Congress of the United States
House of Representatives
Washington, DC 20515

February 9, 2016

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

RE: Comments on Notice of Proposed Rulemaking: 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

Dear Chief Dawkins:

We submit these comments to the Department of Homeland Security's Notice of Proposed Rulemaking: Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers.

We applaud the Department for issuing this Notice of Proposed Rulemaking, which includes several smart changes in accordance with current law to bring some measure of relief, flexibility, and clarity to high-skilled workers and their employers who are trying to navigate a broken immigration system. However, we believe in key respects this proposed rule fails to meet the full potential of the President's goal to "make it easier and faster for high-skilled immigrants, graduates, and entrepreneurs to stay and contribute to our economy, as so many business leaders have proposed."[1] Nor does it meet the objectives of Secretary of Homeland Security Jeh Johnson's November 20, 2014 memorandum directing "regulatory… changes to better assist and provide stability to the beneficiaries of approved employment-based immigrant visa petitions."[2] Therefore, we urge the Department to consider our comments and continue to investigate ways to make improvements before publishing a final rule to help the United States attract and retain high-skilled workers critical to employers and our economy.

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[1] President Barack Obama, *Remarks by the President in Address to the Nation on Immigration* (Nov. 20, 2014) available at https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

[2] Jeh C. Johnson, *Memorandum for Leon Rodriguez, Director U.S. Citizenship and Immigration Services and Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement*, p. 2 (Nov. 20, 2014) available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf.

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I. Recognition of the Important Benefits High-Skilled Foreign Workers Provide to the U.S. Economy

First, we would like to commend the Department for recognizing the important benefits that high-skilled foreign-born workers provide to the U.S. economy. As the Department states in its notice:

> The benefits from these proposed amendments add value to the U.S. economy by retaining high-skilled workers who make important contributions to the U.S. economy, including technological advances and research and development endeavors, which are highly correlated with overall economic growth and job creation.

We could not agree more. We have seen in our districts in Silicon Valley how high-skilled foreign born workers have contributed immensely to the U.S. economy with their skills and innovation. They have been a driving force for the continued prominence of Silicon Valley within the technology sector and for the United States as a global leader in science, technology, engineering, and math. For example, 24 out of 50, or 48% of the country's top venture-funded companies in 2011 had at least one immigrant founder.[3] Additionally, more than 40 percent of the 2010 Fortune 500 companies were founded by immigrants or their children, employing more than 3.6 million people.[4] And it is not just entrepreneurs that create a positive economic impact, rather, high-skilled immigrants at all levels of employment in the STEM fields bring innovation and creativity to U.S. companies and increase wages.[5] It makes no sense for the United States to educate, hire, and train a foreign individual and then drive him/her away with obsolete immigration policies, especially if that individual is at the forefront of American innovation and entrepreneurship.[6]

II. Clarification of and Enhancements to Existing Policy and Guidance

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[3] *See e.g.*, Dane Stangler and Jason Wiens, *The Economic Case for Welcoming Immigrant Entrepreneurs*, Kauffman Foundation (Sept. 8, 2015) available at http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-economic-case-for-welcoming-immigrant-entrepreneurs; Stuart Anderson, *Immigrant Founders and Key Personnel in America's 50 Top Venture-Funded Companies*, National Foundation for American Policy (Dec. 2011) available at http://www.nfap.com/pdf/NFAPPolicyBriefImmigrantFoundersandKeyPersonnelinAmericasTopVentureFundedCompanies.pdf.

[4] The Partnership for a New American Economy, *The "New American" Fortune 500* (June 2011) available at http://www.renewoureconomy.org/sites/all/themes/pnae/img/new-american-fortune-500-june-2011.pdf.

[5] Giovanni Peri, Kevin Shih, and Chad Sparber, *Foreign STEM Workers and Native Wages and Employment in U.S. Cities* (May 2014) NBER Working Papers 20093, available at http://www.nber.org/papers/w20093.pdf.

[6] *See e.g.*, Dane Stangler and Jared Konczal, *Give Me Your Entrepreneurs, Your Innovators: Estimating the Employment Impact of a Startup Visa*, Kauffman Foundation (Feb. 2013) available at http://www.kauffman.org/~/media/kauffman_org/research%20reports%20and%20covers/2013/02/startup_visa_impact_final.pdf.

For the reasons described above, we support the proposed changes to codify existing policy and guidance and make the regulations consistent with worker portability and other provisions in the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), as well as the American Competitiveness and Workforce Improvement Act of 1998.[7] The proposed regulatory amendments clarifying and extending H-1B status beyond the 6 year limitation pursuant to AC21 sections 104(c) and 106(a) and (b) are welcome and long overdue. We are optimistic that the proposed regulations will enhance consistency in USCIS adjudications.

A. Flexibility in H-1B Licensing Requirements

We support the proposed clarifications to the H-1B licensing requirements that will permit a petitioner to meet the licensure requirement by demonstrating that the foreign worker has filed a request for such license but is unable to obtain it, or is unable to file a request for such a license, because a state or locality requires a social security number or the issuance of employment authorization before accepting or approving such requests. This, along with the clarification that DHS may approve an H-1B petition on behalf of an unlicensed worker if he or she will work in a State that allows such individuals to be employed in the occupation under the supervision of licensed personnel, are common-sense solutions that will help U.S. businesses.

B. Nonimmigrant Grace Periods

Similarly, the extension of the 10-day grace period – currently available to H-1B nonimmigrants and their dependents before and after their validity periods – to other employment-authorized nonimmigrant visa classifications (E-1, E-2, E-3, L-1, and TN) makes sense. We fully support this practical approach to give foreign-workers and their families 10 days to prepare for employment, seek new employment in order to extend or change status, or prepare for departure from the United States.

We also support the rule's provision establishing a one-time grace period, during an authorized validity period, of up to 60 days whenever employment ends for individuals holding E-1, E-2, E-3, H-1B, H-1B1, L-1, or TN nonimmigrant status. This grace period, which DHS may eliminate or shorten on a case-by-case basis, is good for U.S. employers and high-skilled nonimmigrants because it enhances job portability and enables U.S. employers to facilitate changes in employment for existing or newly recruited nonimmigrant workers.

We would, however, request that one change be made to the 60-day grace period provision. DHS should have the discretion to grant up to a 60-day grace period more than once during an H-1B validity period on a case-by-case basis. In today's new economy, particularly in STEM fields where many high-skilled foreign workers are employed, start-ups often are bought or fail. They

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[7] American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251; American Competitiveness and Workforce Improvement Act, Pub. L. No. 105-277, Div. C, Title IV, 112 Stat. 2681-641.

may also need employees with different skill sets at different stages of development. As a result, it can be both typical and sometimes beneficial for H-1B workers to change employers more than once during each 3-year validity period. USCIS should have the discretion to approve such *bona fide* cases within the grace period each time an H-1B worker changes jobs.

III. Employment Authorization for High-Skilled Foreign Workers Awaiting Visa Availability

A. Supporting Job Stability and Flexibility through Unrestricted Employment Authorization

We strongly support unrestricted employment authorization for **all** high-skilled foreign workers in the United States in E-3, H-1B, H-1B1, L-1, or O-1 nonimmigrant status who are beneficiaries of approved employment-based petitions (Form I-140) and awaiting their priority dates to become current. Therefore, we are disappointed that this rule would grant open market employment authorization only if the nonimmigrant worker can meet an undefined, but undisputedly high, standard of "compelling circumstances" in addition to having a priority date within one year of the current cut-off date for the relevant employment-based category. As drafted, this change will benefit a limited number of people, and falls far short of both the President and Secretary of Homeland Security's goals, as outlined above.

DHS has set forth these restrictions in the rule with the intention to "discourage individuals from relying on the proposed employment authorization in lieu of completing the employment-based immigrant visa process." Instead of discouraging high-skilled nonimmigrants who have taken all possible steps towards permanent residence, we recommend that DHS expand this option to all E-3, H-1B, H-1B1, L-1, or O-1 nonimmigrants without regard to compelling circumstances or priority dates.[8] We also request that the final rule clearly articulate that individuals with approved petitions awaiting visa availability who choose to avail themselves of unrestricted employment authorization, in lieu of maintaining their nonimmigrant status, will be considered to be in a period of authorized stay and will not accrue unlawful presence under INA section 212(a). Furthermore, we urge DHS to explore legal options prior to publication of the final rule that would permit individuals with approved employment-based petitions to have unrestricted employment authorization while concomitantly maintaining nonimmigrant status.

Expansion of unrestricted employment authorization is fully within the legal authority of the agency. Congress has long vested the Executive with "broad discretion to determine when noncitizens may work in the United States."[9] When Congress enacted INA section 274A, which provides that a noncitizen is "unauthorized" for purposes of employment if the noncitizen is

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[8] This approach would align U.S. policy with the United Kingdom, where five years of employment on a work visa qualifies the individual for permanent residence because it demonstrates an ongoing value to the employer. *See* Website of the Government of the United Kingdom, available at *https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-6a-the-points-based-system*

[9] *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014).

neither "lawfully admitted for permanent residence" nor "authorized to be ... employed by this chapter *or by the [Secretary]*,"[10] it was plainly vesting the Executive with broad regulatory authority over employment authorization. Rather than limiting or curtailing this authority, section 274A expressly confirms the Executive's authority over employment authorization and validates the regulation under which persons may apply for work authorization.[11]

Such regulatory changes would recognize that these aspiring immigrants have spent years residing and working in the United States. Often, they studied at U.S. universities, worked in the United States under Optional Practical Training, and have spent 6 years or more in nonimmigrant status working towards permanent residence. The extended timeframe for acquiring permanent residence is problematic for employees and businesses alike. USCIS recognized this in providing employment authorization to certain H-4 spouses:

> In many cases, H-1B nonimmigrants and their families who wish to acquire LPR status in the United States must wait many years for employment-based immigrant visas to become available. These waiting periods increase the disincentives for H-1B nonimmigrants to pursue LPR status and thus increase the difficulties that U.S. employers have in retaining highly educated and highly skilled nonimmigrant workers.[12]

Similarly, according unrestricted employment authorization to beneficiaries of approved employment-based petitions would align with the purpose of this rule to make "it easier to hire and retain nonimmigrant who have approved immigrant visa petitions and giving such workers additional career options as they wait for immigrant visa numbers to become available."

Additionally, these high-skilled immigrants often have been counseled by their firm's immigration attorneys. They may have legal representation of their own for the immigrant visa process. They are connected to networks of similarly situated high-skilled foreign workers through their employers and independent grassroots organizations. In sum, they are sophisticated individuals fully capable of weighing the pros and cons and making an informed decision about whether to take advantage of the proposed unrestricted employment authorization, even if it would generally require foregoing adjustment of status in the United States for immigrant visa consular processing abroad.

We have no doubt that these high-skilled foreign workers will make the best decisions for themselves. Some may choose to start a new business that will in turn create jobs for U.S. workers. Others may take a position with a different employer that takes their career in a new direction, or a position in education or the not-for-profit sector. But with unrestricted employment authorization, they will not be unnecessarily tethered to an employer for the sole

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[10] INA § 274A(h)(3) (emphasis added).
[11] *See* 8 CFR § 274a.
[12] *Employment Authorization for Certain H-4 Dependent Spouses*, 80 Fed. Reg. 10283 at p. 5 (Feb. 25, 2015).

purpose of completing the immigration process, which may subject a worker to abuse or deflate wages for similarly situated U.S. workers. In fact, by acting according to their own best interest, they will be attractive to potential employers who will be able to hire them more expeditiously, and they help grow our economy and enrich our society. Expanding employment authorization in this way is at the heart of the President's November 2014 directive requesting regulatory changes to better assist and provide stability to beneficiaries of approved employment-based immigrant visa petitions.[13]

Granting unrestricted employment authorization to this population would also address a major flaw – caused by the insufficient number of statutorily available employment-based visas – in the process for permanent employment sponsored immigration. Generally, the employer commences this process by testing the U.S. labor market to assess whether there are U.S. workers "able, willing, [and] qualified" to perform the position in question.[14] This serves the legitimate objective of protecting U.S. workers and the domestic labor market by ensuring that foreign workers seeking immigrant visa classifications are not displacing equally qualified U.S. workers, and preventing businesses from having unfettered access to foreign labor. However, this goal is undermined by statutory visa backlogs that often result in a 3 to 10 year or longer delay before a high-skilled worker can complete immigration processing.[15] This intervening delay renders the labor market test meaningless. By granting unrestricted employment authorization to this population in close proximity to the time the labor market test is approved, we can restore integrity to the labor market test and support both U.S. and foreign born workers in the process.

B. Retention of Employment-Based Petitions and Priority Dates

We applaud the provisions in this proposed rule that enhance portability through the retention of EB-1, EB-2, and EB-3 employment-based immigrant petitions. By clarifying that a loss of a job, closure of an employer's business, and/or withdrawal by the employer of the petition will not cause individuals whose employment-based petitions have been approved for 180 days or more to lose their priority dates or ability to extend H-B status beyond 6 years, this regulation will provide much needed certainty and options for professional mobility. We also support the provisions clarifying that EB-1, EB-2, and EB-3 petition beneficiaries may keep their priority dates even if USCIS has revoked their approved I-140 petitions due to employer withdrawal or because their employer's business shut down. We agree with the DHS assertion in the proposed notice that these provisions "would improve the ability of certain workers to accept promotions, change employers, or accept other employment opportunities without fear of losing their place in line for immigrant visas based on the skills they contribute to the U.S. economy."

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[13] President Barack Obama, *Remarks by the President in Address to the Nation on Immigration* (Nov. 20, 2014) available at https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

[14] INA §§ 212(a)(5)(A) and (P).

[15] Department of State, *Visa Bulletin for February 2016*, available at https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-february-2016.html

IV. Employment Authorization Processing

We strongly support the automatic extension of Employment Authorization Documents (EADs) up to 180 days, if the application (Form I-765) is filed before expiration. According to the Citizenship and Immigration Services Ombudsman 2015 Annual Report to Congress, "[w]hile the agency adjudicates the vast majority of EAD applications within the 90-day regulatory processing timeframe, every year thousands of eligible individuals encounter processing delays."[16] When processing of employment authorization is delayed, "applicants experience financial hardship due to job interruption and employment termination; they may lose or have difficulty renewing driver's licenses; business operations stall due to loss of employee services; and families face suspension of essential income and health benefits."[17]

We are concerned with the elimination of the existing 90 day regulatory requirement for adjudication of employment authorization applications. Should this proposal be included in the final rule, it is essential to clarify that individuals who have been waiting the 180 day automatic extension period will not suffer the consequences of undue administrative delays where employment authorization applications remain pending longer. Additionally, the final rule should recognize that these individuals often need to travel internationally, and therefore clarify that those waiting for renewal of their EADs may depart and return to the United States during the EAD renewal process.

V. Worker Protections: Recognizing Beneficiaries as Parties of Interest

This rule also presents an opportunity to address the fact that there is currently no independent mechanism available for beneficiaries of immigrant and nonimmigrant employment-based visa petitions to be notified or confirm that an employer has filed a petition on their behalf.[18] We are concerned that beneficiaries may be left in the dark during a process that has profound impacts on their lives and their families. For example, without a USCIS receipt number, a beneficiary cannot query USCIS's online case status system to determine the status of the petition filed on her/his behalf. In addition, an H-1B beneficiary wishing to port or engage in concurrent employment may not be able to provide requisite evidence when the worker seeks to begin new employment. Further, information in H-1B petitions may directly affect beneficiaries and their dependents' maintenance of status or pursuit of lawful permanent residence.

We understand that to this point DHS has interpreted its regulations at 8 CFR sections 103.2 and 103.3 such that a beneficiary is not a recognized party in the proceeding and therefore does not

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[16] *CIS Ombudsman 2015 Annual Report to Congress*, at p. 48 (June 29, 2015), available at http://www.dhs.gov/sites/default/files/publications/2015%20CISOMB%20Annual%20Report_508.pdf.

[17] *Id.*

[18] The White House recognized this as an issue to be addressed in its 2015 report, *Modernizing & Streamlining our Legal Immigration System for the 21st Century* (July 2015), at p. 36, available at https://www.whitehouse.gov/sites/default/files/docs/final_visa_modernization_report1.pdf.

have legal standing to receive notifications directly from DHS. However, this interpretation causes great uncertainty to high-skilled, job-creating beneficiaries and their families. Recently, the Second Circuit aligned with the Eleventh and Sixth Circuits in reaching an opposite conclusion – namely that a beneficiary, and not just the former employer, has standing in a district court suit over visa petition revocation.[19] Therefore, we urge DHS to promote uniformity and clarity by including a regulatory change in the final rule recognizing beneficiaries as parties of interest. By doing so, employers would be required to provide copies of notices for petitions filed on behalf of their foreign employees.

Thank you for your work on this important rule and the opportunity to submit these comments.

Sincerely,

Zoe Lofgren
Ranking Member
Subcommittee on Immigration and
Border Security

Michael M. Honda
Ranking Member
Appropriations Subcommittee on
Commerce, Justice, Science

[19] *Mantena v. Johnson*, 809 F.3d 721, 724 (2d Cir. 2015) (explaining "'[t]he…'portability provisions'—8 U.S.C. § 1154(j) and 8 U.S.C. § 1182(a)(5)(A)(iv)—…reflect a congressional intent to protect the interests of qualified aliens.' It follows that to the extent that federal courts have jurisdiction to hear such arguments, qualified aliens have standing to bring these arguments to our courts.") (*internal citations omitted*); *Kurapati v. USCIS,* 775 F.3d 1255, 1260-61 (11th Cir. 2014); *Patel v. USCIS*, 732 F.3d 633, 638 (6th Cir. 2013).