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IRLI is a nonprofit public interest law firm working to end unlawful immigration and to set levels of legal immigration that are consistent with the national interest.

IRLI is a supporting organization of the Federation for American Immigration Reform.

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February 29, 2016

Laura Hawkins
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
20 Massachusetts Ave., NW
Washington, DC 20529

REF: DHS Docket No. USCIS 2015-0008, Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers

Public Comment of the Immigration Reform Law Institute, Inc. and Federation for American Immigration Reform, Inc.

Dear Chief Hawkins:

The Immigration Reform Law Institute, Inc. ("IRLI") and the Federation for American Immigration Reform Inc. ("FAIR") submit the following comments to the U.S. Citizenship and Immigration Services ("USCIS") of the Department of Homeland Security ("DHS") in opposition to the agency's Notice of Proposed Rulemaking ("NPRM"), as published in the Federal Register on December 31, 2015. *See* 80 F.R. 81900-81945.

IRLI is a non-profit public interest law organization that exists to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful, and to monitor and hold accountable federal, state, or local government officials who undermine, fail to respect, or comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

FAIR is a non-profit, non-partisan organization of concerned individuals who believe that our immigration laws must be reformed to better serve the needs of current and future generations. With a support base that includes nearly 50 private foundations and over 250,000 diverse members and activists, FAIR is free of party loyalties and special interest connections. For more than 35 years, FAIR has been leading the call for immigration reform by offering and

advocating solutions that help reduce the harmful impact of uncontrolled immigration on national security, jobs, education, health care, and our environment.

The Department of Homeland Security claims that the proposed NPRM is "primarily aimed at improving the ability of U.S. employers to hire and retain" nonimmigrant specialty workers seeking remain in the U.S. as employment-based immigrants, while "increasing the ability of such workers to … pursue other employment options." 80 Fed. Reg. 81900.

Upon careful review, FAIR and IRLI have concluded that the most accurate translation of that bureaucratic formulation is that DHS has chosen to take an aggressively expansive policy position that is highly favorable to the special interests to be regulated by the notice of proposed rulemaking. Of particular concern is that the NPRM construes the American Competitiveness in the Twenty-first Century Act of 2000 ("AC21"), with no consideration whatsoever for the interests or protection of American specialty occupation workers. The NPRM collects nearly two dozen discrete regulatory proposals in a single NPRM. Apparently DHS hopes to hide behind its dense technical language, in order to festoon the NPRM with additional changes to favor foreign skilled labor over their American counterparts that have no express basis in the relevant statutory texts. This NPRM, and the years of confusing and often contradictory interim guidance it purports to be integrating into the Code of Federal Regulations ("CFR"), are a demoralizing example of agency capture by the special interests that Congress intended it to regulate in the national interest.

The FAIR and IRLI comments are sorted into three categories:

First, we identify proposals that are not only objectionable as agency policy but are also *ultra vires* and would violate the Administrative Procedure Act ("APA") if retained in a final regulation.

Second, we critique proposals that are regrettably not barred by federal immigration law, but which harm and do not protect the interests of American workers.

Third, we note several proposals are unobjectionable changes that improve the efficiency and integrity of the application and adjudication procedures for labor condition applications, employment-based visa petitions, and applications for employment-based adjustment of status.

Finally, we have concluded that the NPRM violates the Unfunded Mandates Reform Act ("UMRA").

A. ULTRA VIRES NPRM ACTIONS

(1) Exemptions to the H-1B Numerical Cap and Revised Definition of "Related and Affiliated Nonprofit Entity" in the American Competitiveness and Workforce Improvement Act of 1998 Fee Context

FAIR and IRLI strongly oppose the USCIS proposed expansion of the definition of a cap-exempt employer that is a "related and affiliated" nonprofit entity, in proposed 8 C.F.R. § 214.2(h)(8)(ii)(F)(4). *See* 80 Fed. Reg. 81918-19.

Senate Report 106-260, which as U.S. Citizenship and Immigration Services ("USCIS") notes is the authoritative summary of the legislative intent of the AC21 §103 cap-exempt provision, specifically stated, at 21-22, that the "primary purpose" of the cap exemption was to enable "more highly qualified educators in specialty occupation fields" to "immediately contribut[e] to educating Americans." Congress expressly intended that the cap exemption would make "more Americans … ready to take positions in these fields upon completion of their education." *Id.* The only secondary rationale provided by the Senate committee report was that "US universities" allegedly have "a different hiring cycle from other employer" which effectively excludes them from filing at the beginning of a fiscal year. *Id.* at 22.

FAIR and IRLI object that new subsection (ii)(F) is intended to expand—potentially on a massive scale—the issuance of cap-exempt H-1B visas to aliens whose actual employment duties have little or nothing to do with immediately making more Americans completing their academic studies ready to take positions in specialty occupation fields. We point to USCIS claims in the NPRM that the "primary purposes" of its proposed definition of related and affiliated entities are to "directly contribute to the research or education mission of the institution of higher education." 80 Fed. Reg. 81919. The NPRM also states that its "primary aim" as a whole is to provide "additional stability and flexibility to both foreign workers and [their] US employers…." 80 Fed. Reg. 81904.

These formulations of the NPRM's primary regulatory purposes and aim conflict with the controlling statutes, especially 8 U.S.C. § 1184(g)(5) (limiting aliens eligible for cap-exempt H-1B visas) and 8 U.S.C. § 1202(g)(B) (delegating only to the Department of State—not USCIS—authority based on "extraordinary circumstances" to extend the validity of expired nonimmigrant visas beyond the authorized period of stay.). Agency intent expressed in the NPRM is thus clearly arbitrary and would violate long-established principles of administrative law if implemented. *See, e.g., Manhattan Gen. Equip. Co. v. Comm'r,* 297 U.S. 129, 134 (1936) (an agency's authority…

is…the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.").

Under §1184(g)(5), exemption for the H-1B cap based on place of employment is based on "employment at" an institution of higher education (singular) or a nonprofit research organization (singular). "Employment at" a cap-exempt entity cannot include any work-related relationship that does not fit within the "conventional master-servant relationship" as recognized by the Supreme Court. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992). This controlling definition excludes self-employed persons, independent contractors, agent-client relationships, and third party placements where the third-party entity has control over the alien's work, compensation, or advancement.

USCIS relies solely and incorrectly on an internal 2005 memorandum to argue that AC21 §103, as codified at § 1184(g)(5), was instead intended to "ensure[] that qualifying institutions have access to a continuous supply of H-1B workers without numerical limitation." Michael Aytes, *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103, etc.*, USCIS AD06-27, at 3 (June 6, 2006). This USCIS theory of open-ended cap exemptions for third-party petitioners based "employment at" an eligible institution cannot be construed to mean "access to a continuous supply" of cap-exemption H-1B workers, because the construction would ignore both the established meaning of employment, and the legislative intent of Congress to carefully restrict the venue for cap-exempt employment. *See* Senate Report 160-260, at 21: "This section exempts from the numerical limitation inidivudals who are employed or receive offers of employment from an institution of higher education, affiliated entity, nonprofit research organization or governmental research organization."

The USCIS theory is also arbitrary because the proposed NPRM definitions of cap-exempt "non-profit entity" and "non-profit research organization" ignore and conflict with the legislative intent for cap-exemptions expressed in Senate Report 106-260. *See* proposed 8 C.F.R. § 214.2(h)(8)(ii)(F)(3). (The proposed 8 C.F.R. § 214.2(h)(8)(ii)(F) also impermissibly attempts to undermine the clear language of § 1184(g)(5) that "the number of aliens who are exempted from such numerical limitations" cannot cumulatively exceed 20,000 per fiscal year.) To avoid a challenge to its validity under the APA, USCIS must incorporate into these definitions the condition that an exempt entity or organization is primarily employing cap-exempt H-1Bs to educate Americans to immediately qualify for employment in a specialty occupation upon graduation.

The proposed regulation is also arbitrary because it would nullify the statutory requirement that the cap-exempt H-1B visa-holder be a bona fide employee of the qualifying entity and insert instead a

non-statutory quasi-requirement that the alien (1) "spend the majority of his or her work time performing job duties" (2) where there is an undefined "nexus" between such duties and "the essential purpose… or function" of the qualifying entity. *See* 8 C.F.R. § 214.2(h)(8)(ii)(F)(4). This standard is arbitrary because it is facially in conflict with the legislative intent expressed in Senate Report 106-260.

(2) <u>Concurrent employment at capped and cap-exempt employers</u>

FAIR and IRLI also strongly oppose the agency's broad regulatory endorsement of "concurrent" cap-exempt and non-exempt H-1B employment in proposed 8 C.F.R. § 214.2(h)(8)(ii)(F)(4). *See* 80 Fed. Reg. 81918.

The legality of concurrent-status H-1B employment is highly suspect, and rests on no more than a 2008 internal USCIS memorandum. *See* D. Neufeld, *Supplemental Guidance Relating to Processing*, etc., AD 08-06, §3 (May 30, 2008). The only basis in law ever offered by USCIS to support the legitimacy of concurrent employment is former Acting Associate Commissioner Neufeld's claim that the statutory phrase "ceases to be employed" by a cap-exempt employer in 8 U.S.C. § 1184(g)(6) is so ambiguous that the agency can authorize an alien who is employed by a cap-exempt employer to accept an additional (concurrent) full-time position with a non-exempt employer, without that concurrent H-1B position becoming subject to either the unequivocal per annum cap authorized by Congress in 8 U.S.C. § 1184(g)(1)(A), or the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA") H-1B nonimmigrant petitioner fee imposed by 8 U.S.C. § 1184(c)(9). That interpretation is arbitrary. It facially contradicts with congressional intent to (1) exempt only H-1B workers classified under 8 U.S.C. § 1184(g)(5)(A) from the § 1184(a)(1)(A)(vii) cap because they are directly engaged in training U.S. citizens for employment as specialty workers in the occupations in which the H-1B worker has expertise, and (2) collect application fees to fund occupational specialty training for U.S. citizen students.

Concurrent employment based on multiple positions held by a single H-1B worker would violate the APA prohibition against arbitrary and abusive agency action. There is not a scintilla of evidence identified in the NPRM that Congress, by enacting AC21, intended or acquiesced to the view that cap-exempt H-1B employment provides an alternate means for the agency to nullify the capped H-1B worker annual quotas, carefully imposed and calibrated by Congress, through the creation of regulatory loopholes.

(3) Employment Authorization for Certain Nonimmigrants Based on Compelling Circumstances

FAIR and IRLI strongly oppose, as *ultra vires* actions in violation of the APA, the proposed creation of a completely discretionary "compelling circumstances" ground for work authorization of H-1B nonimmigrants who are awaiting employment-based visa eligibility dates, as per proposed 8 C.F.R. § 204.5(p)(1)-(p)(5) and proposed 8 C.F.R. § 274a.12(c)(35) and (c)(36). *See* 80 Fed. Reg. at 81924 (referring to the proposed action as "a stopgap measure for retaining employment authorization for a limited period when compelling circumstances arise"), and 81939-40.

USCIS proposes to circumvent protections for U.S. workers by allowing an employer to show that it will experience "substantial disruption to a project for which the worker is a critical employee." 8 Fed. Reg. 81925. USCIS provides as an example an H-1B worker employer treated as cap-exempt under the (*ultra vires*) proposed regulations we analyze in Parts A(1) and A(2) of this comment, thus making the loss of cap-exempt status a "compelling circumstance" for employment of an alien specialty worker. But the proposed regulation intentionally omits any binding definition of a "compelling circumstance," leaving its application to the sole discretion of USICS. *See* proposed 8 C.F.R. § 204.5(p)(3)(1)(A).

It is of great concern that USCIS does not identify any delegation of congressional authority to grant work authorization to otherwise ineligible nonimmigrants in "compelling circumstances" other than the miscellaneous provision 8 U.S.C. §1324a(h)(3)(B). The NPRM disingenuously asserts that § 1324a(h)(3)(B) "recognizes the Secretary's authority to extend employment authorization to non-citizens in the United States."

This radical interpretation would impermissibly enable the U.S. Department of Homeland Security ("DHS") to "enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron and quite likely with the Constitution." *Ry. Labor Executives Ass'n v. Nat'l. Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir 1994). Yet the NPRM provides not a scintilla of evidence that Congress has acquiesced to this radical view of agency hegemony. The NPRM does not even attempt to tie the proposed regulation to ACWIA or AC21.

As the agency is well aware, its discretionary agency hegemony theory of employment authorization has been rejected by the Fifth Circuit. *See Texas v. U.S.*, 809 F.3d 134, 183 (5th Cir. Nov. 9, 2015) (holding that § 1324a(h)(3) is "a miscellaneous definitional provision expressly limited to § 1324a" because "the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of … benefits, including work

authorization."). The controversy is now pending before both the Supreme Court and the District of Columbia Circuit. *See U.S. v. Texas*, No. 15-674 (*certiorari granted* Jan. 19, 2016), and *Washington Alliance of Technology Workers v. DHS*, No. 15-5239 (D.C. Cir.).

(4) <u>Calculating H-1B Admission Period Exemptions to Avoid Per Country Limitations</u>

FAIR and IRLI strongly oppose the USCIS proposed extensions of status for aliens affected by the Immigration and Nationality Act ("INA") per-country limitations in proposed 8 C.F.R. § 214.2(h)(13)(iii)(E). *See* 80 Fed. Reg. 81912.

The proposed NPRM exceeds the agency's statutory authority as delegated by Congress under AC21. It arbitrarily construes AC21 in isolation, without reference to the directly relevant statutory scheme. By intent and effect, the NPRM would institute a permanent policy of agency preference in the issuance of employment-based immigrant visas in favor of specialty workers of Chinese and Indian nationality.

The interplay between INA per-country limits and INA anti-preference protections is the statutory context within which DHS may exercise its delegated authority to regulate employment-based visas petitions. The general rule for per-country allocation of visas is 8 USC § 1152(b). Per-country limitations are among the oldest and most fundamental provisions of American immigration law. Per-country limitations were imposed in 1921, with a quota for each nationality based on the percent of foreign-born persons of that nationality resident in the U.S. in 1910. Act of May 19, 1921, 42 Stat. 5. A permanent nationality-based quota system, using an 1890 baseline but excluding the Western Hemisphere, was enacted in 1924. Immigration Act of 1924, 43 Stat. 153. The formula of Eastern Hemisphere per-country quotas was carried over in the 1952 Immigration and Nationality Act reforms, with the important additional condition that all immigrants are presumed subject to the prescribed numerical limitations, unless expressly exempted. P.L. No. 82-414, 66 Stat. 163 (June 27, 1952). Differential per-country national quotas were abolished by the Immigration Act of 1965, but partially replaced, effective June 30, 1968, with (1) a second overall numerical quota for the Western Hemisphere, (2) numerical limitations based on preference categories, including unlimited immediate relatives, and (3) a 20,000 per-country annual ceiling. P.L. No 89-32, 79 Sta. 911.

The nepotistic effect of the 1965 amendments opened up a flood of legal immigration, and soon led to dominance of annual immigrant visa distributions by a reduced number of nationalities. Both developments were entirely unanticipated by Congress. The phenomenon was popularly called "chain migration."

Reacting to this unplanned demographic tsunami, Congress in 1978 combined the two hemispheric quotas into a single worldwide numerical limit. P.L. No. 95-412, 92 Stat. 907 (Oct. 5, 1978). However, the change was ineffective in practice, and provoked more than a decade of increasing conflict and chaos in legal immigrant admission and illegal alien entries.

In 1990, Congress restored a defined per-country annual quota system within the 1965 framework of worldwide ceilings, preference category numerical limitations, and special immigrant, humanitarian, and immediate relative exemptions. The Immigration Act of 1990, P.L. No. 101-649, 104 Stat. 4978 ("IMMACT 90"). IMMACT 90 applied per-country limits to both family and employment-based preference categories, and slightly increased the per-country annual limit. Significantly, the 1990 Act also established five new employment-based preferences, each with an annual allocation of about 40,000 visas. *Id.*

Coincident with the repeal of the differential 1924 national origin quotas, in 1965 Congress also enacted an express anti-discrimination provision, providing that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's nationality … or place of residence." 8 U.S.C. § 1152(a)(1).

The anti-preference statute is explicit and unambiguous. Allocation of visas above the per-country limits may not be made if such allocation would provide "any preference or priority" to any identifiable nationality. There are exclusions from the § 1152(a)(1) anti-preference protections in § 1152(a)(1)(B), but they only apply to determinations as to venue and the processing of applications by the Secretary of State.

For certain beneficiaries of approved EB-1, EB-2, and EB-3 I-140 visa petitions, AC21 § 104(c) authorized a narrow one-time exemption from the statutory six-year maximum period of H-1B status in 8 U.S.C. § 1184(g)(4). P.L. 106-313 ("One-Time Protection Under Per Country Ceiling") (authorizing "an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.") However, § 104(c) makes it clear that the grant of an extension is not an entitlement, but at the discretion of the agency ("any alien … may apply for, and the Attorney General may grant ….").

AC21 was intended to bring "flexibility" to per-country and preference limits on the issuance of employment-based immigrant visas, but only to the extent that the 140,000 annual cap would not otherwise be met. The Senate committee report referring to AC21 § 104 makes clear that

> "the legitimate function of the per-country limit … is to attempt to allocate visas among residents of different countries if there are not enough visas available for all qualified candidates…. This would work as follows: if after the after the employment based issuable during any calendar quarter have been issued according to the per country limitations those visas then may be issued without regards to the country of origin of the recipient. They may be issued, however, only to the limit of the total number of employment-based visas available for each category."

Senate Report 106-260, at 22.

However, the NPRM—claiming to rely on Senate Report 106-260 and the December 2005 Aytes interim guidance memo—proposes to abuse agency discretion by arbitrarily entitling Chinese and Indian adjustment of status ("AOS") applicants to preferential unlimited three-year extensions "until USCIS adjudicates the beneficiary's adjustment of status application." 80 Fed. Reg. 819013, 81943. Moreover, it would extend such preferential treatment even where the alien is not currently in H-1B status, to include including aliens who are not in the United States. *See* proposed 8 C.F.R. § 214.2(h)(13)(iii)(E)(3), 80 Fed. Reg. 81943.

The NPRM also adopts the flawed reasoning in a 2005 USCIS internal memo, which asserted that the express language in the caption and text of § 104(c), authorizing a single extension, does not apply because "in some cases … it may take more than three years for the alien to be eligible to adjust." Michael Aytes, *Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petition effected by [AC21]*, USCIS HQPRD 70/6.2.8-P (Dec. 27, 2005).

The NPRM is defective because it fails to consider the full relevant legislative scheme. The "beneficiary" described in § 104(c) is necessarily ("notwithstanding section 214(g)(4)") both an applicant for admission as an EB immigrant, and an H-1B visa-holder whose current work authorization is about to expire due to the 6-year limit. USCIS asserts that such H-1B workers do not accrue time towards the statutory limit when outside the United States, because such absences do not cause "disruption to American businesses," a concern which Congress intended to mitigate by enacting AC21. Senate Report 106-260, at 22. It is thus an abuse of discretion for USCIS to treat aliens who are outside the country, or who have petitioned to work as a Legal Permanent Resident ("LPR") for an employer other than their current H-1B employer, as eligible for extension of H-1B status under § 104(c). In neither circumstance can the current H-1B or a future LPR employer experience "disruption" caused by a break in the alien's employment.

The NPRM rationale for unlimited three-year extensions is also an agency abuse of agency discretion. Congress was well aware that waiting-list priority dates can be quite distant in time when it enacted AC21, but without amending the anti-preference or per-country quota statutes. But § 104(c) was only intended to keep an alien employed in the same position with the same employer until the upcoming fiscal year, the only time when a visa number would be "immediately available… at the time his [AOS] application is filed." *See* 8 U.S.C. § 1255(a)(3). Additional evidence that the three-year extension regulation would be an abuse of discretion is the agency's position in proposed 8 C.F.R. § 204.5(p)(5), where USCIS would exclude from eligibility for employment authorization any beneficiary whose "priority date is more than 1 year beyond the date immigrant visas were authorized for issuance for the principal beneficiary's preference category and country of chargeability."

"Interpretive rules must be derivable from the statute that it implements by a process fairly to be described as interpretive: that is, there must be a path that runs from the statute to the rule, rather than merely consistency between statute and rule." *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1158 (10th Cir. 2006). DHS must purge from the NPRM any direct or consequential preference or priority in the processing and adjudication of H-1B applications and of employment-based I-140 visa petitions and I-485 adjustment applications. If the final regulation does not limit eligibility for § 104(c) relief to aliens transitioning from H-1B nonimmigrant status to employment-based LPR status at the same employer through an adjustment of status application, and limit its application to cases where the requisite EB visa will be "immediately available" no later than the following fiscal year, the agency action will be *ultra vires* and at risk of judicial review.

(5) Automatic Revocation With Respect to Approved Employment-Based Immigrant Visa Petitions

FAIR and IRLI strongly oppose the proposed weakening of standards for automatic revocation of I-140 petitions for employment-based immigration visas, as per proposed 8 C.F.R. § 205.1(a)(iii) (C) and (D). *See* 80 Fed. Reg. 81920.

DHS may revoke an immigrant visa petition at any time for good and sufficient cause. 8 U.S.C. § 1255. The NPRM arbitrarily proposes that the agency provide preferential treatment for aliens, "particularly workers from China and India," 80 Fed. Reg. 81921, who are eligible for portability under 8 U.S.C. § 1184(j), over "beneficiaries of employment-based immigrant visa petitions who seek to adjust status based on continuing offers of employment from petitioning employers," 80 Fed. Reg. 81922. In the first case, withdrawal or termination of business by the petitioner would no

longer trigger automatic revocation, while they would continue to do so for continuing employer petitions.

The NPRM states that the intent of the proposed CFR amendments is to enable the alien to continue to use the petition for (1) retention of priority dates, (2) job portability under section 204(j) of the INA, and (3) extension of status for certain H-1B nonimmigrants under AC21 §§ 104(c) and 106(a) and (b). 80 Fed. Reg. 81921. USCIS evidently intends to implement, as a regulatory preference for qualifying alien AOS applicants from over-subscribed nations, federal protection of their employment status against "certain circumstances outside their control."

Implementation of this provision of the NPRM is of questionable legality. It is evident that what the agency labels "circumstances outside their control" means in application the restrictions and conditions imposed on employment-based immigration by Congress. First, because the NPRM is intended to provide greater flexibility for Chinese and Indian nationals, it would violate the anti-preference national origin discrimination statute, 8 U.S.C. § 1152(a)(1). By effectively mandating a materially preferential interpretation of the "good and sufficient cause" element in that INA provision for favored aliens, implementation would constitute an abuse of agency discretion. *See* discussion above in part A(4) of this comment.

Second, the U.S. Court of Appeals for the Ninth Circuit has concluded that eligibility for the AC21 § 106 portability provisions codified at 8 U.S.C. § 1184(j) is irrelevant to and can have no effect upon whether an I-140 petition is invalid, prospectively or retroactively. In *Herrera v. USCIS*, the Ninth Circuit specifically rejected the reasoning in the NPRM, which had been argued by an L visa-holder attempting to petition following a § 1184(j)-based port:

> [In AC21] Congress clearly recognized that long delays were causing difficulties for certain applicants, and the Portability Provision afforded job flexibility for those whose I-485 applications had been pending for 180 days or more. But it is just as clear that Congress did not intend to grant extra benefits to those who changed jobs.

571 F.3d 881, 887 (9th Cir. 2009). "More to the point," the Ninth Circuit explained, "in order for a petition to 'remain' valid, it must have been valid from the start," *i.e.*, at all times. *Id*.

For a petition to be considered "valid" it must be (1) "in harmony with the thrust of the related provisions and with the statute as a whole," *see, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), and (2) "the petition must have been filed for an alien that is 'entitled' to the requested classification." *Herrera*, 571 F.3d at 887 (citing 8 U.S.C. § 1154(a)(1)(F), 8 U.S.C. §

1361). Withdrawal of an I-140 petition by the employer, or the cessation of business by the petitioning employer, are events that eliminate statutory elements of eligibility for an I-140 petition. An I-140 petition requires the designation of a petitioner who is a bona fide employer that is able and willing to pay the required wage and meet other detailed conditions regarding compensation and working conditions. In the case of both voluntary withdrawal and cessation of operations, those conditions by definition no longer exist. Indeed, the agency expressly recognizes this by declining in the NPRM to extend the proposed revocation preferences to H-1B workers of continuing employers whose petitions are not based on portability. 80 Fed. Reg. 81922.

Given the discriminatory intent and impact of the proposed NPRM, the rejection of the agency's reasoning as to the scope of the relevant statutes by the Ninth Circuit, and the absence of any consideration by the agency of the adverse impacts of increased employment flexibility on competing American workers, implementation of proposed 8 C.F.R. § 205.1(a)(iii) (C) and (D) would violate 5 U.S.C. § 706(2)(A).

(6) <u>I-140 Priority Date Retention Following Withdrawal or Close of Business by the Original Petitioner</u>

FAIR and IRLI strongly oppose the USCIS proposed creation of regulatory preferences in priority date retention for certain employment-based visa petition applicants in the EB-1, EB-2 and EB-3 preferences who have changed jobs after their original sponsoring employer withdrew its position or went "out of business" in proposed 8 C.F.R. § 204.5(d) and (e). *See* 80 Fed. Reg. 81922. These changes in the NPRM would be *ultra vires* agency actions for the same reasons as the proposed *ultra vires* preferences ins the CFR amendments critiqued in parts A(4) and A(5)—they are intended to benefit roughly the same population of alien specialty occupation workers, predominately Chinese and Indian nationals. These proposals are, if anything, even less grounded in law, because in addition to revocations under 8 U.S.C. § 1155, the NPRM would also in effect nullify the alien's statutory burden of proof under 8 U.S.C. § 1154(e) to establish entitlement to classification as an employment-based immigrant when seeking readmission after travelling abroad

(7) <u>Employment-Based Immigrant Visa Petition Portability Under 204(j)</u>

FAIR and IRLI strongly oppose the USCIS proposed regulations for AC21-authorized job "porting" for AOS applicants who change jobs or employers after their AOS application has filed for more than 180 days, in proposed 8 C.F.R. §§ 245.25, and 205.1(a)(iii)(C) and (D). *See* 80 Fed. Reg. 81915-16, 81944. First, the NPRM here has the same flaws as the proposed regulation critiqued in parts A(5) and A(6) of this comment, *i.e.*, allowing beneficiaries to port notwithstanding the fact that

the original petition has become invalid due to withdrawal of the petition or termination of the petitioners' business. This is a prime example of the "extra benefits" which Congress never intended to provide under AC21 §106. *See Herrera v. USCIS*, 571 F.3d at 887.

Second, we also strongly oppose the inclusion of so-called "self-employment" petitions as presumptively eligible for 204(j) porting. *See* proposed 8 C.F.R. §§ 245.25(a)(2). This is a continuing serious abuse of the agency's discretion exercised in its 2005 internal memorandum, W. Yates, *Interim Guidance for Processing … Petitions … Affected by [AC21]*, HQPRD 70/6.2.8-P (May 12, 2005). The "Aytes Memo" provides no rationale for its Q&A 8 statement, "Yes as long as the requirements are met." *Id.*at 5. "Self-employment" cannot meet multiple continuing requirements for H-1B specialty worker status. For example, an alien cannot seek a Labor Condition Application ("LCA") for him or herself, an alien serving as the executive/manager of the U.S. employer is not admissible in H-1B status because such persons require a valid B1, E, or L visa, and there is no separation between the alien and the U.S. employer. Under a self-employment arrangement the U.S. employer has no independent right to control the alien employee, as defined by the U.S. Supreme Court in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. at 323-24; see also *Clackamas Gastroenterology Associates P.C. v. Wells*, 538 U.S. 440 (2003) (emphasizing the controlling common-law focus on a master's control over a distinct servant.).

Third, the proposed NPRM would institutionalize a definition of the statutory phrase "same or similar occupation classification" for purposes of I-140 portability that is intended to lower the standard well beyond even the agency's prior guidance, effectively nullifying the statutory mandate for labor certification approval. *See* proposed 8 C.F.R. § 245.25(c). USCIS proposes to define the phrase "same occupation" as including any "occupation that resembles in every relevant aspect the occupation for which the underlying employment-based immigrant visa petition was approved," while "similar occupation" is proposed to mean any "occupation that shares essential qualities or has a marked resemblance or likeness with the occupation for which the underlying employment-based immigrant visa was approved." 80 Fed. Reg. 81944.

This proposal is arbitrary and capricious. The agency may not delegate to itself complete discretion to determine on a case-by-case basis whether an occupation "resembles in every relevant aspect" or "shares essential qualities" or "has a marked resemblance or likeness with" the occupation from which the alien seeks to "port." The language is intentionally crafted by the agency to reduce the significance of the statutory phrase to an unenforceable *de minimus* standard, in defiance of accepted standards of statutory construction. It is clear that the agency has given no consideration whatsoever to conforming its future exercise of unlimited discretion, in defiance of Congress which, as the Ninth

Circuit has interpreted the legislative history, clearly "did not intend to grant extra benefits to those who changed jobs. *Herrera v. USCIS*, 571 F.3d at 887.

Up until recently, USCIS has required at least that the two jobs share the statement of job duties contained in the original ETA-9089 or I-140. The agency has also considered "same or similar" to mean use of the same or similar Dictionary of Occupational Titles ("DOT") or Standard Occupational Code ("SOC") code in the two I-140s. The NPRM provides absolutely no explanation of its sudden and sneaky abandonment of these two basic criteria, in proposed 8 C.F.R. § 245.25(c).

Finally, we oppose the decision to not impose a fee for adjudication of a "same or similar occupation" adjudication, even though USCIS is proposing to commit agency resources by regulation to prepare, issue and adjudicate a new supplementary form for such purposes. *See* 80 Fed. Reg. 81916. That decision seems consistent with an apparent emerging agency policy of actively promoting opportunities for H-1B petitioners to avoid or minimize payments of fees, which were expressly imposed by Congress to fight fraud and reduce the use of alien specialty workers by training Americans to fill jobs in those occupations. That agency policy itself is arbitrary.

(8) <u>Exemptions from H-1B Licensing Requirements</u>

FAIR and IRLI strongly oppose the USCIS proposed relaxation of licensing requirements in proposed 8 C.F.R. § 214.2(h)(4)(v)(C)(1). *See* 80 Fed. Reg. 81926, 81941.

We do not oppose the inclusion in the NPRM of the current practice of granting H-1B status, for a single non-renewable one-year period, where the beneficiary lacks a required license due solely to a policy of the subject licensing authority not to issue licenses to individuals who do not have employment-authorized social security numbers. *See* proposed 8 C.F.R. § 214.2(h)(4)(v)(C)(2). This is, as DHS notes, a "Catch-22 situation." 80 Fed. Reg. 81926. But we do note that the INA currently mandates that employers pay all such H-1B employees "full-time wages" for any "nonproductive time" while the alien awaits a license, and that the statutory language necessarily includes nonproductive time while the alien is outside the United States. 8 U.S.C. § 1182(n)(2)(C)(vii)(I).

However the NPRM then proposes to grant H-1B status to unlicensed aliens in states that allow unlicensed individuals to "practice that occupation under the supervision of licensed senior or supervisory personnel" under proposed § 214.2(h)(4)(v)(C)(1). *Id.*

This NPRM change if implemented would facially violate the statutory requirement for H-1B status of "full state licensure to practice in the occupation, if such licensure is required to practice in the

occupation." 8 U.S.C. §1184(i)(2)(A). Moreover, an H-1B visa petition requires proof of a valid approved LCA. 8 U.S.C. § 1182(n)(1). An LCA is not valid if during recruitment the employer required American applicants to be more qualified than the proposed alien beneficiary, as in this circumstance. 8 U.S.C. § 1182(n)(1)(G)(i)(I).

The NPRM proposes that "USCIS shall examine the nature of the duties …. If the facts demonstrate that the alien under supervision will fully perform the duties of the occupation, H classification may be granted." *See* proposed 8 C.F.R. § 214.2(h)(4)(v)(C)(1). This action would be *ultra vires* and prohibited by 5 U.S.C. § 706(2)(A). If the license was required when the job was advertised pursuant to the LCA application, USCIS lacks the authority to retroactively allow the beneficiary to work in an unlicensed capacity under a licensed supervisor. That authority was delegated by Congress only to the Secretary of Labor. 8 U.S.C. § 1182(n)(1).

(9) <u>Chain Porting under Pending H-1B Status</u>

FAIR and IRLI strongly oppose the USCIS proposed regulations claiming to enhance the job "porting" practices by H-1B nonimmigrants authorized under AC21 § 105(a), in proposed 8 C.F.R. § 214.2(h)(2)(i)(H) and 8 C.F.R. § 274a.12(b)(9). *See* 80 Fed. Reg. 81917. Portability was, regrettably, codified into employment-based immigration law by a paradigm of special-interest legislation, AC21 (where its effect on the American labor force has been entirely malign). We also recognize that H-1B visa-holders are allowed by law to have "dual intent," to seek adjustment of status while they are still working as nonimmigrants. 8 U.S.C. §1184(b). We thus do not contest the codification of the language of 8 U.S.C. § 1184(n) as current procedure in proposed 8 C.F.R. §214.2(h)(2)(i)(H)(1)-(2).

However, it is a different case with proposed § 214.2(h)(2)(i)(H)(3) ("Successive H-1B portability petitions"). By encouraging the extra-statutory practice of bridging, whereby H-1B workers can move repeatedly from employer to employer without waiting for approval of a petition, this proposal would go well beyond the intent of Congress. Under the agency interpretation being proposed as a formal regulation in the NPRM, an H-1B visa holder may move repeatedly from a job and H-1B extension is held only provisionally and conditionally, *i.e.*, where the H-1B petition has not been approved.

The NPRM ignores limitations imposed by relevant statute. The text of AC21 § 105, as codified, requires four elements for H-1B job portability: a valid original approved H-1B status, a beneficiary who is in lawful status (that is, "have been lawfully admitted") at the time of filing the new bridging petition and has not been employed without authorization "subsequent to lawful admission," and a

new bridging petition filed by the petitioner within the alien's authorized "period of stay." 8 U.S.C. § 1184(n)(2)(A)-(C). AC21 § 106(a) clarifies that, for purposes of H-1B amendments and extensions ("the limitation contained in section 214(g)(4)"), "lawful status," "lawful admission," and "the duration of authorized stay" describe the same statutory condition. For aliens who remain in the U.S. beyond their authorized period of stay, filing of a non-frivolous application for a change or extension of status can only toll unlawful presence for up to 120 days. 8 U.S.C. § 1182(a)(9)(B)(iv).

Read together, these provisions prevent DHS from exercising discretion to deem a bridging applicant to be in "a period of stay authorized by the Secretary of Homeland Security" more than 120 days beyond the date authorized in the alien's current I-94. In effect, DHS cannot authorize extended successive porting unless the alien is still the beneficiary of at least one current period of lawful H-1B status, as reflected by the alien's I-94.

(10) Automatic 180-Day Extension of Certain Employment Authorization Documents

FAIR and IRLI strongly oppose the proposal for automatic extension of work authorization for up to 180 days, while eliminating the current 90-day deadline for adjudication of employment authorization document ("EAD") filings in proposed 8 C.F.R. § 274a.13(d).

The NPRM indicates that the agency wants to impose the automatic extension procedure to all categories of aliens required to apply for employment authorization under 8 U.S.C. § 274a(c). For multiple classifications of aliens listed under § 274a(c), the alien is not present in any independent work-authorized or lawful status recognized by statute. Employment authorization for these classes of aliens rests on nothing more than the highly controversial claim by DHS Secretary Johnson that the agency possesses hegemonic inherent discretion to authorize employment for all classes of aliens. *See* part A(3) above, at 15. These classifications include § 274a(c)(3) F-1 students working under clauses (c)(3)(i)(B), post-completion OPT, (c)(3)(i)(C) 17-month OPT extensions, or (c)(3)(ii) severe economic hardship waivers; § 274a(c)(11) aliens paroled into the United States; § 274a(c)(11) aliens granted deferred action; § 274a(c)(17) personal or domestic servants; and § 274a(c)(20) un-adjudicated special agricultural workers ("SAW") amnesty applicants.

Unlike aliens who have applied to renew temporary protected status ("TPS") status described in 8 U.S.C. § 1254a(4)(B), Congress has never authorized or contemplated automatic EAD extensions for these classifications, particularly on the sweeping categorical basis evoked in the NPRM. To implement the proposed 8 C.F.R. § 274a.13(d) without excluding these classifications from

automatic renewal would be an arbitrarily over-broad agency action, in violation of the general constraint on agency discretionary power imposed by 5 U.S.C. § 706(2)(A).

B. OTHER NPRM ACTIONS PREJUDICIAL TO AMERICAN SPECIALTY OCCUPATION WORKERS

(1) Calculating the H-1B Admission Period Exemptions Due to Lengthy Adjudication Delays

FAIR and IRLI oppose the USCIS proposal to grant extensions of H-1B status based on the "lengthy adjudication provisions of AC §§ 106(a) and (b), for aliens who are also seeking to "port" under 8 U.S.C. § 1152(j). *See* 80 Fed. Reg. 81914. This effect is implicit in proposed 8 C.F.R. § 214.2(h)(13)(iii)(D), and stated to be the agency's intent. *Id.* Although USCIS argues that current policy is that "section 106 contains no requirement that the H-1B petitioner be the same employer as listed on the labor certification application or immigrant visa petition in order to seek an exemption from the six year period," as noted above, Congress never intended that AC21 would operate so as to grant extra benefits to those who changed jobs.

We also find contrary to the intent of Congress and harmful for American specialty occupation workers the NPRM proposal at 8 C.F.R. § 214.2(h)(13)(iii)(D)(2), which would suspend the effect of "denials, invalidations, or revocations of labor certification applications and denials of immigrant visa petitions" until the end of the period authorized to file administrative appeals. *See* 80 Fed. Reg. 81914. This in effect makes the Administrative Appeals Office ("AAO")—not USCIS—the *de facto* adjudicator of defective or fraudulent applications, a gratuitous benefit to prima facie ineligible aliens that both ignores congressional intent and countenances routine waste of scarce USCIS adjudicative resources.

While we do not oppose tolling "during the period in which any such appeal is pending," as per proposed clause (h)(13)(iii)(D)(3), the arbitrary automatic tolling proposal where no appeal has been filed has no basis whatsoever in black-letter federal law.

(2) Exemption of time spent outside the United States from the six-year limit on H-1B status

FAIR and IRLI oppose the USCIS proposed regulations claiming to "clarify" the entitlement of H-1B workers to exempt all time that they spend outside the U.S. from the statutory six-year cap on their authorized admission in that status. See 8 C.F.R. § 214.2(h)(13)(iii)(C). *See* 80 Fed. Reg.

81917-18. DHS has gone back and forth on this issue over the years, based on various internal memoranda. The agency did not always consider the reason for absence from the United States to be "irrelevant" as now claimed, and was able to apply a "meaningfully interruptive" standard. We realize that the only federal district court to consider the question found the statutory time limit in 8 U.S.C. § 1184(g)(4) to be ambiguous on this point, and allowed for visa recapture to continue until changed by regulation. The conflict we note is that USCIS is now arguing, in support of its other expansions of portability policy in the NPRM, that a petitioner experiences no disruption to its business when the beneficiary is out of the country. It is thus arbitrary for the agency to claim that periods when the beneficiary was an employee of the petitioner and travelled outside of the United States are "irrelevant" to the 8 U.S.C. § 1184(g)(4) limitation.

(3) Employer Debarment and H-1B Whistleblower Provisions

FAIR and IRLI oppose the proposed codification of ACWIA whistleblower protections in 8 C.F.R. § 214.2(h)(20), unless the phrase "the beneficiary faced retaliatory action" is amended to read, "the beneficiary suffered from retaliatory action described in 8 U.S.C. § 1182(n)(2)(C)(iv)." This statutory provision provides a precise definition of retaliatory action. Without a more precise definition, the agency will be creating arbitrary incentives for H-1B employees to abuse the whistleblower process as a short-cut to permanent immigrant status. We also note a chronic bias reflected in this NPRM section, in that agency policy has consistently interpreted the procedures available to U.S. specialty workers who file whistleblower claims against employers using H-1B aliens in the most narrow, restrictive and ineffectual sense.

C. NPRM ACTIONS FAVORABLE TO IMPROVED MANAGEMENT OF EMPLOYMENT-BASED IMMIGRATION

(1) Priority Date Clarification and Retention for Certain I-140 Petitioners

FAIR and IRLI do not oppose the USCIS "clarification" in proposed 8 C.F.R. § 204.5(d) that, for any employment-based visa petition where no labor certification is required, the priority date is "the date the completed, signed petition is properly filed with DHS. *See* 80 Fed. Reg. 81922.

(2) Revocation of status when cap-exempt employment ceases

FAIR and IRLI do not oppose the proposed standard for revocation of cap-exempt status when employment other than "concurrent" employment ceases, as proposed in 8 C.F.R. § 214.2(h)(8)(ii)(F)(5). We however recommend that the agency make it an administrative practice to routinely

inform the current beneficiary that a notice of intent to revoke a cap-exempt petition has been sent to the petitioner. *See* 80 Fed. Reg. §214.2(h)(10)(ii). This omission has given rise to needles litigation and waste of scarce agency resources. However, language that might indirectly create standing for a beneficiary to contest the notice in lieu of the petitioner would be *ultra vires* and should be strictly avoided.

(3) Period of Admission for Certain Nonimmigrant Classifications

FAIR and IRLI do not oppose the USCIS proposed addition by USCIS of E-1, E-3, L-1 and TN nonimmigrant worker visa-holders to the classifications for whom admission prior to and after their visa status-based work authorization period is authorized for a 10-day "grace period in proposed 8 C.F.R. § 214.1(l)(i) and 8 C.F.R. § 214.2(h)(13)(i)(A). A week to prepare for work after arrival and prior to departure are customary arrangements typical for contemporary overseas expatriate employment assignments. *See* 80 Fed. Reg. 81923.

(4) Elimination of the 90-Day Processing Deadline for Certain EADs

FAIR and IRLI support the elimination of the current 90-day processing deadline for employment authorization in current 8 C.F.R. § 274a.13(d). *See* 80 Fed. Reg. 81928-929. All information that we have been able to independently review supports the agency's view that "the 90-day timeframe and interim EAD provisions ... do not provide sufficient flexibility to reconcile with DHS' core missions to enforce and administer our immigration laws and enhance security." *Id.* As the summary notes, this change will not have any noticeable effect on the vast majority of applicants, and the National Customer Service Center ("NCSC") priority processing request procedure will remain in effect to handle the even tinier number of cases where unique exceptional circumstances might trump the agency's paramount system integrity duties related to national security and identity fraud.

D. VIOLATION OF THE UNFUNDED MANDATES REFORM ACT

The proposed regulations impose federal mandates in violation of the Unfunded Mandates Reform Act. USCIS incorrectly claims that

> "[a]lthough this rule does exceed the $100 million expenditure threshold in the first year of implementation (adjusted for inflation), this rulemaking does not contain such a mandate. Providing job flexibility through unrestricted employment authorization to a limited number of employment-authorized nonimmigrants in compelling circumstances is not a required immigration benefit, nor will use of the proposed flexibilities result in any expenditures by State,

> local, and tribal governments. The requirements of Title II of UMRA, therefore, do not apply…."

80 Fed. Reg. 81936.

The UMRA requires DHS to "assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." 2 U.S.C. § 1531. UMRA defines a "federal private sector mandate" as "any provision in legislation, statute, or regulation that-- (A) would impose an enforceable duty upon the private sector except-- (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program…." 2 U.S.C. §658(7)(a). The contents of the required statement are found at 2 U.S.C. § 1532(a). "In promulgating a general notice of proposed rulemaking … the agency shall include in the promulgation a summary of the information contained in the statement. 2 U.S.C. § 1532(b).

The NPRM confirms that "this rule does exceed the $ 100 million expenditure threshold in the first year of implementation (adjusted for inflation)," 8 Fed. Reg. 81936, and also that "this proposed rule would largely conform DHS regulations to longstanding policies and procedures established in response to certain sections of [ACWIA], and [AC21]." 8 Fed. Reg. 81901.

Regulations issued "in response to" congressional legislation are paradigmatic mandates. The economic impact of direct expenditures alone, and the fact that the proposed amendments to the Code of Federal Regulations are driven by the two cited statutes, clearly places this NPRM within the scope of both private sector and state and local UMRA mandates. For example, these statutory mandates are imposed, *inter alia*, on all "institutions of higher education" and "affiliated and related non-profit entities." *See, e.g.*, proposed 8 C.F.R. § 214.2(h)(8)(ii)(F)(4)-(6). These proposed changes will also materially affect the number and definition of aliens to whom the ACWIA fees apply. *See* Senate Report 106-260, at 28 (finding that extensions and other modifications to the ACWIA fee payment requirements "would be an intergovernmental mandate as defined by UMRA.").

The unfunded mandates associated with this NPRM significantly change how the statutory caps on H-1B admissions and adjustment of status to LPR operate for all other H-1B employers as well. According to USCIS, the NPRM will allegedly have a very significant impact on the entire range of STEM and IT-related economic sectors, which USCIS alleges are reliant on increases in productivity and innovation driven by immigration by H-1B workers, who adjust status while employed in the United States. The unfunded effects of the deceptive agglomeration of proposed employment-related immigration regulations in the NPRM were never the result of "voluntary" action by taxpayer-

funded state and local government agencies. *See, e.g.*, Michelle Malkin and John Miano, *SOLD OUT* (2015) (especially chapter 2—refuting the existence of an American STEM worker shortage, chapter 3—explaining how prevailing wage rate ("PWR") calculations adversely distort labor condition approvals in favor of employers of Indian and Chinese aliens, in particular H-1B workers seeking adjustment of status, and chapter 4—providing case histories). For the protection of the American public, the statement required at 2 U.S.C. § 1532(a) must be provided to the public, with an opportunity for comment.

In conclusion, given the predominately *ultra vires* and arbitrary character of a majority of the proposed changes to C.F.R. Title 8, along with the misleading and bad faith approach taken by the agency in amalgamating this NPRM, and also the permanent harm that implementation would cause to thousands of American specialty occupation workers nationwide, FAIR and IRLI respectfully urge the agency to withdraw the NPRM, and reissue it only after incorporating the extensive redactions described in this public comment. Given the scope of these flaws, we regrettably conclude that even an attempt to cure some of the noted defects of law in a final implementation of the NPRM rule would fail to provide adequate public notice and comments.

Respectfully Submitted,

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