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Docket ID: USCIS-2010-0017

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

Re: Proposed Modification to Regulation Concerning Allowing Certain H-4 Dependent Spouses to Apply for Employment Authorization (Docket ID: USCIS-2010-0017)

Dear Mr. Cummings,

Immigration Voice hereby submits comments on the Department of Homeland Security's ("Department") proposed rulemaking on "Allowing Certain H-4 Dependent Spouses to Apply for Employment Authorization"[1] Formed in 2005, Immigration Voice is a national grassroots, nonprofit organization of highly skilled immigrants and future Americans spread across all 50 states. These highly skilled immigrants legally immigrated to the United States to take part in the American Dream and build stronger communities in this nation.

Immigration Voice strongly supports the Department's proposals and urges swift adoption of the proposed rule.

[1] *See Allowing Certain H-4 Dependent Spouses to Apply for Employment Authorization*, 8 CFR 274a.12(c).

I. Background

A. H-4 nonimmigrants are not authorized for employment based on their H-4 nonimmigrant status

The spouse and unmarried children under 21 (dependents) of the H-1B temporary worker are entitled to H-4 nonimmigrant classification and are subject to the same period of admission and limitations as the H-1B nonimmigrant. See 8 CFR 214.2(h)(9)(iv). Currently, DHS does not authorize H-4 nonimmigrants for employment based on their H-4 nonimmigrant status. If, however, an H-4 nonimmigrant is eligible to apply to adjust his or her status to that of a lawful permanent resident and has filed such an application, he or she may obtain employment authorization based on the pending adjustment of status application. See 8 CFR 274a.12(c)(9).B. Alternatively, the H-4 nonimmigrant can search for employment on the prerequisite that an employer is willing to sponsor a separate H1-B visa for the H-4 nonimmigrant.

B. Changes Brought about by the Proposed Rule

The rule, if adopted, would extend eligibility for employment authorization to H-4 dependent spouses of H-1B nonimmigrants remaining in the United States pursuant to extensions of stay based on sections 106(a) and (b) of AC21, and to H-4 nonimmigrants whose H-1B nonimmigrant spouses are beneficiaries of an approved Form I-140. *See generally* INA section 103(a), 8 U.S.C. 1103(a) (generally authorizing the Secretary to administer and enforce the immigration laws); INA section 274A(h)(3), 8 U.S.C. 1324a(h)(3) (generally authorizing the Secretary to provide for employment authorization for aliens in the United States); INA section 214(a)(1), 8 U.S.C. 1184(a)(1) (authorizing the Secretary to prescribe regulations setting terms and conditions of admission of nonimmigrants). Immigration Voice believes that amending its regulations in this manner will encourage, consistent with the congressional intent expressed in

AC21, potential H-1B nonimmigrants to remain in the United States, thereby relieving U.S. employers of additional disruptions, and furthers the goals of attracting and retaining high-skilled professionals improving American competitiveness. This goal is inherent to AC21 and is further reflected in DHS's proposed amendments to the regulations.

II. Potential Amendments to the Proposed Regulation to Ameliorate other Concerns

With over 100,000 registered members, Immigration Voice is the largest non-profit organization of skilled immigrants in the United States. A large percentage of Immigration Voice members have first experience of the long employment based green card backlogs causing hardships and other negative impact to the families when the spouse of skilled H-1B non-immigrant is unable to work. As the result, significant percentage of Immigration Voice membership will benefit when the proposed rulemaking takes effect. If will be safe to say that Immigration Voice is the single largest entity with largest number of affected members who will be affected by this fix. While we welcome and applaud DHS's proposed regulations, we believe that it does not completely address some overlapping issues which are necessary to give full force to the regulations.

Recommendation 1: Federal agencies (USDOL and USCIS) to provide the immigration case related paperwork upon request from the beneficiary.

The proposed rule applies to:

a.) Spouses of H-1B visa non-immigrants who either are the beneficiaries of an approved Immigrant Visa petition, or

b.) Spouses of H-1B visa non-immigrants who have been granted an extension of H-1B status beyond the normal limit of six (6) years under sections 106(a) and (b) of the

American Competitiveness in the Twenty-First Century Act of 2000 (AC 21 Act). Congressional intent for AC 21 Act was to address the negative effects of lengthy green card backlogs.

In order to get the benefit of Work Authorization under the proposed rule, an H-4 visa nonimmigrant spouse is expected to provide proof of the H-1B status of his or her spouse. A significant number of potential applicant spouses of H-1B visa non-immigrants, who are the beneficiaries of an approved Immigrant Visa petition, will be required to provide information or copy of the approved Immigrant Visa petition.

However, all H-1B petition documents and employment based green card petition documents, including the receipt notices and decision notices, Labor Condition Application (by US DOL), Labor Certification (by US DOL), Immigrant petition and Adjustment of Status petition, are claimed to be "owned" by the employer of the beneficiary. The public access file which employers are required to maintain does not include the H-1B petition receipt and decision notice. Immigration Voice members consistently report that a large number of H-1B visa non-immigrants do not have access to their own immigration paperwork, including receipt and decision notices of H-1B visa petition. This culture of non-transparency creates environment where H-1B employee is beholden to the employer which makes the United States less attractive to the skilled immigrant workers.

This lack of transparency and lack of access to the paperwork causes frustration and stress to H-1B worker. Additionally, employees find it hard to change employers because the previous employer is unwilling to disclose the prevailing wage and H-1B acceptance documents to the new employer. This has recently caused many H-1B employees to leave the United States.

Congressional intent was never to make H-1B visa holder and his family beholden to the employer. Therefore, to be consistent with the intent and objective of the proposed regulations, and enable the United States to attract the best talent from around the world, the final publication of these regulations must consider adding a way for H-1B visa nonimmigrant and H-4 visa spouses to get copies of the H-1B petition and Immigrant petition paper work from USCIS and US Department of Labor on request.

Recommendation 2: Allow children of legal skilled immigrants to obtain work authorization

The Proposed Rule only applies to spouses of H-1B nonimmigrants who are on H-4 nonimmigrant status. However, children of H-1B nonimmigrants, who are also on H-4 status would not be covered under the Proposed Rule, thereby preventing them from accepting employment, such as internships, in high-school and colleges. This restriction makes United States less attractive to the parents of children.

The Deferred Action for Childhood Arrivals (DACA) memorandum allows children who were brought into the country prior to reaching 16 years in age with no fault of their own and who do not have legal status to obtain employment authorization. Immigration Voice supports fix made under DACA because that is the right and humane policy.

However, children of skilled immigrants, who were brought into the country legally and are currently residing in the country legally, are considered aged out if their immigrant petition is not approved prior to the time when these children turn 21 years.

This proposed rule somehow single-out and exclude children of skilled immigrants who are otherwise eligible to work. Under the existing law the children of skilled immigrants have the preciously the same status as Spouses on H-4 visa.

Immigration Voice recommends putting eligible children of skilled immigrants at parity with undocumented children brought into the country with no fault of their own, or those that do not have legal status in the country, in terms of benefits for work authorization. This will be consistent with the existing law which treats Spouses on H-4 visa the same way as eligible children on H-4 visa.

Recommendation 3: USCIS should consider granting automatic extensions of work authorization

USCIS regulations do not allow individuals to apply for employment authorization more than 120 days prior to its expiration. There are instances when it takes more than 120 days for the applicants to receive approved Work Authorization. These processing delays result in a gap in work authorization for the individuals, often causing job interruption, payroll changes, overhead on companies and hardship on applicants. Immigration Voice members have firsthand experience of this hardship and real life problems caused due to delays in the timely processing of Work Authorization.

There is precedent at USCIS of granting automatic extensions of work authorization for certain categories. By granting automatic extension of Work Authorization to eligible Spouses of H-1B

visa holders under the Proposed Rule, USCIS can ease the burden on the individuals and companies who employ them, and also ease the processing burden on itself.

Recommendation 4: USCIS should consider allowing submitting and receiving of Adjustment of Status when a visa number is not available.

One of the stated goals of the proposed rule is to lessen any potential economic burden to the H-1B principal and H-4 dependent spouse during the transition from nonimmigrant to lawful permanent resident status, furthering the goals of attracting and retaining high-skilled foreign workers. The long backlogs in employment based category has well recognized by USCIS and Congress. The current backlogs span over decades. The original Congressional intent was to complete this entire process in a few years. Under sections 106(j) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC 21 Act), Congress has expressed intent to qualify "Long Delayed Applicants" as those waiting for more than six (6) months.

However, due to backlogs in the visa processing system, often an immigrant must wait more than a decade in merely to 'submit' an application for Adjustment of Status. Immigration Voice suggests a technical fix that would allow applicants to 'submit' and USCIS to 'receive' Adjustment of Status applications even when visa numbers are not available. Allowing the mere submission of the application – even though there is no acceleration of the process to approve the application – will present real and substantial benefits to immigrants caught in the backlogs.

For example, six months after submitting the application for Adjustment of Status, even if the Adjustment of Status application has not yet been granted and a visa number is not available, the immigrant can accept a promotion or change employers without having to restart the green card application process all over again.

We recognize that the statute appears to preclude approving an application for adjustment of status if that application was filed when a visa is not immediately available. [8 U.S.C. 1255 (a) (3)] That statute itself, however, does not in any way prevent the administration from accepting and holding Adjustment of Status applications, triggering the EAD process. When the visa number does become available, the applicant can simply resubmit the form for adjustment of status with updated or most recent biometrics information, and that application could be adjudicated.

As stated above, there is no INA statute mandating that USCIS not accept Adjustment of Status applications when visa numbers are not available. The current statute, Section 245 [8 U.S.C. 1255], only declares that a non-immigrant worker's visa may not be adjusted – that is, a final approval of permanent residence status may not be made – until visa numbers are available. This does not prevent USCIS from receiving Adjustment of Status applications filed by the applicant. However, the pertinent regulation - USCIS 8 C.F.R. 245.1 - does not allow an alien to submit an Adjustment of Status application if visa numbers are unavailable. That regulation is not required by statute and should be changed. Additionally, Section 8 U.S.C. 1255 (a) specifically grants Attorney General the discretion and authority to prescribe regulations for adjustment of status application process.

Additionally, there is already extensive bipartisan support for allowing 'Early Submitting' change to the system. The Senate has passed 'Early Submitting' of Adjustment of Status fix many a times. This fix is also part of Senate Immigration Reform bill S.744. The House Immigration Sub-committee recently passed provision for 'Early Submitting' Adjustment of Status petition when deliberating H.R.2131.

This approach has a number of benefits for immigrants, native born workers and for the government, such as:

- It will consistent with the spirit of the law and Congressional intent.
- It will allow immigrant stuck in the backlogs to receive their work-authorizations or EAD cards, allowing them to change jobs. This small change will allow the labor market to work better, benefiting immigrants and native workers alike.
- The change will bring desperately needed relief to young people in danger of aging out of the system. Currently, due to the unforeseen and extremely long backlogs, minor children of employment-based immigrants are aging out of the system when their parents are unable to file their I-485 applications before the children turn 21. This would resolve that issue.
- It will also allow immediate background security and medical (plus immunization) checks on workers who otherwise are not subject to such screening until an immigrant visa number becomes available.
- The government stands to receive increased fees, as the system could have applicants apply twice for adjustment of status.

IV. Conclusion

Immigration Voice appreciates the opportunity to offer comments for the proposed rule. For the foregoing reasons, we urge USCIS to swiftly publish and adopt the final rule.

Respectfully submitted,
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