February 29, 2016

VIA REGULATIONS.GOV
Docket ID: USCIS-2015-0008

Kevin J. Cummings,
Chief Branch Chief, Business and Foreign Workers Division,
Office of Policy and Strategy,
United States Citizenship and Immigration Services,
20 Massachusetts Avenue NW,
Washington, DC 20529-2140

Re: Proposed Modification to Regulation for Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting Highly-Skilled Nonimmigrant Workers (Docket ID: USCIS-2015-0008)

Dear Mr. Cummings,

Immigration Voice completely and totally opposes the proposed modifications of regulations in their current form. As the largest national grassroots nonprofit organization of highly-skilled immigrants, current, new and future Americans, spread across all 50 States, and on behalf of our one-hundred and ten thousand members, we are writing to strongly oppose the proposed regulations and ask for changes that would make a real difference for our community.

The Supreme Court has repeatedly reaffirmed that "*A primary purpose in restricting immigration is to preserve jobs for American workers*" immigrant aliens are therefore admitted to work in this country only if they "*will not adversely affect the wages and working conditions of the workers in the United States similarly employed.*"[1]

In its current form, this proposed regulation ensures perpetual non-immigrant H1B Visa extension for even those high skilled immigrants who have approved immigrant petition. The current language of the proposed regulation ensures that immigrant employees (and their families) with approved immigrant petition will be completely dependent on their employers for their visa status for possibly their entire lives. The laws of nature and human behavior would command that keeping highly skilled workforce dependent and captive to the employers for long periods of time will make such captive and skilled immigrants, more attractive to the employers over US workers. This would further lead to demand for more H1B visas, exploitation of immigrants with few rights to change employer, making employers prefer more immigrant workers over American workers,

[1] 8 U. S. C. § 1182(a)(14). See S. Rep. No. 748, 89th Cong., 1st Sess., 15 (1965). Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893 (U.S. 1984).
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leading to discrimination of American workers in the marketplace. As noted, this cause and effect is artificially and systematically promoted by this proposed regulation and it will adversely, directly and significantly affect the wages and working conditions of the workers in the United States, which is in direct contradiction and conflict with the primary purpose of immigration laws of our great nation.

We are a nation of immigrants. For generations, immigrants have come to America in search for freedom, to live free so they are no longer captive to the artificial and unnatural forces of corrupt systems and institutions.

However, this proposed regulation ensures that skilled immigrants with approved immigrant petitions remain captives to their employers for many decades. The complexity of the process proposed in this regulation and the nuances of artificially tilting the scale in favor of the bad employers, has already been summed up by overwhelming number (thousands) of comments against this proposed regulation. Clearly, any system derived from this proposed regulation will remain deeply flawed, unless the final regulation can accommodate certain changes to:

i.) Give job mobility to skilled immigrants with approved immigrant petition such that immigrants are no longer more attractive for employers over US workers.
ii.) Preserve jobs for American workers by making sure that skilled immigrants are not captive or dependent on their employers, so that the system somehow doesn't present wrong reasons and incentive to hire immigrants over US workers.

To meet these two primary objectives of immigration laws, in our view, the proposed regulations haven't addressed the two biggest issues that high-skilled workers with approved I-140 immigrant petitions are facing: (1) the never-ending waiting period to adjust status because of the backlogs of employment-based immigrant visas which prevent people from filing their application, and (2) the start-all-over-again Green Card application each time workers change their employers, even when they are doing the same exact job function within the same or similar occupational classifications. These issues are literally forcing immigrant workers, especially H-1B, to stay with the same employer-petitioner for decades, and often at a lower wage than the market as the labor certification is interpreted by DHS as preventing any wage raise during the Green Card application process. This constitutes an unfair treatment of workers and is prejudicial to the American economy. We profoundly regret that the proposed regulations ignore these issues and do not ameliorate that critical situation.

As you know, the process of immigrating to the United States on the basis of employment is a three-step process: first a "PERM" labor certification by the Secretary of Labor,[2] second ("Step Two") an Immigrant Petition (I-140)[3] and third the application for permanent residence through Adjustment of Status[4] with USCIS or Consular Processing[5] with the U.S. Embassy or Consulate abroad. The third step can only be initiated when an immigrant visa becomes available. Because of the shortage of immigrant visas for people from densely-populated countries such as India and China, and the impossibility to change jobs at Step Two without starting-all-over-again the Green Card application process, workers cannot have any job flexibility and they are living like indentured servants of their employer-petitioner while waiting for an immigrant visa to become available. We estimate over a million[6] workers and their families are living in these unbearable circumstances.

We criticize DHS interpretation of the INA Statute that has led to the unbearable situation in which immigrant workers are forced to remain with the same employer-petitioner for decades without being able to file for their adjustment of status. DHS is unjustly denying job flexibility to

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[2] INA § 212(a)(5)(A)(i) states: *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.*

[3] INA § 204(a)(1)(F) states: *Any employer desiring and intending to employ within the United States an alien entitled to classification under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) may file a petition with the Attorney General for such classification.*

[4] INA § 245(a) states: *The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if*

> *(1) the alien makes an application for such adjustment,*
> *(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and*
> *(3) an immigrant visa is immediately available to him at the time his application is filed.*

[5] INA § 204(b) states: *After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 203(b)(2) or 203(b)(3) , the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.*

[6] Immigration Voice, "Calculation for Number of Pending Employment Based Applications" http://backlogsize.immigrationvoice.org Retrieved on February 19th, 2016.

immigrant workers despite clear Congressional intent expressed in the job portability provisions. Our community is suffering a lot from this situation and we urge you to change DHS policy and interpretation.

We respectfully request DHS to amend its regulations to provide true job flexibility to all the immigrant workers awaiting for their immigrant visas to become available and stuck in the never-ending backlogs. On behalf of our community and our one-hundred thousand members, we ask that DHS use its authority to change regulations to allow workers to preserve their Green Card application in its entirety (Labor Certification and Immigrant Petition) upon changing jobs and to issue Employment Authorization Documents to all highly-skilled immigrant workers stuck in Step Two of their Green Card application. We also ask for the granting of Advance Parole to allow people to travel without losing their Green Card application.

Please find below our argumentation, detailed comments of the proposed modifications of the regulations, questions and final remarks.

I. Legal arguments:

Nowhere in the Statutes[7] governing steps one, two and three does Congress explicitly require all these three steps of employment-based immigration to be conducted with the same employer. However, because of the specificity required by the labor certification in INA § 212(a)(5)(A)(i), DHS has interpreted the labor certification to not be portable between different employers unless the beneficiary explicitly qualifies for INA § 204(j). But most people do not benefit from the job portability provisions as they are unable to file for their Adjustment for Status, awaiting for an immigrant visa, and thus cannot qualify for INA 204(j). In fact, these people are stuck for decades at Step Two, and this is the unwarranted result of DHS incorrect interpretation of the Statute, INA § 212(a)(5)(A)(i).

Paradoxically, DHS is using the same I-140 Immigrant Petition to renew the H-1B status after 6 years even if the alien worker changed his/her employer. **Whereas Congress only allows the 6th year H-1B renewal to enable the alien worker to complete the Green Card process, DHS is not allowing the I-140 to remain valid for Step Three of the Green Card process with a new employer, which points to an inconsistent interpretation of the act and the absurdity of the situation. In essence, DHS is not keeping the I-140 valid for the very purpose it was designed for.**

[7] INA § 212(a)(5)(A)(i) for Labor Certification, INA § 204(a)(1)(F) for Immigrant Petition, INA § 245(a) for Adjustment of Status, INA § 204(b) for Consular processing.

We recommend that DHS change its interpretation of the Statute by following the Congressional intent expressed in the American Competitiveness in the Twenty-First Century Act (AC-21) of October 2000, which added the statutory provisions of INA § 204(j)[8] and INA § 212(a)(5)(A)(iv)[9]. INA § 204(j) explicitly protects a pending I-485 Adjustment of Status if the adjudication is delayed by 180 days and the employee works in a same or similar profession, and INA § 212(a)(5)(A)(iv) explicitly protects the validity of the underlying labor certification for INA § 204(j) beneficiaries.

Our position is that the AC-21 act is the only appropriate lens through which DHS should interpret INA to remedy to the inconsistencies caused by backlogs, because it is the only legislation passed by Congress which specifically dealt with backlogs at steps two and three in the employment-based immigration process. Indeed, in the AC-21 act Congress showed a very strong intent to eliminate backlogs and ameliorate processing time delays by providing job flexibility. Congress defined "job flexibility" as the ability to work in "same or similar occupational classifications" with different employers without having to start-all-over-again the Green Card application process. **Even though the job flexibility provisions of AC-21 § 106(c), INA § 204(j), apply only to people stuck in processing delays during Step Three, we argue that they should also apply to Step Two** for several reasons namely (i) because when Congress passed the AC-21 act in 2000, for the first time, it intended to fix the delays at Step Two through the recapture of unused immigrant visas from prior years and the exemption from the per-country cap[10] (ii) to maintain the validity of the labor certification by the Secretary of Labor pursuant to INA §

[8] INA 204(j) states: *JOB FLEXIBILITY FOR LONG DELAYED APPLICANTS FOR ADJUSTMENT OF STATUS TO PERMANENT RESIDENCE - A petition under subsection (a)(1)(D)for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.*

[9] INA § 212(a)(5)(A)(iv)states: *LONG DELAYED ADJUSTMENT APPLICANTS- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.*

[10] AC-21 § 104(a) allowed the per-country ceilings for employment-based immigrants to be relaxed under certain conditions. Under AC-21 § 104(c), Congress provided for extension of H-1B status beyond the 6-year limit with a view to retain those employment-based immigrant visa petition beneficiaries in the oversubscribed countries who would have otherwise had to leave the U.S. leading to disruptions to employers. AC-21 § 106 (d) also provided for "recapture" of previously unused visas to be made available for employment-based immigrants.

212(a)(5)(A)(i) and (iii) because DHS is currently keeping valid an Immigrant petition for every other purpose than immigrating[11].

When Congress enacted the job portability provisions - also called "job flexibility," Congress demonstrated its intent to protect the interests of immigrant workers, and not only the interests of their employers-petitioners. Several courts from the Second, the Sixth and the Eleventh Circuits held that immigrants-beneficiaries have standing in federal courts to sue the revocation of an I-140 Immigrant Petition by USCIS, at least on procedural grounds.[12] By doing so, they have also recognized the Congressional intent, as expressed in the AC-21 act, to protect the interests of immigrant workers by allowing them to change jobs without starting-all-over-again their Green Card application.

In the 2013 decision *Patel v. USCIS*, the Court held that "*there is no basis in the text of the statute—none—to conclude that Congress was completely indifferent to the interests of the "qualified immigrants" themselves. To the contrary, **§ 1153(b)(3) makes employment visas available to the immigrant, rather than his employer, which suggests that Congress gave the immigrant, too, a stake in whether he gets a visa.** Simply stated, under § 1153(b)(3) it is the alien, not the employer, who is entitled to an employment visa; and that makes unavoidable the conclusion that the alien's interests are among those "protected or regulated by the statute[.]" Patchak, 132 S. Ct. at 2210. Two other provisions corroborate this conclusion. First, 8 U.S.C. § 1255(b) provides that an alien whose petition is approved under § 1153(b)(3) becomes eligible for a permanent visa, rather than a temporary one. If § 1153(b)(3) provided employment visas only for the benefit of U.S. employers (as the government contends), it would be unnecessary to give the alien a permanent visa; instead, a visa that lasted as long as the employer needed the alien's services would do. That Congress rejected that approach in § 1153(b)(3) suggests that the provision protects the interests of aliens as well as employers. Second, **the so-called "portability provisions"—8 U.S.C. § 1154(j) and 8 U.S.C. § 1182(a)(5)(A)(iv)—likewise reflect a congressional intent to protect the interests of qualified aliens**. Before Congress enacted these provisions, an approved petition for an employment visa was valid only so long as the alien stayed with the employer that filed it. Thus, if an alien who had an approved petition wanted to change jobs, he would need to start the whole status-adjustment process over again. Because of the*

[11] For people who are not INA § 204(j) beneficiaries, DHS proposes using approved I-140 petitions for (1) the retention of priority dates; and (2) extensions of status for certain H-1B nonimmigrant workers under AC-21 § 104(c) and 106(a) and (b) of AC-21, but not for filing for Adjustment of Status.

[12] In 2016, Bernardo v. Johnson, 2016 U.S. App. LEXIS 1619 (1st Cir. Mass. Jan. 29, 2016) distinguished from Mantena v. Johnson, 809 F.3d 721 (2d Cir. N.Y. 2015) and precluded the judicial review of the Secretary of Homeland Security's decision to revoke an approved I-140 on the ground that the Secretary of Homeland Security possesses discretion in making a substantive decision on the petition.

portability provisions, however, the alien's petition "remain[s] valid with respect to a new job" under certain circumstances. 8 U.S.C. § 1154(j)." [13]

In the 2014 decision *Kurapati v. USCIS*, the Court stated that "*a beneficiary of an I-140 visa petition who has applied for adjustment of status and has attempted to port under § 1154(j) "falls within the class of plaintiffs" Congress has authorized to challenge the denial of that I-140 visa petition. See Lexmark, 134 S. Ct. at 1387. It is clear from the statutory framework that such immigrant beneficiaries fall within the zone of interests it regulates or protects. Once the I-140 visa petition is approved, it is the immigrant who receives the visa and who applies for adjustment of status. INA §§ 203(b)(3), 245(a); 8 U.S.C. §§ 1153(b)(3), 1255(a). Additionally, § 1154(j) supports the conclusion that the immigrant's interests are within the statute's zone of interests, as the petitioning employer derives no benefit from the employee's ability to port the I-140 visa petition to another employer. Patel, 732 F.3d at 636.* ***Even assuming that Congress intended to benefit American employers and protect jobs for American citizens in creating the framework for employment visas, that does not rule out that Congress acted with the intent to regulate or protect immigrants' interests.*** *See id. at 637.*" [14]

Similarly, in the 2015 decision *Mantena v. Johnson*, the Court held that "*the portability provisions altered the parties who have an interest in opposing the revocation of a ported I-140 petition,* ***we believe that the regulations must be read to require notice to the real parties in interest.*** *(...) The "affected party" regulation is a remnant of the pre-porting regime, and, we believe, it must be read as such. The regulation, promulgated ten years prior to AC-21, noted that "a visa petition proceeding has long been a proceeding between the petitioner and the service." (...)* ***AC-21, however, allows beneficiaries to sever ties from the original petitioner and move to new employment, with their new employers relying on the original petitioner's I-140.*** *(...)* ***We only hold here that USCIS acted inconsistently with the statutory portability provisions of AC-21*** *by providing notice of an intent to revoke neither i) to an alien beneficiary who has availed herself of the portability provisions to move to a successor employer nor ii) to the successor employer, who is not the original I-140 petitioner, but who, as contemplated by AC-21, has in effect adopted the original I-140 petition. And, in so holding, we recognize that, in some contexts, these beneficiary and successor employer entities may be one and the same, since USCIS permits beneficiaries to port to self-employment.*" [15]

As shown above, case law recognizes the Congress dual intent to protect both of the immigrant beneficiary and the employer petitioner. However, in its interpretation, DHS regards only the interests of the original employer-petitioner, and neglects completely the interests of the immigrant-beneficiary as well as the interest of the new employer who would

[13] Patel v. USCIS, 732 F.3d 633, 636 (6th Cir. Mich. 2013); bold emphasis added.
[14] Kurapati v. USCIS, 775 F.3d 1255, 1261 (11th Cir. Fla. 2014); bold emphasis added.
[15] Mantena v. Johnson, 809 F.3d 721 (2d Cir. N.Y. 2015).

benefit from a prior I-140 petition instead of having to start-all-over-again the immigration process for the new employee.

In support of our analysis, we cite DHS treatment of the labor certification which is artificially kept "current" despite the extended periods of time generated by the backlogs. In our opinion, DHS is conveniently glossing over the critical requirement of INA § 212(a)(5)(A)(i) which requires the Secretary of Labor to certify that there are not sufficient workers who are able, willing, qualified "*... at the time of application for a visa and admission to the United States …"*. DHS is not applying the INA § 212(a)(5)(A)(i) requirement "*...at the time of application for a visa and admission to the United States…"* because, according to Stuart Anderson's estimations, an EB-3 worker from India applying today will be waiting for seventy years for their visa number to become available.[16] Indeed, if a EB-3 worker from India lives long enough, stays employed with the original petitioning employer and finally adjusts her/his status to permanent resident, s/he would be getting an immigrant visa based on a seventy-year-old labor certification! Based on these future estimations and the current backlogs, the labor certification provision INA § 212(a)(5)(A)(i) clearly requires interpretation and the congressional intent in AC-21 is the only appropriate lens for this interpretation.

Another illustration is DHS interpretation of the "one time" extension of H-1B status in the AC-21 § 104(c). In AC-21 §104(c), Congress provided a "one time" extension of H-1B status in the United States for applicants from backlogged countries who are waiting for their visa number to become available. This provision does not preclude multiple H-1B extensions during the waiting period, and DHS has interpreted this Statute as allowing multiple H-1B extensions. Given the size of the backlogs, an EB-3 applicant from India can expect to spend seventy years on an H-1B visa and renew it a minimum of 23 times, if they do not change employer. Although the caption of the Statute is "one time" extension of H-1B status, it is obvious that Congress did not envision the ridiculous length of the backlogs.

In both of these illustrations, DHS treatment of the labor certification to keep it artificially valid for a very long time, and DHS interpretation of the "one time extension" provision to allow multiple extensions, DHS has followed the Congressional intent in order to protect the interests of the employers-petitioners to retain high-skilled employees. However, DHS has completely ignored its equivalent duty to protect the interests of these immigrant workers-beneficiaries by refusing them job flexibility. **Our position is that the only way for DHS to fully apply Congressional intent would be (i) to provide a real job mobility by granting Employment Authorization**

[16] Stuart Anderson, "Waiting and More Waiting: America's Family and Employment-Based Immigration System", National Foundation For American Policy, Page 1, retrieved on January 24th, 2016. http://www.nfap.com/pdf/WAITING_NFAP_Policy_Brief_October_2011.pdf. **Note that even though recent Visa Bulletins (March 2016) indicate the wait to be around 11 years, Stuart's estimation are for an EB-3 worker from India who would apply today.**

Documents and Advance Parole to all immigrant workers stuck in the backlogs and waiting for their immigrant visa to become available [17] and (ii) to provide real job flexibility by preserving workers' Green Card application in its entirety (Labor Certification and Immigrant Petition) upon changing jobs.

We thoroughly analysed the provisions of INA § 245(a) which state that: **"***The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner* ***may be adjusted*** *by the Attorney General, in his discretion and under such regulations as he may prescribe,* ***to that of an alien lawfully admitted for permanent residence if*** *(...)* ***(3) an immigrant visa is immediately available to him at the time his application is filed.*****"** We understand this provision as requiring an immigrant visa to be immediately available for the adjustment of status application **to be approved**; however, Congress **did not prevent the filing** of an adjustment of status application **when a single immigrant visa for the same immigration category is available**. In other words, the correct interpretation of the Statute is that when a single immigrant visa is available, the immigrant applicant should be allowed to file his/her adjustment of status.

Following our interpretation of the Statute would allow to backlogged immigrant workers with approved I-140 Immigrant Petition the ability to file for Adjustment of Status without reference to the priority date listed in the Visa Bulletin as long as a single visa number is available; and provide an alternative solution to the backlogs and our broken immigration system. **We recommend that DHS allow people to file their Adjustment Status once an immigrant visa number is available**; which again is different from the approval of the AOS application at the time the immigrant visa of the applicant becomes available.

Furthermore, INA § 245(a) specifically grants DHS the discretion and authority to prescribe regulations for adjustment of status application process, and therefore the administration possesses the authority to make this improvement. **Note that this measure would bring the Green card process in better alignment with the law and the intent of congress to provide the immigration benefit in a reasonable period of time. It would so by fixing the issue with the labor certification validity period because: (i) after 180 days of filing for Adjustment of Status, the aliens would fall under INA § 204(j) which explicitly allows the underlying labor certification to remain valid (ii) the labor certification provisions in INA § 212(a)(5)(A)(i) were written in a manner which indicates that Congress did not anticipate any delay between the labor certification and the filing of the adjustment of status.**

[17] Note that we believe that DHS possesses the authority to issue Employment Authorization Documents and Advance Parole under INA § 274A(h)(3)(B) and INA § 214(a)(1) which allows the Secretary of DHS to provide employment authorization documents and advance parole through regulation.

At the time of submitting the application for adjustment of status, even if the adjustment of status application has not yet been granted, the worker would become eligible for an Employment Authorization Document (EAD) and an Advance Parole, which allows the immigrant worker to accept a promotion or change employers without having to restart the green card application process all over again. Additionally, it would allow people to travel without need for a visa stamp to re-enter the country. This measure would also solve the problem of children "aging out" at the age of 21 - after which they must leave the country or switch to a non-immigrant visa. "Aging out" is one of the most heart-breaking consequences of backlogs. Many children enter the United States with their parents at an age when they don't even remember their home countries any more. Once a minor is over the age of 21, they no longer qualify as dependents for immigration purposes. Because of the ridiculous lengths of the backlogs, more and more of these children are having to leave their families at the age of 21.

II. Economic arguments:

DHS regulation envisions H-1B workers with approved I-140 immigrant petitions maintaining suitable employment sponsorship for several decades in the future – up to 70 years as per Stuart Anderson's estimate for an EB-3 candidate from India applying today. Having an "anything but temporary" workforce overtly dependent on their employer, results in a workforce with lower bargaining power with their employer. The lack of bargaining power in turn leads to lower wages. Giovanni Peri, a labor economist at the University of California - Davis made the following statement of facts in his widely cited study about the phenomena: [18]

> *"One common empirical finding in the literature is that immigrants are paid less than natives with similar characteristics and skills. This is in part due to the fact that many immigrants, because of less attractive outside options (such as having to go back to their home country), have lower bargaining power with the firm. In this case firms pay immigrants less than their marginal productivity, increasing the firm's profits."*

Indeed, in our experience, highly-skilled workers on H-1B status are living like immobile indentured servants for several decades and going through inhumane hardships while attempting to maintain their H-1B status. Below we are providing some real life stories from our members.

> *Been here for the last 7+ years. Been struggling to maintain status, applying extension. Last September lost my dad. My sister a citizen applied for his GC (Green Card) thinking we will be there for our parents in their old age. Ironically we got a RFE asking for my*

[18] Giovanni Peri, "Immigration, Labor Markets, and Productivity", Cato Journal, Vol. 32, No. 1, 2012. Page 44. Retrieved January 24th 2016.

parents marriage certificate last week and this is after 1 year of application. (Ideally immediate family gets GC in 4-6 months, not when applicants have passed!!) This is such a nightmare the whole GC process. I am so so hopeful that I can go back to my dad's house to complete his 1 yearly rites. Likewise my husband's parents are too old too. We do not want to visit our country when it's too late. You may say follow process and go visit your parents. But we have a lot at stake here. My cousin who did his MS from USC got a dream job, went back for Diwali and has not come back, "administration delay". He lost his job and hope. Unfortunately millions are suffering after putting in half of our lives in our pursuit to raise our kids in the land of opportunity. **Smita G, Ladera Ranch, CA**

A brief background about myself. Came to the US in 2002 for Masters and since then working in biomedical research. I have an approved I-140 with PD in Feb 2011. The wait for an EAD-AP has taken a huge toll on our family's morale, especially when we went to Canada for visa stamping and were stuck there for almost 3 months waiting for the approval. Can you imagine staying in a hotel with two young children for 3 months? It was one of the most depressing periods of our life and for that matter many thousands of immigrants like us. All we want is to live and work freely in this great country that has invited millions of people before us. I have been in this country for 14 years now with no end in sight for our sufferings. Please help the legal immigrant community suffering from backlogs to also taste the freedom of independence from uncertainty and live the American Dream. **Ali B, Boxborough, MA**

My previous company division was divested and I was expected to move to a new location with the new company. By moving to the new location, I have to go through the entire PERM and I-140 approval process. This is a waste of time and resources when I already have an approved I-140. Also, my salary has been very stagnant since I did not have any leverage to get a pay increase. The companies know that I will not move out of the company with a pending Green Card application. **Kagalwala T, Clifton Park, NY**

I have been working in the US for a large advertising agency, part of one of the largest communication companies in the world. I have lived continuously in the US for 8 years. I have bought a house. Paid my taxes. And contributed to the economy by visiting 36 out of the 50 states.However since I have a H-1B, I had not traveled out of the country, simply to not have to go through the vagaries of the stamping process. I have passed on opportunities to travel internationally for work, just to avoid this. However, last month, it became impossible for me to avoid this and I needed to travel to Mexico City. So I decided to get a stamp there. The entire process, due to system issues, took me a week extra than I had planned, and a three day trip to mexico became a 10 day trip. My company supported me, but it was a few uncertain days in Mexico when my visa was undergoing processing, and I was not sure if and when I would be able to get back. Another issue-due to my extension

petition not being found in PIMS, I was only given a stamp till May this year, which means I have to go through this again. I feel it is not fair. I have been working in the US legally, paid all my taxes, broken no laws (not even got a traffic ticket) and yet, I have to face uncertainty when I leave a country I call home. I believe America is my home, but it is nerve racking to be not able to leave home, if you're not certain of being able to come back. **Arun K, Union, NJ**

I started my Journey in 2007, when I moved to US with my wife and 3 month old daughter working for a big German IT giant. After global recession, my company applied for GC process with my priority date in 2011, it has being 5 years since GC was filed, 8 year US, 3 visa extension and I am still on H-1B waiting every day if the priority date would be current. I am working on same position for past 8 years, even being an (sic) top performer within my company I cannot move up to various management roles within Company. Couple of year back me and my friends wanted to start a company (http://www.innovapptive.com) but I could not join them, now that companies had created 100's of job's in past 2 years with growth of 200% year on year. My wife was not able to work all those 8 years, she lost all confidence in life. My 8 year old would be soon will be into middle and high school and would have to go through same struggle during college and job. Sometimes I feel that I had I had made a big mistake of my life to come and settle down in US and wasted a decade. **Parag B, Frisco, TX**

The damages to the H-1B workers and their families can only be ameliorated by allowing true "Job Flexibility" as intended by Congress *i.e.* the preservation of all components of their Green Card applications when they change jobs and giving employees the option of an easily accessible open-market Employment Authorization with Advance Parole along with a simple, straight-forward renewal process. An open market EAD will free the H-1B workers from an exploitative reliance on the employer and enhance the H-1B workers bargaining power in the labor market. An open market EAD would also allow workers to maximize their contribution to the U.S. economy by starting companies without requiring them to jump through additional regulatory hoops. The main issue that backlogged H-1B workers face is the total dependence on their employers-petitioners for ridiculous amounts of time, and this is why, no improvement to the H-1B visa program can ameliorate the situation, unless DHS grants an open-market employment authorization along with the security that Green Card applications remain protected until they can file for Adjustment of Status.

This situation is also causing affecting U.S. workers as employers prefer hiring people on H-1B visas from backlogged countries to the detriment of American citizens and legal permanent residents. We view the phenomena as a natural market-driven outcome of having a two-tier workforce - one with less rights than the other. Employers quite naturally gravitate to workers that have less rights and who consequently have less bargaining power as rightly pointed out in the

aforementioned study by Peri. Recently, the Southern California Edison[19] and Disney[20] companies have been in the news for preferring foreign labor on temporary visas over U.S. workers. Most immigrants don't come to America to "steal jobs" nor do they want to get paid under-market wages and certainly not to depress wages of American workers. However, H-1B workers are forced to accept under-market wages and, as a result, take jobs because of their lack of bargaining power with employers. **This whole system makes H-1B workers more attractive to the employers: employers can offer lowers wages while at the same time have the assurance of retaining the H-1B worker for decades because of the broken immigration system**. Forcing people with approved immigrant petitions to stay on an H-1B visa will only create and perpetuate more Southern California Edison and Disney situations - to the detriment of the American workers. **By not providing H-1B workers with approved immigrant petitions the assurance of the preservation of their Green Card applications across multiple employers and an open-market employment authorization, DHS regulations further damage the labor market for U.S. workers in a perpetual manner. The main purpose of INA provisions is to protect U.S. workers, however DHS proposed modifications of the regulations are not consistent with that purpose.**

The biggest benefit of immigration is that as a group, immigrants are very entrepreneurial and entrepreneurs create jobs. Inc magazine estimates that 52% of all startups in Silicon valley were started by Immigrants[21]. A large study by the *Kaufman foundation* - "Then and Now: America's New Immigrant Entrepreneurs" came up with the following key findings about engineering and technology companies founded in the United States between 2006 and 2012: [22]

- *24.3 percent of these companies had at least one key founder who was foreign-born. In Silicon Valley, this number was 43.9 percent.*
- *Nationwide, these companies employed roughly 560,000 workers and generated $63 billion in sales in 2012.*

[19] Patrick Thibodeau, Computerworld February 4th, 2015, Retrieved January 26th, 2016. http://www.computerworld.com/article/2879083/southern-california-edison-it-workers-beyond-furious-over-h-1b-replacements.html

[20] Julia Preston, The New York Times, June 3, 2015. Retrieved January 22nd, 2016. http://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html?_r=0

[21] Eric Markowitz, Inc Magazine, October 15, 2012, Retrieved January 24th, 2016. http://www.inc.com/magazine/201502/adam-bluestein/the-most-entrepreneurial-group-in-america-wasnt-born-in-america.html

[22] Vivek Wadhwa *et al*. Ewing Marion Kaufman Foundation. "Then and Now: America's New Immigrant Entrepreneurs". Page 3. Retrieved January 24th, 2016. http://www.kauffman.org/~/media/kauffman_org/research%20reports%20and%20covers/2012/10/then_and_now_americas_new_immigrant_entrepreneurs.pdf

- *Of the total of immigrant-founded companies, 33.2 percent had Indian founders, up about 7 percent from 2005. Indians have founded more such companies than immigrants born in the next top seven immigrant-founder-sending countries combined.*
- *The top ten sending countries of immigrant entrepreneurs in descending order were India (33.2 percent), China (8.1 percent), the United Kingdom (6.3 percent), Canada (4.2 percent), Germany (3.9 percent), Israel (3.5 percent), Russia (2.4 percent), Korea (2.2 percent), Australia (2.0 percent), and the Netherlands (2.0 percent).*

Keeping high-skilled immigrants on H-1B visas for decades – constantly stressed out about maintaining status in the U.S. - while they could be founding companies and creating jobs, is prejudicial to the protection of U.S. workers and hurting the U.S. economy. After all, what is the point of inviting skillful, creative and driven people into the country if regulations are going to prevent them from being of the maximum benefit to the country *i.e.* prevent them from being entrepreneurs - or make them jump through hoops to be entrepreneurs? In a study, the Small Business association reinforces our argument. Under section titled "Key Policy Issues" the authors say: [23]:

> *One important set of issues illuminated by this study involves the linkages among nonimmigrant visa categories and between non-immigrant status and legal permanent residence. A large proportion of the immigrant founders in our sample found their way from higher education to professional work to the green card and, ultimately, citizenship.* ***They gained sufficient certainty about their immigration status during this journey that they were willing to make the investment of a lifetime by starting their own businesses.*** *It is possible that some potential high-tech entrepreneurs who are admitted in a non-immigrant status get trapped in that status without sufficient reason. Even those individuals who have a reasonable prospect of extending their stay in the United States may lack the certainty that they will be here long enough to be able to reap the benefits of taking the entrepreneurial "leap," because of the way the immigration system handles their cases. As a result, they never take the leap, and their potential entrepreneurial contribution to the nation may be lost.*

As per the Kaufman study, almost of 40% of immigrant entrepreneurs are from India and China – the exact same backlogged demographic which would benefit from job flexibility by the preservation of their Green Card petition on changing employer prior to filing for adjustment of

[23] David M. Hart et al, "High-tech Immigrant Entrepreneurship in the United States", Report developed under a contract with the Small Business Administration, Page 55, https://www.sba.gov/sites/default/files/rs349tot_0.pdf retrieved on February 7th, 2016.

status, and an open market EAD with advance parole which will allow them to start companies. In fact, it would be reasonable to expect a noteworthy surge of entrepreneurship and a boost to the economy directly resulting from this regulation – if the Obama administration decides to do the right thing by issuing open market EAD's with advance parole for people stuck in the Green Card backlog.

To further illustrate our point, we are providing here some real stories from our members about needlessly lost entrepreneurial potential because our members didn't have job flexibility:

> *Came here as post-doc with a J1 visa, and then moved on to H-1B in 2005 ... Got appointed as full-time Assistant Professor at Boston University School of Medicine, and Principal Investigator of brain Tumor Research Program at Roger Williams Medical Center in Providence, RI in 2012 ... With the I-140 EAD-AP rule, first of all I can concentrate on my research and development of therapies for the dreadful disease of brain tumors, instead of constantly worrying if I will be allowed to stay or be deported. Secondly, my research program has attracted many investors and venture capitalists, who would like to invest in biotech startups under my leadership, but are backing out because of my immigration status. With I-140 EAD/AP and AC-21 same or similar job memo, I will be able to launch the much desired startup and bring the therapies to the bedside quickly.* **Sadhak S, Sharon, MA.**
>
> *I founded a company during business-school in 2011/12. I recruited several part-time workers, paying them out of my own pocket. The idea had a fair chance of being a viable, long term business, but required capital and sustained effort. Because the founder, (i.e. me), was on an H1, this was a huge risk for VCs and angel investors. Having an EAD-AP would enable hundreds like me to start companies, employ 5-10 people. Some would fail, but at least a few will grow to be large, innovative businesses.* **Prasad J, Astoria, NY.**
>
> *The EAD-AP rule will enable me to think about the long term picture without worrying about immigration issues. I want to start a company in marketing technology to provide end to end web marketing and sales platform to Fortune 500 companies. There are very few players in this field but I have already lost out on the first mover advantage due to my visa status but its still not too late.* **Aliasgar A, Plano, TX.**
>
> *First of all I will stay back in the United states instead of going back to my home country … Immediately I would launch my product in the United States. I have seed investors lined up who will fund the first round and i will hire 3 people to start working on sales, customer support and marketing.* **Seshank V, Glenmills, PA.**
>
> *EAD-AP will help me start my own firm providing database solutions to many of the small companies who cannot afford huge expense.* **Rama A, Freemont, CA.**

III. Detailed Comments in Response to the Specific Requests for Feedback:

Comments for Section IV A.1.A: H-1B EXTENSIONS FOR INDIVIDUALS AFFECTED BY THE PER-COUNTRY LIMITATIONS

As mentioned in "§ I Legal Arguments" of our comments, we see serious issues with DHS interpretation of AC-21 § 104 (c). The whole intent behind AC-21 § 104 (c) was to allow H-1B status extension for the skilled worker to complete the green card process. However, as soon as the worker exercises flexibility with a different employer and without explicitly availing of 204(j) portability, DHS requires the worker to restart the green card process. In our view, this interpretation is absurd, completely paradoxical, and strongly indicative of incorrect interpretation of the AC-21 act.

The core premise behind DHS interpretation in using the I-140 petition from previous employer as the basis for AC-21 § 104 (c) H-1B extension with a new employer is an offer of future permanent employment from the previous employer. By keeping the I-140 valid for purposes of H-1B transfers and priority date retention (for not INA 204(j) beneficiaries), DHS is taking the position that the future permanent employment offer from previous employer is still available indefinitely. How can DHS assume EVERY SINGLE permanent job offer with the EVERY SINGLE original I-140 sponsoring employer to EVERY SINGLE beneficiary be valid even after the employee transfers to a different employer?

DHS is choosing to keep an approved immigrant petition valid solely for purposes of H-1B extension (and transfers to different employers) but denying the petition (and the underlying labor certification) to remain valid for the more obvious purpose of pursuing permanent residence - which is the entire Congressional intent behind AC-21 § 104(c).

We recommend that DHS take into account Congressional intent manifest in the AC-21 act and allow the beneficiary to continue the Green Card process with the new employer so long as the employment is in a "same or similar occupational classification" even if the worker has not yet filed for Adjustment of Status. The prospective employers would benefit greatly if they did not have to bear the cost of re-starting the green card for an employee who has already obtained a labor certification proving a shortage of workers in the field.

Comments for Section IV A.1.B: H-1B EXTENSIONS FOR INDIVIDUALS AFFECTED BY LENGTHY ADJUDICATION DELAYS

In this section, DHS also proposes to allow H-1B extensions for any employer who may not have filed the underlying labor petition similar to the interpretation under AC-21 § 104(c) discussed above. The same comments regarding inconsistent application of AC-21 congressional intent, as presented in above for section 104(c), are applicable for this section. We request DHS to resolve the issue of selective and hence obviously inconsistent application of AC-21 congressional intent in allowing AC-21 § 106 (a) and AC-21 § (b) extensions.

Comments for Section IV A.2: JOB PORTABILITY UNDER AC-21 FOR CERTAIN APPLICANTS FOR ADJUSTMENT OF STATUS

We don't think DHS interpretation of INA § 204(j) goes far enough nor benefits the population Congress intended it to benefit. Under this proposed rule, when a beneficiary changes job before filing adjustment of status, the beneficiary would require a new immigrant visa petition filed on his or her behalf in order to file for adjustment of status or go through consular processing. DHS uses INA § 204(j) in their rationale for requiring a new immigrant petition for job changes prior to filing adjustment of status. There is ample evidence in the AC-21 act that Congress did not intend to provide job flexibility only to a specific subset of beneficiaries facing lengthy adjustment delays. Furthermore, INA 204(j) does not explicitly state that no other subgroup shall be provided such job flexibility, rather Congress provided one subgroup which was affected the most at the time of passing the law 15 years ago.

In other words, Congress intended to provide job flexibility to any skilled worker who is tethered to the same job or employer for a long duration just for the preservation of the green card process and that Congress considered any delay longer than 180 days to receive an immigration benefit to be unacceptable for all: the immigrant beneficiaries, employers' ability to hire skilled workers, and American competitiveness. The current regulation, which preferentially interprets AC-21 law only to allow H-1B extensions and H-1B portability on the basis of future employment offer, goes against the congressional intent of providing true job flexibility to the immigrants stuck in backlogs due to per country limits and unavailability of visa numbers, issues that Congress clearly addressed in the AC-21 act.

By not fully allowing job flexibility, DHS regulations undermine Congress' intent and suppress competitiveness that AC-21 intended to promote. Furthermore, the financial impact on employers and the delays generated by restarting the green card processes again prevents employers from hiring qualified workers, the very problem Congress sought to address in INA 204(j). **We believe, for the reasons we stated above, an interpretation of the AC-21 act in its entirely to address the current backlogs and effects thereof is warranted.**

In order to fully implement INA § 204(j) and spirit of AC-21 as a whole, the underlying Labor Certification and I-140 petition should be transferable to the new employer after 180 days of approval with a same or similar job offer. However, applying such rationale only after 180 days of filing I-485 is unfair for those employers and beneficiaries who have not yet filed I-485 due to backlogs, which is the very problem AC-21 intended to mitigate in section 104 and 106 of the act. A consistent implementation of INA § 204(j) could tie this section of the law to the approved I-140 petition allowing job changes even before one has filed I-485 as long as 180 days have elapsed since the approval of I-140 and the new job offer is same or similar to the original I-140 job offer. This interpretation will also make the immigration laws fairer for consular processing applicants. Finally, this would benefit employers by enabling them with a greater access to skilled workers

without the need to re-start the cumbersome, expensive, and mostly redundant green card process again, and thereby increasing market competitiveness as a direct result of the job flexibility.

On the requirement of Form "Supplement J" upon job change under INA § 204(j), Immigration Voice considers such additional burden on the employers and beneficiaries to be a hindrance to job flexibility and ability of employers to hire skilled workers. We oppose such bureaucratic requirement and request to allow an employment job offer letter detailing job duties as sufficient proof of eligibility under INA 204(j).

Comments for Section IV B.1: REVOCATION OF APPROVED EMPLOYMENT-BASED IMMIGRANT VISA PETITIONS

We have two broad concerns with this proposal:

(i) Selective interpretation of the AC-21 act to mean the beneficiary's I-140 is not valid for immigration purposes:

DHS proposal, under this section, will allow an I-140 to remain valid even if the employer requests revocation of the petition or terminates its business. The reason the employer would request such revocation is generally due to termination of their intent to offer full time permanent employment to the beneficiary or the event that the beneficiary no longer intends to accept full time employment listed in the I-140 petition.

Immigration Voice expresses a strong objection to the limited interpretation that such I-140 is only valid for (1) the retention of priority dates; (2) job portability under INA § 204(j) of the INA, and (3) extensions of status for certain H-1B nonimmigrant workers under AC-21 § 104(c) and 106(a) and (b) of AC-21. As DHS stated in their reasoning under INA § 104 (c) H-1B extensions, AC-21 § 104(c) and 106(a) and (b) assume that the employee be in the green card process waiting for a visa number to be available. In DHS's own interpretation as presented in the proposed regulation, AC-21 § 104(c) H-1B extension "by definition contemplates an offer of future employment upon a grant of permanent residence". As we discussed in our response to AC-21 § 104(c) H-1B extensions, **if a "future employment" offer for permanent residence is considered to be in existence for H-1B extensions beyond 6-year, the same employment offer must be available for the green card process.** Without such complete interpretation harmonious with AC-21 congressional intent, the regulation's proposed revocation guidance will create a system in which an H-1B employee can continue to remain on H-1B status indefinitely under AC-21 § 104(c) with the previous employer's I-140 (which is to remain valid indefinitely under this proposed rule), while not having another I-140 from the current employer who has filed the AC-21 § 104(c) H-1B extension(s) - *i.e.* potentially having no pathway to immigrate which is completely contrary to Congressional intent. **It is absurd for the proposed regulation to allow indefinite H-1B extensions without corresponding portability of the entire green card application, since the entire intent behind AC-21 § 104(c) was to allow for the completion of**

the green card process. This absurdity which goes against explicit congressional intent[24] is a strong indicator of an incorrect interpretation of the AC-21 act.

We strongly oppose DHS's rationale based on INA § 204(j) to not allow the same I-140 to be used as the basis to complete the green card process on job or employer change. The statement in the regulation that "*an employment-based immigrant visa petition that is subject to withdrawal or business termination, however, cannot on its own serve as the basis for obtaining an immigrant visa or applying for adjustment of status as there is no longer a bona fide employment offer related to the petition*" has no basis in the Congressional intent and spirit in promoting job flexibility, reducing the burden on employers in restarting the expensive green card process again and again for the same beneficiary, and increasing American competitiveness through mobility of workers. Allowing the I-140 to remain valid for obtaining immigrant visa will fully implement Congress' intent as discussed in "§ I Legal Arguments" of our comments.

We urge DHS to revise this proposed rule considering the abundance of evidence based on legislative history (and court interpretations) surrounding the AC-21 act, the inconsistencies in the proposed modification to the regulation. As a direct result of our proposal of allowing the labor certification and the I-140 to remain valid for all immigration benefits thereof, DHS can make its practices to be in stronger compliance with INA § 212(a)(5)(A)(i) which in the current practice requires DOL to certify years or decades in the future that qualified U.S. workers are not available, which by itself is an impossible proposition in the face of backlogs.

(ii) The "Fraud" loophole: Unscrupulous employers could use the possibility of revocation of I-140 for "fraud" as an employee retention tool. We propose DHS clarify that employers cannot ask DHS to withdraw an employee's I-140 petition for reason of "fraud" without a conviction from a criminal court. Allowing employers to allege "fraud" and putting the burden of defending against it on the immigrant is giant loophole unscrupulous employers could use as an employee retention tool. Additionally DHS needs to affirm that routine civil issues like disputes on non-compete agreements will not affect an approved I-140. Our comments are directed at protecting employees from pressure tactics from employers, we do not mean to suggest a reduction in DHS's existing authority to investigate fraud.

Comments for Section IV B.2: RETENTION OF PRIORITY DATES

Apart from our concern about the limited scope of the validity of the Immigrant petition expressed in "§ I Legal Arguments" and the preceding parts of this section - we would like to express concern about cases where there were issues with approved I-140 petitions, but the beneficiary was not at fault. An example would be an I-140 petition, revoked years later due to a later finding of misrepresentation by the petitioner - but no fault of the employee. DHS also proposes that a petition approved due to USCIS error will also not confer a priority date, and this

[24] Congressional intent for AC-21 § 104(c) is explicitly stated as being to enable the worker to complete the Adjustment of Status process.

could potentially lead to problems in subsequently filed petitions and the beneficiary losing the place in line despite no fault of the beneficiary. Such instances tend to penalize immigrant beneficiaries by depriving them of their ability of retain priority date for no fault of their own. We urge DHS to allow retention of priority date if it can be reasonably verified that the beneficiary has no involvement in the misrepresentation or an error later found by USCIS. This regulation should recognize and codify that a beneficiary has the same interest in the outcome of the I-140 decision/revocation in all cases (not just limited to INA 204(j) job flexibility).

Comments for Section IV B.3: NONIMMIGRANT GRACE PERIODS

DHS is proposing 60 days of grace period per petition "validity period". Immigration Voice interprets "validity period" as duration of the H-1B visa, so effectively, DHS is proposing a 60 day grace period per H-1B visa status (typically 3 years). For example, if an employee gets laid off at employer #1, the employee has 60 days to find new employment. If the employee transfers their H-1B visa to employer #2 within the stipulated 60 days, but say employer #2 shuts down after 6 months of employment, they have 60 days to find another job.

If our interpretation of the rule is correct, we welcome such flexibility, and if our interpretation of the rule is incorrect, we urge DHS to amend the regulation to give beneficiaries the minimum flexibility described in the preceding paragraph.

Comments for Section IV B.4: ELIGIBILITY FOR EMPLOYMENT AUTHORIZATION IN COMPELLING CIRCUMSTANCES

Currently some skilled workers are projected to face backlogs lasting up to 70 years while waiting for their Green Cards. The regulation envisions employees maintaining status on H-1B visa's during this period. While maintaining status on an H-1B for decades might be possible or desirable for some, all would rather have the the *option* to switch to an EAD (with Advance Parole) - warts and all. The regulation points out that switching to an EAD would require the worker to relinquish nonimmigrant status, thus restricting ability to adjust status. The regulation also mentions the worker would be eligible for Consular processing.

Firstly, if a worker really wants to Adjust Status, s/he possibly can get an H-1B visa and re-enter the country on H-1B status prior to filing for Adjustment of status. Also, as DHS noted, there is very little doubt workers would be able to seek permanent residence via Consular Processing. **Given the ridiculous lengths of the backlogs, high skilled immigrants should be given the option of making an informed decision regarding maintaining status in the U.S. or forgoing status by opting for EAD/AP and seeking permanent residence via Consular Processing when an immigrant visa becomes available.** High skilled immigrant workers have strong networks, advocacy groups (like ours) and already have significant experience navigating the immigration system with the help of attorneys. There is no other immigrant group in the United

Stated more capable of making an informed decision about their immigration status so as to not jeopardize the ability to ultimately immigrate.

Given the ridiculous lengths of the backlogs, the damage to H-1B workers and their families, damage to U.S. workers and damage to the U.S. economy - caused by staying on an H-1B visa for extended periods of time causes - we ask that DHS either remove the "Compelling Circumstances" requirement or make long backlogs as a "compelling circumstance". There is no other community in the United States more capable of making informed choices about their future and given the gravity of the problem, DHS needs to make every option available.

Granting backlogged workers EAD with Advance Parole would be consistent with AC-21 § 104(c), captioned "ONE-TIME PROTECTION UNDER PER COUNTRY CEILING" because, as the caption indicates, Congress did not intend for the provision to be used for extended periods of time beyond the "one-time". AC-21 § 104(c) is not the only way for people to remain in the United States while waiting for their visa number to become available. As the proposed modification to CFR concedes, DHS has broad authority to issue EAD's with Advance Parole and by not keeping people on H-1B visas for decades DHS will be fulfilling the "ONE-TIME PROTECTION" Congressional intent in the caption of AC-21 § 104(c).

Comments for Section IV C.1: AUTOMATIC EXTENSIONS OF EADS IN CERTAIN CIRCUMSTANCES

We request USCIS to allow automatic work authorization extensions to the H-4 spouses of H-1B while they are waiting for USCIS to approve the EAD extension. This would be consistent with the practice of continuing the work authorization of the H-1B beneficiary when he/she is waiting for USCIS to approve the respective H-1B extension, which is currently affected by long processing times. In most cases, the H-1B extension, H4 extension, and H4 EAD extension are concurrently filed and approved the same time as a courtesy by the USCIS. Currently, the delay in processing H4 EAD on a timely basis causes many H4 EAD workers to quit their jobs, which results in disruption to employers and projects. A continued work authorization in the interim will address this issue appropriately.

Additionally, if DHS accepts our recommendation to issue EAD's with advance parole to backlogged workers, we ask that the EAD's for these workers benefit from automatic extensions.

IV. Questions to DHS regarding the proposed regulations:

We have the following questions for DHS regarding this regulation:

Q1. Given the following facts:

(a) INA § 212(a)(5)(A)(i) requires the Secretary of Labor to certify that there are not sufficient workers who are able, willing, qualified "*...at the* ***time of application for a visa and admission*** *to the United States…".*
(b) An approved Labor Certification by the Department of Labor (DOL) only certifies that there are not sufficient workers at the time the Labor Certification was made plus 180 days (as opposed to an unknown time in the future when the alien will be admitted).
(c) In the context of current backlogs, DHS is artificially keeping the labor certification valid for years (sometimes decades) when the provision requires the certification be made at "*time of application for a visa and admission to the United States"*.
(d) AC-21 is the only and most recent act passed by Congress specifically written to deal with employment based green-card backlogs.

We have the following questions about the the statutory basis[25] for the proposed modifications to the regulation in the context of DHS keeping the labor certification valid for a non INA § 204(j) beneficiary[26]:

1. In light of the concept of "offer of future permanent employment", how does DHS justify that its practices adhere to the statutory requirement of INA § 212(a)(5)(A)(i) while still maintaining the integrity of the Labor Certification process for the interest of American workers?
2. If DHS is not using congressional intent manifest in the AC-21 act to interpret the labor certification provisions in INA § 212(a)(5)(A)(i), can DHS please justify its decision to keep the labor certification valid for years - even for those workers who stay with the same employer for decades?
3. If DHS is not using congressional intent manifest in the AC-21 act (along with attendant JOB FLEXIBILITY) to justify keeping an INA § 212(a)(5)(A)(i) labor certification valid, can DHS explain why its interpretation of the law is superior to using congressional intent manifest in the AC-21 Act (along with attendant JOB FLEXIBILITY) to justify keeping an INA § 212(a)(5)(A)(i) labor certification valid for decades?
4. If DHS is using congressional intent manifest in the AC-21 act to justify keeping an INA § 212(a)(5)(A)(i) labor certification valid, can DHS explain why its interpretation of the AC-21 Act to keep an INA § 212(a)(5)(A)(i) labor certification valid does not entail providing "JOB FLEXIBILITY" as intended by Congress?

[25] Please answer the questions in terms of Statute and not CFR.

[26] A fair reading of CFR 20 § 656.30(b)(1) would imply that the Department of Labor does not want to certify that sufficient able, willing and qualified U.S. workers are not available for the position more than a period of 180 days in future. Additionally, the Department of Labor does not explicitly affirm the continued validity of the certification after it has been filed in support of an I-140 petition with DHS. This would suggest that the Department of Labor does not take into account the lengthy delays between the time the labor certification is approved and the time the alien is admitted into the United States.

In Immigration Voices view, regardless of how DHS used to justify keeping the labor certification valid for years, once AC-21 was enacted in 2000 (and especially after the 2007 PERM regulation[27]), DHS defacto started using Congressional intent manifest in the AC-21 act to keep the labor certifications valid. However, Congressional Intent in INA § 204(j) and INA § 212(a)(5)(A)(iv) (which are AC-21 provisions) do not simply provide a way to keep a labor certification valid, it also has "JOB FLEXIBILITY"[28] (in caps - by Congress) provisions that DHS is selectively ignoring. In the AC-21 Act Congress defines JOB FLEXIBILITY as preserving the labor certification for "same or similar occupational classifications" and implicit protection of the I-140 petition.

Q2. In AC-21 § 106(c), Congress recognized that lack of "JOB FLEXIBILITY" for a long periods of time is a recipe for indentured servitude and provided a way to keep the labor certification valid on exercising "JOB FLEXIBILITY". Why is DHS reluctant to recognize this fundamental intent of Congress when interpreting provisions applicable to the validity of the labor certifications for employment based immigrants who are unable to file adjustment of status applications while facing decade's long backlogs?

Q3. In the context of an immigrant petition for a worker who would be granted an AC-21 § 104(c) H-1B extension with a new employer but not allowed job flexibility similar to INA § 204(j), the fact that an offer for future permanent employment from either previous or current employer is the basis of an immigrant petition and that the proposed modification to regulation codifies that:

(a) Employment-based immigrant visa petitions that have been approved for 180 days or more would no longer have such approval automatically revoked based only on withdrawal by the petitioner.
(b) Any qualified H-1B petitioner can file for an H-1B extension under AC-21 § 104(c) with respect to any qualified beneficiary of an approved immigrant visa petition, meaning a new employer can file for AC-21 § 104(c) extension based on previous employers approved I-140 (which generally would not be revoked even if employer-petitioner requests revocation after 180 days)

We have the following questions:

1. From where is DHS deriving the standard that 180 days is the period after which an employer's petition to revoke an approved I-140 petition becomes largely ineffective? If DHS is using the congressional intent manifest in AC-21 § 106(c) to derive this standard,

[27] See DOL discussion of the public comments received as part of the May 2007 PERM regulation which removed the "indefinite" validity period of a certified Labor Certification at https://www.gpo.gov/fdsys/pkg/FR-2007-05-17/pdf/E7-9250.pdf

[28] Whenever we use the phrase "JOB FLEXIBILITY", we mean the same thing Congress meant i.e. preservation of the labor certification for "same or similar occupational classifications" with different employers and implicit preservation of the I-140 petition.

why is DHS ignoring the job flexibility provisions in AC-21 § 106(c)? If DHS is not using the congressional intent manifest in AC-21 § 106(c) to justify the derivation of the 180 day standard, can DHS please explain why the reasoning DHS is using is superior to using congressional intent manifest in AC-21 § 106(c) to derive the 180 day standard?

2. In the situation of using previous employer's I-140 to obtain AC-21 § 104(c) extension with a new employer, does DHS assume that the offer of permanent future employment from the previous employer will continue to remain available indefinitely? If so, how does DHS intend to verify that: (i) the employer still continues to offer permanent employment to the employee and (ii) the employee intends to seek permanent employment with the employer? In cases where the employer attempted to revoke the approved I-140 petition, how does DHS intend to verify that: (i) the employer still continues to offer permanent employment to the employee and (ii) the employee intends to seek permanent employment with the employer?
3. In the same situation, does DHS consider that the so-called offer of permanent future employment is "transferred" to the new employer? If so, why isn't DHS allowing the I-140 to remain valid for "Step 3" of the green card process if the job offer from new employer is in the same or similar occupational classification similar to INA § 204(j) provision?
4. Given the complications of verifying that a bona-fide employer-employee relationship (for a future job offer) exists in cases where an employee leaves the original I-140 petitioner-employer to keep the I-140 petition valid, (*i.e.* the complications associated with an affirmative answer to (2)) why is DHS simply not falling back to justifying keeping the I-140 petition valid using congressional intent manifest in AC-21 § 106(c)?

Q4. The core intended purpose for AC-21 § 104(c) H-1B extensions is to be able to complete the Green Card process. However for workers obtaining AC-21 § 104(c) H-1B extensions (without explicit INA § 204(j) portability) with a different employer, DHS is invalidating key parts of the very Green Card process that enabled the application of AC-21 § 104(c) in the first place. This creates an absurd paradox that defeats the core congressional intent behind AC-21 § 104(c) - which is to complete the Green Card process, and is strongly indicative of an incorrect interpretation of the AC-21 act. Can DHS please explain why this paradox is not the result of an incorrect interpretation of the AC-21 act? Can DHS please explain why it is proposing a modification to a regulation whose effect will be contrary to congressional intent[29]?

[29] As discussed earlier, the core intended purpose for AC-21 § 104(c) H-1B extensions is so the beneficiary can complete the Green Card process. The regulation will make it harder for people who do not explicitly benefit from INA § 204(j) portability and who obtain AC-21 § 104(c) extensions with a different employer than their original employer-petitioner to complete the green card process.

V. Final Remarks:

As we said the INA is firstly and foremostly designed to protect American workers. The current situation where immigrant workers are stuck in the backlogs while waiting for their immigrant visa to become available without being able to change jobs has reached an unbearable point as people are living like indentured servants of their employers for decades of their lives. DHS incorrect interpretation of the Statutes has led to the denial of job flexibility, which is hurting immigrant workers, their families, as well as the U.S. workers. However, we believe the Administration can remedy to this problem by reinterpreting the Statute to ensure that the same green card process is preserved upon employer change and provide Employment Authorization, Advance Parole, or by allowing people to file their Adjustment of Status as long as an immigrant visa number is available.

In his final state of the union address, President Obama said: [30]

> *But there are some areas where we just have to be honest -- it has been difficult to find agreement over the last seven years.* ***And a lot of them fall under the category of what role the government should play in making sure the system's not rigged in favor of the wealthiest and biggest corporations. And it's an honest disagreement, and the American people have a choice to make.***

Our organization has worked with the Administration for many years, and specifically last two years on the regulations. Our community has been waiting anxiously for real solutions to the dire, daily problems we are facing since November 2014 when the executive order was announced. So far, President Obama's executive order has been a giant disappointment for our community because the Administration failed to follow through on its promises to high-skilled immigrant workers. We feel like the high-skilled part of the President's executive order was hijacked by lobbyists working for the very "wealthiest and biggest corporations" that President Obama wants to protect from. We feel cheated because the immigration system remains completely unfair for us. I do want to mention that posterity will never forgive us if DHS decides to do this proposed regulation in its current form without considering and making changes that are reasonable with sound legal basis.

We hope that our feedback will be taken seriously and the final version of DHS regulations will be meaningful and address the core issues that we stated: the start-all-over-again Green Card application process upon changing employers and employer dependence caused by being on an H-

[30] President Obama, 2016 State of the Union, Retrieved 20th Feb, 2016. https://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address

1B visa for decades. If the Administration is unwilling to fix these issues, our members and around 1.5 million skilled immigrants will have to resign themselves to spending the next decades as indentured servants. If these core issues are not solved, the American worker will have lost the most and the World's "wealthiest and biggest corporations" will have won once again.

Respectfully submitted,

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