COMMITTEE ON
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Laura Dawkins
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

Re: CIS No. 2571–15; DHS Docket No. USCIS-2015-0008, 80 Fed. Reg. 81900, 81928-29.

Notice of Proposed Rulemaking: "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers."

Comment opposing proposal to repeal 8 C.F.R. § 274a.13(d) providing that USCIS must adjudicate employment authorization applications within 90 days, or in the alternative issue interim employment authorization document.

Dear Chief Dawkins:

The Immigration and Nationality Committee of the New York City Bar Association ("City Bar") strongly opposes the proposed rule eliminating the longstanding requirement that USCIS adjudicate an application for employment authorization within 90 days of the application being filed, or in the alternative provide interim employment authorization. 8 C.F.R. § 274.a13(d). This dramatic change in existing law was published without proper notice and would have an immediate and substantial negative impact on immigrants who have complied with USCIS rules and are awaiting employment authorization.

The City Bar is an independent nongovernmental organization of more than 24,000 lawyers, judges, law professors, and government officials from throughout the United States and over fifty other countries. The City Bar has long advocated for due process and fair administration of the laws, including our nation's immigration laws. The City Bar's Committee

on Immigration and Nationality Law is comprised of current and former immigration judges, experienced immigration attorneys, and scholars. Our members have extensive experience representing clients in a wide range of immigration matters, including applications for employment authorization documents.

As a threshold matter, we express strong concern about U.S. Citizenship and Immigration Services' failure to provide proper notice to the public of this significant proposed change. This far-reaching rule, which will substantially change decades-long practice on issuing an Employment Authorization Document (EAD), is hidden in the middle of a long, complicated proposed regulation on EB work visas. The majority of immigrants affected by the change in EAD rules will not fall within EB categories, yet the very title of the proposed regulations -- Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers – would not lead any immigration practitioner or legal service organization to read the proposed rule unless his or her practice happened to include this highly specialized area of employment-based immigration.

The purpose of notice and comment rule making is to allow the public to provide meaningful input into proposed changes in the law by agencies. Presenting this proposed change in the present manner runs counter to this Administration's commitment to greater transparency in government and do not believe that USCIS should move forward with such a significant change without giving immigration providers truly meaningful notice about the proposed change. We ask that you remove the elimination of the 90 day/interim EAD rule from this proposal and, if necessary, make this the subject of a separate proposed rule that would give the public proper notice and an opportunity to comment.

We further note, with some concern, that this very issue – USCIS's frequent failures to comply with this regulatory 90-day time limit, is currently the subject of class action litigation in the U.S. District Court for the Western District of Washington, *Arcos-Perez et al. v USCIS*, No. 2:15-cv-00813. By trying to effect this proposed change without meaningful opportunity for comment, and thus presumably to moot this lawsuit, USCIS could well be seen as making an end-run around both the judicial process as well as the administrative notice-and-comment procedures.

In addition, the proposed rule should be rejected on the merits. For more than a quarter-century, USCIS and its predecessor INS have provided by regulation for interim employment authorization when the agency did not adjudicate an EAD application within the specified 90 days. Time and again this has proven to be invaluable to non-citizens who need an EAD in order to accept or maintain employment. USCIS's delay in providing employment authorization to eligible noncitizens causes financial hardship to applicants from loss of employment opportunities and/or interruption or termination of employment, loss of driver's licenses in many states and loss of benefits; to employers from the loss of authorized workers; and to applicants' families, when they are left without the applicant's income and benefits.

Delays in USCIS adjudications are commonplace and have increased in recent years. The USCIS Ombudsman's most recent annual report finds that "every year thousands of eligible

individuals encounter processing delays" in EAD applications.[1] Moreover, while DHS emphasizes that the majority of adjudications currently not exceed 90 days, 80 Fed. Reg. 81900, 81929, this timing reflects the current 90-day adjudication deadline and underscores its continuing importance, rather than suggesting it is unnecessary.

Elimination of the 90-day processing requirement for initial EADs or, in the alternative, issuance of interim EADs, thus leaves applicants at risk of extended unemployment, even when they are eligible for employment authorization and have filed timely applications. This consequence would harm applicants' ability to support themselves and their families and employers' ability to hire qualified employees. Indeed, as the Ombudsman recognized, "[w]hen processing of employment authorization applications is delayed, both individuals and their actual or would-be employers suffer adverse consequences. Applicants experience financial hardship due to job interruption and employment termination; they may lose or have difficulty renewing driver's licenses; business operations stall due to loss of employee services; and families face suspension of essential income and health benefits."[2]

DHS raises two hypothetical scenarios to support the repeal of the current 8 U.S.C. § 274a.13(d). First, DHS states that delays may occur if an EAD applicant does not timely comply with biometrics requirements, and second, DHS proffers that it may sometimes need extra time to complete background checks for individuals where security checks remain pending. USCIS does not provide statistics as to how often these are the reasons for delays in EAD processing, so it is not clear that they in fact require substantial delays. Moreover, even if these concerns were documented, an amended regulation could address these concerns in a far more limited way, such as providing that issuance of an EAD may extend beyond 90 days if the applicant does not comply with biometrics appointments, provided the applicant has received proper notice of the appointment. Indeed, currently, an EAD application will be considered abandoned if the applicant fails to appear for a biometrics appointment.

The current 90-day limit and interim EAD rule codified at 8 C.F.R. § 274a.13(d) provides predictability for employers, employees, and families, does not interfere with USCIS's ability to adjudicate an application, request information from an applicant, or terminate an interim employment authorization. The City Bar urges USCIS to reject the proposed elimination of the 90-day processing limit and interim EAD provisions. Moreover, any rule change addressing these provisions should be undertaken via a separate, clearly identified notice with additional time to comment.

Sincerely,

Farrin R. Anello

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[1] USCIS Ombudsman 2015 Annual Report to Congress 48-50, https://www.dhs.gov/sites/default/files/publications/2015%20CISOMB%20Annual%20Report_508.pdf.

[2] *Id.*