Summary of Final Rule:

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

81 Fed. Reg. 82398 (Nov. 18, 2016)

The following is a summary of the provisions of the DHS final rule, "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers."

The provisions summarized herein take effect on January 17, 2017.

PRIORITY DATES:

8 CFR §204.5(d): **Priority date**. Amended to clarify that the priority date of a properly filed employment-based IV petition that does not require a labor certification, or is accompanied by an application for Schedule A designation, is the date the completed, signed petition is properly filed with DHS.

8 CFR §204.5(e): **Retention of section 203(b)(1), (2), or (3) priority date.**

- Amended to provide that the priority date in an EB-1, EB-2, or EB-3 petition may be used for a subsequently filed EB-1, EB-2 or EB-3 petition, and may be used for purposes of 204(j) portability, unless USCIS denies the initial petition or revokes the petition's approval due to: (1) fraud or a willful misrepresentation of a material fact; (2) a determination that the petition was approved based on a material error; or (3) revocation or invalidation of the labor certification associated with the petition.
- Clarifies that a priority date cannot be transferred to another alien.

EMPLOYMENT AUTHORIZATION FOR EMPLOYMENT-BASED NONIMMIGRANTS:

8 CFR §204.5(p): **Eligibility for employment authorization in compelling circumstances.**

(1) Eligibility of principal alien. Permits one year of employment authorization for an individual who: (1) is currently in the U.S. in valid E-3, H-1B, H-1B1, O-1 or L-1

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nonimmigrant status [including the 10-day and 60-day grace periods under 214.1(l)(1) and (2)]; (2) is the principal beneficiary of an approved EB-1, EB-2 or EB-3 IV petition; (3) does not have an IV immediately available; and (4) can demonstrate compelling circumstances that justify the issuance of employment authorization.

(2) Eligibility of spouses and children. Family members of the principal are also eligible for employment authorization and may apply concurrently with the principal but cannot be granted until the principal is granted. The validity period of employment authorization for family members cannot exceed that granted to the principal.

(**3) Eligibility for renewal of employment authorization.** May apply to renew employment authorization prior to expiration of the initial EAD if the individual can show that he or she continues to be the principal beneficiary of an approved EB-1, EB-2 or EB-3 IV petition and either: (1) an IV is still not immediately available and the worker continues to face compelling circumstances; or (2) the difference between the principal beneficiary's priority date and the Final Action Date listed in the current Visa Bulletin for the relevant employment-based category and country of chargeability is 1 year or less. Family members can also apply for renewal concurrently with the principal but cannot be approved unless the principal is granted. The validity period of employment authorization for family members cannot exceed that granted to the principal.

(4) Application for employment authorization. Must file Form I-765 with appropriate fee and biometrics fee. Employment authorization may only be granted in 1-year increments.

(5) Ineligibility for employment authorization. Not eligible if convicted of any felony or two or more misdemeanors.

REVOCATION:

8 CFR §205.1(a)(3)(iii)(C) and (D): Automatic Revocation. Amends the regulations so that employment-based IV petitions that have been approved for 180 days or more (or where an associated adjustment of status application has been pending 180 days or more) would no longer be automatically revoked based only on withdrawal by the petitioner or termination of the petitioner's business. As long as the approval has not been revoked for fraud, material misrepresentation, the invalidation or revocation of a labor certification, or material USCIS error, the petition will continue to be valid for various purposes including: (1) retention of priority dates; (2) job portability under INA §204(j); and (3) extensions of status under AC21 §§104(c) and 106(a) and (b).

GRACE PERIODS:

8 CFR §214.1(l)(1): **Period of Stay.** New provision provides 10-day grace period to individuals in E-1, E-2, E-3, H-1B, L-1, and TN classifications and their dependents. Final rule says individuals "may" be admitted or otherwise provided such status. *But see* 8 CFR §214.2(h)(13)(i)(A), H-2B beneficiaries "shall" be provided a 10 day grace period before and after the petition validity period.

8 CFR §214.1(l)(2): New provision authorizes a grace period, up to 60 days, during the period of petition validity (or other authorized validity period) for E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN nonimmigrants whose employment has ended. Includes dependents. 60 day grace period permitted one time per authorized validity period. DHS may shorten the validity period as a matter of discretion.

H-1B CHANGE OF EMPLOYER

8 CFR §214.2(h)(2)(i)(H): H-1B Portability. Implements AC21 §105(a). Permits H-1B nonimmigrants who are beneficiaries of new H-1B petitions seeking an amendment or extension of their stay to commence new or concurrent employment upon the filing of a non-frivolous H-1B petition. Includes provisions for successive H-1B portability petitions.

LICENSURE:

8 CFR §214.2(h)(4)(v)(C): Duties without licensure. DHS may approve an H-1B petition for a validity period of up to 1 year if a state or local license to engage in the relevant occupation is required and the appropriate licensing authority will not grant such license due solely to the beneficiary's lack of a valid social security number or employment authorization, or failure to meet a similar technical requirement. A beneficiary who has been approved for a 1-year validity period may not obtain an extension of H-1B status for the same position without proof of licensure. The petitioner must include evidence of the identity, physical location, and credentials of the individual(s) who will supervise the alien and evidence that the petitioner is complying with state requirements.

H-1B CAP EXEMPTION

8 CFR §214.2(h)(8)(ii)(F)(1): Adopts the definition of "institution of higher education" provided by §101(a) of the Higher Education Act, consistent with **8 CFR §214.2(h)(19)(iii)(A)** for purposes of the ACWIA fee.

8 CFR §214.2(h)(8)(ii)(F)(2): The term "related or affiliated nonprofit entity" is defined, both for ACWIA fee (**8 CFR §214.2(h)(19)(iii)(B**) and cap exemption purposes, to include nonprofit entities that satisfy any one of the following conditions: (1) the non-profit is connected or associated with an institution of higher education through shared ownership or control by the same board or federation; (2) the non-profit is operated by an institution of higher education; (3) the non-profit is attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or (4) the non-profit has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship with the institution of higher education for the purposes of research or education; and a fundamental activity of the non-profit is to directly contribute to the research or education mission of the institution of higher education.

8 CFR §214.2(h)(8)(ii)(F)(3): Non-profit entity is defined by **8 CFR §214.2(h)(19)(iv)**; Non-profit research organization and governmental research organization are defined by **8 CFR §214.2(h)(19)(iii)(C)**, as a "federal, state, or local entity whose primary mission is the performance or promotion of basic research and/or applied research."

8 CFR §214.2(h)(8)(ii)(F)(4): An H-1B petitioner that is not itself a qualifying institution, organization or entity may claim an exemption from the cap for an H-1B nonimmigrant if: (1) the majority of the worker's duties will be performed at a qualifying institution, organization, or entity; and (2) such job duties directly and predominately further the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity (e.g., higher education, or nonprofit or governmental research).

8 CFR §214.2(h)(8)(ii)(F)(5): A previously exempt H-1B nonimmigrant will be counted against the cap when changing employment if he or she will no longer be employed by a cap-exempt entity, and he or she has not previously been counted within the 6-year period of authorized admission to which the cap-exempt employment applied.

8 CFR §214.2(h)(8)(ii)(F)(6): Permits concurrent cap-subject employment for an H-1B beneficiary in a cap-exempt position, but validity of the cap-subject employment cannot extend beyond the validity of the cap-exempt employment.

H-1B RECAPTURE:

8 CFR §214.2(h)(13)(iii)(C): Calculating the maximum H-1B admission period. Permits H-1B beneficiaries to recapture time spent outside the United States during the validity of an H-1B petition. May recapture at any time before the beneficiary uses the full 6 years.

AC21 §106 H-1B EXTENSIONS (1 YEAR INCREMENTS)

8 CFR 214.2(h)(13)(iii)(D)(1): Lengthy adjudication delay exemption from 214(g)(4) of the Act. Authorizes approval of H-1B status beyond 6 years, in 1-year increments, for certain H-1B nonimmigrants who are seeking employment-based LPR status if 365 days or more have passed since the filing of a labor certification application or employment-based IV petition.

8 CFR §214.2(h)(13)(iii)(D)(2)-(3): Extensions are generally available until the LC expires, a final decision is made to deny the LC or IV petition, or to revoke an approved LC or IV petition, to grant or deny permanent resident status, or otherwise close an application for LC, an IV petition or application to adjust status. Decision to deny or revoke an LC or IV petition is not final until administrative appeals have been exhausted.

8 CFR §214.2(h)(13)(iii)(D)(4): Substitution of Beneficiaries. An alien establishing eligibility for an H-1B extension beyond 6 years must be the named beneficiary on the LC unless he or she was substituted for another alien on the LC on or before July 16, 2007.

8 CFR §214.2(h)(13)(iii)(D)(5): Advance Filing. May file for an H-1B extension beyond 6 years within 6 months of the requested start date. May file before 365 days have elapsed as long as the LC or IV petition is filed at least 365 days prior to the date the period of authorization will take effect. May request time remaining in 6 years, including recapture time, at the same time as requesting a 1-year AC21 extension.

8 CFR §214.2(h)(13)(iii)(D)(6): Petitioners Seeking Exemption. H-1B petitioner need not be the same employer listed in the LC or IV petition.

8 CFR §214.2(h)(13)(iii)(D)(7)-(8): Subsequent Exemptions/Aggregation. Qualifying LC or IV petition need not be the same as that used to qualify for the initial H-1B extension beyond 6 years but cannot aggregate the number of days multiple LCs or IVs have been pending to meet the 365 day requirement.

8 CFR §214.2(h)(13)(iii)(D)(9): Exemption Eligibility. Only the principal beneficiary of the LC or IV petition may be eligible for an AC21 H-1B extension; spouses in H-1B status cannot piggyback.

8 CFR §214.2(h)(13)(iii)(D)(10): Limits on Future Exemptions. No longer eligible for AC21 H-1B extensions if the individual fails to file for adjustment of status or an IV within 1 year of an IV becoming available. May be excused if failure to file was due to circumstances beyond the alien's control. If the cut-off date retrogresses during the 1-year period, a new 1-year period will begin when an IV again becomes available.

AC21 §104 H-1B EXTENSIONS (3-YEAR INCREMENTS)

8 CFR §214.2(h)(13)(iii)(E)(1): Per country limitation exemption from section 214(g)(4) of the Act. Authorizes approval of H-1B status beyond 6 years, in 3-year increments, for beneficiaries of approved EB-1, EB-2, and EB-3 petitions who can demonstrate that an immigrant visa is not available at the time the H-1B petition is filed because the immigrant visa classification sought is over-subscribed.

8 CFR §214.2(h)(13)(E)(2): Extensions may be granted until a final decision is made to revoke an approved IV, approve or deny an IV application, or approve or deny an adjustment of status application.

8 CFR §214.2(h)(13)(E)(3): Current H-1B status not required. Beneficiary need not currently be in H-1B status to qualify for an AC21 3-year H-1B extension.

8 CFR §214.2(h)(13)(E)(4): Subsequent petitioners may seek exemptions. H-1B petitioner need not be the IV petitioning employer.

8 CFR §214.2(h)(13)(E)(5): Advance filing. May file for an H-1B extension beyond 6 years within 6 months of the requested start date. May request time remaining in 6 years at the same time as requesting a 3-year AC21 extension.

8 CFR §214.2(h)(13)(E)(6): Exemption eligibility. Applies only to the principal beneficiary; spouses in H-1B status cannot piggyback.

OTHER CHANGES TO ACWIA FEE PROVISIONS

8 CFR §214.2(h)(19): Amended to update fee amounts and procedures for submitting the fee or claiming a fee exemption. Also changes references to the form.

8 CFR §214.2(h)(19)(iii): Amended to include other entities that are statutorily exempt from the ACWIA fee. Adds new paragraph (D) to include primary and secondary educational institutions and new paragraph (E) to include nonprofit entities which engage in an established curriculum-related clinical training of students registered at an institution of higher education.

RETALIATION:

8 CFR §214.2(h)(20): Retaliatory action claims. An employer may submit documentary evidence that the beneficiary faced retaliatory action for reporting an LCA violation, and such evidence may be considered an "extraordinary circumstance" under 8 CFR §§214.1(c)(4) and 248.1(b), justifying the grant of an extension or change of status notwithstanding the fact that the beneficiary failed to maintain continuous status.

AC21 PERMANENT PORTABILITY UNDER INA §204(j)

8 CFR §245.25(a): Validity of petition for continued eligibility for adjustment of status. Requires an alien who has a pending application to adjust status based on an approved I-140 petition to have a valid offer of employment based on a valid petition at the time adjustment is filed and adjudicated, and the alien must intend to accept the offer of employment. Prior to issuing a final decision on adjustment, USCIS may require the applicant to demonstrate to USCIS, using Form I-485 Supplement J and supporting evidence, that:

1) The employment offer from the petitioning employer is continuing; or
2) The applicant has a new offer of employment from the same employer, a different employer or based on self-employment, in the same or a similar occupational classification as the employment offer listed in the qualifying petition, provided:

    - The adjustment application has been pending for 180 days or more; and
    - The IV petition has been approved and not revoked, or is pending for 180 days or more after filing for adjustment and is subsequently approved.

8 CFR §245.25(b): Defines "same or similar occupational classification.

VERIFICATION OF IDENTITY AND EMPLOYMENT AUTHORIZATION

8 CFR §274a.2(b)(1)(vii): Amended to provide that when the employee produces a Notice of Action (Form I-797C), confirming that the original employment authorization document has been automatically extended for up to 180 days, reverification applies upon the expiration of the 180 day extension period and not the date on the face of the EAD.

EMPLOYMENT AUTHORIZATION:

8 CFR §274a.12(b)(9): Clarifies that an H-1B beneficiary who commences employment with a new employer upon the filing of an H-1B change of employer petition is authorized to work until the petition is adjudicated.

8 CFR §274a.12(c)(35)-(36): Adds the new "compelling circumstances" basis for employment authorization to the list of aliens who must apply for employment authorization.

Proposed 8 CFR §274a.13(d)(1): Authorizes an automatic 180 day extension of EAD or employment authorization if:

1) The individual files a request to renew his or her EAD prior to the expiration date.
2) The individual is requesting renewal based on the same employment authorization category under which the expiring EAD was granted, or the individual has been approved for TPS and his or her EAD was issued pursuant to 8 CFR 274a.12(c)(19).
3) The individual either continues to be employment authorized incident to status beyond the expiration of the EAD or is applying for renewal under a category that does not first require adjudication of an underlying application, petition, or request.

Proposed 8 CFR §274a.13(d)(3): The 180-day extension is automatically terminated upon the lapse of the 180 day period following expiration of the initial EAD, issuance of a decision denying the individual's renewal application, upon written notice to the applicant, notice published in the Federal Register, or any other applicable authority.

Proposed 8 CFR §274a.13(d)(4): The expired EAD, in combination with a Notice of Action (Form I-797C) indicating timely filing of the renewal EAD application would be considered an unexpired EAD for purposes of complying with Employment Eligibility Verification (Form I-9) requirements.

ELIMINATED: **8 CFR §274a.13(d):** Requires the adjudication of EAD applications within 90 days of receipt. Also requires the issuance of interim EADs with validity periods of up to 240 days when such an application is not adjudicated within the 90-day period.