Skilled Immigrants In America

Nov 15, 2016

To

The Honorable Shaun Donovan, Director
The Office of Management and Budget
725 17th Street, NW Washington, DC 20503

Sub: Skilled Immigrant's Concern Reg Proposed rule RIN1615-AC05

Who are we:

We represent an organized group of highly-skilled green card applicants mostly from green card backlogged countries such as India and China with at least a decade of individual professional experience and expertise in sectors such as engineering, science, medical, information technology and more. Many of us hold master's degrees and/or doctorate degrees from prestigious US universities, have published number of academic papers at international level and/or have professional certifications in our respective areas of expertise. We were hired purely based on our skills, experience and qualifications. All of us have been employed legally and have been living in US legally since decades. We've collectively made tremendous contributions in US economy while working for US based firms and by buying houses, investing in 401k, retirement funds, paying all the taxes regularly and following all the rules.

Our primary Objective:

Our primary objective is to create awareness about employment based green card backlogs and related issues affecting hundreds of thousands of legal immigrants primarily from the countries like India and China and work with US Congress, White House and US Immigration agencies to fix the broken legal immigration system and alleviate the pain of law abiding Skilled Immigrants who are stuck in decades long green card backlog because of existing unfair and discriminatory green card allotment process based on race and country of origin rather than on merit.

Main Agenda for Today's Meeting with OMB/USCIS/DHS:

To discuss the merits/demerits of the rule and how USCIS failed to execute President's Obama's executive order primarily related to folks who have approved LPR status and stuck in decades long green card backlog. Request OMB to review if proper rulemaking process was followed and if USCIS revised proposed rule based on overwhelming comments submitted to revise it. If not, did USCIS offer proper justification for not revising rules based on submitted comments.

Explaining Green Card Backlog and Its impact on immigrants stuck in such backlogs:

One of the most important point on the president's executive order [1] was help folks stuck in green card backlog. It is very important to understand how backlog affects lives and legal immigrants and their families and hence we listed down few points below.

1. **Impact on Family:** In spite of living in the United states for over a decade legally, paying taxes, following all the rules, if a person from India or China stuck in green card backlog while working in USA on employment based visa loses his job, he has to sell his house, car, all his belongings and leave United States immediately [2]. Current rules make it impossible for them to find a new job from a company who is willing to re-sponsor their work visa again, apply for the job, clear interviews, get an offer, clear background checks all in short time after losing the original job. This puts tremendous stress on their lives, their families including US born kids who may have to leave the country during middle of the school year with their parents. This affects kids' entire life and career as they would have to restart their life in a new country with a new school system and new environment. The non-US born children of High-skilled Indians stuck in Green card backlog are worst affected. Even though they came here on their parent's dependent visas, once they cross 21 years of age they lose out on dependent GC slot and have to apply fresh non-immigrant visa, start entire immigration cycle from scratch like their parents and get in queue again. Ironically, kids who entered US illegally are granted EAD under a new program called DACA. Families are under constant stress due to high uncertainties. It also prevents the affected families from living up to their full potential.

2. **Impact on their career:** We cannot start our own business/startup companies to generate more jobs preventing us from realizing our full potential. We cannot invest freely due to uncertainties and constant fear. High Skilled applicants stuck in backlog cannot change jobs or get promotions easily as they need to restart the green card process from start every time we change employers or change roles. They have no option but to continue in the same roles in an indentured servitude. This not only hurts their career aspirations, but more importantly it puts American workers/citizens at a greater disadvantage as well. Innovation comes from Free mind and without green cards families suffer from constant stress.

3. **Travel Issues:** High Skilled applicants have to renew their visa every 3 years and get it stamped outside the country. This is costly, time consuming and risky for both employer and the employee. Many have stopped visiting home country to attend weddings, funerals of loved ones, because of high uncertainty in visa stamping process. Wait times to get a visa interview appointment at US Consulates could vary from 1 month to 6 months. Family fear of getting stuck in home country during background checks and verifications while visa stamping. While stuck in home country, employers back in USA usually do not wait and they end employer's visa sponsorship. If employers end visa sponsorship it not only results in high skilled applicants losing his/her job, it also results in fire-sale of houses, cars and all their belongings as they have to rely on mercy of friends and neighbors for such sales.

President Obama's Executive Order:

The President's visa modernization memorandum very clearly acknowledged the green card backlog issue and it wholeheartedly intended to provide immediate relief to the folks who are stuck in such backlog by issuing specific guidelines. The primary intent was to provide portable work authorization and ease in job mobility to folks under approved LPR status.

Most of the below content has been taken from the comments provided by "Skilled Immigrants Advocacy Group" (SIRA) on the draft of proposed regulation by DHS/USCIS to implement president Obama's executive order. Their comments clearly highlights, how the proposed regulation by DHS/USCIS in its current form would completely fail to help most of the greencard applicants stuck in years of backlog. We are providing the full text of SIRA's comments as an attachment to this letter. The same can also be found at

https://www.regulations.gov/document?D=USCIS-2015-0008-16485

The executive actions by President Obama stated the following:

- Providing portable work authorization for high-skilled workers awaiting LPR status and their spouses. Under the current system, employees with approved LPR applications often wait many years for their visa to become available. DHS will make regulatory changes to allow these workers to move or change jobs more easily.
- Ensuring that individuals with lawful status can travel to their countries of origin DHS will clarify its guidance to provide greater assurance to individuals with a pending LPR application or certain temporary status permission to travel abroad with advance permission ("parole").

DHS Secretary Jeh Johnson wrote [3] in his memorandum of Nov. 20, 2014 to USCIS, titled "Policies Supporting U.S: High-Skilled Businesses and Workers": I direct that USCIS carefully consider other regulatory or policy changes to better assist and provide stability to the beneficiaries of approved employment-based immigrant visa petitions. Specifically, USCIS should consider amending its regulations to ensure that approved, long-standing visa petitions remain valid in certain cases where they seek to change jobs or employers.

USCIS stated that it will:

Provide clarity on adjustment portability to remove unnecessary restrictions on natural career progression and general job mobility to provide relief to workers facing lengthy adjustment delays. [4]

In the spring 2015 agenda, published in April 2015, DHS/USCIS published RIN"1615-AC05 titled "Employment-Based Immigration Modernization."

Abstract: The Department of Homeland Security (DHS) is proposing to modernize the immigrant visa system by amending its regulations governing the adjustment of status process and employment-based

immigration. Through this rule, DHS proposes to allow certain approved Immigrant Petition for Alien Worker (Form I-140) beneficiaries to obtain work authorization, clarify the meaning of portable work authorization, and remove unnecessary restrictions on the ability to change jobs or progress in careers, as well as provide relief to workers facing lengthy adjustment delays [5]. Curiously, in the fall 2015 agenda, the title of the same regulation was changed to "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting Highly-Skilled H-1B Alien Workers" indicating a shift in DHS/USCIS focus. The revised abstract confirmed that the agencies had decided that "providing relief to workers facing lengthy adjustment delays" was no longer a worthwhile objective:

The policy focus seemed to have clearly shifted away from providing relief to the I140 beneficiaries facing long delays (by removing mobility restrictions and providing work authorization) to merely providing them "stability," and retaining them as temporary workers. To obfuscate this lack of any meaningful improvement in the status quo, and add insult to injury, the agency decided to merge the proposed regulations with regulations implementing the AC21 Act that has been law for 15 years without rule making, and further restrict existing job portability provisions.

Eventually, more than 13 months after the announcement of the President's Executive Actions, the proposed regulation was published. Notably, no public listening session has been conducted for these regulations during the comment period, ostensibly to avoid facing the outrage of a community that feels abandoned, dejected, and betrayed.

The Miniscule Improvements Provided for in the Proposed Regulations

1. The regulation provides a 60-day grace period for H1B workers upon cessation of employment to respond to sudden or unexpected changes related to their employment (IV.B.3.b., proposed 8 CFR § 214.1(l)(ii)). We welcome this provision of grace period. However, we disagree with its characterization as something that would "enhance job portability."
2. Approved I-140 Petitions that have been approved for 180 days or more would no longer be subject to automatic revocation based on withdrawal by the petitioner or termination of the petitioner's business. (IV.B.1., proposed 8 CFR § 205.1(a)(3)(iii)(C) and (D)). While the provision would allow an H1B worker under AC21 extensions, who is the beneficiary of an approved I-140 petition, to move to another H1B employer without jeopardizing his/her basis for continued H1B work authorization, i.e., the approved I-140 petition, the beneficiary would not be able to use the approved petition for filing AOS (pg. 85, 88-89 of the proposed regulations.

Such a restriction on the portability of the approved I-140 petition severely limits the utility of provision and in effect leaves the worker in a never-ending loop of nonimmigrants status. As stated earlier, the non-immigrants H1B program was designed and intended for temporary workers and is inherently unsuited for indefinite employment while the worker waits in decades long lines for permanent residence. In this context, please see our proposal for I-140 portability at III.E.1.d. below.

A never-ending loop of non-immigrants status only benefits unscrupulous employers who prefer keeping workers with limited job mobility to drive down wages. The only other beneficiary of a never ending non-immigrant status is USCIS which receive millions if not billions of dollars in fees recurring H-1B filings for renewals or change in employer, change in location and so on and so forth.

Problems with the Proposed Regulations:

1. The proposed regulation does not provide job mobility, flexibility, stability, ability to travel and maintain status, or start a business.
2. EAD: Proposed Employment Authorization ("EAD") for beneficiaries of approved Immigrant Petition (I-140) will not benefit anyone except the rarest of rare cases because: (i). it is restricted to those who: (1). show compelling circumstances (see proposed 8 CFR § 204.5(p)(1)(iii)); and (2). have a priority date less than one year from Visa Bulletin cutoff dates for their category. See proposed 8 CFR § 204.5(p)(5)(ii), pg. 153 and pg. 103, ll. 4-11 of the proposed regulation. (ii). Moreover, the EAD would be granted for only one year and the applicant would need to make a fresh showing of both of the above criteria at the time of renewal.

"Compelling circumstances" have not been defined and left to the Secretary's discretion. However, the DHS has identified four such circumstances including serious illness and disability, employer retaliation, significant disruption to the employer, and hardship to family caused by inability to find productive employment in home country following termination of US employer's business. (Pg. 98-100 of the proposed regulation.)

We are perplexed and exasperated by this provision. The compelling circumstances listed by DHS are sufficient to seek administrative relief for hardship from the Secretary under the current law and practice.

Shockingly, DHS describes this provision as something that would "further enhance stability and flexibility" for backlogged EB workers (Id. at pg. 95). At the same time DHS admits that few could possibly benefit from this ludicrous provision as it would restrict the worker's ability to change status while vaguely referring to "other change" that would enhance flexibility:

We are at a complete loss as to which provisions provide the touted "enhanced flexibility," having extensively reviewed the 181 page draft. In fact, DHS itself admits that the promised flexibility and job mobility is more make believe than real.

There is no associated Advance Parole ("AP") accompanying the EAD, which would make it impossible to travel outside the country and come back.

No underlying status for EAD recipients: There is no provision for any underlying status for EAD beneficiaries. Unless underlying status is maintained, beneficiary will not be able to file Adjustment of Status ("AOS") under INA § 245a when priority date eventually becomes current.

SUMMARY

A. The proposed regulation does not provide for improved job portability, flexibility, stability, ability to travel, maintain status, or start a business.

1. Employment Authorization Document ("EAD")

i. Does not benefit anyone except the rarest of rare cases
ii. Limited to only those with priority dates within 1 year of being current, should be expanded. How can one take life's decision based on such unpredictability?
iii. “compelling circumstance” is not defined, guidance is extremely restrictive, unhelpful to most backlogged EB immigration applicants

2. No Status provided to EAD recipients
i. EAD beneficiary is not given any underlying status. Unless underlying status is maintained, beneficiary will not be able to file Adjustment of Status (“AOS”) under INA § 245a when priority date eventually becomes current.
ii. Status of EAD recipients needs to be addressed in regulation.

3. No Advance Parole provided to EAD recipients
i. If unable to maintain underlying nonimmigrant status, recipient will not have a “status” to be able to travel abroad if using EAD; maintaining underlying nonimmigrant status would make the EAD useless.

4. Same of Similar definition is overly restrictive
i. Restrictive language "marked resemblance," "resembles in every relevant respect" and emphasizing SOC codes
ii. Creates extreme difficulty for advancement/promotion in profession for EB beneficiaries with priority date backlogged 10+ years, as higher level positions may not “resemble in every relevant respect” (significantly impacts nationals of certain countries more than others due to retrogression)

5. Supplemental Form J
i. Adds significant burden to applicants and employers
ii. Redundant - Current USCIS practice already requests evidence for proof of job offer in form of an employment letter listing duties to evaluate if in a same of similar position at time of AOS.
iii. Creates a deterrent for portability, increases costs for employer/applicant, as attorneys will be involved in completing complicated form, using “SOC” codes.

6. Removal of 90 day provision for approval of EADs
USCIS has been known for notorious delays in adjudicating EAD petitions. Current limit of 90 days itself is very long and creating hardship for the employees and employers like. Further removing 90 days time limit to approve EADs will worsen the situation and put the skilled immigrants through a hardship.

Our Recommendations:

1. EAD
i. Remove “compelling circumstances” language
ii. Remove eligibility restriction to only priority date less than 1 year from cutoff date
iii. Allow 3 year validity period instead of 1 year.

2. Provide period of “authorized stay” to approved I-140 beneficiaries with EADs.

i. So they do not need to maintain their underlying nonimmigrant status and can apply for AOS when PD becomes current

3. Provide Advance Parole to EAD recipients

i. So they can travel outside the USA and return, as they will not have a "status" to return to.

4. Portability

i. Remove unnecessarily restrictive definition of same or similar.

ii. No supplement J

iii. Allow the ability to "port" the I-140 to a new employer after one year of approval, if same/similar position (without the need to file AOS); and/or

Allow the ability to "port" Approved PERM to a new employer if same/similar position within the same location

5. Removing 90 days time limit on EAD Approvals

I. Do not remove the current 90 days time limit for EAD adjudications. Removing this will further put our life into misery

References and addendums:

1. https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action
2. https://www.uscis.gov/tools/ombudsman-liaison/practical-immigration-consequences-foreign-workers-slowing-economy
3. Jeh Johnson Memo on Nov 20, 2014 https://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf
4. https://www.uscis.gov/immigrationaction
5. http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1615-AC05
6. SIRA Comment https://www.regulations.gov/document?D=USCIS-2015-0008-16485
7. WH Petition and Response https://petitions.whitehouse.gov/petition/no-respite-highly-skilled-americans-waiting-need-portable-work-authorization-recapture-500k-green-cards

ADDENDUMS

The White House

Office of the Press Secretary

For Immediate Release November 20, 2014

FACT SHEET: Immigration Accountability Executive Action

The President's Immigration Accountability Executive Actions will help secure the border, hold nearly 5 million undocumented immigrants accountable, and ensure that everyone plays by the same rules. Acting within his legal authority, the President is taking an important step to fix our broken immigration system.

These executive actions crack down on illegal immigration at the border, prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay their fair share of taxes as they register to temporarily stay in the U.S. without fear of deportation.

These are common sense steps, but only Congress can finish the job. As the President acts, he'll continue to work with Congress on a comprehensive, bipartisan bill—like the one passed by the Senate more than a year ago—that can replace these actions and fix the whole system.

Three critical elements of the President's executive actions are:

- *Cracking Down on Illegal Immigration at the Border:* The President's actions increase the chances that anyone attempting to cross the border illegally will be caught and sent back. Continuing the surge of resources that effectively reduced the number of unaccompanied children crossing the border illegally this summer, the President's actions will also centralize border security command-and-control to continue to crack down on illegal immigration.
- *Deporting Felons, Not Families:* The President's actions focus on the deportation of people who threaten national security and public safety. He has directed immigration enforcement to place anyone suspected of

terrorism, violent criminals, gang members, and recent border crossers at the top of the deportation priority list.

- *Accountability – Criminal Background Checks and Taxes:* The President is also acting to hold accountable those undocumented immigrants who have lived in the US for more than five years and are parents of U.S. citizens or Lawful Permanent Residents. By registering and passing criminal and national security background checks, millions of undocumented immigrants will start paying their fair share of taxes and temporarily stay in the U.S. without fear of deportation for three years at a time.

The President's actions will also streamline legal immigration to boost our economy and will promote naturalization for those who qualify.

For more than a half century, every president—Democratic or Republican—has used his legal authority to act on immigration. President Obama is now taking another commonsense step. As the Administration implements these executive actions, Congress should finish the job by passing a bill like the bipartisan Senate bill that: continues to strengthen border security by adding 20,000 more Border Patrol agents; cracks down on companies who hire undocumented workers; creates an earned path to citizenship for undocumented immigrants who pay a fine and taxes, pass a background check, learn English and go to the back of the line; and boosts our economy and keeps families together by cutting red tape to simplify our legal immigration process.

CRACKING DOWN ON ILLEGAL IMMIGRATION AT THE BORDER

Under the Obama Administration, the resources that the Department of Homeland Security (DHS) dedicates to security at the Southwest border are at an all-time high. Today, there are 3,000 additional Border Patrol agents along the Southwest Border and our border fencing, unmanned aircraft surveillance systems, and ground surveillance systems have more than doubled since 2008. Taken as a whole, the additional boots on the ground, technology, and resources provided in the last six years represent the most serious and sustained effort to secure our border in our Nation's history, cutting illegal border crossings by more than half.

And this effort is producing results. From 1990 to 2007, the population of undocumented individuals in the United States grew from 3.5 million to 11

million people. Since then, the size of the undocumented population has stopped growing for the first time in decades. Border apprehensions—a key indicator of border security— are at their lowest level since the 1970s. This past summer, the President and the entire Administration responded to the influx of unaccompanied children with an aggressive, coordinated Federal response focused on heightened deterrence, enhanced enforcement, stronger foreign cooperation, and greater capacity for Federal agencies to ensure that our border remains secure. As a result, the number of unaccompanied children attempting to cross the Southwest border has declined precipitously, and the Administration continues to focus its resources to prevent a similar situation from developing in the future.

To build on these efforts and to ensure that our limited enforcement resources are used effectively, the President has announced the following actions:

- Shifting resources to the border and recent border crossers. Over the summer, DHS sent hundreds of Border Patrol agents and U.S. Immigration and Customs Enforcement (ICE) personnel to the Southwest border, and the Department of Justice (DOJ) reordered dockets in immigration courts to prioritize removal cases of recent border crossers. This continued focus will help keep our borders safe and secure. In addition, Secretary Johnson is announcing a new Southern Border and Approaches Campaign Plan which will strengthen the efforts of the agencies who work to keep our border secure. And by establishing clearer priorities for interior enforcement, DHS is increasing the likelihood that people attempting to cross the border illegally will be apprehended and sent back.
- Streamlining the immigration court process. DOJ is announcing a package of immigration court reforms that will address the backlog of pending cases by working with DHS to more quickly adjudicate cases of individuals who meet new DHS-wide enforcement priorities and close cases of individuals who are low priorities. DOJ will also pursue regulations that adopt best practices for court systems to use limited court hearing time as efficiently as possible.
- Protecting victims of crime and human trafficking as well as workers. The Department of Labor (DOL) is expanding and strengthening immigration options for victims of crimes (U visas) and trafficking (T visas) who cooperate in government investigations. An interagency working group will

also explore ways to ensure that workers can avail themselves of their labor and employment rights without fear of retaliation.

DEPORTING FELONS, NOT FAMILIES

By setting priorities and focusing its enforcement resources, the Obama Administration has already increased the removal of criminals by more than 80%. These actions build on that strong record by:

- Focusing on the removal of national security, border security, and public safety threats. To better focus on the priorities that matter, Secretary Johnson is issuing a new DHS-wide memorandum that makes clear that the government's enforcement activity should be focused on national security threats, serious criminals, and recent border crossers. DHS will direct all of its enforcement resources at pursuing these highest priorities for removal.
- Implementing a new Priority Enforcement Program. Effectively identifying and removing criminals in state and local jails is a critical goal but it must be done in a way that sustains the community's trust. To address concerns from Governors, Mayors, law enforcement and community leaders which have undermined cooperation with DHS, Secretary Johnson is replacing the existing Secure Communities program with a new Priority Enforcement Program (PEP) to remove those convicted of criminal offenses. DHS will continue to rely on biometric data to verify individuals who are enforcement priorities, and they will also work with DOJ's Bureau of Prisons to identify and remove federal criminals serving time as soon as possible.

ACCOUNTABILITY – CRIMINAL BACKGROUND CHECKS AND TAXES

Every Democratic and Republican president since Dwight Eisenhower has taken executive action on immigration. Consistent with this long history, DHS will expand the existing Deferred Action for Childhood Arrivals (DACA) program to include more immigrants who came to the U.S. as children. DHS will also create a new deferred action program for people who are parents of U.S. Citizens or Lawful Permanent Residents (LPRs) and have lived in the United States for five years or longer if they register, pass a background check and pay taxes.

The President is taking the following actions to hold accountable certain undocumented immigrants:

- Creating a mechanism that requires certain undocumented immigrants to pass a background check to make sure that they start paying their fair share in taxes. In order to promote public safety, DHS is establishing a new deferred action program for parents of U.S. Citizens or LPRs who are not enforcement priorities and have been in the country for more than 5 years. Individuals will have the opportunity to request temporary relief from deportation and work authorization for three years at a time if they come forward and register, submit biometric data, pass background checks, pay fees, and show that their child was born before the date of this announcement. By providing individuals with an opportunity to come out of the shadows and work legally, we will also help crack down on companies who hired undocumented workers, which undermines the wages of all workers, and ensure that individuals are playing by the rules and paying their fair share of taxes.
- Expanding DACA to cover additional DREAMers. Under the initial DACA program, young people who had been in the U.S. for at least five years, came as children, and met specific education and public safety criteria were eligible for temporary relief from deportation so long as they were born after 1981 and entered the country before June 15, 2007. DHS is expanding DACA so that individuals who were brought to this country as children can apply if they entered before January 1, 2010, regardless of how old they are today. Going forward, DACA relief will also be granted for three years.

The President's actions will also streamline legal immigration to boost our economy and promote naturalization by:

- Providing portable work authorization for high-skilled workers awaiting LPR status and their spouses. Under the current system, employees with approved LPR applications often wait many years for their visa to become available. DHS will make regulatory changes to allow these workers to move or change jobs more easily. DHS is finalizing new rules to give certain H-1B spouses employment authorization as long as the H-1B spouse has an approved LPR application.

- Enhancing options for foreign entrepreneurs. DHS will expand immigration options for foreign entrepreneurs who meet certain criteria for creating jobs, attracting investment, and generating revenue in the U.S., to ensure that our system encourages them to grow our economy. The criteria will include income thresholds so that these individuals are not eligible for certain public benefits like welfare or tax credits under the Affordable Care Act.
- Strengthening and extending on-the-job training for STEM graduates of U.S universities. In order to strengthen educational experiences of foreign students studying science, technology, engineering, and mathematics (STEM) at U.S. universities, DHS will propose changes to expand and extend the use of the existing Optional Practical Training (OPT) program and require stronger ties between OPT students and their colleges and universities following graduation.
- Streamlining the process for foreign workers and their employers, while protecting American workers. DHS will clarify its guidance on temporary L-1 visas for foreign workers who transfer from a company's foreign office to its U.S. office. DOL will take regulatory action to modernize the labor market test that is required of employers that sponsor foreign workers for immigrant visas while ensuring that American workers are protected.
- Reducing family separation for those waiting to obtain LPR status. Due to barriers in our system, U.S. citizens and LPRs are often separated for years from their immediate relatives, while they wait to obtain their LPR status. To reduce the time these individuals are separated, DHS will expand an existing program that allows certain individuals to apply for a provisional waiver for certain violations before departing the United States to attend visa interviews.
- Ensuring that individuals with lawful status can travel to their countries of origin. DHS will clarify its guidance to provide greater assurance to individuals with a pending LPR application or certain temporary status permission to travel abroad with advance permission ("parole").
- Issuing a Presidential Memorandum on visa modernization. There are many ways in which our legal immigration system can be modernized to reduce government costs, eliminate redundant systems, reduce burdens on employers and families, and eliminate fraud. The President is issuing a Memorandum directing an interagency group to recommend areas for improvement.

- Creating a White House Task Force on New Americans. The President is creating a White House Task Force on New Americans to create a federal strategy on immigrant integration.
- Promoting Citizenship Public Awareness: DHS will launch a comprehensive citizenship awareness media campaign in the 10 states that are home to 75 percent of the overall LPR population. USCIS will also expand options for paying naturalization fees and explore additional measures to expand accessibility, including studying potential partial fee waiver for qualified individuals.
- Ensuring U.S. Citizens Can Serve: To further our military's needs and support recruitment efforts, DHS will expand an existing policy to provide relief to spouses and children of U.S. citizens seeking to enlist in the military, consistent with a request made by the Department of Defense.

U.S. Citizenship and Immigration Services

Practical Immigration Consequences for Foreign Workers in a Slowing Economy

1. Laid Off H-1B Employees With Advance Notice - What if you are an employee in H-1B status and you receive advance notice that you will be laid off before your validity period ends? Can you change employers?

USCIS Response: Prior to being laid off, another qualified H-1B employer may file a Form I-129, Petition for a Nonimmigrant Worker, on your behalf with USCIS. In order to change employers without having to depart the United States, the I-129 petition should have been filed prior to the termination of your job and you must have been maintaining valid H-1B status. If the I-129 petition is filed after your dismissal, you may have to return overseas to process your H-1B visa for the new employer.

2. Laid Off H-1B Employees Without Advance Notice - What if you are an employee in H-1B status and you are laid off with no advance notice before the end of the validity period? Can you begin working (or port to) another job with a different employer?

USCIS Response: An H-1B nonimmigrant is admitted to be employed by the sponsoring H-1B petitioner. If the employment ends, this condition is no longer satisfied and the individual is no longer in a lawful nonimmigrant status and may be subject to removal proceedings. Therefore, the terminated H-1B nonimmigrant in this scenario may not be able to port to another employer, subject to certain discretionary exceptions.

Depending on the individual's circumstances, the H-1B worker may be eligible to remain in the United States due to a request for a change of status or for extension of stay that is filed while that individual is maintaining H-1B status, or on account a pending adjustment application. In deciding whether to approve a change or extension of status for any nonimmigrant who has fallen out of status, however, USCIS *may* exercise discretion on a case-by-case basis to grant the extension or change of status despite the failure to maintain status.

There is no automatic 10-day or other grace period for terminated employees holding H-1B status, so once the individual is no longer in a lawful nonimmigrant status, he/she usually must depart from the United States.

3. Laid Off Employees in Other Classifications - What if you are in some other nonimmigrant classification, such as E (treaty investor), L (intra-company transferee), O (extraordinary ability), or P (entertainer, athlete), and you are laid off?

USCIS Response: Similar to H-1B nonimmigrants, E, L, O and P nonimmigrants are no longer considered to be maintaining valid status as of the day their petitioned for employment has been terminated. The law and regulations do not provide a grace period for E, L, O, and P nonimmigrants whose employment has been terminated, so once the individual is no longer in a lawful nonimmigrant status, he/she usually must depart from the United States.

Depending on the individual circumstances, he/she may be eligible to remain in the United States due to a request for a change of status or for extension of stay that is filed while that individual is maintaining status, or on account of a pending adjustment application. In deciding whether to approve a change or extension of status for any nonimmigrant who has fallen out of status, however, USCIS *may* exercise discretion on a case-by-case basis to grant the extension or change status despite the failure to maintain status.

4. H-1B Validity Periods - What if the validity period of my H-1B status ends and my employer does not file an extension?

USCIS Response: USCIS regulations allow for an individual to be granted, upon admission to the U.S., up to 10 additional days after the validity of their H-1B period ends. This period of up to 10 days is intended to allow the individual to wrap up his or her affairs prior to departing the United States. *See* 8 CFR 214.2(h)(13)(i)(A). However, such persons are not permitted to work after the validity period of the petition (i.e. you are not authorized to work during the 10-day grace period), unless they have a pending extension of status petition or have other valid work authorization.

5. Employer Requirements - What are the requirements for an employer who has laid-off an employee in H-1B status?

USCIS Response: U.S. employers are required to notify USCIS if there has been a material change in the terms and conditions of the H-1B nonimmigrant's employment, including if the alien has been laid-off or otherwise terminated. *See* 8 CFR 214.2(h)(11)(i)(A). Once USCIS has received notification of the termination, it may revoke the approval of the petition. If USCIS decides to revoke the petition, it will communicate that decision to the petitioner.

Additionally, the employer will be liable for the reasonable costs of return transportation of the alien to the alien's last place of foreign residence if the alien is dismissed from employment by the employer before the end of the period of authorized admission period. If the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition, the alien has not been dismissed. *See* 8 CFR 214.2(h)(4)(iii)(E).

6. TARP Funding - How will employer recipients of TARP funding be affected if they want to hire H-1Bs?

USCIS Response: On February 17, 2009 the President signed into law the Employ American Workers Act (EAWA) contained in the stimulus bill. *See* Pub. L. No. 111-5, Div. A, Title XVI, § 1611. This Act requires employers who received funds through the Troubled Asset Relief Program (TARP) or under section 13 of the Federal Reserve Act (covered funding), to be treated as H-1B dependent employers. Consequently, employers must certify to the Department of Labor that:

- The employer has taken or will take good faith steps meeting industry-wide standards to recruit U.S. workers and will offer compensation that is at least as great as those offered to the H-1B nonimmigrant. U.S. workers are defined as U.S. citizens or nationals, lawful permanent resident aliens, refugees, asylees, or other immigrants authorized to be employed in the United States (i.e., workers other than nonimmigrant aliens)
- The employer has offered or will offer the job to any U.S. worker who applies and is equally or better qualified for the job that is intended for the H-1B nonimmigrant
- The employer will not displace any similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the date of filing a petition for an H-1B

nonimmigrant supported by this application. A U.S. worker is displaced if the worker is laid off from a job that is essentially the equivalent of the job for which an H-1B nonimmigrant is sought

- The employer will not place an H-1B worker to work for another employer unless it has inquired whether the other employer has displaced or will displace a U.S. worker within 90 days before or after the placement of the H-1B worker.

The EAWA applies to any Labor Condition Application (LCA) and/or H-1B petition filed on or after Feb. 17, 2009, involving any employment by a new employer, including concurrent employment and regardless of whether the beneficiary is already in H-1B status, unless otherwise noted below. The EAWA also applies to new hires based on a petition approved before Feb. 17, 2009, if the H-1B employee had not actually commenced employment before that date.

The EAWA does not apply to: (1) a petition to extend the H-1B status of a current H-1B employee with the same employer, or (2) a petition seeking to change the status of a current U.S. work-authorized employee to H-1B status with the same employer. Moreover, an employer who has repaid its covered funding obligations prior to filing a new H-1B petition is no longer subject to EAWA requirements.

7. Dependents - How are my dependents affected if I lose my job?

USCIS Response: Family members of nonimmigrant workers who derive their status as dependents lose that status when the principal nonimmigrant worker's status ends. Therefore, if your status ends as a result of losing your job, your dependents will also lose their immigration status.

8. F-1 Students and OPT - What if you are an F-1 student with an optional practical training (OPT) authorization?

USCIS Response: F-1 academic students may seek post-completion Optional Practical Training (OPT) to enable them to obtain valuable work experience directly related to their course of study. F-1 academic students in the Science, Technology, Engineering, and Mathematics fields (STEM) may seek a one-time extension of their post completion OPT for an additional 17 months. Students granted post-completion OPT and STEM OPT are issued an Employment Authorization Document (EAD), which is not employer-specific; however, in order to maintain their F-1 status, there are limits on the amount of allowable periods of unemployment. Students on post-completion OPT may not accrue more than 90 days of unemployment in the aggregate. Students on STEM OPT are allowed an additional 30 days of unemployment, so they may not accrue more than 120 days of unemployment in the aggregate. *See* 8 CFR 214.2(f)(10)(ii)(E). An F-1 student who exceeds the allowable periods of unemployment is out of status and must seek reinstatement in order to use any remaining periods of available post-completion OPT or STEM OPT. F-1 students do not need to apply for another EAD when they find a new job, so long as they have not fallen out of status by exceeding the allowable periods of unemployment, or have not otherwise violated their F-1 status. Students should consult with their Designated School Official (DSO) if they have any additional questions or concerns about their status.

Last Reviewed/Updated: 03/15/2010

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 20, 2014

MEMORANDUM FOR: León Rodríguez
Director
U.S. Citizenship and Immigration Services

Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Policies Supporting U.S. High-Skilled Businesses and Workers**

I hereby direct the new policies and regulations outlined below. These new policies and regulations will be good for both U.S. businesses and workers by continuing to grow our economy and create jobs. They will support our country's high-skilled businesses and workers by better enabling U.S. businesses to hire and retain highly skilled foreign-born workers while providing these workers with increased flexibility to make natural advancements with their current employers or seek similar opportunities elsewhere. This increased mobility will also ensure a more-level playing field for U.S. workers. Finally, these measures should increase agency efficiencies and save resources.

These new policies and regulations are in addition to efforts that the Department of Homeland Security is implementing to improve the employment-based immigration system. In May, for example, U.S. Citizenship and Immigration Services (USCIS) published a proposed rule to extend work authorization to the spouses of H-1B visa holders who have been approved to receive lawful permanent resident status based on employer-sponsorship. USCIS is about to publish the final rule, which will incentivize employer sponsorship of current temporary workers for lawful permanent residence so they can become Americans over time, while making the United States an even more competitive destination for highly skilled talent. Also, USCIS has been working on guidance to strengthen and improve various employment-based temporary visa programs. I expect that such guidance, consistent with the proposals contained in this memorandum, will be published in a timely manner.

A. Modernizing the Employment-Based Immigrant Visa System

As you know, our employment-based immigration system is afflicted with extremely long waits for immigrant visas, or "green cards," due to relatively low green card numerical limits established by Congress 24 years ago in 1990. The effect of these caps is further compounded by an immigration system that has often failed to issue all of the immigrant visas authorized by Congress for a fiscal year. Hundreds of thousands of such visas have gone unissued in the past despite heavy demand for them.

The resulting backlogs for green cards prevent U.S. employers from attracting and retaining highly skilled workers critical to their businesses. U.S. businesses have historically relied on temporary visas—such as H-1B,[1] L-1B,[2] or O-1[3] visas—to retain individuals with needed skills as they work their way through these backlogs. But as the backlogs for green cards grow longer, it is increasingly the case that temporary visas fail to fill the gap. As a result, the worker's temporary status expires and his or her departure is required. This makes little sense, particularly because the green card petition process for certain categories requires the employer to test the labor market and show the unavailability of other U.S. workers in that position.

To correct this problem, I hereby direct USCIS to take several steps to modernize and improve the immigrant visa process. *First*, USCIS should continue and enhance its work with the Department of State to ensure that all immigrant visas authorized by Congress are issued to eligible individuals when there is sufficient demand for such visas. *Second*, I ask that USCIS work with the Department of State to improve the system for determining when immigrant visas are available to applicants during the fiscal year. The Department of State has agreed to modify its visa bulletin system to more simply and reliably make such determinations, and I expect USCIS to revise its current regulations to reflect and complement these proposed modifications. *Third*, I direct that USCIS carefully consider other regulatory or policy changes to better assist and provide stability to the beneficiaries of approved employment-based immigrant visa petitions. Specifically, USCIS should consider amending its regulations to ensure that approved, long-standing visa petitions remain valid in certain cases where they seek to change jobs or employers.

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[1] INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 101(a)(15)(H)(i)(b).

[2] INA § 101(a)(15)(L), 8 U.S.C. § 101(a)(15)(L).

[3] INA § 101(a)(15)(O)(i), 8 U.S.C. § 101(a)(15)(O)(i).

B. Reforming "Optional Practical Training" for Foreign Students and Graduates from U.S. Universities

Under long-standing regulations, foreign nationals studying in the United States on non-immigrant F-1 student visas[4] may request twelve additional months of F-1 visa status for "optional practical training" (OPT), which allows them to extend their time in the United States for temporary employment in the relevant field of study. OPT, which may occur before or after graduation, must be approved by the educational institution.

This program provides important benefits to foreign students and the U.S. economy. Foreign students are able to further their full course of study in the United States and gain additional, practical experience in their fields by training in those fields with employers in the United States. In turn, foreign students put into practice the skills and education they gain at U.S. universities to benefit the U.S. economy. By regulations adopted in 2007, students in science, technology, engineering, and mathematics (STEM) fields are eligible for an additional 17 months of OPT, for a total of 29 months. This extension has the added benefit of helping America keep many of its most talented STEM graduates from departing the country and taking their skills overseas.

The OPT program should be evaluated, strengthened, and improved to further enhance American innovation and competitiveness, consistent with current legal authority. More specifically, I direct that Immigration and Customs Enforcement (ICE) and USCIS develop regulations for notice and comment to expand the degree programs eligible for OPT and extend the time period and use of OPT for foreign STEM students and graduates, consistent with law. I am also directing ICE and USCIS to improve the OPT program by requiring stronger ties to degree-granting institutions, which would better ensure that a student's practical training furthers the student's full course of study in the United States. Finally, ICE and USCIS should take steps to ensure that OPT employment is consistent with U.S. labor market protections to safeguard the interests of U.S. workers in related fields.

C. Promoting Research and Development in the United States

To enhance opportunities for foreign inventors, researchers, and founders of start-up enterprises wishing to conduct research and development and create jobs in the United States, I hereby direct USCIS to implement two administrative improvements to our employment-based immigration system:

First, the "national interest waiver" provided in section 203(b)(2)(B) of the *Immigration and Nationality Act* (INA) permits certain non-citizens with advanced

[4] INA § 101(a)(15)(F)(i), 8 U.S.C. § 101(a)(15)(F)(i).

degrees or exceptional ability to seek green cards without employer sponsorship if their admission is in the national interest.[5] This waiver is underutilized and there is limited guidance with respect to its invocation. I hereby direct USCIS to issue guidance or regulations to clarify the standard by which a national interest waiver can be granted, with the aim of promoting its greater use for the benefit of the U.S economy.

Second, pursuant to the "significant public benefit" parole authority under section 212(d)(5) of the INA,[6] USCIS should propose a program that will permit DHS to grant parole status, on a case-by-case basis, to inventors, researchers, and founders of start-up enterprises who may not yet qualify for a national interest waiver, but who have been awarded substantial U.S. investor financing or otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting-edge research. Parole in this type of circumstance would allow these individuals to temporarily pursue research and development of promising new ideas and businesses in the United States, rather than abroad. This regulation will include income and resource thresholds to ensure that individuals eligible for parole under this program will not be eligible for federal public benefits or premium tax credits under the Health Insurance Marketplace of the Affordable Care Act.

D. Bringing Greater Consistency to the L-1B Visa Program

The L-1B visa program for "intracompany transferees" is critically important to multinational companies. The program allows such companies to transfer employees who are managerial or executives, or who have "specialized knowledge" of the company's products or processes to the United States from foreign operations. It is thus an essential tool for managing a global workforce as companies choose where to establish new or expanded operations, research centers, or product lines, all of which stand to benefit the U.S. economy. To date, however, vague guidance and inconsistent interpretation of the term "specialized knowledge" in adjudicating L-1B visa petitions has created uncertainty for these companies.

To correct this problem, I hereby direct USCIS to issue a policy memorandum that provides clear, consolidated guidance on the meaning of "specialized knowledge." This memorandum will bring greater coherence and integrity to the L-1B program, improve consistency in adjudications, and enhance companies' confidence in the program.

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[5] INA § 203(b)(2)(B), 8 U.S.C. § 1153(b)(2)(B).

[6] INA § 205(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

E. Increasing Worker Portability

Currently, uncertainty within the employment-based visa system creates unnecessary hardships for many foreign workers who have filed for adjustment of status but are unable to become permanent residents due to a lack of immigrant visas. Current law allows such workers to change jobs without jeopardizing their ability to seek lawful permanent residence, but only if the new job is in a "same or a similar" occupational classification as their old job. Unfortunately, there is uncertainty surrounding what constitutes a "same or similar" job, thus preventing many workers from changing employers, seeking new job opportunities, or even accepting promotions for fear that such action might void their currently approved immigrant visa petitions.

To help eliminate this uncertainty, I hereby direct USCIS to issue a policy memorandum that provides additional agency guidance, bringing needed clarity to employees and their employers with respect to the types of job changes that constitute a "same or similar" job under current law. This guidance should make clear that a worker can, for example, accept a promotion to a supervisory position or otherwise transition to related jobs within his or her field of endeavor. By removing unnecessary restrictions to natural career progression, workers will have increased flexibility and stability, which would also ensure a more level playing field for U.S. workers.

U.S. Citizenship and Immigration Services

Executive Actions on Immigration

Español

Update: Due to a federal court order, USCIS will not begin accepting requests for the expansion of DACA on February 18 as originally planned and has suspended implementation of Deferred Action for Parents of Americans and Lawful Permanent Residents. The court's temporary injunction, issued February 16, does not affect the existing DACA. Individuals may continue to come forward and request an initial grant of DACA or renewal of DACA under the original guidelines. Please check back for updates.

On November 20, 2014, the President announced a series of executive actions to crack down on illegal immigration at the border, prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation.

These initiatives include:

- Expanding the population eligible for the Deferred Action for Childhood Arrivals (DACA) program to people of any current age who entered the United States before the age of 16 and lived in the United States continuously since January 1, 2010, and extending the period of DACA and work authorization from two years to three years. | Details
- Allowing parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years, in a new Deferred Action for Parents of Americans and Lawful Permanent Residents* program, provided they have lived in the United States continuously since January 1, 2010, and pass required background checks | Details
- Expanding the use of provisional waivers of unlawful presence to include the spouses and sons and daughters of lawful permanent residents and the sons and daughters of U.S. citizens | Details
- Modernizing, improving and clarifying immigrant and nonimmigrant visa programs to grow our economy and create jobs | Details
- Promoting citizenship education and public awareness for lawful permanent residents and providing an option for naturalization applicants to use credit cards to pay the application fee | Details

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Important notice: These initiatives have not yet been implemented, and USCIS is not accepting any requests or applications at this time. Beware of anyone who offers to help you submit an application or a request for any of these actions before they are available. You could become a victim of an immigration scam. Subscribe to get updates by email when new information is posted.

*Also known as Deferred Action for Parental Accountability.

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Next steps

USCIS and other agencies and offices are responsible for implementing these initiatives as soon as possible. Some initiatives will be implemented over the next several months and some will take longer.

Over the coming months, USCIS will produce detailed explanations, instructions, regulations and forms as necessary. The brief summaries provided below offer basic information about each initiative.

While USCIS is not accepting requests or applications at this time, if you believe you may be eligible for one of the initiatives listed above, you can prepare by gathering documents that establish factors such as your:

- Identity;
- Relationship to a U.S. citizen or lawful permanent resident, if necessary; and
- Continuous residence in the United States over the last five years or more.

We strongly encourage you to subscribe to receive an email whenever additional information on these initiatives is available on our website. We will also post updates on Facebook and Twitter.

Share this page with your friends and family members. Remind them that the only way to be sure to get the facts is to get them **directly from USCIS**. Unauthorized practitioners of immigration law may try to take advantage of you by charging a fee to submit forms to USCIS on your behalf or by claiming to provide other special access or expedited services which do not exist. To learn how to get the right immigration help, go to the Avoid Scams page.

Below are summaries of major planned initiatives by USCIS, including:

- **Who** is eligible
- **What** the initiative will do
- **When** you can begin to make a request
- **How** to make a request

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1. Deferred Action for Childhood Arrivals (DACA) program	
Who	• Individuals with no lawful immigration status who are seeking initial or renewal DACA.
What	• Extends the deferred action period and employment authorization to three years from two years, and allows you to be considered for DACA if you: ◦ Entered the United States before the age of 16; ◦ Have lived in the United States continuously since at least January 1, 2010, rather than the prior requirement of June 15, 2007; ◦ Are of any age (removes the requirement to have been born since June 15, 1981); and ◦ Meet all the other DACA guidelines.
When	• See note at the top of the page
How	• Go to the Consideration of Deferred Action for Childhood Arrivals (DACA) page for instructions which will be updated. Subscribe to receive updates by email.

See our flier Deferred Action for Childhood Arrivals (DACA) (PDF).

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2. Deferred action for parents of U.S. citizens and lawful permanent residents	
Who	• An undocumented individual living in the United States who is the parent of a U.S. citizen or lawful permanent resident and who meets the guidelines listed below.
What	• Allows parents to request deferred action and employment authorization if they: ◦ Have lived in the United States continuously since January 1, 2010; ◦ Had, on November 20, 2014, a son or daughter who is a U.S. citizen or lawful permanent resident; and ◦ Are not an enforcement priority for removal from the United States, under the November 20, 2014, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum. Notes: USCIS will consider each request for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) on a case-by-case basis. Enforcement priorities include (but are not limited to) national security and public safety threats.
When	• See note at the top of the page
How	• Subscribe to receive updates by email.

2. Deferred action for parents of U.S. citizens and lawful permanent residents

See our flier Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) (PDF)

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3. Provisional waivers of unlawful presence	
Who	• Undocumented individuals who have resided unlawfully in the United States for at least 180 days **and** who are: ◦ The sons and daughters of U.S. citizens; or ◦ The spouse and sons or daughters of lawful permanent residents.
What	• Expands the provisional waiver program announced in 2013 by allowing the spouses, sons and daughters of lawful permanent residents and the sons and daughters of U.S. citizens to get a waiver if a visa is available. There may be instances when the qualifying relative is not the petitioner. • Clarifies the meaning of the "extreme hardship" standard that must be met to obtain a waiver. Notes: Currently, only spouses and minor children of U.S. citizens are allowed to apply to obtain a provisional waiver if a visa is available. For more information about the waivers program, go to the Provisional Unlawful Presence Waivers page which will be updated over the next several months.
When	• Upon issuing of new guidelines and regulations.
How	• Subscribe to receive updates by email.

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4. Modernize, improve and clarify immigrant and nonimmigrant visa programs to grow our economy and create jobs	
Who	• U.S. businesses, foreign investors, researchers, inventors and skilled foreign workers.
What	USCIS will: • Work with the Department of State to develop a method to allocate immigrant visas to ensure that all immigrant visas authorized by Congress are issued to eligible individuals when there is sufficient demand for such visas.

4. Modernize, improve and clarify immigrant and nonimmigrant visa programs to grow our economy and create jobs	
	• Work with the Department of State to modify the Visa Bulletin system to more simply and reliably make determinations of visa availability. • Provide clarity on adjustment portability to remove unnecessary restrictions on natural career progression and general job mobility to provide relief to workers facing lengthy adjustment delays. • Clarify the standard by which a national interest waiver may be granted to foreign inventors, researchers and founders of start-up enterprises to benefit the U.S economy. • Authorize parole, on a case-by-case basis, to eligible inventors, researchers and founders of start-up enterprises who may not yet qualify for a national interest waiver, but who: ◦ Have been awarded substantial U.S. investor financing; or ◦ Otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting-edge research. • Finalize a rule to provide work authorization to the spouses of certain H-1B visa holders who are on the path to lawful permanent resident status. • Work with Immigration and Customs Enforcement (ICE) to develop regulations for notice and comment to expand and extend the use of optional practical training (OPT) for foreign students, consistent with existing law. • Provide clear, consolidated guidance on the meaning of "specialized knowledge" to bring greater clarity and integrity to the L-1B program, improve consistency in adjudications, and enhance companies' confidence in the program.
When	• Upon issuing necessary guidance and regulations.
How	• Subscribe to receive updates by email.

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5. Promote the naturalization process	
Who	• Lawful permanent residents eligible to apply for U.S. citizenship
What	• Promote citizenship education and public awareness for lawful permanent residents. • Allow naturalization applicants to use credit cards to pay the application fee. • Assess potential for partial fee waivers in the next biennial fee study.

5. Promote the naturalization process	
	Notes: Go to the U.S. Citizenship page to learn about the naturalization process and visit the Citizenship Resource Center to find naturalization test preparation resources. You can also visit the N-400, Application for Naturalization, page.
When	• During 2015
How	• Subscribe to receive updates by email.

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Key Questions and Answers

Q1: When will USCIS begin accepting applications related to these executive initiatives?

A1: While USCIS is not accepting applications at this time, individuals who think they may be eligible for one or more of the new initiatives may prepare now by gathering documentation that establishes factors such as their:

- Identity;
- Relationship to a U.S. citizen or lawful permanent resident; and
- Continuous residence in the United States over the last five years or more.

Due to a federal court order, USCIS will not begin accepting requests for the expansion of DACA on February 18 as originally planned and has suspended implementation of Deferred Action for Parents of Americans and Lawful Permanent Residents. The court's temporary injunction, issued February 16, does not affect the existing DACA. Individuals may continue to come forward and request an initial grant of DACA or renewal of DACA under the original guidelines. Please check back for updates.

Others programs will be implemented after new guidance and regulations are issued.

We strongly encourage you to subscribe to receive an email whenever additional information is available on the USCIS website. Remember that the only way to get official information is directly from USCIS. Unauthorized practitioners of immigration law may try to take advantage of you by charging a fee to submit forms to USCIS on your behalf or by claiming to provide other special access or expedited services which do not exist. To learn how to get the right immigration help, visit www.uscis.gov/avoidscams for tips on filing forms, reporting scams and finding accredited legal services.

Q2: How many individuals does USCIS expect will apply?

A2: Preliminary estimates show that roughly 4.9 million individuals may be eligible for the initiatives announced by the President. However, there is no way to predict with certainty how many individuals will apply. USCIS will decide applications on a case-by-case basis and encourages as many people as possible to consider these new initiatives. During the first two years of DACA, approximately 60 percent of potentially eligible individuals came

forward. However, given differences among the population eligible for these initiatives and DACA, actual participation rates may vary.

Q3: Will there be a cutoff date for individuals to apply?

A3: The initiatives do not include deadlines. Nevertheless, USCIS encourages all eligible individuals to carefully review each initiative and, once the initiative becomes available, make a decision as soon as possible about whether to apply.

Q4: How long will applicants have to wait for a decision on their application?

A4: The timeframe for completing this new pending workload depends on a variety of factors. USCIS will be working to process applications as expeditiously as possible while maintaining program integrity and customer service. Our aim is to complete all applications received by the end of next year before the end of 2016, consistent with our target processing time of completing review of applications within approximately one year of receipt. In addition, USCIS will provide each applicant with notification of receipt of their application within 60 days of receiving it.

Q5: Will USCIS need to expand its workforce and/or seek appropriated funds to implement these new initiatives?

A5: USCIS will need to adjust its staffing to sufficiently address this new workload. Any hiring will be funded through application fees rather than appropriated funds.

Q6: Will the processing of other applications and petitions (such as family-based petitions and green card applications) be delayed?

A6: USCIS is working hard to build capacity and increase staffing to begin accepting requests and applications for the initiatives. We will monitor resources and capacity very closely, and we will keep the public and all of our stakeholders informed as this process develops over the course of the coming months.

Q7: What security checks and anti-fraud efforts will USCIS conduct to identify individuals requesting deferred action who have criminal backgrounds or who otherwise pose a public safety threat or national security risk?

A7: USCIS is committed to maintaining the security and integrity of the immigration system. Individuals seeking deferred action relief under these new initiatives will undergo thorough background checks, including but not limited to 10-print fingerprint, primary name and alias name checks against databases maintained by DHS and other federal government agencies. These checks are designed to identify individuals who may pose a national security or public safety threat, have a criminal background, have perpetrated fraud, or who may be otherwise ineligible to request deferred action. No individual will be granted relief without passing these background checks.

In addition, USCIS will conduct an individual review of each case. USCIS officers are trained to identify indicators of fraud, including fraudulent documents. As with other immigration requests, all applicants will be warned that knowingly misrepresenting or failing to disclose facts will subject them to criminal prosecution and possible removal from the United States.

Q8: What if someone’s case is denied or they fail to pass a background check?

A8: Individuals who knowingly make a misrepresentation, or knowingly fail to disclose facts, in an effort to obtain deferred action or work authorization through this process will not receive favorable consideration for deferred action. In addition, USCIS will apply its current policy governing the referral of individual cases to Immigration and Customs Enforcement (ICE) and the issuance of Notices to Appear before an immigration judge. If the background check or other information uncovered during the review of a request for deferred action indicates that an individual's presence in the United States threatens public safety or national security, USCIS will deny the request and refer the matter for criminal investigation and possible removal by ICE, consistent with existing processes.

Q9: Will the information I share in my request for consideration of deferred action be used for immigration enforcement purposes?

A9: Information provided in your request is protected from disclosure to Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings unless you meet the criteria for the issuance of a Notice to Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance. Individuals who are granted deferred action will not be referred to ICE. The information may be shared, however, with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including:

- Assisting in the consideration of the deferred action request;
- To identify or prevent fraudulent claims;
- For national security purposes; or
- For the investigation or prosecution of a criminal offense.

This policy covers family members and guardians, in addition to you.

Q10: What is USCIS doing to assist dependents of U.S. armed services personnel?

A10: USCIS is working with the Department of Defense to determine how to expand parole authorization to dependents of certain individuals enlisting or enlisted in the U.S. armed services. For information on the existing parole-in-place policy for military personnel, please read this policy memorandum.

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Glossary

- **Continuous residence:** For a detailed explanation, go to the USCIS Policy Manual, Chapter 3: Continuous Residence.
- **DACA:** Deferred Action for Childhood Arrivals, a program launched in 2012. For more information, go to the Consideration of Deferred Action for Childhood Arrivals (DACA) page.
- **Deferred action:** A use of prosecutorial discretion to not remove an individual from the country for a set period of time, unless the deferred action is terminated for some reason. Deferred action is determined on a case-by-case basis and only establishes lawful presence but does not provide immigration status or benefits of any kind. DACA is one type of deferred action.
- **Parole in place:** Immigration and Nationality Act section 212(d)(5)(A) gives the Secretary the discretion, on a case-by-case basis, to "parole" for "urgent humanitarian reasons or significant public benefit" an alien applying for admission to the United States. Although it

is most frequently used to permit an alien who is outside the United States to come into U.S. territory, parole may also be granted to aliens who are already physically present in the U.S. without inspection or admission. This latter use of parole is sometimes called "parole in place."

- **Prosecutorial discretion:** The legal authority to choose whether or not to take action against an individual for committing an offense.
- **Provisional waiver:** Waiver for individuals who are otherwise inadmissible due to more than 180 days of unlawful presence in the United States, based on a showing of extreme hardship to certain U.S. citizen or lawful permanent resident family members, which allows the individual to return after departure for an immigrant visa interview at a U.S. embassy or consulate. For more information, go to the Provisional Unlawful Presence Waivers page.

You can find definitions of other terms used on our website in Glossary of Terms.

Last Reviewed/Updated: 04/15/2015

View Rule

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DHS/USCIS **RIN:** 1615-AC05 **Publication ID:** Spring 2016

Title: Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting Highly-Skilled H-1B Alien Workers

Abstract:

In December 2015, the Department of Homeland Security (DHS) proposed to amend its regulations affecting certain employment-based immigrant and nonimmigrant classifications. This rule proposes to amend current regulations to provide stability and job flexibility for the beneficiaries of approved employment-based immigrant visa petitions while they wait to become lawful permanent residents. DHS is also proposing to conform its regulations with the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (the 21st Century DOJ Appropriations Act), as well as the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). The rule also seeks to clarify several interpretive questions raised by ACWIA and AC21 regarding H-1B petitions, and incorporate relevant AC21 policy memoranda and an Administrative Appeals Office precedent decision, and would ensure that DHS practice is consistent with them.

Agency: Department of Homeland Security(DHS)
Priority: Economically Significant
RIN Status: Previously published in the Unified Agenda
Agenda Stage of Rulemaking: Final Rule Stage
Major: Yes
Unfunded Mandates: No
CFR Citation: 8 CFR 204 to 205 8 U.S.C. 214 8 CFR 245 8 CFR 274a (To search for a specific CFR, visit the Code of Federal Regulations.)
Legal Authority: 6 U.S.C. 112 8 U.S.C. 1154 and 1155 8 U.S.C. 1184 8 U.S.C. 1255 8 U.S.C. 1324a
Legal Deadline: None
Timetable:

Action	Date	FR Cite
NPRM	12/31/2015	80 FR 81900
NPRM Comment Period End	02/29/2016	
Final Rule	05/00/2016	

Additional Information: 1615-AB97 will be merged under this rule, 1615-AC05.
Regulatory Flexibility Analysis Required: Yes
Government Levels Affected: None
Small Entities Affected: Businesses
Federalism: No
Included in the Regulatory Plan: Yes
International Impacts: This regulatory action will be likely to have international trade and investment effects, or otherwise be of international interest.
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SIRA Skilled Immigrant Rights Advocates

Draft Comments on Proposed regulations -
Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers
DHS Docket No. USCIS-2015-0008

I. INTRODUCTION

SIRA is a grassroots non-profit advocacy group. SIRA represents employment-based immigration applicants and their families living and working in the US for a decade or more, who will continue to stand in the line for permanent residency for the foreseeable future ("backlogged EB community"). SIRA represents a demography comprised of PhDs, professionals, and other advanced degree holders in a variety of high-tech, engineering, medicine, and other niche areas of employment. Majority of us were educated in the US, and have been following the rules, contributing to the economy, and paying their fair share of taxes, social security, and Medicare, just like US citizens. The long waiting times, uncertainty, and lack of freedom to change jobs and engage in any entrepreneurial activities inhibit us from realizing our full potential and pursue our dreams. Many of us get frustrated by the artificially created hardship and leave the US to pursue our careers and dreams elsewhere. SIRA's focus is to voice issues faced by our community, and alleviates their silent suffering by working towards practical solutions for a hassle free, predictable, and fair immigration system.

Based on the President's Executive Action announcements, and subsequent public agenda set out by USCIS and DHS, we had expected that the proposed regulation would provide significant interim relief, in particular portable work authorization and job mobility to the backlogged EB community while immigration reform remains stymied in the Congress. However, to our shock and dismay, the proposed regulation fails to fulfill the expressly stated purpose of the President's actions and does very little to alleviate any of the myriad problems faced by the backlogged EB community. We believe that in the absence of significant amendments, the proposed regulations would not only be an expensive exercise in futility, but leave the backlogged EB community worse off than before, given the additional restrictions they seek to impose on existing job portability provisions.

II. EXECUTIVE SUMMARY

A. The proposed regulation does not provide for improved job portability, flexibility, stability, ability to travel, maintain status, or start a business.

1. Employment Authorization Document ("EAD")

i. Does not benefit anyone except the rarest of rare cases

ii. Limited to only those with priority dates within 1 year of being current, should be expanded.
iii. "compelling circumstance" is not defined, guidance is extremely restrictive, unhelpful to most backlogged EB immigration applicants

2. No Status provided to EAD recipients

i. EAD beneficiary is not given any underlying status. Unless underlying status is maintained, beneficiary will not be able to file Adjustment of Status ("AOS") under INA § 245a when priority date eventually becomes current.
ii. Status of EAD recipients needs to be addressed in regulation.

3. No Advance Parole provided to EAD recipients

i. If unable to maintain underlying nonimmigrant status, recipient will not have a "status" to be able to travel abroad if using EAD; maintaining underlying nonimmigrant status would make the EAD useless.

4. Same of Similar definition is overly restrictive

i. Restrictive language "marked resemblance," "resembles in every relevant respect" and emphasizing SOC codes
ii. Creates extreme difficulty for advancement/promotion in profession for EB beneficiaries with priority date backlogged 10+ years, as higher level positions may not "resemble in every relevant respect" (significantly impacts nationals of certain countries more than others due to retrogression)

5. Supplemental Form J

i. Adds significant burden to applicants and employers
ii. Redundant - Current USCIS practice already requests evidence for proof of job offer in form of an employment letter listing duties to evaluate if in a same of similar position at time of AOS.
iii. Creates a deterrent for portability, increases costs for employer/applicant, as attorneys will be involved in completing complicated form, using "SOC" codes.

B. SIRA's Proposals – Provide Unrestricted EAD/AP and I-140/PERM portability; Current Law Not an Impediment

1. EAD

i. Remove "compelling circumstances" language
ii. Remove eligibility restriction to only priority date less than 1 year from cutoff date
iii. Allow 2-3 year validity period instead of 1 year.

2. Provide period of "authorized stay" to approved I-140 beneficiaries with EADs.

i. So they do not need to maintain their underlying non-immigrant status and can apply for AOS when PD becomes current

3. **Provide Advance Parole to EAD recipients**
   i. So they can travel outside the USA and return, as they will not have a "status" to return to.
4. **Portability**
   i. Remove unnecessarily restrictive definition of same or similar.
   ii. No supplement J
   iii. Allow the ability to "port" the I-140 to a new employer after one year of approval, if same/similar position (without the need to file AOS); and/or
   Allow the ability to "port" Approved PERM to a new employer if same/similar position within the same location

III. DETAILED COMMENTS

A. Problems Faced by the Backlogged EB Community

At least 500,000 high-skilled beneficiaries of approved I-140 (Immigrant Petitions), have been working in the country for an average of 10 years or more, but are still waiting to obtain green card/permanent residence. Majority of them have Masters or Ph.D. in computers, engineering, or life sciences, and have been educated in the US. Most of them are able to start the application for green card after living in the country for at least 5-8 years while they study on student visa and work on temporary worker visas. The lines for employment based green cards are getting longer, and it is estimated that employment based legal immigrants from India, China, and Philippines who start the process today may have to wait anywhere from 10-70 years to become permanent residents due to country quotas for green cards. They will then need to wait for another 5 years before they are eligible to apply for citizenship.

While waiting in the decades long lines for permanent residence, these high-skilled workers face myriad problems, which include:
1. Most of them are unable to change employers or get promotions because they will have to restart the green card process again, and it may reset the clock and their place in the waiting line. Most are stuck in jobs they are no longer excited about, and unable to make advances in their careers due to work authorization related restrictions.
2. They cannot start their own businesses because it is against the conditions of their work authorization.
3. If they visit their home country, they may or not be granted visas at the local consulate to travel back, even if their work authorizations have already been approved.

4. Sometimes, they are stranded for months or an year in the home country, away from their place of work and homes, while their visa applications are pending "administrative processing" at the consulate perform.
5. Many choose to not travel to their home country to meet their loved ones, or attend weddings or funerals, for fear of being stranded.
6. Their employers are required to reapply for their temporary worker visa every time the worker changes their employment location, job description, employer, or at least every three years. The recurring cost of these applications over 10+ years is enormous and adds to the difficulty in changing jobs and maintaining non-immigrant status indefinitely. The H1B program was not designed or intended for such extended periods.
7. They pay the same federal and state income taxes, as well as social security and Medicare taxes, as US citizens, but are ineligible for unemployment or any other federal or state benefits. Many return to their home country because of the long wait times and will never get any benefit from their payments into social security and Medicare.
8. If they lose their job, they are required to leave the country within 10 days with family leaving their homes, cars, and pets behind.
9. Many continue to rent instead of buying a house.
10. Many have children who pay out of state tuition just like they did when they came to the country.
11. These children become ineligible for the green card as dependents while their parents wait in the green card line. These children will have to restart the process that their parents underwent by starting with student visas, and then transitioning to temporary work visas, and then wait in the long lines for green cards.

B. Background, the Stated Purpose of the Relevant Executive Actions, and the Subsequent Shift in focus away from Providing Relief to Backlogged I-140 beneficiaries

The executive actions by President Obama stated the following:[1]

- Providing portable work authorization for high-skilled workers awaiting LPR status1 and their spouses. Under the current system, employees with approved LPR applications often wait many years for their visa to become available. DHS will make regulatory changes to allow these workers to move or change jobs more easily.
  . . .
- Ensuring that individuals with lawful status can travel to their countries of origin DHS will clarify its guidance to provide greater assurance to individuals with a pending LPR application or certain

[1] https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action

> temporary status permission to travel abroad with advance permission ("parole").

DHS Secretary Jeh Johnson wrote in his memorandum of Nov. 20, 2014 to USCIS, titled "Policies Supporting U.S: High-Skilled Businesses and Workers":

> I direct that USCIS carefully consider other regulatory or policy changes to better assist and provide stability to the beneficiaries of approved employment-based immigrant visa petitions. Specifically, USCIS should consider amending its regulations to ensure that approved, long-standing visa petitions remain valid in certain cases where they seek to change jobs or employers. Pg. 2.

https://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf.

USCIS stated that it will:

> Provide clarity on adjustment portability to remove unnecessary restrictions on natural career progression and general job mobility to provide relief to workers facing lengthy adjustment delays.

https://www.uscis.gov/immigrationaction

In the spring 2015 agenda, published in April 2015, DHS/USCIS published RIN"1615-AC05 titled "Employment-Based Immigration Modernization."

> Abstract: The Department of Homeland Security (DHS) is proposing to modernize the immigrant visa system by amending its regulations governing the adjustment of status process and employment-based immigration. Through this rule, DHS proposes to allow certain approved Immigrant Petition for Alien Worker (Form I-140) beneficiaries to obtain work authorization, clarify the meaning of portable work authorization, and remove unnecessary restrictions on the ability to change jobs or progress in careers, as well as provide relief to workers facing lengthy adjustment delays. (http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1615-AC05, Emphasis added).

Curiously, in the fall 2015 agenda, the title of the same regulation was changed to "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting Highly-Skilled H-1B Alien Workers" indicating a shift in DHS/USCIS focus. The revised abstract confirmed that the agencies had decided that "provid[ing] relief to workers facing lengthy adjustment delays" was no longer a worthwhile objective:

> Abstract: The Department of Homeland Security (DHS) is proposing to amend its regulations affecting certain employment-based immigrant and nonimmigrant classifications. This rule proposes to amend current regulations to provide stability and job flexibility for the beneficiaries of approved employment-based immigrant visa petitions while they wait to become lawful permanent residents. DHS is also proposing to conform its regulations with the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (the 21st Century DOJ Appropriations Act), as well as the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). The rule also seeks to clarify several interpretive questions raised by ACWIA and AC21 regarding H-1B petitions, and incorporate relevant AC21 policy memoranda and an Administrative Appeals Office precedent decision, and would ensure that DHS practice is consistent with them.

The policy focus seemed to have clearly shifted away from providing relief to the I-140 beneficiaries facing long delays (by removing mobility restrictions and providing work authorization) to merely providing them "stability," and retaining them as temporary workers. To obfuscate this lack of any meaningful improvement in the status quo, and add insult to injury, the agency decided to merge the proposed regulations with regulations implementing the AC21 Act that has been law for 15 years without rule making, and further restrict existing job portability provisions.

Eventually, more than 13 months after the announcement of the President's Executive Actions, the proposed regulation was published. Notably, no public listening session has been conducted for these regulations during the comment period, ostensibly to avoid facing the outrage of a community that feels abandoned, dejected, and betrayed.

C. The Miniscule Improvements Provided for in the Proposed Regulations

1. The regulation provides a 60-day grace period for H1B workers upon cessation of employment to respond to sudden or unexpected changes related to their employment (IV.B.3.b., proposed 8 CFR § 214.1(l)(ii)). We welcome this provision of grace period. However, we disagree with its characterization as something that would "enhance job portability."

2. Approved I-140 Petitions that have been approved for 180 days or more would no longer be subject to automatic revocation based on withdrawal by the petitioner or termination of the petitioner's business. (IV.B.1., proposed 8 CFR § 205.1(a)(3)(iii)(C) and (D)). While the provision would allow an H1B worker under

AC21 extensions, who is the beneficiary of an approved I-140 petition, to move to another H1B employer without jeopardizing his/her basis for continued H1B work authorization, i.e., the approved I-140 petition, the beneficiary would not be able to use the approved petition for filing AOS (pg. 85, 88-89 of the proposed regulations.

Such a restriction on the portability of the approved I-140 petition severely limits the utility of provision and in effect leaves the worker in a never ending loop of non-immigrants status. As stated earlier, the non-immigrants H1B program was designed and intended for temporary workers and is inherently unsuited for indefinite employment while the worker waits in decades long lines for permanent residence. In this context, please see our proposal for I-140 portability at III.E.1.d. below.

A never ending loop of non-immigrants status only benefits unscrupulous employers who prefer keeping workers with limited job mobility to drive down wages. The only other beneficiary of a never ending non-immigrant status is USCIS which receive millions of dollars fees recurring H-1B filings for renewals or change in employer, change in location and so on and so forth.

D. Problems with the Proposed Regulations:

1. The proposed regulation does not provide job mobility, flexibility, stability, ability to travel and maintain status, or start a business.

a. EAD: Proposed Employment Authorization ("EAD") for beneficiaries of approved Immigrant Petition (I-140) will not benefit anyone except the rarest of rare cases because:
(i). it is restricted to those who:
(1). show compelling circumstances (*see* proposed 8 CFR § 204.5(p)(1)(iii)); *and*
(2). have a priority date less than one year from Visa Bulletin cutoff dates for their category. *See* proposed 8 CFR § 204.5(p)(5)(ii), pg. 153 and pg. 103, ll. 4-11 of the proposed regulation.

(ii). Moreover, the EAD would be granted for only one year and the applicant would need to make a fresh showing of both of the above criteria at the time of renewal.

"Compelling circumstances" have not been defined and left to the Secretary's discretion. However, the DHS has identified four such circumstances including serious illness and disability, employer retaliation, significant disruption to the employer, and hardship to family caused by inability to find productive employment in home country following termination of US employer's business. Pg. 98-100 of the proposed regulation.

SIRA is perplexed and exasperated by this provision. The compelling circumstances listed by DHS are sufficient to seek administrative relief for hardship from the Secretary under the current law and practice. DHS clearly states that:

> The 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. *Id.* at pg. 98.

Further limiting the eligibility for EAD to those who have a priority date less than one year from Visa Bulletin cutoff dates for their category, DHS provides the following justification, which flies in the face of the stated purpose of the Executive Actions:

> 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. *Id.* at pg. 103, emphasis added.

We believe it is preposterous to suggest that recipients of an unrestricted EAD would forego applying for and obtaining permanent residence. To argue that the benefits of a Green Card or Permanent Resident status can be found in an EAD is ignorant at best, and disingenuous at worst.

Shockingly, DHS describes this provision as something that would "further enhance stability and flexibility" for backlogged EB workers (*Id.* at pg. 95). At the same time DHS admits that few could possibly benefit from this ludicrous provision as it would restrict the workers ability to change status while vaguely referring to "other change" that would enhance flexibility:

> 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. *Id.* at pg. 98, emphasis added.

SIRA is at a complete loss as to which provisions provide the touted "enhanced flexibility," having extensively reviewed the 181 page draft. In fact, DHS itself admits that the promised flexibility and job mobility is more make believe than real:

> 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. *Id.* at pg. 136, emphasis added.

b. AP: There is no associated Advance Parole ("AP") accompanying the EAD, which would make it impossible to travel outside the country and come back.

c. No underlying status for EAD recipients: There is no provision for any underlying status for EAD beneficiaries. Unless underlying status is maintained, beneficiary will not be able to file Adjustment of Status ("AOS") under INA § 245a when priority date eventually becomes current. See pg. 98, ll. 7-14.

d. Portability: There is no provision for job mobility for beneficiaries of approved I-140 petitions facing 10-20 year delays due to visa backlogs. Retention of priority dates (IV.B. 2.) is already existing AC21 law and practice. Moreover, most employers do not withdraw an approved I-140; so, the provision to prevent revocation is of very limited benefit (IV.B.1.). Backlogged EB immigration applicants will continue to need every successive new employer(s) to file labor certification ("PERM") and new I-140 petitions to be able to apply for GC when their priority date becomes current.

2. The proposed regulation puts additional unwarranted hurdles in the existing job flexibility and portability provisions and practice under AC21 that have been available for 15+ years

a. Unnecessary and burdensome provision of Supplemental form J: Apart from failing to provide easier job mobility in accord with the President's intent, the proposed rule actually assumes a more hostile posture towards backlogged petitioners. Prior to the rulemaking, AOS applicants could change to same or similar jobs after 180 days and would need only provide a letter from the new employer stating his current job duties, if required, at the time of adjudication of the application. Approved I-140 beneficiaries facing backlogs and AOS applicants

who decide to port 180 days after AOS filing under INA § 204(j) will now be required to submit a supplemental Form J requiring signatures and detailed information from the employer, and as well written attestations under penalty of perjury from both the applicant and the new employer, with their AOS applications and at every instance of porting. Proposed CFR § 245.25(a)-(b), pg. 173-175; and pg. 67-68 of the proposed regulation. These additional procedures will hinder and deter existing portability enjoyed by AOS applicants and add additional burden to backlogged EB applicants filing AOS several years after their I-140 approvals and additional costs and burden for the employer.

b. Same or Similar: The proposed regulation defines "same or similar" job for purposes of portability under INA § 204(j) in an overly restrictive manner by using a restrictive definition for "similar" as "marked resemblance," "resembles in every relevant respect" and emphasizing SOC codes (see proposed CFR § 245.25(c), pg. 175-176; and pg. 68, last paragraph of the proposed regulation; recently proposed memo on same and similar). This will result in extreme difficulty for advancement/promotion in profession for EB beneficiaries backlogged for years, even decades – as higher positions may not 'resemble in every relevant aspect' the original position the I-140 petition was filed for – even though the new position may be more complex in scope and pay a higher wage than the original prevailing wage. This results in severe lack of mobility for a petitioner from an oversubscribed country, in comparison to petitioners from other countries that are not oversubscribed.

E. SIRA's Proposed Solutions: Provide practical job mobility, ability to travel and maintain status, and start businesses to approved I140 beneficiaries who are in H1B status under AC21 extension (have been in H1b status for 6+ years):

1. Provide Unrestricted EAD/AP, Underlying Status, and approved I-140/PERM portability; Current Law Provides Sound Bases

Unrestricted EAD would allow Approved I-140 beneficiaries to start businesses, work for other employers, or be self-employed. AP would allow them to travel to their home country and for business without the fear of being caught up in uncertainties involved with visa processing at the consulates. Together with approved I-140/PEM portability, these benefits would provide a strong disincentive to employers who suppress wages by using the lack of mobility of the backlogged EB applicants. The current law provides the same bases for unrestricted EAD/AP post I-140 approval as it does for such benefits post AOS filing. Moreover, nothing in the current law prevents DHS from allowing beneficiaries of approved I-140/PERM to

port them to another employer via policy guidance or rule making.

a. Unrestricted EAD: Provide general work authorization:

(i). By removing requirements of compelling circumstances and priority date within 1 year from cutoff date limitations to EAD - deleting proposed 8 CFR § 204.5(p)(1)(iii)) and 8 CFR § 204.5(p)(5)(ii); and

(ii). By providing for EAD validity for a term of 3 years with similar renewal term, and automatic renewal if renewal application is pending with USCIS. This EAD can be of similar scope as those provided to AOS applicants under 8 CFR § 274a.12(c)(9)[2].

(iii) Legal basis: The sole statutory basis for 8 CFR § 274a.12(c)(9) is INA § 274A(h)(3)(B)[3], which provides the Attorney General with authority to provide EADs to aliens. 8 CFR § 274a.12(c)(9) came into effect in 1987 providing EAD for AOS applicants together with EAD for various other groups of aliens under 8 CFR § 274a.12, *without any specific congressional consideration as to merits of giving EADs to AOS applicants*. There is no additional statutory basis for EADs for AOS applicants beyond § 274A(h)(3), and these EADs are not dependent on INA § 204(j) or AC21 that came about in 2000. As discussed throughout this submission, the rationale and policy justifications for giving EADs post AOS apply equally, if not more, in case of approved I140 beneficiaries, in the absence of a separate statutory basis for the former. The regulation has been amended to provide for EAD for H4 beneficiaries under 8 CFR § 274a.12(c)(26).

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[2] An alien who has filed an application for adjustment of status to lawful permanent resident pursuant to part 245 of this chapter. For purposes of section 245(c)(8) of the Act, an alien will not be deemed to be an "unauthorized alien" as defined in section 274A(h)(3) of the Act while his or her properly filed Form I-485 application is pending final adjudication, if the alien has otherwise obtained permission from the Service pursuant to 8 CFR §274a.12 to engage in employment, or if the alien had been granted employment authorization prior to the filing of the adjustment application and such authorization does not expire during the pendency of the adjustment application. Upon meeting these conditions, the adjustment applicant need not file an application for employment authorization to continue employment during the period described in the preceding sentence

[3] § 274A(h)(3): Definition of unauthorized alien-As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) acn alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.

b. Unrestricted AP: Any work authorization without ability to travel outside the country and return would be of little use to the skilled immigrant population. The AP provided in conjunction with EAD post AOS filing is based under 8 CFR § 245.2(a)(4)(ii)(C). There are compelling policy reasons to provide for similar AP for approved I-140 beneficiaries who are recipients of EAD, and no particular legal or policy reasons that would prevent the DHS from amending the regulation. The regulation has been amended to provide AP for H4 EAD beneficiaries.

c. Lawful Status: Any EAD/AP without ability to maintain legal status and file AOS when the priority dates finally become current is of very limited use, if any. 8 CFR § 274a.12(c)(9) provides that the stay of AOS applicants is authorized by the attorney general. There are compelling policy reasons to also provide that approved I-140 beneficiaries who are recipients of EAD are in a stay authorized by the attorney general.

Moreover, DHS can declare that one who receives an EAD pursuant to an approved I-140 is in a lawful status, and amend 8 CFR § 245.1 to provide that "lawful status" under INA § 245(k)(2)(A) means the same thing as "lawful immigration status" under INA § 245(c)(2). This would allow beneficiaries of an approved I-140 who are EAD recipients to file AOS under the § 245(k) exception to §§ 245(c)(2) and 245(c)(7).

8C.F.R. § 245.1(d)(v) defines “lawful immigration status” to include “the immigration status of an individual who is in parole status for purposes of § 245(c)(2). A similar interpretation could be applied to INA § 245(k)(2)(A). Thus, parole granted to beneficiaries of approved I-140 (who are EAD recipients) could be treated as a lawful admission under 245(k) by amending 8 CFR § 245.1 to provide that lawful status under 245(k)(2) includes one on parole.[4]

There are no particular legal or policy reasons that would prevent the DHS from amending the regulations to provide lawful status to allow beneficiaries of an approved I-140 who are EAD recipients.

d. Portability: Provide job portability by:

(i)(1) Drafting a regulation similar to INA § 204(j) that allows recipients of EAD pursuant to an approved I-140 to port the I-140 to another employer, after 1 year of approval, for a same or similar job. The proposed 8 CFR §205.1(a)(3)(iii)(C) should be amended to delete the following:

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[4] *See* The Tyranny Of Priority Dates by Gary Endelman and Cyrus D. Mehta, http://www.ilw.com/articles/2010,0503-endelman.pdf

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.

The proposed 8 CFR §205.1(a)(3)(iii)(D) should be amended to delete the following:

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.

(2) The legal basis for the regulation can be found at INA § 103. An argument may be advanced that this regulation would be in conflict with congressional action expressly providing for portability only after 180 days of AOS filing under INA § 204(j) (and makes that statute redundant). However, the scope of the proposed benefit is much more limited. INA § 204(j) essentially provides for portability of an unapproved (but approvable) I-140 180 days after its *filing*. Portability after *one year of I-140 approval* is much more restrictive than *6 months after concurrent I-140/AOS filing* if the backlogs due to visa unavailability were discounted. Portability benefit was fashioned precisely to remove the consequences of unintended delays. While congress enacted § 204(j) to provide portability to alleviate problem of agency delays in adjudicating AOS applications, that fact cannot be taken as its implicit or intentional refusal to act on delays because of visa unavailability. Indeed, backlogs due to visa unavailability were minimal and current backlogs unforeseeable at the time AC21 was enacted in 2000, whereas AOS processing times were historically 3-5 years, inviting congressional action to alleviate lack of job mobility via § 204(j) portability.

In fact all legitimate policy considerations favor portability of approved I-140. AOS is the beneficiaries' application and its filing is contingent on visa availability, not on market demand or employment availability. Porting of I-140, 1 year after its approval, will not harm anyone, unless one was to presume that backlogs are designed to provide employers with employees with limited mobility. Portability certainly does not harm the US workers. I-140 portability would take away any perverse motivation that allows an employer to artificially freeze wages of an employer dependent employee waiting for visa availability. Moreover, congress has never considered approved I-140 portability, and the law is silent about such a provision. Congressional intent has historically been against EB visa backlogs, as evident from the AC21 legislative history and provisions. If the approved I-140 can be used to obtain recurring AC21 extensions of H1B stays for employers, other than

the I-140 sponsoring employer, the same policy reasons should allow AOS filing for same or similar employment offered by employers other than the I-140 sponsoring employer.

(ii)(1) Portability of PERM to a same or similar job with another employer within a location – DHS should allow an approved PERM of recipients of EAD pursuant to an approved I-140 to be used with another employer if the new job is same or similar and in the same geographical area of intended employment, which includes commuting distance. Then the employer could directly file an I-140 with USCIS any time it wanted to sponsor someone who had an approved PERM in the same location for a same or similar occupation.

(2) Legal basis: INA § 212(a)(5)(A)(i)[5] provides the basis for such a regulation and does not limit PERM certification to the specific employer.

(iii)(1) Portability of PERM to a same or similar job with another employer - For those whose jobs have moved outside the area of intended employment and cannot utilize the existing PERM, the DOL can promulgate a new Schedule A type category for recipients of EAD pursuant to an approved I-140 who have previously approved PERM and are moving to another employer or job outside the area of intended employment, but the job is same or similar under 20 CFR § 656.5 and allow USCIS to handle the labor certification itself under 20 CFR § 656.15 just as is done with other Schedule A occupations. Current regulations at 20 CFR § 656.15(b) would still require the employer to get a prevailing wage determination in a Schedule A case, but DOL could instead indicate in its new regulation that under those circumstances the old PWD could be reused. Then the employer could directly file an I-140 with USCIS any time it wanted to sponsor someone who had an approved PERM for a same or similar occupation.

2. Remove additional proposed hurdles in the existing job flexibility and portability provisions under AC21

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[5] § 212(a)(5)(A) Labor certification.-
(i) In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

a. Remove unnecessarily restrictive definition same or similar. *See* enclosed SIRA's previous submission in response to draft policy memo published last year.

b. Scrap supplemental form J and proposed CFR § 245.25(a)-(b).

IV. Conclusion

We hope DHS would give due consideration to the stated objectives of the Executive Actions and make amendments to the proposed regulation suggested above to provide real meaningful relief to high-skilled workers facing long immigration delays due to visa unavailability and country quota caps.

Yours Sincerely,
SIRA

YOUR **VOICE** IN THE WHITE HOUSE

WE THE PEOPLE ASK THE FEDERAL GOVERNMENT TO TELL US WHAT THE FEDERAL GOVERNMENT IS DOING ABOUT AN ISSUE:

No Respite for Highly-skilled Americans-in-Waiting. Need Portable Work Authorization & Recapture 500K Green Cards

Created by P.C. on July 11, 2016

103,366 SIGNED 100,000 GOAL

On Nov 25th 2014, President Obama signed an executive action (https://goo.gl/wPP4K9 (https://goo.gl/wPP4K9)) that would make it possible for the highly-skilled workers to obtain portable work authorization (I140 EAD and AP). Close to two years since then, there have been no updates on this action. Thousands of green cards are being wasted every year, with an estimated 500,000 green cards wasted so far, while the highly-skilled workers continue to wait in a queue that may take 20-50 years. We urge you to review and take necessary actions to recapture unused green cards, and provide portable work authorization. We want what American workers want – No H-1B worker increases and an equal opportunity to help us build our careers, innovate, and contribute towards the American economy.

CIVIL RIGHTS & EQUALITY HOMELAND SECURITY & DEFENSE IMMIGRATION

A response to your petition on immigration reform:

Thank you for signing this petition (https://petitions.whitehouse.gov/petition/no-respite-highly-skilled-americans-waiting-need-portable-work-authorization-recapture-500k-green-cards) about steps to reform our immigration system.

America prospers when we welcome and retain the most talented workers, graduates, and entrepreneurs from around the world. As President Obama said at a naturalization ceremony for new Americans (https://www.whitehouse.gov/the-press-office/2015/12/15/remarks-president-naturalization-ceremony) last year:

"Immigrants like you are more likely to start your own business. Many of the Fortune 500 companies in this country were founded by immigrants or their children. Many of the tech startups in Silicon Valley have at least one immigrant founder."

America has made real progress over the past seven and a half years. We are working to fully implement commonsense steps announced by President Obama in 2014 to modernize and streamline our legal immigration system. In addition, in July 2015, we released a report laying out several efforts across the federal government that will help ensure that all immigrant visas authorized by Congress are issued when there is sufficient demand, better account for visa availability for persons seeking to adjust to lawful permanent resident status (or "green card holder") while remaining in the United States, and provide additional job flexibility and portability for nonimmigrant workers affected by immigrant visa backlogs.

In December, the Department of Homeland Security (DHS) proposed a rule that would help enable American companies hire and retain people waiting to become lawful permanent residents, while providing those workers stability and job flexibility. These proposed reforms would help those employees further their careers by accepting promotions, changing positions or employers, and pursuing other employment opportunities. DHS is currently reviewing the approximately 28,000 public comments it received, and is drafting a final rule in response to those comments.

In March, the U.S. Citizenship and Immigration Services (USCIS) issued new guidance (https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2016/Final_Same_or_Similar_Policy_Final_Memorandum_3-18-16.pdf) that provides more clarity on the portability provision in the law, allowing individuals to seek new job opportunities or even accept promotions without losing their places in line for their green cards. By recognizing career progression and job transitions, this memo offers individuals who are on the path to permanent residency and their employers increased flexibility and stability.

We are also empowering certain spouses of high-skilled individuals (https://www.uscis.gov/working-united-states/temporary-workers/employment-authorization-certain-h-4-dependent-spouses) on the path to a green card to put their own education and talents to use by requesting work authorization. The Department of Homeland Security (DHS) also finalized a regulation that strengthens and extends on-the-job training (https://studyinthestates.dhs.gov/stem-opt-hub) for graduates from U.S. universities studying science, technology, engineering, and mathematics. Read more about these steps the Administration has taken. (https://www.whitehouse.gov/blog/2016/01/28/presidents-actions-promote-high-skill-immigration)

DHS also recently proposed a rule intended to allow international entrepreneurs to come to the United States if they can demonstrate that their stay would provide significant public benefit to the nation. (https://medium.com/the-white-house/welcoming-international-entrepreneurs-d27571475dfd#.lwgidbfrx)

Through this effort, DHS is seeking to attract entrepreneurs from abroad so they can start or scale their businesses in our country, contribute to the American economy and create jobs for American workers.

You can share your thoughts and feedback on the proposed International Entrepreneur Rule. (https://www.uscis.gov/news/news-releases/uscis-proposes-rule-to-welcome-international-entrepreneurs)

But, we must do even more if we are going to meet the challenges of the 21st century. President Obama has repeatedly called on Congress to enact the kind of commonsense, comprehensive immigration reform supported by a majority of the American people.

Thank you for joining the broader conversation about fixing our broken immigration system by signing this petition. We greatly appreciate your interest and hope that you continue to share your views with the Administration.

-- We the People Team