S.C. 1001(a) (“Higher Education Act”).<sup>23</sup> See INA section 214(g)(5)(A); 8 U.S.C. 1184(g)(5)(A). The terms “related or affiliated nonprofit entity,” and “nonprofit research organization or governmental research organization” are defined at 8 CFR 214.2(h)(19)(iii)(B) and 8 CFR 214.2(h)(19)(iii)(C), respectively, and adopted as a matter of interpretation in the cap exemption context.<sup>24</sup>

## **ii. Application of the H-1B Numerical Cap to Persons Previously Counted**

Section 103 of AC21 also amended the INA to ensure that H-1B nonimmigrant workers can change jobs or employers without requiring that they again count against the

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<sup>23</sup> Section 101(a) of the Higher Education Act of 1965, as amended, defines “institution of higher education” as an educational institution in any State that—

- (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, or persons who meet the requirements of [8 U.S.C. 1091(d)];
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (3) provides an educational program for which the institution awards a bachelor’s degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary [of Education];
- (4) is a public or other nonprofit institution; and
- (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary [of Education] for the granting of preaccreditation status, and the Secretary [of Education] has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

<sup>24</sup> See Aytes Memo June 2006, at 4.

H-1B cap. Specifically, section 103 provides that an individual who has been counted against the H-1B numerical cap within the 6 years prior to petition approval will not be counted against the cap unless that individual would be eligible for a new 6-year period of authorized H-1B admission. See INA section 214(g)(6); 8 U.S.C. 1184(g)(6). As noted above, an individual previously in the United States on H-1B nonimmigrant status is eligible for a full 6 years of authorized admission as an H-1B nonimmigrant after residing and being physically present outside the United States for the immediate prior year. See 8 CFR 214.2(h)(13)(iii)(A).

Section 103 of AC21 also amended the INA to address cases in which an H-1B nonimmigrant worker seeks to change employment from a cap-exempt entity to a “cap-subject” entity. Specifically, section 103 provides that once employment ceases with respect to a cap-exempt entity, the H-1B nonimmigrant worker will be subject to the cap if not previously counted and no other exemptions from the cap apply. See INA section 214(g)(6), 8 U.S.C. 1184(g)(6).

### **iii. H-1B Portability**

Section 105 of AC21 further improved the H-1B program by increasing job portability for H-1B nonimmigrant workers. Specifically, section 105 allows an H-1B nonimmigrant worker to begin concurrent or new H-1B employment upon the filing of a timely, non-frivolous H-1B petition. See INA section 214(n), 8 U.S.C. 1184(n). The H-1B nonimmigrant worker must have been lawfully admitted to the United States, must not have worked without authorization subsequent to such lawful admission, and must be

in a period of stay authorized by the Secretary.<sup>25</sup> Employment authorization based on the pending petition continues until adjudication. See INA section 214(n)(1), 8 U.S.C.

1184(n)(1). If the H-1B petition is denied, the employment authorization provided under this provision ceases. Id. Congress created such H-1B portability to “allow an H-1B visa holder to change employers at the time a new employer files the initial paperwork, rather than having to wait for the new H-1B petition to be approved. This responds to concerns raised about the potential for exploitation of H-1B visa holders as a result of a specific U.S. employer’s control over the employee’s legal status.” See S. Rep. No. 260, at 22-23.

#### **D. The Processing of Applications for Employment Authorization Documents**

The Secretary of Homeland Security has broad authority to extend employment authorization to noncitizens in the United States. See, e.g., section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B). DHS regulations at 8 CFR 274a.12(a), (b), and (c) describe three broad categories of foreign nationals authorized to work in the United States. Individuals in the first class, described at 8 CFR 274a.12(a), are authorized to work in the United States incident to their immigration status, without restriction on the location of their employment or the type of employment they may accept. Such individuals who travel to the United States by air and sea may electronically access an Arrival-Departure Record (Form I-94) indicating their nonimmigrant status and attendant employment authorization; such individuals who are admitted at land border port of entry may receive a paper Form I-94. Those individuals seeking to obtain an EAD (Form I-

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<sup>25</sup> See USCIS Memorandum from Donald Neufeld, “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) (“Neufeld Memo May 2009”) (describing various “periods of authorized stay”).

766) containing both evidence of employment authorization and a photograph typically must file a separate application with USCIS. See 8 CFR 274a.13(a).

Individuals in the second class, described at 8 CFR 274a.12(b), are also employment authorized incident to their nonimmigrant status, but such employment authorization is valid only with a specific employer. Individuals in this second group are not issued an EAD; instead these individuals obtain an Arrival-Departure Record (Form I-94) indicating their nonimmigrant status and attendant employment authorization and do not file separate requests for evidence of employment authorization.

Individuals in the third class, described at 8 CFR 274a.12(c), are required to apply for employment authorization and may begin working only if USCIS approves their application. Such employment authorization is subject to the restrictions described in the regulations for his or her respective employment eligibility category. With respect to individuals described in the first and third categories, USCIS has the discretion to establish a specific validity period for the EAD.

Individuals requesting an EAD must file an Application for Employment Authorization (Form I-765) with USCIS in accordance with the form instructions. See 8 CFR 274a.13. Under current regulations, if USCIS does not adjudicate an Application for Employment Authorization within 90 days from the date USCIS receives the application, an applicant will be granted an interim document evidencing employment authorization with a validity period not to exceed 240 days. See 8 CFR 274a.13(d). Generally, the approval of an Application for Employment Authorization by an

individual described in 8 CFR 274a.12(c) is within the discretion of USCIS.<sup>26</sup> And there is no right to appeal the denial of an Application for Employment Authorization. See 8 CFR 274a.13(c).

#### **E. The Increasing Damage Caused by Immigrant Visa Backlogs**

This proposed rule is intended, in part, to address some of the challenges that flow from the statutory limits on immigrant visas, consistent with existing DHS authorities. As noted above, the number of employment-based immigrant visas allocated per year has remained unchanged since the passage of the Immigration Act of 1990. In the intervening 25 years, the country's economy has expanded dramatically. The U.S. economy, as measured by U.S. gross domestic product (GDP), has increased by 78 percent from \$8.955 trillion in 1990 to \$15.961 trillion in 2014.<sup>27</sup> The per capita share of GDP has also increased by almost 40 percent from \$35,794 in 1990 to \$50,010 in 2014.<sup>28</sup> And the number of entities doing business in the United States increased at least 24 percent during the same period.<sup>29</sup> Over the same period, employer demand for immigrant visas has increasingly outpaced supply, resulting in growing waits for sponsored employees to obtain their LPR status. Such delays have resulted in substantial inequalities and other hardships flowing from limits on a sponsored worker's ability to

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<sup>26</sup> Approval of an application for employment authorization based on a pending asylum application is not discretionary. See 8 CFR 274a.13(a)(1).

<sup>27</sup> U.S. Department of Commerce, Bureau of Economic Analysis, Table 1.1.6 Real Gross Domestic Product, Chained (2009) Dollars, [https://www.bea.gov/iTable/index\\_nipa.cfm](https://www.bea.gov/iTable/index_nipa.cfm).

<sup>28</sup> U.S. Department of Commerce, Bureau of Economic Analysis, Table 7.1 Selected Per Capita Product and Income Series and Chained (2009) Dollars, [https://www.bea.gov/iTable/index\\_nipa.cfm](https://www.bea.gov/iTable/index_nipa.cfm).

<sup>29</sup> Compare U.S. Census data collected in 1992 identifying over 4.61 million firms doing business in the United States, available at [http://www.census.gov/prod/www/economic\\_census.html](http://www.census.gov/prod/www/economic_census.html), with U.S. Census data collected in 2012 identifying over 5.72 million firms doing business, available at <http://www.census.gov/econ/susb/>.

seek employment to enhance his or her skills and on the ability of employers to promote them or otherwise change their positions.

Since AC21 was enacted in October of 2000, workers seeking LPR status in the United States—particularly within the EB-2 and EB-3 preference categories—have faced increasing challenges as a consequence of the escalating wait times for immigrant visas. It often takes many years before an immigrant visa number becomes available. For some, the delays can last more than a decade. The combination of numerical limitations in the various employment-based preference categories with the per-country limitations that further limit visa availability to certain workers, has produced significant oversubscription in the EB-2 and EB-3 categories, particularly for Indian and Chinese nationals. For instance, the current approximate backlog for an EB-3 immigrant visa for workers from most countries is only a few months. For nationals of certain countries applying in the EB-3 category, delays have extended more than a decade.<sup>30</sup>

Given the long and growing delays for many beneficiaries of employment-based immigrant visa petitions, the challenges facing such workers and the U.S. economy, while similar to those recognized by AC21, are substantially greater than those that existed at the time AC21 passed. Although DHS has worked diligently to improve processing times during the intervening period, visa backlogs due to statutory numerical limits for many individuals seeking EB-2 and EB-3 classification have grown

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<sup>30</sup> According to the DOS Visa Bulletin for November 2015, immigrant visas are currently issuable to all persons qualifying under the EB-1 preference category. The EB-2 category Application Final Action date is current for all countries except for China and India, with cut-off dates for nationals of those countries currently set between 2006 and 2012 (a wait of 3 to 9 years). The Application Final Action cut-off dates for nationals of most countries under the EB-3 preference category are set at August 15, 2015 (a wait of less than one month). But for Indian nationals, the Application Final Action cut-off dates are set at April 1, 2004 (a wait of over 10 years). See DOS Visa Bulletin for November 2015, <http://www.travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-november-2015.html>.



significantly.<sup>31</sup> DHS recognizes the resulting realities confronting individuals seeking employment-based permanent residence who, due to immigrant visa unavailability, are required to wait many years for visa numbers to become available before they can file applications for adjustment of status or seek immigrant visas abroad and become LPRs. In many instances, these individuals are in the United States in a nonimmigrant, employer-specific temporary worker category (e.g., H-1B or L-1 visa classification) and may be unable to accept promotions or otherwise change jobs or employers without abandoning their existing efforts—including great investments of time and money—to become permanent residents. Their employment opportunities may be limited to their original job duties with the U.S. employer that sponsored their temporary admission to the United States, despite the fact that they may have gained professional experience that would otherwise have allowed them to progress substantially in their careers.

Indeed, many individuals subject to the immigrant visa backlogs confront the choice between remaining employed in a specific job under the same terms and conditions originally offered to them or abandoning either their place in the immigrant visa queue or the pursuit of LPR status altogether. When such a worker changes employers or jobs—including a change to an identical job with a different employer or to a related job for the same employer—the worker is typically subject to uncertainty as well as expensive additional immigration processes, greatly discouraging any such

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<sup>31</sup> According to the DOS Visa Bulletin for October 2000 (the month AC21 was enacted), visa availability was current for all persons qualifying under the EB-1 preference category. The EB-2 category was current for all countries except for China and India. The EB-2 cut-off dates were March 8, 1999 for persons chargeable to China (a wait of 19 months) and November 1, 1999 for persons chargeable to India (a wait of 11 months). The EB-3 category likewise was current for all countries except for China and India, with a cut-off date of March 15, 1998 for individuals charged to China (a wait of 31 months) and February 8, 1997 for individuals charged to India (a wait of 44 months). See [http://dosfan.lib.uic.edu/ERC/visa\\_bulletin/2000-10bulletin.html](http://dosfan.lib.uic.edu/ERC/visa_bulletin/2000-10bulletin.html).

changes. Indeed, under current regulations, some changes in employment could result in the loss of nonimmigrant status, loss of the ability to change to another nonimmigrant status, loss of the ability to obtain an immigrant visa or adjust to LPR status, and the need for the affected worker and his or her family to immediately depart the United States. As a result, these employees often suffer through many years of effective career stagnation, as they are largely dependent on current employers for immigration status and are substantially restricted in their ability to change employers or even accept promotions from, or make lateral movements within, their current employers.

Simply put, many workers in the immigrant visa process are not free to consider all available employment and career development opportunities. This effectively prevents U.S. employers from treating them like the high-potential individuals the employer hired them to be, thus restricting productivity and the promise they offer to our nation's economy and undermining the very purpose of the employment-based immigrant visa system that prioritizes such workers for LPR status. The lack of predictability and flexibility for such workers may also prevent them from otherwise investing in and contributing to the local, regional, and national economy or fully assimilating into American society.

#### **IV. Proposed Regulatory Changes**

DHS is proposing to amend its regulations related to certain employment-based immigrant and nonimmigrant visa programs. The proposed amendments are intended to benefit U.S. employers and workers participating in these programs, including by: streamlining the processes for employer sponsorship of individuals for permanent residence; ameliorating some of the effects of immigrant visa backlogs by increasing job

portability and otherwise providing stability and flexibility for such workers; and providing additional transparency and consistency in the application of agency policies and procedures related to these programs. These changes are primarily aimed at improving the ability of U.S. employers to employ and retain workers who are beneficiaries of approved immigrant visa petitions and are waiting for LPR status, while increasing the ability of such workers to further their careers by accepting promotions, making lateral changes within current employers, changing employers, and pursuing other employment opportunities.

The improvements proposed in this rulemaking would help DHS fulfill its responsibility to assist U.S. employers, U.S. workers, and foreign national workers, while strengthening and protecting the U.S. economy. The immigrant and nonimmigrant visa programs at issue in this proposed rule were designed to improve the ability of U.S. employers to hire and retain critical foreign workers, while creating job opportunities for and protecting U.S. workers. Consistent with these provisions, the proposed rule would enhance the Department's ability to administer the INA in a manner that better accounts for fluctuating economic conditions and that provides additional stability and flexibility to regulated persons and entities.

#### **A. Proposed Implementation of AC21 and ACWIA**

DHS proposes to clarify and improve longstanding agency policies and procedures established in response to certain sections of AC21 and ACWIA. These sections were intended, among other things, to provide greater flexibility and job portability to certain workers, particularly those who have been sponsored for LPR status by their employers, while protecting U.S. workers, enhancing opportunities for

innovation and expansion, and maintaining U.S. competitiveness. The proposed rule would further clarify and improve agency policies and procedures in this area—policies and procedures that have long been set through a series of policy memoranda and a precedent decision of the USCIS Administrative Appeals Office. By establishing such policies in regulation, DHS would provide greater transparency and certainty to affected employers and workers and increase consistency among agency adjudications. In addition, the proposed rule would clarify several interpretive questions raised by AC21 and ACWIA.

As noted above, except where improvements on current practices are noted in the following sections, DHS intends the following proposals to effectively capture the longstanding policies and procedures that have developed since enactment of AC21 and ACWIA. The Department welcomes all comments on these proposals, including those that identify any such proposals that commenters believe are inconsistent with current practices (and not identified as such in the preamble), so that any such inconsistencies can be resolved in the final rule.

#### **1. Extending H-1B Nonimmigrant Status for Certain Individuals who are being Sponsored for Lawful Permanent Residence**

DHS proposes to codify in regulation and improve longstanding agency policies and practices related to two provisions in AC21 that allow for certain individuals who are being sponsored by employers for permanent residence to obtain H-1B status beyond the general 6-year maximum period of stay. The first provision provides an exemption to certain beneficiaries of approved employment-based immigrant visa petitions who are subject to per-country limitations on immigrant visas that prevent the filing and adjudication of applications for adjustment of status. The second provision provides an

exemption to certain H-1B nonimmigrant workers who are being sponsored for permanent residence by U.S. employers and are subject to certain lengthy adjudication delays.

**a. H-1B Extensions for Individuals Affected by the Per-Country Limitations**

First, the proposed rule would clarify and improve DHS' implementation of section 104(c) of AC21. See proposed 8 CFR 214.2(h)(13)(iii)(E). This section authorizes approval of H-1B status beyond the general 6-year maximum period for certain beneficiaries of approved EB-1, EB-2, and EB-3 immigrant visa petitions. See AC21 section 104(c). Specifically, section 104(c) authorizes such an exemption from the 6-year limit when the H-1B petitioner can demonstrate that an immigrant visa is not available to the beneficiary at the time the H-1B petition is filed because the immigrant visa classification sought is already over-subscribed for that beneficiary's country of birth (i.e., is subject to the per-country limitations on immigrant visas). Id.

Consistent with current practice, DHS proposes that such exemptions be granted in 3-year increments until USCIS adjudicates the beneficiary's adjustment of status application. See proposed 8 CFR 214.2(h)(13)(iii)(E)(1). Although the heading for section 104(c) describes a "one-time protection," the statutory text makes clear that the exemption remains available until the beneficiary has an EB-1, EB-2, or EB-3 immigrant visa number immediately available to him or her. See AC21 section 104(c) (authorizing H-1B extensions under this exemption "until the alien's application for adjustment of status has been processed and a decision made thereon"). As such, the proposed rule "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.” See S. Rep. No. 260, at 22. Moreover, this proposal would allow DHS to review the continued eligibility of the H-1B nonimmigrant worker in 3-year intervals, which is consistent with the duration of H-1B status awarded under general H-1B provisions. See 8 CFR 214.2(h)(9)(iii)(A)(1) and (h)(15)(ii)(B)(1). An H-1B petition filed under this provision may include any time remaining within the normal 6-year period of authorized H-1B stay<sup>32</sup> in addition to the exemption request, but in no case may the approval period exceed 3 years or the validity period of the LCA. See proposed 8 CFR 214.2(h)(13)(iii)(E)(5).

DHS also proposes, consistent with current policy guidance, to make this exemption available to individuals who remain eligible for an additional period of admission in H-1B status, whether or not such individuals are physically in the United States on H-1B status at the time the H-1B petition is filed.<sup>33</sup> See proposed 8 CFR 214.2(h)(13)(iii)(E)(3). Section 104(c) of AC21 does not specifically limit the granting of H-1B status under its provisions to only those individuals currently in H-1B status within the United States. Rather, as is stated in current policy guidance, DHS interprets the provision to require only that the individual have previously held H-1B status and be otherwise eligible for an H-1B approval, including through an extension of current H-1B status, a change to H-1B status, or notification to a U.S. consulate or port of entry (if visa

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<sup>32</sup> Where applicable, the time remaining within the normal 6-year period (“remainder time”) may include periods in which the beneficiary was outside the United States during qualifying H-1B or L-1 visa petition validity that the petitioner seeks to recapture for the beneficiary. As noted previously, USCIS counts any time spent in H-1B or L-1 status towards the limitation for either classification. See 8 CFR 214.2(h)(13)(i)(B) and 214.2(l)(12)(i).

<sup>33</sup> Ayles Memo Dec. 2006 supra note 11 at 3-4.

exempt).<sup>34</sup> The petitioner bears the burden of proving the individual's eligibility under this provision.

Consistent with current practice, DHS proposes to allow any qualified H-1B petitioner to file for an exemption under section 104(c) with respect to any qualified beneficiary of an approved EB-1, EB-2, or EB-3 immigrant visa petition. See proposed 8 CFR 214.2(h)(13)(iii)(E)(4). There is no requirement that the H-1B petitioner be the same employer as that listed on the qualifying immigrant visa petition, which by definition contemplates an offer of future employment upon a grant of permanent residence.<sup>35</sup> Similarly, the H-1B nonimmigrant worker can rely on any currently approved and qualifying immigrant visa petition, even if the H-1B nonimmigrant worker had previously been granted an exemption under section 104(c) based on a different petition.

As discussed later in this proposed rule, however, DHS is effectively proposing to improve access to exemptions under section 104(c) by proposing amendments to DHS regulations promulgated under section 205 of the INA, 8 U.S.C. 1155, that govern when approvals of immigrant visa petitions are automatically revoked. See Section IV.B. Pursuant to these amendments, employment-based immigrant visa petitions that have been approved for 180 days or more would no longer have such approval automatically revoked based only on withdrawal by the petitioner or termination of the petitioner's business. See proposed 8 CFR 205.1(a)(3)(iii)(C) and (D). As long as such an approval has not been revoked for fraud, material misrepresentation, the invalidation or revocation of a labor certification, or USCIS error, the petition will generally continue to be valid

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<sup>34</sup> Id.

<sup>35</sup> See, e.g., Matter of Rajah, 25 I&N Dec. 127, 132-133 (BIA 2009).

with regard to the beneficiary for various job portability and status extension purposes under the immigration laws. Id. As further described below, this change would effectively improve the ability of H-1B nonimmigrants with approved EB-1, EB-2, or EB-3 immigrant visa petitions to rely on such petitions for obtaining exemptions under section 104(c) of AC21.

Finally, the proposed rule, as per current practice, would allow exemptions authorized under section 104(c) of AC21 only with respect to the principal beneficiaries of employment-based immigrant visa petitions, and not any derivative beneficiaries named in such petitions who may also be in H-1B status. See proposed 8 CFR 214.2(h)(13)(iii)(E)(6). Section 104(c) expressly allows H-1B nonimmigrant status beyond the six-year general limitation for “the beneficiary of a petition filed under section 204(a) of [the INA] for a preference status under paragraph (1), (2), or (3) of section 203(b) [of the INA].” AC21 section 104(c). Section 203(b), in turn, applies to principal beneficiaries of immigrant visa petitions, but not derivative beneficiaries who are separately addressed in section 203(d) of the INA. Compare INA section 203(b), 8 U.S.C 1153(b), with INA section 203(d), 8 U.S.C 1153(d). The reference to a single beneficiary (i.e., “the beneficiary”) in section 104(c) of AC21 further supports the interpretation that the provision applies only to the principal beneficiary of the immigrant visa petition. As noted above, however, the spouse or dependent children of H-1B nonimmigrant workers are eligible for H-4 status and are subject to the same period of authorized stay as the principal H-1B nonimmigrant worker. Therefore, eligible H-4 spouses and dependent children may be granted H-4 status during the period the H-1B nonimmigrant spouse or parent maintains H-1B status under this exemption.



Thus, if both spouses are H-1B nonimmigrant workers, to extend their H-1B authorized admission period under section 104(c) of AC21, each spouse would individually have to be the beneficiary of an approved EB-1, EB-2, or EB-3 immigrant visa petition. If only one spouse is eligible for the exemption as an H-1B nonimmigrant, the spouse who is not eligible could seek a change of status to H-4 status and, if otherwise eligible, may remain in H-4 status, as described above. While such a spouse 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), including, among others, those whose H-1B nonimmigrant spouse is the beneficiary of an approved EB-1, EB-2, or EB-3 immigrant visa petition.

DHS invites the public to comment on all aspects of this proposal.

**b. H-1B Extensions for Individuals Affected by Lengthy Adjudication Delays**

Second, the proposed rule would clarify and improve DHS' implementation of sections 106(a) and (b) of AC21, as amended by the 21<sup>st</sup> Century DOJ Appropriations Act. See proposed 8 CFR 214.2(h)(13)(iii)(D). These provisions authorize approval of H-1B status beyond the general 6-year maximum period for certain H-1B nonimmigrant workers who are being sponsored by their employers for permanent residence and are subject to lengthy adjudication delays. See AC21 section 106(a) and (b). Specifically, section 106(b) provides extensions of H-1B status in 1-year increments for H-1B nonimmigrant workers seeking LPR status through employment if 365 days or more have passed since the filing by a U.S. employer of a labor certification application or an employment-based immigrant visa petition on the nonimmigrant's behalf. Id. These 1-

year extensions would generally remain available until a final decision is made to grant or deny the pertinent labor certification application or immigrant visa petition, or to grant or deny the beneficiary's application for adjustment of status or for an immigrant visa. Id.

Consistent with existing policy, DHS proposes to make H-1B extensions under section 106(b) available to workers who remain eligible for additional periods of H-1B status, whether or not such individuals are in H-1B status or in the United States at the time the H-1B petition is filed. See proposed 8 CFR 214.2(h)(13)(iii)(D)(1). DHS also proposes to allow the H-1B petitioner to file for an extension under section 106(b) with respect to any qualifying labor certification application or employment-based immigrant visa petition, pursuant to section 106(a) of AC21, as amended. See proposed 8 CFR 214.2(h)(13)(iii)(D)(6).

As with section 104(c), section 106 of AC21 does not limit its application only to those individuals currently in H-1B status within the United States. DHS interprets the provision to require only that the individuals have previously been issued H-1B status, meet the requirements of section 106(a), and are otherwise eligible for an H-1B approval.<sup>36</sup> Also like section 104(c), section 106 contains no requirement that the H-1B petitioner be the same employer as that listed on the labor certification application or immigrant visa petition in order to seek an exemption from the six-year period of authorized admission. The H-1B nonimmigrant worker can thus rely on any qualifying labor certification application or immigrant visa petition, even if the nonimmigrant had previously been granted an extension under section 106(b) based on a different

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<sup>36</sup> Aytes Memo Dec. 2006, at 3.

application or petition. The petitioner bears the burden of proving the individual's eligibility under these provisions.

DHS also proposes to conform its regulations with existing policy in this area by requiring the prospective H-1B employer to file an H-1B petition demonstrating that the beneficiary has previously held H-1B status and that 365 days has elapsed or will have elapsed between: (1) the filing of an application for labor certification or an employment-based immigrant visa petition on behalf of the individual; and (2) the date on which the individual reached or will reach the 6-year limitation on H-1B admission. See proposed 8 CFR 214.2(h)(13)(iii)(D)(1) and (2). DHS further proposes, consistent with current policy, to grant H-1B approvals in 1-year increments for such individuals until either the application for labor certification expires or a final decision is made to: (1) deny the labor certification application; (2) revoke or invalidate approval of the labor certification application; (3) deny the immigrant visa petition; (4) revoke approval of the immigrant visa petition; (5) grant or deny the individual's application for adjustment of status or for an immigrant visa; or (6) administratively close the application for permanent labor certification, immigrant visa petition, or application for adjustment of status. See proposed 8 CFR 214.2(h)(13)(iii)(D)(2).<sup>37</sup> DHS notes that in cases involving denials, invalidations, or revocations of labor certification applications and denials of immigrant visa petitions, the petitioner may administratively appeal those determinations with DOL and USCIS, respectively. Under this proposed rule, a denial or revocation would not be considered final by USCIS during the period authorized to file such an administrative appeal, or during the period in which any such appeal is pending. See proposed 8 CFR

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<sup>37</sup> See Aytes Memo Dec. 2005, at 6.

214.2(h)(13)(iii)(D)(3). During any such period, as with current practice, the petition or labor certification application that is the subject of the appeal may be used for purposes of seeking an extension of H-1B status under this section.<sup>38</sup>

Also consistent with existing policy, DHS proposes not to grant an extension of H-1B status under section 106(b) if, at the time the extension request is filed, the labor certification is deemed expired under DOL regulations. See proposed 8 CFR 214.2(h)(13)(iii)(D)(2). Under current DOL regulations, “[a]n approved permanent labor certification granted on or after July 16, 2007 expires if not filed in support of a Form I-140 [employment-based immigrant visa] petition with [DHS] within 180 calendar days of the date [DOL] granted the certification.” 20 CFR 656.30(b)(1). DHS treats a labor certification that has expired similarly to one that has been denied or revoked. Indeed, DHS automatically rejects or denies immigrant visa petitions related to expired labor certifications, effectively barring the granting of extensions under section 106(b) in such cases.<sup>39</sup>

DHS also proposes to conform its regulations with current policy by allowing petitioners to file H-1B petitions under sections 106(a) and (b) as early as 6 months prior to the requested H-1B start date. See proposed 8 CFR 214.2(h)(13)(iii)(D)(5). The petitioner would generally be required to demonstrate that the individual will meet the

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<sup>38</sup> See Aytes Memo Dec. 2005, at 6.

<sup>39</sup> DHS also proposes to conform its regulations to current policy regarding the substitution of beneficiaries in labor certification applications. See proposed 8 CFR 214.2(h)(13)(iii)(D)(4). In 2007, DOL changed its regulations to effectively prohibit the substitution of labor certification beneficiaries, except for substitution requests submitted on or before July 16, 2007. See 20 CFR 656.11(a). With respect to substitutions occurring before July 16, 2007, DHS policy now provides that for purposes of section 106(b) of AC21, the labor certification application may only be used for the most recently substituted individual. See Neufeld Memo May 2008, at 5 n.4. DHS proposes to conform its regulations accordingly, which will prevent multiple individuals from using the same labor certification to obtain H-1B extensions under this proposed rule.

requirements of sections 106(a) and (b) as of the date he or she will reach the end of the 6-year period of H-1B admission. This request may include any time remaining within the general 6-year period, including, for example, periods of time spent outside the United States during H-1B petition validity, for which “recapture” of H-1B remainder time is sought, as well as any H-1B “remainder” periods available to the foreign national.<sup>40</sup> But in no case may the approval period exceed 3 years or the validity period of the LCA. See proposed 8 CFR 214.2(h)(13)(iii)(D)(5); see also 8 CFR 214.2(h)(9)(iii)(A)(1) and (h)(15)(ii)(B).

Moreover, each approval granted under sections 106(a) and (b) will provide the beneficiary with a new date upon which the limitation on H-1B admission will be reached. Employers filing an H-1B petition seeking a second or subsequent extension of H-1B status for a beneficiary under sections 106(a) and (b) must demonstrate that a qualifying labor certification or immigrant visa petition was filed at least 365 days prior to the new H-1B expiration date authorized under that section.<sup>41</sup> See proposed 8 CFR 214.2(h)(13)(iii)(D)(7). However, only one labor certification application or immigrant visa petition may be used to establish eligibility in support of any single H-1B petition filed under sections 106(a) and (b). A petitioner may not aggregate the days on which multiple labor certification applications or immigrant visa petitions are on file in order to satisfy the 365-day requirement. See proposed 8 CFR 214.2(h)(13)(iii)(D)(8).

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<sup>40</sup> See Aytes Memo Dec. 2006, at 4. (“The ‘remainder’ period of the initial six-year admission period refers to the full six-year period of admission minus the period of time that the individual previously spent in the United States in valid H-1B status.”) USCIS policy relating to such “recapture” is discussed in greater detail below at section IV.C.(2), “Calculating the 6-Year H-1B Authorized Admission Period.” The “remainder” period is discussed at IV.C.(2), “Recapture of H-1B Remainder Period.”

<sup>41</sup> As noted above, the H-1B petitioner need not be the same employer that filed the labor certification or immigrant visa petition.

DHS proposes, consistent with current practice, to allow applications for extensions under section 106(b) to be filed only by principal beneficiaries seeking to obtain status under section 203(b) of the INA, and not by derivative beneficiaries described in section 203(d) of the INA. See proposed 8 CFR 214.2(h)(13)(iii)(D)(9). Section 106(a) expressly limits eligibility to individuals who have been accorded H-1B status and who have had a labor certification application or employment-based immigrant visa petition filed on their behalf. See AC21 section 106(a), as amended. H-4 dependents do not meet these statutory criteria. As noted previously, however, dependents in H-4 status are subject to the same period of authorized stay as the principal H-1B nonimmigrant worker. Therefore, eligible H-4 spouses and dependent children may be granted H-4 status during the period the H-1B nonimmigrant spouse or parent maintains H-1B status under section 106.

Finally, DHS proposes to restrict extensions of H-1B status under sections 106(a) and (b) for beneficiaries who have not taken certain steps in furtherance of obtaining LPR status. As noted above, these sections were intended to allow individuals to remain in the United States as H-1B nonimmigrant workers while pursuing permanent residence. See S. Rep. No. 260, at 23. Accordingly, the proposed rule would generally require that to remain eligible for extensions of H-1B status under sections 106(a) and (b), the individual must file an application for adjustment of status or submit an application for an immigrant visa within 1 year of an immigrant visa becoming immediately available. See proposed 8 CFR 214.2(h)(13)(iii)(D)(10). This requirement would be effectively tolled, however, during any period in which an application for adjustment of status could not be filed due to the unavailability of immigrant visas. Id. Moreover, if the accrual of the 1-

year period is interrupted by the retrogression of previously available immigrant visas, the individual would be permitted a full new 1-year period to seek LPR status when immigrant visas become available again. Id. In addition, failure to file within such year could be excused at the discretion of DHS if the individual establishes that the failure to apply was due to circumstances beyond his or her control. Id.

DHS invites the public to comment on all aspects of this proposal.

## **2. Job Portability under AC21 for Certain Applicants for Adjustment of Status**

DHS is proposing to clarify and improve policies and procedures related to the job portability protections provided by section 106(c) of AC21. See proposed 8 CFR 245.25. That section amended the INA by adding section 204(j), codified at 8 U.S.C. 1154(j), to enhance the ability of certain workers to change jobs or employers if they have been sponsored for permanent residence by U.S. employers and have pending applications for adjustment of status. See AC21 section 106(c). Specifically, section 204(j) of the INA provides that an employment-based immigrant visa petition filed for EB-1 (other than for “aliens of 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 filed and remains pending for 180 days or more. See INA section 204(j), 8 U.S.C. 1154(j); see also INA sections 204(a)(1)(F) and 212(a)(5)(A)(iv), 8 U.S.C. 1154(a)(1)(F) and 1182(a)(5)(A)(iv). Section 204(j) allows such portability when the new job offer is for a job which is in the same or a similar occupational classification as the job for which the original immigrant visa petition was filed. Id.

To provide greater clarity to the regulated community and enhance consistency across agency determinations under section 204(j) of the INA, DHS proposes to update and conform its regulations governing adjustment of status consistent with longstanding agency policy. For purposes of approving an application for adjustment of status, the proposed rule would clarify that an immigrant visa petition for EB-1 (other than for “aliens of extraordinary ability”), EB-2, or EB-3 classification filed under section 204(a)(1)(F) of the INA, 8 U.S.C. 1154(a)(1)(F), remains valid if the petition is approved and either:

- 1) the employment offer from the petitioning employer is continuing and remains bona fide; or
- 2) pursuant to section 204(j), the beneficiary has a new offer of employment in the same or a similar occupational classification as the employment offer listed in the approved petition, the application for adjustment of status based on this petition has been pending for 180 days or more, and the approval of the petition has not been revoked.

See proposed 8 CFR 245.25(a). Under the second option, the new offer of employment may be from the petitioning employer, from a different U.S. employer, or based on self-employment. Id. Under either option, the individual and his or her U.S. employer must intend that the individual will be employed under the continuing or new employment offer (including self-employment), as applicable, upon the individual’s grant of LPR status. Id.

Although the individual need not have been employed at any time by the employer that filed the immigrant visa petition—or, in a case involving section 204(j)



portability, the employer presenting the new offer of employment—DHS will in all cases determine whether a relevant offer of employment is bona fide. In cases involving 204(j) portability, DHS considers whether the employer that filed the immigrant visa petition had the intent, at the time the petition was approved, to employ the beneficiary upon approval of the application for adjustment of status.<sup>42</sup> With respect to the new employer, DHS considers whether the employer intends to employ the beneficiary in the offered position, and whether the beneficiary intends to work in that position, upon approval of the application for adjustment of status.<sup>43</sup>

As noted above, DHS is proposing to amend its regulations governing applications for adjustment of status to prohibit approval of such an application when the approval of the immigrant visa petition on which the application is based has been revoked. See proposed 8 CFR 245.25(a). DHS is also proposing, however, as discussed in section IV.B., to amend its regulations governing revocation of petition approval so that employment-based immigrant visa petitions that have been approved for 180 days or more would no longer have such approval automatically revoked based only on withdrawal by the petitioner or termination of the petitioner's business. See proposed 8 CFR 205.1(a)(3)(iii)(C) and (D). As long as such an approval has not been revoked for fraud, material misrepresentation, the invalidation or revocation of a labor certification, or USCIS error, the petition would generally continue to be valid for purposes of section 204(j) job portability and certain status extension purposes under the immigration laws. Id. Such a petition, however, cannot on its own serve as the basis for obtaining an immigrant visa or adjustment of status as there is no longer a bona fide employment offer

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<sup>42</sup> See USCIS Adjudicator's Field Manual, Chapter 20.2(c).

<sup>43</sup> See Aytes Memo Dec. 2005, at 4; Matter of Cardoso, 13 I. & N. Dec. 228, 230-31 (BIA 1969).

related to the petition. Id. In such cases, the beneficiary will need a new immigrant visa petition approved on his or her behalf, or a new offer of employment in section 204(j) portability cases, in order to obtain an immigrant visa or adjust status. Id.

Taken together, these regulatory changes are generally consistent with current policy concerning adjustment of status. The regulatory amendments, for example, do not change existing policy with respect to applications for adjustment of status filed by beneficiaries of immigrant visa petitions who seek to adjust status based on a continuing offer of employment from the petitioning employer. In such cases, if the petitioning employer withdraws or goes out of business, there would be no continuing offer of employment on which the beneficiary may rely. Thus, even in a case where such a petition has been approved for at least 180 days and would no longer be subject to automatic revocation based upon withdrawal of the petition or termination of the employer's business, the beneficiary would remain ineligible to file for adjustment of status based solely on that petition. See proposed 8 CFR 204.5(a)(3)(iii)(C) and (D); see also proposed 8 CFR 245.25(a). Under this proposed rule, the beneficiary would require a new immigrant visa petition filed on his or her behalf in order to file for or receive adjustment of status. Id.

With respect to beneficiaries who have applications for adjustment of status that have been pending for at least 180 days and seek to adjust status pursuant to section 204(j), the proposed regulations are also consistent with current policy, except in one respect. Under current policy, withdrawal by the petitioner in such cases does not require the beneficiary to be named in a new immigrant visa petition; rather, the beneficiary would only be required to demonstrate, pursuant to section 204(j) of the INA, that he or

she has a new offer of employment in a same or similar occupational classification.<sup>44</sup> This would continue to be the case under this proposed rule. See proposed 8 CFR 204.5(a)(3)(iii)(C); see also proposed 8 CFR 245.25(a). The proposed rule would, however, expand such treatment to cover cases in which the petitioner's business terminates after the application for adjustment of status has been pending for at least 180 days. Under current policy, termination of the employer's business in such cases would require the beneficiary to be named in a new employment-based immigrant visa petition in order to adjust status. Under the proposed rule, the beneficiary would not be required to have a new immigrant visa petition filed on his or her behalf, and instead would be required to demonstrate that he or she has a new offer of employment in a same or similar occupational classification, consistent with section 204(j) of the INA. Id. DHS believes that such an extension of section 204(j) portability is consistent with congressional intent to allow long-delayed applicants for adjustment of status to change employers with reasonable assurance that they will not be disadvantaged by so doing.<sup>45</sup>

DHS is further proposing a new supplementary form to the application for adjustment of status to assist the Department in the adjudicative process. In general cases, the supplementary form will assist DHS in confirming that a job offer described in an employment-based immigrant visa petition is still available at the time an individual files an application for adjustment of status. In cases involving section 204(j) portability requests, the form will assist DHS in determining, among other things, whether a new

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<sup>44</sup> See Aytes Memo Dec. 2005, at 4-5.

<sup>45</sup> DHS also proposes conforming changes to 8 CFR 204.5 to ensure the retention of priority dates related to certain employment-based immigrant visa petitions that are approved for less than 180 days when a petitioner withdraws the petition or the petitioner goes out of business. In such cases, the priority date listed in the petition may still be used for section 204(j) portability purposes. This regulatory amendment codifies current agency policy and practice. See proposed 8 CFR 204.5(e)(5).

offer of employment is in the same or a similar occupational classification as the job offer listed in the immigrant visa petition. In section 204(j) cases, an individual may submit the supplement affirmatively or when required at the request of USCIS to establish eligibility under the proposed regulatory requirements. Currently, DHS is not proposing an extra fee for submission of this new supplement, but may consider implementing a fee in the future.

DHS contemplates that applicants for adjustment of status seeking approval based on a new offer of employment will submit various pieces of evidence, along with the supplementary form, demonstrating compliance with section 204(j) and the proposed regulations. Unless instructed otherwise, including by the form or form instructions, an applicant will be able to submit: (1) a written attestation signed by the applicant and employer describing the new employment offer, including a description of the position and its requirements; (2) an explanation demonstrating that the new employment offer is in the same or a similar occupational classification as the original employment offer listed in the approved petition; and (3) a copy of the Notice of Action (Form I-797C) issued by USCIS (or, if unavailable, secondary evidence) showing that the individual's application for adjustment of status has been pending with USCIS for 180 days or more. See proposed 8 CFR 245.25(b)(2).

Because the statute does not define the terms "same" or "similar," DHS proposes definitions for those terms based on their common dictionary definitions, as well as the agency's practice and experience in this context.<sup>46</sup> The proposed regulatory provision accordingly defines "same occupational classification" as an occupation that resembles in

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<sup>46</sup> See Taniguchi v. Kan Pacific Saipan, Ltd., 132 S. Ct. 1997, 2002-03 (2012) (when a term goes undefined in a statute, an agency ordinarily should "give the term its ordinary meaning").

every relevant respect<sup>47</sup> the occupation for which the underlying employment-based immigrant visa petition was approved.<sup>48</sup> See proposed 8 CFR 245.25(c). The term “similar occupational classification” is defined as an occupation that shares essential qualities or has a marked resemblance or likeness with the occupation for which the underlying employment-based immigrant visa petition was approved.<sup>49</sup> Id.

DHS invites the public to comment on all aspects of this proposal, including the new proposed supplementary form to the application for adjustment of status (and form instructions) and the possibility of charging a supplemental fee in the future related to such form.

### **3. Job Portability for H-1B Nonimmigrant Workers**

DHS proposes to conform its regulations to its policies and practices under section 105(a) of AC21, which amended the INA by adding the H-1B job portability provision at section 214(n), 8 U.S.C. 1184(n). This section enhances the ability of H-1B nonimmigrant workers to change jobs or employers by authorizing them to accept new or concurrent employment upon the filing of a non-frivolous H-1B petition (“H-1B portability petition”). See INA section 214(n), 8 U.S.C. 1184(n). The H-1B nonimmigrant worker must have been lawfully admitted into the United States, must not have worked without authorization subsequent to such lawful admission, and must be in a

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<sup>47</sup> For these purposes, USCIS adjudicators may consider, among other factors, the job duties of the respective jobs, and the skills, experience, education, training, licenses or certifications specifically required to perform each of the jobs.

<sup>48</sup> See, e.g., Same Definition, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/same> (last visited May 20, 2015) (defining “same” as “identical” or “resembling in every relevant respect”); Same Definition, OED.COM, <http://www.oed.com/view/Entry/170362?redirectedFrom=same#eid> (last visited Jan. 2, 2015) (defining “same” as “identical”).

<sup>49</sup> See, e.g., Similar Definition, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/similar> (last visited May 20, 2015) (defining “similar” as “alike in substance or essentials”); Similar Definition, OED.COM, <http://www.oed.com/view/Entry/179873?redirectedFrom=similar#eid> (last visited May 20, 2015) (defining “similar” as “having a marked resemblance or likeness”).

period of stay authorized by the Secretary of Homeland Security.<sup>50</sup> Employment authorization under the pending H-1B portability petition continues until its adjudication.

Id.

In harmony with the statutory provision, the proposed rule would provide that H-1B nonimmigrant workers who are beneficiaries of new H-1B petitions seeking an amendment or extension of their stay in H-1B status are eligible to commence new or concurrent employment upon the filing of a non-frivolous H-1B petition by that employer. See proposed 8 CFR 214.2(h)(2)(i)(H). If the H-1B nonimmigrant worker meets the requirements of section 214(n), he or she is authorized to commence new employment while adjudication of the new H-1B petition is pending. Id. If the petition is approved, the H-1B nonimmigrant worker's employment authorization continues under the approved petition. Id. If the petition is denied, employment authorization under section 214(n) generally ceases upon the date of denial.<sup>51</sup> Id.

DHS proposes, consistent with current policy, to make the H-1B portability provision discussed in this section available only to H-1B beneficiaries who are in the United States in H-1B status.<sup>52</sup> This interpretation is consistent with the language of section 214(n), which requires in part that the H-1B nonimmigrant worker have been lawfully admitted into the United States at the time the new H-1B petition is filed. See INA section 214(n), 8 U.S.C. 1184(n). This interpretation is also in harmony with

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<sup>50</sup> Neufeld Memo May 2009 (describing various "periods of authorized stay").

<sup>51</sup> If the petition is denied after the H-1B nonimmigrant worker's Arrival-Departure Record (Form I-94) or successor form) has expired, and while the H-1B nonimmigrant worker is in an authorized period of stay consistent with 8 CFR 274a.12(b)(20) and proposed revisions to 8 CFR 274a.12(b)(9), DHS intends to interpret section 214(g)(4) of the INA, 8 U.S.C. 1184(g)(4), to count the time spent in the United States based on a timely filed H-1B extension of stay petition towards the 6 year H-1B period of authorized admission.

<sup>52</sup> Aytes Memo Dec. 2005, at 7.

congressional intent behind the creation of the provision. As noted in the Senate Report accompanying the bill, the H-1B portability provision was intended to “respond[] to concerns raised about the potential for exploitation of H-1B visa holders as a result of a specific employer’s control over the employee’s legal status.” See S. Rep. No. 260, at 22-23.

DHS also proposes to conform its regulations to current policy regarding the ability of H-1B employers to file successive H-1B portability petitions (often referred to as “bridge petitions”) on behalf of H-1B nonimmigrant workers. Under current policy, an H-1B nonimmigrant worker who has changed employment based on an H-1B portability petition filed on his or her behalf may again change employment based on the filing of a new H-1B portability petition, even if the former H-1B portability petition remains pending.<sup>53</sup> Approval of any subsequent H-1B portability petition, however, would effectively be dependent on the approval of any prior H-1B portability petition if the individual’s Arrival-Departure Record (Form I-94) has expired and the prior portability petitions remain pending at the time that the subsequent portability petition is filed. In such a case, where the request for an extension of stay was denied in a preceding H-1B portability petition, a request for an extension of stay in any successive H-1B portability petition(s) must also be denied. See proposed 8 CFR 214.2(h)(2)(i)(H)(3). DHS proposes to maintain this policy in order to best achieve the ameliorative purpose of section 212(n) to enhance the job flexibility of H-1B nonimmigrant workers and minimize their potential exploitation by employers.

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<sup>53</sup> Aytes Memo Dec. 2005, at 7.

DHS is also proposing conforming changes to its employment authorization regulations to recognize the employment authorization of H-1B nonimmigrant workers who are employed pursuant to an H-1B portability petition filed under section 214(n) of the INA. See proposed 8 CFR 274a.12(b)(9). Specifically, the proposed rule would add this class of H-1B nonimmigrant workers to the description of H nonimmigrants authorized for employment incident to status with a specific employer. Id.

DHS invites the public to comment on all aspects of this proposal.

#### **4. Calculating the H-1B Admission Period**

DHS proposes to clarify in regulation its current policy with respect to calculating and “recapturing” what is known as “remainder time” for H-1B nonimmigrant workers. See proposed 8 CFR 214.2(h)(13)(iii)(C). Currently, with respect to an H-1B nonimmigrant worker’s maximum period of authorized admission in H-1B status, DHS does not count against this period any days he or she spent outside of the United States during the validity period of the H-1B petition.<sup>54</sup> Any such period outside the United States may still be used, or “recaptured,” by an H-1B petitioner on behalf of the H-1B nonimmigrant worker.<sup>55</sup> An H-1B petitioner seeking to recapture such time must establish, through objective, documentary evidence—such as passport stamps, Arrival-Departure Records (Forms I-94), or airline ticket stubs—that the H-1B nonimmigrant worker was in fact physically outside of the United States during the day(s) for which recapture is sought.<sup>56</sup>

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<sup>54</sup> See Aytes Memo Oct. 2005.

<sup>55</sup> Id.

<sup>56</sup> To assist in the adjudication process, a petitioner may also provide complementary evidence explaining any such time to be recaptured, such as a chart indicating the dates spent outside of the United States and referencing the relevant objective documentary evidence supporting the chart.



DHS proposes to codify this policy through this rulemaking. Under this proposed rule, time spent outside the United States by an individual during the validity of an H-1B petition that was approved on his or her behalf could be added back to or “recaptured” for his or her maximum period of authorized admission as an H-1B nonimmigrant worker. See proposed 8 CFR 214.2(h)(13)(iii)(C); see also INA section 214(g)(4), 8 U.S.C. 1184(g)(4) (generally establishing a 6-year limit on the period of stay of an H-1B nonimmigrant worker). Consistent with current practice, if an H-1B nonimmigrant worker had counted against the H-1B numerical cap with respect to the 6-year maximum period of H-1B admission from which recapture is sought, then the H-1B petition seeking recapture of such time (“H-1B recapture petition”) would not subject the H-1B nonimmigrant worker again to the cap.<sup>57</sup> See proposed 8 CFR 214.2(h)(13)(iii)(C)(2). If the H-1B nonimmigrant worker had not counted against the H-1B cap in such a case, the recapture petition would be cap-subject (i.e., require that the H-1B nonimmigrant worker count against the cap), unless the H-1B nonimmigrant worker is eligible for another exemption from the cap.

In accordance with current policy, the H-1B petitioner would bear the burden of demonstrating “recapture” eligibility. Along with documentary evidence, the petitioner may provide complementary, explanatory evidence (as described above) to assist USCIS adjudicators in the adjudication process. See proposed 8 CFR 214.2(h)(13)(iii)(C)(1).

Moreover, as with current practice, an H-1B petitioner filing a recapture petition would

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<sup>57</sup> This analysis would also be applied to cases in which the worker has been outside the United States for a full year and would thus be eligible for a new period of admission under section 214(g)(4) of the INA, 8 U.S.C. 1184(g)(4). In such cases, the H-1B petitioner may file a recapture petition or a petition seeking a new period of H-1B admission. If the petitioner does not include a recapture request in the H-1B petition, DHS generally would treat the petition as a request for a new 6-year maximum H-1B admission period under section 214(g)(4) of the INA, 8 U.S.C. 1184(g)(4). The worker in such a case would be subject to the numerical cap unless an exemption applies.

not need to demonstrate that the time spent outside the United States by the H-1B nonimmigrant worker was meaningfully interruptive of the H-1B period in which recapture is sought. The reason for the absence is irrelevant to the recapture determination, but such reason may be relevant to the determination of the individual's admissibility. Any trip of at least one continuous 24-hour period ("day") outside the United States for any purpose may be recaptured.

DHS invites public comment on all aspects of this proposal.

## **5. Exemptions from the H-1B Numerical Cap under AC21 and ACWIA**

### **a. Employers Not Subject to H-1B Numerical Limitations**

DHS proposes to clarify and improve its regulations and policies identifying which employers are cap-exempt under the H-1B program. As discussed above in section III.C.2.b.i., AC21 amended section 214(g)(5) of the INA to allow certain employers to employ H-1B nonimmigrant workers without application of the numerical cap on H-1B visas. See AC21 section 103 (adding paragraphs (5), (6), and (7) to INA section 214(g), 8 U.S.C. 1184(g)). As amended by AC21, section 214(g)(5) of the INA specifically exempts from the H-1B cap those H-1B nonimmigrant workers who are employed (1) "at an institution of higher education . . . , or a related or affiliated nonprofit entity," or (2) "at a nonprofit research organization or a governmental research organization." INA section 214(g)(5), 8 U.S.C. 1184(g)(5). DHS is now proposing to codify its long-standing policy interpretations regarding this exemption from the cap. See proposed 8 CFR 214.2(h)(8)(ii)(F).

DHS has interpreted this provision to exempt H-1B nonimmigrant workers in two types of circumstances. First, H-1B nonimmigrant workers are currently exempt from the

cap if they are employed directly by an employer described in section 214(g)(5) of the INA, 8 U.S.C. 1184(g)(5). Thus, any H-1B nonimmigrant worker would be exempt if employed directly by: (1) an institution of higher education, (2) a nonprofit entity related to or affiliated with such an institution, (3) a nonprofit research organization, or (4) a governmental research organization. See proposed 8 CFR 214.2(h)(8)(ii)(F)(1)-(3). Second, because section 214(g)(5) exempts workers who are employed “at” such qualifying institutions, organizations, or entities, H-1B nonimmigrant workers may also be exempt from the cap in certain circumstances even when they are not directly employed by them.<sup>58</sup> See proposed 8 CFR 214.2(h)(8)(ii)(F)(4). Under current policy, such H-1B nonimmigrant workers may only be treated as cap exempt when: (1) the employment is located at a qualifying institution, organization, or entity; and (2) the H-1B nonimmigrant worker will perform job duties that directly and predominately further the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution, organization, or entity.<sup>59</sup>

DHS is now proposing to amend its regulations, in part, to provide additional clarity with respect to the “employed at” statutory language. See proposed 8 CFR 214.2(h)(8)(ii)(F)(4). Under the proposed rule, an H-1B petitioner that is not itself a qualifying institution, organization or entity may claim an exemption from the cap for an H-1B nonimmigrant worker employed at such organization or entity if: (1) the majority

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<sup>58</sup> In contrast to the “employed at” terminology used in section 214(g)(5) of the INA, 8 U.S.C. 1184(g)(5), other provisions governing the H-1B program use terminology limited to a direct employer-employee relationship with a qualifying employer. Section 212(p)(1) of the INA, 8 U.S.C. 1182(p)(1), for example, provides for special prevailing wage computations where an H-1B nonimmigrant is to be an “employee of” a qualifying institution, organization, or entity. Similarly, section 214(c)(9)(A) of the INA, 8 U.S.C. 1184(c)(9)(A), exempts only qualifying employers from certain H-1B petition fees enacted under ACWIA. Unlike section 214(g)(5), these provisions clearly apply only when the H-1B petitioner is itself a qualifying employer.

<sup>59</sup> Aytes Memo June 2006, at 2-3 and note 2.

of the worker’s duties will be performed at a qualifying institution, organization, or entity; and (2) such job duties directly and predominately further the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity (e.g., higher education, or nonprofit or governmental research). Id. In such cases, the burden is on the petitioner to establish by a preponderance of the evidence that there is a nexus between the work performed by the H-1B nonimmigrant worker and the essential purpose, mission, objectives or functions of the qualifying institution, organization, or entity.

DHS also proposes to conform its regulations to current policy with respect to the definitions of several terms in section 214(g)(5) and the applicability of these terms to both: (1) ACWIA provisions that require the payment of fees by certain H-1B employers; and (2) AC21 provisions that exempt certain employers from the H-1B numerical caps. First, the proposed rule would expressly adopt for the purpose of cap exemption the definition of the term “institution of higher education” provided by section 101(a) of the Higher Education Act.<sup>60</sup> See proposed 8 CFR 214.2(h)(8)(ii)(F)(1). Notably, this definition does not include for-profit institutions of higher education, which would continue to be subject to the H-1B cap. The proposed rule would also adopt definitions for the terms “nonprofit research organization” and “governmental research organization” as currently set forth in DHS regulations at 8 CFR 214.2(h)(19)(iii). See proposed 8 CFR 214.2(h)(8)(ii)(F)(3). The proposed rule additionally clarifies that an entity would be considered a “nonprofit entity” for purpose of proposed 8 CFR 214.2(h)(8)(ii)(F) if it meets the definition of that term at 8 CFR 214.2(h)(19)(iv).

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<sup>60</sup> See id., note 1.

Furthermore, consistent with current DHS regulations, see 8 CFR 214.2(h)(19)(iii)(B), the term “related or affiliated nonprofit entity” would be defined, both for ACWIA fee and cap exemption purposes, to continue to include nonprofit entities that are: (1) connected or associated with an institution of higher education through shared ownership or control by the same board or federation; (2) operated by an institution of higher education; or (3) attached to an institution of higher education as a member, branch, cooperative, or subsidiary. See proposed 8 CFR 214.2(h)(8)(ii)(F)(2). DHS intends to improve upon current policy, however, by proposing additional means by which nonprofit entities may establish a sufficient relation or affiliation with an institution of higher education. This change would better reflect current operational realities for institutions of higher education and how they interact with, and sometimes rely on, nonprofit entities. See proposed 8 CFR 214.2(h)(8)(ii)(F)(2)(iv) and (h)(19)(iii)(B).

In particular, based on its experience in this area, DHS believes that the current definition for “affiliated or related nonprofit entities” does not sufficiently account for the nature and scope of common, bona fide affiliations between nonprofit entities and institutions of higher education. To better account for such relationships, DHS proposes to expand on the current definition by including nonprofit entities that have entered into formal written affiliation agreements with institutions of higher education and are able to meet two additional criteria. First, such entities must establish an active working relationship with the institution of higher education for the purposes of research or education. Second, they must establish that one of their primary purposes is to directly

contribute to the research or education mission of the institution of higher education. See proposed 8 CFR 214.2(h)(8)(ii)(F)(2)(iv) and (h)(19)(iii)(B)(4).

This proposed definition provides much needed flexibility in this area, allowing DHS to better account for the full range of nonprofit entities that are “related or affiliated” with institutions of higher education and thus better ensure that such entities are not subject to the H-1B cap or the ACWIA fee as Congress intended. For example, under federal statute, Veterans Affairs (VA) hospitals are considered affiliated with a medical school or institution of higher learning based on “a contract or agreement . . . for the training or education of health personnel.” 38 U.S.C. 7423(d)(1). But such agreements may be inadequate under the current regulatory definition to establish the requisite affiliation or relation for purposes of the H-1B cap or ACWIA fee exemptions. Such bona fide affiliation contracts or agreements are common in the private sector as well. DHS believes the proposed definition better captures these and other valid types of relationships with institutions of higher education that are contemplated under AC21 and ACWIA.

DHS welcomes public comment on all aspects of this proposal.

**b. Counting Previously Exempt H-1B Nonimmigrant Workers**

DHS also proposes to conform its regulations to existing policy for determining when a change in employment requires a previously exempt H-1B nonimmigrant worker to be counted against the H-1B cap. See proposed 8 CFR 214.2(h)(8)(ii)(F)(5). As discussed above, an H-1B nonimmigrant worker is exempt from the H-1B cap if he or she is employed at an institution of higher education, a nonprofit entity related or affiliated to such an institution, a nonprofit research organization, or a governmental research

organization.<sup>61</sup> See INA section 214(g)(5), 8 U.S.C. 1184(g)(5). Under section 214(g)(6) of the INA, 8 U.S.C. 1184(g)(6), once cap-exempt employment ceases, the H-1B nonimmigrant worker will be subject to the cap if he or she was not previously counted against it and exemptions from the cap no longer apply. Section 214(g)(6) expressly refers to cap-exempt H-1B nonimmigrant workers who cease to be employed by employers described under subparagraph (A) of section 214(g)(5), 8 U.S.C. 1184(g)(5)(A), which lists only institutions of higher education and related or affiliated nonprofit entities. DHS, however, has long maintained the same policy with regard to cessation of employment with employers described under subparagraph (B) of section 214(g)(5), 8 U.S.C. 1184(g)(5)(B), which lists nonprofit research organizations and governmental research organizations.<sup>62</sup> DHS now proposes to incorporate this interpretation into its H-1B regulations. See proposed 8 CFR 214.2(h)(8)(ii)(F)(5). DHS believes this reading is a reasonable interpretation and best implements the congressional intent behind the H-1B cap exemption provisions, which expressly exempt workers employed at those entities described in sections 214(g)(5)(A) and (B). It reasonably follows that termination of such employment should result in the cessation of the cap-exemption.

Consistent with this interpretation, the proposed rule would require a reassessment of an H-1B nonimmigrant worker's cap-exempt status when he or she ceases employment at an institution of higher education, a nonprofit entity related to or affiliated with such an institution, a nonprofit research organization, or a governmental

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<sup>61</sup> Such cap-exempt H-1B nonimmigrant workers may also undertake concurrent, non-exempt H-1B employment without being subjected to the cap. See INA section 214(g)(5), 8 U.S.C. 1184(g)(5).

<sup>62</sup> Neufeld Memo May 2008, at 7-8.

research organization. See proposed 8 CFR 214.2(h)(8)(ii)(F)(5) and (6). If such an H-1B nonimmigrant worker was not previously counted against the H-1B numerical cap within the 6-year period of authorized admission to which the cap-exempt employment applied, he or she would now be subject to the cap if no other exemptions from the cap apply. Id. Accordingly, USCIS will deny any subsequent cap-subject H-1B petition<sup>63</sup> filed for the H-1B nonimmigrant worker if no cap numbers are available, and may revoke the approval of a petition for concurrent employment of the H-1B nonimmigrant worker at a cap-subject employer. Id.

DHS welcomes public comment on this proposal.

#### **6. Whistleblower Protections in the H-1B Program**

DHS proposes to conform its regulations governing the H-1B program to certain policies and practices that have developed since ACWIA amended the INA to provide additional protections to H-1B nonimmigrant workers and other workers. See proposed 8 CFR 214.2(h)(20). As noted previously, section 413 of ACWIA amended the INA by adding new section 212(n)(2)(C), which is codified at 8 U.S.C. 1182(n)(2)(C). Among other things, section 212(n)(2)(C) makes it a violation for an H-1B employer to retaliate against an employee for providing information to the employer or any other person, or for cooperating in an investigation, with respect to an employer's violation of its LCA attestations. See INA section 212(n)(2)(C)(iv), 8 U.S.C. 1182(n)(2)(C)(iv). Employers are prohibited from taking retaliatory action against such an employee, including any action to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee for disclosing information to the employer, or to any

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<sup>63</sup> The subsequent petition may be, for example, a cap-subject petition by a new employer or a petition by the same cap-subject employer for an extension of the beneficiary's stay.



other person, that the employee reasonably believes evidences an LCA violation, any rule or regulation pertaining to the statutory LCA attestation requirements, or for cooperating, or attempting to cooperate, in an investigation or proceeding pertaining to the employer's LCA compliance. Id.

Section 212(n)(2)(C) also requires DHS to establish a process under which an H-1B nonimmigrant worker who files a complaint with DOL regarding such illegal retaliation, and is otherwise eligible to remain and work in the United States, “may be allowed to seek other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such nonimmigrant classification.” INA section 212(n)(2)(C)(v), 8 U.S.C. 1182(n)(2)(C)(v). Under current policy, if credible documentary evidence is provided in support of an H-1B petition demonstrating that the H-1B nonimmigrant worker faced retaliatory action from his or her employer based on a report regarding a violation of the employer's LCA obligations, DHS may consider any related loss of H-1B status by the worker as an “extraordinary circumstance” under 8 CFR 214.1(c)(4) and 248.1(b) justifying an extension of H-1B status or change of status for the worker.<sup>64</sup> Accordingly, the H-1B nonimmigrant worker is afforded time to acquire new H-1B employment or employment under another nonimmigrant classification notwithstanding a termination of employment or other retaliatory action by his or her employer. Credible documentary evidence may include a copy of the complaint filed by the individual, along with corroborative documentation

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<sup>64</sup> See Neufeld Memo May 2008, at 8.

that such a complaint has resulted in retaliatory action against the individual as described in 20 CFR 655.801.<sup>65</sup>

The proposed rule would codify in regulation DHS' current policy regarding these protections. See proposed 8 CFR 214.2(h)(20). Under the proposed rule, a qualifying employer seeking an extension of stay for an H-1B nonimmigrant worker, or a change of status from H-1B status to another nonimmigrant classification, would be able to submit documentary evidence indicating that the beneficiary faced retaliatory action from his or her employer (or former employer) based on a report regarding a violation of the employer's LCA obligations. Id. If DHS determines such documentary evidence to be credible, DHS may consider any loss or failure to maintain H-1B status by the beneficiary related to such violation as an "extraordinary circumstance" under 8 CFR 214.1(c)(4) and 248.1(b). Those regulations, in turn, authorize DHS to grant a discretionary extension of H-1B stay or a change of status to another nonimmigrant classification. See 8 CFR 214.1(c)(4) and 248.1(b). As with current policy, credible documentary evidence should include a copy of the complaint filed by the individual, along with corroborative documentation that such a complaint has resulted in the retaliatory action against the individual as described in 20 CFR 655.801. All evidence submitted will be considered to determine whether "extraordinary circumstances" have been met.

DHS invites the public to comment on all aspects of this proposal.

#### **B. Additional Changes to Further Improve Stability and Job Flexibility for Certain Workers**

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<sup>65</sup> Id.

DHS further proposes to amend its regulations, consistent with AC21 and DHS authorities, related to certain employment-based immigrant and nonimmigrant visa programs to provide additional stability and flexibility to employers and workers in those programs. The proposals are primarily intended to improve job portability for certain beneficiaries of approved employment-based immigrant visa petitions, including by limiting the grounds for automatic revocation of petition approval and increasing the ability of such workers to retain their priority dates for use with subsequently approved employment-based immigrant visa petitions.

The proposed rule would also: improve or establish grace periods for certain nonimmigrant workers so that they may more easily seek and accept new employment opportunities; further assist applicants for adjustment of status and certain other employment-eligible individuals by automatically extending EADs for an interim period upon the timely filing of a renewal application; and provide additional stability and flexibility to high-skilled workers in certain nonimmigrant statuses to apply for employment authorization for a limited period if they meet certain criteria, including demonstrating that they are beneficiaries of approved employment-based immigrant visa petitions, are subject to immigrant visa backlogs, and demonstrate compelling circumstances. These and other proposed changes would provide much needed flexibility to a limited group of beneficiaries of employment-based immigrant visa petitions, as well as the U.S. employers who employ and sponsor them for permanent residence.

#### **1. Revocation of Approved Employment-Based Immigrant Visa Petitions**

As referenced above, DHS is proposing to amend its regulations governing revocation of petition approval to provide greater stability and flexibility to certain

workers who have approved EB-1, EB-2, or EB-3 immigrant visa petitions and are on the path to obtaining LPR status in the United States. The INA provides that any immigrant visa petition, once approved, may have such approval revoked by the Secretary of Homeland Security “for what he deems to be good and sufficient cause.” INA section 205, 8 U.S.C. 1155. Pursuant to this statutory authority, current DHS regulations provide grounds for automatic revocation and revocation on notice to the petitioner. See 8 CFR 205.1 and 205.2.<sup>66</sup> With respect to employment-based immigrant visa petitions, the current regulatory grounds for automatic revocation include: (1) invalidation of the labor certification supporting the petition; (2) death of the petitioner or beneficiary; (3) withdrawal by the petitioning employer; and (4) termination of the petitioning employer’s business. See 8 CFR 205.1. The regulatory provisions governing revocation on notice to the petitioner allow for revocation to be pursued on any other ground “when the necessity for the revocation comes to the attention of [DHS].” 8 CFR 205.2(a). Such revocation may be used, for example, for petitions involving fraud, material misrepresentation, or

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<sup>66</sup> The Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) has corresponding revocation regulations. See 8 CFR part 1205. DHS and DOJ, however, are not proposing to amend those regulations. The EOIR regulations do not permit EOIR to revoke under section 205 of the INA, 8 U.S.C. 1155, employment-based immigrant visa petitions approved under section 204 of the INA, 8 U.S.C. 1154. Subsequent to enactment of the Homeland Security Act, DOJ promulgated regulations transferring or duplicating certain parts of regulations codified in 8 CFR chapter I, including the automatic revocation regulations, to a new chapter pertaining to EOIR at 8 CFR chapter V. See Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824 (Feb. 28, 2003). Thereafter, on December 17, 2004, Congress vested authority for revocations under section 205 of the INA solely in the Secretary of Homeland Security, rather than the Attorney General. See Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458, sec. 5304(c), 118 Stat. 3638 (striking “Attorney General” and inserting “Secretary of Homeland Security”). Moreover, EOIR’s Board of Immigration Appeals has held that immigration judges are not authorized to revoke employment-based immigrant visa petitions approved under section 204 of the INA, and that the Board lacks jurisdiction to review DHS decisions to revoke such petitions. See, e.g., Matter of Marcal-Neto, 25 I&N Dec. 169, 174 (BIA 2010) (immigration judges lack authority to decide whether visa petitions should be revoked); Matter of Aurelio, 19 I&N Dec. 458, 460 (BIA 1987) (the Board lacks jurisdiction over matters involving the automatic revocation of a visa petition) (citing Matter of Zaidan, 19 I&N Dec. 297 (BIA 1985)). Accordingly, EOIR regulations at 8 CFR part 1205 need not be revised to conform with the proposed revisions in this rule.

erroneous approval.<sup>67</sup>

The proposed rule would amend these regulations so that EB-1, EB-2, and EB-3 immigrant visa petitions that have been approved for 180 days or more would no longer have such approval automatically revoked based only on withdrawal by the petitioner or termination of the petitioner's business. See proposed 8 CFR 205.1(a)(3)(iii)(C) and (D). As long as such an approval has not been revoked for fraud, material misrepresentation, the invalidation or revocation of a labor certification, or USCIS error, the petition will generally continue to be valid for various purposes under the immigration laws. Id. Such purposes include: (1) the retention of priority dates; (2) job portability under section 204(j) of the INA, 8 U.S.C. 1154(j); and (3) extensions of status for certain H-1B nonimmigrant workers under sections 104(c) and 106(a) and (b) of AC21. Id. An employment-based immigrant visa petition that is subject to withdrawal or business termination, however, cannot on its own serve as the basis for obtaining an immigrant visa or applying for adjustment of status as there is no longer a bona fide employment offer related to the petition. See id. In such cases, the beneficiary will need a new immigrant visa petition filed on his or her behalf, or a new offer of employment in section 204(j) portability cases, in order to obtain an immigrant visa or adjust status. Id.

DHS believes these regulatory changes are critical to fully implementing the job portability provisions of AC21. The current regulations concerning revocation of employment-based petition approval were last amended in 1996,<sup>68</sup> when wait times for

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<sup>67</sup> See Adjudicator's Field Manual, Chapter 22: Employment-Based Petitions, Entrepreneurs, and Special Immigrants § 22.2(d)(1) Employment-based Immigrant Visa Petitions (Form I-140); Determining the Priority Date, available at <http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html>.

<sup>68</sup> See 61 FR 13061 (1996). In 2006, the Department of Homeland Security and the Department of Justice amended the revocation regulations pertaining to immediate relatives and family-sponsored beneficiaries. See 71 FR 35749.

employment-based immigrant visas were relatively short and the immigration laws seemed to contemplate that sponsored employees would remain with their petitioning employers during the short time it took to obtain LPR status. The passage of time, and AC21, changed this landscape. In the intervening period, wait times for immigrant visas increased substantially, particularly for workers from India and China. See section III.D. And in recognition of these and other delays, Congress enacted AC21 in 2000 to provide additional flexibility to workers who were subject to lengthy delays in the immigrant visa process. Since AC21, wait times for immigrant visas have grown dramatically, so that for many workers the period between the approval of an employment-based immigrant visa petition<sup>69</sup> and the worker's ability to obtain permanent residence is now counted in years, if not decades. Id. This has placed increased emphasis on and further necessitates the benefits Congress sought to provide through AC21.

Importantly, Congress enacted AC21 with the specific purpose of providing increased job flexibility to certain workers who are being sponsored for permanent residence by a particular employer, but who as a result of long delays are forced to wait inordinate periods of time for such permanent residence. Section 106(c) of AC21, for example, created section 204(j) of the INA to allow certain workers with approved immigrant visa petitions and pending applications for adjustment of status to change jobs or employers without invalidating their approved immigrant visa petitions. See Section III.A. This statutory change supports the regulatory change proposed in this section. In

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<sup>69</sup> The period of time necessary for USCIS to approve an employment-based immigrant visa petition requiring a labor certification from DOL does not account for the time that is required for DOL adjudication of the labor certification application. A worker's priority date in such cases, which is established as of the date DOL accepts the labor certification application for processing, see 8 CFR 204.5(e), typically will be more than one year before the date of petition approval under current processing times.

cases involving section 204(j) portability, allowing a withdrawal by the petitioning employer, or termination of its business, to automatically cause revocation of the immigrant visa petition's approval would substantially undermine the protections Congress intended to provide the beneficiaries of such petitions through section 204(j).

The same is true with respect to the various provisions of AC21 that were intended to provide certainty and flexibility to H-1B nonimmigrant workers. AC21 provided various ways in which such workers could extend their H-1B status beyond the general 6-year limitation if they had been sponsored for permanent residence by an employer. See Section III.C. (discussing AC21 sections 104(c) and 106(a) and (b)). At the same time, AC21 enhanced the ability of H-1B nonimmigrant workers to change jobs or employers, including by authorizing such workers to immediately commence new employment upon the filing of a non-frivolous H-1B petition. Id. (discussing AC21 section 105(a)). These extension and portability provisions are far less meaningful if, after the H-1B nonimmigrant worker changes jobs, the approval of his or her qualifying immigrant visa petition can be automatically revoked solely due to withdrawal by the petitioning employer or termination of its business.

Accordingly, this proposed rule would amend DHS regulations governing revocation with respect to employment-based immigrant visa petitions to better reflect and enhance the job portability eligibility authorized by AC21. As noted above, DHS proposes that an employment-based immigrant visa petition that has been approved for 180 days or more would no longer have such approval automatically revoked based only on withdrawal by the petitioner or termination of the petitioner's business. See proposed 8 CFR 205.1(a)(3)(iii)(C) and (D). This change would effectively improve the ability of

certain workers with approved EB-1, EB-2, or EB-3 immigrant visa petitions to rely on such petitions for various job portability and status extension provisions in the immigration laws. Among other things, qualifying workers would be able to take advantage of these provisions without fear that certain circumstances outside of their control will automatically cause the revocation of the approval of their immigrant visa petitions, eliminate access to status extension and portability provisions intended to assist them, and potentially force them to leave their homes in the United States at a moment's notice.

While enhancing these protections, the regulatory changes in this proposed rule would remain consistent with current policy concerning these workers' ability to obtain adjustment of status or an immigrant visa. The proposed rule, for example, would continue to require a valid and qualifying offer of employment (unless the requirement for such an offer is exempted by law) at the time a worker seeks to apply for or receive adjustment of status. As discussed in Section IV.B.1. of this proposed rule, beneficiaries of employment-based immigrant visa petitions who seek to adjust status based on continuing offers of employment from petitioning employers would be unaffected by this rule. If the petitioning employer of such a beneficiary withdraws or goes out of business, the beneficiary must have a new offer of employment and a new immigrant visa petition filed on his or her behalf in order to file for or obtain adjustment of status, consistent with current policy. See proposed 8 CFR 245.25(a)(2) and 205.1(a)(3)(iii)(C).

The analysis is similar for beneficiaries of immigrant visa petitions who seek to adjust status based in part on the portability protection of section 204(j) of the INA. Where the petitioner withdraws or goes out of business 180 days or more after the



adjustment of status application is filed, the beneficiary would continue to be required to demonstrate that he or she has a new and valid offer of employment in a same or similar occupational classification, consistent with section 204(j). See proposed 8 CFR 245.25(b)(2) and 205.1(a)(3)(iii)(D). Thus, in all instances of petition withdrawal or business termination where an offer of employment is necessary, the beneficiary either will need a new immigrant visa petition filed on his or her behalf, or a new offer of employment consistent with section 204(j), in order to file for or obtain adjustment of status. Id.

Accordingly, DHS believes that the proposed changes provide important stability and flexibility to workers who have been sponsored for permanent residence while also protecting against fraud and misuse. First, as just discussed, beneficiaries of approved employment-based immigrant visa petitions will continue to be unable to rely on such petitions for the purposes of adjusting status or obtaining an immigrant visa in cases where the petitioning employer has withdrawn or gone out of business, unless eligible for section 204(j) portability. Second, DHS is proposing to restrict revocation based on petitioner withdrawal or business termination only for petitions that have been approved for 180 days or more. See proposed 8 CFR 205.1(a)(3)(iii)(C) and (D). In addition to the period that it typically takes for a petitioning employer to obtain a labor certification from DOL and approval of an immigrant visa petition from DHS, the 180-day requirement would provide additional assurance that the petition was bona fide when filed. Finally, the proposed amendments do not in any way restrict DHS' current ability to revoke the approval of any immigrant visa petition for fraud, material misrepresentation, the invalidation or revocation of a labor certification, error, or any other circumstance that

DHS believes is good cause for revocation. See 8 CFR 205.1(a)(3)(iii)(A) and 205.2; see also 8 CFR 205.1(a)(3)(iii)(C) and (D).

DHS welcomes public comment on all aspects of this proposed change.

## **2. Retention of Priority Dates**

DHS also proposes to amend its regulations to enhance the ability of beneficiaries with approved EB-1, EB-2 or EB-3 immigrant visa petitions to retain the priority dates associated with those petitions and rely on them when seeking to obtain an immigrant visa or adjust status.

First, the proposed rule would update DHS regulations to provide clarity to all beneficiaries of employment-based immigrant visa petitions regarding the establishment of priority dates and to eliminate obsolete references in this area. See proposed 8 CFR 204.5(d). DHS regulations currently provide how priority dates are determined for employment-based immigrant visa petitions that: (1) are accompanied by labor certifications; (2) are accompanied by applications for Schedule A designation; or (3) are filed on behalf of special immigrants described in section 203(b)(4) of the INA. See 8 CFR 204.5(d). The regulations, however, do not specify how priority dates are established for other employment-based immigrant visa petitions that do not require labor certifications—such as petitions filed under the EB-1 or EB-5 preference categories. DHS thus proposes to revise its regulations to clarify that the priority date of any properly filed employment-based immigrant visa petition that does not require a labor certification (including EB-1 petitions, EB-2 petitions involving national interest waivers, EB-5 petitions, and petitions filed on or after October 1, 1991 on behalf of special immigrants) will be the date the completed, signed petition is properly filed with DHS. See proposed

8 CFR 204.5(d). The proposed rule would also delete a reference to “evidence that the alien’s occupation is a shortage occupation within the Department of Labor’s Labor Market Information Pilot Program,” as that reference is now obsolete. Id.

Second, the proposed rule would clarify and expand the ability of beneficiaries of approved EB-1, EB-2, and EB-3 immigrant visa petitions to retain their priority dates for use with subsequently filed EB-1, EB-2, and EB-3 petitions. See proposed 8 CFR 204.5(e). Current regulations generally allow such retention, but not where DHS denies the petition or revokes its approval under section 204(e) or 205 of the INA, 8 U.S.C. 1154(e) or 1155. See 8 CFR 204.5(e). DHS proposes to revise these regulations so that the priority dates of EB-1, EB-2, and EB-3 petitions may be used for subsequently filed EB-1, EB-2 and EB-3 petitions, unless USCIS denies the petition (or otherwise fails to approve it) or revokes the petition’s approval due to: (1) fraud or a willful misrepresentation of a material fact; (2) a determination that the petition was approved in error; or (3) revocation or invalidation of the labor certification associated with the petition. See proposed 8 CFR 204.5(e). The priority date of a petition that has its approval revoked on these grounds would not be retained, regardless of whether the petition’s approval was previously revoked on other grounds.

This change, in combination with the proposed changes to the automatic revocation provisions discussed above, would effectively expand beneficiaries’ ability to retain the priority dates of their approved EB-1, EB-2, and EB-3 petitions, particularly those that are later withdrawn or that involve petitioning employers that go out of business. Notably, the ability to retain priority dates under this amendment would begin 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. This change would provide greater certainty and stability for beneficiaries in their pursuit of permanent residence in the United States. The change would also continue to allow DHS to restrict retention of priority dates in cases that merit such restriction, including in cases where the petition does not satisfy the pertinent legal requirements, cases where the underlying labor certification has been invalidated or revoked, cases involving fraud or willful misrepresentation, and cases involving DHS error.

DHS welcomes public comment on all aspects of this proposed change.

### **3. Nonimmigrant Grace Periods**

To further improve stability and flexibility for high-skilled nonimmigrant workers, DHS proposes to authorize and improve grace periods in certain nonimmigrant visa classifications. As further described below, DHS is effectively proposing to extend the current grace periods for H-1B nonimmigrant workers—which authorize admission up to 10 days before and after the relevant validity period—to certain other high-skilled nonimmigrant classifications (E-1, E-2, E-3, L-1, and TN classifications). DHS further proposes to make a grace period available in these classifications, as well as the H-1B and H-1B1 nonimmigrant classifications, for up to 60 days during the period of petition validity (or other authorized validity period).

#### **a. Extending 10-Day Grace Periods to Certain Nonimmigrant Classifications**

First, DHS proposes to provide grace periods similar to those currently available to H-1B nonimmigrant workers to other high-skilled nonimmigrant workers. See proposed 8 CFR 214.1(l)(i). DHS regulations currently allow H-1B nonimmigrant workers to receive grace periods of up to 10 days before the validity periods of their H-

1B petitions begin and 10 days after such validity periods end. See 8 CFR 214.2(h)(13)(i)(A). During any such grace period, an H-1B nonimmigrant worker is considered “admitted to the United States” but not authorized to work. See 8 CFR 214.2(h)(13)(i)(A). The initial 10-day grace period allows H-1B nonimmigrant workers to make necessary preparations for their employment in the United States. The 10-day grace period at the end of the validity period provides a short window in which H-1B nonimmigrant workers may either (1) find new qualifying H-1B employment and extend their H-1B status or (2) get their affairs in order before departing the United States. See id.

The proposed rule would extend similar 10-day grace periods to individuals in certain other employment-authorized nonimmigrant visa classifications, namely the E-1, E-2, E-3, L-1, and TN classifications. Providing grace periods in such classifications—which, like the H-1B classification, are generally available to high-skilled individuals and authorize stays of multiple years—reflects goals similar to those underlying AC21 and serves the national interest by promoting stability and flexibility for such workers. A 10-day grace period before the petition or authorized validity period begins allows these nonimmigrants a reasonable amount of time to enter the United States and prepare for their employment in the country. A 10-day grace period after their petition or authorized validity period ends provides a reasonable amount of time to depart the United States or take other actions to extend, change, or otherwise maintain lawful status after their period of authorized employment ends.

Consistent with the current grace periods in the H-1B classification, the proposed rule would not allow eligible nonimmigrants to be employed during either of the 10-day

grace periods. See proposed 8 CFR 214.1(l). Such periods are provided merely for eligible nonimmigrants to prepare for employment, seek new employment in order to extend or change status, or prepare for departure from the United States. Further, the proposed rule would extend grace periods to dependents of eligible principal nonimmigrant workers. Id. If a principal nonimmigrant worker is eligible to extend his or her stay under a grace period provided by this proposed rule, his or her dependent would also be eligible. Id. Finally, DHS also proposes to amend the existing grace period provision in current regulation with respect to the H-1B classification to align such provisions with the proposed cross-classification provision described above. See proposed 8 CFR 214.2(h)(13)(i)(A).

DHS welcomes public comment on all aspects of this proposed change.

**b. Providing a 60-Day Grace Period to Certain Nonimmigrant Classifications**

Second, the proposed rule would authorize a grace period in the E-1, E-2, E-3, H-1B1, L-1, and TN classifications, as well as the H-1B classification, during the period of petition validity (or other authorized validity period). To enhance job portability for these high-skilled nonimmigrants, DHS proposes to generally establish a one-time grace period during an authorized nonimmigrant validity period of up to 60 days or until the existing validity period ends, whichever is shorter, whenever employment ends for these individuals. See proposed 8 CFR 214.1(l)(ii). DHS currently provides flexibility in other nonimmigrant classifications, such as those for F-1 nonimmigrant students and J-1 nonimmigrant exchange visitors.<sup>70</sup> DHS believes that adding this one-time interim grace

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<sup>70</sup> DHS regulations currently provide 60- and 30-day grace periods to F-1 nonimmigrant students and J-1 nonimmigrant exchange visitors, respectively. See 8 CFR 214.2(f)(5)(iv) and (j)(1)(ii). F-1 students who

period of up to 60 days upon cessation of employment for additional classifications of nonimmigrants would allow nonimmigrants in the affected classifications sufficient time to respond to sudden or unexpected changes related to their employment. Such time may be used to seek new employment, seek a change of status to a different nonimmigrant classification, or make preparations for departure from the United States.

Under current policy, for example, an H-1B nonimmigrant worker whose employment ends—whether voluntarily or upon being laid off or terminated by the H-1B employer—is generally considered to be in violation of his or her status and must depart the United States immediately. Under the proposed rule, however, H-1B nonimmigrant workers would be afforded up to 60 days upon the end of employment to seek new H-1B employment and thus extend their H-1B status without having to immediately depart the country. Accordingly, this interim grace period would further support the enhanced job portability protections provided to H-1B nonimmigrant workers by AC21, which authorizes them to change jobs or employers upon the filing of a non-frivolous H-1B petition, if otherwise eligible. The proposed change described in this section would provide H-1B and certain other nonimmigrant workers a small degree of stability and flexibility when faced with sudden changes to their employment.

As with the 10-day grace periods discussed in the preceding section, eligible nonimmigrants would not be authorized for employment during an interim grace period

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have completed their course of study and any subsequently authorized practical training are granted an additional 60-day period to prepare for departure or transfer to another school. See 8 CFR 214.2(f)(5)(iv). The 30-day grace period for J-1 nonimmigrant exchange visitors is available to them during the validity period of their J-1 duration of status, which includes the duration of their J-1 exchange program and a 30-day departure preparation period. See 8 CFR 214.2(j)(1)(ii).

of up to 60 days proposed by this rule.<sup>71</sup> See proposed 8 CFR 214.1(l). Also consistent with the 10-day grace periods, the proposed rule would extend the interim grace periods to dependents of eligible principal nonimmigrant workers. Id. During any interim period in which a principal nonimmigrant worker is eligible to extend his or her stay under this proposed change, his or her dependent would also be eligible.

DHS welcomes public comment on all aspects of this proposal, including on the appropriate length of the grace period and on the nonimmigrant classifications that should be afforded eligibility for such grace periods.

#### **4. Eligibility for Employment Authorization in Compelling Circumstances**

DHS proposes to further enhance stability and flexibility for high-skilled nonimmigrant workers who are the beneficiaries of approved immigrant visa petitions filed by sponsoring U.S. employers and who face compelling circumstances while they wait for their immigrant visas to become available. As discussed in Section III.E., the continually expanding backlogs for employment-based immigrant visas can place sponsored workers and their sponsoring employers in untenable positions.

Currently, sponsoring employers and sponsored workers cannot deviate from the specific job offer described in a labor certification and approved employment-based immigrant visa petition until the worker: (1) has an immigrant visa immediately available to him or her; (2) has filed an application for adjustment of status; and (3) has such application pending for at least 180 days.<sup>72</sup> See INA section 204(j), 8 U.S.C.

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<sup>71</sup> If a qualifying H-1B petition is properly filed on the H-1B nonimmigrant worker's behalf during this 60-day grace period, DHS would consider the individual to no longer be in the 60-day grace period as they would be employment authorized under section 214(n) of the INA, 8 U.S.C. 1184(n).

<sup>72</sup> Over 75 percent of principal beneficiaries of employment-based immigrant visa petitions, sponsored for LPR status by employers based on their skills and contributions to the U.S. economy, are seeking classification as EB-2 and EB-3 immigrants and thus, with limited exception, are subject to a labor market



1154(j). Before all three of these conditions are met, an employer generally cannot promote the sponsored worker, move the worker to another position, or transfer the worker to the same or a similar position in a different geographic area without jeopardizing the immigrant visa petition approved on the worker's behalf, regardless of the circumstances. Neither can a sponsored worker accept employment with an employer other than the sponsoring employer without creating the same risk. Whether the worker and his or her family are facing a medical or other emergency is currently immaterial. Neither is it relevant that the worker may have faced retaliation from the employer for engaging in protected conduct, or that the lack of flexibility may result in significant business or economic harm to the employer or worker.

To provide flexibility in the face of such compelling circumstances, DHS proposes to extend employment authorization to a discrete subset of high-skilled workers who are the beneficiaries of approved employment-based immigrant visa petitions and are in the United States in certain nonimmigrant statuses. Specifically, the proposed rule would provide the ability for individuals to apply for employment authorization for 1 year when they meet all of the following criteria: (1) the individual is currently in the United States and maintaining E-3, H-1B, H-1B1, O-1 or L-1 nonimmigrant status; (2) the individual is the beneficiary of an approved immigrant visa petition under the EB-1, EB-2 or EB-3 classification; (3) the individual does not have an immigrant visa immediately available; and (4) the individual can demonstrate to the satisfaction of DHS compelling circumstances that justify an independent grant of employment authorization.

See proposed 8 CFR 204.5(p)(1). DHS is proposing this change to provide qualified

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test requiring a labor certification from the Department of Labor. See DHS Yearbook of Immigration Statistics, Table 7 <http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents>.

nonimmigrants who are beneficiaries of approved employment-based immigrant visa petitions, but are awaiting an immigrant visa, a stopgap measure for retaining employment authorization for a limited period when compelling circumstances arise.

DHS anticipates that use of this proposal, if finalized, would be limited for various reasons. First, DHS believes that the other changes proposed in this rule to enhance flexibility for employers and nonimmigrant workers, if finalized, would significantly decrease instances where this proposal will be needed. Second, nonimmigrant workers will have significant incentive to choose other options, as the proposal discussed in this section would require the worker to relinquish his or her nonimmigrant status, thus restricting his or her ability to change nonimmigrant status or adjust status to that of a lawful permanent resident. Accepting the employment authorization under this proposal, for example, would generally require the worker to forego adjusting status in the United States and instead seek an immigrant visa abroad through consular processing. Finally, DHS anticipates that a limited number of nonimmigrant workers with approved EB-1, EB-2, or EB-3 immigrant visa petitions will be able to demonstrate compelling circumstances justifying an independent grant of employment authorization. Employment authorization based on compelling circumstances will not be available to a nonimmigrant worker solely because his or her statutory maximum time period for nonimmigrant status is approaching or has been reached. Likewise, employment authorization generally would not be available to a nonimmigrant if the tendered compelling circumstance is within his or her control.

DHS is not proposing to define the term “compelling circumstances” at this time, as the Department seeks to retain flexibility as to the types of compelling circumstances

that clearly warrant the Secretary's exercise of discretion in granting employment authorization. DHS, however, has currently identified four circumstances in which it may consider granting employment authorization under the proposed change:

- **Serious Illnesses and Disabilities.** The nonimmigrant worker can demonstrate that he or she, or his or her dependent, is facing a serious illness or disability that entails the worker moving to a different geographic area for treatment or otherwise substantially changing his or her employment circumstances.
- **Employer Retaliation.** The nonimmigrant worker can demonstrate that he or she is involved in a dispute regarding the employer's illegal or dishonest activity as evidenced by, for example, a complaint filed with a relevant government agency or court, and the employer has taken retaliatory action that justifies granting separate employment authorization to the worker on a discretionary basis.
- **Other Substantial Harm to the Applicant.** The nonimmigrant worker can demonstrate that due to compelling circumstances, he or she will be unable to timely extend or otherwise maintain status, or obtain another nonimmigrant status, and absent continued employment authorization under this proposal the applicant and his or her family would suffer substantial harm. Such circumstances, for example, may involve an H-1B nonimmigrant worker who has been applying an industry-specific skillset in a high-technology sector for years with a U.S. entity that is unexpectedly terminating its business, where the worker is able to establish: (1) that the same or a similar industry (e.g., nuclear energy, aeronautics, or artificial intelligence) does not materially exist in the home country, and (2) that the resulting inability to find productive employment would

cause significant hardship to the worker and his or her family if required to return home. In such circumstances, the employment authorization proposal would provide the individual with an opportunity to find another employer to sponsor him or her for immigrant or nonimmigrant status and thereby protect the worker and his or her family members from the substantial harm they would suffer if required to depart the United States.

- **Significant Disruption to the Employer.** The nonimmigrant worker can show that due to compelling circumstances, he or she is unexpectedly unable to timely extend or change status, there are no other possible avenues for the immediate employment of such worker with that employer, and the worker's departure would cause the petitioning employer substantial disruption to a project for which the worker is a critical employee. Such circumstances, for example, may include the following:

- An L-1B nonimmigrant worker is sponsored for permanent residence by an employer that subsequently undergoes corporate restructuring (e.g., a sale, split, or spin off) such that the worker's new employer is no longer a multinational company eligible to employ L-1B workers, there are no available avenues to promptly obtain another work-authorized nonimmigrant status for the worker, and the employer would suffer substantial disruption due to the critical nature of the worker's services. In such cases, the employment authorization proposal would provide the employer and worker a temporary bridge allowing for continued

employment while they continue in their efforts to obtain a new nonimmigrant or immigrant status.

- An H-1B nonimmigrant worker is providing critical work on biomedical research for an entity affiliated with an institution of higher education, thus making the entity exempt from the H-1B cap, when the funding for the research unexpectedly changes and now comes through a for-profit entity, thus causing the entity to lose its cap-exempt status. In cases where the worker is unable to quickly obtain H-1B status based on a cap-subject H-1B petition or another work-authorized nonimmigrant status, the employment authorization proposal would provide a temporary bridge for continued employment of the worker when his or her departure would create substantial disruption to the employer's biomedical research.

In each of these examples of situations where USCIS may find compelling circumstances, the proposed provision would provide individuals with the ability to retain employment authorization and the opportunity to find a new sponsoring employer or explore options with the current sponsoring employer. DHS invites public comment on these examples of compelling circumstances or other types of compelling circumstances that may warrant a discretionary grant of separate employment authorization. DHS also welcomes public comment on the manner in which applicants should be expected to document such compelling circumstances.

As noted above, DHS is proposing this employment authorization only for certain workers who are the beneficiaries of approved employment-based immigrant visa petitions and who are in the United States in E-3, H-1B, H-1B1, O-1, or L-1

nonimmigrant status. See proposed 8 CFR 204.5(p)(1)(i). The requirement that the individual must be the beneficiary of an approved employment-based immigrant visa petition is intended to limit employment authorization to those workers who are seeking employment-based permanent residence in the United States and are merely awaiting an immigrant visa and either: (1) are the subject of an approved labor certification indicating that their employment would not harm U.S. workers or (2) are in a classification that Congress has chosen to prioritize by exempting them from the labor certification requirement. DHS is further limiting eligibility to the listed nonimmigrant classifications as they represent the vast majority of high-skilled nonimmigrant workers who are sponsored for permanent residence by U.S. employers.<sup>73</sup> DHS invites public comment on the listed nonimmigrant classifications and whether other nonimmigrant classifications should be considered. DHS also invites public comment on the requirement that applicants be the beneficiaries of approved EB-1, EB-2, or EB-3 immigrant visa petitions.

DHS is further proposing that workers who have been granted 1 year of employment authorization under the proposed rule would not be able to extend such employment authorization at the end of the 1-year period unless certain criteria are met. DHS is proposing to limit renewal of such employment authorization to those workers who can show that they continue to be the principal beneficiary of an approved EB-1, EB-2 or EB-3 immigrant visa petition and either: (1) the worker continues to face compelling circumstances; or (2) the worker has a priority date that is less than 1 year

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<sup>73</sup> Based on USCIS analysis of approved employment-based immigrant visa petitions with the “beneficiary’s current nonimmigrant status” field completed, approximately 97 percent held H-1B or H-1B1 status, and approximately 2.9 percent held L-1 nonimmigrant status. Approximately 10.5 percent of approved petitions had missing information for that field.

from the current cut-off date for the relevant employment-based category and country of nationality in the most recent visa bulletin published by the Department of State. See proposed 8 CFR 204.5(p)(3)(i).

DHS further proposes that individuals would be ineligible to obtain employment authorization under this rule, whether initial or renewal, if at the time of the filing of the EAD application the alien's priority date is more than 1 year beyond the date on which immigrant visa numbers were authorized to be issued to individuals with the same priority date for the relevant employment-based category and country of nationality. DHS believes this outer limit would discourage individuals from relying on the proposed employment authorization in lieu of completing the employment-based immigrant visa process. See proposed 8 CFR 204.5(p)(5).

DHS also proposes to generally require these applicants to appear in person at a USCIS Application Support Center (ASC) to submit biometric information and pay a biometric fee as prescribed in 8 CFR 103.7(b)(1)(i)(C). See proposed 8 CFR 204.5(p)(4). This requirement would allow DHS to better assess the applicant's potential risk to public safety and national security, and to enable DHS to make a more informed decision when exercising discretion to approve or deny such application for employment authorization. See 8 CFR 274a.13(a)(1). DHS also is proposing that, in all cases, an individual would be ineligible for employment authorization under this provision if convicted of any felony or two or more misdemeanors. See proposed 8 CFR 204.5(p)(5)(i). DHS welcomes public comment on these additional requirements.

With regard to dependents of qualifying principal nonimmigrants, DHS proposes to extend employment authorization eligibility to those dependent spouses and children

who are also present in the United States in nonimmigrant status, but only if the principal spouse or parent is granted employment authorization under this rule and such authorization has not been terminated or revoked. See proposed 8 CFR 204.5(p)(2). The validity period of the family member's employment authorization may not extend beyond the period authorized for the principal spouse or parent. Id. Dependent family members seeking renewals of employment authorization would be subject to these same limitations. See proposed 8 CFR 204.5(p)(3)(ii).

DHS further proposes conforming amendments to 8 CFR 274a.12(c), which lists classes of individuals who must apply for employment authorization. These amendments would add two new categories of individuals eligible for employment authorization, one for the principal beneficiaries described above and one for their dependent spouses and children. See proposed 8 CFR 274a.12(c)(35) and (36). Under these regulations, qualifying individuals would not be permitted to engage in employment until USCIS approves, as a matter of discretion, the employment authorization application and issues an EAD (Form I-766, or successor form). See 8 CFR 274a.12(c) and 8 CFR 274a.13(a)(1).

DHS welcomes public comment on all aspects of this proposal, including the appropriate validity period for grants of employment authorization and the nonimmigrant visa classifications that should be eligible to request such employment authorization.

## **5. H-1B Licensing Requirements**

DHS proposes to amend its regulations consistent with current policy for determining when H-1B status may be granted notwithstanding the H-1B beneficiary's inability to obtain a required license. See proposed 8 CFR 214.2(h)(4)(v)(C)(2).



Generally, if the beneficiary of an H-1B petition requires a state or local license to fully perform the duties of the occupation described in the petition, the petition may not be approved unless the beneficiary possesses the license. See 8 CFR 214.2(h)(4)(v)(A). However, this sometimes results in a “Catch-22” situation, as the state or local licensing authority may not issue licenses to individuals who do not have social security numbers or cannot otherwise prove employment authorization (such as with an approved H-1B petition). Under current policy, DHS may approve an H-1B petition in such cases for a 1-year period, provided that the only obstacle to obtaining licensure is the lack of a social security number or employment authorization.<sup>74</sup>

DHS is now proposing to formalize this policy in its H-1B regulations. Under the proposed rule, DHS may approve an H-1B petition for a 1-year validity period if a state or local license to engage in the relevant occupation is required and the appropriate licensing authority will not grant such license absent evidence that the beneficiary has been issued a social security number or granted employment authorization. See proposed 8 CFR 214.2(h)(4)(v)(C)(2)(i). Petitioners filing H-1B petitions on behalf of such beneficiaries would be required to submit evidence from the relevant licensing board indicating that the only obstacle to the beneficiary’s licensure is the lack of a social security number or employment authorization. Id. In addition, the petitioner must establish that the beneficiary satisfies all other regulatory and statutory requirements for engaging in the occupation. In other words, the petitioner would need to demonstrate that

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<sup>74</sup> USCIS Memorandum from Donald Neufeld, “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.” (March 21, 2008) (“Neufeld Memo March 2008”), INS Memorandum from Thomas Cook, “Social Security Cards and the Adjudication of H-1B Petitions” (Nov. 20, 2001) (“Cook Memo Nov. 2001”).

at the time of the petition's filing, the beneficiary meets the educational, training, experience, or other substantive requirements for obtaining the relevant license (other than acquiring a social security number or being employment authorized).

Moreover, the petitioner would generally be required to demonstrate that at the time of the petition's filing, the beneficiary has already filed an application for the relevant license in accordance with state or local licensing procedures. See proposed 8 CFR 214.2(h)(4)(v)(C)(2)(ii). In the alternative, the petitioner would be required to demonstrate that the beneficiary cannot file such an application due to the lack of a social security number or employment authorization.<sup>75</sup> Id. The proposed rule would also make clear that a beneficiary who has been approved for a 1-year validity period may not obtain an extension of H-1B status without proof of licensure. Any subsequent H-1B petition filed on behalf of such a beneficiary with respect to the same occupation must contain proof that the beneficiary has obtained the required license. See proposed 8 CFR 214.2(h)(4)(v)(C)(3).

The proposed rule would also clarify that an individual without an occupational license may obtain H-1B status if he or she will be employed in a state that allows such an unlicensed individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel. In such cases, DHS will examine the nature of the H-1B nonimmigrant worker's proposed duties and the level at which they will be performed, as well as evidence provided by the petitioner as to the identity, physical location, and

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<sup>75</sup> For example, as of 2014, the State of California requires provision of a social security account number when applying for an acupuncture license. According to its website, California will not process an application on which the applicant does not provide a social security account number. See [www.acupuncture.ca.gov/pubs\\_forms/license\\_app.pdf](http://www.acupuncture.ca.gov/pubs_forms/license_app.pdf). In such cases under the proposed rule, the petitioner would be allowed to obtain a 1-year approval for the unlicensed H-1B beneficiary.

credentials of the individual(s) who will supervise the H-1B nonimmigrant worker. See proposed 8 CFR 214.2(h)(4)(v)(C)(1). If the facts demonstrate that the H-1B nonimmigrant worker will fully perform the duties of the occupation under the supervision of licensed senior or supervisory personnel in that occupation, H-1B classification may be granted. Id.

DHS invites public comment on all aspects of this proposal.

### **C. Processing of Applications for Employment Authorization Documents**

DHS is also proposing to update its regulations governing the processing of Applications for Employment Authorization (Forms I-765). First, to help prevent gaps in employment authorization, DHS proposes to automatically extend the validity of expiring EADs for up to 180 days from such document's and such employment authorization's expiration date in certain circumstances upon the timely filing of an application to renew such documents. Such automatic renewal would be available to individuals with pending applications for adjustment of status and other employment-authorized individuals who: (1) are seeking renewal of an EAD (and, if applicable, employment authorization) based on the same employment authorization category under which it was granted (or the renewal application is for an individual approved for Temporary Protected Status (TPS) whose EAD was issued pursuant to 8 CFR 274a.12(c)(19)); and (2) either continue to be employment authorized incident to status beyond the expiration of the EAD or are applying for renewal under a category that does not first require adjudication of an underlying application, petition, or request. Second, to address national security and fraud concerns, DHS is proposing to eliminate the current regulatory provisions that require adjudication of EAD applications within 90 days of filing and that authorize

interim EADs in cases where such adjudications are not conducted within the 90-day timeframe. Taken together, these updates would provide additional stability and certainty to employment-authorized individuals and their U.S. employers, while reducing opportunities for fraud and better accommodating increased security measures, including technological advances that utilize centralized production of tamper-free documents.

### **1. Automatic Extensions of EADs in Certain Circumstances**

First, DHS proposes to amend its regulations to help prevent gaps in employment authorization for certain employment-authorized individuals who are seeking to renew expiring EADs. Under the proposed rule, such individuals who fall within certain classes of individuals eligible for employment authorization may have the validity of their EADs (and, if necessary, their employment authorization as well) extended for up to 180 days from such document's and such employment authorization's expiration date upon the timely filing of an application to renew such EAD (or the renewal application is for an individual approved for TPS whose EAD was issued pursuant to 8 CFR 274a.12(c)(19)). See proposed 8 CFR 274a.13(d)(1). Specifically, the rule would authorize automatic extensions of their EADs—and, for those qualifying individuals who are not employment authorized incident to status, extensions of their employment authorization<sup>76</sup>—so long as all of the following conditions are met:

- (1) The individual files a request for renewal of his or her EAD (currently through an Application for Employment Authorization, Form I-765) prior to its expiration date.

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<sup>76</sup> For classes of employment-eligible individuals listed at 8 CFR 274a.12(c), employment authorization is based on the adjudication of the Application for Employment Authorization and is not incident to their underlying immigration status. For such individuals who are covered by this rule, DHS is proposing to extend both their underlying employment authorization as well as their EADs.

- (2) The individual is requesting renewal based on the same employment authorization category under which the expiring EAD was granted (as indicated on the face of the EAD), or the individual has been approved for TPS and his or her EAD was issued pursuant to 8 CFR 274a.12(c)(19).
- (3) The individual either continues to be employment authorized incident to status beyond the expiration of the EAD or is applying for renewal under a category that does not first require adjudication of an underlying application, petition, or request.

Id. An expiring EAD that has its validity automatically extended under this proposal would continue to be subject to any limitations and conditions that applied before the extension. See proposed 8 CFR 274a.13(d)(2). Moreover, although the validity of such an EAD would be extended for up to 180 days, such validity is automatically terminated upon issuance of notification of a decision denying the individual's renewal application. See proposed 8 CFR 274a.13(d)(3). The automatic extension could also be terminated before a decision is made on the renewal application through written notice to the applicant, notice published in the Federal Register, or any other applicable authority.

Moreover, DHS is proposing that the expired EAD, in combination with a Notice of Action (Form I-797C) indicating timely filing of the application to renew the EAD (provided it lists the same employment authorization category as that listed on the expiring or expired EAD), would be considered an unexpired EAD for purposes of complying with Employment Eligibility Verification (Form I-9) requirements. See proposed 8 CFR 274a.13(d)(4). Thus, when the expiration date on the face of the EAD is reached, an individual who is continuing in his or her employment with the same

employer may, along with the employer, update the previously completed Form I-9 to reflect the extended expiration date based on the automatic extension while the renewal is pending. Reverification of employment authorization, however, would not be triggered until after the expiration of the additional period of validity granted through the automatic extension provisions discussed above. See proposed 8 CFR 274a.2(b)(1)(vii).

These provisions would significantly mitigate the risk of gaps in employment authorization and required documentation for eligible individuals, thereby benefitting them and their employers. For compliance with Form I-9 documentation requirements, however, individuals would need to file their renewal applications far enough in advance to receive the Notice of Action (Form I-797C), which is necessary to document that filing for their employers, prior to the expiration of their EADs. The Form I-797C generation and issuance process is currently automated such that it is able to issue forms within a few days after receiving an Application for Employment Authorization. DHS expects that applicants would generally receive the Form I-797C within 2 weeks of the date of filing.<sup>77</sup>

As discussed, DHS is proposing an automatic extension period of up to 180 days past the expiration date noted on the face of the EAD for qualifying individuals. DHS believes that this time period is reasonable and provides more than ample time for USCIS to complete the adjudication process based on USCIS's current 3-month average processing time for Applications for Employment Authorization.<sup>78</sup> Additionally, this 180-day automatic extension period is similar to that used in other contexts and would

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<sup>77</sup> Depending on any significant surges in filings, however, there may be periods in which USCIS takes longer than 2 weeks to issue Notices of Action (Forms I-797C).

<sup>78</sup> See current USCIS processing timeframes at <https://egov.uscis.gov/cris/processTimesDisplayInit.do>.

thus provide consistency for employers that are responsible for verifying employment authorization. For example, DHS has a long-standing policy of providing 180-day automatic extensions of EADs to re-registering beneficiaries of Temporary Protected Status (TPS) when the re-registration period does not provide sufficient time to renew EADs.<sup>79</sup> DHS regulations also provide certain F-1 nonimmigrants seeking extensions of Optional Practical Training (OPT) with automatic extensions of their employment authorization for up to 180 days. See 8 CFR 274a.12(b)(6)(iv).

As noted above, DHS is proposing two conditions to ensure that only eligible aliens receive automatic extensions of their EADs and thus to protect the employment authorization program from abuse. First, DHS is proposing to require that the renewal application be based on the same employment authorization category as that indicated on the expiring EAD, including renewal applications based on TPS re-registration filed by applicants who still hold EADs that were initially issued under 8 CFR 274a.12(c)(19). See proposed 8 CFR 274a.13(d)(1)(ii). Because the resulting Notice of Action (Form I-797C) would indicate the employment authorization category cited in the application,<sup>80</sup> this requirement would help to ensure, both to DHS and to employers, that such a notice was issued in response to a timely filed renewal application. Second, DHS is proposing to limit eligibility for automatic extensions to individuals who continue to be employment authorized incident to status beyond the expiration of the EAD or who are seeking to renew employment authorization in a category in which eligibility for such renewal is not

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<sup>79</sup> See, e.g., 80 FR 51582 (Aug. 25, 2015) (Notice auto-extending EADs of Haitian TPS beneficiaries for 6 months).

<sup>80</sup> The Notice of Action that TPS beneficiaries will receive may not necessarily be based on the filing of a Form I-765, but instead on their TPS re-registration application filed on Form I-821, Application for Temporary Protected Status. In such cases, the employment authorization category would not be listed. USCIS intends to revise the Notices of Action issued to TPS beneficiaries to indicate the auto-extension provided by this rule.

contingent on a USCIS adjudication of a separate, underlying application, petition, or request. See proposed 8 CFR 274a.13(d)(1)(iii). This limitation would similarly help to ensure that only individuals eligible for employment authorization are able to extend their employment authorization under this proposal.

Based on the above parameters, DHS has identified 15 employment authorization categories where renewal applicants would be able to receive automatic extensions under this proposed rule. Among these are applicants for adjustment of status. So long as their applications for adjustment of status remain pending or USCIS determines, upon written notice to the applicant or notice published in the Federal Register, that it must terminate the auto-extension by category, these applicants are eligible for employment authorization under current regulation. See 8 CFR 274a.12(c)(9). Because such eligibility is not contingent on the adjudication of a separate application, petition, or request, DHS believes it is reasonable to make automatic extensions available to such individuals. The 15 categories of employment authorization that would allow for automatic extensions under this rule are:

- Aliens admitted as refugees. See 8 CFR 274a.12(a)(3).
- Aliens granted asylum. See 8 CFR 274a.12(a)(5).
- Aliens admitted as parents or dependent children of aliens granted permanent residence under section 101(a)(27)(I) of the INA, 8 U.S.C. 1101(a)(27)(I). See 8 CFR 274a.12(a)(7).
- Aliens admitted to the United States as citizens of the Federated States of Micronesia or the Marshall Islands pursuant to agreements between the United States and the former trust territories. See 8 CFR 274a.12(a)(8).



- Aliens granted withholding of deportation or removal. See 8 CFR 274a.12(a)(10).
- Aliens granted Temporary Protected Status (TPS) (regardless of the employment authorization category on their current EADs).<sup>81</sup> See 8 CFR 274a.12(a)(12) and (c)(19).
- Aliens who have properly filed applications for TPS and who have been deemed prima facie eligible for TPS under 8 CFR 244.10(a) and have received an EAD as a “temporary treatment benefit” under 8 CFR 244.10(e) and 274a.12(c)(19).
- Aliens who have properly filed applications for asylum or withholding of deportation or removal. See 8 CFR 274a.12(c)(8).
- Aliens who have filed applications for adjustment of status under section 245 of the INA, 8 U.S.C. 1255. See 8 CFR 274a.12(c)(9).
- Aliens who have filed applications for suspension of deportation under section 244 of the INA (as it existed prior to April 1, 1997), cancellation of removal pursuant to section 240A of the INA, or special rule cancellation of removal under section 309(f)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. See 8 CFR 274a.12(c)(10).
- Aliens who have filed applications for creation of record of lawful admission for permanent residence. See 8 CFR 274a.12(c)(16).
- Aliens who have properly filed legalization applications pursuant to section 210 of the INA, 8 U.S.C. 1160. See 8 CFR 274a.12(c)(20).

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<sup>81</sup> DHS is further proposing to specifically identify TPS beneficiaries as eligible for automatic extensions under this proposed rule. See proposed 8 CFR 274a.13(d)(1)(iii). This will include TPS beneficiaries who have existing EADs issued originally under 8 CFR 274a.12(a)(12) or (c)(19).

- Aliens who have properly filed legalization applications pursuant to section 245A of the INA, 8 U.S.C. 1255a. See 8 CFR 274a.12(c)(22).
- Aliens who have filed applications for adjustment pursuant to section 1104 of the LIFE Act. See 8 CFR 274a.12(c)(24).
- Aliens who are the principal beneficiaries or qualified children of approved VAWA self-petitioners, under the employment authorization category “(c)(31)” in the form instructions to the Application for Employment Authorization (Form I-765).

As noted above, each of these categories describes individuals who are eligible to apply for employment authorization after their EADs have expired and are thus candidates for automatic extensions of EADs under this proposed rule. To provide maximum clarity to the regulated public, DHS proposes to list these categories as eligible for automatic extensions on USCIS’ website.

DHS is not currently proposing to make automatic extensions of EADs (or attendant employment authorization) available to other classes of employment-authorized individuals. For example, DHS considered making automatic extensions available to certain H-4 nonimmigrants (i.e., spouses of H-1B nonimmigrant workers) who are eligible for employment authorization and EADs. See 8 CFR 274a.12(c)(26). Such H-4 nonimmigrants are generally eligible to renew their EADs, but only so long as they can extend their H-4 status, which is itself dependent on their spouses remaining in H-1B status. Thus, whether an H-4 nonimmigrant’s eligibility for employment authorization continues beyond the expiration date of his or her EAD is typically contingent upon adjudication of an underlying application to extend his or her stay in H-4 status and, in

most instances, an underlying petition to extend the stay of the H-1B nonimmigrant worker. In such cases, DHS cannot be reasonably assured that the individual will continue to be eligible to apply for employment authorization without first reviewing the underlying application, petition, or request. DHS thus does not propose to make automatic extensions of employment authorization available to this category, or to other categories in which employment authorization is contingent on adjudication of another application, petition, or request.

DHS welcomes public comment on all aspects of this proposal.

## **2. Elimination of 90-Day Processing Timeframe and Interim EADs**

Second, due to fraud and national security concerns, and in light of technological and process advances with respect to document production, DHS is proposing to eliminate certain existing regulations concerning the processing of Applications for Employment Authorization (Forms I-765). Specifically, DHS would eliminate the provision at 8 CFR 247a.13(d) that currently requires, with certain limited exceptions, the adjudication of Applications for Employment Authorization within 90 days of receipt.<sup>82</sup> DHS would also eliminate the provision in that regulation that requires the issuance of interim EADs with validity periods of up to 240 days when such an application is not

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<sup>82</sup> Excepted from the 90-day processing requirement are the following classes of aliens: applicants for asylum described in 8 CFR 274a.12(c)(8); certain H-4 spouses of H-1B nonimmigrants; and applicants for adjustment applying under the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA). Application processing for asylum applicants are governed by current 8 CFR 274a.13(a)(2) and do not include provisions for interim employment authorization documentation. The provision at 8 CFR 274a.13(d) also exempts adjustment applicants described in 8 CFR 245.13(j). In 2011, 8 CFR 245.13 was removed from DHS regulations. *See* 76 FR 53764, 53793 (Aug. 29, 2011). However, the cross-reference to 8 CFR 245.13(j) in current 8 CFR 274a.13(d) was inadvertently retained. Prior to its removal in 2011, 8 CFR 245.13 provided for adjustment of status for certain nationals of Nicaragua and Cuba pursuant to section 202 of the Nicaragua Adjustment and Central American Relief Act, Public Law 105–100, 111 Stat. 2160, 2193 (Nov. 19, 1997). The application period for benefits under this provision ended April 1, 2000. USCIS removed 8 CFR 245.13 from DHS regulations in 2011 as it no longer has pending applications pursuant to this provision. *See* 76 FR at 53793.

adjudicated within the 90-day period. In addition to the automatic extension provisions for renewal applications proposed in this rule, DHS would instead address processing timeframes through operational policy guidance that reinforces the Department's continued commitment to a 90-day processing timeframe and provides recourse to individuals whose case is nearing the 90-day mark, including the ability to contact USCIS to request prioritized processing.

DHS believes that the 90-day timeframe and interim EAD 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. The 90-day timeframe at 8 CFR 274a.13(d), for example, was established more than 20 years ago when Applications for Employment Authorization were adjudicated at local offices of legacy INS and corresponding documents were also produced by such offices. See 52 FR 16216, 16228 (May 1, 1987) (setting adjudication timeframe at 60 days); see also 56 FR 41767, 41787 (Aug. 23, 1991) (increasing adjudication timeframe to 90 days). At the time, EADs (then known as Forms I-688B) were produced by local offices that were equipped with stand-alone machines for such purposes. While decentralized card production resulted in immediate and customized customer service for the public, the cards that were produced did not contain state-of-the art security features and were thus susceptible to tampering and counterfeiting. Such deficiencies became increasingly apparent as the United States faced new and increasing threats to national security and public safety that did not exist when the current regulations were promulgated.

In response to these concerns, the former INS and DHS made considerable efforts to upgrade application procedures and leverage technology to enhance integrity, security, and efficiency in all aspects of the immigration process. For example, to combat the document security problem discussed above, the former INS took steps to centralize application filing locations and card production. By 2006, DHS fully implemented these centralization efforts.<sup>83</sup> DHS now requires that Applications for Employment Authorization be filed at remote processing centers.<sup>84</sup> Some classes of employment-eligible aliens are also required to appear at an Application Support Center (ASC) for collection of their biometric information before DHS can complete adjudication of such applications.<sup>85</sup> If DHS ultimately approves such an application, a card order is sent to a card production facility. The card facility produces a tamper-proof card reflecting the specific employment authorized category and mails that card to the applicant.

While the 90-day timeframe and interim EAD provisions at 8 CFR 274a.13(d) may have made sense when applications were processed and cards were produced at the local level, DHS believes that the intervening changes discussed above now require that such provisions be eliminated. DHS, for example, may be unable to meet the 90-day processing timeframe for applicants who are required to submit biometric information at

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<sup>83</sup> See USCIS Memorandum from Michael Aytes, “Elimination of Form I-688B, Employment Authorization Card” (Aug. 18, 2006). In January 1997, the former INS began issuing new, more secure EADs from a centralized location and gave it a new form number (I-766) to distinguish it from the less secure, locally produced EADs (Forms I-688B). DHS stopped issuing Form I-688B EADs from local offices altogether in 2006.

<sup>84</sup> Asylum applicants, however, make their request for employment authorization directly on the Application for Asylum and Withholding of Removal, Form I-589, and need not file a separate Application for Employment Authorization (Form I-765) following a grant of asylum. If they are requesting employment authorization based on their pending asylum application, they must file a separate request for employment authorization on Form I-765.

<sup>85</sup> For example, many individuals who concurrently file their Application for Employment Authorization with another application or petition, such as TPS applicants, must appear at an ASC for submission of their biometric information before DHS completes adjudication of their applications.

an ASC but who do not provide such information in a timely manner. DHS may also be unable to meet the 90-day timeframe in a given case where security checks remain pending. Given the fraud and national security concerns discussed above, DHS believes it is not prudent to issue interim EADs in such cases. Moreover, the 90-day timeframe constrains DHS' ability to maintain necessary levels of security when application receipt volumes suddenly increase, as well as the ability to implement security improvements if those improvements may further extend the adjudication of applications in certain cases.

Given these considerations, DHS believes that the 90-day timeframe and interim EAD provisions at 8 CFR 274a.13(d) do not provide sufficient flexibility to reconcile with DHS' core missions to enforce and administer our immigration laws and enhance security. Moreover, DHS notes that under current processing timelines, elimination of these provisions would not have any noticeable effect on the vast majority of applicants.<sup>86</sup> DHS remains committed to the current 90-day processing goal, as well as the current policy of prioritizing application processing where applications are pending for at least 75 days. Consistent with current protocols, applicants whose initial or renewal EAD applications have been pending for 75 days or more may continue calling the National Customer Service Center (NCSC) to request priority processing. In practice, as noted above, these policies result in the adjudication of the vast majority of Applications for Employment Authorization within 90 days of filing. DHS anticipates that it will be unable to adjudicate applications within 90 days in only a small percentage of cases, including those involving delays in security processes.

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<sup>86</sup> See USCIS current processing times at <https://egov.uscis.gov/cris/processTimesDisplayInit.do>.

DHS welcomes public comment on all aspects of this proposal, including alternate suggestions for regulatory amendments to the 90-day processing timeframe and interim employment authorization provisions not already discussed that address customer service, national security, and identity verification considerations that USCIS must fulfill as part of its core mission within DHS.

### **3. Conforming and Technical Amendments**

Finally, DHS proposes to make conforming and technical amendments to its regulations in light of the changes described above. The proposed rule first would amend DHS regulations concerning individuals applying for adjustment of status under the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA), Public Law No. 105-277, div. A, title IX, sections 901-904, 112 Stat. 2681-538 to 542 (codified as amended at 8 U.S.C. 1255 note (2006)). These regulations currently provide that interim employment authorization is accorded upon expiration of a 180-day waiting period or 90 days from the date the Application for Employment Authorization is filed, whichever comes later. See 8 CFR 245.15(n)(2). Consistent with the proposed changes to 8 CFR 274a.13(d) discussed above, DHS is proposing to delete from the regulatory text at 8 CFR 245.15(n)(2) both: (1) the cross-reference to 8 CFR 274a.13(d), and (2) the term “interim” modifying employment authorization. See proposed 8 CFR 245.15(n)(2). Pursuant to these changes, DHS would be required to issue an EAD, rather than an interim EAD, within the timeframes currently provided in 8 CFR 245.15(n)(2). DHS also proposes making technical amendments to 8 CFR 245.15(n)(2) by replacing specific references to the “Director of the Nebraska Service Center” and “Service” with broader references to USCIS and DHS. DHS believes these changes would not have wide

impact, as the Department receives very few applications for adjustment of status based on HRIFA.<sup>87</sup> Additionally, HRIFA-based applicants for adjustment of status would be eligible for the automatic 180-day extension of expiring EADs proposed in this rule, provided they file a timely request for renewal.

Similarly, the proposed rule would amend DHS regulations at 8 CFR 214.2(h)(9)(iv) concerning H-4 nonimmigrant spouses of H-1B nonimmigrant workers. This regulation currently allows H-4 spouses to file their applications for employment authorization concurrently with their underlying requests for nonimmigrant status, but tolls the 90-day processing timeframe at 8 CFR 274a.13(d) until the underlying benefit requests are approved. See 8 CFR 214.2(h)(9)(iv); see also 80 FR 10284, 10297 (Feb. 25, 2015). Consistent with the changes described above, DHS is proposing to delete the sentence in 8 CFR 214.2(h)(9)(iv) containing the cross-reference to 8 CFR 274a.13(d), regarding the applicability of the 90-day period to the processing of EADs for certain H-4 dependent spouses. See proposed 8 CFR 214.2(h)(9)(iv). DHS is also proposing to move the regulatory text authorizing the concurrent filing of applications for employment authorization to 8 CFR 274a.13(a), and to apply that language to any class of employment-eligible aliens to the extent permitted by the application form instructions. This amendment to the regulations would codify current DHS policy applicable to several classes of foreign nationals, and provide clear authority to expand it to additional classes of foreign nationals.

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<sup>87</sup> See 2013 Yearbook of Immigration Statistics at p 18 (available at <http://www.dhs.gov/publication/yearbook-2013>) showing a decrease in HRIFA adjustments from 2,451 in 2004 to 62 in 2013. During fiscal year 2015, USCIS adjudicated 8 HRIFA adjustment applications.



This rule also proposes a technical amendment that would merge the current text at paragraph (a) of 8 CFR 274a.13, with similar, repetitive text at paragraph (a)(1) of that section. The text at paragraph (a) currently describes the application requirement with respect to individuals authorized for employment incident to status listed in 8 CFR 274a.12(a)(3), (4), (6) through (8), (10) through (15), and (20). Text describing the application requirement is essentially repeated at paragraph (a)(1), but with respect to aliens listed in 8 CFR 274a.12(c) (except asylum applicants at 8 CFR 274a.12(c)(8), which are covered by 8 CFR 274a.13(a)(2)). DHS has determined that listing the application requirements at both 8 CFR 274a.13(a) and (a)(1) is unnecessarily repetitive and potentially confusing. DHS proposes to describe the application requirement once in the introductory text at 8 CFR 274a.13(a), which would apply to classes of individuals described at both 8 CFR 274a.12(a) and (c). The proposed text also would clarify that the same application requirement would apply to both individuals requesting only an EAD<sup>88</sup> and those requesting both employment authorization and an EAD.<sup>89</sup> Additionally, the proposed text would identify the employment authorization document that USCIS will issue based on a grant of such application, which is Form I-766.

## **V. Statutory and Regulatory Requirements.**

### **A. Executive Orders 12866 and 13563 (Regulatory Planning and Review)**

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health

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<sup>88</sup> Individuals who would file an application for an EAD alone are those aliens in 8 CFR 274a.12(a) who are authorized for employment incident to status.

<sup>89</sup> Individuals who would file an application for both employment authorization and an EAD are those aliens listed in 8 CFR 274a.12(c).

and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action” that is economically significant, under section 3(f)(1) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

DHS is proposing to amend its regulations relating to certain employment-based immigrant and nonimmigrant visa programs. The proposed amendments interpret existing law as well as propose regulatory changes in order to provide various benefits to participants in those programs, including: improved processes for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers, greater stability and job flexibility for such workers, and increased transparency and consistency in the application of agency policy related to affected classifications. Many of these changes are primarily aimed at improving the ability of U.S. employers to retain high-skilled workers who are beneficiaries of approved employment-based immigrant visa petitions and are waiting to become lawful permanent residents (LPRs), while increasing the ability of such workers to seek promotions, accept lateral positions with current employers, change employers, or pursue other employment options.

First, DHS proposes to amend its regulations consistent with certain worker portability and other provisions in the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), as amended, as well as the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). These proposed amendments would clarify and improve longstanding agency policies and procedures, previously articulated

in agency memoranda and precedent decisions. These proposed amendments would also implement sections of AC21 and ACWIA relating to certain foreign workers, specifically sections on workers who have been sponsored for LPR status by their employers. In so doing, the proposed rule would provide a primary repository of governing rules for the regulated community and enhance consistency among agency adjudicators. In addition, the proposed rule would clarify several interpretive questions raised by AC21 and ACWIA.

Second, and consistent with existing DHS authorities and the goals of AC21 and ACWIA, DHS proposes to amend its regulations governing certain employment-based immigrant and nonimmigrant visa programs to provide additional stability and flexibility to employers and workers in those programs. The proposed rule would, among other things: improve portability for certain beneficiaries of approved employment-based immigrant visa petitions by limiting the grounds for automatic revocation of petition approval; enhance job portability for such beneficiaries by improving their ability to retain their priority dates for use with subsequently approved employment-based immigrant visa petitions; establish or extend grace periods for certain high-skilled nonimmigrant workers so that they may more easily maintain their nonimmigrant status when changing employment opportunities or preparing for departure; and provide additional stability and flexibility to certain high-skilled workers by allowing those who are working in the United States in certain nonimmigrant statuses, are the beneficiaries of approved employment-based immigrant visa petitions, are subject to immigrant visa backlogs, and demonstrate compelling circumstances to effectively apply for independent employment authorization for a limited period. These and other proposed changes would

provide much needed flexibility to the beneficiaries of employment-based immigrant visa petitions, as well as the U.S. employers who employ and sponsor them for permanent residence. In addition, these changes will provide greater stability and predictability for U.S. employers and avoid potential disruptions to ongoing business operations in the United States.

Finally, consistent with providing additional certainty and stability to certain employment-authorized individuals and their U.S. employers, DHS is also proposing changes to its regulations governing the processing of applications for employment authorization to minimize the risk of any gaps in such authorization. These changes would provide for the automatic extension of the validity of certain Employment Authorization Documents (EADs or Form I-766) for an interim period upon the timely filing of an application to renew such documents. At the same time, in light of national security and fraud concerns, DHS is proposing to remove regulations that provide a 90-day processing timeline for EAD applications and that require the issuance of interim EADs if processing extends beyond the 90-day mark.

Table 1, below, provides a more detailed summary of the proposed provisions and their impacts.

<b>Table 1: Summary of Provisions and Impacts</b>		
<b>Provisions</b>	<b>Purpose</b>	<b>Expected Impact of Proposed Rule</b>
Priority Date	Clarifies priority date when a labor certification is not required by INA 203(b).	<b>Quantitative:</b> • None.
		<b>Qualitative:</b> • Removes ambiguity and sets consistent priority dates for affected petitioners and beneficiaries.
Priority Date Retention	Revises regulation so that the priority date attached to an employment-	<b>Quantitative:</b> • None.

	based immigrant visa petition is only lost when: USCIS revokes approval of the petition for error, fraud or willful misrepresentation of a material fact, or upon revocation or invalidation of the labor certification accompanying the petition.	<b>Qualitative:</b> <ul style="list-style-type: none"> <li>Results in administrative efficiency and predictability by explicitly listing when priority dates are lost as these revoked petition approvals cannot be used as a basis for an immigrant visa.</li> </ul>
Employment-Based Immigrant Visa Petition Portability Under 204(j)	Incorporates statutory portability provisions into regulation.	<b>Quantitative:</b> <b>Petitioners –</b> <ul style="list-style-type: none"> <li>Opportunity costs to petitioners for 1 year range from \$128,126 to \$4,678,956.</li> </ul> <b>DHS/USCIS –</b> <ul style="list-style-type: none"> <li>Neutral because the proposed supplementary form to the application for adjustment of status to permanent residence will formalize the process for USCIS requests for evidence of compliance with section 204(j) porting.</li> </ul>
		<b>Qualitative:</b> <b>Applicants/Petitioners –</b> <ul style="list-style-type: none"> <li>Provides stability and job flexibility to certain individuals with approved employment-based immigrant visas;</li> <li>Clarifies the definition of "same or similar occupational classifications";</li> <li>Allows certain foreign workers to advance and progress in their careers;</li> <li>Potential increased employee replacement costs for employers.</li> </ul> <b>DHS/USCIS –</b> <ul style="list-style-type: none"> <li>Administrative efficiency;</li> <li>Standardized and streamlined process.</li> </ul>
Employment Authorization for Certain Nonimmigrants Based on Compelling Circumstances	Proposes provisions allowing certain nonimmigrant principal beneficiaries, and their dependent spouses and children, to apply for unrestricted employment authorization if the principal beneficiary has an approved EB-1, EB-2, or EB-3 immigrant visa petition while waiting for his/her immigrant visa to become available. Applicants must demonstrate compelling circumstances justifying an independent grant of employment authorization.	<b>Quantitative:</b> Total costs over 10-year period to applicants are: <ul style="list-style-type: none"> <li>\$553.2 million for undiscounted costs.</li> <li>\$489.5 million at a 3% discounted rate.</li> <li>\$423.2 million at a 7% discounted rate.</li> </ul>
		<b>Qualitative:</b> <b>Applicants –</b> <ul style="list-style-type: none"> <li>Provides ability for nonimmigrants who have been sponsored for LPR status to change jobs or employers when compelling circumstances arise;</li> </ul>

		<ul style="list-style-type: none"> <li>• Incentivizes such skilled nonimmigrant workers contributing to the economy to continue seeking LPR status;</li> <li>• Nonimmigrant principal workers who take advantage of the unrestricted EAD would abandon their current nonimmigrant status and not be able to adjust to LPR status in the United States. Consular processing imposes potentially significant costs, risk and uncertainty for individuals and their families as well.</li> </ul> <p><b>Dependents –</b></p> <ul style="list-style-type: none"> <li>• Allows them to enter labor market earlier and can contribute to household income.</li> </ul>
90-Day Processing Time for Employment Authorization Applications	<p>Eliminates regulatory requirement for 90-day adjudication timeframe and issuance of interim-EADs. Proposes an automatic extension of EADs for up to 180 days for certain workers filing renewal requests.</p>	<p><b>Quantitative:</b></p> <ul style="list-style-type: none"> <li>• None.</li> </ul> <p><b>Qualitative:</b></p> <p><b>Applicants–</b></p> <ul style="list-style-type: none"> <li>• Removing a regulatory timeframe and moving to one governed by processing goals could potentially lead to longer processing times whenever the agency is faced with higher than expected filing volumes. If such a situation were to occur, this could lead to potential delays in work employment start dates for first-time EAD applicants until approval is obtained. However, USCIS believes such scenarios would be rare and mitigated by the auto extension provision for renewal applications which would allow the movement of resources in such situations;</li> <li>• Providing the automatic continuing authorization for up to 180 days for certain renewal applicants could lead to less turnover costs for U.S. employers.</li> </ul> <p><b>DHS/USCIS –</b></p> <ul style="list-style-type: none"> <li>• Streamlines the application and card issuance processes;</li> <li>• Enhances the ability to ensure all national security verification checks are completed;</li> <li>• Reduces agency duplication</li> </ul>

		<p>efforts;</p> <ul style="list-style-type: none"> <li>• Reduces opportunities for fraud and better accommodates increased security measures.</li> </ul>
Automatic Revocation With Respect to Approved Employment-Based Immigrant Visa Petitions	Revises regulations so that a petition may continue to remain valid, despite withdrawal by the employer or termination of the employer's business after 180 days or more of approval.	<p><b>Quantitative:</b></p> <ul style="list-style-type: none"> <li>• None.</li> </ul>
		<p><b>Qualitative:</b></p> <ul style="list-style-type: none"> <li>• Beneficiary retains priority date, has porting ability under INA 204(j), or AC21 sections 104 (c) and (b), and may be eligible for the new unrestricted compelling circumstances EAD.</li> </ul>
Period of Admission for Certain Nonimmigrant Classifications	Nonimmigrants in certain high-skilled, nonimmigrant classifications would be granted a grace period of up to 10 days before and after their validity period and a one-time grace period, upon cessation of employment, of up to 60 days or until the end of their authorized validity period, whichever is shorter.	<p><b>Quantitative:</b></p> <ul style="list-style-type: none"> <li>• None.</li> </ul>
		<p><b>Qualitative: Nonimmigrant Visa Holders –</b></p> <ul style="list-style-type: none"> <li>• Assists the beneficiary in getting sufficiently settled such that they are immediately able to begin working upon the start of their petition validity period;</li> <li>• Provides time necessary to wrap up affairs to depart the country;</li> <li>• Would not have to enter into non-status period or take other actions to extend, change, or otherwise maintain lawful status after the period of authorized employment ends in order to wrap up affairs to respond to sudden or unexpected changes related to their employment, or to seek a change of status to different nonimmigrant classification.</li> </ul>
Portability of H-1B Status H-1B Licensing Requirements Calculating the H-1B Admission Period Exemptions Due to Lengthy Adjudication Delays Per Country Limitation Exemptions Employer Debarment and H-1B Whistleblower Provisions	Updates, improves, and clarifies DHS regulations consistent with policy guidance.	<p><b>Quantitative:</b></p> <ul style="list-style-type: none"> <li>• None.</li> </ul>
		<p><b>Qualitative:</b></p> <ul style="list-style-type: none"> <li>• Formalizes existing DHS policy in the regulations, which will give the public access to existing policy in one location.</li> </ul>
Exemptions to the H-1B Numerical Cap and Revised	Codifies definition of institution of higher education and adds a broader	<p><b>Quantitative:</b></p> <ul style="list-style-type: none"> <li>• None.</li> </ul>

Definition of “Related and Affiliated Nonprofit Entity” in the ACWIA Fee Context	definition of related or affiliated nonprofit entity. Also, revises the definition of related or affiliated nonprofit entity for purposes of the ACWIA fee to conform to the new proposed definition of the same term for H-1B numerical cap exemption.	<b>Qualitative:</b> <ul style="list-style-type: none"> <li>Expands the numbers of petitioners that are cap exempt and thus allows greater access by certain employers to H-1B workers;</li> </ul>
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As required by OMB Circular A-4<sup>90</sup>, Table 2 also presents the prepared accounting statement showing the expenditures associated with the provisions of these regulations. The main benefits of this proposed regulation are to improve processes for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers, provide greater stability and job flexibility for such workers, and increase transparency and consistency in the application of agency policy related to affected classifications.

Table 2: OMB A-4 Accounting Statement (\$ millions, 2015)				
Category	Primary Estimate	Minimum Estimate	Maximum Estimate	Source Citation (RIA, preamble, etc.)
BENEFITS				
Monetized Benefits	Not estimated	Not estimated	Not estimated	RIA
Annualized quantified, but unmonetized, benefits	0	0	0	RIA
Unquantified Benefits	Improves processes for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers, provides greater stability and job flexibility for such workers, and increases transparency and consistency in the application of agency policy related to affected classifications.			RIA
COSTS				

<sup>90</sup> OMB Circular A-4 is available at [www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf).



Annualized monetized costs for 10 year period starting in 2016 to 2025 (discount rate in parenthesis)	(7%)	\$62.2	\$60.7	\$64.9	RIA
	(3%)	\$59.7	\$57.9	\$62.1	RIA
Annualized quantified, but unmonetized, costs	N/A		N/A	N/A	RIA
Qualitative (unquantified) costs	Potential turnover cost due to enhanced job mobility of beneficiaries of nonimmigrant and immigrant petitions.				RIA
TRANSFERS					
Annualized monetized transfers: “on budget”	N/A		0	0	RIA
From whom to whom?	N/A		N/A	N/A	N/A
Annualized monetized transfers: “off-budget”	N/A		0	0	RIA
From whom to whom?	N/A		N/A	N/A	N/A
Miscellaneous Analyses/Category	Effects				Source Citation (RIA, preamble, etc.)
Effects on state, local, and/or tribal governments	None				RIA
Effects on small businesses	No direct costs. Indirect effects only.				RIA
Effects on wages	None				None
Effects on growth	None				None

DHS has prepared a full analysis according to Executive Orders 12866 and 13563 which can be found by searching for RIN 1615-AC05 on [regulations.gov](https://www.regulations.gov).

## **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. The term “small

entities” comprises small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An “individual” is not defined by the RFA as a small entity, and costs to an individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates small entities.<sup>91</sup> Consequently, any indirect impacts from a rule to a small entity are not costs for RFA purposes.

The changes proposed by DHS have direct impacts to individual beneficiaries of employment-based nonimmigrant and immigrant visa petitions. As individual beneficiaries of employment-based immigrant visa petitions are not defined as small entities, costs to these individuals are not considered as RFA costs. However, due to the fact that the petitions are filed by a sponsoring employer, this rule has *indirect* effects on employers. The original sponsoring employer that files the petition on behalf of an employee will incur employee turnover related costs as those employees port to the same or a similar occupation with another employer. Therefore, DHS has chosen to examine the indirect impact of this proposed rule on small entities as well. The analysis of the indirect impacts of these proposed changes on small entities follows.

#### 1. Initial Regulatory Flexibility Analysis

Small entities primarily affected by this rule that could incur additional indirect costs are those that file and pay fees for certain immigration benefit petitions, including Form I-140, Immigrant Petition for Alien Worker. DHS conducted a statistically valid

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<sup>91</sup> A Guide for Government Agencies How to Comply with the Regulatory Flexibility Act, May 2012 page 22. See Direct versus indirect impact discussion, [https://www.sba.gov/sites/default/files/advocacy/rfaguide\\_0512\\_0.pdf](https://www.sba.gov/sites/default/files/advocacy/rfaguide_0512_0.pdf)

sample analysis of these petition types to determine the number of small entities indirectly impacted by this rule. While DHS acknowledges that the changes engendered by these proposed rules would directly impact individuals who are beneficiaries of employment-based immigrant visa petitions, which are not small entities as defined by the RFA, DHS believes that the actions taken by such individuals as a result of these proposals will have immediate indirect impacts on U.S. employers. Employers will be indirectly impacted by employee turnover-related costs as beneficiaries of employment-based immigrant visa petitions take advantage of these proposals. Therefore, DHS is choosing to discuss these indirect impacts in this initial regulatory flexibility analysis to aid the public in commenting on the impact of the proposed requirements.

- In particular, DHS requests information and data to gain a better understanding of the potential impact of this rule on small entities. Specifically, DHS requests information on: the numbers of small entities that have filed immigrant visa petitions for high-skilled workers who are waiting to adjust status, and the potential costs to such small entities associated with employee turnover resulting from employees who port;
- the potential costs to employers that are small entities associated with employee turnover if a sponsored nonimmigrant worker pursues the option for unrestricted employment authorization based on compelling circumstances; and
- the number of small entities that would qualify for the proposed exemptions of the ACWIA fee when petitioning for H-1B nonimmigrant workers.

a. A description of the reasons why the action by the agency is being considered.

The purpose of this action, in part, is to amend regulations affecting certain employment-based immigrant and nonimmigrant classifications in order for DHS regulations to conform to provisions of AC21 and ACWIA. The proposed rule also seeks to permit greater job flexibility, mobility and stability to beneficiaries of employment-based nonimmigrant and immigrant visa petitions, especially when faced with long waits for immigrant visas. In many instances, the need for these individuals' employment has been demonstrated through the labor certification process. In most cases, before an employment-based immigrant visa petition can be approved, the DOL has certified that there are no U.S. workers who are ready, willing and available to fill those positions in the area of intended employment. By increasing flexibility and mobility, the worker is more likely to remain in the United States and help fill the demonstrated need for his or her services.

b. A succinct statement of the objectives of, and legal basis for, the proposed rule.

DHS objectives and legal authority for this proposed rule are discussed in the preamble.

c. A description and, where feasible, an estimate of the number of small entities to which the proposed changes would apply.

DHS conducted a statistically valid sample analysis of employment-based immigrant visa petitions to determine the maximum potential number of small entities indirectly impacted by this rule when a high-skilled worker who has an approved

employment-based immigrant visa petition and a pending adjustment of status application for 180 days or more ports to another employer. DHS utilized a subscription-based online database of U.S. entities, Hoovers Online, as well as two other open-access, free databases of public and private entities, Manta and Cortera, to determine the North American Industry Classification System (NAICS) code, revenue, and employee count for each entity.<sup>92</sup> In order to determine a business' size, DHS first classified each entity by its NAICS code, and then used SBA guidelines to note the requisite revenue or employee count threshold for each entity. Some entities were classified as small based on their annual revenue and some by number of employees.

Using FY 2013 data on actual filings of employment-based immigrant visa petitions, DHS collected internal data for each filing organization. Each entity may make multiple filings. For instance, there were 63,953 employment-based immigrant visa petitions filed, but only 24,912 unique entities that filed petitions. DHS devised a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. To achieve a 95 percent confidence level and a 5 percent confidence interval on a population of 24,912 entities, DHS used the standard statistical formula to determine that a minimum sample size of 385 entities was necessary.<sup>93</sup> DHS created a sample size 15 percent greater than the 385 minimum necessary in order to increase the likelihood that our matches would meet or exceed the minimum required sample. Of the 443 entities sampled, 344 instances resulted in entities defined as small. Of the 344 small entities, 185 entities were classified as small by

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<sup>92</sup> The Hoovers website can be found at <http://www.hoovers.com/>; The Manta website can be found at <http://www.manta.com/>; and the Cortera website can be found at <https://www.cortera.com/>.

<sup>93</sup> See <https://www.qualtrics.com/blog/determining-sample-size/>.

revenue or number of employees. The remaining 159 entities were classified as small because information was not found (either no petitioner name was found or no information was found in the databases).

<b>Table 1: Summary Statistics and Results of Small Entity Analysis of Form I-140 Petitions</b>		
<b>Parameter</b>	<b>Quantity</b>	<b>Proportion of Sample</b>
Population—petitions	63,953	-
Population—unique entities	24,912	-
Minimum Required Sample	385	-
Selected Sample	443	100.0%
Entities Classified as "Not Small"		
by revenue	73	16.5%
by number of employees	26	5.9%
Entities Classified as "Small"		
by revenue	145	32.7%
by number of employees	40	9.0%
because no petitioner name found	109	24.6%
because no information found in databases	50	11.3%
<b>Total Number of Small Entities</b>	<b>344</b>	<b>77.7%</b>
Source: USCIS analysis.		

- d. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills.

The proposed amendments in this rule do not place direct requirements on small entities that petition for workers. However, if the principal beneficiaries of employment-based immigrant visa petitions take advantage of the flexibility provisions proposed herein (including porting to a new sponsoring employer or pursuing the unrestricted

employment authorization in cases involving compelling circumstances), there could be increased turnover costs (employee replacement costs) for U.S. entities sponsoring the employment of those beneficiaries, including costs of petitioning for new employees. While DHS has estimated 29,166 individuals who are eligible to port to a new employer under section 204(j) of the INA, the Department was unable to predict how many will actually do so. As mentioned earlier in the Executive Orders 12866 and 13563 analysis, a range of opportunity costs of time to petitioners who prepare Supplement J (\$43.93 for a human resources specialist, \$93.69 for an in-house lawyer, or \$160.43 for an outsourced lawyer) are anticipated depending on the total numbers of individuals who port. However, DHS is currently unable to determine the numbers of small entities who take on immigrant sponsorship of high-skilled workers who are waiting to adjust status from the original sponsoring employer. The estimates presented also do not represent employee turnover costs to the original sponsoring employer, but only represent paperwork costs. Similarly, DHS is unable to predict the volume of principal beneficiaries of employment-based immigrant visa petitions who will pursue the option for unrestricted employment authorization based on compelling circumstances.

The proposed amendments relating to the H-1B numerical cap exemptions may impact some small entities by allowing them to qualify for exemptions of the ACWIA fee when petitioning for H-1B nonimmigrant workers. As DHS cannot predict the numbers of entities these proposed amendments would impact at this time, the exact impact on small entities is not clear, though some positive impact should be anticipated.

- e. An identification of all relevant Federal rules, to the extent practical, that may duplicate, overlap, or conflict with the proposed rule.

DHS is unaware of any duplicative, overlapping, or conflicting Federal rules, but invites any comment and information regarding any such rules.

- f. Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities.

This rule does not impose direct costs on small entities. Rather, this rule imposes indirect cost on small entities because the proposed provisions would affect beneficiaries of employment-based immigrant visa petitions. If those beneficiaries take actions or steps in line with the proposals that provide greater flexibility and job mobility, then there would be an immediate indirect impact—an externality—to the current sponsoring U.S. employers. DHS considered whether to exclude from the flexibility and job mobility provisions those beneficiaries who were sponsored by U.S. employers that were considered small. However, because DHS so limited the eligibility for unrestricted employment authorization to beneficiaries who are able to demonstrate compelling circumstances, and restricted the portability provisions to those seeking employment within the same or similar occupational classification(s), DHS did not feel it was necessary to pursue this proposal. There are no other alternatives that DHS considered that would further limit or shield small entities from the potential of negative externalities and that would still accomplish the goals of this regulation. To reiterate, the goals of this regulation include providing increased flexibility and normal job progression for beneficiaries of approved employment-based immigrant visa petitions. To incorporate



alternatives that would limit such mobility for beneficiaries that are employed or sponsored by small entities would be counterproductive to the goals of this rule. DHS welcomes public comments on significant alternatives to the proposed rule that would minimize significant economic impact to small entities.

### **C. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandate Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of \$100,000,000 in 1995 adjusted for inflation to 2014 levels by the Consumer Price Index for All Urban Consumers is \$155,000,000.

Although this rule does exceed the \$100 million expenditure threshold in the first year of implementation (adjusted for inflation), this rulemaking does not contain such a mandate. Providing job flexibility through unrestricted employment authorization to a limited number of employment-authorized nonimmigrants in compelling circumstances is not a required immigration benefit, nor will use of the proposed flexibilities result in any expenditures by State, local, and tribal governments. The requirements of Title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA.

### **D. Small Business Regulatory Enforcement Fairness Act of 1996**

This proposed rule is a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will result in an annual effect on the

economy of more than \$100 million in the first year only. For each subsequent year, the annual effect on the economy will remain under \$100 million. As small businesses may be impacted under this proposed regulation, DHS has prepared a Regulatory Flexibility Act (RFA) analysis. The RFA analysis can be found with the analysis prepared under Executive Orders 12866 and 13563 on [regulations.gov](https://www.regulations.gov).

**E. Executive Order 13132 (Federalism)**

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

**F. Executive Order 12988 (Civil Justice Reform)**

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

**G. Paperwork Reduction Act**

Under the Paperwork Reduction Act (PRA) of 1995, Public Law 104-13, Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting requirements inherent in a rule. This rule proposes revisions to the following information collections:

1. The Application for Employment Authorization, Form I-765; and Form I-765 Work Sheet, Form I-765WS, OMB Control Number 1615-0040. Specifically, USCIS is revising this collection by revising the instructions to Form I-765 to

include information for the newly proposed group of applicants (beneficiaries of an approved Form I-140 who are in the United States in E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status, who are the beneficiaries of an approved employment-based immigrant visa petition, who do not have immigrant visas immediately available to them, and who demonstrate compelling circumstances justifying a grant of employment authorization) eligible to apply for employment authorization under proposed section 8 CFR 274a.12(c)(35). Their dependent spouses and children who are present in the United States in nonimmigrant status will also be eligible to obtain employment authorization under proposed section 8 CFR 274a.12(c)(36), provided that the principal alien has been granted employment authorization. USCIS is also proposing to amend Form I-765 to include Yes/No questions requiring these applicants to disclose certain criminal convictions. USCIS estimates an upper-bound average of 155,067 respondents will request employment authorization as a result of the changes proposed by this rule in the first 2 years. This average estimate is derived from a maximum estimate of 257,039 new respondents who may file applications for employment authorization documents in year 1 and a maximum estimate of 53,095 respondents in year 2. USCIS averaged this estimate for new I-765 respondents over a 2-year period of time based on its request seeking a 2-year approval of the form and its instructions from OMB.

2. USCIS is revising the form and its instructions and the estimate of total burden hours has increased due to the addition of this new population of Form

I-765 filers, and the increase of burden hours associated with the collection of biometrics from these applicants.

3. The Immigrant Petition for Alien Worker, Form I-140; OMB Control Number 1615-0015. Specifically, USCIS is revising this information collection to remove ambiguity regarding whether information about the principal beneficiary's dependent family members should be entered on Form I-140, by revising the word "requests" to "requires" for clarification in the form instructions. USCIS is also revising the instructions to remove the terms "in duplicate" in the second paragraph under the labor certification section of the instructions because USCIS no longer requires uncertified Employment and Training Administration (ETA) Forms 9089 to be submitted in duplicate. There is no change in the data being captured on the information collection instrument, but there is a change to the estimated annual burden hours as a result of USCIS' revised estimate of the number of respondents for this collection of information.
4. The Petition for Nonimmigrant Worker, Form I-129, OMB Control Number 1615-0009. USCIS is making revisions to Form I-129, specifically the H-1B Data Collection and Filing Fee Exemption Supplement and the accompanying instructions, to correspond with revisions to the regulatory definition of "related or affiliated nonprofit entities" for the purposes of determining whether the petitioner is exempt from: (1) payment of the \$750/\$1,500 fee associated with the American Competitiveness and Workforce Improvement Act (ACWIA) and (2) the statutory numerical limitation on H-1B visas (also

known as the H-1B cap). USCIS does not estimate that new respondents would file petitions for alien workers as a result of the changes proposed by this rule.

5. The Application to Register Permanent Residence or Adjust Status, Form I-485, including new Supplement J, “Confirmation of Bona Fide Job Offer or Request for Job Portability under INA Section 204(J),” OMB Control Number 1615-0023. Specifically, USCIS is creating a new Supplement J to Form I-485 to allow the adjustment applicant requesting portability under section 204(j) of the INA, and the U.S. employer offering the applicant a new permanent job offer, to provide formal attestations regarding important aspects of the job offer. Providing such attestations is an essential step to establish eligibility for adjustment of status in any employment-based immigrant visa classification requiring a job offer, regardless of whether the applicant is making a portability request under section 204(j) or is seeking to adjust status based upon the same job that was offered in the underlying immigrant visa petition. Through this new supplement, USCIS will collect required information from U.S. employers offering a new permanent job offer to a specific worker under section 204(j). Moreover, Supplement J will also be used by applicants who are not porting pursuant to section 204(j) to confirm that the original job offer described in the Form I-140 petition is still bona fide and available to the applicant at the time the applicant files Form I-485. Supplement J will replace the current Form I-485 initial evidence requirement that an applicant must submit a letter on the letterhead of the

petitioning U.S. employer that confirms that the job offer on which the Form I-140 petition is based is still available to the applicant.

This supplement will also serve as an important anti-fraud measure, and it will allow USCIS to validate employers extending new permanent job offers to individuals under section 204(j). USCIS estimates that approximately 29,166 new respondents would file Supplement J as a result of the changes proposed by the rule.

Additionally, USCIS is revising the instructions to Form I-485 to reflect the implementation of Supplement J. The Form I-485 instructions are also being revised to clarify that eligible applicants will need to file Supplement J to request job portability under section 204(j) of the INA. There is no change to the estimated annual burden hours as a result of this revision as a result of the changes proposed in this rule.

DHS is requesting comments on the proposed revisions to these information collections until [Insert date 60 days from date of publication in the FEDERAL REGISTER].

In accordance with the PRA, information collection notices are published in the Federal Register to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (i.e., the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments. When submitting comments on this information collection, your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) Type of Information Collection: Revision of a Currently Approved Collection.

(2) Title of the Forms/Collections:

- Application for Employment Authorization Document;
- Form I-765 Work Sheet;
- Immigrant Petition for Alien Worker;
- Petition for Nonimmigrant Worker;
- Application to Register Permanent Residence or Adjust Status.

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: Forms I-765/I-765WS, I-140, I-129 and I-485; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract:

Form I-765: Primary: Individuals or households: This form was developed for individuals to request employment authorization and evidence of that employment authorization. USCIS is revising this form to add a new class of workers eligible to apply for employment authorization as the beneficiary of a valid immigrant petition for classification under sections 203(b)(1), 203(b)(2) or 203(b)(3) of the INA. Eligible applicants must be physically present in the United States in E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status, and must demonstrate that they face compelling circumstances while they wait for their immigrant visas to become available. Dependent spouses and children who are present in the United States in nonimmigrant status are also eligible to apply provided that the principal has been granted employment authorization. Supporting documentation demonstrating eligibility must be filed with the application. The form instructions list examples of relevant documentation.

Form I-140: Primary: Business or other for-profit organizations, as well as not-for profit organizations. USCIS will use the information furnished on this information collection to classify individuals under sections 203(b)(1), 203(b)(2) or 203(b)(3) of the INA.

Form I-129: Primary: Business: This form is used by an employer to petition for workers to come to the U.S. temporarily to perform services, labor, and training



or to request extensions of stay or changes in nonimmigrant status for nonimmigrant workers. USCIS is revising Form I-129, specifically the H-1B Data Collection and Filing Fee Exemption Supplement, and the accompanying instructions, to correspond with revisions to the regulatory definition of “related or affiliated nonprofit entities” for the purposes of determining whether the petitioner is exempt from: (1) payment of the \$750/\$1,500 fee associated with the American Competitiveness and Workforce Improvement Act (ACWIA), and (2) the statutory numerical limitation on H-1B visas (also known as the cap).

Form I-485: Primary: Individuals or households: The information collected is used to determine eligibility to adjust status under section 245 of the INA. The instructions to Form I-485, Application to Register Permanent Residence or Adjust Status, are being revised to reflect the implementation of Form I-485 Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability under INA Section 204(j) (Supplement J). Supplement J will be used by individuals applying for adjustment of status to lawful permanent resident on the basis of being the principal beneficiary of an approved Form I-140, Immigrant Petition for Alien Worker. Applicants will use Supplement J to confirm that the job offer described in the Form I-140 petition is still bona fide and available to the applicant at the time the applicant files Form I-485. Supplement J is replacing the current Form I-485 initial evidence requirement that an applicant must submit a letter on the letterhead of the petitioning employer which confirms that the job offer on which the Form I-140 petition is based is still available to the applicant.

Applicants will also use Supplement J when requesting job portability pursuant to section 204(j) of the INA. Supplement J will provide a standardized procedure along with specific evidentiary requirements for all job portability requests submitted to USCIS.

(5) An estimate of the total annual number of respondents and the amount of time estimated for an average respondent to respond:

- Form I-765/I-765WS:
  - 4,618,099 responses related to Form I-765 at 3.42 hours per response;
  - 437,070 responses related to Form I-765WS at .50 hours per response;
  - 592,137 responses related to Biometrics services at 1.17 hours; and
  - 4,618,099 responses related to Passport-Style Photographs at .50 hours per response.
- Form I-140:
  - 101,719 respondents at 1.5 hours per response.
- Form I-129:
  - Form I-129 – 333,891 respondents at 2.34 hours;
  - E-1/E-2 Classification to Form I-129 – 4,760 respondents at .67 hours;
  - Trade Agreement Supplement to Form I-129 – 3,057 respondents at .67 hours;
  - H Classification Supplement to Form I-129 – 255,872 respondents at 2 hours;
  - H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement – 243,965 respondents at 1 hour;

- L Classification Supplement to Form I-129 – 37,831 respondents at 1.34 hours;
- O and P Classifications Supplement to Form I-129 – 22,710 respondents at 1 hour;
- Q-1 Classification Supplement to Form I-129 – 155 respondents at .34 hours; and
- R-1 Classification Supplement to Form I-129 – 6,635 respondents at 2.34 hours.
- Form I-485:
  - 697,811 respondents at 6.25 hours per response;
  - 697,811 respondents related to Biometrics services at 1.17 hours.

(6) An estimate of the total annual public burden (in hours) associated with these collections:

- Form I-765/I-765WS: 19,014,283.37 hours.
- Form I-140: 152,579 hours.
- Form I-129: 1,631,234 hours.
- Form I-485: 5,238,957 hours.

(7) An estimate of the annual public burden (monetized) associated with these collections:

- Form I-765/I-765WS: \$1,357,721,106
- Form I-140: \$42,365,964.
- Form I-129: \$73,751,280.
- Form I-485: \$239,349,173.

## **List of Subjects**

### **8 CFR Part 204**

Administrative practice and procedure, Adoption and foster care, Immigration, Reporting and recordkeeping requirements.

### **8 CFR Part 205**

Administrative practice and procedure, Immigration.

### **8 CFR Part 214**

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

### **8 CFR Part 245**

Aliens, Immigration, Reporting and recordkeeping requirements.

### **8 CFR Part 274a**

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

## **PART 204 -- IMMIGRANT PETITIONS**

1. The authority citation for part 204 is revised to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1184, 1186a, 1255, 1324a, 1641; 8 CFR part 2.

2. Section 204.5 is amended by:

- a. Revising paragraph (d);

- b. Revising paragraph (e);
- c. Revising paragraph (n)(3);
- d. Adding paragraph (p).

The revisions and addition read as follows:

**§ 204.5 Petitions for employment-based immigrants.**

\* \* \* \* \*

(d) Priority date. The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor shall be the date the labor certification application was accepted for processing by any office of the Department of Labor. The priority date of any petition filed for a classification under section 203(b) of the Act which does not require a labor certification from the Department of Labor shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with USCIS. The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with USCIS. The priority date of an alien who filed for classification as a special immigrant under section 203(b)(4) of the Act prior to October 1, 1991, and who is the beneficiary of an approved petition for special immigrant status after October 1, 1991, shall be the date the alien applied for an immigrant visa or adjustment of status.

(e) Retention of section 203(b)(1), (2), or (3) priority date. (1) A petition approved on behalf of an alien under sections 203(b)(1), (2), or (3) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any

classification under sections 203(b)(1), (2), or (3) of the Act for which the alien may qualify. In the event that the alien is the beneficiary of multiple approved petitions under sections 203(b)(1), (2), or (3) of the Act, the alien shall be entitled to the earliest priority date.

(2) The priority date of a petition may not be retained under paragraph (e)(1) of this section if at any time USCIS revokes the approval of the petition because of:

(i) Fraud, or a willful misrepresentation of a material fact;

(ii) Revocation by the Department of Labor of the approved permanent labor certification that accompanied the petition;

(iii) Invalidation by USCIS or the Department of State of the permanent labor certification that accompanied the petition; or

(iv) A determination by USCIS that petition approval was in error.

(3) A denied petition will not establish a priority date.

(4) A priority date is not transferable to another alien.

(5) A petition filed under section 204(a)(1)(F) of the Act for an alien shall remain valid with respect to a new employment offer as determined by USCIS under section 204(j) of the Act and 8 CFR 245.25. An alien will continue to be afforded the priority date of such petition, if the requirements of paragraph (e) of this section are met.

\* \* \* \* \*

(n) \* \* \*

(3) Validity of approved petitions. Unless approval is revoked under section 203(g) or 205 of the Act, an employment-based petition is valid indefinitely.

\* \* \* \* \*

(p) Eligibility for employment authorization in compelling circumstances—(1) Eligibility of principal alien. An individual who is the principal beneficiary of an approved immigrant petition for classification under sections 203(b)(1), 203(b)(2) or 203(b)(3) of the Act may be eligible to receive employment authorization, upon application, if:

(i) In the case of an initial request for employment authorization, the individual is in E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status at the time the application for employment authorization is filed;

(ii) An immigrant visa is not immediately available to the principal beneficiary based on his or her priority date at the time the application for employment authorization is filed; and

(iii) USCIS determines, as a matter of discretion, that the principal beneficiary demonstrates compelling circumstances that justify the issuance of employment authorization.

(2) Eligibility of spouses and children. The family members, as described in section 203(d) of the Act, of a principal beneficiary, who are in nonimmigrant status at

the time the principal beneficiary applies for employment authorization under paragraph (p)(1) of this section, are eligible to apply for employment authorization provided that the principal beneficiary has been granted employment authorization under paragraph (p) of this section and such employment authorization has not been terminated or revoked. Such family members may apply for employment authorization concurrently with the principal beneficiary, but cannot be granted employment authorization until the principal beneficiary is so authorized. The validity period of employment authorization granted to family members may not extend beyond the validity period of employment authorization granted to the principal beneficiary.

(3) Subject to paragraph (p)(5) of this section, an alien may be eligible to receive renewal of employment authorization under paragraph (p) of this section, upon application, if:

(i) He or she is the principal beneficiary of an approved immigrant petition for classification under sections 203(b)(1), 203(b)(2) or 203(b)(3) of the Act and either:

(A) USCIS determines, as a matter of discretion, that the principal beneficiary continues to demonstrate compelling circumstances that justify the issuance of employment authorization, or

(B) The difference between the principal beneficiary's priority date and the date upon which immigrant visas are authorized for issuance for the principal beneficiary's preference category and country of chargeability is 1 year or less according to the current Department of State Visa Bulletin; or



(ii) Is a family member, as described under paragraph (p)(2) of this section, of a principal beneficiary satisfying the requirements under paragraph (p)(3)(i) of this section, except that the family member need not be maintaining nonimmigrant status at the time the principal beneficiary applies for renewal employment authorization under paragraph (p) of this section.

(4) Application for employment authorization. To request employment authorization, an eligible applicant described in paragraphs (p)(1) or (2) of this section must file an application for employment authorization, or a successor form, with USCIS, in accordance with 8 CFR 274a.13(a) and the form instructions, including evidence of compelling circumstances. Such applicant is subject to the collection of his or her biometric information and the payment of any biometric services fee as provided in the form instructions. Employment authorization under this paragraph may be granted solely in 1-year increments.

(5) Ineligibility for employment authorization. An alien is not eligible for employment authorization, including renewal of employment authorization, under this paragraph in the following circumstances:

(i) The individual has been convicted of any felony or two or more misdemeanors; or

(ii) The principal beneficiary's priority date is more than 1 year beyond the date immigrant visas were authorized for issuance for the principal beneficiary's preference category and country of chargeability according to the Department of State Visa Bulletin current at the time the application for employment authorization, or successor form, is

filed.

## **PART 205 – REVOCATION OF APPROVAL OF PETITIONS**

3. The authority citation for part 205 is revised to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1155, 1182, 1324a, and 1186a.

4. Section 205.1 is amended by revising paragraphs (a)(3)(iii)(C) and (D) to read as follows:

### **§ 205.1 Automatic revocation.**

(a) \* \* \*

(3) \* \* \*

(iii) \* \* \*

(C) In employment-based preference cases, upon written notice of withdrawal filed by the petitioner to any officer of USCIS who is authorized to grant or deny petitions, where the withdrawal is filed less than 180 days after approval of the employment-based preference petition, provided that the revocation of a petition's approval under this clause will not, by itself, impact a beneficiary's ability to retain his or her priority date under 8 CFR 204.5(e). A petition that is withdrawn 180 days or more after approval remains approved unless its approval is revoked on other grounds. If an employment-based petition on behalf of an alien is withdrawn, the job offer of the petitioning employer is rescinded and the alien must obtain a new employment-based preference petition on his or her behalf in order to seek adjustment of status or issuance of an immigrant visa as an

employment-based immigrant, unless eligible for adjustment of status under section 204(j) of the Act and in accordance with 8 CFR 245.25.

(D) Upon termination of the petitioning employer's business less than 180 days after petition approval in an employment-based preference case under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act, provided that the revocation of a petition's approval under this clause will not, by itself, impact a beneficiary's ability to retain his or her priority date under 8 CFR 204.5(e). If a petitioning employer's business terminates 180 days or more after approval, the petition remains approved unless its approval is revoked on other grounds. If a petitioning employer's business terminates, the job offer of the petitioning employer is rescinded and the beneficiary must obtain a new employment-based preference petition on his or her behalf in order to seek adjustment of status or issuance of an immigrant visa as an employment-based immigrant, unless eligible for adjustment of status under section 204(j) of the Act and in accordance with 8 CFR 245.25.

\* \* \* \* \*

## **PART 214 -- NONIMMIGRANT CLASSES**

5. The authority citation for part 214 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Pub. L. 105-277, 112 Stat. 2681-641; Pub. L. 106-313, 114 Stat. 1251-1255; Pub. L. 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

6. Section 214.1 is amended by adding a new paragraph (l) to read as follows:

**§ 214.1 Requirements for admission, extension, and maintenance of status.**

\* \* \* \* \*

(l) Period of stay. (1) An alien admissible in E-1, E-2, E-3, H-1B, L-1, or TN classification and his or her dependents may 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. Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period.

(2) An alien admitted or otherwise provided status in E-1, E-2, E-3, H-1B, H-1B1, L-1, or TN classification and his or her dependents shall not be considered to have failed to maintain nonimmigrant status solely on the basis of the cessation of the employment on which the alien's classification was based for a one-time period during any authorized validity period. Such one-time period shall last up to 60 days or until the end of the authorized validity period, whichever is shorter.

(3) An alien in any authorized period described in paragraph (l) of this section may apply for and be granted an extension of stay under paragraph (c)(4) of this section or change of status under 8 CFR 248.1, if otherwise eligible. DHS may eliminate or shorten the 60-day period described in paragraph (l)(2) of this section as a matter of

discretion and, unless otherwise authorized under 8 CFR 274a.12, the alien may not work during such period.

7. Section 214.2 is amended by:

a. Adding new paragraphs (h)(2)(i)(H), (h)(8)(ii)(F), (h)(13)(iii)(C) through (E) and (h)(20);

b. Revising paragraphs (h)(4)(v)(C), (h)(13)(i)(A), and (h)(19)(iii)(B); and

c. Removing the fifth sentence from paragraph (h)(9)(iv).

The revisions and additions read as follows:

**§ 214.2 Special requirements for admission, extension, and maintenance of status.**

\* \* \* \* \*

(h) \* \* \*

(2) \* \* \*

(i) \* \* \*

(H) H-1B portability. An eligible H-1B nonimmigrant is authorized to start concurrent or new employment under section 214(n) of the Act upon the filing, in accordance with 8 CFR 103.2(a), of a non-frivolous H-1B petition on behalf of such alien, or as of the requested start date, whichever is later.

(1) Eligible H-1B nonimmigrant. For H-1B portability purposes, an eligible H-1B nonimmigrant is defined as an alien:

(i) Who has been lawfully admitted into the United States;

(ii) On whose behalf a non-frivolous H-1B petition for new employment has been filed, including a petition for new employment with the same employer, with a request to amend or extend the H-1B nonimmigrant's stay, before the H-1B nonimmigrant's period of stay authorized by the Secretary of Homeland Security expires; and

(iii) Who has not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment.

(2) Length of employment. Employment authorized under paragraph (h)(2)(i)(H) of this section automatically ceases upon the adjudication of the H-1B petition described in paragraph (h)(2)(i)(H)(1)(ii) of this section.

(3) Successive H-1B portability petitions. (i) An alien maintaining authorization for employment under paragraph (h)(2)(i)(H) of this section, whose status, as indicated on the Arrival-Departure Record (Form I-94), has expired, shall be considered to be in a period of stay authorized by the Secretary of Homeland Security for purposes of paragraph (h)(2)(i)(H)(ii) of this section. If otherwise eligible under paragraph (h)(2)(i)(H) of this section, such alien may begin working in a subsequent position upon the filing of another non-frivolous H-1B petition or from the requested start date, whichever is later, notwithstanding that the previous H-1B petition upon which employment is authorized under paragraph (h)(2)(i)(H) of this section remains pending and regardless of whether the validity period of an approved H-1B petition filed on the alien's behalf expired during such pendency.

(ii) A request to amend the petition or for an extension of stay in any successive H-1B portability petition cannot be approved if a request to amend the petition or for an

extension of stay in any preceding H-1B portability petition in the succession is denied, unless the beneficiary's previously approved period of H-1B status remains valid.

(iii) Denial of a successive portability petition does not affect the ability of the H-1B beneficiary to continue or resume working in accordance with the terms of an H-1B petition previously approved on behalf of the beneficiary if that petition approval remains valid and the beneficiary has maintained H-1B status or been in a period of authorized stay and has not been employed in the United States without authorization.

\* \* \* \* \*

(4) \* \* \*

(v) \* \* \*

(C) 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 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.

(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 for a period of up to 1 year if:

(i) The license would otherwise be issued provided the alien was in possession of a valid social security number or was authorized for employment in the United States, and

(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 both. The petitioner must demonstrate that the alien is fully qualified to receive the State or local license in all other respects, meaning that all educational, training, experience, and other requirements have been met. The alien must have filed an application for the license in accordance with applicable State or local rules and/or procedures, provided that State or local rules and/or procedures do not prohibit the alien from filing the license application without provision of a social security number or proof of employment authorization.

(3) An H-1B petition on behalf of an alien who has been previously accorded H-1B classification under paragraph (h)(4)(v)(C)(2) of this section may not be approved unless the petitioner demonstrates that the alien has obtained the required license, is seeking to employ the alien in a position requiring a different license, or the alien will be employed in that occupation in a different location which does not require a state or local license to fully perform the duties of the occupation.

\* \* \* \* \*

(8) \* \* \*

(ii) \* \* \*



(F) Cap-exemptions under sections 214(g)(5)(A) and (B) of the Act. An alien is not subject to the numerical limitations identified in section 214(g)(1)(A) of the Act if the alien qualifies for an exemption under section 214(g)(5) of the Act. For purposes of section 214(g)(5)(A) and (B) of the Act:

(1) “Institution of higher education” has the same definition as described at section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)).

(2) A nonprofit entity shall be considered to be related to or affiliated with an institution of higher education if:

(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;

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

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

(iv) The nonprofit entity has, absent shared ownership or control, entered into a 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 of 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.

(3) An entity is considered a “nonprofit entity” if it meets the definition described at paragraph (h)(19)(iv) of this section. “Nonprofit research organization” and

“governmental research organization” have the same definitions as described at paragraph (h)(19)(iii)(C) of this section.

(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 if the H-1B beneficiary will spend the majority of his or her work time performing job duties at a qualifying institution, organization or entity and those job duties directly and predominately further 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.

(5) If cap-exempt employment ceases, and if the alien is not the beneficiary of a new cap-exempt petition, then the alien will be subject to the cap if not previously counted within the 6-year period of authorized admission to which the cap-exempt employment applied. If cap-exempt employment converts to cap-subject employment subject to the numerical limitations in section 214(g)(1)(A) of the Act, USCIS may revoke the petition authorizing such employment consistent with paragraph (h)(11)(iii) of this section.

(6) Concurrent H-1B employment in a cap-subject position of an alien that qualifies for an exemption under section 214(g)(5)(A) or (B) of the Act shall not subject the alien to the numerical limitations in section 214(g)(1)(A) of the Act. When petitioning for concurrent cap-subject H-1B employment, the petitioner must demonstrate

that the H-1B beneficiary is employed in valid H-1B status under a cap exemption under section 214(g)(5)(A) or (B) of the Act, the beneficiary's employment with the cap exempt employer is expected to continue after the new cap-subject petition is approved, and the beneficiary can reasonably and concurrently perform the work described in each employer's respective positions.

(i) Validity of a petition for concurrent cap-subject H-1B employment approved under paragraph (h)(8)(ii)(F)(6) of this section cannot extend beyond the period of validity specified for the cap-exempt H-1B employment.

(ii) If H-1B employment subject to a cap exemption under section 214(g)(5)(A) or (B) of the Act is terminated by a petitioner, or otherwise ends before the end of the validity period listed on the approved petition filed on the alien's behalf, the alien who is concurrently employed in a cap-subject position becomes subject to the numerical limitations in section 214(g)(1)(A) of the Act, unless the alien was previously counted with respect to the 6-year period of authorized H-1B admission to which the petition applies or another exemption applies. If such an alien becomes subject to the numerical limitations in section 214(g)(1)(A) of the Act, USCIS may revoke the cap-subject petition described in paragraph (h)(8)(ii)(F)(6) of this section consistent with paragraph (h)(11)(iii) of this section.

\* \* \* \* \*

(13) \* \* \*

(i) \* \* \*

(A) Except as set forth in 8 CFR 214.1(l) with respect to H-1B beneficiaries and their dependents and paragraph (h)(5)(viii)(B) of this section with respect to H-2A beneficiaries, a beneficiary shall be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition.

\* \* \* \* \*

(iii) \* \* \*

(C) Calculating the maximum H-1B Admission Period. Time spent physically outside the United States exceeding 24 hours by an alien during the validity of an H-1B petition that was approved on the alien's behalf shall not be considered for purposes of calculating the alien's total period of authorized admission under section 214(g)(4) of the Act, regardless of whether such time is meaningfully interruptive of the alien's stay in H-1B status and the reason for the alien's absence. Accordingly, such time may be recaptured in a subsequent H-1B petition on behalf of the alien, subject to the maximum period of authorized H-1B admission described in section 214(g)(4) of the Act.

(1) It is the H-1B petitioner's burden to request and demonstrate the specific amount of time for recapture on behalf of the beneficiary. The beneficiary may provide appropriate evidence, such as copies of passport stamps, Arrival-Departure Records (Form I-94), and/or airline tickets, together with a chart, indicating the dates spent outside of the United States, and referencing the relevant independent documentary evidence,

when seeking to recapture the alien's time spent outside the United States. Based on the evidence provided, USCIS may grant all, part, or none of the recapture period requested.

(2) If the beneficiary was previously counted toward the H-1B numerical cap under section 214(g)(1) of the Act with respect to the 6-year maximum period of H-1B admission from which recapture is sought, the H-1B petition seeking to recapture a period of stay as an H-1B nonimmigrant will not subject the beneficiary to the H-1B numerical cap, notwithstanding whether the alien has been physically outside the United States for 1 year or more and would be otherwise eligible for a new period of admission under such section of the Act. An H-1B petitioner may either seek such recapture on behalf of the alien or, consistent with paragraph (h)(13)(iii) of this section, seek a new period of admission on behalf of the alien under section 214(g)(1) of the Act.

(D) Lengthy adjudication delay exemption from 214(g)(4) of the Act. (1) An alien who is in H-1B status or has previously held H-1B status is eligible for H-1B status beyond the 6-year limitation under section 214(g)(4) of the Act, if, prior to the 6-year limitation being reached, at least 365 days have elapsed since:

(i) The filing of a labor certification with the Department of Labor on the alien's behalf, if such certification is required for the alien to obtain status under section 203(b) of the Act; or

(ii) The filing of an immigrant visa petition with USCIS on the alien's behalf to accord classification under section 203(b) of the Act.

(2) H-1B approvals under paragraph (h)(13)(iii)(D) of this section may be granted in up to 1-year increments until either the approved permanent labor certification expires or a final decision has been made to:

(i) Deny the application for permanent labor certification, or, if approved, to revoke or invalidate such approval;

(ii) Deny the immigrant visa petition, or, if approved, revoke such approval;

(iii) Deny or approve the alien's application for an immigrant visa or application to adjust status to lawful permanent residence; or

(iv) Administratively or otherwise close the application for permanent labor certification, immigrant visa petition, or application to adjust status.

(3) No final decision while appeal available or pending. A decision to deny or revoke an application for labor certification, or to deny or revoke the approval of an immigrant visa petition, will not be considered final under paragraphs (h)(13)(iii)(D)(2)(i) or (ii) of this section during the period authorized for filing an appeal of the decision, or while an appeal is pending.

(4) Substitution of beneficiaries. An alien who has been replaced by another alien, on or before July 16, 2007, as the beneficiary of an approved permanent labor certification may not rely on that permanent labor certification to establish eligibility for H-1B status based on this lengthy adjudication delay exemption. Except for a substitution of a beneficiary that occurred on or before July 16, 2007, an alien establishing eligibility

for this lengthy adjudication delay exemption based on a pending or approved labor certification must be the named beneficiary listed on the permanent labor certification.

(5) Advance filing. A petitioner may file an H-1B petition seeking a lengthy adjudication delay exemption under paragraph (h)(13)(iii)(D) of this section within 6 months of the requested H-1B start date. The petition may be filed before 365 days have elapsed since the labor certification application or immigrant visa petition was filed with the Department of Labor or USCIS, respectively, provided that the application for labor certification or immigrant visa petition must have been filed at least 365 days prior to the last day of the alien's authorized 6-year period of H-1B admission under section 214(g)(4) of the Act. Such authorized 6-year period of H-1B status includes any prior or concurrent request to recapture unused H-1B, L-1A, or L-1B time spent outside of the United States. The petitioner may request any time remaining to the beneficiary under the maximum period of admission described at section 214(g)(4) of the Act along with the exemption request, but in no case may the approved H-1B period of validity exceed the limits specified by paragraph (h)(9)(iii) of this section.

(6) Petitioners seeking exemption. The H-1B petitioner need not be the employer that filed the application for labor certification or immigrant visa petition that is used to qualify for this exemption. Separate requests for lengthy adjudication delay exemptions under paragraph (h)(13)(iii)(D) of this section may be based on separate, eligible labor certification applications or immigrant visa petitions on behalf of the same alien.

(7) Subsequent exemption approvals after the 7th year. Each exemption granted under paragraph (h)(13)(iii)(D) of this section affords the alien a new date at which the alien's maximum period of admission expires. A petition for any subsequent extension

under paragraph (h)(13)(iii)(D) of this section must include evidence that a qualifying labor certification or immigrant visa petition was filed at least 365 days prior to the last day of the alien's authorized period of H-1B admission. Such labor certification or immigrant visa petition need not be the same as that used to qualify for the initial exemption under paragraph (h)(13)(iii)(D) of this section.

(8) Aggregation of time not permitted. A petitioner may not aggregate the number of days that have elapsed since the filing of one labor certification or immigrant visa petition with the number of days that have elapsed since the filing of another such application or petition to meet the 365-day requirement.

(9) Exemption eligibility. Only a principal beneficiary of a non-frivolous labor certification application or immigrant visa petition filed on his or her behalf may be eligible under paragraph (h)(13)(iii)(D) of this section for an exemption to the maximum period of admission under section 214(g)(4) of the Act.

(10) Limits on future exemptions from the lengthy adjudication delay. An immigrant visa petition under section 203(b) of the Act cannot support a request for the lengthy adjudication delay exemption under paragraph (h)(13)(iii)(D) of this section if the alien fails to file an adjustment of status application or make an application for an immigrant visa within 1 year of an immigrant visa becoming immediately available. If the accrual of such 1-year period is interrupted by the unavailability of an immigrant visa, a new 1-year period shall be afforded when an immigrant visa again becomes immediately available. USCIS may excuse a failure to file in its discretion if the alien establishes that the failure to apply was due to circumstances beyond his or her control. The limitations described in this paragraph apply to any approved immigrant visa petition



under section 203(b) of the Act, including petitions withdrawn by the petitioner or those filed by a petitioner whose business terminates 180 days after approval.

(E) Per-country limitation exemption from 214(g)(4) of the Act. An alien who currently maintains or previously held H-1B status, who is the beneficiary of an approved immigrant visa petition for classification under sections 203(b)(1), (2), or (3) of the Act, and who is eligible to be granted that immigrant status but for application of the per country limitation, is eligible for H-1B status beyond the 6-year limitation under 214(g)(4) of the Act. The petitioner must demonstrate such visa unavailability as of the date the H-1B petition is filed with USCIS and the unavailability must exist at time of the petition's adjudication.

(1) Validity periods. USCIS may grant validity periods of petitions approved under this paragraph in increments of up to 3 years for as long as the alien remains eligible for this exemption.

(2) H-1B approvals under (h)(13)(iii)(E) of this section may be granted until a final decision has been made to:

- (i) Revoke the approval of the immigrant visa petition; or
- (ii) Approve or deny the alien's application for an immigrant visa or application to adjust status to lawful permanent residence.

(3) Current H-1B status not required. An alien who is not in H-1B status at the time the H-1B petition on his or her behalf is filed, including an alien who is not in the United States, may seek an exemption of the 6-year limitation under 214(g)(4) of the Act under this clause, if otherwise eligible.

(4) Subsequent petitioners may seek exemptions. The H-1B petitioner need not be the employer that filed the immigrant visa petition that is used to qualify for this exemption. An H-1B petition may be approved under paragraph (h)(13)(iii)(E) of this section with respect to any approved immigrant visa petition, and a subsequent H-1B petition may be approved with respect to a different approved immigrant visa petition on behalf of the same alien.

(5) Advance filing. A petitioner may file an H-1B petition seeking a per-country limitation exemption under paragraph (h)(13)(iii)(E) of this section within 6 months of the requested H-1B start date. The petitioner may request any time remaining to the beneficiary under the maximum period of admission described at section 214(g)(4) of the Act along with the exemption request, but in no case may the H-1B approval period exceed the limits specified by paragraph (h)(9)(iii) of this section.

(6) Exemption eligibility. Only the principal beneficiary of an approved immigrant visa petition for classification under sections 203(b)(1), (2), or (3) of the Act may be eligible under paragraph (h)(13)(iii)(E) of this section for an exemption to the maximum period of admission under section 214(g)(4) of the Act.

\* \* \* \* \*

(19) \* \* \*

(iii) \* \* \*

(B) An affiliated or related nonprofit entity. A nonprofit entity shall be considered to be related to or affiliated with an institution of higher education if:

(1) 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;

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

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

(4) The nonprofit entity has, absent shared ownership or control, entered into a 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 of 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.

\* \* \* \* \*

(20) Retaliatory action claims. If credible documentary evidence is provided in support of a petition seeking an extension of H-1B stay in or change of status to another classification indicating that the beneficiary faced retaliatory action from his or her employer based on a report regarding a violation of the employer's labor certification application obligations under section 212(n)(2)(C)(iv) of the Act, USCIS may consider a loss or failure to maintain H-1B status by the beneficiary related to such violation as due to, and commensurate with, "extraordinary circumstances" as defined by 8 CFR 214.1(c)(4) and 8 CFR 248.1(b).

\* \* \* \* \*

**PART 245 – ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED  
FOR PERMANENT RESIDENCE**

8. The authority citation for part 245 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1182, 1255; Pub. L. 105-100, section 202, 111 Stat. 2160, 2193; Pub. L. 105-277, section 902, 112 Stat. 2681; Pub. L. 110-229, tit. VII, 122 Stat. 754; 8 CFR part 2.

9. Revise § 245.15(n)(2) to read as follows:

**§ 245.15 Adjustment of status of certain Haitian Nationals under the Haitian  
Refugee Immigrant Fairness Act of 1998 (HRIFA)**

\* \* \* \* \*

(n)\* \* \*

(2) Adjudication and issuance. Employment authorization may not be issued to an applicant for adjustment of status under section 902 of HRIFA until the adjustment application has been pending for 180 days, unless USCIS verifies that DHS records contain evidence that the applicant meets the criteria set forth in section 902(b) or 902(d) of HRIFA, and determines that there is no indication that the applicant is clearly ineligible for adjustment of status under section 902 of HRIFA, in which case USCIS may approve the application for employment authorization, and issue the resulting document, immediately upon such verification. If USCIS fails to adjudicate the application for employment authorization upon the expiration of the 180-day waiting period, or within 90 days of the filing of application for employment authorization, whichever comes later, the applicant shall be eligible for an employment authorization

document. Nothing in this section shall preclude an applicant for adjustment of status under HRIFA from being granted an initial employment authorization or an extension of employment authorization under any other provision of law or regulation for which the applicant may be eligible.

\* \* \* \* \*

10. Add § 245.25 to read as follows:

**§ 245.25 Adjustment of status of aliens with approved employment-based immigrant visa petitions; validity of petition and offer of employment.**

(a) Validity of petition for continued eligibility for adjustment of status. An alien who has a pending application to adjust status to that of a lawful permanent resident based on an approved employment-based immigrant visa petition filed under section 204(a)(1)(F) of the Act on the applicant's behalf must have a valid offer of employment based on a valid petition at the time the application to adjust status is filed and at the time the alien's application to adjust status is adjudicated, and the applicant must intend to accept such offer of employment. Prior to a final administrative decision on an application to adjust status, USCIS may require that the applicant demonstrate, or the applicant may affirmatively demonstrate to USCIS, on a designated form in accordance with the form instructions, or as otherwise determined by USCIS, with any required supporting documentary evidence, that:

(1) The employment offer by the petitioning employer is continuing; or

(2) Under section 204(j) of the Act, the applicant has a new offer of employment from the petitioning employer or a different U.S. employer, or a new offer based on self-

employment, in the same or a similar occupational classification as the employment offer under the qualifying petition, provided that:

(i) The alien's application to adjust status based on a qualifying petition has been pending for 180 days or more; and

(ii) The approval of the qualifying petition has not been revoked.

In all cases, the applicant and his or her intended employer must demonstrate the intention for the applicant to be employed under the continuing or new employment offer (including self-employment) described in paragraphs (a)(1) and (2) of this section, as applicable, within a reasonable period upon the applicant's grant of lawful permanent resident status.

(b) Evidence—(1) Continuing employment offer. Unless otherwise specified on the form or form instructions, for purposes of paragraph (a)(1) of this section, evidence of a continuing employment offer shall be provided in the form of a written attestation, signed by such employer, attesting that the employer continues to extend the original offer of employment and intends that the applicant will commence the employment described in the offer of employment within a reasonable period upon adjustment of status.

(2) New employment offer. Unless otherwise specified by a form or form instructions, for purposes of paragraph (a)(2) of this section, evidence of a new offer of employment that is in the same or a similar occupational classification as the employment offer under the approved petition as required by section 204(j) of the Act must include:

(i) A written attestation signed by the new employer describing the new employment offer, including its requirements and a description of the duties in the new position, and stating that the employer intends that the applicant will commence the employment described in the new employment offer within a reasonable period upon adjustment of status;

(ii) An 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, which may include material and credible information provided by another Federal government agency, such as information from the Standard Occupational Classification (SOC) system, or similar or successor system, administered by the Department of Labor; and

(iii) A copy of the receipt notice issued by USCIS, or if unavailable, secondary evidence showing that the alien's application to adjust status based on such petition has been pending with USCIS for 180 days or more.

(3) Intention after grant of adjustment of status application. Evidence that the applicant intends to commence the employment described either in the continuing employment offer or, if pursuing an offer of new employment in accordance with section 204(j) of the Act, the new employment offer, within a reasonable period upon adjustment of status, including a written attestation signed by the applicant.

(c) Definition of same or similar occupational classification. The term "same occupational classification" means an occupation that resembles in every relevant respect the occupation for which the underlying employment-based immigrant visa petition was

approved. The term “similar occupational classification” means an occupation that shares essential qualities or has a marked resemblance or likeness with the occupation for which the underlying employment-based immigrant visa petition was approved.

## **PART 274a – CONTROL OF EMPLOYMENT OF ALIENS**

11. The authority citation for part 274a continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2.

12. Amend § 274a.2 by revising paragraph (b)(1)(vii) to read as follows:

### **§ 274a.2 Verification of identity and employment authorization.**

\* \* \* \* \*

(b) \*\*\*

(1) \*\*\*

(vii) If an individual’s employment authorization expires, the employer, recruiter or referrer for a fee must reverify on the Form I-9 to reflect that the individual is still authorized to work in the United States; otherwise, the individual may no longer be employed, recruited, or referred. Reverification on the Form I-9 must occur not later than the date work authorization expires. If an Employment Authorization Document (Form I-766 or successor form) as described in § 274a.13(d) was presented for completion of the Form I-9 in combination with a Notice of Action (Form I-797C), or successor form, stating that the original Employment Authorization Document has been automatically extended for up to 180 days, reverification applies upon the expiration of the



automatically extended validity period under § 274a.13(d) and not upon the expiration date indicated on the face of the alien's Employment Authorization Document. In order to reverify on the Form I-9, the employee or referred individual must present a document that either shows continuing employment eligibility or is a new grant of work authorization. The employer or the recruiter or referrer for a fee must review this document, and if it appears to be genuine and relate to the individual, reverify by noting the document's identification number and expiration date, if any, on the Form I-9 and signing the attestation by a handwritten signature or electronic signature in accordance with paragraph (i) of this section.

\* \* \* \* \*

13. Amend § 274a.12 by:

- a. In paragraph (b)(9), removing “;” at the end and adding in its place “.”, and adding a new sentence to the end of the paragraph;
- b. Adding and reserving new paragraphs (c)(27) to (c)(34); and
- c. Adding new paragraphs (c)(35) and (c)(36).

The additions read as follows:

**§ 274a.12 Classes of aliens authorized to accept employment.**

\* \* \* \* \*

(b) \* \* \*

(9) \* \* \* In the case of a nonimmigrant with H-1B status, employment authorization will automatically continue upon the filing of a qualifying petition under 8 CFR 214.2(h)(2)(i)(H) until such petition is adjudicated, in accordance with section 214(n) of the Act and 8 CFR 214.2(h)(2)(i)(H);

\* \* \* \* \*

(c) \* \* \*

(35) An alien who is the principal beneficiary of a valid immigrant petition under section 203(b)(1), 203(b)(2) or 203(b)(3) of the Act described as eligible for employment authorization in 8 CFR 204.5(p).

(36) A spouse or child of a principal beneficiary of a valid immigrant petition under section 203(b)(1), 203(b)(2) or 203(b)(3) of the Act described as eligible for employment authorization in 8 CFR 204.5(p).

\* \* \* \* \*

14. Amend § 274a.13 by:

- a. Revising the paragraph (a) introductory text;
- b. Removing the first sentence of paragraph (a)(1); and
- c. Revising paragraph (d).

The revisions read as follows:

**§ 274a.13 Application for employment authorization.**

(a) Application. An alien requesting employment authorization or an Employment Authorization Document (Form I-766 or successor form), or both, may be required to apply on a form designated by USCIS with any prescribed fee(s) in accordance with the form instructions. An alien may file such request concurrently with a related benefit request that, if granted, would form the basis for eligibility for employment authorization, only to the extent permitted by the form instructions.

\* \* \* \* \*

(d) Renewal application—(1) Automatic extension of Employment Authorization Documents. Except as otherwise provided in this chapter or by law, notwithstanding 8 CFR 274a.14(a)(1)(i), the validity period of an expiring Employment Authorization Document (Form I-766 or successor form) and, for aliens who are not employment authorized incident to status, also the attendant employment authorization, will be automatically extended for an additional period not to exceed 180 days from the date of such document's and such employment authorization's expiration if a request for renewal on a form designated by USCIS is:

(i) Properly filed as provided by form instructions before the expiration date shown on the face of the Employment Authorization Document;

(ii) Based on the same employment authorization category as shown on the face of the expiring Employment Authorization Document or is for an individual approved for Temporary Protected Status whose EAD was issued pursuant to 8 CFR 274a.12(c)(19); and

(iii) Based on a class of aliens whose eligibility to apply for employment authorization continues notwithstanding expiration of the Employment Authorization Document 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, including aliens described in 8 CFR 274a.12(a)(12) granted Temporary Protected Status and pending applicants for Temporary Protected Status who are issued an EAD under 8 CFR 274a.12(c)(19), as may be announced on the USCIS Web site.

(2) Terms and conditions. Any extension authorized under this paragraph shall be subject to any conditions and limitations noted in the immediately preceding employment authorization.

(3) Termination. The period authorized by paragraph (d)(1) of this section shall automatically terminate the earlier of up to 180 days after the expiration date of the Employment Authorization Document (Form I-766, or successor form), or upon issuance of notification of a decision denying the renewal request. Nothing in paragraph (d) of this section shall affect DHS's ability to otherwise terminate any Employment Authorization Document or extension period for such document and, as applicable, employment authorization, in accordance with 8 CFR 274a.14 or otherwise in this chapter, by written notice to the applicant, or by notice to a class of aliens published in the Federal Register.

(4) Unexpired Employment Authorization Documents. An Employment Authorization Document (Form I-766, or successor form) that has expired on its face is considered unexpired when combined with a Notice of Action (Form I-797C), or

successor form which demonstrates that the requirements of paragraph (d)(1) of this section have been met.

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**Jeh Charles Johnson,**

Secretary.

[FR Doc. 2015-32666 Filed: 12/30/2015 8:45 am; Publication Date: 12/31/2015]