February 29, 2016

Laura Dawkins, Chief, Regulatory Coordination Division
United States Citizenship and Immigration Services
Office of Policy and Strategy
20 Massachusetts Avenue NW
Washington, DC 20529-2140

RE: Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers; 80 FR 81900 (12/31/15); DHS Docket No. USCIS-2015-0008

Dear Ms. Dawkins:

The Alliance of Business Immigration Lawyers (ABIL) is pleased to submit these comments regarding the Proposed Rule issued by the Department of Homeland Security on December 31, 2015 titled Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers. We appreciate the Department's efforts at implementing improvements in this area, and we hope that our comments provide a framework for further improving and strengthening the proposed rules. The Alliance of Business Immigration Lawyers is comprised of 20 of the top U.S. business immigration law firms, each led by a prominent member of the U.S. immigration bar. ABIL member firms employ over 250 attorneys (700+ total staff) devoted to business immigration in 25 major U.S. cities, plus 25 international cities. More information about our organization is available at www.abil.com.

We have organized our comments according to the order presented in the Proposed Rule. Much of the proposed rule is a helpful codification of existing procedure, and we appreciate the effort put in by DHS in this regard. Our comments below are limited to those areas of the proposed rule that we believe should be changed. Thank you for your consideration.

A. Proposed Implementation of AC21 and ACWIA

1. Extending H-1B Nonimmigrant Status for Certain Individuals Who Are Being Sponsored for Lawful Permanent Residence

Section 104(c) of AC21 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 the application of certain ''per country'' limitations on immigrant visas.[1]

Sections 106(a) and (b) of AC21 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. [2]

The proposed regulation unfairly limits the relief granted by Sec. 104(c) and Sec. 106(a) and (b) to only the alien family member who is the principal beneficiary of the employment based petition or labor certification. The regulations should also benefit any derivative beneficiary of the petition.

Section 104(c) of AC21 provides an H-1B extension beyond six years to "any alien" who "is the beneficiary" of an immigrant visa petition, and Section 203(d) states that a dependent spouse or child shall "be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent." Taken together, these statutory provisions show that derivative beneficiaries are "entitled to the same status" as principal beneficiaries, and are clearly persons ". . . on whose behalf a petition under section 204(b) of that Act to accord the alien immigrant status under section 203(b) of that Act . . . has been filed."

1. Section 106(a) of AC 21 provides yet another basis for a spouse in H-1B to extend status. 106(a) allows for an H-1B extension beyond the sixth year if: *365 days or more have passed since the filing of **any** application for labor certification that is required or used by the alien to obtain status under the Immigration and Nationality Act ("INA") § 203(b),*
2. *365 days or more have passed since the filing of an Employment-based immigrant petition under INA § 203(b).*

There is no reason to prohibit a spouse to use "any" application for labor certification, which could be the labor certification filed on behalf of the other spouse.

The absence of any reference to INA §203(d) in AC21 §104(c) or §106(a) does not suggest that that only the principal spouse can immigrate under INA §203(b). INA 203(d) states that the spouse is "entitled to the same status, and the same order of consideration provided in the respective subsection (INA § 203(a), § 203(b), or § 203(c)), if accompanying or following to join, the spouse or parent." Thus, the derivative spouse still immigrates under INA 203(b). INA § 203(d), which was introduced by the Immigration Act of 1990 ("IMMACT90"), is essentially superfluous and only confirms that a derivative immigrates with the principal. *See* Pub. L. No. 101-649, 104 Stat. 4978 (1990). Prior to IMMACT90, there was no predecessor to INA § 203(d), and yet spouses immigrated with the principal. Thus, it is clear that a spouse does not immigrate via INA § 203(d), and the purpose of this provision is merely to confirm that a spouse is given the same order of consideration as the principal under INA § 203(b). Moreover, the fact that "beneficiary" is mentioned in the singular and not in the plural should also not undermine support for the notion that any beneficiary, either as principal or spouse, can qualify for an AC 21 H-1B

[1] **Federal Register** / Vol. 80, No. 251 / Thursday, December 31, 2015 / Proposed Rules, p. 81903.
[2] *Id*.

extension who is capable of immigrating under a labor certification or I-140 petition, or both. DHS must interpret existing ameliorative provisions in AC 21 that Congress has specifically passed to relieve the hardships caused by crushing quota backlogs in a way that reflects Congressional intention.

The proposed rules on AC21 104(c) and 106(a) unduly and unfairly limit the remedial effect of these statutory provisions. Under the proposed rules, a derivative beneficiary of her spouse's labor certification or I-140 petition, who is an H-1B worker, would have to cease H-1B employment and leave her job, unless she has her own I-140 or labor certification. While such an H-1B worker could potentially change status to H-4 and seek an EAD, the current processing times are interminably long for such applications, followed by an even longer time to obtain an EAD after the spouse's status has been changed to H-4. This would be unduly disruptive to an H-1B spouse's ability to continue employment.

The proposed rules should clearly provide that the relief of AC21 104(c) and 106(a) should be available to derivative beneficiaries, so that the rules would read:

8 CFR §214.2(h)13)(iii)(D)(9) Exemption eligibility. The principal beneficiary and any derivative 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.

8 CFR §214.2(h)(13)(iii)(E)(6) Exemption eligibility. The principal beneficiary and any derivative 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)

Under the newly-proposed 8 CFR §214.2(h)(13)(iii)(D)(10), beneficiaries of AC21 106(a) and (b) must file an adjustment of status or immigrant visa application within one year of a visa becoming immediately available. The period is tolled, however, during any period in which priority dates are unavailable and a person is not eligible to file, and the one year clock will reset if priority dates retrogress. Also, failing to file within a year may be excused by DHS if the failure to apply was due to circumstances beyond the beneficiary's control. This new provision has been proposed to ensure that extensions of H-1B status beyond six years are available only to beneficiaries who take certain steps in furtherance of obtaining permanent residence.[3]

ABIL believes that this is an unnecessary and confusing requirement. First, there is no evidence that there is a problem. In our experience, H-1B visa holders are eager, even desperate, to become permanent residents and do so at the first opportunity. Where the beneficiary is prevented from taking steps toward permanent residence because a subsequent employer has not been willing or able to proceed with a labor certification and I-140, this limitation places an unwarranted (and extreme) hardship on that individual and his or her family. Second, the regulation is incomplete and confusing. When is a visa immediately available – Final Action Date or Date for Filing? Does this change when USCIS determines that an adjustment application can be filed based on Date for Filing Chart? What does it mean to "make" an immigrant visa application? There are many steps involved in the immigrant visa process, and to "make" an immigrant visa application is not a term of art in immigration law or

[3] *Id* at 81915.

procedure. Leaving the term undefined in the regulation is a serious error. Finally, retrogression resets the one year clock – but what if retrogression does not occur and USCIS changes which chart is used for I-485 filing which causes a visa to no longer be available? Is the one-year period tolled or does it continue to run?

2. Job Portability Under AC21 for Certain Applicants for Adjustment of Status

a. 8 CFR §245.25(c)

DHS has proposed a new 8 CFR §245.25 which is intended to "clarify and improve" the policies and procedures related to the job portability provisions of Section 106(c) of AC21. ABIL believes that the proposed 8 CFR §245.25(c) takes an overly narrow interpretation of the term "same or similar" and results in a situation where INA 204(j) is interpreted in a way that is more inflexible than current practice, lessens job flexibility and takes much needed discretion away from USCIS adjudicators.

The proposed rule picks an especially strict definition of the word, "similar," which AC21 left undefined. The rule opts for the online version of a British dictionary, the *Oxford English Dictionary (OED),* publicly inaccessible except by paid subscription, which apparently defines "similar" as "having a marked resemblance or likeness." However, the American online dictionary, Merriam-Webster.com (*MW*), defines similar to mean "alike in substance or essentials" -- a definition clearly less restrictive than the *OED*'s "marked resemblance" formulation. Similar is also defined as "having a likeness or resemblance, especially in a general way."[4] There is no reason for DHS to opt for the most restrictive definition of the word "similar" in a context where Congress plainly meant to be flexible and accommodating. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* . . . we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity. The question for a reviewing court is whether in doing so the agency has acted reasonably and thus has "stayed within the bounds of its statutory authority."[5] Even under *Chevron*'s deferential framework, agencies must operate "within the bounds of reasonable interpretation." And reasonable statutory interpretation must account for both "the specific context in which . . . language is used" and "the broader context of the statute as a whole." *Robinson v. Shell Oil Co.* Thus, an agency interpretation that is "[inconsistent] with the design and structure of the statute as a whole," does not merit deference.[6]

Instead of requiring the stricter showing of "marked resemblance," USCIS should give the phrase, the "same or similar occupational classification," its ordinary meaning, namely that a job would be "similar" to another if the subject matter expertise required in each of the two jobs, or the stated duties, skills and qualifications, are fairly "comparable."

b. 8 CFR §245.25(a)

The proposed regulation begins with the statement "An alien . . . 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

[4] Merriam-Webster, *Similar*, http://www.merriam-webster.com/dictionary/similar (last visited February 24, 2016).
[5] *City of Arlington, Texas, et al. v. Federal Communications Commission et al.* 133 S.Ct. 1863 (2013).
[6] *Utility Air Regulatory Group v. Environmental Protection Agency et al.* 684 F. 3d 102 (2014).

application to adjust status is adjudicated . . ." This section seems to ignore the essential premise of AC21 portability. Where an I-140 is approved and the I-485 has been pending for more than 180 days, the employee is free to "port" his green card to any subsequent employer or job (which includes self-employment) so long as the employment or job is in the same or similar occupational classification. There is no need for any petition from the subsequent employer. If by "valid petition" DHS means "unrevoked petition" (under the new proposed rules), the regulation should say so. Its proposed language is unnecessarily confusing.

Finally, we wish to comment on DHS's proposal to adopt a new supplementary form to the adjustment of status application which is intended to assist USCIS in making AC21 portability determinations. Currently, DHS is not proposing an additional fee for this form and we would urge the agency not to do so. An additional filing fee for a supplementary form is punitive to foreign nationals already impacted the hardest by backlogs, and particularly if this form is supposed to be filed proactively every time someone with a pending adjustment of status application changes jobs.

c. 8 CFR §245.25 (b)

This section describes the evidence that must be submitted to show a continuing or new employment offer. Although the regulation includes self employment, there is no mention of the evidence that might be considered satisfactory to demonstrate self employment.

3. Job Portability for H-1B Nonimmigrant Workers

The proposed 8 CFR §214.2(h)(2)(i)(H) is intended to implement AC21 §105(a) and current guidance. Among other things, DHS proposes making portability available only to H-1B beneficiaries currently in the U.S. in H-1B status. In "bridge petitions" where a third or later employer files an H-1B petition on behalf of a worker, a subsequent portability petition is dependent on the approval of an extension of stay in the preceding case(s). ABIL has the following concerns with this proposed rule:

- Why can't portability extend to H-1B nonimmigrants who are employed but are travelling for business or vacation? Delaying the filing until return from travel causes a delay in start dates and impedes a business' ability to move forward with its hiring process. True portability should allow job changes for H-1B workers who are employed by their sponsor, whether they are physically in the U.S. or not. If they can prove that they are employed at the time of filing, what does it matter where they are? The rules should keep up with the pace of business and business travel.
- We understand that in the context of a bridge petition, the requirement of an approval of the extension in the preceding case is largely meant to curtail frivolous filings of the so-called bridge petitions. However, an employee is often unable to control when his or her employer files an extension. If an employer delays the filing, and chooses not to premium process, the employee will not be able to port for (potentially) several months. This unfairly restricts the availability of Section 105 to employees in these situations. For example, if the employee were to leave the second sponsor, and an RFE was issued on the second case, the employer would have no incentive to respond. The case would be denied and the employee would lose the ability to port through no fault of anyone's. Why not instead require that the bridge petition be non-frivolous?

If the employee can show proof that he or she worked for the company and was paid the proffered wage, shouldn't that be enough?

4. Calculating the H-1B Admission Period

Proposed 8 CFR §214.2(h)(13)(iii)(C) is intended to implement current guidance on recapture, and we believe that it largely succeeds. However, we have a question with respect to the "remainder" option: can this option be used for people who were initially counted against the cap more than six years ago?

5. Exemptions from the H-1B Numerical Cap Under AC21 and ACWIA

Proposed 8 CFR §214.2(h)(8)(ii)(F)(1)-(3) is intended to broaden the current definition of "affiliated or related nonprofit entities", and ABIL appreciates this acknowledgement of reality in higher education affiliations. However, we believe that the "primary purpose" requirement of proposed 8 CFR §214.2(h)(8)(ii)(F)(2) is too restrictive, and we would strike that clause from the regulation. It should be sufficient to require proof of an "active working relationship between the nonprofit entity and the institution of higher education for the purposes of research and/or education."

6. Whistleblower Protections in the H-1B Program

The proposed 8 CFR §214.2(h)(20) is intended to codify current DHS policy of protection to employees who report violations of the employer's LCA obligations. Under the proposed regulation, employers could submit evidence that the beneficiary faced retaliatory action from a former employer regarding reporting a violation of the LCA obligation. The evidence should include a complaint filed by the beneficiary and corroborative documentation that the complaint resulted in retaliatory action. If DHS determines that the evidence is credible, DHS can then overlook loss or failure to maintain H-1B status as a result. ABIL has the following concerns:

- It is unclear what the evidentiary standard is regarding the credibility determination (preponderance of the evidence?)
- It is unclear what corroborating documentation would be sufficient.
- How important is the timing to the analysis – will it matter if the complaint and retaliation are separated by shorter or longer periods of time?
- It would be helpful to have examples of types of corroborating documentation of the retaliation, as it is unlikely an employer will admit in writing that someone is being terminated for filing a complaint.

B. <u>Additional Changes To Further Improve Stability and Job Flexibility for Certain Workers</u>

1. Revocation of Approved Employment-Based Immigrant Visa Petitions

Currently, an employment-based immigrant visa petition will be revoked automatically upon: (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. Additionally, upon notice to the petitioner an immigrant petition can be revoked on any other ground "when the necessity for the revocation comes to the attention of [DHS]", such as for

fraud, material misrepresentation or erroneous approval. *See* 8 CFR §205.2(a). The proposed rule, 8 CFR §205.1(a)(3)(iii)(C) and (D), will eliminate automatic revocation of approved EB-1, EB-2 and EB-3 immigrant petitions based on a petitioner's request for withdrawal of the petition or termination of the petitioning employer's business where the petition has been approved for 180 days or longer.

ABIL has significant concerns with the proposed rule that a petition must be approved for 180 days prior to withdrawal in order to confer H-1B extension and portability benefits. This is an arbitrary timeframe that does not make any sense. The purported reason is "to provide additional assurance that the petition was bona fide when filed," but DHS "in all cases" already determines whether a relevant offer of employment is bona fide[7] so there is no need for an additional six-month assurance. The proposed rule allows an employer to retaliate against an employee who seeks a job change and thereby effectively chains H-1B workers to their I-140 petitioners for an arbitrary six-month period. There is no reason to provide such control to employers – they are capable of looking out for themselves, and indeed many employers deal with this situation through legal claw-back arrangements. The 180-day limitation makes even less sense in the case of a petitioner going out of business, as we would expect the overall health of a business to be completely separate from the bona fides of any particular job offer from that business. We would propose that *any* approved I-140 be valid for job portability and extension provisions.

2. Retention of Priority Dates

The proposed rule would also codify that, upon approval of the EB-1, EB-2 and EB-3 immigrant petition, the priority date will be immediately retained. Further, the priority date will continue to be retained even if (1) the petitioner withdraws the immigrant petition within 180 days of the petition's approval or (2) the petitioning employer's business terminates within less than 180 days of the immigrant petition's approval.

ABIL appreciates the important clarification that a petitioner's withdrawal of an approved I-140 will not affect the beneficiary's ability to retain his or her priority date.

3. Nonimmigrant Grace Periods

Proposed 8 CFR §214.1(l)(i) provides for a 10-day grace period for individuals in H-1B, E-1, E-2, E-3, L-1 and TN status, and their dependents, to to allow flexibility and stability by allowing such visa holders to prepare for employment and/or look for new employment and extend their stays or prepare to depart. We commend this new provision and have the following comments:

- The rule fails to mention the H-1B1 classification.
- What happens if the foreign national's I-94 does not reflect the additional 10 days? In that case, can an extension of stay be filed during the 10 day period?

Proposed 8 CFR §214(l)(ii) provides a one-time 60-day grace period for those in E-1, E-2, E-3, H-1B, H-1B1, L-1 and TN status whose employment is terminated either voluntarily or involuntarily. ABIL applauds the introduction of a grace period for these nonimmigrant classifications and has the following

[7] **Federal Register** / Vol. 80, No. 251 / Thursday, December 31, 2015 / Proposed Rules, p. 81916.

comments:

- We note that the H1-B1 is specifically included in the 60-day grace period but not the 10-day grace period.
- What is a "one-time" period during any authorized validity period? Is it linked to a particular I-797, for example, so that an individual might have several "one-time" grace periods during his or her general eligibility for H-1B classification?
- Under what circumstances would USCIS have discretion to limit the 60 day period?
- While a 60-day grace period is certainly helpful, ABIL believes that a 120-day grace period would better reflect the exigencies of modern life. In particular, 120 days would generally allow children to complete an entire school semester in valid status prior to departing the U.S. Further, 120 days is a more realistic timeframe in which to expect an individual to be able replace his or her nonimmigrant employment.

4. Eligibility for Employment Authorization in Compelling Circumstances

Proposed 8 CFR §204.5(p) provides an avenue for individuals in certain nonimmigrant classifications to obtain employment authorization in limited compelling circumstances. Individuals would be eligible for one year of employment authorization when they meet the following criteria:

1) the individual is currently in the U.S. 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.

ABIL questions why this is limited to only a few NIV classes. Why, for example, are TN or P classifications not included? We believe that this benefit should be open to anyone in a valid nonimmigrant status which permits employment.

The proposed rule does not define "compelling circumstances," but in its discussion of the rule DHS proposes four circumstances under which it might consider granting employment authorization. One of these is "significant disruption to the employer," where the worker can show that he or she is unexpectedly unable to timely extend or change status, there are no other possible avenues for the immediate employment of such workers with that employer and the worker's departure would cause the employer substantial disruption to a project for which the worker is critical. Examples include:

- an L-1B nonimmigrant sponsored for permanent residence and the employer goes through corporate restructuring such that the worker no longer qualifies as an intracompany transfer
- an H-1B employer loses cap exemption status and the worker is part of a critical project

ABIL asks whether more subjective criteria might qualify as compelling, for example, what if an L-1A needs to extend but is no longer managing any employees and therefore may have the petition denied? If the employer's business is disrupted, can the employee apply for an EAD on this ground?

Moreover, ABIL questions the need for imposing any compelling circumstance requirement. The ability for the DHS to grant work authorization stems from INA Section 274A(h)(3), which is the same statutory provision under which 8 CFR 274a(c)(9) was promulgated, which grants an EAD to a pending adjustment applicant. There is no similar compelling circumstance requirement for an adjustment applicant seeking an EAD who is on the path to permanent residency. Therefore, the need to also require compelling circumstances for the beneficiary of an approved I-140 who is clearly eligible to obtain permanent residency, but for the priority date, is unnecessary. Furthermore, the "compelling circumstances" would not provide the amelioration that the beneficiary of an approved I-140 petition caught in the crushing employment-based backlogs needs to be able to exercise job mobility.

If DHS retains a "compelling circumstance" requirement, DHS must clarify the circumstances under which an applicant can seek renewal of the EAD. DHS allows a renewal if the applicant continues to demonstrate compelling circumstances or that the difference between the principal beneficiary's priority date and the date upon which an immigrant visa is authorized is 1 year or less. See 8 CFR 204.5(p)(3)(i)(A) and (B). Yet, at 8 CFR 204.5(p)(5) relating to "[i]neligibility for employment authorization," renewal of an EAD will not be permitted if the principal beneficiary's priority date is more than 1 year beyond the date beyond the date that immigrant visas were authorized. This contradicts the earlier section in the proposed rule, which allows a beneficiary to seek renewal if s/he continues to demonstrate compelling circumstances, which is independent of whether the beneficiary's priority date is within 1 year or less of the official cut-off date. DHS must clarify that a renewal of an EAD may be sought if either the beneficiary continues to demonstrate compelling circumstances or if the priority date is within 1 year of the official cut-off date.

5. H-1B Licensing Requirements

Proposed 8 CFR §214.2(h)(4)(v)(C)(2) is intended to adopt current policy and ameliorate the "Catch-22" under which some licensed professionals, including many physicians, are unable to secure the license required to perform the duties of the H-1B position without first obtaining approval of the H-1B petition. The proposed rule would permit approval of an H-1B petition for up to one year on behalf of an unlicensed beneficiary for a position where a license is otherwise required to perform the duties of the position provided that:

- The petitioner proves that the license would otherwise be approvable but for the lack of H-1B approval or the issuance of a Social Security card; and
- The beneficiary has filed an application for the required license is filed (unless the jurisdiction in which the license is sought does not permit submission of the application prior to H-1B approval)

ABIL appreciates DHS's codification of existing practice in this area but believes that it is not necessary to limit the H-1B approval to one year. In almost all cases, the evidence provided with the initial filing will demonstrate that the license will be approved very shortly following H-1B approval. Further, approval of the H-1B petition – whether for 12 months or 36 months – does not authorize an H-1B worker to engage in an occupation for which he does not hold the appropriate state license. So, if the required license were never approved, the H-1B beneficiary would still not be legally employable notwithstanding

the approved H-1B petition. In addition, limiting the validity of the initial H-1B to 12 months results in disparate treatment of licensed H-1B workers depending upon the state in which they will be employed, and it imposes an unnecessary financial burden on petitioners who must prematurely file new H-1B petitions.

Proposed 8 CFR §214.2(h)(4)(v)(C)(1) recognizes that some states permit unlicensed individuals to work in a licensed field so long as that person will be under supervision. However, ABIL is concerned that the proposed rule gives USCIS too much authority to second-guess established practices followed by state licensing authorities. USCIS must not be permitted to substitute its judgment for that of the state licensing authority. The quality and nature of the supervision is within the province of the licensing board within the state of intended employment. USCIS adjudicating officers are neither qualified nor authorized to make these determinations. As written, the proposed rule could result in denials of H-1B petitions filed for unlicensed workers whose supervision the state has deemed adequate but whom USCIS nonetheless determines is not. ABIL therefore suggests the following revisions to the proposed rule at 8 C.F.R. §214.2(h)(4)(v)(C)(1):

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

C. <u>Processing of Applications for Employment Authorization Documents</u>

1. Automatic Extensions of EADs in Certain Circumstances

Proposed 8 CFR §274a.13(d)(1), (3), and (4) authorize an automatic 180 day extension of EAD or employment authorization if the individual: 1) files a request to renew his or her EAD prior to the expiration date, 2) requests a renewal based on the same employment authorization category under which the expiring EAD was granted or has been approved for TPS and his or her EAD was issued pursuant to 8 CFR §274a.12(c)(19); and 3) 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. The 180-day extension is automatically terminated upon issuance of a decision denying the individual's renewal application, upon written notice to the applicant, notice published in the Federal Register, or any other applicable authority. The expired EAD, in combination with a Notice of Action (Form I-797C) indicating timely filing of the renewal EAD application would be considered an unexpired EAD for purposes of complying with Employment Eligibility Verification (Form I-9) requirements.

While we applaud DHS' commitment to providing an automatic extension of employment authorization upon filing a renewal request, the proposed regulation is unduly restrictive both in terms of the benefit provided and the classes of aliens who may use it.

First, the 180-day extension period is too short to prevent lapses in employment authorization from causing unnecessary disruptions for both foreign national employees and their employers. While USCIS is required to adjudicate EAD applications within 90 days (but often does not), applications may be filed only 120 days in advance, leading to intermittent and unpredictable lapses in employment authorization. EADs are used for employment in every sector of the U.S. economy and by every type of business; inconsistent and unpredictable adjudication and gaps in employment authorization not only hurt the foreign national, they hurt the employer, American co-workers, the economy and the American public. ABIL proposes lengthening the extension period to 240 days, which is the period for which the agency provided interim EADs in the past and consistent with the 240-day rule for timely filed extensions under 8 CFR §274a.12(b)(20) for H-1B and other work authorization classifications. Further, USCIS should be required to lift the prohibition against filing a Form I-765 for an EAD renewal not more than 120 days before the expiration date. The agency should accept applications 180 days prior to expiration of employment authorization to be consistent with other nonimmigrant extension rules and allow more time to adjudicate the petitions within the extension period.

Second, the list of 15 employment authorization categories where renewal applicants would be able to receive automatic extensions is incomplete. The most egregious exclusion is work-authorized dependents in H-4, J-2 and L-2 status. No justification is provided for the exclusion of work-authorized dependents from this important benefit. These dependents are in no different positions than the other classes of individuals already included in the proposed rule. These dependents rely on EADs to work; so, both they and their employers currently experience the same disruption caused by the lack of an automatic extension for timely filed EAD renewals as other beneficiaries. The relief provided by the proposed rule is incomplete if these individuals are excluded from its benefits. Therefore, H-4, J-2 and L-2 dependents should be included in the proposed automatic EAD extension portion of the proposed rule. In addition, B-1 domestic employees should be included in this group. B-1 status typically lasts only for six months, and B-1 domestic employees are perennially working without authorization simply because it is impossible to successfully time EAD extension filings after approvals of extensions of status, such that the card arrives before the prior card expires.

Third, the proposed 8 CFR §274a.13(d)(4) provides that proper I-9 documentation would consist of the expired EAD combined with an I-797 receipt from the extension. Requiring a filing receipt for I-9 purposes is problematic if the extension was filed just before the expiration. The receipt would not arrive for several days after the expiration, and the employer would be non-compliant with reverification rules even though the extension was timely filed. We would propose that the I-9 rules allow for a process similar to H transfers, where the employer makes a note that the extension was filed and then updates it when the receipt comes in.

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

The propose regulation eliminates current 8 CFR §274a.13(d). Present law requires the adjudication of Form I-765 within 90 days of receipt as well as the issuance of interim EADs with validity periods of up to 240 days when such an application is not adjudicated within the 90-day period. DHS believes that the 90-day timeframe and interim EAD procedures "are outdated and no longer reflect the operational realities of the Department . . . " ABIL acknowledges that operational realities are different than 20 years ago when EADs were processed by local field offices, but there are important benefits to requiring that the agency adjudicate EADs withing a particular timeframe. As the USCIS Ombudsman stated in July 2011 at http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-documents-

07182011.pdf, employment authorization is a critical immigration benefit, important to the U.S. economy, and individuals and the organizations that employ them may suffer economic hardship when EAD applications are delayed. If DHS feels that 90 days is no longer adequate to complete necessary background and security checks, then the required adjudication period should be extended to 180 days or 240 days. Further, individuals should be allowed to file for a new or renewal of an EAD up to 180 days in advance of the expiration of current employment authorization or in advance of eligibility of such authorization.

Respectfully submitted,

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