Council for Global Immigration
A SHRM Affiliate

SHRM
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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Submitted via www.regulations.gov

Ms. Laura Dawkins
Chief of the Regulatory Coordination Division
USCIS Office of Policy and Strategy
20 Massachusetts Avenue NW.
Washington, DC 20529-2140

Re: Requests for Information: Immigration Policy, published at 79 Fed. Reg. 78458-78460 (December 30, 2014); Docket Number DHS-2014-0014

Dear Ms. Dawkins:

The Council for Global Immigration (CFGI) and the Society for Human Resource Management (SHRM) are pleased to submit these comments in connection with the Request for Information on Immigration Policy stemming from the President's executive action on visa modernization. We appreciate this unique opportunity to make recommendations to the Department of Homeland Security (DHS), Department of State (DOS) and other agencies to improve adjudications and other processes and to create better efficiencies within the agencies.

CFGI, founded in 1972 as the American Council on International Personnel, is a strategic affiliate of SHRM. It is a nonprofit trade association comprised of leading multinational corporations, universities, and research institutions committed to advancing the employment-based immigration of high-skilled professionals. CFGI bridges the public and private sectors to promote sensible, forward-thinking policies that foster innovation and global talent mobility.

Founded in 1948, SHRM is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

Recommendations

In his 2013 Principles on Immigration Reform, President Obama said that "[f]or the sake of our economy and our security, legal immigration should be simple and efficient." This idea also underlies the heart of what the agencies are asking for in this RFI.

We agree with this goal. In our 2014 Employer Immigration Metrics Survey, 86 percent of employers reported that the ability to obtain visas in a timely, predictable and flexible manner is critical to their business objectives, up from 70 percent in 2013. Accordingly, we make the following recommendations:

I. Priority 1: Implement a Robust Trusted Employer Program

Before addressing the specific questions in this RFI, we want to emphasize that our highest regulatory priority, which will simplify legal immigration filings and create efficiencies in the spirit of the President's stated objectives, is the implementation of an effective Trusted Employer program. We recognize and applaud DHS for announcing that it is exploring a Known Employer pilot program on the Northern border - we hope to have opportunities to work actively with the agency to ensure success and encourage expansion of this initiative in both scope and size to become a more comprehensive, robust, efficient program.

There is widespread, bipartisan support for a Trusted Employer program, but the agencies need not wait for Congressional action. The visa modernization process provides significant opportunity to advance processing into the modern era.

We have extensive materials available describing our vision for a Trusted Employer program. We envision a program that:

- substantially reduces the resources necessary for adjudications and other visa processes at DHS, DOL and DOS,
- allows reallocation of resources toward other priorities such as backlog reduction and combatting fraud, and
- provides substantial relief to compliant employers who are overly burdened by the current system.

Under the current immigration system, our members submit extensive documentation about their organization (including company description, organizational structure, and finances) that has already been submitted with many other petitions – sometimes numbering in the dozens, hundreds or thousands each year. In addition, recurring job classifications and descriptions must be submitted and adjudicated each time they arise – there is no way for adjudicators to refer to previous filings from the same company for the same position, even if it is a standard position for a Fortune 500 company or a world-class university or research institution. As a result, according to our 2014 Employer Immigration Metrics Survey, employers spend, on average, five times

longer preparing each immigration application than the government estimates. For example, the government estimates that the average I-129 process takes 2.75 hours to complete – an estimate that is supposed to include all activities related to Form I-129 including preparation of cover letters, collection of documents from the foreign national, etc. In reality, employers report that the process for an H-1B visa, one of the more common I-129 processes, takes 13 hours in total. With each paper-based filing potentially including hundreds of pages of evidence, these processes also run counter to the spirit of the Paperwork Reduction Act.

We encourage the agencies to work on a Trusted Employer program that provides American employers with a timelier, efficient, predictable immigration system that keeps us competitive with our global counterparts. DHS already has several successful models to draw from, including Trusted Shipper, Trusted Traveler and TSA Pre-Check. And, as the government has taken steps to move forms and other processes to online electronic formats, we envision a seamless electronic Trusted Employer program

Similar in concept, employer registration programs provide priority processing for trusted employers in other countries, such as Australia, Ireland, Italy and Sweden. For example, Ireland, in December 2014, began piloting a Trusted Partner program designed to provide a streamlined immigration work permit process for employers supportive of foreign industry and enterprise. Preregistered employers file less documentation and gain access to expedited processing.

How Would Trusted Employer Work?

CFGI has developed detailed overviews of how a Trusted Employer program might work. In a nutshell, Trusted Employer should be available to any employer that can demonstrate a track record of compliance with applicable laws. Such employers would register and obtain certification with the relevant agency(ies) prior to submitting applications for particular employees under the program.

In working toward an effective Trusted Employer program, it is helpful to consider the three major decisions adjudicators must currently make with each application:

1. Has the employer proven it meets the legal requirements for sponsorship?
2. Has the employer proven that the position qualifies for the immigration classification being requested?
3. Has the employer proven the foreign professional is qualified for the job?

The initial goal of a Trusted Employer program should be to answer the first question in the registration process. Ultimately, this could be expanded to also answer the second question. By alleviating adjudicators from reconsidering facts which do not change from petition to petition, adjudicators would be freed to concentrate on the foreign national's qualifications.

In the registration process, employers would pay a fee and submit evidence such as company descriptions, organizational structure, finances and annual reports. As the fundamentals do not change frequently or rapidly in these documents, they would be adjudicated one time to determine that the organization is a legitimate employer with the ability to pay its employees.

These documents would then be resubmitted periodically to demonstrate continued legitimacy and ability to pay.

In cases such as L-1 petitions, where qualifying relationships must exist between parents, subsidiaries, branches and affiliates, those determinations could also be made at the time of registration for the Trusted Employer program. This would be similar to the process for Blanket L petitions used in consular processing.

In addition to organization bona fides, pre-approval of certain job classifications is a logical step for a Trusted Employer program to take, as employers often have tens, hundreds, or thousands of employees with nearly identical job titles and job descriptions. These repeated job titles and job descriptions are frequently reflected in immigration filings. Requiring adjudicators to make the same determination in each of these filings is an inefficient use of resources and lessens predictability for employers.

Overall, a Trusted Employer program would achieve the timelier, efficient and predictable processing that is needed in today's immigration system. This would save the government, employers and professionals time and money and put the United States on par with other countries competing for top global talent. With the greatest processing volume USCIS has ever seen on the horizon, now is the time for Trusted Employer.

We are happy to provide additional feedback at any time on any additional elements or requirements for a Trusted Employer process. The goal, for both the agencies and employers, should be a program that is widely used and substantially reduces burdens for everyone involved. CFGI and SHRM are vast networks of employers and HR professionals that can provide the government with practical advice as to how these goals can be achieved.

Specific Responses to RFI Questions

As noted in Section I of this comment, a Trusted Employer program is our top priority because we believe it will alleviate many of the other processing concerns discussed below. The rest of our priorities are as follows:

a. <u>In response to questions 3(b) and 3(e), institute reforms and policies that will reduce the numbers of unnecessary and overly burdensome requests for evidence (RFEs)</u>

The most consistent and prevalent concern regarding visa processing for our members continues to be the volume of RFEs to which they need to respond and the overly burdensome nature of many of those required responses. While some RFEs are necessary, a large portion either ask for information that has already been provided, apply an inappropriate burden of proof or ask for significantly more evidence than is necessary to grant the benefit being sought.

A few statistics from our 2014 Employer Immigration Metrics survey illustrate the problem:

- Only 21% of employers agree that RFEs generally request necessary information and/or documentation that was not provided in initial petition, while 59% disagree;

- Only 32% of employers agree that H-1B RFEs generally ask for information reasonably related to the requested immigration status, while 46% disagree;

- Only 20% of employers agree that L-1 RFEs generally ask for information reasonably related to the requested immigration status, while 56% disagree;

- Only 7% of employers agree that O-1 RFEs generally ask for information reasonably related to the requested immigration status, while 34% disagree.

An example from a CFGI member illustrates the type of problems that sometimes arise. A major entertainment company filed an O-1 petition for a beneficiary who had won an Academy Award (Oscar). Because "published" evidence was not readily available, the company filed the petition with photographs of (1) the beneficiary holding his Oscar backstage at the Oscar ceremony and (2) a close-up photograph of the Oscar showing the beneficiary's name. The adjudicator sent an RFE stating that the photographs did not constitute "published" evidence.

The problem in this scenario was not the quality of the wording of the RFE; rather, the problem was that the adjudicator did not understand that a photograph of the beneficiary holding what was clearly his own Oscar was sufficiently reliable evidence that the beneficiary had received the most prestigious award in the motion picture industry. The case could be approved without further delay; instead, an unnecessary RFE was issued.

USCIS can best alleviate strains on its limited resources by proactively avoiding unnecessary RFEs which adjudicators expend needless time issuing, which employers must expend needless time, energy and legal fees responding to, and which, cumulatively, unnecessarily cost millions of dollars every year in lost productivity.

We have previously submitted recommendations with regard to RFEs in numerous comments, including our responses to the DHS Retrospective Review of Existing Regulations (submitted March 28, 2014) and in several comments on RFE templates (most recently in our comment on the Template for Form I-140 to be used for E13 Multinational Executives and Managers, submitted January 21, 2015). We reiterate below the major points we made in those comments.

In order of priority, these are the actions which could reduce the number of unnecessary and overly burdensome RFEs:

- **Institute a policy of deference to prior adjudications for extensions and changes to similar statuses.** Employers are unduly burdened when an employee has been granted an immigration status and there are no changes in the nature of the organization or job, but an RFE is nonetheless issued on a petition requesting an extension or a change to a similar status.

This most often arises in extensions of nonimmigrant status – for instance, when an employee is already in H-1B, L-1A or L-1B status and is applying for an extension of the same status. This can also arise when moving from a nonimmigrant status to immigrant status in the case of an L-1A visa holder moving to E13 executive and managerial status, is cases where the L-1A visa holder's position abroad was in executive or managerial capacity and not in a specialized knowledge occupation.[1]

An internal policy of deference at USCIS would free up valuable resources and provide much needed relief and predictability for employers who are currently burdened responding to unnecessary RFEs. Some non-precedent Administrative Appeals Office (AAO) decisions have held that deference is not required where there have been material errors, but this does not preclude an internal policy of deference within the Service Centers where there have been no material errors.[2] This policy would be in accordance with the April 23, 2004 memorandum from William R. Yates, then Associate Director of Operations at USCIS:

> In matters relating to an extension of nonimmigrant petition validity involving the same parties (petitioner and beneficiary) and the same underlying facts, a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference. A case where a prior approval of the petition need not be given deference includes where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new information that adversely impacts the petitioner's or beneficiary's eligibility. Material error, changed circumstances, or new information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

This memorandum, which puts forth a policy that recognizes material error but still provides for deference, should be enforced within the Service Centers. Without deference, employers face a situation where they lack reasonable predictability in employment decisions that is essential to success – and the U.S. economy suffers unnecessarily.

[1] 8 CFR §204.5(j); 8 CFR §214.2(l)(i)(B)

[2] Administrative Appeals Office Decision, March 22, 2006; Administrative Appeals Office Decision, August 15, 2012

- **Include employers in adjudicator training and implement liaison position:** We have often heard from our members that they would be eager to participate in training of USCIS adjudicators and staff in a more formalized way to ensure quality adjudications and reduce unnecessary RFEs. We recognize the efforts that the agency has made with the Entrepreneurs in Residence program and the Loaned Executive Program, but far more can be done to ensure that adjudicators understand how legitimate businesses operate and the terrible adverse impact and cost caused by unnecessary RFEs. We recommend a formalized employer liaison position to function as an information conduit between USCIS and employers to ensure adjudicators have a proper understanding of various professions and modern business models that allow our country to innovate. This position could also be charged with ensuring that USCIS follows through on the many thoughtful recommendations that are made at stakeholder meetings at headquarters and the service centers.

  In addition to training at USCIS facilities, several CFGI members have offered to arrange for training off-site at employer locations and other places where adjudicators can see how organizations actually operate. CFGI has arranged such opportunities in the past and we are eager to reestablish these programs.

- **Institute a policy of supervisory reviews for all RFEs.** We have frequently recommended that all RFEs be reviewed by a supervisor before they are issued. We believe this will significantly reduce the rate of unnecessary RFEs. We understand that, on paper, this could be perceived as creating additional work for supervising officers. However, on aggregate, a substantial reduction in unnecessary and overly burdensome RFEs will substantially free up resources, as ISOs will no longer have to adjudicate responses to those RFEs. This is a win-win policy that will benefit USCIS and employers alike.

- **Increase training on the preponderance of the evidence standard**. Many unnecessary and overly burdensome RFEs are the result of a misunderstanding or misapplication of the preponderance of the evidence standard, which stands for the proposition that a case that is "more likely than not" approvable should be approved. We understand that, in 2012, USCIS instituted a training module that allocates four hours of training on the preponderance of the evidence standard as part of its six and a half week Basic curriculum for new ISOs. It is also our understanding that those who were already working as ISOs prior to the implementation of this module have not received this training. Finally, it is our understanding that there are no mandatory refresher courses on the preponderance of the evidence standard for ISOs.

  Accordingly, it is our recommendations that, in order to reduce the number of unnecessary and overly burdensome RFEs:

  - Expanded Basic curriculum be devoted to the preponderance of the evidence standard;
  - Those ISOs who did not receive this training prior to the introduction of the 2012 module receive the training; and

- All ISOs should have a mandatory refresher course on the preponderance of the evidence standard at least annually.

- **When RFEs are necessary, use templates which clearly describe deficiencies in those petitions rather than unnecessarily contributing to confusing and overly burdensome RFEs.** We appreciate the interest USCIS has taken in improving the quality of RFEs and the agency's willingness to engage in developing its RFE templates.

  While we support the RFE template project, we want to reiterate that this project should be secondary to the goal of proactive avoidance of unnecessary RFEs. For this reason, a policy of deference, increased supervisory review and increased training on the preponderance of the evidence standard are higher priorities for us than the RFE template project. The most important decision with an RFE is not the content of the RFE when issued – it is the initial decision by USCIS to issue an RFE.

  This does not mean the RFE template project is unimportant. In fact, well drafted RFE templates can help adjudicators better understand the standards they should be using for adjudications and the evidence they should be requesting. On the other hand, poorly constructed templates which do little more than copy entire (often irrelevant) regulatory sections not only fail in avoiding overly burdensome RFEs – they can actively contribute to the problem.

  To that end, we recommend the following characteristics for all future RFE templates:

  - **Improve effectiveness of "red boxes" to make it crystal clear 1) which sections and bullet points should be deleted and 2) that the preponderance of the evidence standard should be applied.** Many RFE templates include "red boxes" above specific sections instructing adjudicators to delete that section if it is irrelevant to the RFE. For instance, the recently released template for Form I-140 to be used for E13 Multinational Executives and Managers has instructions to delete broad sections that might not apply in specific RFEs – requests for English translations, petitioner requirements, and beneficiary requirements. These notes say: "NOTE to ISO: Review and delete the following subsections if the petitioner has met the requirement addressed."

    These boxes are useful, but could be more useful if they appeared <u>above each subsection or bullet point</u>, rather than simply above the primary section with instructions that apply to the subsections. The current placement creates a danger of large portions of the template being used in individual RFEs when large portions of the evidence requested have already been submitted.

    Additionally, there is an opportunity to reinforce the preponderance of the evidence standard throughout the comment with these red boxes. This is a valuable tool that should not be overlooked. Reiteration of the preponderance of the evidence standard throughout the template would reinforce adjudicator

training and be a reminder to clearly think through whether the standard has been met before requesting each type of evidence.

We recommend the following language appear in red boxes in bold print throughout the templates, as appropriate:

> **"NOTE to ISO: Carefully review the evidence submitted and delete this subsection if the petitioner has met the requirement addressed by a preponderance of the evidence (*i.e.*, more likely than not)."**
> or
>
> **"NOTE to ISO: Carefully review the evidence submitted and delete these bullet points if the petitioner has met the requirement addressed by a preponderance of the evidence (*i.e.*, more likely than not)."**

- **Modify language where lists of suggested evidence are provided to clarify that not all suggested evidence needs to be submitted and that other evidence may be submitted.** RFE templates tend to include several lists of types of evidence to satisfy various requirements. For instance, the recently released I-140 RFE template for E13 executives and managers lists eight types of documents that can be used to demonstrate who owns and controls an organization – some but not all are required to demonstrate control and ownership, and additional types of evidence can be used.

  We are concerned that the templates do not make it sufficiently clear that the listed documents are suggested evidence only, are not mandatory, and that other types of evidence may be submitted. We are further concerned that, when reviewing RFE responses, the template creates a danger of erroneous denials when a petitioner submits some, but not every category of, suggested evidence.

  Therefore, above each such list, we recommend that the following language appear in bold letters:

  > **Please note that not petitioners do not need to submit all of the following categories of suggested evidence to satisfy this evidentiary requirement by a preponderance of the evidence. Furthermore, the list is not exhaustive and petitioners may submit other forms of evidence to satisfy this evidentiary requirement.**

b. <u>In response to question 5, institute a policy of pre-registration of adjustment of status for so those waiting in the green card backlog can get work authorization and travel documents.</u>

We urge USCIS to institute a policy through which individuals would be eligible to file Form I-485 adjustment of status applications, along with Form I-131 applications for travel documents and Form I-765 applications for employment authorization, concurrently with I-140 petitions regardless of whether a visa number is immediately available. While an immediately available green card is required under §245 of the INA to complete the adjustment process, USCIS is not precluded from accepting applications to be held until the visa number becomes available.

It is our understanding that about 410,000 people currently waiting in the green card backlog could benefit from this change in policy and be able to travel and work while their green card is pending without having to file otherwise unnecessary extensions of temporary visas. It is also our understanding that the agency might be considering a policy of "opening the door" for a period of time – in other words, instituting a policy of pre-registration for a period of time and then "closing the door" at a later date. We believe that, to create modern and efficient visa systems, the preferable policy would be to make the policy of pre-registration permanent rather than a temporary "Band-Aid" solution.

In addition to primary visa holders, dependents of those immigrants pre-registering for adjustment of status would be able to receive interim work authorization and travel documents. While we understand that the administration is finalizing a work authorization process for certain H-4 spouses, this could allow broader opportunities for work authorization – for spouses in other categories as well as children who are of a legal age to work. This would provide tremendous relief to individuals who might be hesitant to pursue green cards or even remain in the U.S. workforce if their dependents remain ineligible to work for many years.

c. **<u>In response to questions 15 and 16, the agencies should recapture unused visa numbers from prior fiscal years and ensure visas are counted effectively moving forward.</u>**

Several sections of the Immigration and Nationality Act need to be administered effectively in order to ensure all available employment-based green card numbers are used every year. This includes INA §202(e) (which governs the movement of visas from one category of employment-based visas to another), §201(c)(3)(C)) and §202(d)(2)(C) (which govern movement between employment and family-based visa categories), and §202(a)(5) and §202(a)(4)(A), which govern the rules regarding per-country caps).

We have long advocated for recapture policies and legislation related to recapture has received bipartisan support on Capitol Hill. However, legislation is not required for recapture – nothing in the Immigration and Nationality Act prohibits the Department of State from recapturing visas on its own.

Recapture of unused visas would have the immediate effect of freeing up approximate 200,000 visa numbers. This would provide tremendous relief to the green card backlog. Revisiting the Visa Bulletin structure moving forward, and ensuring all visas numbers are used each year, would provide green card relief in the years to come.

d. <u>In response to question 3(b), guidance should be issued providing for "dual intent" for F-1 students, allowing foreign national students at U.S. universities to apply for green cards, remain in the U.S. and help our economy grow.</u>

One of the most important policies that DHS can issue that will streamline and modernize visa processes is to allow those foreign nationals who attend U.S. universities to pursue permanent residency in the United States. Currently, those foreign national students do not have this option because they must maintain nonimmigrant intent.

A foreign national student who graduates from a U.S. university now, unless he or she is eligible for another visa status, essentially has two options: 1) return to his or her home country, taking the knowledge and skills he or she obtained at a top-notch U.S. university and contributing to our global competitors, or 2) work in the United States for one year on Optional Practical Training (OPT), or up to 29 months for certain STEM fields, before returning home. Some foreign nationals are fortunate enough to get an H-1B visa before the end of their OPT, but the chances for that are decreasing, as the odds of winning the H-1B lottery are already below 50 percent and it appears they will continue to decrease.

A simple policy fix could alleviate many of these problems: F-1 visa status should permit "dual intent," as H-1B and L-1 visa statuses already do, allowing students to pursue a green card without violating their status. This would have the added benefit of alleviating the H-1B cap, as some students would be able to pursue their green card and never require an H-1B visa.

e. <u>In response to questions 3, 4 and 5, expand Premium Processing to cover additional categories of I-129 and I-140 filings, as well as filings of I-539 change of status applications, I-131 applications for travel documents and I-765 applications for employment authorization.</u>

Premium Processing is an expensive but valuable tool that, when all goes well, helps employers obtain benefits for employees that are critical to organizations' business objectives in a timely fashion. The widespread use of Premium Processing, despite its high cost, is indicative of how critical timely adjudication is to employers. Premium Processing is also a valuable revenue generator for USCIS, a fee based agency that must do significant work with limited resources.

We recommend expanding Premium Processing to additional categories of benefits, but before we get to those specific recommendations, we want to raise a couple of crucial points about Premium Processing:

- Employers should never feel they are "forced" to use Premium Processing because a petition is beyond a reasonable processing time. Many of our members report that they

frequently upgrade cases that have been pending for several months because it is their last resort in getting a case approved in a reasonable period of time. An employer who upgrades a case that has been pending for five months to premium processing is essentially paying $1,225 to have a case adjudicated in five and a half months. USCIS must adjudicate cases in a reasonable time so employers are not routinely put in this situation.

- Adjudicators should never issue RFEs to avoid adjudicating a case in the Premium Processing window. We know that USCIS has a policy that Premium Processing cases are adjudicated with the same standards as regular processing, and we trust that that message is consistently reinforced to adjudicators. A problem, however, becomes evident when looking at the results of a February 2014 survey of CFGI members. For those who use both regular processing and premium processing, 28 percent saw a higher RFE rate when filing H-1Bs with premium processing, 38 percent saw a higher RFE rate when filing L-1As with premium processing, 50 percent saw a higher RFE rate when filing L-1Bs with premium processing and 33 percent saw a higher RFE rate when filing I-140s with Premium Processing. We respectfully ask that the agency strongly reinforce the message that Premium Processing is not an excuse to issue an RFE and that appropriate actions be taken should there be evidence that adjudicators are issuing RFEs disproportionately, or for inappropriate reasons, in Premium Processing cases.

So long as USCIS takes these two crucial points to heart, Premium Processing remains a useful tool, and we suggest that it be expanded to the following categories:

- I-129 filings for E-3 and H-1B1 nonimmigrants

- I-140 filings for EB-1 multinational executives and managers and EB-2 National Interest Waiver filings

- I-539 applications to change or extend nonimmigrant filings

  While we recommend Premium Processing be made available for all I-539 filings, it is particularly urgent in the case of nonimmigrants changing status from F-1 to J-1. Our members report that these changes of status routinely take 3 to 5 months to process, and it is not rare for such a change of status to take 6 months. Many academics, researchers and physicians require this particular change of status, often to work on crucial projects that have grant money attached. We have heard real world examples where universities and research institutions have lost grant money due to a required change of status not being adjudicated in a timely fashion. Of course, these changes of status need to be processed faster as a general matter, but employers do not even have the option of Premium Processing when they desperately need it.

- I-131 applications for travel documents

  Individuals with pending adjustment of status applications are often in the untenable position of not being to leave the country and return to the U.S. while their application is pending. Advance parole documents allow such travel but, unfortunately, the I-131 applications are often not processed in a timely fashion. This leads to very tragic situations for some foreign nationals – for instance, they may not be able to return to their home country to attend the funeral of a close family member. Premium Processing should be made available to avoid these situations.

- I-765 application for employment authorization

  I-765 applications filed concurrently with adjustment of status applications, or for other purposes, should be eligible for Premium Processing. No one should be without work authorization on a timely-filed I-765 simply because of excessive USCIS processing times. This issue has taken on an added degree of urgency given the long processing times for extensions of status pursuant Deferred Action for Childhood Arrivals (DACA). Furthermore, EADs are sometime necessary for financial transactions that are important to the applicant, such as applying for a home loan. Premium Processing for Form I-765 would give many applicants peace of mind while generating revenue for USCIS.

f. **In response to question 3, keep forms and instructions simple and internally consistent.**

We have repeatedly recommended, as proposed forms have been introduced, that instructions be kept simple on USCIS forms and that the forms themselves refrain from making unnecessary information requests or contradictory statements.

For an instructive example, we point to the current version of Form I-129, for which we submitted comments on September 3, 2013. The previous version of the form had instructions that were 24 pages long for a 35-page form (including all supplements). The current form increased the length of the instructions to 29 pages and increased the form itself to 36 pages (including all supplements). We believe that adding such details to the instructions have the danger of leading petitioners to rely more upon the instructions and less on the regulations. There is no "short-cut" to learning the rules; a fundamental understanding of the statute, regulations and relevant policy guidance is required to complete Form I-129. Extensive instructions leave petitioners with the misimpression that all necessary information is contained in the instructions. In turn, this results in incomplete filings, leading to yet more RFEs.

We recommend that USCIS eliminate redundant, and often confusing, explanatory information from instructions for its forms when that information can be found in regulations and policy guidance. Aside from furthering the goal of paperwork reduction, this recommendation minimizes the risk of instructions which contain inaccurate or outdated explanations and summaries; instead, USCIS could provide links in the instructions to the USCIS website where the current statute, regulations, policy memoranda and online policy manual are available.

A further instructive example is the proposed Form I-907, Application for Premium Processing Service (we commented on this proposed form on September 22, 2014). The current Form I-907 is a relatively simple and straightforward form that does not create significant burdens for employers. The two-page form can easily be printed, front and back, on one sheet of paper and attached to the top of a benefits request. The expanded form, a six-page form, would increase the burden on employers and paperwork used by requiring unnecessary information – nearly all of which is duplicative of information required on concurrently filed Forms G-28, I-129 and I-140.

In the spirit of the Paperwork Reduction Act, we respectfully request that USCIS make strides to ensure that future form and instruction revisions be simplified and avoid unnecessary and redundant information requests.

g. **In response to question 2, we recommend reinstating the policy of domestic visa revalidation for E, H, I, L, O and P visas, and expanding the policy to cover F and J visas.**

In 2004, DOS suspended its Domestic Revalidation division. Between January 1, 2004 and July 16, 2004, the division processed 95,065 applications.[3] The suspension of the domestic visa revalidation program for workers currently in the United States requires that companies send employees abroad to renew visas – an extremely expensive and lengthy process in virtually every instance.

Given the delays in scheduling interviews at certain consular posts and the need for the employee to travel with his/her family to revalidate all visas at once, employers have no way to determine how long an employee may be absent from the United States. As we have noted in our fact sheet on domestic visa revalidation, the result is that U.S. employers are unable to plan their businesses in any effective manner and incur huge and unnecessary additional costs.

The security concerns that led DOS to suspend domestic visa revalidation no longer exist. Specifically, DOS did not have the capacity to collect biometrics domestically prior to 2004 – it now has that capacity.

We propose reintroduction of the policy of domestic visa revalidation, which would allow professionals who comply with immigration laws to revalidate visas in the United States, including, E, H, I, L, O and P visa holders. We further recommend expanding the policy to cover F and J visas. This proposal has had bipartisan support since at least January 2008, when it was proposed in the Report of the Secure Borders and Open Doors Advisory Committee.

This proposal is possible because:

- Biometrics are collectable. DHS and USCIS sponsor Application Support Centers (ASC) where biometric identifiers can be collected for the issuance of green cards and other

[3] Information provided by Department of State to the Secure Borders and Open Doors Advisory Committee, used in the Committee's January 2008 report

work-related authorization. DOS could commission officers at ASC facilities to collect biometrics.

- Interviews may be waived. Public Law 108-458 provides a waiver for the in-person interview requirement if the candidate meets the same basic criteria required for the previous domestic visa revalidation, and if the waiver is issued by a consular post in the applicant's country of usual residence. Some nonimmigrants may claim the United States as their "place of residence," making visa revalidation viable from a domestic post.

- Security will remain a priority. Ultimately, reestablishing the domestic revalidation program would not compromise security concerns because:

    - Applicant biometrics could be collected at ASC or DOS facilities;
    - Applicants could be required to provide the same documentation materials as foreign nationals applying abroad;
    - Most revalidation candidates were previously interviewed upon their initial application at a foreign post in the last couple of years; and
    - DOS could choose to revert to the current policy requiring travel to a foreign post for an interview, when warranted.

h. **In response to question 13, use Fraud Detection and National Security (FDNS) Directorate resources to target bad actors while not overly burdening employers who have demonstrated records of compliance.**

In our 2014 Employer Immigration Metrics Survey, employers with at least 5,000 employees report that they receive, on average, 15 FDNS site visits a year. Some employers receive more than 50 such visits every year, meaning employers must prepare their staff and take valuable time every week to respond to FDNS site visits even where there have been no allegations of fraud or misrepresentation. The majority of these site visits come from the Administrative Site Visit and Verification Program (ASVVP), the program within FDNS that conducts random site visits for H-1B, L-1A and R-1 nonimmigrants.

Furthermore, while most FDNS site visits run smoothly, employers have reported site visits where officers do not to have a clear understanding of the law or visa requirements, ask questions clearly beyond the scope of what is required or appropriate, or engage in other forms of inappropriate behavior– for instance, one employer's surveillance cameras detected an FDNS officer knowingly and intentionally breaching a secure area of the employer's premises after specifically being asked to wait in the reception area. In other instances, employers have reported FDNS officers visiting H-1B employees at their residence, which might technically be permissible, but is clearly stressful, intrusive and, in most cases, unwarranted.

FDNS has recently made significant strides in correcting these issues – most notably by instituting a policy whereby all FDNS officers are USCIS employees. Prior to 2014, many H-1B site visits were conducted by contractors; the quality of site visits conducted by USCIS officers are significantly better, on average, than those conducted by contractors. We applaud the move to a 100% USCIS employee workforce within FDNS.

While the H-1B site visit experience has typically improved since moving to a 100% USCIS employee workforce, we want to note that there are new challenges presented by the newly instituted L-1A site visits. Some officers do not yet appear to understand how a site visit for an L-1A should differ from the site visit for an H-1B – members have reported being given an H-1B questionnaire on an L-1A site visit. Furthermore, L-1A site visits are frequently much longer than H-1B site visits, with L-1A visits taking as long as an hour, whereas H-1B site visits typically take under 30 minutes.

Accordingly, we are making recommendations with regard to FDNS that we believe will better help the directorate combat fraud. Our primary recommendation is as follows:

- **Focus more fraud detection efforts where there are indications of fraud.** The common sense way for FDNS to combat fraud is to conduct site visits when there are real indications of fraud through USCIS adjudications, fraud indicators, or interagency collaboration. While we understand random audits serve a purpose, they should not be the primary focus of FDNS. We do not have access to private FDNS data, but we have a strong sense that most site visits are being conducted through the ASVVP program. If ASVVP is taking resources away from investigations where there are true indicators of fraud, we respectfully suggest that ASVVP be scaled back to focus resources where they are needed.

We also understand that FDNS has revised its Standard Operating Procedures (SOP) and that there may have been recent changes that will affect employers moving forward. Since the SOP is internal and we are unable to see the content of the SOP, we recommend that the following be included in any future SOP revisions if they are not yet included:

- **Acknowledge when a petition has been "verified."** FDNS visits end in either a determination of "verified" or "non-verified." Typically, a compliant employer never gets notification that a petition has been "verified." When a petition is "non-verified," the employer might not know for over a year, until a Notice of Intent to Revoke appears in the mail from USCIS. This protocol is inefficient and, ultimately, unfair. To enable employers to carry on their business without the continuing uncertainty of the outcome of an FDNS visit, we recommend that all employers receive timely notification of verification or non-verification.

- **Absent extenuating circumstances, FDNS officers should provide reasonable advance notice when they will be visiting a site.** Currently, there is no consistent policy within FDNS that officers will contact the employer before simply showing up at a worksite. We understand FDNS wants an element of "surprise" when visiting a site to ensure no fraud is being committed. However, in the absence of any indication whatsoever of wrongdoing, this consideration is more than counterbalanced by a host of issues that can arise without prior notification – for example, the person in charge of record retention could be away, the employee could be on vacation or taking a sick day, or the offices could be closed entirely. Not only is it a waste of the officer's time in these situations – there is a real danger the officer will mistakenly determine that the petition is "non-verified." We recommend that a policy be instituted whereby employers be notified prior to site visits.

i. <u>In response to question 3(e), we recommend the following actions to streamline and modernize processes related to H-1B visas:</u>

- **USCIS should provide for H-1B portability when a recently terminated employee finds new H-1B employment with a new employer.**

  H-1B portability under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) is an important tool through which employers who hire employees who already hold H-1B status with another employer are able to immediately bring the employee on board while the newly filed H-1B is pending. However, there are numerous situations in which when an H-1B employee does the "right thing" by providing advance notice that he or she is leaving an organization, only to be terminated immediately as a result. Since there is no grace period for H-1Bs and no current policy in place to preserve portability in this situation, the employee -- who has acted professionally and honorably -- is unfairly penalized by being prevented from working for the new employer until the new H-1B petition is approved. Since 2001, we have recommended correcting this problem. We recommend instituting a policy of preserving H-1B portability for recently terminated employees for whom employers file a new H-1B petition within 30 days.

- **USCIS should allow H-1B filings without certified Labor Condition Applications (LCAs).**

  As we noted in our 2014 comment in response to DHS' retrospective review of existing regulations, operational glitches and outright errors with the Department of Labor's iCERT website, which employers must use to get certified LCAs, underscore the hurdles many employers face filing H-1Bs in a timely fashion. When the iCERT website is down or an LCA is incorrectly denied because of inaccurate or outdated information in DOL's system, employers are unable to obtain certified LCAs through no fault of their own, resulting in punitive and expensive consequences for individuals and employers: foreign nationals could accrue unlawful presence and employers could be forced to suspend the individual's employment, leading to economic hardship for the employee and unnecessary business interruption for the employer. If USCIS amends its policy to accept H-1Bs without certified LCAs, provided employers submit evidence that an LCA has been submitted for processing and is pending at the time of filing, these problems could be avoided.

- **The definition of "affiliated nonprofit entity" should be revised for ACWIA fee-exemption and cap-exemption purposes.**

  As we noted in our 2014 comment in response to DHS' retrospective review of existing regulations, the definition of "affiliated nonprofit entity" should be revised for ACWIA fee-exemption and cap-exemption purposes. We understand that this regulatory change might already be in process and we urge the agency to move forward.

  The legislative and original regulatory provisions clearly intended to allow non-profit institutions with complex affiliations, whose work actively serves the greater social good, to benefit from the exemptions which were written into the H-1B regulations. The regulation at 8 CFR §214.2(h)(19)(iii)(B) should be amended to adopt a more flexible definition of "affiliated nonprofit entity" that accounts for a broader range of relationships between universities and non-profit entities, including relationships centered around established curriculum-related clinical training such as that found in many teaching universities, hospitals, and nonprofit research organizations.

- **USCIS should consider "pre-registration" for the H-1B lottery, to save paperwork and expenses related to preparing H-1B petitions that are ultimately not selected.**

  Pre-registration for the H-1B lottery, if well devised, would solve one of the most frustrated problems for employers: after spending many hours of work preparing petitions and incurring many thousands of dollars in legal fees, an H-1B has less than a 50-50 chance of being selected in the lottery. For FY 2015, when 172,500 H-1Bs were filed for 85,000 slots, only 49 percent of H-1Bs filed in the lottery were ultimately selected. The problem will get worse before it gets better – 69% of CFGI members report that they will file more H-1Bs in FY 2016 than in FY 2015 – which means the number of H-1B cap filings could well surpass 200,000.

Pre-registration would allow employers to provide basic information, including the name of the beneficiary, during a predetermined period prior to April 1, with the lottery being conducted prior to April 1. Employers would then only need to prepare petitions and pay legal fees for those beneficiaries selected in the lottery.

We recognize that USCIS proposed a rule for a pre-registration process in the Federal Register on March 3, 2011 – we submitted comments on May 2, 2011. We noted several problematic aspects of that proposal including a two-week registration period that is too short (we proposed at least a 4 week period), there was no ability to "lock-in" a number (which we recommended should allow an employer to have 60 days to file after selection in the lottery), the system did not provide adequate safeguards against duplicate filings, and there were not adequate disincentives to speculative or prospective filings where an employer might get an H-1B spot in the lottery and never use. Notwithstanding the concerns we expressed about the proposed pre-registration system, however, we believe a well-designed pre-registration system is possible and urge the agency to explore the possibility.

j. In response to question 14, Improve E-Verify to safeguard against identity theft.

As we have repeatedly urged, most recently in our comments on myE-Verify on March 20, 2014, we strongly recommend that any electronic employment eligibility verification system use state-of-the-art, multidimensional, dynamic technology to determine to a high degree of accuracy whether an individual presenting biographic information is the individual with that true identity. We believe that in order for any component of E-Verify (including Self Check and myE-Verify) to provide sufficient safeguard against identity theft, a multidimensional, dynamic "knowledge-based authentication" (KBA) component is crucial.

k. **In response to questions 3(c), 7, 8 and 9, reform O-1 visas to attract top researchers, entrepreneurs, physicians and other professionals in high-demand.**

Note: There is no question in this RFI specifically geared for many categories of professionals who qualify for O-1 visas. Question 3(c) asks about nonimmigrants generally, and questions 7, 8, and 9 ask about, researchers, entrepreneurs, and "high-demand professions, such as physicians" respectively. However, we also presume the administration is interested in attracting top talent in other fields – including top engineers, business leaders at Fortune 500 companies, world-renowned artists, filmmakers and entertainers, philanthropists, and educators who want to come to the United States, contribute to our country and bring our economy to a higher level. In the following O-1 discussion, we present ideas with all of these groups in mind.

In order to facilitate the employment of highly talented individuals, Congress created O-1 visas in the Immigration Act of 1990 using relatively simple language[4]. In the rulemaking process, however, the decision was made to create two separate categories of O-1 visas: O-1A visas for

[4] Immigration Act of 1990, Pub. L. 101-649, Sec. 207(3)(i)

sciences, education, business, or athletics and of O-1B visas for arts, motion pictures and television. O-1Bs, in turn, have two regulatory subcategories: O-1B visas for arts, and O-1B visas for motion pictures and television – each with distinct legal standards and evidentiary requirements.

Since this structure is the product of agency rulemaking, not legislative action, USCIS has latitude to undertake significant changes to O-1 visas should it choose to do so. While we do not expect, nor are we suggesting, the wholesale re-vamping of the O-1 classification, this is perhaps the most significant category in which the government can progress toward its stated goal of attracting and retaining the "best and brightest." To that end, we suggest the following:

- **Improve training for O-1 adjudicators.** We recognize that O-1 adjudicators have among the most difficult jobs at USCIS Service Centers. Therefore, the recommendations we make in Section II(a) of this comment regarding training of adjudicators to avoid RFEs are paramount in the O-1 context. More specifically, we ask that the agency use industry expertise to provide training for adjudicators with regard to the unique aspects of extraordinary ability and extraordinary achievement, improve training on "comparable evidence," and use quality RFE templates when, and only when, RFEs are merited (we commented on several O RFE templates on February 5, 2013). We also ask that the following more nuanced recommendations be implemented:

    - **Train adjudicators that a "small percentage" is more than a small handful of people in common professions.**

      O-1A visa holders must have a "level of expertise indicating that the person is one of the small percentage who has risen to the very top of the field of endeavor." Adjudicators need training to understand the global labor market for specific professions to have an accurate understanding that more than a small number of people may qualify.

      The answer to that question has significant implications. Consider, for example, an employer seeking to hire a physician on an O-1 visa. We currently estimate that there are over 10 million physicians worldwide.[5] Even if a "small percentage" is 0.1 percent (which is clearly well below what is typically deemed a "small percentage"), that is over 10,000 physicians worldwide that should qualify for O-1 visas.

[5] We arrived at this estimate by comparing estimated world population to estimates of the density of physicians by population. At 6:46 PM on January 20, 2015, the Census.gov world population clock estimated world population to be 7,219,189,134 people. The Henry J. Kaiser Family Foundation currently estimates that there are 13.9 physicians for every 10,000 people worldwide.

We understand that extraordinary ability is a high bar. However, our members report that the implementation has been so restrictive that only an unreasonably small handful of people in a given profession currently qualify. We believe it is incumbent on the agency to apply a reasonable standard so the best and brightest are able to contribute their talents in the United States.

- **Provide specific training on preponderance of the evidence for O-1s that explains that each prong merely needs to be proved by a preponderance of the evidence.** There seems to be a common misconception that each prong of evidence in an O-1 submission need to be proven by an extremely high standard for a foreign national to qualify for O-1 status. In reality, each of the 3 of 8, or 3 of 6, prongs needs only be proven by a preponderance of the evidence standard to demonstrate that, on aggregate, the individual meets the standard for an O-1. Furthermore, only 3 of 8, or 3 of 6, prongs need to be proven by a preponderance of the evidence – additional prongs are not necessary to meet the standard.

  For example, a scientist who is a member of 5 organizations in his field that require outstanding achievements, has been published in 10 major trade publications and has made 5 major scientific contributions in his field has proven three prongs of eight by a preponderance of the evidence. He need not prove any other prongs to qualify for O-1 status; nor does he need to double the amount of evidence for each category to prove each prong beyond a reasonable doubt. O-1 training should reflect this.

- **Instruct adjudicators that order of names on scholarly publications and patents is not determinative.** Many of our members have complained about receiving RFEs on O-1 filings where a beneficiary's contribution to a major scholarly article is discounted or discredited entirely simply because the beneficiary's name appeared second or third, not first, among a list of authors. A similar issue occurs with the ordering of names on approved patents. It appears better training is needed for O-1 adjudicators on these points.

  There are many reasons why an author's name might not appear first in an article that have very little to do with his or her contribution. It may be due to internal dynamics, contractual agreements, alphabetical order, or merely that two collaborators contributed equally and one had to be listed first. Furthermore, for extraordinary scholarly works, more than one author can contribute extraordinary work: Imagine a scenario where "Crick" from "Watson and Crick" gets slighted because his name was merely second on the scholarly works that documented the discovery of DNA.

l. In response to questions 3(c) and 9, 1) expand spousal work authorization to spouses of O-1 and TN visa holders, 2) discontinue the policy or requiring EADs for nonimmigrant dependents who have work authorization incident to status that do not require EAD cards and 3) allow J-2 dependents of J-1s in the Conrad 30 program to change status to other statuses that have work authorization eligibility.

We understand that H-4 work authorization is outside the scope of this comment as it appears elsewhere in the President's executive actions. However, as we noted in our July 11, 2014 comment on the proposed H-4 regulation, H-4 spouses are not the only nonimmigrant spouses who do not currently have work authorization eligibility.

O-1 visa holders are, by definition, among the most accomplished people in the world in the fields of science, arts and entertainment, education, business and athletics. These are precisely the individuals whom U.S. immigration law most strongly encourages to come to the United States and help grow the economy. Despite the strong need to bring these foreign nationals to the United States, the fact that their O-3 dependent spouses are unable to obtain work authorization is a substantial deterrent. Thus, employers face the same, and perhaps even greater, difficulties hiring and retaining O-1 visa holders than they have with H-1B visa holders.[6] To address this issue, we strongly encourage expansion of the Proposed Rule to provide employment authorization to O-3 spouses.

Likewise, TD dependent spouses of TN nonimmigrants are unable to obtain work authorization. The TN nonimmigrant classification, created by the North American Free Trade Agreement with Canada and Mexico, allows Canadians and Mexicans in certain occupations to work in the United States. The various E visa categories – also created by treaty – established a clear precedent of allowing dependent spouses on treaty-based nonimmigrant classifications to obtain work authorization in the United States. We recommend that the proposed rule be expanded to make the TN classification consistent with the E (and presumably H-1B1) visa classifications by providing employment authorization to TD spouses.

[6] For a more detailed examination of the effect a lack of spousal work authorization, see the Permits Foundation survey, "International Mobility and Dual Career Survey of International Employers," available at http://www.permitsfoundation.com/wp-content/uploads/2013/04/Permits-Global-Employers-Survey-2012.pdf.

In addition, we support a correction to 8 CFR §274a.12(a): Aliens Authorized for Employment Incident to Status to add spouses of L-1 intracompany transferees, E-1 treaty traders and E-2 treaty investors to the list. The language at INA §214(c)(E) and INA §214(e)(6) state that these classes of nonimmigrants "shall" be authorized to engage in employment in the United States. Currently, these L-2 and E-1/E-2 spouses, who typically enter at the border with a passport stamp indicating their status, can apply for an EAD card only after entry and typically will not receive the EAD card for about 90 days – a burden that is unnecessary since the employment authorization is incident to status. Employers currently cannot complete an I-9 process for these spouses either, as Form I-9 requires either an EAD card for nonimmigrants except in cases where the nonimmigrant is authorized to work for the specific employer. We recommend that, since the employment authorization is truly incident to status, an EAD should not be required should for these classes of nonimmigrants and that Form I-9 recognize such employment incident to status by allowing for evidence of lawful admission in these statuses.

We also encourage, as was recommended by the CIS Ombudsman on March 24, 2004, that the agency take steps toward reforming change of status eligibility for J-2 dependents of Conrad State 30 Program physicians with J-1 visas. The agency should not put unnecessary impediments to the success of the important Conrad State 30 Program, which addresses doctor shortages in underserved areas. Currently, upon issuance of a waiver, these J-2 dependents (who have work authorization pursuant to J-2 status) can only transfer to H-4 status which, as discussed above, does not allow for work authorization. This can cause some physicians to reevaluate whether they want to participate in the crucial Conrad State 30 program. We recommend that the regulations be modified to allow these J-2 dependents to move to other derivative spouse categories that allow work authorization.

m. In response to question 3(c) extend the "240-day rule" to employment authorization documents and travel documents, as well as H-1B1, CW-1, E-3, and Q-1 categories.

Currently, pursuant to 8 CFR §274a.12(b)(20): Aliens Authorized for Employment with a Specific Employer Incident to Status, certain classes of nonimmigrant aliens (such as H-1B and L-1 visa holders) who timely file an application to extend nonimmigrant status are allowed an automatic 240-day extension of work authorization. We believe this policy should be instituted as well for employment authorization documents (EAD cards pursuant to Form I-765) and advance parole travel documents (pursuant to Form I-131). This issue has taken on an added degree of urgency given the long processing times for extensions of status pursuant Deferred Action for Childhood Arrivals (DACA).

As noted above in our discussion of Premium Processing, individuals with pending adjustment of status applications are often in the untenable position of not being to leave the country and return to the U.S. while their application is pending. When advance parole documents are not processed in a timely manner, individuals face situations where they may be unable to return to their home country when there are events such as a death in the family. Likewise, it is simply unfair and indefensible that anyone should be without work authorization on a timely-filed I-765 simply because of excessive USCIS processing times. Expanding the 240-day rule to advance parole and EAD cards would largely eliminate these problems.

For visa extensions, the 240-day rule applies to virtually all employment-based nonimmigrant classifications other than the H-1B1, CW-1, E-3, and Q-1 categories. There is no logical reason to exclude these four classifications; we believe the fact that they are not currently included is simply due to a failure to update and conform the regulations rather to any policy considerations. The 240-day automatic extension is critical to employers who, for legitimate logistical reasons, are often unable to file extension requests many months in advance. Further, even when employers file extension requests many months in advance, Department of Labor (DOL) and/or U.S. Citizenship and Immigration Services (USCIS) errors or processing delays can prevent the extension requests from being approved timely, resulting in serious disruption to the employer's business through no fault of the employer.

On May 12, 2014, USCIS released a proposed rule in the Federal Register ("Enhancing Opportunities for H–1B1, CW–1, and E–3 Nonimmigrants and EB–1 Immigrants") that would expand the 240-day rule to H–1B1, CW–1, and E–3 nonimmigrants. However, as we noted in our comment submitted on July 11, 2014, the proposed rule did not cover Q-1 nonimmigrants. Since there appears to be no logical reason, we believe the exclusion of Q-1s was simply an oversight. We therefore recommended, and continue to recommend, incorporating Q-1s into the rule and finalizing the rule. We also recommend that employment authorization documents and travel documents be made eligible for the 240-day rule in this or another rulemaking process.

n. In response to questions 3(c) and 3(e), provide a grace period for terminated employees on H, L, E, O and TN status.

As we noted in our 2014 comment in response to DHS' retrospective review of existing regulations, individuals on H, L, E, O and TN visas currently have no official grace period in which to depart the United States should their employment cease prior to the expiration of their approved petition. USCIS has often informally referred to a 10-day "rule-of-thumb," but greater legal certainty is warranted. This lack of an official grace period creates an undue hardship, as these individuals often bring their families to the U.S., have children in school, buy homes in the United States and have a variety of other ties to the U.S. We continue to urge the Department to provide a 90 day grace period. At minimum, the regulations should be amended at 8 CFR §214.2 to formalize a grace period that provides reasonable time for these individuals to wrap up their affairs and depart the United States.

o. **In response to question 17, we recommend 1) significant upgrades to the Department of Labor's PERM and iCert information technology infrastructure, 2) reorganization of USCIS customer service to provide for experts on employment based questions and 3) fully electronic forms at USCIS when, and only when, the forms have been thoroughly tested.**

Our members rely on numerous agencies with intricate information technology (IT) systems when completing immigration processes. We represent many of the greatest computer and IT companies in the world and are happy to connect agency leaders get in touch with the foremost experts that can provide sound, technical IT advice that we are not able to provide in the scope of this comment.

While we cannot provide technical suggestions in this comment, we can point to general IT issues our members have noted along with that could benefit all employers. We recommend the following:

- **Ensure that Department of Labor IT systems, including the PERM system and iCert, remain operational and rely on current data.** The shutdown of the Federal Government from October 1 through October 18, 2013 brought important lessons regarding serious deficiencies of the Department of Labor (DOL) IT systems. The PERM and iCert systems were both slow to come back up after the government reopened – and when they did, the systems were largely unusable, with glitches for months, some persisting to this day. Additionally, DOL systems have repeatedly rejected LCAs based on DOL's failure to keep its data current and accurate.

  The PERM and iCert systems are critical for our members with important H-1B and green card deadlines that cannot be missed. DOL systems must be reliable and accurate. Improving DOL system reliability is our number one IT priority for the immigration system.

  We recognize that PERM modernization is outside the scope of this comment, but we do note that if and when a new Form ETA-9089 is released, it will require significant beta testing and time to implement it properly. This process must not be taken lightly, as successful IT is critical to PERM filings. We have participated in beta testing in the past for both PERM and iCert and we urge other agencies to follow DOL's example on beta testing. We are happy to help once again with any testing to prevent avoidable disruptions to the operation of American businesses.

- **Implement a call system at USCIS that allows for employment-based immigration experts in customer service.** We recognize that USCIS customer service receives millions of calls each year and that successfully managing that volume is a tremendous challenge.

  Many of our members have expressed frustration with the tiered service system and the fact that it can sometimes take over a month to talk with someone on the phone who truly understands their employment-based immigration question. We recommend that USCIS train customer service representatives to deal specifically with employment-based immigration cases and that, at the initial prompt on the USCIS customer service line, callers be given the opportunity to speak to an employment-based immigration representative.

- **USCIS should move toward further electronic when, and only when, forms have been thoroughly tested.** We support the USCIS Transformation project goal of ultimately moving away from paper filing toward all electronic filing. We have previously submitted comments on USCIS business transformation efforts on February 13, 2006, July 15, 2009, May 27, 2011 and October 28, 2011. We recognize that it is is

an expensive program, but respectfully point out that little meaningful progress has been made during this nearly 10-year process.

Ultimately, we see electronic filing to be the heart of our proposal for a Trusted Employer program. We share the goals of the Transformation project and encourage full engagement of employers as employment-based forms are made electronic to ensure that forms are usable and well-formatted to ensure a successful electronic filing process that reduces employer burdens while improving the integrity of filings.

p. In response to questions 3 and 6, 1) CBP should create a streamlined, consistent policy for issuing corrected I-94 records and 2) DHS should modify I-94 requirements.

As we noted in our 2014 comment in response to DHS' retrospective review of existing regulations, since Customs and Border Protection (CBP) largely eliminated paper I-94s, the website used to print I-94 records has been fraught with technical issues: huge numbers of I-94s contain incorrect information (such as biographical information, date of entry and/or visa status) or cannot be found on the website at all. In many cases, CBP officers hand-write one visa status and expiration date on the passport entry stamp, but enter completely different information into the electronic system. We raised these issues at our annual Symposia in 2013 and 2014 and submitted a letter detailing employer experience with the website in July 2013. While we commend CBP for taking this seriously and making some improvements, we still hear reports that these problems persist, requiring individuals and employers to spend huge amounts of time and resources seeking correction of CBP clerical errors.

One ongoing problem for employers and their foreign national employees is inconsistency and inefficiency of processes to get I-94 records corrected. At some ports of entry, corrections can easily be made by calling deferred inspection by phone. Other ports of entry require lengthy waits at deferred inspection offices to get corrections made. This is not simply an inconvenience; it results in tens of thousands of wasted hours and millions of dollars of lost productivity every year. This burden is wasteful and unreasonable, particularly given it is CBP error that creates these circumstances. We respectfully request that CBP implement a streamlined process that applies to all ports of entry whereby I-94 records can be corrected by phone or through an easy, quick online process.

It should be noted that CBP maintains the I-94 website to provide I-94s for uses outside of CBP – the agency itself does not require use of I-94s except in limited circumstances. Given this reality, we urge other agencies under the umbrella of DHS to eliminate or minimize requirements to present printed I-94 records by accepting reliable alternative evidence of status, such as a valid entry stamp.

q. In response to question 1, Amend regulations regarding priority date retention to except withdrawal by the employer as a basis for denying retention of an earlier priority date.

As we noted in our 2014 comment in response to DHS' retrospective review of existing regulations, the regulations at 8 CFR §204.5(e) provide for the retention of a previously accorded priority date under INA §203(b)(1), (2), or (3) with respect to any subsequently approved petition under INA §203(b)(1), (2), or (3). The regulation further states that "[a] petition revoked under sections 204(e) or 205 of the Act will not confer a priority date, nor will any priority date be established as a result of a denied petition." Moreover, Chapter 22(d)(1) of the Adjudicators Field Manual provides that the earlier priority date will be retained unless the previously approved I-140 has been revoked due to fraud or willful misrepresentation. USCIS has interpreted this provision to preclude priority date retention where an earlier I-140 petition is withdrawn by a former employer, even where there is no indication or allegation of fraud or willful misrepresentation. The regulation should be amended to except withdrawal by the employer as a basis for denying retention of an earlier priority date.

r. **In response to question 9, revise the regulatory definition of "required period of clinical medical service."**

As we noted in our 2014 comment in response to DHS' retrospective review of existing regulations, the regulations should define "required period of clinical medical service" as appearing in 8 CFR §204.12(c)(1) to mean the balance of the five years not already worked at the time of filing the national interest waiver petition. Consistent with the statute, physicians could be required to present a contract for the balance of the five years and evidence of whatever time was previously worked toward the five-year commitment at the time of filing the petition.

III. Additional items related to executive action

Although we understand that these items are beyond the intended scope of this request for information, we want to urge continued action on the following items pursuant to executive action:

- Provide clear, consistent and fair guidance with regard to L-1B "specialized knowledge." This guidance should return to prior, less restrictive standards for specialized knowledge and make it clear that the bar is not so high that only one person, or a small handful of people, in a multinational organization can possibly possess such knowledge. Predictability is key – employers should know what the standards are and not be put in a position where L-1B filings are a veritable game of chance.

- Finalize the rule for H-4 work authorization and expand work authorization to further categories of visa holders as recommended in our July 11, 2014 comment.

- Modernize the PERM labor certification process to ensure that employers have an opportunity to correct and address harmless errors, incorporate accurate and consistent prevailing wage determinations, and recognizes modern recruitment practices, while exploring the possibility of incorporating Trusted Employer concepts.

In addition, immigration agencies should provide guidance and clarity regarding a variety of scenarios related to DACA and DAPA. We will soon be sending letters to federal immigration agencies requesting guidance for scenarios related to organizational honesty policies and interpretations of "constructive knowledge." Clarity around these issues are crucial for employers in ensuring a legal workforce.

CFGI and SHRM once again thank DHS for the opportunity to comment in response to this Request for Information. We remain available and willing to provide additional information and feedback at any time.

Sincerely,

Lynn Shotwell
Executive Director
Council for Global Immigration

Mike Aitken
Vice President, Government Affairs
Society for Human Resource Management