



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

July 11, 2014

Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529-2140

**Re: Comments to Proposed Rule: Enhancing Opportunities for H-1B1, CW-1,
and E-3 Nonimmigrants and EB-1 Immigrants
79 Federal Register 26870 (May 12, 2014)
DHS Docket No. USCIS-2012-0005**

Dear Chief, Regulatory Coordination Division:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the USCIS proposed rule, “Enhancing Opportunities for H-1B1, CW-1, and E-3 Nonimmigrants and EB-1 Immigrants,” published in the Federal Register on January 18, 2011.

AILA is a voluntary bar association of more than 13,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this proposed rule and believe that our members’ collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

Summary of the Proposed Rule

As set forth in the notice, USCIS is proposing the following amendments to Title 8 of the Code of Federal Regulations:

- Amend 8 CFR §274a.12 to designate principal E-3 and H-1B1 nonimmigrants as employment authorized incident to status with a specific employer;
- Amend 8 CFR §274a.12 to automatically extend employment authorization for a period of up to 240 days to principal E-3, H-1B1, and CW-1 nonimmigrants with timely filed requests for extension of stay;

- Amend 8 CFR §214.1(c)(1) and 8 CFR §248.3(a) to add principal E-3 and H-1B1 nonimmigrants to the list of individuals who must file a petition with USCIS to request an extension of stay or change of status, and replace the term “employer” with the more general term, “petitioner”; and
- Amend 8 CFR §204.5(i)(3) to add a provision allowing a petitioner seeking to employ an outstanding professor or researcher to submit “comparable evidence” to establish the beneficiary is recognized internationally as outstanding.

We first would like to thank USCIS for its ongoing efforts to harmonize the rules that are applicable to similarly situated visa categories and bring them in line with actual agency practice. This type of rule-making provides uniformity and predictability for U.S. employers and their employees and enhances compliance at virtually no cost to USCIS. The proposed rule will ensure that U.S. employers who employ individuals in the H-1B1, E-3, and CW-1 nonimmigrant categories experience as little disruption as possible in the commencement and continuity of their employment. The rule will also ensure that nonimmigrants in these categories are accorded the same treatment as other similarly situated individuals, such as those in H-1B, E-1, and E-2 status.

We also want to thank DHS for replacing the more narrow term “employer” with the more general term “petitioner” in reference to who may file a request to change or extend status under 8 CFR §214.1(c) and §248.3(a). The term “employer” does not adequately describe the array of individuals and entities that may file petitions under 8 CFR §214.2 and the term “petitioner” is a much more accurate descriptor.

Outstanding Professors and Researchers

We also commend USCIS for allowing petitioners seeking to employ an outstanding professor or researcher to prove the beneficiary is internationally recognized as “outstanding” through submission of evidence comparable to that which is specifically listed in 8 CFR §204.5. As USCIS points out in the Supplementary Information, this change will bring the standard of proof for outstanding professors and researchers in line with those that have long been permitted for other preference categories such as aliens of extraordinary ability (EB-1) and aliens of exceptional ability (EB-2). Moreover, the proposed rule recognizes the fact that the world has changed greatly since these evidentiary categories were first created.

As noted in the Supplementary Information, outstanding professors and researchers represent the top tier in their respective fields and statistical evidence clearly indicates that these individuals contribute significantly to innovation and entrepreneurship in the U.S. Many leading companies, particularly in the technology and healthcare sectors, were incubated in and then spun off from U.S. colleges and universities with foreign-born researchers and professors at the helm. Foreign born researchers and professors share their knowledge and techniques in both the classroom and the lab to better equip aspiring scholars and innovative thinkers to contribute to the U.S.

economy and advance our country's standing as a leader in their respective fields. Permitting applicants in this visa category to submit comparable evidence that reflects their accomplishments without limitations will facilitate the ability of U.S. employers to recruit the best and the brightest.

DHS Should Also Amend 8 CFR §274a.12(a) to Include Spouses of L-1, E-1, and E-2 Nonimmigrants in the Categories of Individuals Who Are Authorized for Employment Incident to Status

We respectfully submit that 8 CFR §274a.12(a) be amended to include spouses of L-1, E-1, and E-2 nonimmigrants in the categories of individuals who are authorized for employment incident to status. Under INA §214(c)(2)(E) and INA §214(e)(6), L-2 and E-1/E-2 spouses who are accompanying or following-to-join a principal nonimmigrant “shall” be authorized to engage in employment in the United States and be provided with “an ‘employment authorized’ endorsement or other appropriate work permit.” Notwithstanding the fact that the statute permits an “employment authorized” endorsement in the spouse’s passport upon admission to the U.S. in L-2 or E-1/E-2 status, and the fact that the Social Security Administration will issue a Social Security Number to L-2 and E-1/E-2 spouses upon submission of proof of status, USCIS requires these individuals to apply for and receive an Employment Authorization Document (EAD), a process that often takes 3 months or more.¹ When these individuals enter the United States and assume their nonimmigrant status, they have fulfilled all of the requirements under the law and should be deemed eligible to assume employment with a U.S. employer without having to first obtain an EAD. The instructions for Form I-765, which have the force of regulation pursuant to 8 CFR §103.2(a)(1), assign the authorization code (a)(17) for E-1/E-2 and E-3 spouses, and (a)(18) for L-1 spouses. These codes correspond to 8 CFR §274a.12(a)(17) and (18) which fall under the regulatory categories of individuals who are employment authorized incident to status. These sections, which are currently “reserved,” should finally be included in the regulations.

Amend 8 CFR §274a.12(b) and 8 CFR §274a.12(c) to Eliminate the Requirement that B-1 Household Employees Obtain an EAD and Include Them in the Categories of Individuals Who Are Authorized for Employment with a Specific Employer Incident to Status

Although B-1 household employees are required to obtain an EAD under 8 CFR §274a.12(c), elimination of the EAD requirement for these individuals is appropriate. The interruption of service of a household employee can be extraordinarily difficult for a family that is dependent on the employee to carry out the principal’s main functions in the U.S. Moreover, the B-1 visa holder is authorized to be in the U.S. solely because of the role that employee plays within the household, making the B-1’s right to work in fact “incident to status.” Because B-1 domestic visa holders are only granted extensions of stay in six-month increments, they are required to

¹ See USCIS Memorandum, “Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions,” (Feb. 22, 2002), located at http://www.uscis.gov/sites/default/files/files/pressrelease/E_LEmpAuthPub.pdf

separately file for an extension of the EAD to match each B-1 extension. This procedure leads to an endless series of applications simply to maintain status and coordinate said status with possession of a valid EAD card. Therefore, we suggest that the proposed rule be expanded to remove the requirement that B-1 household employees obtain an EAD and include them in the categories of individuals who are authorized for employment with a specific employer incident to status.

Conclusion

We appreciate the opportunity to comment on this notice, and we look forward to a continued dialogue with USCIS on issues concerning this important matter.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION