DHS Docket NO. USCIS-2015-00008

Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skill Non-Immigrant Workers.

Comments submitted by the IEEE-USA

29 February 2016

We are submitting these comments on behalf of the IEEE-USA, an operational unit of the IEEE (Institute of Electrical and Electronics Engineers). We are speaking for our 200,000 members in the United States. These members are individual technology professionals and include American citizens, green card holders, H-1B workers, and students from all around the world.

Our position on high-skill immigration has been consistent for almost fifteen years. IEEE-USA supports high-skill immigration and efforts to make it easier for individuals with advanced skills or educations to immigrate to the United States. But the H-1B visa is not an immigration visa. It is a short-term work permit that would, in an ideal world, have little to do with the immigration system. While the H-1B visa has a role in our economy, that role ought to be minor and short-term, rather than the central role the visa plays today.

Moreover, the H-1B visa has increasingly come to be used as a tool for replacing American workers with low-cost foreign workers – who will never be invited to become Americans. This business model is contrary to the intent of H-1B law, to America's long-term economic interests, and to the interests of workers using the visa; but it persists. We hope that any changes to the regulations governing the H-1B will reflect concerns about outsourcing, and reduce the use of H-1B visas to eliminate American jobs.

In the proposed regulations, the Administration is to be commended for drawing attention to the importance of portability to the H-1B program. Many of the problems associated with the H-1B program could be reduced, although not eliminated in most cases, if H-1B workers could easily change jobs without abandoning any permanent residency process started on their behalf by their current employer. Currently, they cannot. Instead, H-1B employees are often effectively forced to stay with their original employer, a fact that places them in an easily exploitable position. Regrettably, many employers take advantage of this in ways that harm both the H-1B workers and American workers. The proposed regulations codify the statutory mandate of permitting a change of employment upon filing of a petition by the new employer. 8 CFR 214.2(h)(2)(i)(H). The clarifying conditions of this proposed regulation is helpful. While the proposed regulations change very little from the current rules controlling the portability of H-1B visas, it is still worthwhile to note the flexibility that H-1B workers do have.

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We also support the proposed provision to prevent a petitioning employer from withdrawing an approved petition 180 days or more after approval. 8 CFR 205.1(a)(3)(i)(C). The intention is to permit a transfer to another employer in the same or similar occupation without having to obtain a new labor certification and approved petition. However, the third sentence of the clause should be reworded to make clear that an adjustment of status application can be filed on such a preserved approved petition. The reference to Sec. 204(j) could be misunderstood, since it does not come into effect until the adjustment application—not the petition—has been pending for 180 days.

Further, IEEE-USA commends the DHS for the added flexibility that the proposed regulations are intended to provide. However, IEEE-USA has concerns about the DHS proposal to allow nonimmigrant workers who have an approved immigrant visa petition to stay in the United States without a visa if they lose their sponsorship due to "compelling circumstances" while waiting for a visa to become available. The DHS' proposal is certainly a humane and honorable one, but we fear it is poorly designed because it may put immigrants in danger of falling out of status. As we understand it, the proposal would provide such nonimmigrant workers with an Employment Authorization Document (EAD) so that they could stay in the United States without a visa. Unfortunately, the DHS has declined to define the "compelling circumstances" that the worker would have to face to become eligible for the EAD. Further, the proposal would not provide workers with an EAD with legal status to stay in the United States without a visa.

While we respect the intent of the proposal, it would place the worker in legal jeopardy by placing them, technically, out of status. As such, the worker would be placing his/her long-term ability to immigrate at risk, whether or not they have an EAD.

It is essential that nonimmigrant workers facing compelling circumstances be given legal status to remain in the United States, not merely permission to remain.

IEEE-USA opposes those aspects of the proposed rules that seek to broaden the exemptions from the H-1B annual cap. There are three specific aspects of the proposed rules that make the exemption applicable to situations that are inconsistent with the intent of Congress to apply the cap to most employment and only to provide exemption to a narrow set of nonprofit and governmental educational and research employers. Commercial enterprises should never have access to these exemptions, nor should employers that do not directly employ the exempted employee. This would permit a massive expansion of the H-1B program in clear violation of the intent of the law.

First, under proposed 8 CFR 214.2(h)(8)(ii))F)(*4*) the rules seek to exempt workers employed "at" an institution that is exempt from the H-1B cap, even if the workers in question are not employed "by" the except institution. Under the proposed rules, a private for-profit company would need to simply rent space at a facility owned by an exempt organization and engage in work similar to that done by the exempt institution to enjoy unlimited access to the H-1B program. These for-profit companies could then employ a limitless number of H-1B workers, none of whom would count against the cap.

The proposed rules stipulate that the workers would have to be engaged in activities that "directly and predominantly further the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity." However, this qualification is so broad and open-ended that it offers few real constraints on the involved organizations.

For example, a pharmaceutical company could rent space from a hospital under this exemption and then replace their entire staff with H-1B workers, none of whom would count against the cap. The employees in this case would be working to cure diseases – which would "further the essential purpose, mission, objectives or functions of" a hospital. Similarly, a university could, under this proposal, permit a corporation to build a facility on land owned by the university. The facility would be "at" the university, and could therefore employ all the H-1B workers they want, so long as the employees are engaged in work related to similar work being done at the university. One could produce a lengthy list of for-profit corporations that could link their work to the purpose, mission, objective or function of a non-profit, all of which could make use of the non-profit's exemption from the H-1B cap. For that matter, reading the provision broadly, a qualifying institution, organization or entity could have its essential purpose, mission, objectives or functions predominantly furthered by obtaining a stable income stream from a private for-profit company renting some of its space.

Beyond the limitless scope of this new exemption, the proposal itself violates Congress' intent when drafting the H-1B law. The statutory text makes it clear that Congress wanted to treat for-profit and selected not-for-profit organizations differently. Congress further placed a hard cap on the number of visas organizations could use, unless those organizations fit very clear and limited criteria. Opening up this exemption to all companies would defeat the careful protections Congress placed in the law, and would place tens of thousands of American jobs at risk.

This concern is amplified by proposed 8 CFR 214.2(h)(8)(ii))F)(*2*), the proposal to expand the definition of "related or affiliated nonprofit entity." Under current rules, organizations are exempt from the H-1B visa cap and from certain visa fees if they are (1) connected to or affiliated with an institution of higher education, (2) operated by an institution of higher education, or (3) attached to an institution of higher education. The proposal would broaden this to include nonprofits that have an "active working relationship" with an institute of higher education and whose primary purposes include research or education.

While there may be examples where a broadening of the "related" criteria is appropriate, the proposed new exemptions from the cap are extremely broad and poorly defined. Any nonprofit that engages in any significant educational or research programs would qualify, so long as they have some sort of working relationship with a university. This would include a large number of groups that are not "an institution of higher education," a "nonprofit research organization" or a "government research organization." The exemption in current law is limited to these two classifications of organizations ("related" and "affiliated"). The cap and fee exemption should not, and we believe cannot, be expanded to other types of organizations simply because they have a working relationship with a university and are engaged in some educational programs. These actions are insufficient to turn organizations into a university or research facility.

We are further concerned with proposed 8 CFR 214.2(h)(8)(ii))F)(*6*), which is discussed in footnote 61, without further amplification. Despite the reference to Sec. 214(g)(5), that statutory provision makes no mention whatsoever of concurrent employment. The proposal to extend the exemption to concurrent employment has no statutory justification, nor is it consistent with prior practice. On the contrary, it is an invitation to massive abuse of the statutory cap. Under the proposed language, any H-1B workers who is employed by a cap-exempt organization and concurrently employed by a non-exempt organization would not count against the annual H-1B cap. This exemption from the cap does not take into account the nature of each job. For example, a worker could be employed by an exempt institution for a few hours each week, but also be employed by a non-exempt company for a full 40 hours. Such a worker would not count against the annual H-1B cap despite spending the bulk of his or her working hours in a non-exempt position. Even if the concurrent employment is not clearly dominant in this way, it will be impossible to know whether this is truly concurrent separate employment of a collusive effort to undermine the cap. We are aware of Wright University operating a staffing arrangement to "rent" its exemption. This provision could be used to legalize what was found in that case to be illegal.

Furthermore, the University of Massachusetts has proposed to create incubator programs under its aegis to allow it to share its exemption while allowing the employees to work primarily on commercial, rather than educational, activities. Advocates of expanded H-1B numbers have blanketed the country with proposals for such approaches to "hacking" the H-1B cap. This proposal is a roadmap as to how to break the cap with the approval of DHS. But Congress has not even authorized concurrent employment at all—although DHS has—and to break the cap in this fashion is *ultra vires.* The rule should be that concurrent employment is subject to the cap unless the concurrent employer is exempt on its own without this unwarranted loophole.

Again, Congress clearly limited the number of jobs that could be filled with an H-1B worker, with a limited exemption for very specific organizations. There is no provision in the law that says this limit could be breached simply by giving those H-1B workers a second job.

Nor is there any logical reason to think the cap ought to be breached. The fact that a company employs workers who also work a couple of hours a week at a university does not change the fact that the company is using an H-1B visa. The law clearly states that visas used by non-exempt companies count against the cap. Second jobs do not alter this legal mandate.

Creating the exemption would give companies a way to "hack" the immigration system, as a number of groups have already bragged. The DHS ought to remember that hacking, by definition, is an illegal act. Likewise, this proposal would subvert the clear language and logic of the law.

Taken together, these three instances of loosening the exemptions to the cap all push in the wrong direction.

They do so by using the nonprofit educational and research exemption and therefore contravene the intent of the original cap-exemption. This exemption was extended to very specific institutions with the intent of encouraging the use of H-1B workers in academic research institutions, national labs and hospitals. The proposed regulations invite abuse of this exemption by unscrupulous

organizations, which in turn could cause the exemption itself to be called into question. The DHS should not jeopardize the current cap-exemption by stretching it beyond what Congresses intended and beyond what the law allows.

The H-1B visa is a troubled program. While the visa can play an important, if limited, role in our economy, abuses to the system have led to hundreds of thousands of Americans losing their jobs and workers under the programs being placed in untenable positions. Reforms are clearly needed, and the DHS should be commended for suggesting some. IEEE-USA is, in particular, supportive of efforts to make the H-1B visa more portable and to protect workers using the visas.

However, the proposed rules would open up the program to new forms of visa abuse and new ways of taking advantages of visa workers, and cost Americans even more jobs. Worse, they would do so in violation of the law. IEEE-USA opposes the DHS' proposal to expand the nonprofit exemption in any way. The location of non-exempt jobs, a few educational programs, and the existence of a second job should not magically transform a non-exempt organization into an exempt organization.