NAFSA: Association of International Educators

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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: Docket No. USCIS-2015-0008

Dear Ms. Dawkins,

I write today on behalf of NAFSA: Association of International Educators in response to the notice of proposed rulemaking published at 80 FR 81900: Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers; Proposed Rules. NAFSA is the world's largest professional association dedicated to international education and exchange, with over 10,000 members at approximately 3,500 colleges and universities throughout the United States and around the world.

NAFSA applauds the Department of Homeland Security (DHS) for ameliorating the harshest negative impacts to immigration status of high skilled immigrants—and their families—as they seek to change employers, accept promotions, or pursue other employment opportunities. Codifying in regulation current agency guidance provides essential transparency and consistency to the process, and advances the goal of retaining talented immigrants. However, the proposed rule still falls short of this goal in several ways.

We appreciate the opportunity to review the proposed rule and provide recommendations to be addressed in advance of a final rule. An addendum accompanies this letter outlining our recommendations in detail, but we wish to highlight one key overriding issue below.

Retain the 90-day Timeframe for Application for Employment Authorization and Interim Work Authorization.

DHS proposes to eliminate the required 90-day processing time for Form I-765, Application for Employment Authorization (EAD), along with the interim work authorization available if a decision is not made within the 90-day period. In the

proposed rule, DHS asserts this change would "provide enhanced stability and certainty to employment-authorized individuals and their employers, while reducing opportunities for fraud and protecting the security-related processes undertaken for each EAD application." While NAFSA supports the goals of the proposal, it is not clear that eliminating the 90-day processing time requirement will meet either goal. Therefore, NAFSA opposes this change and recommends maintaining the 90-day processing time and interim EADs.

It is said that the best predictor of future behavior is past behavior. Past U.S. Citizenship and Immigration Service (USCIS) processing behavior is that backlogs and delays are common. Without questioning the sincerity of the agency's goal to maintain the 90-processing timeframe for EADs, the ability of it to do so consistently is questionable. Eliminating the certainty of a set timeframe for adjudication and the availability of an interim EAD if the timeframe is not met inserts instability and uncertainty for immigrants and their employers where it now does not exist, contrary to the to the goal of the rule.

NAFSA fully supports the goal to reduce fraud and protect security, however it is unclear that eliminating the 90-day timeframe and interim EADs will achieve the desired result. DHS asserts that eliminating the 90-day processing time is necessary to enhance security, and that only a small percentage of cases will fail to be processed within 90 days. These assertions do not address the important role EADs play in providing assurances to immigrants and their employers of compliance with immigration law. DHS recognizes the importance of EADs to those authorized to work in the United States, noting the efforts it will go to issue EADs: reiterating its dedication to maintaining the 90-day processing; prioritizing application pending for 75 days or more; and allowing applicants to call the National Customer Service Center to request priority processing. If a timely issued EAD were not necessary, USCIS would not make these options available.

Therefore, we recommend that DHS retain the requirement at 8 CFR 274.a.13 to timely adjudicate applications for employment authorization, or provide interim authorization and implement the necessary processes to accomplish it. Currently, many applications for work authorization are not adjudicated within the 90-day timeframe and there appears to be no process for obtaining interim employment authorization as required by the regulation. The proposed automatic extension of employment authorization contained in the proposed rule may ameliorate the effects of long processing delays and backlogs on some applicants for extensions, but it will not do so for initial applicants for employment authorization. If retained and implemented by DHS, the current requirement at 8 CFR 274.a.13 would protect those applicants. We also recommend that DHS implement premium processing for EAD applications so that those who will be most harmed by processing delays have the option to pay an additional fee for a timely adjudication. Furthermore, we recommend that DHS implement an expedited process that can be used to prioritize the applications of prospective employers and employees who would be most harmed by processing delays and backlogs.

Again, we applaud DHS for promulgating this proposed rule and appreciate the opportunity to provide our comments and recommendations. As outlined both above and in the following addendum, we do have concerns with some of the changes proposed in

the rule and ask that you give them full consideration before moving to issue a final rule. If you have any questions, please do not hesitate to contact me.

Sincerely,

Marlene M. Johnson
Executive Director and CEO

ADDENDUM

1. **Priority dates in the case of error by the United States Citizenship and Immigration Services (USCIS).**
2. **Per country limit AC21 104(c).**
3. **Concurrent filing of EAD application with underlying benefit application.**
4. **Recapture time.**
5. **Interruption in employment 60-day "grace period."**

1. **Priority dates in the case of error by USCIS.**

The proposed rule acknowledges the tremendous hardships and uncertainty created by green card backlogs. Therefore, it is difficult to overstate the importance of retaining priority dates to maintain a place in line for an immigrant visa. While the proposed rule takes steps to protect the priority dates, it falls short by allowing the loss of a priority date based on USCIS error.

It is understandable that a priority date would be lost due to fraud or an intentional nefarious act on the part of the petitioner, however it does not make sense to punish the immigrant for a USCIS error. People plan their lives expecting to obtain a green card, when it becomes available, based on the priority date. It is fundamentally unfair for immigrants who relied on the approved petition by USCIS to later lose their place in the green card line because of a mistake unknown to them. Furthermore, it opens the immigrant to the vagaries of the interpretations of different USCIS adjudicators. A later review of an adjudicator should not negate the decision on which the immigrant relied. USCIS error alone should not cause the loss of a priority date with the resulting potential of adding years, if not a decade or more, to an immigrant's wait to obtain green cards.

2. **Per country limit AC21 104(c).**

Regarding proposed 214.2(h)(13)(iii)(E) the per-country limitation exemption from 214(g)(4) of the Act [80 FR 81943], we suggest that the provision be amended to clarify that it also applies to beneficiaries of approved I-140s who are ineligible for an immigrant visa number both when their country is singled out for a "per country" limit as well as when their country is within the "world-wide" limits on immigrant visa numbers in the EB-1, EB-2, and EB-3 categories.

This is consistent with current policy as expressed in USCIS' May 30, 2008 memo, which clarified that both "per country limitations" and "worldwide" unavailability of visa number unavailability can serve as the basis for a 104(c) extension. [See Supplemental Guidance Related To Processing Forms I-140, I-129, and I-485 Under AC21 and ACWIA [USCIS, Donald Neufeld (May 30, 2008)]. That memo states that an AC21 104(c) exception is available when:

> AC21 § 104(c) is applicable when an alien, who is the beneficiary of an approved I-140 petition, is eligible to be granted lawful permanent resident status but for application of a per country limitation to which that alien is subject **or,**

> **alternatively**, if the immigrant preference category applicable to that alien is, as a whole, "unavailable". Any petitioner seeking an H-1B extension on behalf of an H-1B alien beneficiary pursuant to AC21 §104(c) must thus establish that at the time of filing for such extension, the alien is not eligible to be granted lawful permanent resident status on account of the per country immigrant visa limitations or, alternatively, because the immigrant preference classification applicable to the alien is "unavailable".
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> In order to make a determination as to the H-1B alien beneficiary's eligibility for an extension of H-1B status under the provisions of §104(c) of AC21, USCIS adjudicators are instructed to review the Department of State Immigrant Visa Bulletin that was in effect at the time of filing of the Form I-129 petition. If, on the date of filing of the H-1B petition, the Visa Bulletin shows that the alien was **subject to a per country or worldwide visa limitation** in accordance with the alien's immigrant visa "priority date", then the H-1B extension request under the provisions of §104(c) of AC21 may be granted. To establish the alien's priority date, USCIS may accept a copy of the H-1B alien beneficiary's Form I-140 petition approval notice.

Both per-country limits and general world-wide category limits are a function of an individual's country of chargeability, and there is policy precedent for treating any unavailability as a condition of eligibility for an AC21 104(c) exception, whether it is based on a cut-off date that is beyond the alien's priority date or through the complete unavailability of a category.

Suggested regulatory language:

> (E) *Exemption from 214(g)(4) limitations of the Act.* An alien who currently maintains or previously held H-1B status, who is the beneficiary of an approved immigrant visa petition for classification under sections 203(b)(1), (2), or (3) of the Act, and who is eligible to be granted that immigrant status but for application of the per country or world-wide limitation, is eligible for H-1B status beyond the 6-year limitation under 214(g)(4) of the Act. This exemption applies both when the category availability relating to the alien's country of chargeability is unavailable because of a priority date that is not "current" or because the category is "unavailable." The petitioner must demonstrate such visa unavailability as of the date the H-1B petition is filed with USCIS and the unavailability must exist at time of the petition's adjudication.

3. Concurrent filing of EAD application with underlying benefit application.

DHS is also proposing to move the regulatory text authorizing the concurrent filing of applications for employment authorization to 8 CFR 274a.13(a), and to apply that language to any class of employment-eligible aliens to the extent permitted by the application form instructions. NAFSA applauds this action.

Proposed § 274a.13 reads:

> (a) *Application*. An alien requesting employment authorization or an Employment Authorization Document (Form I-766 or successor form), or both, may be required to apply on a form designated by USCIS with any prescribed fee(s) in accordance with the form instructions. An alien may file such request concurrently with a related benefit request that, if granted, would form the basis for eligibility for employment authorization, only to the extent permitted by the form instructions.

We would ask that, consistent with this new rule if approved as proposed, USCIS be sure to update Form I-539 and I-765 instructions to allow F-1 students and M-1 students applying for reinstatement to concurrently apply for practical training or other F-1 or M-1 work authorization that requires an EAD.

4. Recapture time.

We suggest that proposed 8 CFR 214.2(h)(13)(iii)(C) be revised to recognize time spent inside the United States in another nonimmigrant status as "recapturable." The provision as proposed allows recapture only when the alien spends time physically present outside the United States.

Suggested regulatory wording:

> (C) *Calculating the maximum H-1B Admission Period*. Time spent physically outside the United States, or time spend physically inside the United States in a nonimmigrant status other than H-1B, exceeding 24 hours by an alien during the validity of an H-1B petition that was approved on the alien's behalf shall not be considered for purposes of calculating the alien's total period of authorized admission under section 214(g)(4) of the Act, regardless of whether such time is meaningfully interruptive of the alien's stay in H-1B status and the reason for the alien's absence. Accordingly, such time may be recaptured in a subsequent H-1B petition on behalf of the alien, subject to the maximum period of authorized H-1B admission described in section 214(g)(4) of the Act.
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> (1) It is the H-1B petitioner's burden to request and demonstrate the specific amount of time for recapture on behalf of the beneficiary. The beneficiary may provide appropriate evidence, such as copies of passport stamps, Arrival-Departure Records (Form I-94), change of status approval notices, and/or airline tickets, together with a chart, indicating the dates spent outside of the United States or in a nonimmigrant status other than H-1B, and referencing the relevant independent documentary evidence, when seeking to recapture the alien's time spent outside the United States or spent inside the United States in a nonimmigrant status other than H-1B. Based on the evidence provided, USCIS may grant all, part, or none of the recapture period requested.
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> (2) If the beneficiary was previously counted toward the H-1B numerical cap under section 214(g)(1) of the Act with respect to the 6-year maximum period of H-1B admission from which recapture is sought, the H-1B petition seeking to recapture a period of stay as an H-1B nonimmigrant will not subject the beneficiary to the H-1B

> numerical cap, notwithstanding whether the alien has been physically outside the United States, or inside the United States in a nonimmigrant status other than H-1, for 1 year or more and would be otherwise eligible for a new period of admission
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> under such section of the Act. An H-1B petitioner may either seek such recapture on behalf of the alien or, consistent with paragraph (h)(13)(iii) of this section, seek a new period of admission on behalf of the alien under section 214(g)(1) of the Act.

5. Interruption in employment 60-day "grace period."

NAFSA applauds the addition of a "grace period" for employees and employers who would otherwise be negatively affected by a temporary cessation in employment. We are concerned, however, that if the period is only 60 days, as proposed at 8 CFR 214.1(l)(2), it will simply be ineffectual for those nonimmigrant classifications requiring Labor Conditions Applications (LCAs). The Department of Labor's target processing timeframe for the prevailing wage determinations that support LCAs is 60 days, and then there is the 7-day processing timeline for the LCA itself. This fact usually makes it impossible for a prospective employer of an H-1B nonimmigrant, for example, to submit an H-1B petition on behalf of the prospective employee within 60 days of the job offer. For this reason, we recommend that DHS revise the proposed 60-day "grace period" at 8 CFR 214.1(l)(2) to at least 90 days.

We also recommend that DHS eliminate the "one-time" restriction on the "grace period." If DHS has concerns that the "grace period" could be used repeatedly by an unscrupulous individual if it is not limited to one occurrence, DHS could implement additional requirements on subsequent uses. For example, DHS might require petitions for beneficiaries of subsequent "grace periods" to include a job offer letter executed by the petitioning employer within 30 days of the cessation of prior employment. This would ensure that the beneficiary did not misuse the "grace period," but instead quickly took affirmative steps to secure new employment. A 90-day "grace period," as recommended above, that may be used more than once would better account for agency processes involved in a change of employer scenario and better address the needs of employers in the United States as the proposed rule intends.