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July 11, 2014

Kevin J. Cummings, Chief  
Business and Foreign Workers Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
U.S. Department of Homeland Security  
20 Massachusetts Avenue, NW  
Washington, DC 20529-2140

Re: Employment Authorization for Certain H-4 Dependent Spouses  
79 Fed. Reg. 26886 (May 12, 2014)  
RIN 1615-AB92

Dear Mr. Cummings:

We are writing in response to the Department of Homeland Security's request for comment concerning its proposal to allow an application for employment authorization by certain H-4 spouses where the H-1B principal is being sponsored for lawful permanent residency. Specifically, the rule allows an H-4 spouse to request a work permit when the spouse is a named derivative beneficiary on an approved I-140 petition or where the H-1B principal qualifies for AC21 extensions beyond six years (under either §106(a) or (b) of the American Competitiveness in the Twenty-First Century Act). The proposed rule from U.S. Citizenship and Immigration Services (USCIS), entitled *Employment Authorization for Certain H-4 Dependent Spouses*, 79 Fed. Reg. 26886 (May 12, 2014) (hereafter "NPRM," "proposed rule" or "proposal") identifies a sensible and useful tool for employers to retain highly skilled workers who are about to become permanent members of our workforce and for our nation to receive significant economic benefit.

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system.

## **OVERVIEW**

The U.S. Chamber strongly supports the proposed rule. However, we believe that the agency has understated its benefit to our economy and are writing primarily to draw attention to the value this rule would have to the employers who are sponsoring H-1B professionals for green card status (lawful permanent residency) and to the country at large. In addition, we are writing to encourage the agency, because of these significant national benefits, and in order to affect the policy goals specifically articulated in the NPRM, to expand the scope of the dependents authorized to request work authorization in at least two important ways. Lastly, we ask the agency to consider a few technical issues in its proposed process to implement the rule.

## **NPRM UNDERSTATES BENEFITS OF PROPOSAL**

After conducting our own in-house economic analysis<sup>1</sup> of the proposed rule and gathering input and data from some of our member companies, we believe the NPRM's cost-benefit analysis overstates the potential costs of the proposed rule and, for that reason and others, seriously understates the benefits associated with the rule.

### *Cost Analysis of Allowing Certain Dependents to Apply for Work Authorization When They are Pending Permanent Residents*

The Department believes that over a ten-year analysis horizon, the costs associated with implementing this rule to be a present value sum of \$136.2 million to \$160.8 million, depending on whether future costs are discounted at 7% or 3%, respectively. The Chamber believes these estimates are exaggerated in at least one significant way. The Department calculated the cost per applicant to be \$435.67 per applicant. The Department took that figure and multiplied it by the Department's estimate of 100,600 applicants for the first year following implementation and then multiplied that same dollar amount by 35,900 applicants for each of nine subsequent years. The Department came up with the \$435.67 amount per applicant by adding the \$380 filing fee for an employment authorization document (the necessary documents needed for H-4 dependent spouses to work) with an additional \$55.67 as the cost of the applicant's time to complete and submit the application forms.

The \$55.67 amount is of particular concern, because it was calculated based on a wage opportunity cost of \$7.25 per hour, using the federally established minimum wage

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<sup>1</sup> Ronald Bird, Ph.D., assisted with the regulatory economic analysis. Ronald Bird earned his Ph.D. in Economics from the University of North Carolina at Chapel Hill and is a Senior Economist for Regulatory Analysis in the Economic Policy division of the U.S. Chamber of Commerce.

under the Fair Labor Standards Act as a baseline. In our opinion, the calculation of the \$55.67 amount contains an obvious logical error because the putative H-4 dependent spouse who would apply for employment authorization documents is currently not permitted to work in the United States prior to receiving employment authorization document. Since the spouse cannot work prior to receiving the document, the Chamber is of the opinion that there is no lost wage associated with the use of the applicant's time to complete and submit the application. Indeed, by the fact that applying will be a voluntary choice of the applicant, it is implicit that the individual who chooses to apply places a higher value on the application than the notional value of any uncompensated personal time allocated to the task. Therefore, whatever value that individual places on the time used to apply for the Employment Authorization Document (EAD), and regardless of how or low that value may be, it is indisputably less than the value the individual places on obtaining legal work authorization in the United States.

We feel that a more accurate estimate would subtract the \$55.67 amount from the total cost in the analysis. Not only will this change reduce the estimated costs by 12.8%, but this adjustment reduces the cumulative ten year cost range to between \$118.8 million to \$141.5 million in present value, depending on the discount rates used by the Department.

*Benefit Analysis of Allowing Certain Dependents to Apply for Work Authorization When They are Pending Permanent Residents*

The reduction in the cost figure for the rule means the benefits of the proposal were underappreciated. More importantly, though, are other benefits not considered by the agency. The Department took a narrow view of the types of benefits associated with this NPRM as evidenced by the Department's benefits description only in terms of the qualitative national benefits of increasing the incentive for needed high skill workers to seek permanent status to remain in the U.S. The Chamber agrees with the Department that the proposed rule will improve the likelihood that highly skilled H-1B workers will seek to stay in the US on a permanent basis and remain in the U.S. labor force.

The Chamber believes there are many other benefits that accrue by allowing dependents of pending permanent residents to receive legal work authorization in the U.S. We encourage the Department include in the final rule a plan to collect data to facilitate a retrospective evaluation of the actual impact of the program in terms of take-up rates (the number or percentage of eligible H-4s that choose to apply for an EAD), earnings, hours and weeks worked, active years in the program and participant characteristics to facilitate policy review and future decisions.

A. Estimating economic benefits to the nation.

The national benefit of permitting certain H-4 dependent spouses to work during the transition to permanent status is more immediate and tangible than the long-term benefit described by the Department in qualitative terms. The employed spouse will produce increased output that will be reflected in the family income immediately during the transition period, and that additional income will most likely, at least in part, be spent on increased consumption of goods and services within the United States. Such spending will have a multiplicative dynamic impact on the incomes and employment opportunities for Americans in their communities and throughout the nation. Many H-4 dependent spouses, like the principal H-1B worker, possess college degrees. There is no publicly available data that documents the extent of this, but anecdotally our members report this is common. For example, one company was able to review the files on a representative sample of its H-1B workers and estimates that 70% of its H-1Bs were being sponsored for green cards, 96% were married, and of those 100% of the spouses had university degrees. It would be reasonable to presume, and would not be surprising to find, that many highly educated individuals marry spouses who are also highly educated.

If the H-4 spouses who will be able to work, do largely have university degrees, it is relevant to consider that BLS data for 2013 shows that the typical (median) four-year degree college graduate has a full-time weekly income of \$1,108, or \$57,616 per year.<sup>2</sup> Using the same numbers in the Department's estimate of 100,600 eligible applicants for the first year of the program, if the typical H-4 spouse being covered under the NPRM earned at this rate, the result would be an additional amount of up to \$5.8 billion in these families' budgets, which in turn would flow to their local American communities as they consume goods and services with this increased purchasing power. This additional spending by H-1B families will translate into increased income and jobs in their communities and throughout the nation. This would also translate to an increase in tax receipts to the government – such as increased federal and state income taxes, property taxes that support local schools and community services, and Social Security payroll taxes that contribute to the financial sustainability of the program for the benefit of all Americans. Since the workers who enter the labor force the first year will on average remain in the program for three or more years, the annual benefit of their added earnings to the economy will continue to rise.

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<sup>2</sup> See, Bureau of Labor Statistics data at [http://www.bls.gov/emp/ep\\_chart\\_001.htm](http://www.bls.gov/emp/ep_chart_001.htm). The benefit calculated will vary depending on whether the actual educational attainment of H-4 eligible participants in the program differs from the assumed four-year degree level. For proportionality reference, the BLS data for 2013 shows median weekly earnings for full time workers age 25 or older with a high school diploma only as \$651, some college no degree as \$727, and with a Master's degree at \$1,329.

Taking these estimates one step further and using the Department's estimate of 35,900 eligible applicants in the second and each subsequent year, the subsequent annual additions of new workers receiving work permits may add up to \$2.0 billion more in spending each year for as long as the typical worker remains in the permitted worker pool. At the end of 5 years, for example, the direct increment to consumption (and taxes) spending could be as much as \$14.1 billion.<sup>3</sup>

These potential benefit calculations are immediate, direct and national in scope. And, there are other economic benefits that would be associated with the increased labor output brought about by allowing these H-4 dependent spouses to work. Other economic benefits would include such things as increased employer productivity, additional investments incurred by the business expansion brought about these workers, and so on. It is difficult to accurately quantify these types of multiplier effects with regard to the benefits they have on the American economy, but economists certainly attempt to do so. For example, for 2013, the Bureau of Economic Analysis at the U.S. Department of Commerce reports that for every dollar of employee wages or non-wage compensation there were 37.4 cents of "other" (upstream or downstream) economic activity in the form of profits, rents, and the like.<sup>4</sup>

Importantly, the individuals receiving work authorization under the proposed rule will each eventually be authorized workers in the economy even without this rule – because they have completed all the prerequisites for permanent residency (green card status) and are simply waiting because of the green card backlog.<sup>5</sup> Thus, no new worker is being introduced into the economy that would not otherwise be joining the workforce.<sup>6</sup>

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<sup>3</sup> The amount would be reduced to the extent that workers entering permit status exit the work force within the five year period of the example, and also less to the extent that typical workers earn less than the typical college educated full-time worker cited in the example or work fewer than full-time hours per week or fewer than 52 weeks per year. The example also assumes that all individuals the Department estimates to be eligible to apply actually do apply.

<sup>4</sup> There are many caveats associated with such calculations including the fact that the immediate, direct benefits may be less when the economy is operating at less than full employment. See, e.g., the National Income and Products Account (NIPA) tables of the Bureau of Economic Analysis.

<sup>5</sup> The green card backlog has grown exponentially in the last decade. For example, with regard to Second Preference immigrants: in June 2004 advanced degree professionals born in India and China found that visa numbers were "current" and available once prerequisite Labor Certification and I-140 Immigrant Visa Petition processing was completed; in June 2007 such advanced degree professionals born in India had to wait 3 years and those from China had to wait 18 months; March 2013 found India natives with an 8½ year wait and China natives with a 5 year backlog; in July 2014 India natives have a 6 year backlog while China natives have a 5 year backlog.

<sup>6</sup> Moreover, using the agency's projection of 100,600 initial applications, this constitutes about .07% of the 155 million workers in our nation's employment market, a small addition.

B. Benefits in improved global competitive position since other countries allow work authorization for spouses of authorized foreign professional workers.

Other countries consider that their economy becomes more desirable for job location, or relocation, by the provision of employment authorization for the spouses of professional workers on visas. Complementing the rules of many countries, including the U.S., that allow spouses of intra-company transfers to work, some countries have also found that such spousal work authorization for high skilled professional foreign staff on visas is likewise important. For example, companies that have integrated North American operations are aware that in Canada and Mexico spouses of highly skilled visa holders may request work authorization.<sup>7</sup> When the Chamber's member companies are recruiting foreign talent, whether the candidate currently resides in the U.S. or abroad, it is not uncommon for the candidate to be interested in "near shore" opportunities to perform the job nearby, especially in Canada, so that the recruited worker's spouse can be employed.

Australia and the United Kingdom also join Canada and Mexico as countries where the spouses of high skilled visa holders are able to secure work authorization. The U.S. entity may not always have operations in Canada, Mexico, Australia or the United Kingdom or have the ability for the particular job in question to be performed outside the United States. In general, though, it is axiomatic that jobs go where the human capital is. To the extent the proposed rule moves toward parity with other global competitors for jobs, the Department should consider this a major plus in assessing how quickly it should act to finalize its proposal to allow certain pending permanent residents the ability to work.

C. Benefits in better assimilating immigrant families in the country.

It is not clear that the Department adequately accounted for how allowing certain H-4 dependent spouses to work during the transition period from temporary to permanent status for the H-1B worker will improve the stability as well as financial security of the family unit during that time period.

To that end, the Department should place more weight on how granting work authorization to these H-4 dependent spouses helps facilitate the integration of their families into the communities of their American born professional colleagues in which the economic advantages of two-income family unit is the socio-economic norm. It seems reasonable to infer that the opportunity for improved economic status and community

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<sup>7</sup> In Mexico, spouses of high skilled visa holders are entitled to make a request for a work permit conditioned upon an offer of employment. In Canada, spouses of high skilled visa holders are entitled to work but only after making an application, which can be filed simultaneous with the principal worker's or after arrival in Canada.

integration will increase the likelihood that these workers and their families will choose to pursue permanent status and to persist in the sometimes lengthy transition process, the policy goal of the Department. In addition, though, it is likewise reasonable to infer that such improved integration and financial security has real and direct individual impacts to families in terms of emotional stress. Such stress impacts the ability of the principal H-1B worker in job performance, and the sanctity of the family unit as well.

For example, one member company shared the story of an H-1B with a Ph.D. in Mechanical Engineering and M.Sc. in Aerospace Engineering with a spouse who possesses a Ph.D. in Pharmacology and M.Sc. in Computer Science. All of the graduate degrees by both spouses were earned in the United States, at such schools as the University of Texas and Georgia Tech. The H-4 spouse is unable to work in the United States<sup>8</sup> – although she has had employers file H-1B petitions the last two years she was not selected in the random lottery. To facilitate the H-4 spouse being able to pursue the possibility of employment in the city where she has ties through the academic community, the couple is separated with the couple's four year old daughter living with the H-4 spouse. The H-1B worker rarely gets to see his spouse and child as they live in two different states.

This type of stress inhibits the ability of immigrants to integrate into our society, as well as being a major employee relations issue for the thousands of employers across the country that lawfully employ highly skilled, highly educated H-1B workers. The Department's proposal will lead to measurable improvement in this regard.

D. Summarizing the Benefits for Employers.

If finalized, the proposed rule would help many employers in recruiting and retaining talented individuals that employers hire because they anticipate the individuals will make important contributions to their enterprise. The proposed change makes inroads in better facilitating employers' ability to treat these H-1B professionals like the high potential individuals that led to their initial offer of employment with the employers.

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<sup>8</sup> Anecdotally, many people believe that the majority of H-1B workers are male. From the companies that were able to go through their files and share gender information with us it does appear that most H-1B professionals are male – the male ratio of the H-1B worker population was estimated as follows for the seven companies that were able to provide us such information: 74% male, 73% male, 73% male, 70% male, 58% male, 70% male, 95% male. No publicly available information confirms this for the wider H-1B population generally, since gender is not tracked in the annual H-1B Characteristics report. In the Senate Judiciary Committee consideration of S. 744 there were several amendments introduced that attempted to address this presumed gender disparity. To the extent the Department of Homeland Security would like to ensure equal opportunity is being created for women, the NPRM is creating work authorization for a group that is likely primarily female spouses.

One of our member companies was able to provide data on its H-1B population and for that company 52% of its H-1B workers were married and of those 57% wanted to work but did not have work authorization. Some did have their own H-1B status, and one was married to an executive in L-1A status. Correspondingly, 42% of the H-1B workers for this company were being sponsored for green cards and of those 62% had priority dates that were not current and had a long wait in front of them. In the case of this company, if the Department's new rule was in place about half of the company's H-1B workers would have an improved motivation to remain in the country. For this company, its H-1B population is approximately 89% individuals who have earned degrees in the U.S. and overall about 68% of their H-1B workers possess STEM graduate degrees.

Another company reviewed its H-1B population and reports that about 70% of its H-1B hires are recruited from U.S. universities and 18% of its H-1B hires are experienced, lateral hires from other U.S. employers where the worker also graduated from a U.S. university. About 91% of this company's H-1B hires have STEM graduate degrees. For this company, about 75% of its H-1Bs are sponsored for green cards and of those nearly 60% had an approved I-140 Immigrant Visa Petition with a priority date that was not current, with a long expected wait for a visa number. In this company about 65% of the H-1Bs were married. This would be another company whose employees would greatly benefit from the proposed rule.

Still another member company was able to provide information on its H-1B population, revealing that 24% of its H-1B hires were hired through on-campus recruiting efforts, about 25% of this company's H-1B workers possessed Master's or Doctorate level degrees, and about 15% of the H-1B workers held graduate degrees in STEM fields. About 60% of the H-1B workers had H-4 spouses residing in the U.S. with them. About 36% of the H-1B workers being sponsored for green cards have approved I-140 Immigrant but do not have visa numbers current and available.

Certainly, these examples highlight how H-1B workers, their spouses, and their employers will be assisted by the proposed rule

#### **EXPANSION OF IDENTIFIED DEPENDENTS WHO SHOULD BE ABLE TO REQUEST WORK AUTHORIZATION**

In keeping with the stated purpose of the regulation, the agency should consider including the following groups of individuals in the final rule:

- ❖ H-4 dependent children who are age 18 or older. These young people are intending permanent residents and, as the children of professional workers,



are likely to be seeking to pursue post-secondary education of some sort. Since they are going to be permanent members of our society and are on their way to doing so, we shouldn't cut off their opportunity to help fund their post-secondary education, or participate in on-the-job learning experiences. While the E and L dependent work authorization does not include children, the E and L dependent work authorization is not conditioned upon pending permanent resident status.

- ❖ Spouses of other nonimmigrant workers also being sponsored for green card status. Spouses in the U.S. in other classifications other than H-1B where the principal worker is being sponsored for a green card and the principal worker has an approved I-140 Immigrant Visa Petition should also be able to take advantage of the new rule.

The identical policy reasons supporting H-4 spousal work authorization also support adding H-4 children and spouses in other nonimmigrant classifications. There may be other categories of dependents whose inclusion would likewise meet the policy goals articulated in the NPRM, and we are supportive of the agency inserting in the final rule other groups of dependents whose work authorization would be consistent with the purposes of the proposed rule.

#### **TECHNICAL IMPROVEMENTS TO PROPOSED IMPLEMENTATION PROCESS**

The agency should consider a few revisions to the process to implement the new work authorization for H-4 spouses:

- ❖ Since spouses will be able to work upon I-140 approval, an option should be provided to file the EAD request with a non-refundable fee at the time of I-140 filing (understanding that the fee would be lost should the I-140 be denied).
- ❖ The EAD should be valid through the end date of the spouse's H-4 status, to provide coterminous status and authorization documents. The agency's current regulations at 8 CFR §274a.12(c) seem to permit USCIS in its discretion to establish a specific validity period for an EAD.
- ❖ The EAD should remain valid when an EAD extension is filed, upon receipt of the official I-797 receipt notice. The agency's current regulations (8 CFR §274a.12(c)) seem to allow USCIS to allow EAD validity to continue

while an extension application is pending but if not then regulatory text should be included in the final rule that states this.

- ❖ The EAD request by an H-4 spouse should be able to be filed concurrently with the I-539 requesting either a change of status to H-4 or an extension of H-4 status.
- ❖ There seem to be some complicated issues regarding the delineation of §106(a) or (b) AC21 eligibility (an area where the agency has never promulgated governing regulations). It would be desirable for the final rule preamble, and, where necessary, the evidentiary standard adopted in the final regulation text to provide clarification relating to those H-4 spouses who will be filing based on §106(a) or (b) AC21 eligibility of the principal H-1B worker.

## **CONCLUSION**

This NPRM represents an important step forward in preserving the ability of highly educated and highly skilled nonimmigrants to remain in the United States. The Chamber would welcome further, similar efforts where they are within the Department's legal authority under current law because, undoubtedly, there are other means by which the Department's policies can be refined to facilitate the retention of highly skilled persons who will benefit our nation's economy.

The agency has publicly listed this NPRM on its Unified Agenda for over two years and we are pleased the Department is now moving forward. The rule makes good policy sense and is grounded in existing, well-used authority under the Immigration and Nationality Act.<sup>9</sup> Especially with some enhancements regarding the implementation process and the categories of dependents who can request work authorization, the new rule will represent significant progress. We believe that the Department should move quickly to publish a final rule and commence implementation of the new rule later this year.

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<sup>9</sup> Exercising its authority under §103 and §274A(h)(3) of the INA, the Department of Homeland Security and legacy Immigration and Naturalization Service have promulgated regulations many times creating work authorization – and the terms and conditions for such authorization – for certain foreign nationals identified by Congress as being able to be lawfully present in the United States, such as F-1 students, J-2 spouses, dependents of A-1 and A-2 diplomats, and dependents of G-4 international organization employees.

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
*Comment on Notice of Proposed Rule Making Concerning Dependent Work Authorization  
for Pending Permanent Residents*  
July 11, 2014  
Page 11 of 11

The Chamber appreciates the opportunity to share our observations with the Department. Thank you for your consideration of these comments.

Sincerely,



Randel K. Johnson  
Senior Vice President  
Labor, Immigration and  
Employee Benefits



Amy M. Nice  
Executive Director  
Immigration Policy