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Department of Homeland Security
20 Massachusetts Avenue, NW
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By electronic submission: www.regulations.gov

**RE: Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program
Improvements Affecting High-Skilled Nonimmigrant Workers
80 Fed. Reg. 81900 (December 31, 2015)
RIN Number 1615-AC05**

Dear Chief Dawkins:

The U.S. Chamber of Commerce writes in response to the request for comments by the Department of Homeland Security (hereinafter referred to “DHS” or “Department”) to the Notice of Proposed Rulemaking entitled *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 80 Fed. Reg. 81900 (December 31, 2015) (hereinafter referred to as “NPRM,” or “proposal”).

The Chamber and its members are pleased to see USCIS (hereinafter referred to as “the agency”) issue this NPRM with the intent to conform the proposed regulatory text to many current DHS policies and procedures. The certainty provided to our members by largely retaining the status quo for certain processing issues is appreciated, as it will allow employers to maintain their current internal procedures with respect to those processes. In addition, our members welcome the incremental changes contained in the proposal that will give our members added flexibility as they make employment decisions.

However, there are some provisions contained in the NPRM that are of great concern to Chamber members, particularly with regard to the provisions that eliminate the agency accountability governing the processing of Employment Authorization Document (EAD) applications. Many of our members are worried that if these provisions remain unchanged when the rule is finalized, there will be many incidences where their workers will lose their legal work status in the country. This type of uncertainty that is needlessly being injected into

the process is unnecessary, but we are hopeful that the agency will consider our suggestions to amend the proposal in a way that would work for our members.

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 is dedicated to promoting, protecting, and defending America's free enterprise system.

CODIFICATION OF EXISTING POLICIES IN THE CODE OF FEDERAL REGULATIONS

The Chamber supports DHS's proposal to codify existing policies, procedures, and guidance in a manner that is consistent with the worker portability and other provisions that were included in the American Competitiveness in the Twenty-first Century Act of 2000 (hereinafter referred to as "AC21") and the American Competitiveness and Workforce Improvement Act of 1998. In particular, the way in which the agency has proposed the regulatory implementation of §104(c), §106(a), and §106(b) of AC21 is much appreciated, as it provides certainty for our companies who are making employment decisions with regard to their foreign-born workers in H-1B status.¹ Agency continuity with respect to the processing of these cases allows our members to approach these employment decisions in the same way that they currently do, limiting any potential for the new rule to cause workplace disruptions.

Other positive contributions that are contained in the NPRM concern the job portability provisions of AC21. Given that the agency is proposing regulatory text that largely conforms to longstanding policy, and given the restraints placed upon the agency by the statutory language in the Immigration and Nationality Act,² the agency has still proposed the inclusion of provisions that are praiseworthy. First, the agency proposed to provide much desired flexibility with regard to the types of new job offers that could be accepted by an immigrant worker – the new job could be offered to the immigrant by the petitioning employer, a different U.S. employer, or even through self-employment.³ The agency's decision to provide greater latitude to the type of entities who can offer employment opportunities that immigrant workers can accept without sacrificing their "place in line" in the

¹ See both proposed 8 C.F.R. § 214.2(h)(13)(iii)(D)(2), which allows employers to extend the status of an H-1B worker in 1-year increments if they have sponsored that individual for permanent residency and the worker is subject to substantial delays in the adjudication process, and proposed 8 C.F.R. § 214.2(h)(13)(iii)(E)(1), which allows employers to extend the H-1B status of an employee in 3-year increments if the individual is the beneficiary of an approved I-140 Immigrant Petition for Alien Worker, 80 Fed. Reg. 81900, 81942-3 (December 31, 2015).

² §204(j) of the Immigration and Nationality Act only allows an individual the ability to change his/her job under the portability provisions under AC21 if the new job is in the "same or similar occupational classification" as the job contained in the original immigrant visa petition, which has historically prohibited people from accepting jobs in different fields of employment or accepting promotions because these new jobs do not fall within a similar occupational classification.

³ See proposed 8 C.F.R. §245.25(a)(2).

immigrant visa queue is welcome news. Providing immigrant workers with more opportunities to change jobs will allow them to behave more like American workers, which will encourage more competition for talent in the U.S.

ENHANCEMENTS TO EXISTING POLICIES

Changes in H-1B Licensing Requirements

The Chamber supports the inclusion of the provisions clarifying the ability of potential H-1B workers to obtain approvals even though, at the time of the petition's submission, the individual did not possess the license required to fulfill his/her job duties. The current regulations state that generally speaking, if an occupation requires a state/local license to perform the duties of the occupation, an alien seeking H classification in that occupation **must** have said license prior to approval.⁴ Furthermore, while the current regulations do provide the ability for certain individuals without a state/local license to nevertheless be granted H-1B status for a position requiring a license, the NPRM's provisions specifically allow the admission of an individual in H-1B status for 1 year to work in an occupation requiring a license that he/she does not possess, so long as the petitioner can show that the individual does not possess the license because the individual does not possess a valid Social Security Number (hereinafter "SSN") or valid employment authorization in the U.S.⁵

The added clarification by the agency is helpful for employers with regard to workforce planning, as this allows employers to hire who they want when they want to hire them. While this change is likely to impact a small minority of Chamber members, this is a commonsense change that will greatly help those companies who need to hire individuals in fields of employment that require licensure.

Nonimmigrant Grace Periods

The Chamber is very supportive of the codification of new grace periods for not just H-1B beneficiaries, but for aliens working in the United States under the following nonimmigrant visa classifications: E-1, E-2, E-3, L-1, and TN.⁶ The 10-day grace periods for these types of workers, which applies to the 10 days prior to the commencement of their validity period and the 10 days after their validity period expires, will be very helpful for these companies, these workers, and the immediate family members who have followed to join these nonimmigrant workers. It gives the worker some time to get ready for their employment in the U.S., as well as provide them with time to make the necessary preparations to either depart the U.S. or seek new employment opportunities that they can legally avail themselves of in the U.S. This simple measure will do much to help the quality of life for

⁴ See 8 C.F.R. §214.2(h)(4)(v)(A).

⁵ See proposed 8 C.F.R. §214.2(h)(4)(v)(C), 80 Fed. Reg. 81900, 81941 (Dec. 31, 2015).

⁶ See proposed 8 C.F.R. §214.1(l)(1), 80 Fed. Reg. 81900, 81940 (Dec. 31, 2015).

nonimmigrants, which will likely have a positive impact on the productivity of these workers during the course of their employment in the U.S.

The Chamber is also supportive of the agency's inclusion of a one-time 60-day grace period whenever the authorized employment for a principal nonimmigrant in E-1, E-2, E-3, H-1B, L-1, or TN status ceases.⁷ The inclusion of these provisions will be helpful to both companies and workers, as it helps increase opportunities for nonimmigrants to legally work in the U.S. Put another way, these measures allow nonimmigrant workers to behave more like U.S. workers, which will help reduce the unfortunate stigma that some have about nonimmigrant workers being modern "indentured servants" that will be tied to an employer, no matter how poorly they are treated in the workplace.

While the Chamber is generally supportive of the 60-day grace period provision, there are ways that the agency could improve upon the proposed regulatory text. Regarding the current employment practices among many employers in the STEM fields, it is not uncommon for an individual to change employers more than once in a 3-year period. Limiting a worker to just one 60-day grace period where that individual can legally seek new employment is short-sighted, and would effectively be an unnecessary limitation on the ability of a nonimmigrant to remain legally authorized to work in the U.S.

The agency should include language in its final rule that provides a reasonable means for a nonimmigrant worker to change jobs more than once. This can be accomplished by the agency in several ways. The agency could reserve the right to review each case where a single individual seeks change employers more than once during a 3-year period and allow that worker to change employers more than once after a review of the facts and circumstances surrounding that individual's case. The agency could also provide each nonimmigrant with 60 days' worth of time to be unemployed in the U.S. and they can use all 60 days to find one employer, or they can use that time to change employers several times. This is preferable to the agency's proposal to provide a nonimmigrant worker with only one single 60-day period where they can be unemployed in the U.S.

The goal of this type of provision should be to provide the worker with increased flexibility to change employers, which will benefit our members and our nation by fostering competition and dynamism in the labor market. Our suggestions will also help put American workers and nonimmigrant workers on a level playing field because, as with the other portability provisions in the proposal, it helps allow the nonimmigrants to behave more like Americans in that they have more freedom to change jobs.

⁷ See proposed 8 C.F.R. § 214.1(i)(2), 80 Fed. Reg. 81900, 81940 (Dec. 31, 2015).

Automatic Extension of Employment Authorization Documents in Certain Circumstances

The Chamber supports the agency's inclusion of provisions in the NPRM that provide for the automatic extension of Employment Authorization Documents (EADs) for certain individuals for up to 180 days.⁸ Many of our member companies have provided us with many examples where the agency has been unable to adjudicate an application for an EAD within the required time period of 90 days established under the current regulations.⁹ These types of processing delays can be very disruptive to our members when they cause valued employees to lose their work authorization. These situations force companies to cease that individual's employment at the firm. When you factor in the time and resources spent to train these workers and the contingency arrangements that companies must make when they have to remove productive workers from the worksite, these disruptions can be very costly.

The agency's proposal to grant an automatic extension of an EAD in the circumstances set forth in the NPRM will reduce the likelihood that an employee will lose work authorization. The additional certainty provided to employers is welcome, as it will give companies more latitude with regard to workforce decisions.

Unfortunately, there are many other provisions in the NPRM that interplay with these specific provisions that are extremely concerning to the Chamber. These issues are discussed in-depth below. We believe that, unfortunately, much of the benefits associated with this proposal will be negated if these concerns are not addressed.

PROVISIONS THAT ARE CONCERNING TO THE CHAMBER

Elimination of 90 Day Requirement for EAD Application Processing

The Chamber is very concerned about the agency's proposal that eliminates the agency's current legal obligation to adjudicate applications for EADs within 90 days of the date when the application is received.¹⁰ Given the many stories we have heard from Chamber members wherein USCIS has been unable to meet this requirement, companies of various sizes view this as an example of the agency seeking to avoid accountability to stakeholders. The Chamber recognizes that the agency has legitimate concerns about national security and fraud,¹¹ but there are many alternatives that the agency could consider that would address their concerns while also accounting for our members' concerns about applications not being adjudicated in a timely fashion.

Under the current regulatory framework, when USCIS fails to meet the existing adjudication timeframes, the employee must cease employment. Many of our companies

⁸ See proposed 8 C.F.R. §274a.13(d), 80 Fed. Reg. 81900, 81945 (Dec. 31, 2015).

⁹ 8 C.F.R. 274a.13(d).

¹⁰ Id.

¹¹ 80 Fed. Reg. 81900, 81929 (Dec. 31, 2015).

employ individuals whose work status is dependent upon a valid EAD, some of whom are the dependents of H-1B and L-1 nonimmigrants. When one of our members is forced to suddenly terminate a valuable employee to their company, it is extremely disruptive to the business operations of that firm. Furthermore, if that company values that employee enough to do what is necessary to help that individual re-obtain valid work status and bring them back onto the company's payroll, the additional paperwork to accomplish that is not only costly for the company, but is something that could have been avoided if the agency's policy to address these types of issues were more flexible to deal with these types of issues.

The Chamber urges DHS to rethink its determination in the NPRM to completely eliminate its current requirement to adjudicate EAD applications within 90 days of receipt.¹² Chamber members are very concerned about a complete lack of accountability on the part of the agency to adjudicate these applications within a reasonable amount of time. We do not seek to downplay the concerns over national security and fraud, but those concerns should be properly balanced with the concerns of legitimate stakeholders who utilize the system in a manner consistent with our national interests. We believe that given the agency's assurances in the NPRM's preamble that it seeks to continue processing EAD applications in 90 days, the Chamber would strongly recommend a simple reinstatement of the 90 day requirement currently in the regulations.

However, in light of the agency's decision to automatically extend an EAD in certain circumstances, if the agency were to consider broadening the types of aliens who could avail themselves of this extension, the agency could extend the current 90 day period to 120 days, perhaps longer, to give the agency more time after the receipt of the petition to process the petition. The agency could also amend the language contained in proposed 8 C.F.R. §274a.13(d) that any timely filed application for an individual who has received a 180 day automatic extension on their EAD will have their application adjudicated during that 180 day period. Another idea worthy of agency consideration is the insertion of regulatory text that simply allows an individual who receives an automatic extension to maintain their work authorization until their application is adjudicated. All of these measures would provide our members with some added assurances on the back end of the process that these applications will be adjudicated in a reasonable amount of time, but these measures would have to be accompanied by changes broadening the applicability of the automatic extension to different classes of aliens, which are described in depth in the next section of this comment.

Another way that DHS could address agency concerns about national security and fraud in a way that balances the concerns of employers who need to plan and make workforce decisions is to allow stakeholders to apply for EAD renewals earlier than what current agency policy allows. Today, applicants may not apply to renew their EADs more than 120 days before the original EAD expires. DHS could extend that filing period from 120 days before expiration to 180 days expiration. This would give the agency a total of 6 months' lead-time

¹² 8 C.F.R. §274a.13(d).

to adjudicate an application for EAD renewal before the initial EAD expires. Assuming an individual would be eligible to receive the automatic 180 day extension as proposed in the NPRM, this would give the agency a years' worth of time (360 days) to adjudicate an application to renew an EAD.

Furthermore, Labor Department policy in the H-1B context provides a very good example of an executive branch agency giving stakeholders the ability to submit documentation 180 days before the specific immigration benefit is needed by the individual. Current regulatory policy with regard to the timely filing of Labor Condition Applications ("LCAs") in the H-1B program provides employers with the ability to file LCAs with DOL 180 days before the period of intended employment begins.¹³ If the agency were to allow EAD renewal applications to be submitted further in advance of the initial EAD's expiration date, it would give the agency more time and more flexibility to manage its workload, and it would give more certainty for employers by enabling them to make workforce planning decisions sooner than they currently do. This can help companies mitigate the risk of future workplace disruptions. We hope that the agency seriously considers our suggested changes on both the front-end and back-end of the agency's processing of EAD applications, as we believe them to be mutually beneficial to the agency and the Chamber.

Limited Applicability of the Automatic EAD Extension

The Chamber is concerned that the applicability of the automatic EAD extension is far too limited to create any meaningful change that would be beneficial to our members. Simply put, the 15 categories the agency enumerated in the NPRM will not translate into the type of regulatory change that will allow U.S. companies to retain their valued employees.¹⁴ Our members are concerned that individuals present in the U.S. on F-1 visas pursuant to their Optional Practical Training (OPT) Status and the spouses of H-1B and L-1 workers are not mentioned in the list of aliens who can avail themselves of this benefit, and we strongly suggest that the agency either add these groups of individuals into the categories listed in the proposal, or ensure that their EAD renewal applications are processed within 90 days of receipt.

The inclusion of these individuals in the listed categories of aliens who can avail themselves of the automatic 180 day EAD extension is very important for Chamber members of all sizes and across industries, especially if the current 90 day processing requirement is extended beyond its current length. Our members need certainty with respect to workforce development and planning; allowing these groups of individuals to avail themselves of this benefit would go a long way to providing our companies with the certainty they need to make the best-informed employment decisions.

¹³ See 20 C.F.R. §655.730(b), which states in relevant part that "An LCA shall be submitted by the employer to ETA...no earlier than six months before the beginning date of the period of intended employment shown on the LCA."

¹⁴ 80 Fed. Reg 81900, 81928 (Dec. 31, 2015).

CONCLUSION

The Chamber appreciates the opportunity to comment on this proposal. We appreciate the efforts of DHS to help provide added certainty for our members by proposing multiple regulatory provisions with the intent to codify certain practices and procedures, as well as proposing targeted improvements to the current system. However, the Chamber believes that this proposal can be improved upon and we hope that the Department considers our suggestions to help make the rule more beneficial for our members.

Thank you for considering our views. We look forward to working with the Department as it moves forward to finalize this proposal.

Sincerely,



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