Regulatory Impact Analysis

Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers

PROPOSED RULE
(8 CFR Parts 204, 205, 214, 245 and 274a)

RIN: 1615-AC05

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Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action" that is economically significant under section 3(f)(1) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

1. Executive Summary

The Department of Homeland Security (DHS) is proposing to amend its regulations relating to certain employment-based immigrant and nonimmigrant visa programs. The proposed amendments interpret existing law as well as propose regulatory changes in order to provide various benefits to participants in those programs, including: improved processes for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers, greater stability and job flexibility for such workers, and increased transparency and consistency in the application of agency policy related to affected classifications. Many of these changes are primarily aimed at improving the ability of U.S. employers to retain high-skilled workers who are beneficiaries of approved employment-based immigrant visa petitions and are waiting to become lawful permanent residents (LPRs), while increasing the ability of such workers to seek promotions, accept

lateral positions with current employers, change employers, or pursue other employment options.

First, DHS proposes to amend its regulations consistent with certain worker portability and other provisions in the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), as amended, as well as the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). These proposed amendments would clarify and improve longstanding agency policies and procedures, previously articulated in agency memoranda and precedent decisions. These proposed amendments would implement sections of AC21 and ACWIA relating to certain workers, specifically sections on workers who have been sponsored for LPR status by their employers. In so doing, the proposed rule would provide a primary repository of governing rules for the regulated community and enhance consistency among agency adjudicators. In addition, the proposed rule would clarify several interpretive questions raised by AC21 and ACWIA.

Second, consistent with the goals of AC21 and ACWIA, DHS proposes to amend its regulations governing certain employment-based immigrant and nonimmigrant visa programs to provide additional stability and flexibility to employers and workers in those programs. The proposed rule would, among other things: improve portability for certain beneficiaries of approved employment-based immigrant visa petitions by limiting the grounds for automatic revocation of petition approval; enhance job portability for such beneficiaries by improving their ability to retain their priority dates for use with subsequently approved employment-based immigrant visa petitions; establish or extend grace periods for certain high-skilled nonimmigrant workers so that they may more easily

maintain their nonimmigrant status when changing employment opportunities or preparing for departure; and provide additional stability and flexibility to certain high-skilled workers in certain nonimmigrant statuses to apply for employment authorization for a limited period of time if they meet certain criteria, including demonstrating that he or she is the beneficiary of approved employment-based immigrant visa petitions, is subject to immigrant visa backlogs, and demonstrates compelling circumstances. These and other proposed changes would provide much needed flexibility to the beneficiaries of employment-based immigrant visa petitions, as well as the U.S. employers who employ and sponsor them for permanent residence. In addition, these changes will provide greater stability and predictability for U.S. employers and avoid potential disruptions to ongoing business operations in the United States.

Finally, consistent with providing additional certainty and stability to certain employment-authorized individuals and their U.S. employers, DHS is also proposing changes to its regulations governing the processing of applications for employment authorization to minimize the risk of any gaps in such authorization. These changes would provide for the automatic extension of the validity of certain Employment Authorization Documents (EADs or Form I-766) for an interim period upon the timely filing of an application to renew such documents. At the same time, in light of national security and fraud concerns, DHS is proposing to remove regulations that provide a 90-day processing timeline for EAD applications and that require the issuance of interim EADs if processing extends beyond the 90-day mark.

Table 1, below, provides a more detailed summary of the proposed provisions and their impacts.

Table 1: Summary of Provisions and Impacts		
Provisions	**Purpose**	**Expected Impact of Proposed Rule**
Priority Date	Clarifies priority date when a labor certification is not required by INA 203(b).	**Quantitative:** • None. **Qualitative:** • Removes ambiguity and sets consistent priority dates for affected petitioners and beneficiaries.
Priority Date Retention	Revises regulation so that the priority date attached to an employment-based immigrant visa petition is only lost when: USCIS revokes approval of the petition for error, fraud or willful misrepresentation of a material fact, or upon revocation or invalidation of the labor certification accompanying the petition.	**Quantitative:** • None. **Qualitative:** • Results in administrative efficiency and predictability by explicitly listing when priority dates are lost as these revoked petition approvals cannot be used as a basis for an immigrant visa.
Employment-Based Immigrant Visa Petition Portability Under 204(j)	Incorporates statutory portability provisions into regulation.	**Quantitative:** **Petitioners –** • Opportunity costs to petitioners for 1 year range from $128,126 to $4,678,956. **DHS/USCIS** – • Neutral because the proposed supplementary form to the application for adjustment of status to permanent residence will formalize the process for USCIS requests for evidence of compliance with section 204(j) porting. **Qualitative:** **Applicants/Petitioners** – • Provides stability and job flexibility to certain individuals with approved employment-based immigrant visas; • Clarifies the definition of "same or similar occupational classifications"; • Allows certain foreign workers to advance and progress in their careers; • Potential increased employee replacement costs for employers. **DHS/USCIS** – • Administrative efficiency; • Standardized and streamlined process.

Employment Authorization for Certain Nonimmigrants Based on Compelling Circumstances	Proposes provisions allowing certain nonimmigrant principal beneficiaries, and their dependent spouses and children, to apply for unrestricted employment authorization if the principal beneficiary has an approved EB-1, EB-2, or EB-3 immigrant visa petition while waiting for his/her immigrant visa to become available. Applicants must demonstrate compelling circumstances justifying an independent grant of employment authorization.	**Quantitative:** Total costs over 10-year period to applicants are: • $553.2 million for undiscounted costs. • $489.5 million at a 3% discounted rate. • $423.2 million at a 7% discounted rate. **Qualitative:** **Applicants** – • Provides ability for nonimmigrants who have been sponsored for LPR status to change jobs or employers when compelling circumstances arise; • Incentivizes such skilled nonimmigrant workers contributing to the economy to continue seeking LPR status; • Nonimmigrant principal workers who take advantage of the unrestricted EAD would abandon their current nonimmigrant status and not be able to adjust to LPR status in the United States. Consular processing imposes potentially significant costs, risk and uncertainty for individuals and their families as well. **Dependents** – • Allows them to enter labor market earlier and can contribute to household income.
90-Day Processing Time for Employment Authorization Applications	Eliminates regulatory requirement for 90-day adjudication timeframe and issuance of interim-EADs. Proposes an automatic extension of EADs for up to 180 days for certain workers filing renewal requests.	**Quantitative:** • None. **Qualitative:** **Applicants–** • Removing a regulatory timeframe and moving to one governed by processing goals could potentially lead to longer processing times whenever the agency is faced with higher than expected filing volumes. If such a situation were to occur, this could lead to potential delays in work employment start dates for first-time EAD applicants until approval is obtained. However, USCIS believes such scenarios would be rare and mitigated by the auto extension provision for renewal applications which would allow the movement of resources in such situations;

		• Providing the automatic continuing authorization for up to 180 days for certain renewal applicants could lead to less turnover costs for U.S. employers. **DHS/USCIS** – • Streamlines the application and card issuance processes; • Enhances the ability to ensure all national security verification checks are completed; • Reduces agency duplication efforts; • Reduces opportunities for fraud and better accommodates increased security measures.
Automatic Revocation With Respect to Approved Employment-Based Immigrant Visa Petitions	Revises regulations so that a petition may continue to remain valid, despite withdrawal by the employer or termination of the employer's business after 180 days or more of approval.	**Quantitative:** • None. **Qualitative:** • Beneficiary retains priority date, has porting ability under INA 204(j), or AC21 sections 104 (c) and (b), and may be eligible for the new unrestricted compelling circumstances EAD.
Period of Admission for Certain Nonimmigrant Classifications	Nonimmigrants in certain high-skilled, nonimmigrant classifications would be granted a grace period of up to 10 days before and after their validity period and a one-time grace period, upon cessation of employment, of up to 60 days or until the end of their authorized validity period, whichever is shorter.	**Quantitative:** • None. **Qualitative: Nonimmigrant Visa Holders –** • Assists the beneficiary in getting sufficiently settled such that they are immediately able to begin working upon the start of their petition validity period; • Provides time necessary to wrap up affairs to depart the country; • Would not have to enter into non-status period or take other actions to extend, change, or otherwise maintain lawful status after the period of authorized employment ends in order to wrap up affairs to respond to sudden or unexpected changes related to their employment, or to seek a change of status to different nonimmigrant classification.
Portability of H-1B Status H-1B Licensing Requirements Calculating the H-1B Admission Period Exemptions Due to Lengthy Adjudication Delays		**Quantitative:** • None.

Per Country Limitation Exemptions Employer Debarment and H-1B Whistleblower Provisions	Updates, improves, and clarifies DHS regulations consistent with policy guidance.	**Qualitative:** • Formalizes existing DHS policy in the regulations which will give the public access to existing policy in one location.
Exemptions to the H-1B Numerical Cap and Revised Definition of "Related and Affiliated Nonprofit Entity" in the ACWIA Fee Context	Codifies definition of institution of higher education and adds a broader definition of related or affiliated nonprofit entity. Also, revises the definition of related or affiliated nonprofit entity for purposes of the ACWIA fee to conform to the new proposed definition of the same term for H-1B numerical cap exemption.	**Quantitative:** • None. **Qualitative:** Expands the numbers of petitioners that are cap exempt and thus allows greater access by certain employers to H-1B workers.

As required by OMB Circular A-4, Table 2 also presents the prepared accounting statement showing the expenditures associated with the provisions of these regulations.[1] The main benefits of this proposed regulation are to improve processes for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers, provide greater stability and job flexibility for such workers, and increase transparency and consistency in the application of agency policy related to affected classifications.

Table 2: OMB A-4 Accounting Statement ($ millions, 2015)

Category	Primary Estimate	Minimum Estimate	Maximum Estimate	Source Citation (RIA, preamble, etc.)
BENEFITS				
Monetized Benefits	Not estimated	Not estimated	Not estimated	RIA
Annualized quantified, but unmonetized, benefits	0	0	0	RIA

[1] OMB Circular A-4 is available at www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf.

Unquantified Benefits	Improves processes for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers, provides greater stability and job flexibility for such workers, and increases transparency and consistency in the application of agency policy related to affected classifications.			RIA
COSTS				
Annualized monetized costs for 10 year period starting in 2016 to 2025 (discount rate in parenthesis)	(7%) $62.2	$60.7	$64.9	RIA
	(3%) $59.7	$57.9	$62.1	RIA
Annualized quantified, but unmonetized, costs	N/A	N/A	N/A	RIA
Qualitative (unquantified) costs	Potential turnover cost due to enhanced job mobility of beneficiaries of nonimmigrant and immigrant petitions.			RIA
TRANSFERS				
Annualized monetized transfers: "on budget"	N/A	0	0	RIA
From whom to whom?	N/A	N/A	N/A	N/A
Annualized monetized transfers: "off-budget"	N/A	0	0	RIA
From whom to whom?	N/A	N/A	N/A	N/A
Miscellaneous Analyses/Category	***Effects***			***Source Citation (RIA, preamble, etc.)***
Effects on state, local, and/or tribal governments	None			RIA
Effects on small businesses	No direct costs. Indirect effects only.			RIA
Effects on wages	None			None
Effects on growth	None			None

2. Background and Purpose of the Proposed Rule

Section 201 of the Immigration and Nationality Act (INA)[2] makes 140,000 employment-based immigrant visas available each fiscal year, plus any unused visas in the family-sponsored preferences from the previous fiscal year. Employment-based immigrant visas are divided into five preference categories. These categories include "priority workers" (first preference or EB-1, herein), "professionals with advanced degrees or aliens of exceptional ability" (second preference or EB-2), "skilled workers, professionals, and other workers" (third preference or EB-3), "certain special immigrants" such as religious workers (fourth preference or EB-4), and "immigrant investors" (fifth preference or EB-5). According to reports prepared by the DHS Office of Immigration Statistics, in Fiscal Year (FY) 2013 a total of 161,110 persons were granted LPR status under employment-based preference visa categories.[3, 4] Historically, the overwhelming majority of persons obtaining LPR status through employment tend to obtain such status while already living in the United States (Table 3). In FY 2013, that trend held with 140,009, or approximately 87 percent, adjusting status to that of a LPR via the employment-based preference categories while in the United States.[5] Similarly, larger shares of individuals obtaining employment-based LPR status do so through the first, second, or third preference classifications. Of these 161,110 individuals, 24 percent

[2] See INA Section 201(d).
[3] While the employment-based immigrant visa limit is 140,000 for each fiscal year, any unused visas in the family-sponsored preferences from the previous year can be applied for a total over the 140,000.
[4] DHS Office of Immigration Statistics, 2013 Yearbook of Immigration Statistics, Table 7 (August 2014), available at http://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf. Note: At the time of drafting the 2013 report was the most recent report available.
[5] Id.

are in the EB-1 category, 39 percent are in the EB-2 category, and 27 percent are in the EB-3 category.

Table 3: Persons Obtaining Legal Permanent Resident (LPR) Status in Employment-Based Preference Visas

Employment-Based Preference Classification	FY2009	FY2010	FY2011	FY2012	FY2013	Average
First Preference: Priority Workers						
Adjustments of status	39,420	39,070	14,955	37,799	37,283	**33,705**
New arrivals	1,504	1,985	1,646	1,517	1,695	**1,669**
Second Preference: Professional with Advanced Degrees or Aliens of Exceptional Ability						
Adjustments of status	44,336	52,388	65,140	49,414	60,956	**54,447**
New arrivals	1,216	1,558	1,691	1,545	2,070	**1,616**
Third Preference: Skilled Workers, Professionals, and Unskilled Workers						
Adjustments of status	33,525	34,433	29,757	31,208	34,937	**32,772**
New arrivals	6,873	5,329	7,459	8,021	8,695	**7,275**
Fourth Preference: Certain Special Immigrants						
Adjustments of status	8,869	9,384	5,306	6,644	5,602	**7,161**
New arrivals	4,603	1,716	1,395	1,222	1,329	**2,053**
Fifth Preference: Employment Creation (Investors)						
Adjustments of status	985	735	576	951	1,231	**896**
New arrivals	2,703	1,745	2,764	5,677	7,312	**4,040**
Total	**144,034**	**148,343**	**130,689**	**143,998**	**161,110**	**145,635**
Adjustments as a percentage of Total	**88.27%**	**91.69%**	**88.56%**	**87.51%**	**86.90%**	**88.56%**
New arrivals as a percentage of Total	**11.73%**	**8.31%**	**11.44%**	**12.49%**	**13.10%**	**11.44%**

Source: DHS Office of Immigration Statistics, Fiscal Years 2009 – 2013, Table 7: Persons Obtaining Legal Permanent Residence Status by Type and Class of Admission. Available at: http://www.dhs.gov/yearbook-immigration-statistics.

In many cases, the timeframe associated with seeking LPR status is lengthy, extending well beyond the period of stay allotted for many employment-based

nonimmigrant visa classifications. All categories of employment-based immigrant visas are generally issued in chronological order according to the petition's priority date until the annual numerical limit for the category is reached. A petition's priority date is set by the earlier of: (1) the date on which the petition was filed, or (2) the date that the labor certification application (if required) was accepted for processing by the Department of Labor (DOL). An immigrant visa cannot be issued until an applicant's priority date is reached. The priority date determines a beneficiary's place in the queue to apply for an immigrant visa through overseas consular processing or to apply to adjust status to lawful permanent residence while remaining in the United States. Per-country annual limitations also impact the availability of immigrant visas for each category. Some immigrant visa categories may be oversubscribed; in those cases the allocation of the number of visas in that category has been exceeded. In certain heavily oversubscribed categories, there may be a waiting period of several years before a priority date is reached. As of June 2015, the EB-1 visa category is current and has visas available for all beneficiaries in that category, regardless of nationality.[6] The EB-2 visa category is current and has available visas for all beneficiaries, except for individuals from China and India in that category.[7] The EB-3 visa category does not offer sufficient numbers of visas to satisfy the demand for immigrant visas for beneficiaries from any country.[8] Thus, the employment-based categories under which many high-skilled and other workers typically

[6] Department of State (DOS) Bureau of Consular Affairs, June 2015 Visa Bulletin (May 11, 2015), available at http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_June2015.pdf.
[7] Id.
[8] Id.

qualify to pursue LPR status are the very categories that have historically been oversubscribed.[9]

The goals of this proposed rule are to enhance U.S. employers' ability to retain and attract high-skilled and certain other workers to the United States,[10] and to increase flexibility and normal career progression for those workers pursuing LPR status in certain employment-based immigrant visa categories who are waiting for visas to become available. As such, this rulemaking will primarily impact workers intending to obtain a visa under the EB-2 and EB-3 preference categories. As noted above, this rule is intended to reduce the disincentives to pursue lawful permanent residence due to the potentially long wait for immigrant visas to become available for many high-skilled and other workers and their families. Also, this rule will encourage high-skilled and certain other workers that already have started the process for seeking LPR status to continue their efforts.

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[9] Wadhwa, Vivek, et al., "Intellectual Property, the Immigration Backlog, and a Reverse Brain-Drain – America's New Immigrant Entrepreneurs, Part III," Center for Globalization, Governance & Competitiveness (Aug. 2007), available at http://www.cggc.duke.edu/documents/IntellectualProperty_theImmigrationBacklog_andaReverseBrainDrain_003.pdf.

[10] See Hart, David, et al., "High-tech Immigrant Entrepreneurship in the United States," Small Business Administration Office of Advocacy (July 2009), available at: https://www.sba.gov/sites/default/files/rs349tot_0.pdf, which presents the economic contributions of high-skilled immigrants and the need to retain them. Among the study's conclusions is that 36 percent of immigrant-founded companies conduct R&D and 29 percent of immigrant-founded companies held patents, both higher percentages than native-founded companies (Page 60).
See Fairlie, Robert, "Open for Business How Immigrants are Driving Small Business Creation in the United States," The Partnership for a New American Economy (August, 2012), available at: http://www.renewoureconomy.org/sites/all/themes/pnae/openforbusiness.pdf.
See "Immigrant Small Business Owners a Significant and Growing Part of the Economy" (June 2012), available at: http://www.fiscalpolicy.org/immigrant-small-business-owners-FPI-20120614.pdf.
See Anderson, Stuart, "American Made 2.0 How Immigrant Entrepreneurs Continue to Contribute to the U.S. Economy, National Venture Capital Association," available at: http://nvca.org/research/stats-studies/.

a. AC21

Since the majority of those seeking LPR status are already in the United States, U.S. employers would be adversely impacted should their nonimmigrant workers be unable to obtain LPR status before their maximum period of authorized admission expires. With the intent of minimizing disruptions to U.S. employers and increasing the country's access to skilled workers, among other things, the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), and the amendments to AC21 resulting from the Twenty-First Century DOJ Appropriations Act, addressed the difficulties encountered by H-1B nonimmigrants whose 6-year maximum period of authorized admission would expire before they are able to obtain LPR status.

Prior to fiscal year 2001, beneficiaries of immigrant visa petitions from any single country could receive no more than 7.0 percent of the total number of immigrant visas within the family-sponsored and employment-based immigrant categories. AC21 permitted these "per-country limits" for employment-based immigrant visas to be excused for individual countries that are oversubscribed so long as immigrant visas remain available within the overall statutory limit and such visas would otherwise go unused.[11]

Even with the easing of the 7.0 percent per-country limits for employment-based immigrant visas, there is still a significant backlog of nonimmigrant high-skilled workers who, while they are the beneficiaries of approved employment-based immigrant visa petitions, cannot adjust status or be issued immigrant visas because of the restrictions of

[11] See section 104(a) of AC21; INA section 202(a)(5). The 7.0 percent per country limit remains applicable without exception to family-based immigrants. INA section 202(a)(2).

visa availability. To address this issue, AC21 exempts from the general 6-year limit on H-1B status those H-1B nonimmigrants who are the beneficiaries of approved immigrant visa petitions but who are unable to adjust their status in part because of the per-country limits on employment-based immigrant visas.[12] AC21 similarly exempts from the general 6-year limit those H-1B nonimmigrants who are being sponsored for permanent residence by an employer and are subject to lengthy adjudication or processing delays.[13]

In order to increase access to high-skilled workers, AC21 provides exemptions from the H-1B numerical cap for individuals who are employed at (or offered employment at) an institution of higher education or a related or affiliated nonprofit entity, or a nonprofit research or governmental research organization.[14] AC21 also clarifies when certain H-1B nonimmigrants would be counted against the numerical limitations.[15] Moreover, AC21 allows for portability (a change of employment) for an H-1B nonimmigrant upon the filing of an H-1B petition on the nonimmigrant's behalf in certain circumstances. Finally, AC21 provides job flexibility for applicants with long-delayed applications for adjustment of status.[16] DHS is now proposing to amend its regulations to implement these AC21 provisions.

b. ACWIA

The American Competitiveness Workforce Improvement Act (ACWIA) was enacted on October 21, 1998. Among other things, ACWIA was intended to address

[12] See section 104(c) of AC21.
[13] See sections 106(a) and (b) of AC21, as amended by section 11030A of the 21st Century DOJ Appropriations Act, Public Law 107-273(2002).
[14] See Section 103 of AC21 which amended the INA to add sections 214(g)(5)(A) and (B); 8 U.S.C. 1184(g)(5)(A) and (B).
[15] Id., amending the INA to add sections 214(g)(6) and (7); 8 U.S.C. 1184(g)(6) and (7).
[16] See Section 106(c) of AC21 which has been codified at INA 204(j), 8 U.S.C. 1154(j).

shortages of workers in the U.S. high-technology sector. ACWIA also included several measures intended to improve protections for U.S. and H-1B workers. Section 414 of ACWIA imposed a temporary fee on certain H-1B employers to fund, among other things, job training of U.S. workers and scholarships in the science, technology, engineering, and mathematics (STEM) fields. This ACWIA fee was eventually made permanent by subsequent laws. Currently, the ACWIA fee is $1,500 per petition, or $750 for petitions submitted by U.S. employers who employ 25 or fewer full-time employees.

DHS is proposing to update its regulations consistent with current practice as it relates to ACWIA whistleblower provisions, in order to assist H-1B beneficiaries who have faced retaliatory action from their employers for reporting violations of their employer's labor condition application obligations.

3. Proposed Amendments

As previously discussed, USCIS has implemented many of these provisions of the various statutes by means of DHS policy guidance, memoranda and a precedent decision. As such, DHS is proposing to incorporate and clarify existing practice within its regulations as it relates to the following provisions:

- H-1B Extensions for Individuals Affected by the Per Country Limitations
- H-1B Extensions for Individuals Affected by Lengthy Adjudication Delays
- Calculating the H-1B Admission Period
- Portability of H-1B Employment
- Employer Debarment and H-1B Whistleblower Provisions
- H-1B Licensing Requirements

- Application of the H-1B Numerical Cap to those Previously Counted
- Establishment of priority dates when a labor certification is not required by employment-based immigrant visa petitions
- Providing clarification that a priority date is lost when: USCIS revokes the approval of the employment-based immigrant visa petition because it was approved in error, fraud or willful misrepresentation; the DOL has revoked the labor certification accompanying the petition; or USCIS or DOS has invalidated the labor certification.

In addition to incorporating existing policy governing the employment-based immigrant and nonimmigrant processes into the regulations, DHS also proposes the following:

- Standardizing and streamlining portability under section 204(j) of the INA for beneficiaries of approved employment-based immigrant visa petitions whose applications for adjustment of status have been filed and are pending for 180 days or more.
- Adding regulations allowing principal beneficiaries, and their dependent spouses and children, to apply for temporary, unrestricted employment authorization if the principal beneficiary: has an approved employment-based immigrant visa petition; is an E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant; is unable to obtain lawful permanent resident status because of visa unavailability; and demonstrates compelling circumstances.

- Eliminating the 90-day processing time for employment authorization applications and eliminating the regulatory requirement to issue interim-EADs when the 90-day processing time is not met.
- Proposing an automatic extension of existing EADs for up to 180 days if the applicant is seeking renewal of his or her EAD based on the same employment category and is employment authorized incident to status beyond the expiration of the EAD or does not first require the adjudication of an underlying immigration application, petition, or request.
- Revising regulations so that an employment-based immigrant visa petition may remain valid for certain purposes despite withdrawal by the employer or termination of the employer's business.
- Revising regulations to permit certain high-skilled nonimmigrants a grace period of up to 10 days before and after their validity period and a one-time grace period, upon cessation of employment, of up to 60 days or until the end of their authorized validity period, whichever is shorter.
- Clarifying which H-1B nonimmigrant workers are exempt from the H-1B numerical cap based on employment at a U.S. institution of higher education or a related or affiliated nonprofit entity, or a nonprofit research or U.S. governmental research organization, and further clarifying the definition of related or affiliated nonprofit entity for purpose of the H-1B numerical cap exemption.

- Revising the definition of "affiliated or related nonprofit entity" for purpose of the ACWIA fee to conform to the new proposed definition for H-1B numerical cap exemption.

This analysis will focus on describing the likely impacts of these proposed provisions.

4. Impacts of Proposed Regulatory Changes

a. Establishing Priority Dates

Current DHS regulations do not address how a petitioner may establish the priority date for petitions filed under section 203(b) of the INA that do not require a labor certification.[17] DHS proposes to clarify that the priority date for such petitions will be the date the completed and signed petition (including all initial evidence and correct fee) is properly filed with USCIS.[18] The proposed amendment also removes the reference to petitions accompanied by evidence that the worker's occupation is a shortage occupation within the Department of Labor's Labor Market Information Pilot Program, as that program has expired.[19]

[17] These include aliens with extraordinary ability, outstanding professors and researchers, certain multinational executives and managers, members of professions holding advanced degrees or aliens of exceptional ability whose services are in the national interest, and alien entrepreneurs. See 8 U.S.C. 1153(b).

[18] This clarification is consistent with DHS regulations governing the filing of immigrant visa petitions and priority date establishment of other types of immigrant visa petitions. Moreover, DHS has posted how priority dates (with or without labor certifications) are determined in guidance material. See USCIS Visa Availability and Priority Dates: http://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-and-priority-dates.

[19] DOL's Labor Market Information Pilot Program ended on March 31, 1993. Available at: http://wdr.doleta.gov/directives/corr_doc.cfm?docn=25.

USCIS does not anticipate any quantitative or qualitative costs associated with this proposed regulatory amendment. DHS expects that the proposed amendment would clarify DHS's interpretation of priority dates for the affected population. DHS anticipates that both petitioners and the beneficiaries may experience qualitative benefits by removing ambiguity regarding priority dates for employment-based immigrant visa petitions when a labor certification is not required.

b. Priority Date Retention and Automatic Revocation of Petitions

Current DHS regulations at 8 CFR 204.5(e) allow individuals who are classified as priority workers, members of professions holding advanced degrees or aliens of exceptional ability, or skilled workers, professionals, and other workers, to keep the priority date associated with the originally approved petition for any subsequently filed petition for any classification under the above mentioned groups for which the worker may qualify.[20]

The proposed amendments in section 204.5 clarify this regulation so that the priority date of the approved employment-based petitions in the aforementioned categories will not be retained if the approval of a petition is revoked under the following circumstances only: when the petition's approval resulted from fraud or willful misrepresentation of a material fact; the Department of Labor (DOL) has revoked the labor certification accompanying the petition; USCIS or the Department of State (DOS) has invalidated the labor certification; or the petition was approved in error. If a

[20] Sections 203(b)(1), (2), and (3) of the Immigration and Nationality Act define these groups.

petition's approval is revoked under these circumstances the individual loses his or her priority date.

Additionally, current DHS regulations at 8 CFR 205.1(a)(3)(iii)(C) and (D) require that the approval of an employment-based immigrant visa petition be automatically revoked when USCIS receives a written notice of withdrawal filed by the petitioning employer or when an employer's business is terminated. DHS proposes to cease the practice of automatically revoking the approved employment-based immigrant visa petitions in these circumstances, except when such withdrawal or business termination occurs earlier than 180 days from the date on which the employment-based immigrant visa petition was approved. Under the proposed amendments, the beneficiary of a petition whose approval is automatically revoked under these circumstances would be allowed to retain the original priority date, thus maintaining their place in line for an immigrant visa provided the individual obtains a new sponsoring employer. Additionally, if newly proposed amendments permitting unrestricted employment authorization in certain cases are finalized, amending the DHS automatic revocation regulations in this way would also maintain the eligibility of these beneficiaries to apply for unrestricted employment authorization based on compelling circumstances if they otherwise qualify.

DHS is not able to obtain information on how many times USCIS issued automatic revocation decisions in the past for any reason, including due to employer withdrawals or business termination. Currently, beneficiaries of such revoked petitions may have to depart the United States, and if still intending to immigrate to the United States based on their employment, would have to find new employers to petition on their behalf, in which case their priority dates would change to later dates. Thus, the proposed

amendments would result in tangible benefits, both in retaining the original priority date and in allowing these beneficiaries to obtain new employment in cases where their original sponsoring employers withdraw their sponsorship or if the business terminates. DHS expects that if the proposed amendments to the automatic revocation regulations were finalized, there would be both qualitative benefits to the beneficiary and financial benefits in the form of income, though we are unable to quantify the scope of such monetary benefits.

c. Employment-Based Visa Petition Portability

Currently, the INA authorizes DHS to provide job flexibility for applicants with long delayed applications for adjustment of status under section 204(j) of the INA. Under this section, a Form I-485 application (Application to Register Permanent Residence or Adjust Status) that has been filed and remains pending for 180 days or more remains valid with respect to a new job if the individual changes jobs or employers, as long as the new job is in the same or similar occupational classification as the job for which the original employment-based immigrant visa petition was filed.

One reason for lengthy adjudication of applications for adjustment of status involves a situation in which a priority date retrogresses – situations where the beneficiary's priority date shows visa availability on one month's Visa Bulletin, published by the Department of State (DOS), and in subsequent months the cutoff date is moved back. This visa retrogression occurs when more people apply for a visa in a particular category than there are visas available. This occurs most often when the annual limit has been reached earlier than expected. As such, the Form I-485 applications in these cases are often pending for 180 days or longer, and it may take years

for a priority date to become current again. When the priority date again becomes current, the Form I-485 application can then be adjudicated by USCIS.

Generally, for long-pending employment-based Form I-485 applications, USCIS sends a Request for Evidence (RFE) to the applicant approximately 3 months before the anticipated visa availability date. This RFE usually requires an applicant to submit an employment letter on the letterhead of the petitioning employer which confirms that the job on which the visa petition is based is still available to the applicant. The letter is also required to state the salary to be paid to the employee. If the applicant has "ported" to another employer in the same or a similar occupational classification, a new job offer letter must be provided to USCIS in order for an applicant to be eligible for adjustment of status pursuant to section 204(j). In instances where the Form I-485 application has been pending for 180 days or more and the original petitioning employer has withdrawn its petition, USCIS will issue a Notice of Intent to Deny (NOID) to the applicant for adjustment of status if he or she has not already submitted evidence of a new qualifying job offer. Such a NOID would request evidence from the applicant demonstrating that he or she has "ported" to a new employer in the same or a similar occupational classification.

DHS proposes to revise 8 CFR part 245 to clarify the requirement for the issuance of employment authorization documents to Haitian nationals under the Haitian Refugee Immigrant Fairness Act of 1998, and to implement the provisions of AC21 that relate to the adjustment of status evidentiary requirements for beneficiaries of employment-based immigrant visa petitions, including job portability under section 204(j) of the INA. The latter amendments are intended to formalize current agency policy articulated in memoranda and a precedent decision that provides guidance on portability provisions for

individuals who have an approved employment-based immigrant visa petition and a Form I-485 application that has been pending for 180 days or more. Codifying in regulation current DHS policy memoranda and guidance would provide stability and job flexibility to the beneficiaries of approved employment-based immigrant visa petitions during their transition to LPR status, thereby furthering the statutory goal of enabling U.S. businesses to hire and retain high-skilled and other workers. AC21 allows for approved employment-based immigrant visa petitions to become "portable," such that a qualifying petition would remain valid for a beneficiary under a new job offer in the same or a similar occupational classification. This portability provision allows individuals to continue the often lengthy permanent residence process without being tied to one position with one employer. In addition, DHS proposes to standardize the information needed to establish a porting relationship through the introduction of Supplement J to the USCIS Form I-485. This new supplemental form will replace the submission of an updated employment letter. Applicants will either use Supplement J to confirm that the job offered to the applicant in the employment-based immigrant visa petition, which is the basis of the Form I-485 application, remains available, or the applicant will use Supplement J to request job portability under section 204(j).

i. Population Impacted by this Proposed Amendment

The implementation of this portability provision may result in some increased demand for eligible workers with Form I-485 applications pending for 180 days or longer to port to a new employer. Even though DHS currently permits porting in this way, the promulgation of rulemaking may increase awareness that such porting is possible and add clarity to the process. However, DHS does not anticipate a significant shift with the

addition of this provision; it would only standardize and streamline a process that is currently in place through policy memoranda and submission of an employment letter. As of May 2015, the total number of applicants that had an approved employment-based immigrant visa petition and a pending Form I-485 application for 180 days or more was 29,166. The majority of Form I-485 applications that have been pending for 180 days or more were found in the Advanced Degree or Exceptional Ability Aliens and Skilled and Professional Workers visa categories (Table 4). DHS does not currently collect data on the number of applicants who submit employment letters to confirm employment or port to another employer, nor does it collect data on how many RFEs or NOIDs are sent by adjudicators for these employment letters. DHS welcomes comments on data sources that may contain this information.

Table 4: Applicants with an Approved Form I-140 and a Pending Form I-485 Application for 180 Days or More

Employment-Based Preference Category	Form I-485 Applications Pending for 180 Days or More
Advanced Degree or Alien of Exceptional Ability	14,220
Skilled and Professional Workers	12,386
National Interest Waiver	797
Multinational Executive or Manager	763
Other Worker	739
Outstanding Professor or Researcher	216
Total Blank	45
Grand Total	**29,166**

Source: USCIS, Office of Performance and Quality, as of May 2, 2015.

ii. Costs

Currently, when reviewing 204(j) portability employment and requesting additional evidence from the applicant, USCIS funds the associated administrative and operational costs through the filing fees for the Form I-485 application. The proposal to add Supplement J does not entail the collection of additional fees from the applicant or his/her U.S. employer at this time. USCIS currently reviews employment letters when adjudicating the Form I-485 application and would review and process Supplement J submissions instead.

While we present a sensitivity analysis for the annual costs of Supplement J in this analysis, DHS believes that the submission of Supplement J would not impose any additional burdens on USCIS or employers because applicants/employers are already required to submit employment letters in response to an RFE or NOID. In contrast, DHS believes that the Supplement J would provide more transparency and standardize information collection and thus ease the reporting burden for both beneficiaries and U.S. employers. Supplement J would be used any time an applicant ports to the same or a similar occupational classification or when an applicant confirms that the job offered in the I-140 petition remains a valid job offer.

While historical data is unavailable for the numbers of individuals who have actually ported to a new employer, DHS analyzed the total number of cases in which the beneficiary has an approved employment-based immigrant visa petition and a Form I-485 application that has been pending for 180 days or more as a potential maximum number of people (29,166 from Table 4) who are able to port. A percentage range under various demand scenarios of this maximum number shows how many of these applicants may

port and thus use Supplement J. Costs due to this provision relate only to the opportunity costs of time to petitioners associated with filing the newly proposed Supplement J. DHS already routinely processes RFEs and employment letters and these agency costs are accounted for in the collection fees for Form I-485. DHS does not have information to estimate opportunity costs of time to petitioners associated with the current practice of responding to an RFE or NOID with an employment letter to establish that the new job is in a same or similar occupational classification. In light of this lack of information, DHS presents the costs related to Supplement J as an additional cost even though there is an existing process, which we are assuming has an opportunity cost of zero. Thus, DHS acknowledges that these costs are likely overstated for this proposed provision.

Table 5 shows the total opportunity costs of time depending on the percentage of individuals who port by type of petitioner. For example, if 75 percent of eligible individuals port to the same or a similar occupational classification (as defined in Supplement J), this would result in 21,875 porting applicants with a total opportunity cost of $960,947, $2,049,422, or $3,509,217 to petitioners. The three opportunity cost totals are dependent on whether a human resources specialist, an in-house lawyer, or an outsourced lawyer fills out Supplement J.[21] The relevant wage is currently $30.09 per hour for a human resources specialist and $64.17 per hour for a lawyer. [22,23,24] In order to

[21] DHS limited its analysis to human resources specialists, in-house lawyers, and outsourced lawyers to present potential costs. However, we understand that not all entities have these departments or occupations and therefore, recognize equivalent occupations may also prepare these petitions.
[22] Bureau of Labor Statistics, U.S. Department of Labor, "Occupational Employment Statistics, May 2014, Human Resources Specialist": http://www.bls.gov/oes/current/oes131071.htm.
[23] Bureau of Labor Statistics, U.S. Department of Labor, "Occupational Employment Statistics, May 2014, Lawyers": http://www.bls.gov/oes/current/oes231011.htm.
[24] Bureau of Labor Statistics, U.S. Department of Labor, "Occupational Employment Statistics, May 2014," [July 20, 2015] [www.bls.gov/oes/].

anticipate the full opportunity cost to petitioners, we multiplied the average hourly U.S. wage rate for human resource specialists and lawyers by 1.46 to account for the full cost of employee benefits, such as paid leave, insurance, and retirement for a total of $43.93 per hour for a human resources specialist and $93.69 per hour for an in-house lawyer.[25] DHS recognizes that a firm may choose to outsource the preparation of Supplement J, and therefore, has presented two wage rates for lawyers. To determine the full opportunity costs if a firm hired an outsourced lawyer, we multiplied the average hourly U.S. wage rate for lawyers ($64.17) by 2.5 for a total of $160.43 to roughly approximate an hourly billing rate for an outsourced attorney.[26] The time burden estimate was developed by USCIS with an average of 60 minutes to complete Supplement J.

Table 5: Sensitivity Analysis of Annual Costs of Filing Supplement J by Petition Preparer Type

Percentage of eligible beneficiaries changing jobs	Annual Number of Supplement J Forms Filed by Petitioners	Annual Cost for Human Resources Specialist	Annual Cost for In-house Lawyers	Annual Cost for Firms that hire Outsourced Lawyers
100%	29,166	$1,281,262	$2,732,563	$4,678,956
90%	26,249	$1,153,136	$2,459,306	$4,211,060
75%	21,875	$960,947	$2,049,422	$3,509,217
50%	14,583	$640,631	$1,366,281	$2,339,478
25%	7,292	$320,316	$683,141	$1,169,739
10%	2,917	$128,126	$273,256	$467,896

[25] Bureau of Labor Statistics, U.S. Department of Labor, "Employer Costs for Employee Compensation," [August 1, 2015] [http://www.bls.gov/news.release/pdf/ecec.pdf].

[26] The DHS, ICE "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney based on information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule, See Page G-4. [September 1, 2015] [http://www.regulations.gov/#!documentDetail;D=ICEB-2006-0004-0922]

Source: USCIS analysis.
Notes: Calculations for Total Costs are as follows:
Annual Cost for Human Resources Specialist = (29,166*Percentage Porting per year) * ($43.93*1 hr)
Annual Cost for In-house Lawyers = (29,166*Percentage Porting per year) * ($93.69*1 hr)
Annual Cost for Firms that hire Outsourced Lawyers = (29,166*Percentage Porting per year) * ($160.43*1 hr)

Based on our calculation, the range in costs to preparers of Supplement J would be from $128,126 to $1,281,262, if human resources specialists complete the form. The costs range from $273,256 to $2,732,563 if Supplement J is prepared by in-house lawyers. The costs based on outsourced lawyers completing the form would range from $467,896 to $4,678,956. The opportunity cost of time per petition is $43.93 if a human resources specialist prepares Supplement J, compared to $93.69 if an in-house lawyer prepares Supplement J, or $160.43 if an outsourced lawyer prepares Supplement J. To reiterate, while DHS presented the costs for Supplement J as total new costs, we do not have information on how long it takes to complete the current employment letter to conduct a side by side comparison. Anecdotal input suggests that this process would be roughly equivalent, as petitioners currently have to submit a letter that requires similar information to that requested in Supplement J.

Additionally, USCIS recognizes that this provision would encourage applicants who have had an approved employment-based immigrant visa petition, and a Form I-485 that is pending 180 days or more, to change employers through the proposed simplified and standardized process. USCIS acknowledges the potential for an increased awareness of porting as a result of this proposed regulation. While beneficial to the applicant, this could potentially result in higher turnover for some employers, along with additional costs that may be incurred due to employee replacement.

iii. Benefits

Several benefits would come from the implementation and use of Supplement J in the porting process. While the clarity and ease of portability could result in additional costs for some employers, other employers would benefit from an improved ability to retain current employees or gain new employees due to this proposed rule. Employees who have been waiting several years for their priority date to become current would also benefit by the clarity and ease of portability, as it would improve their ability to change jobs within their current employer or change employers without being tied to their original petitioning employer for extended periods of time. The option to change jobs or port to another employer allows high-skilled employees the flexibility to advance in their careers and progress in their occupations while keeping their position in the queue for LPR status. This proposed rule would further help facilitate this process.

A standardized form would not only streamline the process, but would also reduce the ambiguity that currently exists when adjudicators issue an RFE or NOID to obtain employment confirmation letters. Time would be saved by less back and forth between adjudicators, applicants, and petitioners. A standardized form and form instructions would clarify the exact information that should be submitted to the adjudicating officer. In addition, the use of Supplement J would allow USCIS to collect and maintain uniform data and track the movement of workers in the United States. Since we currently do not have information on how many RFEs or NOIDs involve requests for employment letters, or the numbers of workers who port, the Supplement J form would facilitate this data collection and subsequent analysis.

Supplement J also provides clarification on what is considered a "same or similar occupational classification" by including guidance in the form instructions. DHS proposes to consider various factors in determining whether occupations are in the same or similar occupational classification(s) including: similarity of job duties and responsibilities, similarity of educational and training experience or other special skill requirements, and similarity of offered wage or salary. The form instructions also provide several Department of Labor resources to help aid both applicants and adjudicators in assessing whether two occupations are in the same or similar occupational classification(s). The inclusion of this definition and resources further reduces confusion and provides a clear and transparent process.

d. Temporary Employment Authorization Based on Compelling Circumstances

An approved employment-based immigrant visa petition does not confer any status on the beneficiary or his or her dependent spouse or children. Approval of such a petition simply makes the beneficiary, and his or her dependents, eligible to apply for LPR status on the basis of having a permanent job offer. Additionally, unless otherwise permitted by virtue of his or her nonimmigrant status, dependent spouses and children are generally not permitted to apply for employment authorization.[27] Also, current DHS regulations permit principal beneficiaries and their dependent spouses and children to apply for unrestricted employment authorization based on a pending Form I-485. An Application for Employment Authorization (Form I-765) may be filed concurrently with Form I-485, or separately afterwards. DHS recently permitted, by regulation, certain H-4

[27] For example, spouses of E-3 and L-1 nonimmigrants are permitted to work currently.

nonimmigrant spouses of H-1B nonimmigrants to apply for employment authorization if the H-1B nonimmigrant spouse: (1) is the beneficiary of an approved employment-based immigrant visa petition, or (2) is extending status under AC21 because a petitioning employer has started the employment-based permanent residence process on his or her behalf.[28]

DHS is proposing to extend benefits to an additional population limited to high-skilled workers and their dependent spouses and children who also endure long periods of time waiting for an employment-based immigrant visa before they may apply for lawful permanent residence. Specifically, DHS is proposing to extend eligibility for employment authorization to certain high-skilled nonimmigrants who are the principal beneficiaries of approved Form I-140 employment-based immigrant visa petitions and are able to demonstrate compelling circumstances that warrant a discretionary determination by USCIS that an unrestricted one-year period of employment authorization is appropriate. In addition, to be eligible under this provision, the principal beneficiary of the approved immigrant visa petition must: (1) be in lawful E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status at the time of filing; and (2) remain unable to file for LPR status or apply for an immigrant visa because the principal beneficiary does not have a priority date that is earlier than the date published in the current Department of State (DOS) Visa Bulletin. The proposed rule further provides that dependent spouses and children of qualifying principal beneficiaries may also be eligible to apply for employment authorization, but only where the principal beneficiary of an approved employment-based

[28] See "Employment Authorization for Certain H-4 Dependent Spouses; Final rule," 80 FR 10284 (25 Feb. 2015).

immigrant visa petition has applied for, and been granted, employment authorization under the terms described in the proposed rule. Additionally, the proposed regulatory change allows dependent spouses and children to file applications for employment authorization concurrently with the principal beneficiary of the approved employment-based immigrant petition; however, dependent spouses and children may only receive a grant of employment authorization after the principal beneficiary is so authorized.

DHS proposes to permit these newly eligible individuals to apply for employment authorization by filing Form I-765. DHS proposes that EADs granted under this proposal have a validity period of one year. Individuals who receive work authorization under this provision may apply for renewal only under the following circumstances: 1) the individual continues to demonstrate compelling circumstances; or 2) there is one year or less between the principal beneficiary's priority date and the date upon which the principal may be eligible to receive an immigrant visa or adjustment of status according to the current Department of State (DOS) Visa Bulletin. DHS has provided a non-exhaustive list of examples of compelling circumstances in the preamble of the rule. Importantly, despite any circumstances that may be deemed compelling, eligibility for unrestricted employment authorization is not permanent. Individuals are not eligible for a renewal of work authorization, under this provision if his or her priority date is more than one year beyond the date that immigrant visas were authorized for issuance for the principal beneficiary's preference category and country of chargeability according to the Department of State Visa Bulletin current at the time the application for employment authorization, or successor form, is filed.

In all cases, DHS and DOS will still require a valid immigrant visa petition in order to establish eligibility for the immigrant visa or adjustment of status. Correspondingly, as previously discussed, DHS is proposing to no longer automatically revoke approved employment-based visa petitions on the basis of petitioner withdrawal or business termination if such withdrawal or termination occurs 180 days or more after petition approval. Principal beneficiaries in those cases would similarly be eligible to apply for unrestricted employment authorization under this proposal if they face compelling circumstances. However, the grant of employment authorization does not remove the obligation that principal beneficiaries find another U.S. employer to submit an immigrant petition on their behalf in order to be eligible to obtain permanent residence on the basis of an offer of permanent employment. In such cases, the beneficiary of the new employment-based immigrant visa petition would generally continue to be afforded the priority date assigned to the originally approved employment-based immigrant visa petition.

While principal beneficiaries in the eligible nonimmigrant classifications—E-3, H-1B, H-1B1, O-1, or L-1—are currently eligible to work in the United States for the employer that sponsored their nonimmigrant status, those who pursue unrestricted employment authorization under this proposal will not be deemed to be maintaining valid nonimmigrant status for purposes of extension of stay, change of status to another nonimmigrant classification, or adjustment of status to that of lawful permanent resident. As a result, individuals seeking employment again in a valid nonimmigrant status would be required to leave the country upon approval of a new nonimmigrant visa petition to consular process and seek re-admission to the United States. Similarly, those seeking

lawful permanent residence would be required to apply for and obtain an immigrant visa from a DOS consulate abroad and then apply for admission as a lawful permanent resident at a U.S. port of entry. DHS acknowledges that consular processing imposes potential costs for individuals and their families. Financial costs associated with consular processing could include traveling abroad, lodging, and food for individuals and their families during the visa processing period. In addition, consular processing presents uncertainty with respect to timing for individuals and their families as they must sit for an interview with the DOS and subsequently present themselves to U.S. Customs and Border Protection (CBP) at a port of entry. DHS did not quantify these costs due to the wide variances in individual circumstances that contribute to the costs in this process.

i. Population Impacted by this Proposed Amendment

DHS estimates of the volume of the population eligible for employment authorization under this proposed amendment consists of two parts: 1) an immediate, first-year estimate consisting of the current backlog of principal beneficiaries, and their dependent spouses and children, who are present in the United States in a specified lawful nonimmigrant status, have an approved employment-based immigrant visa petition, and are currently waiting for an immigrant visa to become available; and 2) an annual estimate based on future demand to immigrate under employment-based immigrant visa preference categories from eligible nonimmigrant visa classifications. However, the volume estimate for the proposed rule will not include the population of H-4 dependent spouses of H-1B nonimmigrants who are principal beneficiaries of approved employment-based immigrant visa petitions as this proportion of the population was

estimated in a recently promulgated DHS rule.[29] Likewise, the proposed rule would require eligibility based on whether the applicant can demonstrate circumstances that are compelling enough to warrant a discretionary grant of employment authorization. This analysis is unable to model for or predict the number of individuals who would find themselves in a compelling situation, and of that number, then predict their eligibility along those discretionary lines. Thus, the eligible population estimates presented below provide the maximum number of individuals that DHS estimates may be eligible to apply, as the Department is not able to predict the smaller numbers that are expected to meet the compelling circumstances criteria.

DHS has estimated the number of persons in the specified, eligible nonimmigrant visa classifications with approved employment-based immigrant visa petitions who are currently waiting for a visa to become available in certain employment-based preference categories. In this analysis, the estimated number of persons waiting for the availability of an immigrant visa is referred to as the "backlog," and includes those with an approved employment-based immigrant visa petition as of June 2015.[30] The EB-1 visa category is not oversubscribed and is considered to be "current." Therefore, DHS believes that the majority of principal beneficiaries, and their dependent spouses and children, applying for employment authorization under this rule will be seeking to obtain employment-based visas under the EB-2 or EB-3 preference categories.

[29] "Employment Authorization for Certain H-4 Dependent Spouses; Final rule," 80 FR 10284 (25 Feb. 2015).
[30] Source for backlog estimate: USCIS Office of Policy & Strategy analysis of data obtained by DHS Office of Immigration Statistics. Analysis based on CLAIMS3 data captured in approved Immigrant Petition for Alien Worker (Form I–140).

ii. Backlog estimate

An individual with an approved employment-based immigrant visa petition who is in lawful nonimmigrant status, with certain exceptions, may apply for adjustment of status when his or her priority date is earlier than the date indicated in the Department of State Visa Bulletin published monthly. The data DHS analyzed to estimate the backlog were refined to include only individuals with an approved employment-based immigrant visa petition from the countries and employment-based preference categories indicated in Table 6. For example, individuals from China in the EB-2 preference category with an approved employment-based immigrant visa petition and a priority date of June 2, 2013 or later are included in the data set we analyzed.[31]

Table 6: Priority Dates from June 2015 Visa Bulletin Published by the Department of State, Bureau of Consular Affairs

	All other countries	China, Mainland	India	Mexico	Philippines
Employment 2nd Preference	C	6/1/2013	10/1/2008	C	C
Employment 3rd Preference - excluding other worker	2/15/2015	9/1/2011	1/22/2004	2/15/2015	1/1/2005
Employment 3rd Preference - other worker	2/15/2015	1/1/2006	1/22/2004	2/15/2015	1/1/2005

Source: DOS Bureau of Consular Affairs, June 2015 Visa Bulletin available at http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_June2015.pdf
Notes: C denotes the visa category is current and that there are a sufficient number of visas available for all qualified applicants. Visas are available only for applicants whose priority date is *earlier* than the cut-off date shown.

[31] If this rule is finalized, DHS will update this analysis with the most recent Visa Bulletin at the time of the statistical analysis.

The backlog estimate of the number of principal beneficiaries who are present in the United States in a specified lawful nonimmigrant status and have an approved employment-based immigrant visa petition is shown in Table 7, while Table 8 shows the backlog estimate including dependent spouses and children. DHS estimated the employment-based immigrant visa petition backlog using data from the USCIS Central Index System Consolidated Operational Repository (CISCOR) database on individuals with an approved employment-based immigrant visa petition in the EB-2, EB-3, and EB-3 Other, Unskilled Workers preference categories. Additionally, DHS limited the analysis to only those in the backlog in the eligible nonimmigrant visa classifications of E-3, H-1B, H-1B1, O-1, and L-1, for the period January 22, 2004 through June 1, 2015. Finally, the data set was further refined to include only individuals with priority dates that were on or after the cutoff dates identified in the DOS June 2015 Visa Bulletin indicating when a visa is available.

The estimate of principal beneficiaries currently in the backlog as of June 2015 is shown in Table 7.

Table 7: Employment-Based Waiting List for Principal Beneficiaries of an Approved Form I-140 who are Present in the U.S., as of June 2015

	Employment-based Preference			
Country of Birth	**EB-2**	**EB-3**	**EB-3, Other Workers[32]**	**Total**

[32] Whether by choice or by error, an employer may request an employment-based immigrant visa classification under INA section 203(b) on Form I-140 as an EB-3, Other Worker for an individual who was in a high-skilled nonimmigrant status for a variety of reasons. One reason that an employer might seek approval of an employment-based immigrant visa for a high-skilled nonimmigrant under INA section 203(b) in the EB-3, Other Worker category is if immigrant visa numbers are more readily available for the EB-3, Other Workers preference category than in the EB-3 Professional or Skilled worker preference

China	3,804	2,591	4	6,399
India	97,853	52,014	53	149,920
Mexico	-	-	-	-
Philippines	-	9,257	79	9,336
Other Countries	-	3	-	3
Total	**101,657**	**63,865**	**136**	**165,658**
Source: USCIS analysis.				

Those in H-1B and H-1B1 nonimmigrant status comprise approximately 97 percent of those counted in the backlog estimate that would be eligible under this rule.[33] Those in L-1 nonimmigrant status represent the next largest share of the backlog at 2.9 percent. The estimate of principal beneficiaries in the backlog provides the basis for approximating the backlog estimate when including dependent spouses and children who will be impacted by this rule. In order to estimate the dependent spouses and children that accompany principal beneficiaries of approved employment-based immigrant visa petitions, DHS examined detailed statistics for those obtaining LPR status over the period FY 2009-2013. DHS calculated multipliers based on the proportion of principal beneficiaries versus dependent spouses and children under each preference category, and used those 5-year averages to estimate the upper-bound estimate of principal beneficiaries and their dependent spouses and children who are represented in the backlog and would likely be eligible to apply for employment authorization under this proposal. Table 8 presents the estimate of the backlog when accounting for dependent spouses and children.

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category. Another reason that an employer may petition for a high-skilled nonimmigrant as an EB-3, Other Worker is because the beneficiary's qualifications as a high-skilled nonimmigrant was based on experience, rather than his or her education. Finally, an employer who petitioned for a high-skilled nonimmigrant worker may have mistakenly selected the EB-3, Other Worker category when completing the Form I-140.

[33] USCIS analysis of approved employment-based immigrant petitions with the "beneficiary's current nonimmigrant status" field completed. Approximately 10.5 percent of approved petitions had missing information for that field, which represents the error rate.

Table 8: Employment-based Waiting List for Principal Beneficiaries with an Approved Form I-140 who are Present in the United States, Including Dependent Spouses and Children, as of June 2015				
	Employment-based Preference			
Country of Birth	**EB-2**	**EB-3**	**EB-3, Other Workers[34]**	**Total**
China	7,606	5,071	7	12,684
India	195,652	101,822	104	297,578
Mexico	-	-	-	-
Philippines	-	18,121	156	18,277
Other Countries	-	5	-	5
Total	**203,258**	**125,019**	**267**	**328,544**
Source: USCIS analysis.				

DHS recently published a final rule, "Employment Authorization for Certain H-4 Dependent Spouses," (H-4 rule) allowing certain H-4 spouses to apply for an EAD. In that rule, DHS estimated the current backlog to be 124,600 dependent spouses. Since the estimates established as part of the "H-4 rule" cover part of the population who would be potentially eligible for unrestricted employment authorization under this proposed rule, those individual dependent spouses are excluded from the estimated volumes presented herein for this proposed rule to avoid the potential of double-counting the effects of this proposed amendment. Accordingly, DHS has reduced its estimate of dependent spouses and children in the backlog who would be impacted by this proposed amendment by 124,600 applicants accordingly. As such, DHS estimates 165,658 principals and 38,286 dependent spouses and children in the backlog, for a total maximum estimate of 203,944

[34] Id.

individuals who could be eligible to apply for employment authorization under this proposed rule in the first year.[35]

iii. Annual Estimate

In addition to the backlog population, future flows of principal beneficiaries who meet the proposed criteria would also be eligible to apply for unrestricted employment authorization. Dependent spouses and children of such principal beneficiaries would also be eligible contingent on the grant of an unrestricted EAD to the principal beneficiary. Unlike the backlog estimate, which is limited to individuals seeking to adjust under the EB-2 and EB-3 preference categories, annual estimates are based on approvals of employment-based immigrant visa petitions across all employment classifications. DHS cannot predict future visa allocation limits, and, therefore, it would be inappropriate to limit annual estimates according to current visa allocations.

Table 9: Form I-140 Approvals by Nonimmigrant Visa Classification, Fiscal Years 2010 – 2014

Fiscal Year	E-3	H-1B*	L-1	O-1	Total
2010	56	39,264	7,713	1,368	48,401
2011	87	57,211	8,356	1,057	66,711
2012	96	47,841	9,344	1,285	58,566
2013	119	52,495	9,859	1,385	63,858
2014	100	41,137	10,396	1,445	53,078
Totals	**458**	**237,948**	**45,668**	**6,540**	**290,614**
5-year Average	**92**	**47,590**	**9,134**	**1,308**	**58,123**

Source: USCIS analysis.

* The H-1B population estimate includes the H-1B1 population.

[35] Calculation of total numbers in the backlog: 328,544 – 124,600 (estimate of H-4 spouses already authorized to apply for EAD) = 203,944. Calculation of dependent spouses and children excluding H-4 spouses already eligible: (1) 328,544 (principals & dependent spouses and children) – 165,658 (principals only) = 162,886 dependent spouses and children; (2) 162,886 (baseline estimate of spouses & children in the backlog) – 124,600 (spouses already eligible under the H-4 rule) = 38,286 spouses and children eligible under this NPRM.

The basis for the annual volume estimate is the 5-year historical average of the number of approved employment-based immigrant visa petitions for beneficiaries in the E-3, H-1B, H-1B1, O-1, and L-1 nonimmigrant visa classifications at the time of petition filing. Because the proposed amendment allowing eligibility for unrestricted employment authorization would limit eligibility to those who are physically present in the United States, DHS estimated the proportion of principal beneficiaries that we believe could be impacted according to historical adjustment percentages. As shown previously in Table 3, the historical average percentage of those that obtain LPR status under employment-based classifications and through adjustment of status is 88.56 percent. Therefore, DHS estimates the average annual volume of employment-based immigrant visa petition approvals is 51,474 for principal beneficiaries present in the United States.[36, 37] In addition, to account for dependent spouses and children, DHS estimated an overall multiplier of 2.1 based on the average historical ratio of principal versus dependent recipients of LPR status. DHS therefore estimates the baseline annual estimate as 108,095 principal beneficiaries and their spouses and children.[38] Accordingly, DHS estimates 56,569 as the average annual volume of dependent spouses and children of principal beneficiaries present in the United States with an approved employment-based immigrant visa petition.[39] Similar to the final maximum estimate for the backlog population, the estimated 55,000 H-4 spouses already accounted for under a recently

[36] Calculation: 58,123 * 88.56% = 51,473.73, rounded to 51,474 principals present in the United States.
[37] To estimate the number of individuals who are physically present in the United States DHS uses the percentage of principals that adjust status to LPR over the EB-1, EB-2, and EB-3 preference categories as a proxy for those that could be physically present in the United States.
[38] Calculation: 51,474 * 2.1 = 108,095.4, rounded to 108,095 principals and dependent spouses and children present in the United States.
[39] Calculation: 108,095 – 51,474 = 56,621 dependent spouses and children present in the United States.

promulgated DHS regulation are excluded in this analysis from the annual estimates of dependents.[40] Therefore, DHS estimates 51,474 as the maximum annual number of principal beneficiaries who could be impacted by this proposed rule and 1,621 as the maximum annual number of dependent spouses and children who could be impacted by this proposed rule.[41] As a result, DHS estimates 53,095 as the total maximum annual number of principal beneficiaries and dependent spouses and children who could be impacted by this proposed rule.[42]

In summary, DHS estimates a total backlog of 165,658 individual principal beneficiaries with an approved employment-based immigrant visa petition who are present in the United States in a specified lawful nonimmigrant status (see Table 7 above). After applying appropriate multipliers based on a review of historical LPR data, and removing the expected number of H-4 spouses that are already covered under a recently promulgated DHS regulation, DHS estimates there could be as many as 38,286 dependent spouses and children in the backlog.[43] Thus, DHS estimates there could be a total of as many as 203,944 individuals in the backlog who could be eligible to apply for unrestricted employment authorization. DHS has based its annual volume estimates on the number of employment-based immigrant visa petitions approved annually for the relevant nonimmigrant classifications. DHS assumed that the average proportion of

[40] "Employment Authorization for Certain H-4 Dependent Spouses; Final rule," 80 FR 10284 (25 Feb. 2015).
[41] Calculation: 56,621 (dependent family members) – 55,000 (H-4 spouses already eligible) = 1,621 newly eligible dependent family members.
[42] Calculation: 51,474 + 1,621 = 53,095 principal beneficiaries and dependent spouses and children.
[43] While the H-4 population was excluded from this economic analysis based on the estimates presented in a recently promulgated DHS regulation, DHS was not able to remove spouses of E-3 and L-1 nonimmigrants who are currently eligible to apply for employment authorization due to data limitations. Therefore, DHS acknowledges that the estimate of eligible dependent spouses and children under the proposed rule is further overstated.

persons obtaining LPR status via adjustment of status under employment-based classifications represents a reasonable proxy of those we can expect would be physically present in the United States. Therefore, DHS estimates as many as 51,474 principal beneficiaries could be eligible to apply for unrestricted employment authorization under this proposed rule annually. After applying an appropriate multiplier and removing the H-4 spouses already eligible under a recently promulgated rule, DHS estimates that as many as 1,621 dependent spouses and children could be eligible to apply for unrestricted employment authorization annually. Therefore, on an annual basis, DHS estimates as many as 53,095 individuals could be eligible under this proposed rule. Again, DHS is not able to estimate the proportion of these maximum estimates that would seek to apply considering the limitations of the proposed employment authorization or that would satisfy the compelling circumstances criterion. As a result, for this reason as well as others discussed below, the volume estimates presented are likely overstated.

In light of these limitations and for ease of analysis, DHS assumes that all individuals in the backlog would apply for employment authorization in the first year of implementation if this rule is finalized. Therefore, DHS estimates that this rule could result in a maximum initial estimate of 257,039 individuals who may be eligible to apply for unrestricted employment authorization under this proposal in the first year of implementation, and an annual flow of as many as 53,095 who may be eligible in subsequent years. Table 10 shows the estimated number of eligible principal beneficiaries and dependent spouses and children for the first year of implementation and subsequent years. However, Table 10 does not reflect the anticipated filing volumes for EAD applications that USCIS may receive in future years. DHS is proposing that

employment authorization granted under this proposed rule be valid for a period of one year. DHS is not able to predict with any degree of accuracy future requests for renewal of existing employment authorization, as those numbers are dependent upon the individual's ability to demonstrate continued compelling circumstances, the individual's priority date, and the movement of cutoff dates in the DOS Visa Bulletin.[44] Consequently, DHS presents estimates that do not factor in applications for renewal of one year EAD applications are filed, while 100 percent of those eligible file initial one year EAD applications in years 2-10.

Table 10: Summary of Annual Estimates of Individuals Eligible to Apply for Initial Unrestricted Employment Authorization under the Proposed Rule

	Principal Beneficiaries		**Dependent Spouses & Children**		**Total**
Fiscal Year	**Backlog**	**Annual Flow**	**Backlog**	**Annual Flow**	
Year 1	165,658	51,474	38,286	1,621	257,039
Years 2 – 10, annually	---	51,474	---	1,621	53,095
10-year Total	**165,658**	**514,740**	**38,286**	**16,210**	**734,894**

Source: USCIS analysis.
Note: Estimates for dependent spouses and children do not include certain H-4 spouses who are eligible to apply for work authorization under a recently promulgated DHS regulation (H-4 rule). See "Employment Authorization for Certain H-4 Dependent Spouses; Final rule," 80 FR 10284 (25 Feb. 2015).

DHS anticipates that use of this proposal, if finalized, would be limited for various reasons. First, DHS believes that the other changes proposed in this rule to enhance flexibility for employers and nonimmigrant workers, if finalized, would decrease the need for the proposal discussed in this section. Second, nonimmigrant workers will have significant incentive to choose other options, as the proposal discussed in this

[44] Cutoff dates published in the DOS Visa Bulletin indicating when a visa becomes available are moved forward or retrogressed (moved back in time) as determined by DOS according to the number of visas made available according to employment preference and country.

section would require the worker to relinquish his or her nonimmigrant status, thus restricting his or her ability to change nonimmigrant status or adjust status to that of a lawful permanent resident. In some instances, accepting the employment authorization under this proposal may actually require the worker to consular process his or her visa abroad (instead of adjusting status domestically) and seek admission to the United States again at a port of entry. Finally, DHS does not anticipate that a significant number of nonimmigrant workers with approved EB-1, EB-2 or EB-3 petitions will be able to demonstrate compelling circumstances justifying an independent grant of employment authorization. Employment authorization based on compelling circumstances, for example, will not be available to a nonimmigrant worker solely because his or her statutory maximum time period for nonimmigrant status is approaching or has been reached. Likewise, employment authorization generally would not be available to a nonimmigrant if the tendered compelling circumstance is within his or her control.

Therefore, DHS considers these volume estimates as maximum estimates that overstate the actual numbers of individuals who would apply for unrestricted employment authorization under this proposed rule. While DHS is not able to estimate a percentage or number of the maximum pool of possible applicants that might seek such employment authorization, DHS does not expect that a significant percentage of principal beneficiaries will take advantage of the proposed amendment to obtain unrestricted employment authorization, and, by extension, DHS does not expect a significant percentage of dependents will apply for employment authorization.

Moreover, DHS is not able to determine the age of dependent children at this time, and therefore unable to predict the number of dependent children who are eligible to

work under the Fair Labor Standards Act (FLSA).[45] While USCIS does not have a policy restricting eligibility for requesting employment authorization based on age, the FLSA restricts employment eligibility depending on age and type of job involved. Generally, 14 years is the minimum age for employment, and the FLSA limits the number of hours worked by children under the age of 16. Dependent children above the age of 16 would be eligible to obtain an unrestricted employment authorization. Only some dependent children above the age of 14 would be eligible to work. Without knowing the age of this dependent population, DHS estimates are likely to be further overestimated.

iv. Costs

A. Filer Costs

The final rule will permit certain beneficiaries of approved employment-based immigrant visa petitions and their dependent spouses and children to apply for unrestricted employment authorization to work in the United States. The costs of this proposed provision are derived from filing fees and the opportunity costs of time associated with filing Form I-765, Application for Employment Authorization. Table 11 shows the estimated population and costs of filing for unrestricted employment authorization in the United States as proposed in this rule.

Table 11: Estimated Population and Costs of Filing for Unrestricted Employment Authorization in the United States	
I-140 Approvals - Principals and Dependent Spouses and Children, including Backlog in Fiscal Year 1	257,039
Principals Only, including Backlog	217,132
Dependent Spouses and Children Only, including	39,907

[45] U.S. Department of Labor, Youth and Labor Age Requirements, available at: http://www.dol.gov/dol/topic/youthlabor/agerequirements.htm.

Backlog	
I-140 Approvals - Principals and Dependent Spouses and Children, in Fiscal Years 2 through 10	53,095
Principals Only, Annual Flow	51,474
Dependent Spouses and Children Only, Annual Flow	1,621
Form I-765 Filing Fee ($380)	$380.00
Passport Photos (2 required) ($20)	$20.00
Passport Photos Opportunity Cost of Time	
Principals (0.5 hours * $33.16 per hour)	$16.58
Dependent Spouses and Children (0.5 hours * $10.57 per hour)	$5.29
Form I-765 Filing Opportunity Cost of Time	
Principals (3.42 hours * $33.16 per hour)	$113.41
Dependent Spouses and Children (3.42 hours * $10.57 per hour)	$36.15
Biometrics Processing Fee - ($85)	$85.00
Biometrics Processing Opportunity Cost of Time	
Principals (1.17 hours * $33.16 per hour)	$38.80
Dependent Spouses and Children (1.17 hours * $10.57 per hour)	$12.37
Biometrics Processing Travel Costs ($28.75)	$28.75
Biometrics Processing Opportunity Cost of Time for Travel	
Principals (2.5 hours * $33.16 per hour)	$82.90
Dependent Spouses and Children (2.5 hours * $10.57 per hour)	$26.43
Total Cost Per Filer	
Principals	**$765.43**
Dependent Spouses and Children	**$593.98**
Source: USCIS analysis.	

The current filing fee for Form I-765 is $380.00. The fee is set at a level to recover the processing costs to DHS. In addition, applicants for employment authorization are required to submit two passport-sized photos with their application. The estimated cost of two passport-sized photos is $20.00 per application based on

Department of State estimates.[46] DHS estimates the time burden of completing Form I-765 is 3.42 hours.[47]

The Bureau of Labor Statistics (BLS) within the Department of Labor periodically reports the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. Using the most recent BLS report, DHS calculated a benefits-to-wage multiplier of 1.46 to estimate the full opportunity cost to petitioners, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement.[48] However, due to data limitations, DHS assumes that civilian workers who are granted unrestricted employment authorization will be widely dispersed throughout the various occupational groups and industry sectors of the U.S. economy. For this proposed rule, DHS calculates the average total rate of compensation for principals with an approved employment-based immigrant visa petition who are present in the United States in a specified lawful nonimmigrant status as $33.16 per hour, where the average base wage is $22.71 per hour worked and average benefits are $10.45 per hour.[49, 50]

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[46] The Department of State estimates that the average cost of one passport-sized photo is $10.00 according to the Paperwork Reduction Act (PRA) Supporting Statement under OMB control number 1450-0004. The PRA Supporting Statement can be found at Question 13 on Reginfo.gov at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201102-1405-001.

[47] Source: Paperwork Reduction Act (PRA) Supporting Statement for Form I-765 (OMB control number 1615-0040). The PRA Supporting Statement can be found at Question 13 on Reginfo.gov at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201502-1615-004.

[48] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour) / (Wages and Salaries per hour). See Economic News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (June 2015), available at http://www.bls.gov/news.release/pdf/ecec.pdf (viewed July 7, 2015).

[49] The mean average hourly wage across all occupations is reported to be $22.71. See National Occupational Employment and Wage Estimates United States. May 2014. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics program. Available at http://www.bls.gov/oes/2014/may/oes_nat.htm.

While we used a base wage rate $22.71 per hour for this analysis (which is the average hourly wage across all occupations), we recognize that most EB-2 and EB-3 classifications are workers in specialty occupations or with advanced degrees. We considered using the BLS earnings by degree attainment as a better measure of wages for workers in specialty occupations or with advanced degrees. However, these wages are not provided by an average per hour wage by educational attainment; BLS provides educational attainment data as median weekly earnings. In the final rule, we may consider using the median wage of $27.53 per hour (before adjusting upward by 1.46 to account for benefits) for workers with at least a bachelor's degree to more accurately capture these wages.[51] We are seeking comments on this approach, or requesting alternative sources of data that may exist on average wages per hour by educational attainment.

DHS recognizes that many dependent spouses and children do not currently participate in the U.S. labor market, and as a result, are not represented in national average wage calculations. Even though many individuals do not participate in the labor force, we cannot assume their time has no value simply because they do not currently earn a wage. In order to provide a reasonable proxy of time valuation, DHS has to assume some value of time above zero and therefore uses an hourly rate of $10.57 to estimate the

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[50] The calculation of the hourly wage for principals with an approved Form I-140: $22.71 per hour X 1.46 = $33.16 per hour.

[51] Using the median weekly earnings by degree attainment (available here: http://www.bls.gov/emp/ep_chart_001.htm) provided by the Current Population Survey at the BLS, we can perform further calculations to arrive at an hourly wage estimate. Assuming a standard work hours per year of 2080 hours, BLS' wage estimate would be $27.53/hour for workers with at least a bachelor's degree (before the addition of benefits for total compensation). Adjusting $27.53 upwards by 1.46 to account for employee benefits yields a median hourly rate of compensation of $40.19 for workers with at least a bachelor's degree.

opportunity cost of time for dependent spouses and children of principals with an approved employment-based immigrant visa petition. The value of $10.57 per hour is consistent with other DHS rulemakings when estimating time burden costs for those who are not authorized to work.[52] The value of $10.57 per hour represents the federal minimum wage with an upward adjustment for benefits.[53]

Based on these estimated wage rates, principal beneficiaries with an approved employment-based immigrant visa petition who are in a specified lawful nonimmigrant status classification and who decide to file a Form I-765 application will incur an estimated opportunity cost of time of $113.41 per applicant.[54] At the same time, the opportunity cost of time for dependent spouses and children of these principal beneficiaries is estimated to be $36.15 per applicant.[55]

USCIS requires applicants who file Form I-765 to submit biometric information (fingerprints, photograph, and signature) by attending a biometrics services appointment at a designated USCIS Application Support Center (ASC). The biometrics processing fee is $85.00 per applicant. In addition to the $85 biometrics services fee, the applicant would incur the following costs to comply with the biometrics submission requirement: the opportunity and mileage costs of traveling to an ASC, and the opportunity cost of

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[52] U.S. Department of Labor, Wage and Hour Division. The minimum wage in effect as of July 24, 2009. Available at http://www.dol.gov/dol/topic/wages/minimumwage.htm. The calculation for total employer costs for employee compensation for dependent spouses and children of principals with an approved Form I-140: $7.25 per hour X 1.46 = $10.57 per hour.

[53] See "Employment Authorization for Certain H-4 Dependent Spouses; Final rule," 80 FR 10284 (25 Feb. 2015); and "Provisional and Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule," 78 FR 536, 572 (3 Jan. 2013).

[54] Calculation for opportunity cost of time for principals: $33.16 per hour × 3.42 hours (net form completion time) = $113.41.

[55] Calculation for opportunity cost of time for dependent spouses and children of principals: $10.57 per hour × 3.42 hours (net form completion time) = $36.15.

submitting his or her biometrics. While travel times and distances vary, DHS estimates that an applicant's average roundtrip distance to an ASC is 50 miles, and that the average time for that trip is 2.5 hours.[56] DHS estimates that an applicant waits an average of 1.17 hours for service and to have his or her biometrics collected at an ASC, adding up to a total biometrics-related time burden of 3.67 hours.[57]

In addition to the opportunity cost of providing biometrics, applicants would experience travel costs related to biometrics collection. The cost of such travel would equal $28.75 per trip, based on the 50-mile roundtrip distance to an ASC and the General Services Administration's (GSA) travel rate of $0.575 per mile.[58] DHS assumes that each applicant would travel independently to an ASC to submit his or her biometrics, meaning that this rule would impose a time cost on each of these applicants.

Based on the estimated wage rates for principals and their dependent spouses and children, principals with an approved employment-based immigrant visa petition who submit the required biometrics information will incur an estimated opportunity cost of time for biometrics processing and travel of $121.70 per applicant.[59] At the same time, the opportunity cost of time for dependent spouses and children for biometrics processing

[56] See "Employment Authorization for Certain H-4 Dependent Spouses; Final rule," 80 FR 10284 (25 Feb. 2015); and "Provisional and Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule," 78 FR 536, 572 (3 Jan. 2013).
[57] Source biometric time burden estimate: Paperwork Reduction Act (PRA) Supporting Statement for Form I-765 (OMB control number 1615-0040). The PRA Supporting Statement can be found at Question 13 on Reginfo.gov at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201502-1615-004.
[58] See U.S. General Services Administration website for Privately Owned Vehicle (POV) Mileage Reimbursement Rates, http://www.gsa.gov/portal/content/100715 (accessed August 8, 2015).
[59] Calculation for opportunity cost of time for principals: ($33.16 per hour × 1.17 hours processing) + ($33.16 per hour × 2.5 hours travel) = $121.70.

and travel is estimated to be $38.79 per applicant.[60] In sum, DHS estimates that the requirement to submit biometrics would cost a total of $235.45 for principals and $152.54 for dependent spouses and children, which includes the biometrics processing fee, opportunity cost of time for biometrics processing and travel, and travel costs of biometrics collection.[61]

The total cost to file Form I-765 for those requesting unrestricted work authorization includes the fee to file Form I-765, the cost to submit two passport-style photos, the biometrics processing fee, travel costs associated with biometrics processing, and the opportunity cost of time for filing Form I-765, obtaining passport photos, biometrics processing, and travel for biometrics processing. DHS estimates that the total cost per application for principals will be $765.43 and that the total cost per application for dependent spouses and children of principals will be $593.98.

Table 12 presents the combined total estimated costs associated with filing for an unrestricted EAD for principal beneficiaries who have an approved employment-based immigrant visa petition and their dependent spouses and children. The total estimated costs are presented non-discounted, at a 3 percent discount rate, and at a 7 percent discount rate.

Table 12: Total Estimated Costs of Filing for Unrestricted Employment Authorization for Principal Beneficiaries with an Approved Form I-140 and Their Dependent Spouses and Children

[60] Calculation for opportunity cost of time for dependent spouses and children of principals: ($10.57 per hour × 1.17 hours processing) + ($10.57 per hour × 2.5 hours travel) = $38.79.
[61] Calculation: For principals - $85 fee + $121.70 opportunity cost of time + $28.75 travel costs = $235.45. For dependent spouses and children - $85 fee + $38.79 opportunity cost of time + $28.75 travel costs = $152.54.

	Year 1	Years 2 through 10	Total Over 10-year Period
Non-discounted Estimated Cost	$189,904,114	$363,265,253	$553,169,367
3% Discount rate	$184,372,927	$305,115,731	$489,488,658
7% Discount rate	$177,480,481	$245,769,210	$423,249,691
Source: USCIS analysis.			

Table 13 shows the total estimated costs to only principal beneficiaries who have an approved employment-based immigrant visa petition. The estimated total costs are presented non-discounted, at a 3 percent discount rate, and at a 7 percent discount rate.

Table 13: Total Estimated Costs of Filing for Unrestricted Employment Authorization for Principal Beneficiaries with an Approved Form I-140 Only

	Year 1	Years 2 through 10	Total Over 10-year Period
Non-discounted Estimated Cost	$166,200,302	$354,599,733	$520,800,035
3% Discount rate	$161,359,517	$297,837,340	$459,196,857
7% Discount rate	$155,327,385	$239,906,502	$395,233,887
Source: USCIS analysis.			

Additionally, Table 14 shows the total estimated costs for only the dependent spouses and dependent children of principals who have an approved employment-based immigrant visa petition. The estimated total costs again are presented non-discounted, at a 3 percent discount rate, and at a 7 percent discount rate.

Table 14: Total Estimated Costs of Filing for Unrestricted Employment

Authorization for Dependent Spouses and Children of Principal Beneficiaries with an Approved Form I-140 Only			
	Year 1	**Years 2 through 10**	**Total Over 10-year Period**
Undiscounted Estimated Cost	$23,703,812	$8,665,520	$32,369,332
3% Discount rate	$23,013,410	$7,278,391	$30,291,801
7% Discount rate	$22,153,096	$5,862,708	$28,015,803
Source: USCIS analysis.			

In the first year of implementation, DHS estimates the total maximum cost to the total number of principal beneficiaries who have an approved employment-based immigrant visa petition and their dependent spouses and children who may be eligible to file for an initial employment authorization will be as much as $189,904,114 (undiscounted), while the total aggregate estimated costs over years 2 through 10 will be $363,265,253 (see Table 12 above). DHS estimates the total 10-year undiscounted cost is $553,169,367. In addition, the 10-year discounted cost of this rule to filers of initial employment authorizations is $489,488,658 at the 3 percent discount rate and $423,249,691 at the 7 percent discount rate. Importantly, in future years the applicant pool of dependent spouses and children of those who have approved employment-based immigrant visa petitions filing for employment authorization will include both those initially eligible and those who will seek to renew their EADs as they continue to wait for visas to become available. In this analysis, DHS is not able to estimate the number of renewals since the renewals volume is dependent upon visa availability, which differs based on the preference category and the country of nationality. The total cost per application for principals who have an approved employment-based immigrant visa

petition and their dependent spouses and children will still be $765.43 and $593.98, respectively, to renew their employment authorization.

While DHS estimates the costs incurred by individuals through filing fees and opportunity costs of time associated with filing Form I-765, there are other costs to applicants that DHS cannot estimate quantitatively. First, DHS cannot estimate the cost of exercising the option to file for an unrestricted EAD, which can result in the loss of an individual's nonimmigrant status for those in status that permit employment with only the petitioning employer. In such a case, an individual may no longer be able to file to adjust to LPR status in the United States. If the individual is unable to adjust to LPR status in the United States, he or she would be required to travel abroad and consular process his or her immigrant visa and seek admission again to the United States at a port of entry. For the individual, consular processing introduces uncertainty and increases the costs and financial burden associated with obtaining LPR status, including the cost of traveling to a U.S. consulate abroad in the applicant's home country and the uncertainty of the final determination of eligibility for an immigrant visa and seeking admission back into the United States.

B. Government Costs

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including administrative costs and services provided without charge to certain applicants and petitioners. See INA section 286(m), 8 U.S.C. 1356(m). DHS has established the fee for the adjudication of Form I–765, Application for Employment Authorization, in

accordance with this requirement. As such, there are no additional costs to the Federal Government resulting from this rule.

v. Labor Market Impacts

Under current DHS regulations, once visas are determined to be immediately available, beneficiaries of employment-based immigrant visa petitions and their dependent spouses and children who are eligible may apply for adjustment of status to that of a LPR. As previously discussed, the overwhelming majority of beneficiaries of employment-based immigrant visa petitions obtain LPR status by adjusting status while in the United States. Current DHS regulations permit such beneficiaries, including principal and dependent spouses and children, to request unrestricted employment authorization upon filing an adjustment of status application. This rule, if finalized, may reduce the wait time during which such beneficiaries who are facing compelling circumstances may become eligible to obtain unrestricted employment authorization. Additionally, in certain cases, if a beneficiary takes advantage of the proposed amendment, he or she could lose his or her nonimmigrant status and thus lose the ability to adjust to LPR status in the United States. The economic analysis discusses the expected impacts of the proposed rule from the perspective of the same population of individuals that intend to become LPRs, but, in such cases, pursuit of the proposed unrestricted employment authorization could affect the method in which individuals are eligible to be granted LPR status. Therefore, it is possible that only a limited number of nonimmigrants would seek to apply for unrestricted employment authorization under this proposed provision.

As discussed previously, DHS estimates that if this rule is finalized there could be as many as 257,039 individuals who could be eligible to apply for unrestricted employment authorization in the first year. Of the 257,039 potentially eligible individuals, DHS estimates that 217,132 of the maximum numbers eligible to apply for unrestricted employment authorization would be principal beneficiaries of the employment-based immigrant visa petition, and 39,907 of those eligible would be dependent spouses and children. In subsequent years, DHS preliminary estimates indicate that as many as 53,095 individuals annually could be eligible to apply for unrestricted employment authorization, with 51,474 being principal beneficiaries of the employment-based immigrant visa petition, and 1,621 being dependent spouses and children. The principal beneficiaries of approved employment-based immigrant petitions that would be eligible under the proposed rule currently are in a nonimmigrant status that provides employment authorization. In addition, spouses of E-3 and L-1 nonimmigrants are currently eligible to apply for EADs. However, DHS did not remove those spouses of E-3 and L-1 nonimmigrants from the estimate of dependent spouses and children who could be eligible to apply for employment authorization under this rule. Only those dependent spouses and children who choose to apply for employment authorization on the basis of a grant to the principal worker and who are not currently eligible to apply for employment authorization could be considered "new" labor market participants. For purposes of this analysis, DHS is basing its analysis of "new" labor market participants on an overestimate of the number of affected spouses and children who would initially be eligible, despite the fact that this overstates actual labor market impact.

As of 2013, there were an estimated 155,922,000 people in the U.S. civilian labor force.[62] Consequently, the estimated 39,907 "new" available workers in the first year (the year with the largest number of eligible applicants) represent approximately 0.02 percent of the overall U.S. civilian labor force.[63] In general, recent literature on labor market impacts of immigration show net long-term benefits and a potential for negative impacts in the short term for some U.S. workers.[64] In fact, most federal government reports and academic literature show that immigration generally produces a modest increase in the wages of native-born workers in the long-run, and that any negative economic effects—in the form of wages—are largely felt by other immigrant workers with similar education and skill levels.[65] While there is some debate in the economic literature, lower-skilled and lower-educated workers may experience declining wages as an immediate, short run response to a labor supply shock before recovering or exceeding pre-labor supply shock levels.[66] A recent Congressional Budget Office (CBO) report presents a similar finding, though with a focus on all workers in the U.S. and not just

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[62] See News Release, United States Department of Labor, Bureau of Labor Statistics, Local Area Unemployment Statistics, Regional and State Unemployment –2013 Annual Averages, Table 1 "Employment status of the civilian non-institutional population 16 years of age and over by region, division, and state, 2013-14 annual averages" (Mar. 4, 2015), available at http://www.bls.gov/news.release/archives/srgune_03042015.pdf.

[63] Calculation: 39,907 / 155,922,000 X 100 = 0.0255%.

[64] "The Economic Impact of S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act," June 18, 2013, available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/44346-Immigration.pdf; Ottaviano, G. & Peri, G., "Rethinking the Effects of Immigration on Wages" (March 2010), available at http://economics.ucdavis.edu/people/gperi/site/papers/rethinking-the-effect-of-immigration-on-wages.

[65] Id.

[66] See Boras, George J., The Wage Impact of the *Marielitos*: A Reprisal (2015), available at http://www.hks.harvard.edu/fs/gborjas/publications/working%20papers/Mariel2015.pdf. Borjas' findings focus specifically on low-skilled and low-educated Cuban immigrants who arrived in the United States during the 1980 Mariel boatlift. As many as 125,000 Cubans immigrated to the United States by the end of 1980 with as many as half settling in the Miami area, thereby increasing the number of workers by about 8 percent and increasing the number of high school dropouts by almost 20 percent.

native U.S. workers.[67] The CBO report finds that wages for low-skilled workers would initially decline in response to a labor supply shock, but would steadily increase towards, and eventually exceed, the pre-labor supply shock wage level. Additionally, an increased number of high- and low-skilled workers in the labor force are expected to increase employment and economic growth (i.e., increase gross domestic product [GDP]) as well as increase labor productivity as workers gain more flexibility in the labor market and are able to pursue additional training and activities to improve skills.[68]

From a labor market perspective, it is important to note that there are not a fixed number of jobs in the United States. Basic principles of labor market economics recognize that individuals not only fill jobs, but also stimulate the economy and create demand for jobs through increased consumption of goods and services. To that end, increased household income for the family could lead to increased spending throughout the economy, greater investments in real estate, the potential for job creation, and increased tax revenue.

Finally, DHS assumes that the proposed rule may negatively impact some U.S. employers who sponsor workers for employment-based immigrant visas, primarily

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[67] See "The Economic Impact of S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act," June 18, 2013, available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/44346-Immigration.pdf. According to the report, wages for the entire labor force are projected to be 0.1 percent lower through 2023, but then increase through 2033 to where wages are about 0.5 percent higher than the initial wage level in 2013. After disaggregating relative wages according to skill level, CBO estimated that wages of those in the lowest and highest quintile (low-skilled and high-skilled, respectively) would decline by 0.3 percent; the wages of those in the middle three quintiles are expected to increase by 0.5 percent. The CBO report emphasizes the overall level of wages is also affected by other factors such as the capital-to-labor ratio and total factor productivity.

[68] Treyz, Frederick R., C. Stottlemyer, and R. Motamedi. (2013) "Key Components of Immigration Reform: An Analysis of the Economic Effects of Creating a Pathway to Legal Status, Expanding High-skilled Visas, & Reforming Lesser-skilled Visas." Regional Economic Models, Inc. (REMI). Available at http://www.remi.com/immigration-report.

through higher rates of employee turnover due to accepting offers of employment with other employers. Employers incur costs by filing an employment-based immigrant visa petition on an employee's behalf when seeking to sponsor that employee for lawful permanent residence. However, employers may view the costs associated with sponsoring an employee as a tangible investment in the company. At the same time, if the principal beneficiary of the immigrant visa petition pursues unrestricted employment authorization under this rule and changes employers, the petitioning employer could incur some turnover costs.[69] Consequently, increased rates of employee turnover may occur as certain nonimmigrant workers pursue unrestricted employment authorization.

vi. Benefits

The finalized rule would grant a newly created benefit of permitting certain nonimmigrant workers who face compelling circumstances, as well as their dependents, to apply for unrestricted employment authorization. The ability to obtain these employment authorizations increases incentives to nonimmigrant workers who have begun the process of becoming LPRs and find themselves under difficult circumstances to remain in and contribute to the U.S. economy as they complete the LPR process. The lengthy timeframes and lack of flexibility in the process of becoming an LPR can be discouraging and drive many high-skilled nonimmigrant workers to abandon their pursuit of permanent status. The unrestricted employment authorizations are an attractive benefit

[69] Center for American Progress, "There Are Significant Business Costs to Replacing Employees," Boushey, Heather and Glynn, Sarah Jane, November 16, 2012. Available at: http://www.americanprogress.org/issues/labor/report/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/. According to the study, the cost to the employer of replacing an existing employee equals approximately 20 percent of the employee's annual salary. Turnover costs include direct costs, such as severance, temporary staffing, training and job posting as well as indirect costs such as lost productivity, reduced morale and lost institutional knowledge.

in retaining these high-skilled workers as they wait to become LPRs, especially when those workers are faced with compelling circumstances that might otherwise cause them to abandon their efforts. These EADs allow such high-skilled workers to continue to progress in their careers by allowing flexibility in accepting offers of employment, with their current employer or with a new employer, while maintaining their position in the queue for visa availability. Retaining these high-skilled nonimmigrant workers who intend to become LPRs is important when considering the contributions of these individuals to the U.S. economy, including advances in entrepreneurial, research and development endeavors. Moreover, the ability to pursue new career choices does not eliminate the requirement for such workers to have a new employer petition on his or her behalf for permanent employment.

e. Elimination of 90-day Processing Time Requirement for Employment Authorization Applications and Elimination of Interim EADs; Proposing an Automatic Extension of EADs for Certain Renewal Applicants

Currently, DHS regulations at 8 CFR 274.13(d) requires USCIS to adjudicate most Forms I-765 within 90-days of receipt of a properly filed application.[70] The 90-day requirement does not generally make allowances for processing underlying benefit requests that the application may be associated with or any necessary biometric processing for background and identity verification. However, if USCIS requires additional documentation from the applicant and sends a RFE, the 90-day timeframe is paused until this additional documentation is received by USCIS. Once all necessary information is received, the 90-day timeframe continues from where it left off and a

[70] A properly filed application is one that is complete, signed, and accompanied by the correct fee.

decision is sent to the applicant. In those instances where a decision is not made within 90 days of receipt by USCIS of a properly filed EAD application, current regulations require the issuance of an interim employment authorization document. An interim employment authorization document may not exceed 240 days and is subject to the conditions noted on the document. Once adjudication of Form I-765 is complete, USCIS approves or denies the application. If approved, an EAD (Form I-766) is mailed according to the mailing preferences indicated by the applicant. If Form I-765 is denied, USCIS sends a written notice to the applicant explaining the basis for denial.

i. Purpose of the Proposed Regulation

This proposed regulation amends section 274a.13 (Application for employment authorization) by updating paragraph (d). The revisions to this paragraph would remove the 90-day timeframe for processing Forms I-765, as well as remove the provision requiring issuance of interim employment authorization documents. DHS is proposing to eliminate the 90-day timeframe due to longer average processing times of fraud and national security screening. DHS is also proposing to eliminate interim EAD requests that are available per the current regulations as it is an outdated practice that no longer reflects the operational realities of the Department. Additionally, DHS is proposing to automatically extend the validity period of an applicant's current EAD for up to 180 days for certain employment authorization categories where: (1) the applicant has timely filed a renewal application based on the same employment authorization category as that indicated on the expiring EAD (or the renewal application is for an individual approved for Temporary Protected Status (TPS) whose EAD was issued pursuant to 8 CFR 274a.12(c)(19)); and (2) the applicant continues to be employment authorized incident to

status beyond the expiration of the EAD or is seeking to renew employment authorization in a category in which eligibility for such renewal is not contingent on a USCIS adjudication of a separate, underlying application, petition, or request. This automatic renewal of the EAD would ensure the continuation of evidence of work authorization for these individuals.

Despite proposing to remove the current regulatory 90-day adjudication timeframe, as mentioned in the preamble of this rule, USCIS remains committed to meeting the 90-day processing goal established for Form I-765 adjudications, and will maintain the established customer service protocols in place for individuals whose applications are pending for 75 days or more to submit requests for expedited processing.

ii. Population Impacted

These proposed amendments would impact all individuals who file an Application for Employment Authorization (Form I-765) with USCIS, except for pending initial Forms I-765 filed by asylum applicants, which will continue to be governed by 8 CFR 274a.13(a)(2). Table 15 shows the receipts received for Form I-765 (Application for Employment Authorization) for fiscal years 2010 to 2014.

Table 15: Receipts of Employment Authorization Applications (Forms I-765)

Year	Total Receipts*	Total Initial Receipts	Total Renewal Receipts	Total Renewal Receipts Not Requiring an Underlying Benefit to be Adjudicated
2014	1,406,220	1,019,424	369,624	275,337
2013	1,809,008	1,244,525	545,538	482,975
2012	1,317,226	767,843	532,757	473,970
2011	1,057,222	691,020	353,623	296,146
2010	1,177,104	696,061	466,933	410,318

Average	1,353,356	883,775	453,695	387,749

Source: USCIS, Office of Performance and Quality
*Total receipts do not include replacement receipts or those receipts not listed. Therefore, initial and renewal receipts will not equal to total receipts.

In FY 2014, USCIS received 1,406,220 Forms I-765. A majority of these (1,019,424) were initial receipts of applications requesting employment authorization for the first time. The number of receipts of applications requesting the renewal of employment authorization was smaller (369,624). This trend is similar across all five years. The average number of total receipts over the five year span was 1,353,356, with an average of 883,775 of the applicants filing initial Forms I-765 and an average of 453,695 of applicants requesting renewal of their existing work authorization.

Table 15 also shows the total numbers of renewals that do not require an underlying application or benefit to be adjudicated for each of the fiscal years. In FY 2014, there were 275,337 renewal receipts received that did not require an underlying application, petition, or request to be adjudicated. This group of renewal receipts (i.e., those that do not require an underlying application, petition, or request to be adjudicated prior to adjudicating Form I-765 and those that involve individuals who are employment authorized incident to status) made up 74 percent of the total renewals for FY 2014. Under this proposed regulation, 74 percent of renewals would have EADs that would have been automatically extended for up to 180 days. In any given year from 2010 to 2014, the renewals that do not require an underlying benefit make up more than 74 percent of the total renewal receipts received.

Under this proposed regulation, the automatic extension of renewal EADs would apply to 15 categories of workers. These 15 categories include the following groups:

- Aliens granted Temporary Protected Status (TPS),
- Aliens who have properly filed applications for TPS and who have been deemed prima facie eligible for TPS under 8 CFR 244.10(a) and have received an EAD as a "temporary treatment benefit" under 8 CFR 244.10(e) and 274a.12(c)(19),
- section 210 legalization,
- individuals subject to withholding of removal,
- section 245A legalization (pending Form I-687),
- suspension of deportation applicants (filed before April 1, 1997), cancellation of removal applicants, or cancellation applicants under NACARA,
- LIFE legalization,
- asylum applicants with applications pending filed on/after January 4, 1995, asylum application pending filed before January 4, 1995 and applicant is in exclusion/deportation proceedings, or asylum application under American Baptist Churches agreement,
- Citizens of Micronesia, Marshall Islands, or Palau,
- Individuals who filed an application for creation of record (adjustment based on continuous residents since January 1, 1972),
- N-8 or N-9 nonimmigrants (parents or dependent children of employees of international organizations),

- Individuals requesting relief under VAWA,
- Individuals with pending adjustment of status applications under section 245 of the INA,
- Asylees,
- Refugees.

Table 16 shows the breakdown of the 275,337 renewals based on the 15 categories identified in this proposed rule. The aliens granted TPS category represents the largest number of renewals from this group with 85,483 renewal receipts. These renewals also make up 92.7 percent of the total receipts received for aliens granted TPS. Other categories that have renewals as a large percentage of total receipts include section 210 legalization, withholding of removal, section 245A legalization (pending Forms I-687), and suspension of deportation applicants (filed before 4/1/97), cancellation of removal applicants or cancellation applicants under the Nicaraguan Adjustment and Central American Relief Act (NACARA).

Table 16: Renewal Receipts Received in Fiscal Year 2014 for Class Preferences that do not Require the Adjudication of an Underlying Benefit

Categories that do not Require Adjudication of an Underlying Benefit	Renewal Receipts	Total Receipts
Aliens granted Temporary Protected Status	85,483	92,189
Pending Adjustment of Status under Section 245 of the Act	62,471	448,479
Suspension of Deportation Applicants (filed before April 1, 1997); Cancellation of Removal Applicants; or Cancellation Applicants Under NACARA	60,952	85,455
Asylum Application Pending filed on/after January 4, 1995; Asylum Application Pending filed before January 4, 1995 and applicant is in exclusion/deportation proceedings; or Asylum Application under ABC Agreement	45,729	106,179
Withholding of Removal	13,546	16,145

Asylee	4,949	38,745
VAWA	706	3,281
Refugee	567	66,345
Aliens who have properly filed applications for TPS and who have been deemed prima facie eligible for TPS under 8 CFR 244.10(a) and have received an EAD as a "temporary treatment benefit" under 8 CFR 244.10(e) and 274a.12(c)(19)	369	3,892
Citizen of Micronesia, Marshall Islands, or Palau	176	523
Section 245A Legalization (pending I-687)	133	172
Section 210 Legalization	111	120
N-8 or N-9 nonimmigrants	53	177
LIFE Legalization	49	108
Creation of Record (Adjustment based on Continuous Residence Since January 1, 1972)	43	139
Grand Total	**275,337**	**861,949**
Source: USCIS, Office of Performance and Quality		

At this time, USCIS is unable to determine which applications are pending beyond the current regulatory timeframe of 90 days. In addition, USCIS does not have details on the reasons for why the applications are pending. Therefore, we are not able to differentiate between those applications that are within the 90-day timeframe and being timely adjudicated and those applications that are delayed due to RFEs or some other factor beyond the agency's control. Additionally, at this time, USCIS is unable to determine the number of interim EADs that have been issued in the past.

iii. Costs

DHS expects that USCIS will receive increased volumes of applications requesting employment authorization as a result of the proposed employment authorization for certain nonimmigrants based on compelling circumstances provision in this regulation. Removing a regulatory timeframe and moving to one governed by processing goals could potentially lead to longer processing times whenever the agency is

faced with higher than expected filing volumes.[71] If such a situation were to occur, this could lead to potential delays in work employment start dates for first-time EAD applicants until approval is obtained. However, USCIS believes such scenarios would be rare and mitigated by the auto extension provision for renewal applications which would allow the movement of resources in such situations.

DHS also anticipates some indirect costs to be incurred on behalf of those employers that may need to wait before they may employ employees who need to obtain an initial EAD and have no other acceptable evidence of employment authorization and identity. In those cases where there are longer delays in obtaining an EAD for the first time, the employee's start date may be impacted, thus resulting in longer periods where the individual is not able to work. DHS also recognizes that the automatic extensions for renewal EADs excludes some categories of workers and does not cover all renewal EADs.

iv. Benefits

Eliminating the provisions establishing a 90-day processing time and authorizing interim EADs ensures that employment authorization documentation is accorded only to eligible applicants whose underlying benefit requests have been approved and background checks have been completed. The changes allow USCIS to conduct complete security checks before being required to issue evidence of employment authorization, thus improving USCIS' ability to detect derogatory information. Likewise, updating this regulation ensures that benefits are granted to individuals who do not pose

[71] USCIS regularly provides notice of average processing times of benefit request, available at: https://egov.uscis.gov/cris/processTimesDisplayInit.do. Note: DHS USCIS is not proposing to change the current processing time commitment for Form I-765 in this rule.

security risks to the United States or are otherwise not entitled to the requested immigration benefit.

The elimination of the provisions requiring 90-day processing and interim EADs also helps to modernize and streamline the application process for all EAD applicants. Issuing an interim EAD to serve as evidence of employment authorization is a duplicative process to the processing of the Form I-765 after which USCIS must produce evidence of employment authorization for the full benefit period.

The proposed regulations to automatically extend EADs by up to 180 days for certain categories of workers would greatly benefit individuals as their renewal EADs are being processed. These workers would be permitted to continue employment without interruptions provided that their renewal request for employment authorization is filed timely. This provision would also lessen turnover costs to employers as they would be able to keep these workers on the payroll while they wait for their renewal applications to be approved. This provision would lessen the disruptions in continuation of work for both the employers and employees.

f. Period of Admission for Certain Nonimmigrant Classifications

Current DHS regulations and policy require certain high-skilled, long-stay nonimmigrant workers to depart the United States immediately upon expiration of their nonimmigrant status or authorized period of stay. For example, nonimmigrant workers with E-1, E-2, and E-3 visas may be initially admitted in nonimmigrant status for up to 2 years, but, unless an extension petition is filed on their behalf and approved, they must depart the United States prior to the expiration of their nonimmigrant status. The H-1B

nonimmigrant visa category currently contains a regulatory provision that allows for up to a 10-day departure period at the end of the petition validity period. Once the validity period expires, the worker is required to depart the country unless he or she remains in an authorized period of stay based on a pending change of status, extension of status, or adjustment of status application.

The requirement of immediate departure for such nonimmigrant workers does not allow sufficient time necessary to wrap up affairs for a fairly settled life in the United States. These nonimmigrant workers would most likely need to provide notice of vacating to their landlords, pack and ship their belongings, and make travel arrangements. Furthermore, if the nonimmigrant has dependent spouses and children who are also in the United States, arrangements may need to be made to depart from school or other authorized employment. While this can be a difficult and abrupt transition for all nonimmigrant worker families, it is especially stressful for those nonimmigrant workers whose employment ceased prior to the end of the validity period as these workers are presently required to depart immediately or begin to accrue time for failing to maintain a lawful nonimmigrant status.

i. Purpose of the Proposed Regulation

The proposed regulation would amend section 214.1 by adding a paragraph (l) and revising parallel provisions pertaining to these changes. The proposed section 214.1(l) would amend the requirements for admission, extension, and maintenance of status. Specifically the addition of paragraph (l) would allow for individuals admitted under the E-1, E-2, E-3, H-1B, L-1, or TN nonimmigrant categories and his or her dependents to be admitted to the United States up to 10 days before the petition validity

period (or authorized validity period for those classifications that do not require a petition) begins and up to 10 days after the validity period ends. The beneficiary will not be permitted to work during the grace periods, and may only work according to the terms of the petition approval.

DHS is proposing this amendment to enable workers admitted into the United States under high-skilled, long-stay nonimmigrant statuses reasonable periods of time to prepare for employment upon entry and subsequently to conclude their affairs and prepare for departure after expiration of their authorized period of employment. Many of these nonimmigrant categories, for example, currently require immediate departure once the validity period expires, while others, such as the H-1B, offer up to a 10-day grace period for entry and departure purposes. While these workers are temporary, they have been living in the United States and need to make the necessary arrangements to depart, often with their families.. DHS is proposing to amend the regulations to provide for a 10-day grace period prior to and at the end of the validity period to provide consistent grace periods across these high-skilled, long-stay nonimmigrant visa categories. Providing 10 days prior to the validity period assists the beneficiary in getting sufficiently settled such that he or she is immediately able to begin working upon the start of the validity period. A 10-day grace period after the validity period ends allows the nonimmigrant worker sufficient time to work through the end of his or her authorized validity period while providing a reasonable amount of time to depart the United States or take other actions to extend, change, or otherwise maintain lawful status.

Additionally, DHS is proposing to permit a one-time interim-grace period of up to 60 days upon cessation of employment for nonimmigrants in the E-1, E-2, E-3, H-1B, H-

1B1, L-1, and TN classifications during the period of petition validity (or other authorized validity period). This one-time interim-grace period of up to 60 days upon cessation of employment would allow nonimmigrants in the affected classifications sufficient time to respond to sudden or unexpected changes related to their employment. Such time may be used to seek new employment, seek a change of status to a different nonimmigrant classification, or make preparations for departure from the United States. Table 17 provides the current periods of stay permitted for the impacted visa classifications.

Table 17: Length of Stay and Current Grace Period Status of High-Skilled, Long-Stay Nonimmigrant Visa Categories

High-Skilled, Long-Stay Nonimmigrant Visa Categories				
Visa Category	**Classification**	**Maximum Length of Initial Stay**	**Currently Allows Grace Period**	**Number of Extensions Allowed**
E-1	Treaty Traders and their spouses and children	2 years	No	extension of stay in increments not more than 2 years; no limits on extension
E-2	Treaty investors and their spouses and children	2 years	No	extension of stay in increments not more than 2 years; no limits on extension
E-3	Australian Free Trade Agreement principals, spouses and children	2 years	No	extension of stay in increments of 2 years; no limits on extension
H-1B	Temporary workers in specialty occupations, performing services of an exceptional nature relating to a cooperative research and development project administered by the Department of Defense (DOD), or performing services of distinguished merit and ability in the field of fashion modeling.	3 years, 5 years (DOD)	validity period + 10 days before and after	extension of stay in increments of up to 3 years for specialty occupation workers and fashion models and in increments of 5 years for DOD workers (not to exceed 6 years for specialty occupation workers and fashion models or 10 years for DOD workers, with limited exceptions)
H-1B1	Chile and Singapore Free Trade Agreement aliens	1 year	No	extension of stay in increments of 1 year; no limits on extension
L-1	Intracompany transferees	3 years, 1 year for new office	No	Extensions of stay in increments of 2 years (not to exceed 5 years for

		petitions		specialized knowledge transferees or 7 years for executives/managers); 2 years for new office petitions
TN	North American Free Trade Agreement (NAFTA) professional workers	3 years	No	extension of stay in increments not more than 3 years
Source: USCIS. List of Temporary (Nonimmigrant) Worker Classification. Available: http://www.uscis.gov/working-united-states/temporary-workers/temporary-nonimmigrant-workers (accessed August 19, 2015).				

ii. Population Impacted

In 2013, the total number of admissions (as determined by I-94 Arrival Records by CBP) for nonimmigrants in these high-skilled categories was 1,963,459 people.[72] The numbers of admissions every year from 2010 to 2013 in the E-1, E-2, E-3, H-1B, H-1B1, L-1, and TN nonimmigrant categories have remained relatively level.[73] The arrivals data, however, only presents counts of events (i.e., admissions to the United States) and not unique individuals, as individuals on nonimmigrant status are "admitted" each time they enter the United States and thus may be admitted multiple times per year if they travel often. These nonimmigrant categories have between 2-5 years of maximum lengths of initial stay with the possibility of extension (Table 18). While we know that the addition of the grace periods would impact these 1.9 million admissions every year, we are unsure of the total number of people in these visa categories currently in the country. Part of the reason for not being able to obtain a total number of people in these categories is the lack of data available as nonimmigrants leave the country, along with the lack of admissions data on unique individuals.

[72] 2013 Yearbook of Immigration Statistics. Office of Immigration Statistics, Department of Homeland Security. August, 2014. http://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf.
[73] Id.

iii. Costs

This provision of the proposed rule would not create additional costs for petitioning employers or for the high-skilled, long-stay nonimmigrant workers.

iv. Benefits

Adding a grace period to the already mentioned high-skilled, long-stay visa categories has numerous benefits for nonimmigrants. The additional time will assist these nonimmigrants in preparing to leave the country properly and with fewer loose ends to tie up at a later time. The additional time allows for things such as notifications to apartment/housing to vacate their dwellings and canceling utilities. The time allows for packing, selling, and shipping of all belongings the nonimmigrants would take with them. The time allows for travel arrangements to be made, which would save money on last minute travel costs. If the principal has dependent children that are in school, arrangements can be made for transfer certificates or other necessary information. Allowing the nonimmigrant to finalize these arrangements without failing to maintain their nonimmigrant status or accruing unlawful presence would prevent the individual from jeopardizing their immigration status and impacting their ability to return to the country at a future date.

Another benefit of adding a grace period to these nonimmigrant visa categories is the assumption that these workers would no longer be required to enter into a non-status period or would not have to change to a visitor status in order to stay in the country to wrap up their affairs. While researching the proposed regulation, several blogs suggested nonimmigrants change to a visitor classification (i.e. B-2 nonimmigrant status) if they

were suddenly terminated.[74] Changing status to a visitor classification could allow for these nonimmigrants to stay in status (or authorized period of stay) while they wrap up their affairs and prepare for departure, but that would be unnecessary if the proposed grace period is implemented. The added grace period would also allow for nonimmigrants in these categories to potentially change employment and find another employer to sponsor their visa.

g. H-1B Provisions

The proposed rule would incorporate several AC21 provisions relating to H-1B nonimmigrant petitions into the Code of Federal Regulations (CFR). Table 18 outlines the CFR sections that will update those provisions already implemented through policy guidance and memoranda. While the absence of this rule would pose no impacts on those affected by the guidance and policy memoranda already implementing the AC21 statute, USCIS has also included information in Table 18 on the impacts of such policy per OMB Circular A-4. Formalizing existing USCIS policy and guidance would ensure that the regulations are consistent with the applicable legislation, and that the general public has access to these policies through the CFR without locating and reviewing multiple policy memoranda. As these provisions are already implemented, no resulting economic impacts are anticipated from the addition of these proposed rules.

[74] "Layoffs or Reductions in Labor Force FAQs." Weaver, Schlenger, Mazel, LLP. Accessed on June 24, 2015. http://www.wsmimmigration.com/immigration-resources/faqs/layoffs-or-reductions-in-force/.
"Layoffs/Terminations of Employment/FAQs." Jackson & Hertogs. Accessed on June 24, 2015. http://www.jackson-hertogs.com/jh/80542.pdf.
"How to Handle Termination of H-1B Visa Employment." Legal Language Services. Accessed on June 24, 2015. https://www.legallanguage.com/legal-articles/termination-h1-b-visa/.
"H-1B Revoked, Withdrawal, Termination – By Employer? USCIS? Oh My? Options." Red Bus Blog. Accessed June 24, 2015. http://redbus2us.com/h1b-revoked-withdrawal-termination-by-employer-uscis-oh-my-options/.

Table 18: Current Policy Under AC21 to be Codified in the CFR		
New CFR Section/Title	**Current Policy/Guidance**	**Impact**
8 CFR section 214.2(h)(2)(i)(H): H-1B Portability	Prior to 2000, H-1B workers were unable to port. Pursuant to the AC21, since 2000 H-1B workers have been able to port. Current policy allows H-1B nonimmigrant workers to accept new or concurrent employment upon the filing of a non-frivolous H-1B petition on their behalf.[75]	Neither the AC21 portability provisions nor the agency's guidance relating to these provisions require any paperwork or fees other than that otherwise already required when an H-1B visa petition is filed. AC21 created a benefit for certain H-1B nonimmigrants when an H-1B visa petition was filed on their behalf; USCIS and the former Immigration and Naturalization Service issued guidance regarding eligibility for this benefit. The statute and implementing guidance provide benefits and flexibility to both the H-1B worker and U.S. employers.
8 CFR section 214.2(h)(4)(v)(C): Duties without Licensure	Current policy allows an H-1B petition filed on behalf of a worker to be approved for a period of 1 year if a State or local license to engage in the profession is required and the appropriate licensing authority will not grant such license absent evidence that the individual has been granted a social security number or employment authorization.[76] This provision has been implemented via policy memoranda issued in 2001 and 2008.	There are no costs arising from the statute or the implementing guidance beyond effort to document State or professional rules governing the licensure. The impact of this regulatory provision is minimal because petitioners have been following the current policy guidance in order to apply for and receive an approved 1-year H-1B petition. This provision allowed for flexibility and additional time to obtain necessary licensure while still permitting H-1B employment during the pendency of State or local license applications.
8 CFR section 214.2(h)(13)(iii)(C): Calculating the Maximum H-1B Admission Period	Under USCIS guidance issued on October 21, 2005, an H-1B worker to recoup time spent outside the U.S. by adding the time to the maximum period of H-1B admission. AC21 provided that aliens counted against the H-1B annual cap within six years prior to approval of the H-1B petition shall not be counted against that cap again unless the alien would be eligible for a new 6-year period of H-1B status. Pursuant to a 2005 USCIS policy memoranda, time spent outside the United States by a worker during the validity of an H-1B petition that was	The H-1B worker or sponsoring employer must assemble evidence of time outside the U.S., typically including through copies of passport pages, but otherwise there are no costs arising from the statute or the implementing guidance. This provision provides benefits in allowing H-1B workers and their sponsoring U.S. employers to obtain the full period of employment to which such workers are entitled.

[75] INA 214(n)(1) and INA 214(n)(2)(A)-(C).

[76] See USCIS Memorandum from Donald Neufeld, Adjudicator's Field Manual Update: Chapter 31: Accepting and Adjudicating H-1B Petitions When a Required License is not Available Due to State Licensing Requirements Mandating Possession of a Valid Immigration Document as Evidence of Employment Authorization." (March 21, 2008) ("Neufeld Memo March 2008").

	approved on his or her behalf may be added back to the maximum period of authorized admission as an H-1B nonimmigrant, including any H-1B remainder period available to a worker who has remained outside the United States for at least a full year, notwithstanding that the worker may be otherwise eligible for a new six-year period of H-1B admission.[77]	
8 CFR section 214.2(h)(13)(iii)(D): Exemptions Due to Lengthy Adjudication Delays	Pursuant to AC21, H-1B workers may receive extensions of stay in one year increments beyond six years in certain situations. A series of USCIS guidance memoranda describes eligibility for this exemption to the six year maximum period of admission for certain H-1B nonimmigrant workers who are sponsored for LPR status by an employer and are subject to lengthy adjudication or processing delays as set forth in section 106(a) of AC21, as amended.[78]	Before AC21, sponsoring employers were unable to seek extensions to an H-1B nonimmigrant's period of authorized validity beyond a 6 year maximum. Post-AC21, sponsoring employers are permitted to do so on behalf of certain workers in 1 year increments, and in seeking such extensions are subject to the normal costs associated with preparing and filing a petition to extend the worker's stay. These H-1B extensions of stay afforded by AC21 protect employers from disruption of productivity or turnover costs associated with losing the ability to continue to employ the H-1B worker that otherwise would result.
8 CFR section 214.2(h)(13)(iii)(E): Per Country Limitation Exemption	Pursuant to AC21, H-1B workers may receive extensions of stay in three year increments beyond six years in certain situations. A series of guidance memoranda describes eligibility for this exemption to the six year maximum period of admission for certain H-1B nonimmigrants who are the beneficiary of an approved immigrant visa petition under section 203(b)(1), (2), and (3) of the INA, 8 U.S.C. § 1153(b)(1), (2), and (3). The H-1B petitioner must demonstrate that an immigrant visa is not available to the individual at the	Before AC21, sponsoring employers were unable to seek extensions to an H-1B nonimmigrant's period of authorized validity beyond a 6 year maximum. Post-AC21, sponsoring employers are permitted to do so on behalf of certain workers in 3 year increments, and in seeking such extensions are subject to the normal costs associated with preparing and filing a petition toextend the worker's stay. These H-1B extensions of stay afforded by AC21 protect employers from disruption of productivity or turnover costs associated with losing the ability to continue to employ the H-1B worker that otherwise

[77] See USCIS Memorandum from Michael Aytes, "Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year." (Dec. 5, 2006).

[78] Id. See also USCIS Memorandum from Donald Neufeld, Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277. (May 30, 2008)("Neufeld Memo May 2008").

	time the H-1B petition is filed because the immigrant visa classification sought is over-subscribed for that individual's country of birth.[79]	would result.
8 CFR Part 214.2(h)(20): Employer Debarment and H-1B Whistleblower Provisions	Prior to the enactment of ACWIA in 1998, U.S. workers had fewer protections and did not provide penalties for employer violations under Labor Condition Attestations (LCA). Current USCIS guidance disallows certain debarred organizations from filing certain immigrant and nonimmigrant petitions, including H-1Bs and employment-based immigrant visa petitions during, the debarment period. The policy also allows USCIS to consider documentary evidence indicating that the beneficiary faced retaliatory action from his or her employer (or former employer) based on a report regarding a violation of the employer's LCA obligations. If USCIS finds the evidence credible, then any such loss or failure to maintain H-1B status by the beneficiary may be deemed an "extraordinary circumstance," and may allow USCIS to grant a discretionary extension of H-1B stay or a change of status to another nonimmigrant classification.[80]	There are no costs under the statute or implementing guidance. The proposed provision allows certain H-1B nonimmigrants who are currently employed by an employer that is subject to federal debarment (usually for worker violations) a reasonable period of time to seek new sponsoring employment without violating the terms of his or her nonimmigrant status.

h. H-1B Numerical Cap Exemptions under AC21 and Certain Fee Exemptions under ACWIA

AC21 and the proposed regulation exempts from the H-1B numerical cap limitations and ACWIA fee exemptions those H-1B nonimmigrants who are employed at (or are offered employment at) an institution of higher education, non-profit entity that is related to or affiliated with an institution of higher education, non-profit research

[79] Id.
[80] See Neufeld Memo May 2008.

organization, or governmental research organization.[81] The advantage of such employment is that it allows these institutions to have access to a continuous supply of H-1B workers without numerical cap limitations. Thus, certain workers employed by a qualifying institution are treated as cap exempt. [82]

i. Purpose of Regulation

DHS regulations at 8 CFR 214.2(h)(19), for purpose of ACWIA fee exemption, presently define the terms "institution of higher education," "nonprofit entity," "affiliated or related nonprofit entity," "nonprofit research organization," and "governmental research organization." DHS has adopted, by policy, the definitions of these same terms in the cap exemption context.[83] DHS proposes to codify definitions of these terms at 8 CFR 214.2(h)(8)(ii)(F) in the cap exemption context and to modify its definition of "related or affiliated nonprofit entity" to more accurately reflect the types of affiliations that presently exist between nonprofit entities and institutions of higher education in order to ensure these institutions have access to H-1B workers as intended by Congress. These entities are immediately contributing to the education of Americans, which is a primary purpose of the cap exemption. This modified definition of a related or affiliated nonprofit entity will also be adopted for purposes of the ACWIA fee.

DHS is also proposing to amend its regulations to allow petitioners to claim exemption from the H-1B numerical limitations if the H-1B nonimmigrant worker will not be directly employed by the qualifying institution or related or affiliated nonprofit entity, but will be working at such institution, organization or entity. This proposed

[81] See section 214(g)(5) of the INA, 8 U.S.C. 1184(g)(5).
[82] Id.
[83] Aytes Memo June 2006.

amendment is consistent with the statutory language,[84] as well as existing DHS policy and practice.[85] The proposed definition provides cap exemption to H-1B nonimmigrant workers who are employed by third parties but who will spend the majority of their work time performing job duties at a qualifying institution, organization or entity and those job duties directly and predominately further the essential purpose, mission, objectives or function of the qualifying institution—namely, higher education, nonprofit research or governmental research. Consistent with current policy, if a petitioner is not itself a qualifying institution, for the petition to be cap exempt based on employment "at" a qualifying institution, the petitioner must establish that there is a nexus between the duties to be performed by the H-1B nonimmigrant worker and the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity. Such a petitioner would nonetheless be required to pay the ACWIA fee, even if the employment is cap exempt.

ii. Population Impacted

A total of 315,857 H-1B petitions were approved in fiscal year 2014.[86] Of the total H-1B petitions approved, 231,548 petitions did not involve fee exemptions. A total of 84,309 petitions were approved with at least one exemption. There were a total of 11,387 exemptions due to the employer being a nonprofit entity related to or affiliated with an institution of higher education. DHS anticipates the numbers of exemptions, both fee and cap exemptions, due to the employer being a nonprofit entity related to or

[84] See section 214(g)(5)(A) of the INA, 8 U.S.C. 1184(g)(5)(A))
[85] Aytes Memo June 2006.
[86] Department of Homeland Security, Report on H-1B Petitions, Fiscal Year 2014 Annual Report to Congress October 1, 2013 – September 30, 2014. Available at: http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/FY_2014_H-1B_Petitions_Report_SIGNED.pdf.

affiliated with an institution of higher education, to increase as a result of these proposed amendments. However, we cannot project the degree of such an increase at this time. In addition, DHS notes that as more petitioners could be eligible for cap exempt status, this could result in more capacity for other petitions to be approved that are subject to the cap, thus resulting in a greater number of H-1B workers. Again, DHS is not able to predict how many additional workers could be provided initial H-1B status in each fiscal year as a result of these changes.

iii. Costs

The current employer funded training ACWIA filing fee is $1,500 ($750 for employers with fewer than 25 full-time employees in the United States). DHS does not expect that there would be a change in the overall fees collected in the ACWIA fee account, because as discussed previously, as cap-exempt petitioners are identified these cap numbers would be replaced with the excess demand from the H-1B petitioners that would otherwise not have received a cap number.

iv. Benefits

Providing a regulatory definition of the phrase "institution of higher education" ensures that DHS interprets the phrase similarly to the Department of Education's interpretation of the definition used in the Higher Education Act of 1965. Defining related or affiliated nonprofit entity, nonprofit research organization and governmental research organization also assists in explicitly stating the organizations that are exempt under this regulation. These definitions, coupled with the proposed broader definition of related or affiliated nonprofit entity, is likely to expand the number of entities that would

be cap exempt if the proposed amendments are finalized. A larger number of entities that would be cap exempt under the proposed definition would allow for greater access to H-1B workers at such institutions, consistent with the intent of the statute, as these workers contribute to the higher education of U.S. residents. Furthermore, the revised definition of "related or affiliated nonprofit entity" for purposes of the ACWIA fee to conform to the new proposed definition for H-1B numerical cap exemption will result in increased adjudication consistency and efficiency.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. The term "small entities" comprises small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An "individual" is not defined by the RFA as a small entity and costs to an individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates small entities.[87] Consequently, any indirect impacts from a rule to a small entity are not costs for RFA purposes.

[87] A Guide for Government Agencies How to Comply with the Regulatory Flexibility Act, May 2012 page 22. See Direct versus indirect impact discussion, https://www.sba.gov/sites/default/files/advocacy/rfaguide_0512_0.pdf

The changes proposed by DHS have direct impacts to individual beneficiaries of employment-based nonimmigrant and immigrant visa petitions. As individual beneficiaries of employment-based immigrant visa petitions are not defined as small entities, costs to these individuals are not considered as RFA costs. However, due to the fact that the petitions are filed by a sponsoring employer, this rule has *indirect* effects on employers. The original sponsoring employer that files the petition on behalf of an employee will incur employee turnover related costs as those employees port to the same or a similar occupation with another employer. Therefore, DHS has chosen to examine the indirect impact of this proposed rule on small entities as well. The analysis of the indirect impacts of these proposed changes on small entities follows.

1. Initial Regulatory Flexibility Analysis

Small entities primarily affected by this rule that could incur additional indirect costs are those that file and pay fees for certain immigration benefit petitions, including Form I-140, Immigrant Petition for Alien Worker. DHS conducted a statistically valid sample analysis of these petition types to determine the number of small entities indirectly impacted by this rule. While DHS acknowledges that the changes engendered by these proposed rules would directly impact individuals who are beneficiaries of employment-based immigrant visa petitions, which are not small entities as defined by the RFA, DHS believes that the actions taken by such individuals as a result of these proposals will have immediate indirect impacts on U.S. employers. Employers will be indirectly impacted by employee turnover-related costs as beneficiaries of employment-based immigrant visa petitions take advantage of these proposals. Therefore, DHS is

choosing to discuss these indirect impacts in this initial regulatory flexibility analysis to aid the public in commenting on the impact of the proposed requirements.

In particular, DHS requests information and data to gain a better understanding the potential impact of this rule on small entities. Specifically, DHS requests information on:

- the numbers of small entities that have filed immigrant visa petitions for high-skilled workers who are waiting to adjust status, and the potential costs to such small entities associated with employee turnover resulting from employees who port;
- the potential costs to employers that are small entities associated with employee turnover if a sponsored nonimmigrant worker pursues the option for unrestricted employment authorization based on compelling circumstances; and
- the number of small entities that would qualify for the proposed exemptions of the ACWIA fee when petitioning for H-1B nonimmigrant workers.

a. A description of the reasons why the action by the agency is being considered.

The purpose of this action, in part, is to amend regulations affecting certain employment-based immigrant and nonimmigrant classifications in order for DHS regulations to conform to provisions of AC21 and ACWIA. The proposed rule also seeks to permit greater job flexibility, mobility and stability to beneficiaries of employment-

based nonimmigrant and immigrant visa petitions, especially when faced with long waits for immigrant visas. In many instances, the need for these individuals' employment has been demonstrated through the labor certification process. In most cases, before an employment-based immigrant visa petition can be approved, the DOL has certified that there are no U.S. workers who are ready, willing and available to fill those positions in the area of intended employment. By increasing flexibility and mobility, the worker is more likely to remain in the United States and help fill the demonstrated need for his or her services.

b. A succinct statement of the objectives of, and legal basis for, the proposed rule.

DHS objectives and legal authority for this proposed rule are discussed in the preamble.

c. A description and, where feasible, an estimate of the number of small entities to which the proposed changes would apply.

DHS conducted a statistically valid sample analysis of employment-based immigrant visa petitions to determine the maximum potential number of small entities indirectly impacted by this rule when a high-skilled worker who has an approved employment-based immigrant visa petition and a pending adjustment of status application for 180 days or more ports to another employer. DHS utilized a subscription-based online database of U.S. entities, Hoovers Online, as well as two other open-access, free databases of public and private entities, Manta and Cortera, to determine the North American Industry Classification System (NAICS) code, revenue, and employee count

for each entity.[88] In order to determine a business' size, DHS first classified each entity by its NAICS code, and then used SBA guidelines to note the requisite revenue or employee count threshold for each entity. Some entities were classified as small based on their annual revenue and some by number of employees.

Using FY 2013 data on actual filings of employment-based immigrant visa petitions, DHS collected internal data for each filing organization. Each entity may make multiple filings. For instance, there were 63,953 employment-based immigrant visa petitions filed, but only 24,912 unique entities that filed petitions. DHS devised a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. To achieve a 95 percent confidence level and a 5 percent confidence interval on a population of 24,912 entities, DHS used the standard statistical formula to determine that a minimum sample size of 385 entities was necessary.[89] DHS created a sample size 15 percent greater than the 385 minimum necessary in order to increase the likelihood that our matches would meet or exceed the minimum required sample. Of the 443 entities sampled, 344 instances resulted in entities defined as small. Of the 344 small entities, 185 entities were classified as small by revenue or number of employees. The remaining 159 entities were classified as small because information was not found (either no petitioner name was found or no information was found in the databases).

Table 19: Summary Statistics and Results of Small Entity Analysis of Form I-140 Petitions

[88] The Hoovers website can be found at http://www.hoovers.com/; The Manta website can be found at http://www.manta.com/; and the Cortera website can be found at https://www.cortera.com/.
[89] See https://www.qualtrics.com/blog/determining-sample-size/.

Parameter	Quantity	Proportion of Sample
Population—petitions	63,953	-
Population—unique entities	24,912	-
Minimum Required Sample	385	-
Selected Sample	443	100.0%
Entities Classified as "Not Small"		
by revenue	73	16.5%
by number of employees	26	5.9%
Entities Classified as "Small"		
by revenue	145	32.7%
by number of employees	40	9.0%
because no petitioner name found	109	24.6%
because no information found in databases	50	11.3%
Total Number of Small Entities	**344**	**77.7%**
Source: USCIS analysis.		

d. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills.

The proposed amendments in this rule do not place direct requirements on small entities that petition for workers. However, if the principal beneficiaries of employment-based immigrant visa petitions take advantage of the flexibility provisions proposed herein (including porting to a new sponsoring employer or pursuing the unrestricted employment authorization in cases involving compelling circumstances), there could be increased turnover costs (employee replacement costs) for U.S. entities sponsoring the employment of those beneficiaries, including costs of petitioning for new employees. While DHS has estimated 29,166 individuals who are eligible to port to a new employer

under section 204(j) of the INA, the Department was unable to predict how many will actually do so. As mentioned earlier in the Executive Orders 12866 and 13563 analysis, a range of opportunity costs of time to petitioners who prepare Supplement J ($43.93 for a human resources specialist, $93.69 for an in-house lawyer, or $160.43 for an outsourced lawyer) are anticipated depending on the total numbers of individuals who port. However, DHS is currently unable to determine the numbers of small entities who take on immigrant sponsorship of high-skilled workers who are waiting to adjust status from the original sponsoring employer. The estimates presented also do not represent employee turnover costs to the original sponsoring employer, but only represent paperwork costs. Similarly, DHS is unable to predict the volume of principal beneficiaries of employment-based immigrant visa petitions who will pursue the option for unrestricted employment authorization based on compelling circumstances.

The proposed amendments relating to the H-1B numerical cap exemptions may impact some small entities by allowing them to qualify for exemptions of the ACWIA fee when petitioning for H-1B nonimmigrant workers. As DHS cannot predict the numbers of entities these proposed amendments would impact at this time, the exact impact on small entities is not clear, though some positive impact should be anticipated.

e. An identification of all relevant Federal rules, to the extent practical, that may duplicate, overlap, or conflict with the proposed rule.

DHS is unaware of any duplicative, overlapping, or conflicting Federal rules, but invites any comment and information regarding any such rules.

f. Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities.

This rule does not impose direct costs on small entities. Rather, this rule imposes indirect cost on small entities because the proposed provisions would affect beneficiaries of employment-based immigrant visa petitions. If those beneficiaries take actions or steps in line with the proposals that provide greater flexibility and job mobility, then there would be an immediate indirect impact—an externality—to the current sponsoring U.S. employers. DHS considered whether to exclude from the flexibility and job mobility provisions those beneficiaries who were sponsored by U.S. employers that were considered small. However, because DHS so limited the eligibility for unrestricted employment authorization to beneficiaries who are able to demonstrate compelling circumstances, and restricted the portability provisions to those seeking employment within the same or similar occupational classification(s), DHS did not feel it was necessary to pursue this proposal. There are no other alternatives that DHS considered that would further limit or shield small entities from the potential of negative externalities and that would still accomplish the goals of this regulation. To reiterate, the goals of this regulation include providing increased flexibility and normal job progression for beneficiaries of approved employment-based immigrant visa petitions. To incorporate alternatives that would limit such mobility for beneficiaries that are employed or sponsored by small entities would be counterproductive to the goals of this rule. DHS welcomes public comments on significant alternatives to the proposed rule that would minimize significant economic impact to small entities.