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DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 274a

CIS No. 2501-10; DHS Docket No. USCIS-2010-0017

RIN 1615-AB92

Employment Authorization for Certain H-4 Dependent Spouses

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This final rule amends Department of Homeland Security ("DHS" or "Department") regulations by extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who are seeking employment-based lawful permanent resident ("LPR") status. Such H-1B nonimmigrants must be the principal beneficiaries of an approved Immigrant Petition for Alien Worker (Form I-140), or have been granted H-1B status in the United States under the American Competitiveness in the Twenty-first Century Act of 2000, as amended by the 21st Century Department of Justice Appropriations Authorization Act. DHS anticipates that this regulatory change will reduce personal and economic burdens faced by H-1B nonimmigrants and eligible H-4 dependent spouses during the transition from nonimmigrant to LPR status. The final rule will also support the goals of attracting and retaining highly skilled foreign workers and minimizing the disruption to U.S. businesses resulting from H-1B nonimmigrants who choose not to pursue LPR status in the United States. By providing the possibility of employment authorization to certain H-4

dependent spouses, the rule will ameliorate certain disincentives for talented H-1B nonimmigrants to permanently remain in the United States and continue contributing to the U.S. economy as LPRs. This is an important goal considering the contributions such individuals make to entrepreneurship and research and development, which are highly correlated with overall economic growth and job creation. The rule also will bring U.S. immigration policies concerning this class of highly skilled workers more in line with those of other countries that are also competing to attract and retain similar highly skilled workers.

DATES: This final rule is effective [**INSERT DATE 90 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

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I. Executive Summary

A. Purpose of the Regulatory Action

DHS does not currently extend eligibility for employment authorization to H-4 dependents (spouses and unmarried children under 21 years of age) of H-1B nonimmigrants. See 8 CFR 214.2(h)(9)(iv). The lack of employment authorization for H-4 dependent spouses often gives rise to personal and economic hardships for the families of H-1B nonimmigrants. Such hardships may increase the longer these families remain in the United States. In many cases, H-1B nonimmigrants and their families who wish to acquire LPR status in the United States must wait many years for employment-based immigrant visas to become available. These waiting periods increase the disincentives for H-1B nonimmigrants to pursue LPR status and thus increase the difficulties that U.S. employers have in retaining highly educated and highly skilled

nonimmigrant workers. These difficulties can be particularly acute in cases where an H-1B nonimmigrant's family is experiencing economic strain or other stresses resulting from the H-4 dependent spouse's inability to seek employment in the United States. Retaining highly skilled workers who intend to acquire LPR status is important to U.S. businesses and to the Nation given the contributions of these individuals to U.S. businesses and the U.S. economy. These individuals, for example, contribute to advances in entrepreneurship and research and development, which are highly correlated with overall economic growth and job creation.

In this final rule, DHS is amending its regulations to extend eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants to support the retention of highly skilled workers who are on the path to lawful permanent residence. DHS expects this change to reduce the economic burdens and personal stresses that H-1B nonimmigrants and their families may experience during the transition from nonimmigrant to LPR status while, at the same time, facilitating their integration into American society. As such, the change will ameliorate certain disincentives that currently lead H-1B nonimmigrants to abandon efforts to remain in the United States while seeking LPR status, thereby minimizing disruptions to U.S. businesses employing such workers. The change will also support the U.S. economy, as the contributions H-1B nonimmigrants make to entrepreneurship and research and development are expected to assist overall economic growth and job creation. The rule also will bring U.S. immigration policies concerning this class of highly skilled workers more in line with those of other countries that compete to attract similar highly skilled workers.

B. Legal Authority

The authority of the Secretary of Homeland Security (Secretary) for this regulatory amendment can be found in section 102 of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 6 U.S.C. 112, and section 103(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1103(a), which authorize the Secretary to administer and enforce the immigration and nationality laws. In addition, section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B), recognizes the Secretary's authority to extend employment to noncitizens in the United States.

C. Summary of the Major Provisions of this Regulatory Action

On May 12, 2014, DHS published a notice of proposed rulemaking, which proposed to amend DHS regulations at 8 CFR 214.2(h)(9)(iv) and 274a.12(c) to extend eligibility for employment authorization to H-4 dependent spouses of H-1B nonimmigrants if the H-1B nonimmigrants either: (1) are the principal beneficiaries of an approved Immigrant Petition for Alien Worker (Form I-140); or (2) have been granted H-1B status pursuant to sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 107-273, 116 Stat. 1758, as amended by the 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002) (collectively referred to as "AC21"). See Employment Authorization for Certain H-4 Dependent Spouses, 79 FR 26886 (May 12, 2014). After careful consideration of public comments, DHS is adopting the proposed regulatory amendments with minor wording changes to improve clarity and readability.[1] Also, DHS is making additional revisions to 8 CFR 214.2(h)(9)(iv) and 8 CFR 274a.13(d) to permit H-4

[1] In this final rule, DHS has amended its estimate of the volume of individuals who may become eligible to apply for employment authorization pursuant to this rulemaking. The impact on the U.S. labor market resulting from this change is negligible, and the justification for the rule remains unaffected by this change.

dependent spouses under this rule to concurrently file an Application for Employment Authorization (Form I-765) with an Application to Extend/Change Nonimmigrant Status (Form I-539).

D. Summary of Costs and Benefits

In preparing this final rule, DHS updated its estimates of the impacted population by examining more recent data, correcting data entry errors made in calculating the population of H-4 dependent spouses assumed to be in the backlog, and revising the estimate of the population eligible pursuant to AC21. This final rule is expected to result in as many as 179,600 H-4 dependent spouses being eligible to apply for employment authorization during the first year of implementation. As many as 55,000 H-4 dependent spouses will be eligible to apply for employment authorization each year after the first year of implementation. DHS stresses that these are maximum estimates of the number of H-4 dependent spouses who may become eligible to apply for employment authorization. Although the estimates are larger than those provided in the preamble to the proposed rule, the initial year estimate (the year with the largest number of potential eligible applicants) provided in this final rule still represents far less than one percent of the overall U.S. workforce. DHS's rationale for this rule thus remains unchanged, especially as the changes made in this rule simply alleviate the long wait for employment authorization that these H-4 dependent spouses endure through the green card process, and accelerate the timeframe within which they generally will become eligible to apply for employment authorization (such as when they apply for adjustment of status).

The costs associated with this final rule stem from filing fees and the opportunity costs of time associated with filing an Application for Employment Authorization, Form

I-765 ("Application for Employment Authorization" or "Form I-765"), as well as the estimated cost of procuring two passport-style photos. These costs will only be borne by the H-4 dependent spouses who choose to apply for employment authorization. The costs to the Federal Government of adjudicating and processing the applications are covered by the application fee for Form I-765.

DHS expects these regulatory amendments to provide increased incentives to H-1B nonimmigrants and their families who have begun the immigration process to remain permanently in the United States and continue contributing to the Nation's economy as they complete this process. DHS believes these regulatory changes will also minimize disruptions to petitioning U.S. employers. A summary of the costs and benefits of the rule is presented in Table 1.

Table 1. Total Costs and Benefits of Initial Employment Authorization for Certain H-4 Dependent Spouses 10-Yr Present Value Estimates at 3% and 7% ($Millions)			
	Year 1 Estimate (179,600 filers)	Sum of Years 2 - 10 (55,000 filers annually)	**Total over 10-year Period of Analysis***
3% Discount Rate			
Total Costs Incurred by Filers @ 3%	$76.1	$181.3	$257.4
7% Discount Rate			
Total Costs Incurred by Filers @ 7%	$73.2	$146.1	$219.3
Qualitative Benefits	This rule is intended to remove a disincentive to pursuing lawful permanent resident (LPR) status due to the potentially long wait for employment-based immigrant visas for many H-1B nonimmigrants and their family members. This rule will encourage H-1B nonimmigrants who have already taken steps to become LPRs to not abandon their efforts because their H-4 dependent spouses are unable to work. By encouraging H-1B nonimmigrants to continue in their pursuit of becoming LPRs, this rule would minimize disruptions to petitioning U.S. employers. Additionally, eligible H-4 dependent spouses who participate in the labor market will benefit financially. DHS also anticipates that the socioeconomic benefits associated with permitting H-4 spouses to participate in the labor market will assist H-1B families in integrating into the U.S. community and economy.		

*Note: Totals may not sum due to rounding.

E. Effective Date

This final rule will be effective on [**INSERT DATE 90 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER**], 90 days from the date of publication in the Federal Register. DHS has determined that this 90-day effective date is necessary to guarantee that USCIS will have sufficient resources available to process and adjudicate Applications for Employment Authorization filed by eligible H-4 dependent spouses under this rule while maintaining excellent customer service for all USCIS

stakeholders, including H-1B employers, H-1B nonimmigrants, and their families. With this 90-day effective date, USCIS will be able to implement this rule in a manner that will avoid wholesale delays of processing other petitions and applications, in particular those H-1B petitioners seeking to file petitions before the FY 2016 cap is reached. DHS believes that this effective date balances the desire of U.S. employers to attract new H-1B workers, while retaining current H-1B workers who are seeking employment-based LPR status.

II. Background

A. Current Framework

Under the H-1B nonimmigrant classification, a U.S. employer or agent may file a petition to employ a temporary foreign worker in the United States to perform services in a specialty occupation, services related to a Department of Defense (DOD) cooperative research and development project or coproduction project, or services of distinguished merit and ability in the field of fashion modeling. See INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); 8 CFR 214.2(h)(4). To employ a temporary nonimmigrant worker to perform such services (except for DOD-related services), a U.S. petitioner must first obtain a certification from the U.S. Department of Labor (DOL) confirming that the petitioner has filed a labor condition application (LCA) in the occupational specialty in which the nonimmigrant will be employed. See 8 CFR 214.2(h)(4)(i)(B) and 8 CFR 214.2(h)(1)(ii)(B). Upon certification of the LCA, the petitioner may file with U.S. Citizenship and Immigration Services (USCIS) a Petition for a Nonimmigrant Worker (Form I-129 with H supplements) ("H-1B petition" or "Form I-129").

If USCIS approves the H-1B petition, the approved H-1B status is valid for an initial period of up to three years. USCIS may grant extensions for up to an additional

three years, such that the total period of the H-1B nonimmigrant's admission in the United States does not exceed six years. See INA section 214(g)(4), 8 U.S.C. 1184(g)(4); 8 CFR 214.2(h)(9)(iii)(A)(1), (3), and 8 CFR 214.2(h)(15)(ii)(B)(1). At the end of the six-year period, the nonimmigrant generally must depart from the United States unless he or she: (1) falls within one of the exceptions to the six-year limit;[2] (2) has changed to another nonimmigrant status; (3) or has applied to adjust status to that of an LPR.[3] See INA sections 245(a) and 248(a), 8 U.S.C. 1255(a) and 1258(a); 8 CFR 245.1 and 8 CFR 248.1. The dependents (i.e., spouse and unmarried children under 21 years of age) of the H-1B nonimmigrants are entitled to H-4 status and are subject to the same period of admission and limitations as the H-1B nonimmigrant. See 8 CFR 214.2(h)(9)(iv).

For H-1B nonimmigrants seeking to adjust their status to or otherwise acquire LPR status through employment-based (EB) immigration, an employer generally must first file a petition on their behalf. See INA section 204(a), 8 U.S.C. 1154(a). An H-1B

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[2] These exceptions to the six-year limit include those authorized under sections 104(c) and 106(a) and (b) of AC21. Under sections 106(a) and (b) of AC21, an H-1B nonimmigrant who is the beneficiary of a permanent labor certification application or an employment-based immigrant petition that was filed at least 365 days prior to reaching the end of the sixth year of H-1B status may obtain H-1B status beyond the sixth year, in one year increments. See AC21 sections 106(a)-(b), as amended. Another exception is found in section 104(c) of AC21. Under that provision, H-1B nonimmigrants with approved Form I-140 petitions who are unable to adjust status because of per-country visa limits are able to extend their H-1B stay in three-year increments until their adjustment of status applications have been adjudicated. See AC21 section 104(c).

[3] For H-1B nonimmigrants performing DOD-related services, the approved H-1B status is valid for an initial period of up to five years, after which the H-1B nonimmigrants may obtain up to an additional five years of admission for a total period of admission not to exceed 10 years. See 8 CFR 214.2(h)(9)(iii)(A)(2), (h)(15)(ii)(B)(2). These H-1B nonimmigrants cannot benefit from AC21 sections 106(a) or (b), because those sections solely relate to the generally applicable six-year limitation on H-1B status under INA section 214(g)(4), whereas the requirements for H-1B status for DOD-related services, including the 10-year limitation, were established in section 222 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; see 8 U.S.C. 1101 note. This rule, however, will authorize eligibility for employment authorization of H-4 dependents of H-1B nonimmigrants performing DOD-related services if the H-1B nonimmigrant is the beneficiary of an approved I-140 petition.

nonimmigrant may seek LPR status under one of the following five EB preference categories:

- First preference (EB-1)—Aliens with extraordinary ability, outstanding professors and researchers, and certain multinational executives and managers;
- Second preference (EB-2)—Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability;
- Third preference (EB-3)—Skilled workers, professionals, and other workers;
- Fourth preference (EB-4)—Special immigrants (see INA section 101(a)(27), 8 U.S.C. 1101(a)(27)); and
- Fifth preference (EB-5)—Employment creation immigrants.

See INA section 203(b), 8 U.S.C. 1153(b).

Generally, the second (EB-2) and third (EB-3) preference categories require employers to obtain an approved permanent labor certification from DOL prior to filing an immigrant petition with USCIS on behalf of the worker. See INA section 212(a)(5)(A), 8 U.S.C. 1182(a)(5)(A); 8 CFR 204.5(a). To apply for adjustment to LPR status, the alien must be the beneficiary of an immigrant visa that is immediately available. See INA sections 201(a), 203(b) and (d), and 245(a); 8 U.S.C. 1151(a), 1153(b) and (d), 1255(a).

The EB-2 and EB-3 immigrant visa categories for certain chargeability areas are oversubscribed, causing long delays before applicants in those categories, including H-1B nonimmigrants, are able to obtain LPR status. U.S. businesses employing H-1B nonimmigrants suffer disruptions when such workers are required to leave the United States at the termination of their H-1B status as a result of these delays. To ameliorate

those disruptions, Congress enacted provisions in AC21 that allow for the extension of H-1B status past the sixth year for workers who are the beneficiaries of certain pending or approved employment-based immigrant visa petitions or labor certification applications. See S. Rep. No. 106-260, at 22 (2000) ("These immigrants would otherwise be forced to return home at the conclusion of their allotted time in H-1B status, disrupting projects and American workers. The provision enables these individuals to remain in H-1B status until they are able to receive an immigrant visa number and acquire lawful permanent residence through either adjustment of status in the United States or through consular processing abroad, thus limiting the disruption to American businesses.").

DHS cannot alleviate the delays in visa processing due to the numerical limitations set by statute and the resultant unavailability of immigrant visa numbers.[4] DHS, however, can alleviate a significant obstacle that may encourage highly skilled foreign workers to leave the United States,[5] thereby preventing significant disruptions to U.S. employers in furtherance of the congressional intent expressed through AC21.

B. Proposed Rule

On May 12, 2014, DHS published a proposed rule in the Federal Register at 79 FR 26886, proposing to amend:

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[4] The worldwide level of EB immigrant visas that may be issued each fiscal year is set at 140,000 visas, plus the difference between the maximum number of immigrant visas which may be issued under section 203(a) of the INA, 8 U.S.C. 1153(a) (relating to family-sponsored immigrants) and the number of visas used under that section for the previous fiscal year. See INA section 201(d), 8 U.S.C. 1151(d). These EB visa numbers are also limited by country. Generally, in any fiscal year, foreign nationals born in any single country may use no more than 7 percent of the total number of immigrant visas available in the family- and employment-based immigrant visa classifications. See INA section 202(a)(2), 8 U.S.C. 1152(a)(2).

[5] These obstacles, moreover, may discourage highly skilled foreign workers from seeking employment in the United States in the first instance. This final rule will diminish that possibility.

- 8 CFR 214.2(h)(9)(iv) to extend eligibility for employment authorization to H-4 dependent spouses of H-1B nonimmigrants if the H-1B nonimmigrants either: are the principal beneficiaries of an approved Immigrant Petition for Alien Worker (Form I-140);[6] or have been granted H-1B status pursuant to sections 106(a) and (b) of AC21; and
- 8 CFR 274a.12(c) by adding paragraph (26) listing the H-4 dependent spouses described in revised 8 CFR 214.2(h)(9)(iv) as a new class of aliens eligible to request employment authorization from USCIS. Aliens within this class would only be authorized for employment following approval of their Application for Employment Authorization (Form I-765) by USCIS and receipt of an Employment Authorization Document (Form I-766) ("EAD").

DHS also proposed conforming changes to Form I-765. DHS proposed adding H-4 dependent spouses described in the proposed rule to the classes of aliens eligible to file the form, with the required fee. DHS also proposed a list of the types of supporting documents that may be submitted with Form I-765 to establish eligibility.

DHS received nearly 13,000 public comments to the proposed rule. An overwhelming percentage of commenters (approximately 85 percent) supported the proposal, while a small percentage of commenters (approximately 10 percent) opposed

[6] The H-1B nonimmigrant must be the principal beneficiary of the approved I-140 petition, not the derivative beneficiary, consistent with the preamble to the proposed rule: "Specifically, DHS is proposing to limit employment authorization to H-4 dependent spouses only during AC21 extension periods granted to the H-1B principal worker or after the H-1B principal has obtained an approved Immigrant Petition for Alien Worker." See 79 FR at 26891 (emphasis added); see also id. at 26896 (estimating "annual demand flow of H-4 dependent spouses who would be eligible to apply for initial work authorization under this proposed rule . . . based on: (1) the number of approved Immigrant Petitions for Alien Worker (Forms I-140) where the principal beneficiary is currently in H-1B status").

the proposal. Approximately 3.5 percent of commenters expressed a mixed opinion about the proposal.

C. Final Rule

In preparing this final rule, DHS considered all of the public comments contained in the docket. Although estimates of the current population of H-4 dependent spouses who will be eligible for employment authorization pursuant to this rule have changed, the effect of the revision does not affect the justification for the rule, and DHS is adopting the regulatory amendments set forth in the proposed rule with only minor, non-substantive changes to 8 CFR 214.2(h)(9)(iv) to improve clarity and readability. These technical changes clarify that an H-4 dependent spouse covered by this rule should include with his or her Application for Employment Authorization (Form I-765) evidence demonstrating that he or she is currently in H-4 status and that the H-1B nonimmigrant is currently in H-1B status. Also, in response to public comments regarding filing procedures for Applications for Employment Authorization (Forms I-765) under this rule, DHS is making conforming revisions to 8 CFR 214.2(h)(9)(iv) and 8 CFR 274a.13(d) to permit H-4 dependent spouses under this rule to concurrently file the Form I-765 with an Application to Extend/Change Nonimmigrant Status (Form I-539).

The rationale for the proposed rule and the reasoning provided in its background section remain valid with respect to these regulatory amendments. This final rule does not address comments seeking changes in U.S. laws, regulations, or agency policies that are unrelated to this rulemaking. This final rule also does not change the procedures or policies of other DHS components or federal agencies, or resolve issues outside the scope

of this rulemaking. Comments may be reviewed at the Federal Docket Management System (FDMS) at http://www.regulations.gov, docket number USCIS-2010-0017.

III. Public Comments on the Proposed Rule

A. Summary of Public Comments

In response to the proposed rule, DHS received nearly 13,000 comments during the 60-day public comment period. Commenters included, among others, individuals, employers, academics, labor organizations, immigrant advocacy groups, attorneys, and nonprofit organizations. More than 250 comments were also submitted through mass mailing campaigns.

While opinions on the proposed rule varied, a substantial majority (approximately 85 percent) of commenters supported the extension of employment authorization to the class of H-4 dependent spouses described in the proposed rulemaking. Supporters of the proposed rule agreed that it would help the United States to attract and retain highly skilled foreign workers; alleviate economic burdens on H-1B nonimmigrants and their families during the transition from nonimmigrant to LPR status; and promote family unity. Some supporters also stated that the rule furthers women's rights, noting the impact the rule's change will have on promoting financial independence for the H-4 dependent spouse, potentially reducing factors which could lead to domestic violence, and assuaging negative health effects (such as depression).[7] Others voiced the belief that

[7] An H-4 dependent spouse who is the victim of domestic violence may be independently eligible for employment authorization under certain circumstances. As noted in the proposed rule, section 814(b) of the Violence Against Women Act and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162, amended the INA by adding new section 204(a)(1)(K), 8 U.S.C. 1154(a)(1)(K), which provides for employment authorization incident to the approval of a VAWA self-petition. Section 814(c) of VAWA 2005 amended the INA by adding new section 106, which provides eligibility for employment authorization to battered spouses of aliens admitted in certain nonimmigrant statuses, including H-1B status.

this rule aligns with core U.S. values, asserting that employment authorization should be considered a constitutional or human rights issue or an issue of equal opportunity.

Commenters commonly stated that if spouses are authorized for employment, families would be more stable, contribute more to their local communities, and more fully focus on their future in the United States. Additionally, commenters outlined ways they thought this proposal would help the U.S. economy, such as by increasing disposable income, promoting job creation, generating greater tax revenue, and increasing home sales. Several commenters agreed that extending employment authorization as described in the rule will promote U.S. leadership in innovation by strengthening the country's ability to recruit and retain sought-after talent from around the world. Finally, some commenters noted that this rule would facilitate U.S. businesses' ability to create additional U.S. jobs by improving the retention of workers with critical science, technology, engineering and math (STEM) skills.

The approximately 10 percent of commenters who opposed the proposed rule cited to potential adverse effects of the rule, including displacement of U.S. workers, increasing U.S. unemployment, and lowering of wages. Some commenters expressed concern that the rule may negatively affect other nonimmigrant categories. Other commenters were concerned that this rule may cause the lowering of minimum working standards in certain sectors of the economy, such as in the Information Technology sector. Some commenters questioned DHS's legal authority to promulgate this regulatory change.

About 3.5 percent of commenters had a mixed opinion about the proposed regulation. Some of these commenters were concerned about the size and scope of the

class made eligible for employment authorization under the rule; some argued that the described class is too restrictive, while others argued that it is too broad. Other commenters expressed concern about the possibility of fraud. Approximately 200 commenters (about 1.5 percent of commenters) submitted responses that are beyond the scope of this rulemaking, such as comments discussing U.S. politics but not addressing immigration, submissions from individuals who sent in their resumes or discussed their professional qualifications without opining on the proposed rule, and comments on the merits of other commenter's views, but not on the proposed changes.

DHS has reviewed all of the public comments received in response to the proposed rule and addresses relevant comments in this final rule. DHS's responses are grouped by subject area, with a focus on the most common issues and suggestions raised by commenters.

B. Classes Eligible for Employment Authorization

1. Comments Supporting the Rule

The comments supporting the proposed rule largely underscored the positive socioeconomic benefits this rule would have for certain H-1B nonimmigrants and their H-4 dependent spouses. For example, several commenters noted that while they knew about the restriction on H-4 employment before coming to the United States, they did not anticipate such a long wait to apply for LPR status or the emotional toll that long-term unemployment would take on them and their families. Other commenters noted they have not been able to apply for a social security card or a driver's license in certain states because they do not have an Employment Authorization Document (EAD) (Form I-766). Approximately 200 commenters noted that the current policy of allowing only the H-1B

nonimmigrant to work often led to family separation or the decision to immigrate to other countries that authorize employment for dependent spouses.

A few commenters described their families as dual H-1B nonimmigrant households and supported the principle of both spouses working. These commenters voiced appreciation for the changes in the proposed rule, which will allow the H-4 dependent spouse to seek employment while the H-1B nonimmigrant continues to pursue permanent residence.

More than a thousand commenters believe this change will help U.S. businesses retain highly skilled H-1B nonimmigrants. More than 500 commenters asserted that the addition of skilled H-4 dependent spouses into the workforce will help U.S. employers. More than 60 commenters stated that they had planned to move out of the United States, but will instead remain and pursue LPR status as a result of this rule change. Approximately two dozen commenters noted that they had already moved out of the United States due to the prohibition on employment for H-4 dependent spouses. Several commenters stated that they are planning to leave the United States in the near future because H-4 dependent spouses cannot work under the current rules.

Nearly 400 commenters who supported the final rule also asserted that the regulation should be implemented without change as a matter of fairness. According to the comments, the regulation will help H-1B nonimmigrants and their families who have maintained legal status for years, contributed to the economy, and demonstrated the intent to permanently remain in the United States.

The overwhelmingly positive responses from the public to the proposed rule has strengthened DHS's view, as expressed in the proposed rule, that extending

employment authorization eligibility to the class of H-4 dependent spouses of H-1B nonimmigrants described in this rulemaking will have net beneficial results. Among other things, the rule will increase the likelihood that H-1B nonimmigrants will continue to pursue the LPR process through completion. DHS further believes that this rule will provide increased incentives to U.S. employers to begin the immigrant petitioning process on behalf of H-1B nonimmigrants, encourage more H-1B nonimmigrants to pursue lawful permanent residence, and bolster U.S. competitiveness. This rule will also decrease workforce disruptions and other harms among U.S. employers caused by the departure from the United States of H-1B nonimmigrants for whom businesses have filed employment-based immigrant visa petitions. This policy supports Congress' intent in enacting AC21. See S. Rep. No. 106-260, at 2-3, 23 (2000).

A handful of commenters supporting the proposed rule requested clarification on whether H-4 dependent spouses will be permitted to file for employment authorization based on their classification as an H-4 dependent spouse if they have a pending adjustment of status application. DHS confirms that under this rule, H-4 dependent spouses with pending adjustment of status applications are still eligible for employment authorization on the basis of their H-4 classification. They may choose to apply for employment authorization based on either the H-4 dependent spouse category established by this rule under new 8 CFR 274a.12(c)(26) or the adjustment of status category under 8 CFR 274a.12(c)(9).

Another commenter asked if H-4 dependent spouses of H-1B nonimmigrants who have extended their stay under section 104(c) of AC21 would be eligible for work

authorization. DHS confirms that H-4 dependent spouses of H-1B nonimmigrants who have extended their stay under section 104(c) of AC21 are eligible for employment authorization under this rule. Section 104(c) of AC21 applies to a subset of H-1B nonimmigrants who are the principal beneficiaries of approved Form I-140 petitions.[8] Because this rule provides eligibility for employment authorization to H-4 dependent spouses of all H-1B nonimmigrants who are the principal beneficiaries of approved Form I-140 petitions, it captures the section 104(c) subset. DHS has thus determined that it is unnecessary to include section 104(c) of AC21 as a separate basis for employment authorization eligibility in this rule.

2. Comments Requesting Expansion of the Rule

i. H-4 dependent spouses of H-1B1, H-2 and H-3 nonimmigrants

Slightly over 200 commenters requested that DHS extend eligibility for employment authorization to the H-4 dependent spouses of H nonimmigrants who are not in H-1B status (H-1B1, H-2 and H-3 nonimmigrants), and not only to the spouses of certain H-1B nonimmigrants who have begun the process of permanent residence through employment.[9] Some of these commenters expressed that this expansion would also help U.S. competitiveness by attracting more skilled workers from abroad.

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[8] See Mem. from Donald Neufeld, Acting Assoc. Dir., Domestic Operations, USCIS, Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Pub. L. No. 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Pub. L. No. 105-277, at 6 (May 30, 2008) ("AC21 § 104(c) is applicable when an alien . . . is the beneficiary of an approved I-140 petition.") (emphasis in original).

[9] The H-4 classification includes dependents of H-2A temporary agricultural workers, H-2B temporary nonagricultural workers, H-3 trainees, H-1B specialty occupation workers, and H-1B1 Free Trade Agreement specialty occupation workers from Singapore and Chile. See INA 101(a)(15)(H); see also 8 CFR 214.2(h)(9)(iv).

DHS has determined that expansion of employment authorization beyond the class of H-4 dependent spouses described in the proposed rule is not appropriate at this time, and it has therefore not included such an expansion in this final rule. First, the Department believes this rule best achieves DHS's goals of helping U.S. employers minimize potential disruptions caused by the departure from the United States of certain highly skilled workers, enhancing U.S. employer's ability to attract and retain such workers, and increasing America's economic competitiveness.

Second, DHS notes two significant differences between H-1B nonimmigrants and other H nonimmigrants under the immigration laws. The INA explicitly permits H-1B nonimmigrants to have what is known as "dual intent," pursuant to which an H-1B nonimmigrant may be the beneficiary of an immigrant visa petition filed under section 204 of the INA or otherwise seek LPR status without evidencing an intention to abandon a foreign residence for purposes of obtaining or maintaining H-1B status. See INA 214(h); see also 8 CFR 214.2(h)(16). Further, in enacting AC21, Congress permitted H-1B nonimmigrants who are the beneficiaries of certain pending or approved employment-based immigrant visa petitions or labor certification applications to remain in the United States beyond the six-year statutory maximum period of stay. Congress therefore has passed legislation specifically encouraging, and removing impediments to, the ability of H-1B nonimmigrants to seek LPR status, such that they may more readily contribute permanently to United States economic sustainability and growth. Congress has not extended similar benefits to other H nonimmigrants, including H-1B1 (Free Trade Agreement specialty workers from Chile and Singapore), H-2A (temporary agricultural workers), H-2B (temporary nonagricultural workers), or H-3 nonimmigrants (trainees).

Extending employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants, and not to H-4 dependent spouses of other H nonimmigrants, thus serves to advance the Department's immediate interest in furthering the aims of AC21.[10]

Finally, as noted in the proposed rule, DHS may consider expanding H-4 employment eligibility in the future. See Ctr. for Biological Diversity v. EPA, 722 F.3d 401, 410 (D.C. Cir. 2013) (observing that "'agencies have great discretion to treat a problem partially'") (quoting City of Las Vegas v. Lujan, 891 F.2d 927, 935 (D.C. Cir. 1989)); Lamers Dairy Inc. v. U.S. Dep't of Agric., 379 F.3d 466, 475 (7th Cir. 2004) ("[T]he government must be allowed leeway to approach a perceived problem incrementally. Similarly, equal protection does not require a governmental entity to choose between attacking every aspect of a problem or not attacking the problem at all.") (quotation marks omitted) (citing FCC v. Beach Commc'ns, 508 U.S. 307, 316 (1993); and Dandridge v. Williams, 397 U.S. 471, 487 (1970)).

ii. H-4 dependent spouses of all H-1B nonimmigrants

Over 150 commenters noted that all dependent spouses of other nonimmigrant categories, such as the spouses of L-1 (intracompany transferee), E-1 (treaty trader), E-2 (treaty investor), and E-3 (Australian specialty occupation workers) nonimmigrants, are eligible to apply for employment authorization These commenters stated that because

[10] As noted in the proposed rule, to ease the negative impact of immigrant visa processing delays, Congress intended that the AC21 provisions allowing for extension of H-1B status past the sixth year for workers who are the beneficiaries of certain pending or approved employment-based immigrant visa petitions or labor certification applications would minimize disruption to U.S. businesses employing H-1B workers that would result if such workers were required to leave the United States. See S. Rep. No. 106-260, at 22 (2000) ("These immigrants would otherwise be forced to return home at the conclusion of their allotted time in H-1B status, disrupting projects and American workers. The provision enables these individuals to remain in H-1B status until they are able to receive an immigrant visa number and acquire LPR status either through adjustment of status in the United States or through consular processing abroad, thus limiting the disruption to American businesses.").

the employment-based nonimmigrant categories are similar to each other, all H-4 dependent spouses of H-1B nonimmigrants—rather than only certain subclasses of H-4 dependent spouses—likewise should be eligible for employment authorization.

DHS, however, recognizes an important difference between the dependent spouse category of H-1B nonimmigrants and those of L-1, E-1, E-2, and E-3 nonimmigrants. Specifically, Congress directed by statute that DHS grant employment authorization to all spouses of L-1, E-1, E-2, and E-3 nonimmigrants.[11] See Pub. L. No. 107-124 (2002) (amending the INA to expressly authorize employment for spouses of E nonimmigrants); Pub. L. No. 107-125 (2002) (same for spouses of L nonimmigrants); see also INA section 214(c)(2)(E) & (e)(6), 8 U.S.C. 1184(c)(2)(E) & (e)(6). Congress has not provided such statutory direction with respect to the spouses of H-1B nonimmigrants. Thus, the fact that the INA authorizes dependent spouses of L and E nonimmigrants for U.S. employment does not indicate that H-4 dependent spouses of all H-1B nonimmigrants also must be authorized to work.

In extending such employment authorization through regulation, DHS studied congressional intent with respect to H-1B nonimmigrants. Although Congress has not specifically required extending employment authorization to dependent spouses of H-1B nonimmigrants, Congress did recognize in AC21 the importance of addressing the lengthy delays faced by such workers seeking to obtain LPR status. Consistent with this congressional concern, and the legal authorities vested in the Secretary of Homeland Security described in Section C, below, DHS has chosen to limit this regulation within

[11] DHS is implementing the statutory provisions authorizing employment of spouses of L-1, E-1, E-2, and E-3 nonimmigrants, though the regulations have not been revised.

that statutory framework, and the Department declines to extend the changes made by this rule to the H-4 dependent spouses of all H-1B nonimmigrants at this time.

iii. Employment authorization incident to status

Over 60 commenters requested that H-4 dependent spouses be granted employment authorization "incident to status," which would relieve the need to apply for employment authorization before receiving it. These commenters generally recommended that DHS provide employment authorization incident to status by authorizing the employment of H-4 dependent spouses through amendment to 8 CFR 274a.12(a) instead of 8 CFR 274a.12(c), which provides employment authorization through case-by-case, discretionary adjudications of each individual request.[12] For those classes of aliens listed in 8 CFR 274a.12(a), employment authorization is automatic upon the grant of immigration status. Examples of classes of aliens who are employment authorized incident to status under 8 CFR 274a.12(a) are LPRs, asylees, and refugees.

DHS is unable to classify H-4 dependent spouses described in this rule as employment authorized incident to status. Unlike other noncitizens who are employment authorized incident to status, H-4 dependent spouses will not be eligible for employment authorization based solely on their immigration status. Rather, H-4 dependent spouses must meet certain additional conditions before they can be granted employment authorization, and current USCIS systems cannot automatically and independently determine whether such conditions have been met. USCIS systems, for example, cannot independently or automatically determine whether an H-4 dependent spouse has the

[12] DHS regulations provide for three categories of persons eligible for employment authorization: (1) aliens authorized for employment incident to status, see 8 CFR 274a.12(a); (2) aliens authorized to work for a specific employer incident to status, see 8 CFR 274a.12(b); and (3) aliens who must apply to USCIS for employment authorization, see 8 CFR 274a.12(c).

requisite spousal relationship to an H-1B nonimmigrant who either is the beneficiary of an approved Form I-140 petition or has been granted H-1B nonimmigrant status under sections 106(a) and (b) of AC21; that determination must be made by a USCIS adjudicator. DHS has therefore determined that it must require the filing of an application requesting employment authorization, see 8 CFR 274a.12(c) and 8 CFR 274a.13, before it can extend employment authorization to the class of H-4 dependent spouses described in this rule. This application process will ensure that only eligible H-4 dependent spouses receive a grant of employment authorization and proper documentation evidencing such employment authorization, and will avoid granting employment authorization to ineligible spouses.

iv. Employment authorization at different points in time

More than a dozen commenters requested that the class of H-4 dependent spouses who are eligible for employment authorization be expanded by permitting them to file at points in time different from those provided in the proposed rule. DHS carefully considered these suggestions for determining when an H-4 dependent spouse should be eligible for employment authorization. For the reasons that follow, DHS has determined that it will not adopt the commenters' suggestions in this final rule.

(1) H-1B nonimmigrants with Pending PERM labor certifications or Form I-140 petitions

Some commenters requested that DHS make H-4 dependent spouses eligible for employment authorization when their H-1B nonimmigrant spouses have filed permanent

(PERM) labor certifications with DOL.[13] Other commenters suggested providing such eligibility when H-1B nonimmigrants have Form I-140 petitions or adjustment of status applications pending with USCIS.

DHS believes that the basis for eligibility in the proposed rule reasonably addresses H-4 dependent spouses' interests in obtaining employment authorization at the earliest possible time in advancing the Department's policy goals of attracting and retaining highly skilled workers and promoting compliance with U.S. immigration laws. In furtherance of these goals, DHS has chosen to limit eligibility for employment authorization to cases where the H-1B nonimmigrant either: (1) is the principal beneficiary of an approved Form I-140 and thus is on a path to lawful permanent residence that is reasonably likely to conclude successfully; or (2) has been granted H-1B status under sections 106(a) and (b) of AC21. This approach provides several benefits to the Department.

Among other things, the approach allows DHS to confirm a significant record of compliance with U.S. immigration laws, which indicates the likelihood of continued compliance in the future. Requiring an approved Form I-140 petition, for example, reduces the risk of frivolous labor certification and immigrant visa petition filings for the purpose of making H-4 dependent spouses eligible for employment authorization, because the approval of the petition generally signifies that the foreign worker is eligible for the underlying immigrant classification. In contrast, authorizing employment immediately upon the filing of a PERM application or Form I-140 petition (rather than

[13] Currently, employers seeking to file immigrant visa petitions on behalf of noncitizens in certain employment-based preference categories must first obtain a labor certification under DOL's PERM program. See generally INA sections 204(b), 212(a)(5); 8 U.S.C. 1154(b), 1182(a)(5); 8 CFR 204.5(k)-(l); 20 CFR pt. 656.

after the 365-day waiting period or the approval of the Form I-140 petition) could produce a reasonable possibility of granting employment authorization to an H-4 dependent spouse where the H-1B nonimmigrant's case might not be approvable and the H-1B nonimmigrant has a relatively shorter record of compliance with U.S. immigration laws. The eligibility requirements in this rule also allow for better control of processing, as it is difficult for USCIS to track another agency's filings, such as PERM applications. Finally, with respect to the comment suggesting that employment should be authorized at the point when an adjustment of status application is pending, Department regulations already provide eligibility for employment authorization in that situation. See 8 CFR 274a.12(c)(9).

(2) H-1B nonimmigrants who are eligible for AC21 extensions under sections 106(a) and (b)

Some commenters expressed support for an alternative policy that would extend employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who are eligible for, but have not yet been approved for, extensions of status under sections 106(a) and (b) of AC21. DHS declines to adopt such a policy because it creates the possibility of granting employment authorization to H-4 dependent spouses of H-1B nonimmigrants who are later denied the extension of H-1B status. For instance, a labor certification or Form I-140 petition may have been timely filed on behalf of the H-1B nonimmigrant 365 days prior to the prospective expiration of his or her six-year limitation of stay, thus making the H-1B nonimmigrant eligible for an extension under AC21. But the labor certification or Form I-140 petition ultimately may be denied before the H-1B nonimmigrant files for and receives the AC21 extension. Additionally, if the

individual is determined to be ineligible for the H-1B extension, he or she would no longer be maintaining H-1B status and the U.S. employer will be unable to retain the worker. Accordingly, DHS believes the sounder policy is to extend employment authorization to H-4 dependent spouses of H-1B nonimmigrants who have been granted H-1B status pursuant to AC21, ensuring that such H-1B nonimmigrants are maintaining H-1B status and are significantly down the path to obtaining LPR status.

(3) Pending Form I-140 immigrant petitions with new employer

Fewer than a dozen commenters requested that DHS extend employment authorization to H-4 dependent spouses in cases where the H-1B nonimmigrants have transferred their employment to a new employer and are in the process of obtaining approval of a new Form I-140 petition. As noted above, however, authorizing employment based solely on the filing (rather than the approval) of a PERM application or Form I-140 petition is likely to encourage frivolous filings to allow the H-4 dependent spouse to obtain employment authorization while the filings remain pending. DHS thus is not extending this rule on the basis of pending PERM applications or Form I-140 petitions. By requiring that a Form I-140 petition first be approved, DHS will further disincentivize frivolous filings and better serve the goal of extending the immigration benefit of this rule to only those spouses of H-1B nonimmigrants who are genuinely on the path to lawful permanent residence.

v. H-4 minors

Less than 40 commenters requested that DHS authorize employment for certain H-4 dependent minor children whose H-1B nonimmigrant parent is the beneficiary of an approved Form I-140 or has been granted an extension of his or her authorized period of

admission in the United States under AC21. These commenters cited concerns about H-4 dependent children being unable to obtain the same types of work experience as their peers, being unable to afford post-secondary education in the United States, and losing eligibility for H-4 status through age (known as "aging-out"[14]) before their parents can file for adjustment of status. Some commenters also raised fairness concerns, given the eligibility under DHS deferred action policies that make eligible for employment authorization certain individuals who came to the United States unlawfully as children under the age of 16.[15]

DHS declines to adopt the commenters' suggestions to expand eligibility for employment authorization to H-4 dependent minor children. As reflected by the comments, DHS does not view the employment of dependent minor children in the United States as a significant deciding factor for an H-1B nonimmigrant considering whether to remain in the United States and seek LPR status while continuing employment with his or her U.S. employer. Also, as stated in the proposed rule, extending employment eligibility to certain H-4 dependent spouses will alleviate a significant portion of the potential economic burdens that H-1B nonimmigrants currently may face, such as paying for academic expenses for their children, during the transition from

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[14] To qualify as a "child" for purposes of the immigration laws, an individual generally must be unmarried and under the age of 21. See INA section 101(b)(1), 8 U.S.C. 1101(b)(1). The Child Status Protection Act (CSPA) amended the INA by permitting certain individuals over the age of 21 to continue to qualify as a child for purposes of certain immigration benefits. See Pub. L. No. 107-208 (2002). If an individual becomes too old to qualify as a child under the immigration law, and in turn no longer can derivatively benefit from a petition or application on behalf of a parent, he or she is described as "aging out."

[15] On June 15, 2012, the Secretary of Homeland Security announced that certain aliens who came to the United States as children and meet several guidelines may request consideration for deferred action from removal for a period of two years, subject to renewal. This policy is generally referred to as Deferred Action for Childhood Arrivals (DACA). On November 20, 2014, the Secretary announced expanded eligibility guidelines for consideration under the DACA policy and extended the period of deferred action and work authorization from two years to three years.

nonimmigrant to LPR status as a result of the inability of their dependent family members to work in the United States.

Additionally, limiting employment authorization to H-4 dependent spouses is consistent with the treatment of dependent minors in other nonimmigrant employment categories (such as the L and E nonimmigrant categories), which provide employment authorization to dependent spouses but not dependent children. And in the instances where DHS has extended eligibility for employment authorization to minor children, foreign policy reasons have been an underlying consideration. DHS has extended eligibility for employment authorization to minors within the following nonimmigrant categories: dependents of Taipei Economic and Cultural Representative Office (TECRO) E-1 nonimmigrants; J-2 dependent children of J-1 foreign exchange visitors; dependents of A-1 and A-2 foreign government officials; dependents of G-1, G-3, and G-4 international organization officials; and dependents of NATO officials. Each of these instances involves foreign policy considerations that are not present in the H-1B nonimmigrant program.

DHS also declines to extend employment authorization to H-4 dependent children who age out and lose their H-4 status. Providing work authorization in such circumstances would encourage such individuals to violate the terms of their authorized stay. Moreover, comments suggesting that the Department should make changes to prevent H-4 dependent minor children from aging out are outside the scope of this rulemaking, which in no way involves the ability of a minor to maintain H-4 status or eligibility for LPR status as a derivative beneficiary of a parent's immigrant petition.

Finally, the circumstances of persons eligible for consideration of Deferred Action for Childhood Arrivals ("DACA") are distinct from those of H-4 dependent minor children, and the policy for authorizing employment for individuals who have received deferred action has no bearing on whether H-4 dependent minor children should be eligible to apply for employment authorization. The DACA program concerns the departmental exercise of prosecutorial discretion with the aim of ensuring that limited DHS enforcement resources are appropriately focused on the Department's highest enforcement priorities. The policy aims underlying this rule, as described above, are different, and for the reasons already discussed do not justify extending employment authorization to the H-4 dependent children of H-1B nonimmigrants.

vi. Principal beneficiaries

A few dozen commenters requested that the rule also allow H-1B nonimmigrants to receive Employment Authorization Documents (EADs), which authorize employment without regard to employer, incident to status.[16] One commenter requested that DHS provide one EAD to households in which both spouses have H-1B status in order to avoid necessitating one of the spouses to change to H-4 status. A few commenters requested an EAD for an H-1B nonimmigrant whose spouse is also in H-1B status, but has been granted a different length of stay.

DHS declines to adopt the commenters' suggestions regarding EADs for H-1B nonimmigrants. If an H-1B nonimmigrant would like to apply for an EAD as the dependent spouse of an eligible H-1B nonimmigrant, he or she must first change to H-4

[16] The commenters' refer to these unrestricted EADs as "open market" EADs. In contrast, classes of aliens listed in 8 CFR 274a.12(b), such as H-1B nonimmigrants, are authorized for employment only with a specific employer.

status. Moreover, issuance of an EAD to an H-1B nonimmigrant authorizing employment other than with his or her petitioning employer is incompatible with the H-1B classification, which allows employment only with the petitioning employer.[17] If an H-1B nonimmigrant works on an EAD for an employer other than his or her petitioning employer, he or she may be violating the terms and conditions of his or her petition and, therefore, may no longer be maintaining a valid nonimmigrant status.

vii. H-4 dependent spouses not selected in the H-1B lottery

Less than 20 commenters requested a carve-out for H-4 dependent spouses who had filed an H-1B petition but who were not selected in the H-1B computer-generated random selection process ("H-1B lottery").[18] Although DHS appreciates the frustration that may result from not being selected in the H-1B lottery, the Department declines to extend eligibility for employment authorization to these H-4 dependent spouses. This rule is not a substitute for the H-1B program and is not intended to circumvent the H-1B lottery. A primary purpose of this rule is to help U.S. businesses retain the H-1B nonimmigrants for whom they have already filed an employment-based immigrant petition. Expanding the rule to help nonimmigrants in other situations does not directly support this goal.

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[17] See INA sections 101(a)(15)(H)(i)(b) (requiring that DOL determine and certify that "the intending employer has filed" an LCA) (emphasis added), 212(n) (establishing LCA requirements applicable to employers of H-1B nonimmigrants), 214(c) (requiring employers file petitions with the Secretary of Homeland Security to employ an H-1B nonimmigrant); 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), 1184(c).

[18] If USCIS receives more than a sufficient number of H-1B petitions to reach the general statutory cap of 65,000 visas or the 20,000 cap under the advanced degree exemption during the filing period, see INA section 214(g)(1)(A), (5)(C), 8 U.S.C. 1184(g)(1)(A), (5)(C), USCIS holds a computer-generated random selection process, or lottery, to select enough petitions to meet the statutory caps. See 8 CFR 214.2(h)(8)(ii)(B). USCIS rejects and returns cap-subject petitions not randomly selected, with filing fees, unless a petition is found to be a duplicate filing.

viii. Other nonimmigrant categories

Less than 20 commenters requested that DHS authorize employment for the dependents of principals in other employment-based nonimmigrant classifications, such as dependents of O-1 nonimmigrants (O-3)[19] and TN nonimmigrants (TD)[20]. One commenter specifically requested employment authorization for children of O-1 and TN nonimmigrant highly skilled workers who are on the path to lawful permanent residence.

DHS declines to expand eligibility for employment authorization in this rule to the dependents of principals with other nonimmigrant classifications. DHS is narrowly tailoring the expansion of eligibility for employment authorization to meet several policy objectives, including the goal of helping U.S. businesses retain highly skilled H-1B nonimmigrants who are on the path to lawful permanent residence. DHS may consider expanding employment authorization to other dependent nonimmigrant categories in the future.

Moreover, there are significant differences between the H-1B nonimmigrant classification on the one hand, and the O-1 and TN classifications on the other, that inform the Department's decision to limit applicability of this rule to only H-4 dependent spouses. The spouses of H-1B nonimmigrants, for example, generally have greater need for the benefits of this rule than the spouses of O-1 nonimmigrants. O-1 nonimmigrants typically apply for LPR status through the EB-1 immigrant visa preference category,

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[19] An O-3 nonimmigrant is a dependent of an O-1 nonimmigrant. The O-1 nonimmigrant classification applies to individuals who possess extraordinary ability in the sciences, arts, education, business, or athletics, or who have a demonstrated record of extraordinary achievement in the motion picture or television industry and have been recognized nationally or internationally for those achievements. See INA section 101(a)(15)(O), 8 U.S.C. 1101(a)(15)(O); 8 CFR 214.2(o).

[20] A TD nonimmigrant is a dependent of a TN nonimmigrant. The TN nonimmigrant classification permits qualified Canadian and Mexican citizens to seek temporary entry into the United States to engage in business activities at a professional level. See INA section 214(e), 8 U.S.C. 1184(e); 8 CFR 214.6.

which has not historically suffered from visa backlogs. This allows the spouses of O-1 nonimmigrants to generally obtain employment authorization much more quickly than the spouses of H-1B nonimmigrants who typically seek LPR status through the EB-2 and EB-3 preference categories, which have historically been subject to lengthy backlogs.

The spouses of TN nonimmigrants are also not similarly situated to the spouses of H-1B nonimmigrants. Unlike H-1B status, TN status stems from an international agreement—the North American Free Trade Agreement (NAFTA)—negotiated between the United States and foreign nations. As such, changes to that status implicate reciprocal international trade and foreign policy concerns that are generally not implicated with respect to the H-1B classification and are beyond the scope of this rulemaking.

3. Comments Opposing the Rule

Approximately ten percent of commenters opposed extending employment authorization to the class of H-4 dependent spouses described in the proposed rule. Many of these commenters were generally concerned that the rule would result in the displacement of U.S. workers; exacerbation of the nation's unemployment rate; and a decrease in wages. All comments discussing economic issues, both in opposition to and in support of the proposed rule, are discussed in Part III, Public Comments on Proposed Rule, Section D, Comments on Executive Orders 12866 and 13563.

Commenters also questioned whether the change in the proposed rule is actually necessary in light of other provisions of U.S. immigration law. Other commenters suggested that the proposed rule would have an adverse impact on other immigration categories or nationalities. DHS has carefully considered these concerns. But for the reasons that follow, DHS has decided to finalize the rule as proposed.

i. Change unnecessary

More than 20 commenters believed that because current immigration laws provide the ability for H-4 dependent spouses to change status to an employment-authorized category, the proposed rule would not provide any additional incentives for H-1B nonimmigrants to remain in the United States and continue to pursue LPR status. One commenter stated that most of the comments posted on www.regulations.gov failed to indicate that potential immigrants have abandoned the immigration process, or have decided against coming to the United States in the first place, because their spouses would not be authorized to work.

DHS disagrees with these commenters and believes that the changes made by this rule are warranted. DHS acknowledges that thousands of commenters who voiced support for the rule did not provide specific reasons for their support, including whether H-1B nonimmigrants were abandoning their applications for LPR status. DHS notes, however, that more than 60 commenters specifically indicated they planned to abandon their pursuit of lawful permanent residence without the changes in the proposed rule. Approximately, two dozen commenters stated that they left the United States because the current regulations preclude H-4 dependent spouses from engaging in employment. And several U.S. employers submitted comments in which they describe the loss of valued H-1B nonimmigrants because of the restriction on spousal employment. These employers noted that the changes in the proposed rule would help to align America's immigration laws with the policies of other countries that allow spousal employment. DHS agrees with these employers and other commenters who supported the proposed rule, and the Department believes that this change will support U.S. businesses and strengthen U.S.

competitiveness. DHS also believes that this rule will fulfill its intended purpose and encourage certain highly skilled H-1B nonimmigrants to remain in the United States and continue to pursue their efforts to become LPRs.

ii. Impact on other categories or nationalities

Less than 80 commenters suggested that the proposed rule would harm persons in other nonimmigrant categories or with certain nationalities. A few commenters who had changed status from H-4 status to F-1 nonimmigrant student status, for example, thought the rule was unfair because F-1 nonimmigrant graduates who had exhausted their Optional Practical Training had no path to employment authorization except through another principal nonimmigrant classification, such as the H-1B classification. These commenters argued that the rule would put recent F-1 nonimmigrant graduates at a disadvantage because they would have to go through the H-1B petition process whereas the qualifying H-4 dependent spouses would be eligible for an EAD authorizing employment without regard to employer.

DHS appreciates these commenters' concerns but does not believe that the changes made by this rule will adversely affect other classifications or specific nationalities. Rather, DHS expects that this rule will help to partially alleviate the adverse impact of oversubscription of certain chargeability categories in the EB-2 and EB-3 categories on certain H-1B nonimmigrants and their families, without negatively impacting others. DHS has narrowly tailored this rule to provide employment authorization to only those H-4 dependent spouses of H-1B nonimmigrants who have taken active steps to become LPRs. The rule does not affect any other nonimmigrant category, nor does the rule make distinctions among persons of different nationalities.

Moreover, as noted throughout this rule, DHS expects that because of the small size of the newly eligible class of workers, the rule should not negatively impact the employment of persons in other nonimmigrant categories. DHS also notes that the H-4 dependent spouses at issue may already obtain employment authorization when they file their applications to adjust status; this rule simply accelerates the timeframe in which they may enter the labor market.

iii. Impact on universities

Several commenters suggested that because it is common for H-4 dependent spouses to change status to F-1 nonimmigrant student status to enhance their marketability and use their time productively, universities may lose revenue from decreased enrollment if such H-4 dependent spouses are allowed to work pursuant to this rule. DHS carefully considered but declined to address these concerns. First, this rule does not directly regulate U.S. institutions of higher education or its students (including F-1 nonimmigrants), and any impacts on university enrollments or revenues would be an indirect impact of this rule. Second, the rule merely expands the choices available to H-4 dependent spouses. While the rule expands the ability for such individuals to obtain employment authorization, it does nothing to restrict or otherwise change their ability to engage in study to the extent authorized by the Department in accordance with law. Third, even if the opportunity for employment authorization may mean that fewer H-4 dependent spouses eventually choose to enroll as nonimmigrant students, it is not clear how this rule could significantly impact revenues at colleges and universities considering

the relatively small number of people impacted by this rule.[21] Indeed, other commenters noted that this rule could actually help university enrollment, as the increased ability for H-1B nonimmigrant families to generate income would further enable the H-1B nonimmigrant and H-4 dependent spouse to engage in higher education or contribute towards the higher education of their children. Consequently, it is uncertain if the net impact of this rule is to reduce overall enrollment and revenues, given the offsetting effects of this rule suggested by commenters. Commenters did not provide statistics or data demonstrating that this rule will have significant adverse effects on U.S. institutions of higher education or that DHS should limit employment opportunities for H-4 dependent spouses to protect revenue sources. Finally, DHS notes that it received several supportive comments both from representatives of the academic community and also from self-identified H-4 dependent spouses who viewed this rulemaking as positive.

4. Comments Requesting a More Restrictive Policy

Slightly over 180 commenters suggested limiting employment authorization to a more restricted class of H-4 nonimmigrants. For the reasons discussed below, DHS has determined that it will not adopt the commenters' suggestions in this final rule.

i. Certain skills or sectors

A number of commenters recommended granting employment authorization only to H-4 dependent spouses who have certain skills or work in certain sectors of the economy. Other commenters requested that DHS limit employment authorization under

[21] According to Department of Education statistics, approximately 21 million students are expected to enroll in postsecondary degree-granting institutions in fall 2014. See http://nces.ed.gov/fastfacts/display.asp?id=372. Given the relatively large student population enrolled in American schools and the narrow population impacted by this rule, DHS believes this rule would not significantly impact net college enrollments.

the rule to H-4 dependent spouses who hold advanced degrees from U.S. universities or have degrees in certain subjects, such as subjects in STEM fields. Some commenters were concerned that eligible H-4 dependents will be able to compete across all occupations, not just skilled professions.

DHS declines to restrict employment authorization eligibility to H-4 dependent spouses with certain skills or degrees. A primary purpose of this rule is to help U.S. employers retain H-1B nonimmigrant employees who have demonstrated the intent to become LPRs, which would provide substantial benefits to these employers and the U.S. economy. This rule is intended to provide this incentive to H-1B nonimmigrants regardless of the academic backgrounds of their H-4 dependent spouses. Limiting the rule to benefit only H-1B nonimmigrants whose H-4 dependent spouses have certain skills or hold certain educational credentials would undermine the effectiveness of this rule.

ii. Reciprocity

A number of commenters recommended limiting employment authorization to H-4 dependent spouses who are from countries that authorize employment for spouses of U.S. citizens in a similar immigration status abroad (i.e., when there is reciprocity). DHS's focus in this rule, however, is on retaining H-1B nonimmigrants for the benefit of U.S. employers and the U.S. economy, including by helping businesses minimize expensive disruptions caused by the departures from the United States of certain highly skilled H-1B nonimmigrants. As noted above, limiting the rule to affect only a subset of H-1B nonimmigrant families based on reciprocity would weaken the rule's efficacy.

Moreover, reciprocity would implicate foreign policy considerations that are outside the scope of this rulemaking.

iii. Limiting employment authorization based on AC21 extensions

A few commenters requested that DHS extend eligibility for employment authorization only to the H-4 dependent spouses of H-1B nonimmigrants who are beneficiaries of AC21 extensions. DHS discussed this option in the proposed rule. The Department appreciates this suggestion, but believes that also extending employment authorization to the spouses of H-1B nonimmigrants who are the beneficiaries of approved Form I-140 petitions more effectively accomplishes the goals of this rulemaking. For the benefit of U.S. businesses and the U.S. economy, DHS believes the rule should provide incentives for those workers who have established certain eligibility requirements and demonstrated intent to reside permanently in the United States and contribute to the U.S. economy. Extending employment authorization to H-4 dependent spouses of H-1B nonimmigrants with either approved Form I-140 petitions or H-1B status granted pursuant to sections 106(a) and (b) of AC21 encourages a greater number of professionals with high-demand skills to remain in the United States. Moreover, by tying eligibility for employment authorization to approved Form I-140 petitions, DHS is reaching the H-4 dependent spouses of H-1B nonimmigrants granted status under section 104(c) of AC21. DHS thus declines to exclude from this rule the spouses of H-1B nonimmigrants who have approved Form I-140 petitions.

C. Legal Authority to Extend Employment Authorization to Certain H-4 Dependent Spouses

Over 40 commenters questioned DHS's legal authority to extend employment authorization to certain H-4 dependent spouses, often emphasizing that employment for

spouses of L and E nonimmigrants is expressly authorized by statute.[22] Several commenters argued that it was the role of Congress, not the Executive Branch, to create immigration laws.

DHS disagrees with the view that this rule exceeds the Secretary's authority. In the INA, Congress provided the Secretary with broad authority to administer and enforce the immigration laws. The Secretary is expressly authorized to promulgate rules and "perform such other acts as he deems necessary for carrying out his authority" based upon considerations rationally related to the immigration laws. INA section 103(a)(3), 8 U.S.C. 1103(a)(3). Congress also provided the Secretary with the more specific statutory authority to set by regulation the conditions of nonimmigrant admission. INA section 214(a), 8 U.S.C. 1184(a). These provisions grant the Secretary broad discretion to determine the most effective way to administer the laws. See Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979) (observing that the INA "need not specifically authorize each and every action taken by the Attorney General [(now Secretary of Homeland Security)], so long as his action is reasonably related to the duties imposed upon him"); see also Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (noting "broad discretion exercised by immigration officials" under the immigration laws).

More specifically, section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B), recognizes that employment may be authorized by statute or by the Secretary. See Arizona Dream Act Coalition v. Brewer, 757 F.3d 1053, 1062 (9th Cir. 2014) ("Congress has given the Executive Branch broad discretion to determine when noncitizens may work in the United States."); Perales v. Casillas, 903 F.2d 1043, 1050 (5th Cir. 1990)

[22] See INA section 214(c)(2)(E), (e)(6); 8 U.S.C. 1184(c)(2)(E), (e)(6).

(describing the authority recognized by INA 274A(h)(3) as "permissive" and largely "unfettered"). Thus, the commenters' arguments that DHS lacks authority to grant employment eligibility to H-4 dependent spouses because Congress has not specifically required it by statute are misplaced. The fact that Congress has directed the Secretary to authorize employment to specific classes of aliens (such as the spouses of E and L nonimmigrants) does not mean that the Secretary is precluded from extending employment authorization to other classes of aliens by regulation as contemplated by section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B).[23]

D. Comments on the Analysis of Executive Orders 12866 and 13563

1. Comments Related to Labor Market Impacts

Of the approximately ten percent of commenters who generally opposed the rule, a majority of those commenters asserted that allowing eligible H-4 dependent spouses to receive employment authorization would have negative economic impacts. Chief among these concerns was the impact of the proposed rule on the U.S. labor market. Many commenters believed that the proposed rule would increase competition for jobs; exacerbate the nation's unemployment rate; drive down wages; and otherwise negatively impact native U.S. workers. A few commenters also suggested that allowing H-4

[23] Moreover, in the few instances in which Congress has determined to limit employment authorization for certain classes of aliens, it has done so expressly. See INA section 208(d)(2), 8 U.S.C. 1158(d)(2) ("An [asylum] applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum."); INA section 236(a)(3), 8 U.S.C. 1226(a)(3) (restricting employment authorization for aliens who have been arrested and are in removal proceedings unless the alien is a lawful permanent resident "or otherwise would (without regard to removal proceedings) be provided work authorization"); INA section 241(a)(7), 8 U.S.C. 1231(a)(7) (providing that alien who has been ordered removed is ineligible for work authorization unless the Secretary finds that the alien cannot be removed for lack of a country willing to receive the alien or "the removal of the alien is otherwise impracticable or contrary to the public interest").

dependent spouses to enter the labor market would negatively impact highly skilled H-1B nonimmigrants.

DHS appreciates these viewpoints and has carefully considered the potential for negative labor market impacts throughout this rulemaking. DHS affirms its belief expressed in the proposed rule that any labor market impacts will be minimal. As a preliminary matter, this regulatory change applies only to the H-4 dependent spouses of H-1B nonimmigrants who have actively taken certain steps to obtain LPR status. As such, the rule simply accelerates the timeframe by which these spouses are able to enter the U.S. labor market. Importantly, the rule does not require eligible H-4 spouses to submit an application for an EAD, nor does the granting of an EAD guarantee that H-4 spouses will obtain employment. Further, the relatively small number of people affected by the rule limits any impact the rule may have on the labor market. Although DHS, in this final rule, increased its estimate of the number of H-4 dependent spouses who might benefit from the rule, the maximum number of such spouses who could request employment authorization and actually enter the labor market in the initial year (the year with the largest number of potential applicants) represents only 0.1156 percent of the overall U.S. civilian labor force. This increased estimate does not change the Department's conclusion that this rule will have minimal labor market impacts.

Moreover, with respect to the potential that this rule and the policy goals of retaining certain highly skilled H-1B nonimmigrants may cause native-worker displacement and wage reduction, DHS notes that there is a large body of research that supports the findings that immigration of highly skilled workers is beneficial to the U.S. economy and labor market in the long-term. For example, several commenters provided

studies that refuted arguments that highly skilled immigrants are used for "cheap labor,"[24] while many others offered evidence that showed the positive effects of immigration, and particularly high-skilled immigration, on the U.S. labor market.[25] These commenters pointed to a Congressional Budget Office report and academic study[26] that showed that immigration generally produces a modest increase in the wages of native-born workers in the long-run, and that any negative economic effects—in the form of wages—are largely felt by other immigrant workers with similar education and skill levels. DHS also notes that the Immigration and Nationality Act's employment-related antidiscrimination provision, enforced by the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices, prohibits employment discrimination in hiring, firing and recruiting and referring for a fee based on citizenship status. In general, employers may not reject U.S. workers in favor of nonimmigrant visa holders based on citizenship status. INA section 274B(a)(1)(B), 8 U.S.C. 1324b(a)(1)(B).

From a labor market perspective, it is important to note that there are not a fixed number of jobs in the United States. Basic principles of labor market economics

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[24] For example, commenters cited to the following studies in refuting the claim that H-1B workers are a source of cheap labor: Lofstrom, M. & Hayes, J., "H-1Bs: How Do They Stack Up to US Born Workers? IZA Discussion Paper No. 6259" (Dec. 2011), available at http://ssrn.com/abstract=1981215; Rothwell, J. & Ruiz, N. "H-1B Visas and the STEM Shortage: A Research Brief" (May 11, 2013), available at http://ssrn.com/abstract=2262872.

[25] Commenters cited to the following to highlight positive effects of highly skilled immigration: National Foundation for American Policy, "H-1B Visas and Job Creation" (Mar. 2008), available at http://www.nfap.com/pdf/080311h1b.pdf.

[26] Commenters cited to the following studies in highlighting the effects of immigration: Congressional Budget Office, "The Economic Impact of S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act," June 18, 2013, available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/44346-Immigration.pdf; Mathews, D., "No, the CBO Report Doesn't Mean Immigration Brings Down Wages," June 19, 2013, available at http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/19/no-the-cbo-report-doesnt-mean-immigration-brings-down-wages/; Ottaviano, G. & Peri, G., Rethinking the Effects of Immigration on Wages (March 2010), available at http://economics.ucdavis.edu/people/gperi/site/papers/rethinking-the-effect-of-immigration-on-wages.

recognize that individuals not only fill jobs, but also stimulate the economy and create demand for jobs through increased consumption of goods and services. On this point, approximately 2,600 commenters thought that the regulation as proposed will stimulate the U.S. economy through the spillover effects associated with dual-income households, thus leading to increased spending throughout the economy, greater investments in real estate, the potential for job creation, and increased tax revenue. Relatedly, other commenters expressed their belief that the rule will bolster U.S. competitiveness, economic strength and innovation. A few commenters noted that the proposal will enhance the ability of U.S. businesses to attract and retain highly skilled immigrants, resulting in potential economic gains to U.S. companies and the U.S. economy.

In addition, commenters also highlighted several social benefits of the proposed rule, including: family unification; overall family financial security and stability; providing a means for H-4 dependent spouses to be financially independent; and significantly aiding the H-1B nonimmigrant and his or her family in integrating into American culture and communities. DHS appreciates these comments and agrees that the rule will provide economic and social benefits to the H-1B nonimmigrant worker and his or her family as they wait to obtain LPR status.

Finally, a few commenters suggested that allowing H-4 dependent spouses to enter the labor market would negatively impact the job prospects of highly skilled H-1B nonimmigrants. These commenters generally suggested, without providing empirical support, that by allowing H-4 dependent spouses to have an EAD, U.S. employers will prefer to hire such individuals rather than to go through the additional effort of hiring an H-1B nonimmigrant. DHS appreciates these concerns but lacks data on the skillsets or

educational levels of H-4 dependent spouses to indicate that they will take jobs that are typically held by highly skilled H-1B nonimmigrants. Nor, as noted above, is the U.S. labor market static; individuals who supply labor also create demand for labor through increased consumption and other spending. The fact that this rule provides employment authorization only to H-4 dependent spouses who are tied to an H-1B nonimmigrant who is sufficiently on the path to LPR status further mitigates the possibility that this rule will cause employers to hire H-4 dependent spouses over H-1B nonimmigrants. DHS anticipates that employers will continue to fully utilize the H-1B program and does not believe that this rule will adversely affect the job prospects of H-1B nonimmigrants.

2. Comments on the Volume Estimate and Methodology

Of the ten percent of commenters who opposed the rule, many felt that the Department's estimates of the potential eligible population were too low. Two commenters suggested that DHS employ a different methodology to arrive at the estimated number of likely eligible H-4 dependent spouses. One commenter provided highlighted excerpts of the Yearbook of Immigration Statistics, as published by the DHS Office of Immigration Statistics, containing statistics on individuals who had obtained LPR status under employment-based preference categories. The commenter highlighted the total number of spouses who had adjusted status to lawful permanent residence and the total number of individuals who adjusted to LPR status under the first through third employment-based preference categories. DHS assumes that the commenter was suggesting that DHS simply apply that historical average to estimate the number of H-4 dependent spouses who will be eligible to apply for employment authorization under this rule.

DHS appreciates this response and carefully considered this approach. However, that approach fails to account for those H-1B nonimmigrants and their families who are currently in the backlog waiting for immigrant visas. Furthermore, that approach would also overstate the likely number of H-4 dependent spouses who would be eligible to apply for employment authorization under this rule. That is so because the approach does not account for the proportion of employment-based adjustment applicants who are in H-1B status as compared to those adjusting from another nonimmigrant status. Moreover, not all spouses of H-1B nonimmigrants are currently in H-4 nonimmigrant status. For these reasons, DHS disagrees with the commenters' suggested approach to estimating the volume of H-4 dependent spouses who will be eligible to apply for employment authorization under this rule. Estimating the eligible population by taking into account the backlog of H-1B nonimmigrants who have approved I-140 petitions but are unable to adjust status due to a lack of available immigrant visas, along with the estimated future flow of newly eligible spouses, is a more accurate methodology for estimating the number of H-4 dependent spouses whom this rule may impact.

DHS has carefully considered ways to estimate the volume of potential H-4 dependent spouses who will be eligible to apply for employment authorization under this rule. Based on comments received that questioned whether the estimated volume of such spouses was too low, DHS reviewed and updated its estimates in preparing this final rule. DHS acknowledges that there is some uncertainty in this analysis, but believes its methodology offers the best available estimates.

Although the estimate of H-4 dependent spouses who could be eligible to apply for employment authorization increased in this final rule,[27] the findings and impacts of the rule remain essentially the same. In the first year, if all 179,600 H-4 dependent spouses who DHS estimates may be eligible under the rule were to enter the U.S. labor market, that population would still constitute a small fraction of one percent of the overall U.S. civilian workforce. And many of these H-4 dependent spouses will be able to seek employment even without this rule, as immigrant visa numbers become available and H-1B nonimmigrant families become eligible to file for adjustment of status. As noted previously, this rule simply accelerates the timeframe in which certain H-4 dependent spouses are able to enter the labor market.

Notwithstanding the revised volume estimates, the basis for this rule, as discussed throughout the proposed rule and this final rule, remains accurate. DHS is taking this action to further incentivize H-1B nonimmigrants and their families to continue to wait and contribute to the United States through an often lengthy waiting period for an immigrant visa to become available. DHS expects that these actions will also benefit U.S. employers by decreasing the labor disruptions that occur when H-1B nonimmigrants abandon the permanent resident process.

3. Comments on Specific Costs and Benefits Discussed in the Analysis

One commenter believed that the proposed rule overstated the potential costs and understated the benefits of the rule. Specifically, the commenter alleged that DHS' estimates for cost per applicant were exaggerated because DHS included the monetized

[27] Please refer to Section IV.C. of this document for a deeper discussion of the final estimate of the impact of this rule.

opportunity costs associated with applying for employment authorization. That same commenter also believed that DHS failed to stress the economic and social benefits of the rule. Another commenter believed that the proposed rule failed to acknowledge the economic losses incurred by the current inability of H-4 dependent spouses to work.

DHS has carefully considered these comments and does not believe that the potential costs and benefits were either under- or overestimated. In the proposed rule, DHS highlighted the economic benefits to both the H-4 dependent spouse and the H-1B family unit that would accrue from additional income. In addition, in the proposed rule DHS discussed the societal integration benefits that would accrue to the H-4 dependent spouse and the H-1B family that would come from the spouse's ability to participate in the U.S. labor market. DHS disagrees with comments that the application costs were inflated because we assigned a valuation to the H-4 dependent spouse's time. DHS acknowledged in the proposed rule that these spouses do not currently work. DHS decided to use the minimum wage as a reasonable proxy to estimate the opportunity costs of their time. DHS disagrees with the questionable notion that just because these spouses are not currently able to participate in the labor market, they do not face opportunity costs and/or assign valuation in deciding how to allocate their time. As such, DHS utilized a reasonable approach in assigning value to their time.

E. Comments on the Application for Employment Authorization

Over 180 commenters raised issues related to employment authorization, including filing procedures, premium processing, validity periods, renewals, evidentiary documentation, concurrent filings for extension of stay/change of status, automatic

extensions of employment authorization, and filing fees. DHS carefully considered these comments and addresses them below.

1. Streamlined or Modernized Filing Procedures

Commenters urged DHS and USCIS to utilize streamlined or modernized filing procedures for Applications for Employment Authorization (Forms I-765) submitted by H-4 dependent spouses. USCIS is moving from a paper-based application and adjudication process to an electronic one through the development of an Electronic Immigration System ("USCIS ELIS"). When complete, USCIS ELIS will allow customers to electronically view their applications, petitions or requests, receive electronic notification of decisions, and electronically receive real-time case status updates. This is a global effort affecting all USCIS benefit request programs and, therefore, is outside the scope of this rulemaking. DHS will notify the public when USCIS is prepared to begin accepting electronic filings of Applications for Employment Authorization by eligible H-4 dependent spouses. DHS will begin accepting Applications for Employment Authorization (Forms I-765) submitted by certain H-4 dependent spouses on the effective date of this rule, [**INSERT DATE 90 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER**]. This effective date is intended to prevent an overlap of H-1B cap season and an initial filing surge of Forms I-765 under 8 CFR 274a.12(c)(26). As a result, USCIS will be able to implement this program in a manner that will avoid prolonged delays of processing other petition and application types, in particular those H-1B petitions seeking an FY 2016 cap number. It will also allow USCIS to maintain excellent customer service for all USCIS stakeholders, including H-1B employers, H-1B nonimmigrants and their families.

2. Employment Authorization Document (Form I-766) Validity Period

Nine commenters requested that DHS issue the Employment Authorization Document (EAD) (Form I-766) with a validity period that matches the H-4 dependent spouse's status. Related to this request, another commenter requested a three-year validity period to match the H-1B and H-4 authorized periods of admission. DHS agrees with commenters that to reduce possible cases of unauthorized employment, the EAD validity period should match the H-4 dependent spouse's length of authorized admission. Thus, in issuing an EAD to an otherwise eligible H-4 dependent spouse, DHS generally will authorize a validity period that matches the H-4 spouse's remaining authorized period of admission, which may be as long as three years in cases not involving DOD-related services. This policy will ensure that USCIS does not grant employment authorization to an H-4 dependent spouse who is not eligible for the benefit. It will also likely reduce the number of times that H-4 dependent spouses may need to request renewal of their employment authorization.

One commenter requested that DHS issue a probationary EAD with a six-to twelve-month validity period, at the end of which the H-4 dependent spouse would have to prove that he or she is working legally and paying taxes. DHS declines to adopt this suggestion. The EAD that DHS will issue H-4 dependent spouses pursuant to this rule is evidence of employment authorization to lawfully work in the United States for any employer. DHS is not aware of any risk factors—such as fraud, criminal activity, or threats to public safety or national security—associated with H-4 dependent spouses as a whole that would support imposing a six-month validity period. Moreover, the administrative burden resulting from additional adjudications and the possibility of gaps

in employment authorization, together with the burdens this limitation would place on the H-4 dependent spouse, make imposing a six-month validity period unreasonable.

Regarding the suggestion that H-4 dependent spouses should be required to prove that they pay taxes as a condition of obtaining or maintaining work authorization, DHS does not require proof of payment of taxes for any of the classes of aliens eligible to file the Application for Employment Authorization. As a preliminary matter, issuance of an EAD does not require an H-4 dependent spouse to work. Nor does issuance of the EAD guarantee that an H-4 dependent spouse will find employment and therefore be required to pay taxes on any income earned through such employment. Moreover, DHS is not aware of any evidence, and the commenter provided none, indicating that H-4 dependent spouses are likely to engage in tax evasion or other tax-related unauthorized activity if they are provided employment authorization pursuant to this rule. At the same time, USCIS would face significant operational burdens if it were required to collect and verify tax documents for each H-4 dependent spouse seeking employment authorization under this rule.

3. EAD Renewals

Five commenters requested that DHS allow H-4 dependent spouses to apply for EAD renewals up to six months in advance, in part to align with the time frame permitted for filing of the Petition for a Nonimmigrant Worker (Form I-129) to extend the H-1B nonimmigrant's status. As explained below in Section III.E.5, DHS will permit those H-4 dependent spouses seeking to concurrently file their Form I-765 application with their Application to Extend/Change Nonimmigrant Status (Form I-539), and if applicable their spouses' Form I-129 petition, to file up to six months in advance of the requested start

date. Please note, however, that USCIS will not adjudicate the Form I-765 application until a determination has been made on the underlying Form I-539 application and/or Form I-129 petition. The time at which an H-4 dependent spouse will be eligible to apply for an EAD renewal will vary, as it is dependent on actions taken by the H-1B nonimmigrant, including actions to maintain and extend his or her H-1B status, as well as the H-4 dependent spouse's status.

4. Acceptable Evidentiary Documentation

Several commenters submitted comments related to the Application for Employment Authorization (Form I-765) and to the evidence required to be submitted by applicants with the application. One commenter asked DHS to make changes to assist applicants in obtaining acceptable evidentiary documentation. This commenter requested that USCIS provide the H-4 dependent spouse, upon request, with his or her immigration case related paperwork, such as the original underlying petition. Another commenter requested that DHS provide clarification about the evidentiary standard relating to AC21 eligibility.

In conjunction with the proposed rule, DHS proposed conforming revisions to the Form I-765 application to add H-4 dependent spouses described in this rule to the classes of aliens eligible to file the form. Concurrent with publication of this final rule, DHS has made further changes to the form. DHS has made clarifying changes to improve readability of the form instructions describing the types of documentary evidence that may be submitted in support of the application. As further discussed in Part III.F.1 relating to marriage fraud concerns, DHS also has revised the regulatory text in 8 CFR 214.2(h)(9)(iv) and the form instructions to clarify that supporting documentary evidence

includes proof of marriage. Finally, DHS has revised the form itself to include a check box that self-identifies the applicant as an eligible H-4 dependent spouse. DHS believes that adding the check box for H-4 dependent spouses to the form will aid in the efficient processing of the form by facilitating USCIS's ability to match the application with related petitions that are integral to determining the H-4 dependent spouse's eligibility for employment authorization, as discussed below in Part III.E.5.

DHS appreciates the concerns regarding the difficulty that some applicants may face in obtaining the necessary documentation to support the Form I-765 application. DHS's revisions in this final rule to 8 CFR 214.2(h)(9)(iv) and the instructions to Form I-765 provide for flexibility in the types of evidentiary documentation that may be submitted by applicants. If the H-4 dependent spouse cannot submit the primary evidence listed in the form instructions, he or she may submit secondary evidence, such as an attestation that lists information about the underlying Form I-129 or Form I-140 petition, so that an adjudicator may be able to match the Form I-765 application with the underlying petition(s). Such information may include the petition receipt number, the beneficiary's name and/or the petitioner's name. If secondary evidence does not exist or cannot be obtained, an applicant may demonstrate this and submit two or more sworn affidavits by non-parties who have direct knowledge of the relevant events and circumstances. This approach should address the situation where the H-4 dependent spouse is unable to access the immigration paperwork relating to the H-1B nonimmigrant. Notwithstanding the option for submitting secondary evidence, if an applicant prefers to obtain the primary evidence listed in the form instructions from USCIS for submission with the Form I-765, the applicant may make a request for

documents maintained by USCIS by following established procedures for making such requests under the Freedom of Information Act (FOIA). See http://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/how-file-foiapa-request. DHS declines to establish new procedures for making document requests that are applicable only to applicants who are H-4 dependent spouses. The established FOIA process for making document requests promotes fairness, uniformity, and administrative efficiency, while ensuring that privacy protections are enforced.

Finally, in response to the comment on the evidentiary standard that will apply to H-4 dependent spouses, DHS notes that such spouses will have to meet the same burden of proof (i.e., preponderance of the evidence) as other applicants for employment authorization. See, e.g., Matter of Chawathe, 25 I. & N. Dec. 369, 376 (AAO 2010) (describing "preponderance of the evidence" standard).

5. Concurrent Filings

A couple of commenters requested that DHS allow eligible H-4 dependent spouses to file the Application for Employment Authorization (Form I-765) concurrently with an Immigrant Petition for Alien Worker (Form I-140) or an Application to Extend/Change Nonimmigrant Status (Form I-539). For the reasons that follow, DHS agrees to allow Form I-765 to be concurrently filed with Form I-539, but not with Form I-140.

DHS currently permits an H-4 dependent spouse to file Form I-539 concurrently with a Petition for a Nonimmigrant Worker (Form I-129) filed on behalf of the H-1B nonimmigrant. This provides several efficiencies, as the status of the H-4 dependent spouse is based on the resolution of the H-1B nonimmigrant's Form I-129 petition and

both forms may be processed at the same USCIS locations. For similar reasons, DHS has decided to permit H-4 dependent spouses to file Applications for Employment Authorization (Forms I-765) concurrently with certain related benefit requests: Applications to Extend/Change Nonimmigrant Status (Forms I-539) and, if applicable, with Petitions for a Nonimmigrant Worker (Form I-129). As noted previously, DHS has decided to issue EADs to eligible H-4 dependent spouses with validity dates that match their authorized periods of admission. That period of admission is determined as part of the Form I-539 application adjudication, which, in turn, is largely dependent on the H-1B nonimmigrant's period of admission determined as part of the Form I-129 adjudication. Because adjudication of those forms are interrelated, and because they are submitted to the same USCIS locations, DHS has determined that it is reasonable to allow those forms to be concurrently filed.

DHS, however, cannot extend the courtesy of concurrent filing with Form I-140 immigrant visa petitions filed on behalf of the H-1B nonimmigrant. Presently, Forms I-129 and I-539 are not processed at the same USCIS locations in which Form I-140 petitions are adjudicated. As a result, each form must be filed separately at the USCIS Service Center location having jurisdiction over the relevant form. Additionally, determining the spousal relationship between the H-1B nonimmigrant and the H-4 dependent spouse is not a necessary part of the adjudication of the Form I-140 petition.[28] To permit concurrent filing of Form I-765 with Form I-140 would undermine DHS' efforts to facilitate efficient processing of both benefit requests.

[28] Unlike the I-140 adjudication, adjudication of Form I-539 requires evidence of such spousal relationship.

DHS also notes that it cannot adjudicate a Form I-765 filed by an H-4 dependent spouse until the Department has made a determination regarding the H-1B nonimmigrant's eligibility for H-1B status under sections 106(a) and (b) of AC21 or until a Form I-140 petition has been approved. Prior to adjudicating such Form I-765, DHS must also make a determination that the H-4 dependent spouse remains eligible for H-4 status. As such, DHS amends the current rule to clarify that the 90-day clock specified in 8 CFR 274a.13(d) authorizing DHS to issue interim employment authorization if the Form I-765 is not adjudicated within 90 days is not triggered until necessary eligibility determinations have been made on the underlying nonimmigrant status for the H-1B nonimmigrant and the H-4 dependent spouse. If the H-4 dependent spouse's employment authorization is based on a favorable eligibility determination relating to the nonimmigrant status of either the H-1B nonimmigrant or the H-4 dependent spouse, the 90-day clock is triggered when that eligibility determination is made. Alternatively, if employment authorization is based on a favorable eligibility determination relating to the nonimmigrant status of both the H-1B nonimmigrant and the H-4 dependent spouse, the 90-day clock is not triggered until an eligibility determination is made on both. Accordingly, DHS is making conforming amendments to 8 CFR 214.2(h)(9)(iv) and 8 CFR 274a.13(d) in this final rule and the instructions to Form I-765. These amendments permit H-4 dependent spouses under this rule to concurrently file their Form I-765 with related benefit requests, specified in the form instructions to include their Application to Extend/Change Nonimmigrant Status (Form I-539), and if applicable, their spouse's Form I-129 petition. As a result of the amendments, the 90-day clock described in 8 CFR

274a.13(d) would also not start until after a determination has been made on the underlying H-1B status, H-4 status, or both.

6. Premium Processing

Three commenters requested premium processing service for H-4 dependent spouses seeking to file Applications for Employment Authorization (Forms I-765). These commenters highlighted the benefit that the extra premium processing fees could bring to USCIS. DHS appreciates these comments, but has decided not to extend premium processing to Form I-765 applications filed by H-4 dependent spouses in conjunction with this rulemaking. DHS currently offers premium processing service for certain employment-based petitions and applications, including H-1B, L, and E nonimmigrant worker petitions and certain EB-1, EB-2 and EB-3 immigrant visa petitions. Extending premium processing to Form I-765 applications, however, presents operational concerns and would be inconsistent with procedural realities for USCIS. The agency, for example, would be unable to comply with premium processing requirements on any Form I-765 application that is contingent on the adjudication of a concurrently filed Application to Extend/Change Nonimmigrant Status (Form I-539). Due to these and other operational concerns, DHS will not extend premium processing service to Form I-765 applications, including applications filed by H-4 dependent spouses under this rule at this time.

7. Automatic Extensions of Work Authorization

One commenter requested an automatic extension of work authorization for 240 days after an H-4 dependent spouse's EAD expires. DHS, however, is concerned with improperly granting employment authorization to an H-4 dependent spouse who is

ineligible for it. As the validity of the H-4 dependent spouse's eligibility for employment authorization will be tied to his or her authorized period of admission, automatic extensions of employment authorization without review of the underlying extension of stay applications for the H-1B nonimmigrant and H-4 dependent spouse could result in employment authorization being extended to individuals who will eventually be determined ineligible for this benefit. DHS thus declines to adopt this recommendation.

To avoid any potential gaps in employment authorization when seeking an extension of employment authorization, DHS recommends that the H-4 dependent spouse timely file all necessary applications. DHS's policy to permit concurrent filing of Forms I-539, I-129, and I-765 should also help H-4 dependent spouses avoid gaps in employment authorization, as these forms may be filed concurrently up to six months in advance of date of need.

8. Filing Fees

Several commenters submitted remarks on the filing fees without expressing support for or opposition to the fees. Additionally, some commenters asserted that USCIS would benefit from an increased volume of fees, and another commenter requested that the U.S. Government help pay for immigration-related application fees.

DHS is bound by statutes and regulations governing its collection of fees in connection with immigration benefit requests. See INA section 286(m)-(p), 8 U.S.C. 1356(m)-(p); 8 CFR 103.7. DHS generally must set application fees at a level that enables it to recover the full costs of providing services, including the costs of similar services provided without charge to certain other applicants. But DHS may offer assistance with respect to immigration-related application fees in the form of fee waivers.

Discretionary fee waivers are provided on a case-by-case basis when the party requesting the benefit is unable to pay the prescribed fee and the waiver request is consistent with the underlying benefit being requested. See 8 CFR 103.7(c)(1).

For the reasons that follow, DHS believes that it would be unlikely that H-4 dependent spouses would be unable to pay the prescribed fee for the Application for Employment Authorization (Form I-765). By definition, H-4 dependent spouses are married to H-1B nonimmigrants who are employed and earning a salary of at least the prevailing wage in their occupation. H-4 dependent spouses will thus generally be unable to establish that they cannot pay the fee prescribed for the Form I-765 application. For these reasons, DHS declines to establish a general fee waiver for the Form I-765 filed by eligible H-4 dependent spouses under this rule. See 8 CFR 103.7(d). USCIS will consider fee waiver requests on a case-by-case basis. See 8 CFR 103.7(c)(3)(viii). As noted above, given the nature of the H-1B nonimmigrant's employment, a showing of inability to pay as required by the regulation would be the exception rather than the rule.

9. Possible Restrictions on EADs Issued to H-4 Dependent Spouses

A few commenters recommended imposing certain restrictions on employment authorization issued to H-4 dependent spouses, such as: creating a cap on the number of EADs that could be granted to H-4 dependent spouses; prohibiting the H-1B nonimmigrant and H-4 dependent spouse from having the same employer or working in the same occupation; prohibiting employers from replacing an American veteran with an H-1B nonimmigrant; restricting H-4 work authorization to certain employers; creating a National Registry of Jobs that H-4 dependent spouses would be allowed to apply for; forcing individuals to surrender their foreign passports when they obtain U.S. citizenship

as a way of proving allegiance; allocating EADs in a proportionate manner based on nationality; and requiring H-4 dependent spouses to pay for training programs for U.S. citizens.

DHS declines to incorporate the suggested restrictions into this final rule. A primary purpose of this rule is to assist U.S. employers in retaining certain highly skilled H-1B nonimmigrants. Allowing certain H-4 dependent spouses to apply for employment authorization removes a disincentive that currently undermines this goal. Imposing the suggested restrictions, such as numerical caps or per-country quotas, would limit the effectiveness and purpose of this rule. Additionally, DHS believes that EADs provide inherent protections that mitigate the risk of abuse and exploitation. Because these EADs may be used to work for any employer, workers are free to find new employment at any point during the EAD's validity, including if they are dissatisfied with their pay or working conditions. Finally, DHS reiterates that the individuals being provided employment authorization under this rule belong to a class of aliens that is already likely to enter the U.S. labor market with EADs. In sum, DHS does not believe that extending eligibility for employment authorization to H-4 dependent spouses will lead to the broad exploitation of EADs.

10. Circular EADs

One commenter noted that this rule could lead to "circular EADs," whereby spouses who are both eligible for H-1B status may switch status (H-1B to H-4 and vice versa) so that one spouse may maintain an EAD at all times. This commenter conveyed the concern that H-1B nonimmigrants might initiate the primary steps towards permanent residence, then switch back and forth between H-1B and H-4 statuses to stay in the

United States forever.

DHS acknowledges that H-1B nonimmigrants will be able to change status, as permitted by law. DHS believes it is extremely unlikely, however, that an H-1B nonimmigrant will seek to remain in the United States forever by switching between nonimmigrant statuses as a result of this rule. The rule is intended to benefit those H-1B nonimmigrants who are already well on the path to lawful permanent residence and, therefore, seek to remain in the United States permanently on this basis. Although the waiting period for an immigrant visa may be lengthy, there is an end date as indicated on the Department of State's Visa Bulletin. So any incentive to switch between statuses indefinitely would be weighed by the nonimmigrant against the benefits of obtaining LPR status, including the ability to work in the United States without being tied to a specific employer and the ability of the H-4 dependent spouse to work without needing to periodically apply and pay for an EAD. Moreover, with lawful permanent residency, an individual is eligible to apply for U.S. citizenship, generally after five years, and to petition for relatives to immigrate to the United States, benefits that are not available to persons with H-1B or H-4 status.

11. Form I-765 Worksheets

One commenter expressed concern that H-4 dependent spouses would need to demonstrate economic need for employment because of the reference in the Paperwork Reduction Act section of the proposed rule to the Form I-765 Worksheet (Form I-765WS). DHS is clarifying that H-4 dependent spouses are not required to establish economic need for employment authorization. H-4 dependent spouses are not required to submit Form I-765WS with their Application for Employment Authorization (Form I-

765). DHS has corrected this error in the form instructions to the Application for Employment Authorization (Form I-765).

12. Other Related Issues

Several commenters sought guidance on issues tangential to the issuance of employment authorization to H-4 dependent spouses. For example, one commenter asked for clarification on the type of status that an H-4 dependent spouse will receive when readmitted into the United States after traveling abroad. Another commenter wanted to know if an H-4 dependent spouse could work from home in the United States for his or her native country employer on the native country salary. Because this rulemaking is limited to extending eligibility for employment authorization to H-4 dependent spouses and does not make changes to admission requirements or conditions of employment authorization, DHS considers these questions outside the scope of this rulemaking. Please consult the USCIS Web site at www.uscis.gov or contact USCIS Customer Service at 1-800-375-5283 for current guidance.

Finally, several commenters requested clarification about EAD processing and adjudication times. USCIS posts current processing times on its Web site and encourages interested stakeholders to consult www.uscis.gov if they have questions about adjudication times.[29]

F. Fraud and Public Safety Concerns

Over 100 commenters raised concerns related to fraud and public safety, including issues related to resume fraud, marriage fraud, participation by individuals with

[29] For example, as of January 26, 2015, the processing time at the California Service Center (CSC) for the Application for Employment Authorization, Form I-765, ranged from 3 weeks to 3 months depending on the basis for the Form I-765. See https://dashboard.uscis.gov/index.cfm?formtype=12&office=2&charttype=1.

criminal records, unauthorized employment, and employer abuse in the H-1B program. Strict consequences are already in place for immigration-related fraud and criminal activities, including inadmissibility to the United States, mandatory detention, ineligibility for naturalization, and removability. See, e.g., INA sections 101(f), 212(a)(2) & (a)(6), 236(c), 237(a)(1)(G) & (a)(2), 318; 8 U.S.C. 1101(f), 1182(a)(2) & (a)(6), 1226(c), 1227(a)(1)(G) & (a)(2), 1429. Nevertheless, the Department welcomes suggestions to further prevent fraud and protect public safety in the implementation of its programs. The Department carefully considered these comments and addresses them below.

1. Falsifying Credentials and Marriage Fraud

Over 100 commenters anticipated that certain H-4 dependent spouses would falsify their resumes or qualifications or marry for immigration purposes. With respect to potential resume fraud, DHS notes that eligibility for employment authorization for H-4 dependent spouses will not depend in any way on their professional or educational qualifications or their resumes. It will be up to potential employers to verify the qualifications of H-4 dependent spouses they may be seeking to hire. This concern is therefore outside the scope of this rulemaking.

With respect to marriage fraud, DHS is revising 8 CFR 214.2(h)(9)(iv) to clarify that establishing eligibility for employment authorization under this rule requires evidence of the spousal relationship between the H-4 dependent spouse and the H-1B nonimmigrant. DHS is also making conforming revisions to the form instructions to Form I-765 to require that H-4 dependent spouses submit proof of marriage to the H-1B nonimmigrant with the form. USCIS officers are specially trained to recognize indicia of

fraud, including marriage fraud and falsified documents, and review other immigration petitions for these circumstances as well. If such fraud is suspected, the relevant USCIS officer may refer the case to the local fraud unit for further inquiry. USCIS may also submit leads related to significant fraud to U.S. Immigration and Customs Enforcement for criminal investigation. DHS believes that current fraud-detection training, mechanisms for detecting and investigating fraud, and fraud-related penalties are sufficient for deterring and detecting marriage fraud in this context.

2. Prohibition Related to Felony Charges and Convictions

Two commenters requested a prohibition against participation by anyone charged with, awaiting trial for, or convicted of a felony. DHS appreciates the commenters' concerns over public safety and notes that the eligibility for employment authorization extended by this rule to certain H-4 dependent spouses is discretionary. DHS officers will consider any adverse information—including criminal convictions, charges, and other criminal matters—on a case-by-case basis.

3. Unauthorized Employment

A few commenters thought that this rule would help curb any unauthorized employment in which H-4 dependent spouses are currently engaging. Additionally, several commenters raised concerns that this rule could encourage illegal immigration and increase the number of undocumented workers in the United States. DHS disagrees that this rule may encourage illegal immigration. DHS believes that this rule will provide options to certain H-4 dependent spouses allowing them to engage in authorized employment. Individuals eligible for employment authorization under this rule must have been granted H-4 status and must remain in such lawful status before they can be

granted employment authorization pursuant to this rule. An H-4 dependent spouse who engaged in unauthorized employment would not have been maintaining lawful H-4 status and therefore would be ineligible for this new benefit. Therefore, the Department does not believe that this rule will incentivize unauthorized employment or any other illegal activities.

4. Employer Abuse of H-1B Nonimmigrants and H-4 Dependent Spouses

A number of commenters raised concerns over potential employer abuse of H-1B nonimmigrants and H-4 dependent spouses. These concerns included failure to pay prevailing wages and demanding long hours without adequate compensation. DHS appreciates these concerns and maintains that employers must not intimidate, threaten, restrain, coerce, blacklist, discharge or otherwise discriminate or take unlawful action against any employee. Violators face severe penalties. See INA 212(n)(2)(C)(iv), 8 U.S.C. 1182(n)(2)(C)(iv). DHS takes seriously any potential abuse of H-1B nonimmigrants and H-4 dependent spouses and encourages any workers who feel that their rights have been violated by their employers to file a complaint with DOL or another appropriate entity, such as the Equal Employment Opportunity Commission.[30] Any concerns raised by commenters regarding H-1B nonimmigrants and worker protections in the H-1B program, however, are outside the scope of this rulemaking.

G. General Comments

Over 300 commenters submitted feedback about general immigration issues. A few commenters expressed support for or opposition to immigration. Comments ranged

[30] An individual can submit a Nonimmigrant Worker Information Form, Form WH-4, with DOL. This form was authorized by the American Competitiveness and Workforce Improvement Act (ACWIA) of 1998. See INA sections 212(n)(2)(G), 8 U.S.C. 1182(n)(2)(G). It is available on-line at http://www.dol.gov/whd/forms/wh-4.pdf.

from requesting DHS to discontinue all types of immigration to underscoring the need for comprehensive reform of the immigration laws to general support of immigration. DHS is charged with administering the immigration laws enacted by Congress, and only Congress can change those laws. The comments described above are therefore outside the scope of this rulemaking. DHS, however, is committed to comprehensive immigration reform that creates a workable system that strengthens border security, improves the U.S. economy, unites families, and preserves national security and public safety.

Additionally, fewer than a dozen commenters objected to the ability of non-U.S. citizens to submit comments on the proposed rule. As noted in that rule, DHS welcomed comments from all interested parties and did not place any restrictions based on citizenship or nationality.

H. Modifications to the H-1B Program and Immigrant Visa Processing

1. H-1B Visa Program

i. Circumventing the H-1B cap

A few commenters suggested that employers may try to exploit this regulation by using it to avoid the H-1B numerical cap and hiring more foreign specialty occupation workers than permitted by the statute. As a preliminary matter, DHS cannot agree with the premise that hiring an individual with general (rather than employer-specific) employment authorization constitutes circumvention of the cap on H-1B nonimmigrants. This is particularly so when such employment authorization is contingent on being married to an individual who was selected in the H-1B program and is subject to the cap. Moreover, commenters provided no evidence or data that would support the contention

that this rule will be used by employers and H-4 dependent spouses to circumvent the cap. For example, DHS does not have, and commenters did not provide, data on the skillsets or educational levels of H-4 dependent spouses to indicate that they will generally qualify for jobs that are typically held by highly skilled H-1B nonimmigrants. Finally, it is unlikely that highly skilled individuals who could independently qualify under the H-1B program will instead opt to enter the United States as H-4 dependent spouses and subject themselves to lengthy periods of unemployment with the intent to circumvent the H-1B cap. As noted previously, this rule provides eligibility for employment authorization only to those H-4 dependent spouses who are married to certain H-1B nonimmigrants who have taken substantial steps, generally taking many years, towards obtaining permanent residence. Such an individual may eventually obtain a job for which an H-1B nonimmigrant could possibly have qualified, but the Department does not consider this a circumvention of the H-1B cap.

ii. Elimination or Modification of the H-1B program

More than a dozen commenters requested that the H-1B program be terminated. An approximately equal number of commenters requested that the H-1B visa cap be eliminated or modified in various ways. Several commenters requested that DHS increase the number of visas available, other commenters asked DHS to eliminate the H-1B visa cap, while others recommended decreasing the number of visas available.

DHS cannot address the commenters' suggestions in this rulemaking. The H-1B program is required by statute, which also sets the current cap on H-1B visa numbers. Congressional action is thus required to address the commenters' concerns, as the Secretary does not have the authority to eliminate the program or change the visa cap

without congressional action. The suggested changes are thus outside the scope of this rulemaking.

Additionally, one commenter requested that DHS allow for more flexible filing times for H-1B visas. This request would require DHS to amend its H-1B regulations, which currently provide that an H-1B petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services. See 8 CFR 214.2(h)(9)(i)(B). This rulemaking, however, does not make substantive changes to the H-1B program or its regulations. The request is thus outside the scope of this rulemaking.

iii. More flexible change of status from H-1B to H-4

One commenter requested a modification of the H-1B program to allow a family member who has been in the United States for more than five years to choose between H-1B and H-4 status. To some extent, H-1B nonimmigrants currently have this option. An H-4 dependent spouse may seek classification as an H-1B nonimmigrant if an employer files a petition on his or her behalf. As long as one of the spouses maintains H-1B status, the other is eligible for H-4 status. However, the underlying H-1B status is connected to the need of a U.S. employer. To the extent that the commenter is suggesting a change to this requirement such that both spouses could be present in the United States in H-4 status, such a change would require congressional action and, therefore, is beyond the scope of this rulemaking.

iv. Applying for H-1B status and cap exemption

One commenter recommended that H-4 dependent spouses be allowed to apply for H-1B visas and be exempt from the cap. This final rule does not prohibit H-4

dependent spouses from seeking and obtaining H-1B status. Once an H-4 spouse seeks to change to H-1B status, he or she is subject to annual limitations on H-1B nonimmigrants. Only Congress can exempt groups of individuals from the statutory H-1B numerical limitations. This request is therefore beyond the scope of this rulemaking.

v. Dependents of G principal nonimmigrants

One commenter requested that DHS change its G visa regulations to allow dependents of principal G visa holders to more freely obtain a different visa classification (such as H-1B classification). Such a change is outside the scope of this rulemaking.

2. Immigrant Visa Processing and Adjustment of Status

Over 30 commenters requested the elimination of the worldwide quotas for immigrant visas.[31] One commenter requested allowing the submission and receipt of applications for adjustment of status when visas are not available, and another requested that the rule include provisions to expedite the permanent residence process for the EB-2 and EB-3 preference categories. Several commenters requested that USCIS grant EADs to LPR applicants while they wait for their immigrant visas. Another commenter requested that USCIS grant one skilled worker visa per eligible family unit (rather than per each individual family member), for the purpose of reducing backlogs. One commenter requested that USCIS establish a procedure by which those in the process of seeking LPR status could "pre-register" their intention to apply to adjust status.

DHS appreciates feedback from the public regarding possible changes to the immigration laws and the system for obtaining LPR status. DHS, however, will not

[31] Section 201(d) of the INA, 8 U.S.C. 1151(d), prescribes the worldwide level of employment-based immigrants. Section 203(b) of the INA, 8 U.S.C. 1153(b), prescribes the preference allocation for employment-based immigrants. Section 202 of the INA, 8 U.S.C. 1152, prescribes per country levels for family-sponsored and employment-based immigrants.

respond to these comments as they do not address changes to the regulations made by this rulemaking and are therefore outside the scope of this rulemaking.

I. H-1B Nonimmigrant's Maintenance of Status

Several commenters asked for more information about the effect that an H-1B nonimmigrant's loss of employment or change of employer would have on the H-4 dependent spouse's employment authorization. As stated in the proposed rule, the H-4 dependent's status is tied to the H-1B nonimmigrant's status. Thus, if the H-1B nonimmigrant fails to maintain status, the H-4 dependent spouse also fails to maintain status and would therefore no longer be eligible for employment authorization. Under current regulations, DHS may seek to revoke employment authorization if, prior to the expiration date of such authorization, any condition upon which it was granted has not been met or no longer exists. See 8 CFR 274a.14(b).

J. Environmental Issues

In the proposed rule, DHS requested comments relating to the environmental effects that might arise from the proposed rule. Nine commenters submitted related feedback, noting general environmental issues that come with an increased population. DHS appreciates these comments but notes that the vast majority of the population immediately affected by the rule is already in the United States and has been here for a number of years while waiting for their immigrant visas. The H-4 dependent spouses affected by this rule generally will eventually be able to seek employment even without this rule, as immigrant visa numbers become available and H-1B nonimmigrant families become eligible to file for adjustment of status. As noted previously, this rule simply accelerates the timeframe in which these individuals are able to enter the labor market.

K. Reporting

A few commenters requested more information about how DHS will monitor the outcome of the final rule, such as by tracking EAD adjudications for H-4 dependent spouses and publishing annual reports. DHS maintains statistics on all immigration benefit programs and will monitor H-4 EAD adjudications and include relevant information in its annual reports in accordance with current reporting protocols.

L. Implementation

Several hundred commenters requested that the rule be implemented as soon as possible. One commenter requested that a sunset provision be included in the rule. At the end of the sunset period, the commenter recommended that DHS evaluate the program, and, if the results are positive, expand it. DHS believes that a general sunset provision would not be practicable or fair as it would require DHS to provide different periods of employment authorization to H-4 dependent spouses depending on when they become eligible to apply. Further, DHS considers a sunset provision to be at odds with the rule's purpose, which is to retain highly skilled workers who often have a multi-year wait before being eligible to apply for permanent residence.

With respect to implementation of this rule, DHS must consider the 30-day effective date requirement at 5 U.S.C. 553(d) as well as USCIS's implementation requirements. Based on these factors, DHS has decided that this rule will be effective 90 days from the date of publication, [INSERT DATE 90 DAYS FROM THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

IV. Statutory and Regulatory Requirements

A. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of $100,000,000 in 1995 adjusted for inflation to 2014 levels by the Consumer Price Index for All Urban Consumers is $155,000,000.

This rule does not exceed the $100 million expenditure in any one year when adjusted for inflation ($155,000,000 in 2014 dollars), and this rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply, and DHS has not prepared a statement under the Act.

B. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States companies to compete with foreign-based companies in domestic and export markets.

C. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

DHS is amending its regulations to extend eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who either: (1) are principal beneficiaries of an approved Immigrant Petition for Alien Worker (Form I-140); or (2) have been granted H-1B status under sections 106(a) and (b) of AC21.

1. Summary

Currently, USCIS does not issue work authorization to H-4 dependent spouses. To obtain work authorization, the H-4 dependent spouse generally must have a pending Application to Register Permanent Resident Status or Adjust Status or have changed status to another nonimmigrant classification that permits employment. AC21 provides for an authorized period of admission and employment authorization beyond the typical six-year limit for H-1B nonimmigrants who are seeking permanent residence. This final rule will extend eligibility for employment authorization to H-4 dependent spouses where: the H-1B nonimmigrant is the principal beneficiary of an approved Form I-140

petition; or the H-1B nonimmigrant has been granted status pursuant to sections 106(a) and (b) of AC21.

DHS has updated its estimate of the population of H-4 dependent spouses who will be impacted by the rule. DHS estimates the current population of H-4 dependent spouses who will be eligible for employment authorization could initially be as many as 179,600 after taking into account the backlog of H-1B nonimmigrants who have approved I-140 petitions, or who are likely to have such petitions approved, but who are unable to adjust status because of the lack of immigrant visas. For ease of analysis, DHS has assumed that those H-4 dependent spouses in the backlog population will file for employment authorization in the first year of implementation. DHS estimates the flow of new H-4 dependent spouses who could be eligible to apply for initial employment authorization in subsequent years may be as many as 55,000 annually. Even with the increased estimate of H-4 dependent spouses who could be eligible to apply for employment authorization, DHS still affirms in the initial year (the year with the largest number of eligible applicants) that the rule will result in much less than a one percent change in the overall U.S. labor force.

DHS is unable to determine and does not include in this analysis the filing volume of H-4 dependent spouses who will need to renew their employment authorization documents under this rule as they continue to wait for immigrant visas. Eligible H-4 dependent spouses who wish to apply for employment authorization must pay the $380 filing fee to USCIS, provide two passport-style photos, and incur the estimated 3-hour-and-25-minute opportunity cost of time burden associated with filing an Application for Employment Authorization (Form I-765). After monetizing the expected opportunity

cost and combining it with the filing fee[32] and the estimated cost associated with providing two passport-style photos, an eligible H-4 dependent spouse applying for employment authorization will face an anticipated total cost of $436.18.

The maximum anticipated annual cost to eligible H-4 dependent spouses applying for initial employment authorization in Year 1 is estimated at $78,337,928 (non-discounted), and $23,989,900 (non-discounted) in subsequent years. The 10-year discounted cost of this rule to eligible H-4 dependent spouses applying for employment authorization is $257,403,789 at 3 percent and $219,287,568 at 7 percent. Table 2 shows the maximum anticipated estimated costs over a 10-year period of analysis for the estimate of 179,600 applicants for initial employment authorization, and the 55,000 applicants expected to file for initial employment authorization annually in subsequent years.

[32] The filing fee is assumed to be a reasonable approximation for USCIS's costs of processing the application. See INA section 286(m), 8 U.S.C. 1356(m).

Table 2. Total Costs and Benefits of Initial Employment Authorization for Certain H-4 Dependent Spouses 10-Yr Present Value Estimates at 3% and 7% ($Millions)			
	Year 1 Estimate (179,600 filers)	Sum of Years 2 - 10 (55,000 filers annually)	**Total over 10-year Period of Analysis***
3% Discount Rate			
Total Costs Incurred by Filers @ 3%	$76.1	$181.3	$257.4
7% Discount Rate			
Total Costs Incurred by Filers @ 7%	$73.2	$146.1	$219.3
Qualitative Benefits	This rule is intended to remove a disincentive to pursuing LPR status due to the potentially long wait for employment-based immigrant visas for many H-1B nonimmigrants and their family members. This rule will encourage H-1B nonimmigrants who have already taken steps to become LPRs to not abandon their efforts because their H-4 dependent spouses are unable to work. By encouraging H-1B nonimmigrants to continue in their pursuit of becoming LPRs, this rule would minimize disruptions to petitioning U.S. employers. Additionally eligible H-4 dependent spouses who participate in the labor market will benefit financially. DHS also anticipates that the socioeconomic benefits associated with permitting H-4 spouses to participate in the labor market will assist H-1B families in integrating into the U.S. community and economy.		

* Note: Totals may not sum due to rounding.

2. Purpose of the Rule

According to the most recently released reports prepared by the DHS Office of Immigration Statistics, in Fiscal Year (FY) 2013 a total of 990,553 persons became LPRs of the United States.[33] Most new LPRs (54 percent) were already living in the United

[33] See DHS Office of Immigration Statistics, Annual Flow Report, U.S. Lawful Permanent Residents: 2013 (May 2014), available at http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2013.pdf.

States and obtained their LPR status by applying for adjustment of status within the United States.

Employment-based immigrant visas accounted for approximately 16 percent of the total number of persons obtaining LPR status, and 30 percent of total LPRs who adjusted status in FY 2013. In FY 2013, there were a total of 161,110 LPRs admitted under employment-based preference visa categories. Of these 161,110 individuals, "priority workers" (first preference or EB-1) accounted for 24 percent; "professionals with advanced degrees" (second preference or EB-2) accounted for 39 percent; and "skilled workers, professionals, and other workers" (third preference or EB-3) accounted for 27 percent.[34]

Based on historical trends, H-1B nonimmigrants seeking to adjust status to lawful permanent residence will most likely adjust under the EB-2 and EB-3 preference categories, with a much smaller amount qualifying under the EB-1 preference category. As of January 2015, the employment-based preference categories are "current" and have visas available, except for Chinese and Indian nationals seeking admission under the second preference category and individuals of all nationalities seeking admission under the third preference category.[35] Thus, the employment-based categories under which H-1B nonimmigrants typically qualify to pursue LPR status are the very categories that are currently oversubscribed.[36]

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[34] Id.

[35] See Department of State Bureau of Consular Affairs, December 2014 Visa Bulletin (Nov. 7, 2014), available at http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_January2015.pdf.

[36] See Wadhwa, Vivek, et al., Intellectual Property, the Immigration Backlog, and a Reverse Brain-Drain – America's New Immigrant Entrepreneurs, Part III, Center for Globalization, Governance & Competitiveness (Aug. 2007), available at http://www.cggc.duke.edu/documents/IntellectualProperty_theImmigrationBacklog_andaReverseBrainDrai

In many cases, the timeframe associated with seeking lawful permanent residence is lengthy, extending well beyond the six-year period of stay allotted by the H-1B nonimmigrant visa classification. As a result, retention of highly educated and highly skilled nonimmigrant workers can become challenging for U.S. employers. Retaining highly skilled persons who intend to acquire LPR status is important when considering the contributions they make to the U.S. economy, including advances in research and development and other entrepreneurial endeavors, which are highly correlated with overall economic growth and job creation. By some estimates, immigration was responsible for one quarter of the explosive growth in patenting in past decades, and these innovations have the potential to contribute to increasing U.S. gross domestic product (GDP).[37] In addition, over 25 percent of tech companies founded in the United States from 1995 to 2005 had a key leader who was foreign-born.[38] Likewise, the Kauffman Foundation reported that immigrants were more than twice as likely to start a business in the United States as the native-born in 2012, and a report by the Partnership for a New American Economy found that more than 40 percent of Fortune 500

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n_003.pdf. Note: The report examined the 2003 cohort of employment-based immigrants and showed that 36.8 percent of H-1B nonimmigrants that adjust status do so through the EB-3 category and another 28 percent do so through the EB-2 category, while only 4.62 percent adjust through the EB-1 category.

[37] See generally Jennifer Hunt & Marjolaine Gauthier-Loiselle, How Much Does Immigration Boost Innovation?, Nat'l Bureau of Econ. Research, Sept. 2008, available at http://www.nber.org/papers/w14312.

[38] See Wadhwa, Vivek, et al., "America's New Immigrant Entrepreneurs," Report by the Duke School of Engineering and the UC Berkeley School of Information (Jan. 4, 2007) available at http://people.ischool.berkeley.edu/~anno/Papers/Americas_new_immigrant_entrepreneurs_I.pdf; see also Wadhwa, Vivek, et al., Intellectual Property, the Immigration Backlog, and a Reverse Brain-Drain – America's New Immigrant Entrepreneurs, Part III, Center for Globalization, Governance & Competitiveness (Aug. 2007), available at http://www.cggc.duke.edu/documents/IntellectualProperty_theImmigrationBacklog_andaReverseBrainDrain_003.pdf; cf. Preston, Julia, "Work Force Fueled by Highly Skilled Immigrants," N.Y. Times, Apr. 15, 2010, available at http://www.nytimes.com/2010/04/16/us/16skilled.html?_r=1.

companies in 2010 were founded by immigrants or their children.[39] Additionally, in March 2013, the House Committee on the Judiciary held a hearing on Enhancing American Competitiveness Through Skilled Immigration, providing some members of the business community with an opportunity to provide their perspectives on immigration. The witnesses represented various industries, but underscored a unified theme: skilled immigrants are contributing significantly to U.S. economic competitiveness and it is in our national interest to retain these talented individuals.[40]

As noted above, this rule is intended to reduce the disincentives to pursue lawful permanent residence due to the potentially long wait for immigrant visas for many H-1B nonimmigrants and their families. Also, this rule will encourage those H-1B nonimmigrants who have already started the process for permanent residence not to abandon their efforts because their H-4 dependent spouses are unable to work.

3. Volume Estimate

Due to current data limitations, DHS is unable to precisely track the population of H-4 dependent spouses tied to H-1B nonimmigrants who have an approved Immigrant Petition for Alien Worker (Form I-140) or who have been granted H-1B status under the provisions of AC21. DHS databases are currently "form-centric" rather than "person-centric." As USCIS transforms its systems to a more fully electronic process, there will be a shift from application- and form-based databases to one database that tracks

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[39] See Fairlie, Robert,"Kauffman Index of Entrepreneurial Activity: 1996–2012," The Ewing Marion Kauffman Foundation. Apr. 2013, available at http://www.kauffman.org/what-we-do/research/2013/04/kauffman-index-of-entrepreneurial-activity-19962012; Partnership for a New American Economy, 2011, The "New American" Fortune 500, available athttp://www.nyc.gov/html/om/pdf/2011/partnership_for_a_new_american_economy_fortune_500.pdf.

[40] See Enhancing American Competitiveness through Skilled Immigration: Hearing before the H. Judiciary Subcomm. On Immigration, 113th Cong. 15 (2013), available at http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg79724/pdf/CHRG-113hhrg79724.pdf.

information by the applicant or petitioner and which will improve DHS's ability to track the number of potential H-4 employment authorization applicants.

In the proposed rule, DHS estimated that as many as 100,600 H-4 dependent spouses would be eligible to apply for employment authorization in the first year, and as many as 35,900 H-4 dependent spouses would be eligible to apply annually in subsequent years. The estimates provided in the proposed rule have been updated in this final rule. In an effort to provide a reasonable approximation of the number of H-4 dependent spouses who will be eligible for employment authorization under this final rule, DHS has compared historical data on persons obtaining LPR status against employment-based immigrant demand estimates. Based on current visa availability, DHS believes that dependent spouses of H-1B nonimmigrants who are seeking employment-based visas under the second or third preference categories will be the group most impacted by the provisions of this rule, because certain chargeability areas in these preference categories are currently oversubscribed. In addition, in line with the goals of this rule and AC21, and based on immigration statistics, we assume that the large majority of H-4 dependent spouses who will be eligible for this provision are residing in the United States and will seek to acquire LPR status by applying to adjust status with USCIS rather than by departing for an indeterminate period to pursue consular processing of an immigrant visa application overseas. This assumption is supported by immigration statistics on those obtaining LPR status. In FY 2013, there were a total of 161,110 employment-based immigrant visa admissions, of which 140,009 (or 86.9 percent) obtained LPR status

through adjustment of status in the United States.[41] This analysis limits the focus and presentation of impacts based only on the employment-based preference immigrant population seeking to adjust status to that of a lawful permanent resident, rather than the employment-based preference immigrant population seeking to obtain an immigrant visa through consular processing.

DHS will extend eligibility to apply for employment authorization to the H-4 dependent spouses of H-1B nonimmigrants who are principal beneficiaries of approved Form I-140 petitions or who have been granted H-1B status pursuant to sections 106(a) and (b) of AC21. Therefore, DHS assumes that the volume of H-4 dependent spouses newly eligible for employment authorization is comprised of two estimates: 1) an immediate, first year estimate due to the current backlog of Form I-140 petitions; and 2) an annual estimate based on future demand to immigrate under employment-based preference categories. Extending eligibility for employment authorization to H-4 dependent spouses is ultimately tied to the actions taken by the H-1B nonimmigrant; therefore, the overall volume estimate is based on the population of H-1B nonimmigrants who have taken steps to acquire LPR status under employment-based preference categories.

DHS has estimated the number of persons waiting for LPR status in the first through third employment-based preference categories as of June 30, 2014. In this analysis, the estimated number of persons waiting for an immigrant visa is referred to as the "backlog" and includes those with an approved Form I-140 petition as of June 30,

[41] See DHS Office of Immigration Statistics, 2013 Yearbook of Immigration Statistics, Table 6, available at http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents (compare statistics listed under "total employment-based preferences" and "adjustment of status employment-based preferences").

2014 and those with a filed Form I-140 petition that is pending as of June 30 but is likely to be approved in the future.[42] Currently, the first preference employment-based (EB-1) visa category is not oversubscribed. Therefore, DHS believes that the majority of H-4 dependent spouses applying for employment authorization under this rule will be those whose H-1B principals are seeking to adjust status under the second or third preference category. However, as there are persons with pending Form I-140 petitions in the first preference category that are approved or likely to be approved based on historical approval rates, and because the provisions of AC21 apply to these individuals, DHS has included them in this analysis.[43] Additionally, DHS has examined detailed characteristics about the LPR population for FY 2009 – FY 2013 to further refine this estimate.[44] We have laid out each of our assumptions and methodological steps for both the backlog and annual estimates of H-4 dependent spouses who will be eligible to apply for employment authorization. Again, the estimates are based on the actions and characteristics of the H-1B nonimmigrant (e.g., whether the H-1B nonimmigrant reports being married) because the H-4 dependent spouse's eligibility to apply for employment authorization is tied to

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[42] Source for backlog estimation: USCIS Office of Policy & Strategy analysis of data obtained from the USCIS Office of Performance and Quality. Analysis based on CLAIMS3 data captured in approved Immigrant Petition for Alien Worker (Form I-140). Of the Form I-140 petitions that were approved or pending as of June 30, 2014, USCIS allocated those that were pending that were "likely to be approved" based on USCIS approval rates in order to more accurately estimate the cases in the backlog.

[43] Despite the fact that a beneficiary is in a preference category where a visa is immediately available, and the beneficiary is able to apply to adjust status to an LPR immediately upon the filing of the I-140 petition, DHS is including estimates of first-preference LPRs that have an approved Form I-140 or are waiting for Form I-140 approval as of June 30, 2014 for which we are unable to determine that an adjustment of status application has been concurrently filed. As mentioned previously, principal beneficiaries of Form I-140 petitions and their dependents who are eligible to file for adjustment of status also are eligible for employment authorization.

[44] Source: USCIS Office of Policy & Strategy analysis of data obtained from DHS Office of Immigration Statistics. Analysis based on CLAIMS3 data captured in Application to Register Permanent Residence or Adjust Status (Form I-485) records approved in the FY 2009-13 period.

the steps taken on behalf of the H-1B nonimmigrant to acquire LPR status under an employment-based preference category.

a. Backlog Estimate

The estimate of the number of individuals who are the principal beneficiaries of either an approved Form I-140 petition or a Form I-140 petition that is likely to be approved and who are waiting for an immigrant visa in the EB-1, EB-2, and EB-3 categories is shown in Table 3. Importantly, the number of principal workers shown in Table 3 is not limited only to those individuals who are currently in H-1B status. The estimates in Table 3 include aliens who are currently in H-1B and other nonimmigrant statuses, as well as those seeking to immigrate under employment-based preference categories who are currently abroad.

Table 3. DHS Estimate of Backlog (Principals only) as of June 30, 2014

Preference Category	Principal Workers
EB-1	9,000
EB-2	146,500
EB-3	78,500

DHS is unable to precisely determine the number of H-1B nonimmigrants in the backlog who will be impacted by this rule. Instead, DHS examined detailed statistics of those obtaining LPR status from FY 2009 – 2013, and used this information as a proxy to refine the estimate of principal workers in the backlog that DHS expects to be married H-1B nonimmigrants seeking to adjust status. That estimate provides the basis for approximating the number of H-4 dependent spouses who will be impacted by this rule.[45]

[45] Id.

Table 4 presents the assumptions and steps taken to determine the upper-bound estimate of H-4 dependent spouses who are represented in the backlog and will likely now be eligible to apply for work authorization.

Table 4: Steps Taken to Arrive at the Upper-bound Final Estimate of H-4 Dependent Spouses of H-1B Nonimmigrants who are in the "Backlog"[46]				
Assumption and/or Step	**EB-1**	**EB-2**	**EB-3**	**Total**
1) Principal workers in the backlog (as of June 30, 2014)	9,000	146,500	78,500	234,000
2) Historical percentage of principal workers who obtained LPR Status through adjustment of status, average over FY 09-FY13 data	96.1%	98.2%	89.3%	
3) Estimated proportion of the backlog that DHS assumes will adjust status (rounded)	8,649	143,863	70,128	222,640
4) Historical percentage of those who adjusted status who were H-1B nonimmigrants, average over FY 09-FY13 data	32.5%	89.3%	61.6%	
5) DHS estimated proportion of the assumed H-1B nonimmigrants who adjusted status (rounded)	2,811	128,470	43,199	174,480
6) Historical percentage of H-1B principal workers who adjusted status and who reported being married, average over FY 09-FY13 data	81.1%	72.6%	67.2%	
7) DHS estimated proportion of the assumed H-1B nonimmigrants who adjusted status and who report being married (rounded)	2,280	93,269	29,030	124,579
8) Final Estimate of H-1B Nonimmigrants in the Backlog Potentially Impacted by the Final Rule (Rounded Up)				124,600

As shown in Table 4, DHS estimates there are approximately 124,600 H-1B nonimmigrants currently in the backlog for an immigrant visa under the first through third employment-based preference categories who are married. Accordingly, DHS

[46] Note: In the proposed rule, there was a data compilation error in step 4 for EB-2 estimates of the H-1B population which carried through the calculations. Instead of 19,159 reported in the proposed rule as the estimated proportion of H-1B nonimmigrants that adjusted their status to EB-2 and reported being married, that total should have read approximately 60,000. The proposed rule's total estimate of H-1B in the backlog as of September 2012 (step 8 of the calculation) should have read approximately 106,000 based on FY 08 - FY 11 data.

assumes by proxy that there could be as many as 124,600 H-4 dependent spouses of H-1B nonimmigrants currently in the backlog who could be initially eligible to apply for employment authorization under this rule. DHS does not have a similar way to parse out the backlog data for those classified as "dependents" to capture only those who are spouses rather than children. Furthermore, DHS recognizes that the estimate of H-4 dependent spouses in the backlog who will now be eligible to apply for employment authorization is a maximum estimate since there is no way to further refine this estimate by determining the immigration or citizenship status of the spouses of H-1B nonimmigrants who report being married. For instance, the spouse of the H-1B nonimmigrant could reside abroad, be a U.S. citizen or LPR, or be in another nonimmigrant status that confers employment eligibility. Additionally, H-4 dependent spouses who may be eligible for employment authorization under this rule may decide not to work and therefore not apply for an EAD. Accordingly, DHS believes that the estimate of 124,600 represents an upper-bound estimate of H-4 dependent spouses of H-1B nonimmigrants currently waiting for immigrant visas.

b. Annual Demand Estimate

The annual demand flow of H-4 dependent spouses who will be eligible to apply for initial employment authorization under the final rule is based on: 1) the number of Form I-140 petitions approved where the principal beneficiary is currently in H-1B status; and 2) the number of extensions of stay petitions approved for H-1B nonimmigrants pursuant to AC21.[47] Petitioners request extensions of stay or status for an

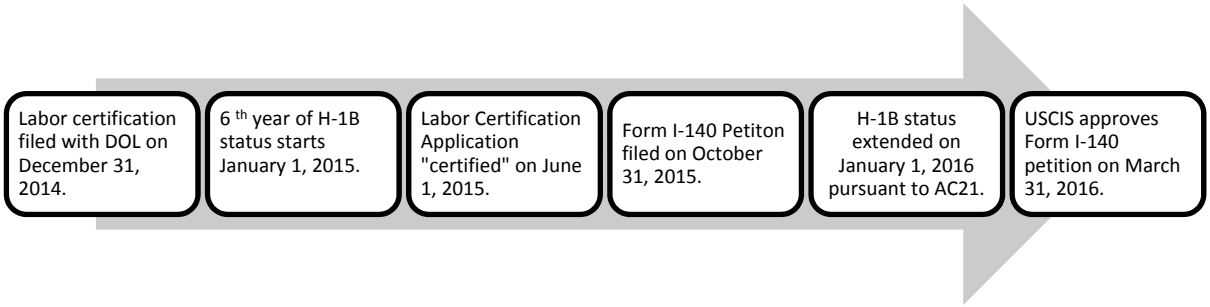
[47] There may be a very limited number of instances where an individual could be abroad and obtain an H-1B nonimmigrant visa pursuant to AC21; however, USCIS is unable to precisely determine this limited population due to current system limitations. As such, this analysis focuses only on those cases where an

H-1B nonimmigrant using the Petition for a Nonimmigrant Worker (Form I-129). Section 104(c) of AC21 allows for extensions of stay for an H-1B nonimmigrant who has an approved Form I-140 petition but is unable to apply to adjust to LPR status because of visa unavailability. Sections 106(a) and (b) of AC21 allow for extensions of stay for an H-1B nonimmigrant on whose behalf a labor certification application or a Form I-140 petition was filed at least 365 days prior to reaching the end of the sixth year of his or her H-1B status.

In the preamble of the proposed rule, DHS used colloquial language to describe the basis for H-1B nonimmigrants to be eligible for extensions of their stay under section 106 of AC21. It is typical to describe H-1B nonimmigrants who are eligible for AC21 extensions as those H-1B nonimmigrants who are the beneficiaries of a labor certification application or Form I-140 petition that has been pending for at least 365 days prior to reaching the end of the sixth year of H-1B status. This colloquial description was used in the proposed rule; however, this language does not accurately describe AC21 eligibility. Per the statute, an H-1B nonimmigrant is eligible for an extension of stay pursuant to AC21 provided that they are the beneficiary of a labor certification application or a Form I-140 petition that has been filed at least 365 days prior to the end of their sixth year of H-1B status. From a practical standpoint, neither the labor certification nor the Form I-140 petition needs to remain pending adjudication for 365 days or more to qualify for an extension pursuant to AC21.

H-1B nonimmigrant is currently in the United States and requesting an extension of their H-1B status pursuant to AC21.

It may be helpful to illustrate this description using a graphical illustration of a case where an H-1B nonimmigrant would generally be eligible for an extension of his or her maximum period of stay pursuant to AC21, even though neither the labor certification application nor the Form I-140 petition remain pending with DOL or DHS, respectively, for a year or more.



In this illustration, the H-1B nonimmigrant would be eligible for extension of his or her stay pursuant to sections 106(a) and (b) of AC21, even though his or her labor certification was certified in 6 months and the Form I-140 petition had only been pending for two months at the time of AC21 extension.

In this final rule's preamble, DHS is correcting the description of how H-1B nonimmigrants become eligible for extensions of stay pursuant to sections 106(a) and (b) of AC21. Importantly, this language change does not impact who ultimately qualifies to apply for employment authorization under this final rule. The informal language used in the preamble of the proposed rule also does not impact the USCIS adjudication of petitions to authorize H-1B status pursuant to AC21. Accurately describing the statutory conditions of AC21 does, however, necessitate that DHS amend its estimate of the annual flow projections of H-4 dependent spouses who may be eligible to apply for employment authorization. In the proposed rule, DHS estimated the number of H-4 dependent spouses who would be eligible to apply for work authorization pursuant to AC21 by

examining historical data of labor certifications or Form I-140 petitions pending for a year or more with the DOL and DHS, respectively. In contrast, this final rule examines the historical data of extensions of stay petitions approved for nonimmigrants currently in H-1B status to estimate the volume of H-4 dependent spouses eligible to apply for work authorization pursuant to AC21.

To recap, this rule will permit certain H-4 dependent spouses of H-1B nonimmigrants to be eligible to apply for employment authorization provided that the H-1B nonimmigrants are: (1) the principal beneficiaries of an approved Form I-140 petition, or (2) granted H-1B status pursuant to sections 106(a) and (b) of AC21. The annual flow estimate will therefore be based on historical data of these two categories. USCIS began tracking those cases that were approved for an extension pursuant to AC21 on October 17, 2014; in the past, USCIS databases have not captured and stored this information.[48] An extension of stay request may be submitted on behalf of H-1B nonimmigrants at any point throughout their authorized maximum six-year period of stay, or to extend stay beyond the maximum six years pursuant to AC21. Typically, an extension of stay request seeking eligibility pursuant to AC21 would be at least the second extension request filed on behalf of that H-1B nonimmigrant. The historical data of H-1B nonimmigrants who have been approved for extensions of stay include all requests, only some of which relate to extensions pursuant to AC21.

[48] On October 17, 2014, USCIS began capturing this information during the adjudication of Form I-129 petitions. Importantly, the tracking of cases that were approved for extension pursuant to AC21 do not distinguish between cases approved under section 104 and cases approved under section 106. There is thus a potential for overlap between the estimate of cases approved under AC21 and the estimate of persons with approved Form I-140 petitions.

The number of approved Form I-140 petitions and approved Form I-129 extension of stay petitions where the beneficiary currently has H-1B status is presented in Table 5.

Table 5: Form 1-140 and Form I-129 (Extension of Status or Stay (EOS) only) Approvals for Beneficiaries Currently in H-1B Nonimmigrant Status

Fiscal Year	Form I-140 Approvals	Form I-129 Extensions of Status /Stay Approvals
2010	48,511	116,363
2011	54,363	163,208
2012	45,732	125,679
2013	43,873	158,482
2014	42,465	191,531
5-Year Average	**46,989**	**151,053**

Based on approximately 90 days of tracking data (which is all that is currently available), DHS estimates that 18.3 percent of approved extension of stay requests filed on behalf of H-1B nonimmigrants are approved pursuant to AC21. Assuming this proportion holds constant, DHS estimates that annually it will approve approximately 27,643[49] extension of stay requests pursuant to AC21. Importantly, because the tracking of extensions pursuant to AC21 does not distinguish between those cases adjudicated under section 104(c) of AC21 and those cases adjudicated under section 106 of AC21, there is likely some overlap in the baseline estimate of 27,643 and the estimate of persons who have

[49] Calculation: 151,053 (5-year average of I-129 extension of stay approvals) x 18.3 percent = 27,643 extensions approved pursuant to AC21.

approved I-140 petitions. Because DHS is unable to parse out the individuals who have extended their status pursuant to section 104(c) of AC21, and because such persons have approved I-140 petitions, DHS may be overestimating the annual number of H-4 dependent spouses who will be eligible to apply for initial employment authorization. However, while there is uncertainty that may result in overstating the annual estimates, DHS relied on the best available information to arrive at this estimate. Thus, for purposes of this analysis, DHS will use 74,632[50] as the baseline projection of H-1B nonimmigrants who have started the immigration process.

To refine the annual flow projection estimates, DHS has chosen to estimate the proportion of applications filed in the first through third employment-based preference categories. Additionally, since DHS has already limited the historical counts in Table 5 to those approved petitions where the beneficiary's current nonimmigrant classification is H-1B, DHS has made the assumption that the petitions shown in Table 5 represent H-1B nonimmigrants who are physically present in the United States and intend to adjust status. As shown in Table 4, the historical proportion of H-1B nonimmigrants obtaining LPR status under EB-1, EB-2, and EB-3 categories who reported being married was 81.1 percent, 72.6 percent, and 67.2 percent, respectively, resulting in an average of 73.6 percent. Applying this percentage to the baseline projection results in an annual flow estimate of 55,000 (rounded).[51] Again, due to the fact that DHS is unable to estimate the proportion of H-1B nonimmigrants granted extensions of status pursuant only to section 106 of AC21, and because DHS is unable to determine the immigration or citizenship

[50] Calculation: 46,989 (5-year average of Form I-140 approvals) + 27,643 (annual estimate of approved extensions of stay pursuant to AC21) = 74,632 baseline estimate.

[51] Calculation: 74,632 x 73.6 percent = 54,929 or 55,000 rounded up to the nearest hundred.

status of spouses of H-1B nonimmigrants who report being married, this is an upper-bound estimate of H-4 dependent spouses who could be eligible to apply for employment authorization under the rule.

Therefore, DHS estimates that this rule will result in a maximum initial estimate of 179,600[52] H-4 dependent spouses who could be newly eligible to apply for employment authorization in the first year of implementation, and an annual flow of as many as 55,000 who are newly eligible in subsequent years.

4. Costs

i. Filer Costs

The final rule will permit certain H-4 dependent spouses to apply for employment authorization in order to work in the United States. Therefore, only H-4 dependent spouses who decide to seek employment while residing in the United States will face the costs associated with obtaining employment authorization. The costs of the rule will stem from filing fees and the opportunity costs of time associated with filing Form I-765.

The current filing fee for Form I-765 is $380. The fee is set at a level to recover the processing costs to DHS. Applicants for employment authorization are required to submit two passport-style photos along with the application, which is estimated to cost $20.00 per application based on Department of State estimates.[53] DHS estimates the time burden of completing this application to be 3 hours and 25 minutes. DHS recognizes that H-4 dependent spouses do not currently participate in the U.S. labor market, and, as a

[52] Calculation: Backlog of 124,600 plus annual demand estimate for married H-1Bs of 55,000 = 179,600.

[53] DOS estimates an average cost of $10 per passport photo in the Paperwork Reduction Act (PRA) Supporting Statement found under OMB control number 1450-0004. A copy of the Supporting Statement is found on Reginfo.gov at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201102-1405-001 (see question #13 of the Supporting Statement) (accessed Oct. 21, 2014).

result, are not represented in national average wage calculations. However, to provide a reasonable proxy of time valuation, DHS chose to use the minimum wage to estimate the opportunity cost consistent with methodology employed in other DHS rulemakings when estimating time burden costs for those who are not work authorized.

The Federal minimum wage is currently $7.25 per hour.[54] In order to anticipate the full opportunity cost to petitioners, we multiplied the average hourly U.S. wage rate by 1.46 to account for the full cost of employee benefits such as paid leave, insurance, and retirement for a total of $10.59 per hour.[55] Based on this wage rate, H-4 dependent spouses who decide to file Form I-765 applications will face an estimated opportunity cost of time of $36.18 per applicant.[56] Combining the opportunity costs with the fee and estimated passport-style photo costs, the total cost per application will be $436.18.[57] In the first year of implementation, DHS estimates the total maximum cost to the total of H-4 dependent spouses who could be eligible to file for an initial employment authorization will be as much as $78,337,928 (non-discounted), and $23,989,900 annually in subsequent years. The 10-year discounted cost of this rule to filers of initial employment authorizations is $257,403,789 at 3 percent, while the 10-year discounted cost to filers is $219,287,568 at 7 percent. Importantly, in future years the applicant pool of H-4

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[54] U.S. Dep't of Labor, Wage and Hour Division. The minimum wage in effect as of July 24, 2009, available at http://www.dol.gov/dol/topic/wages/minimumwage.htm.

[55] The calculation to burden the wage rate: $7.25 x 1.46 = $10.59 per hour. See Economic News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (June 2014), available at http://www.bls.gov/news.release/archives/ecec_09102014.htm (viewed Oct. 23, 2014).

[56] Calculation for opportunity cost of time: $10.59 per hour x 3.4167 hours (net form completion time) = $36.18.

[57] Calculation for total application cost: $380 (filing fee) + $20 (cost estimate for passport photos) + $36.18 (opportunity cost of time) = $436.18.

dependent spouses filing for employment authorization will include both those initially eligible and those who will seek to renew their EADs as they continue to wait for visas to become available. DHS could not project the number of renewals as the volume of H-4 dependent spouses who will need to renew is dependent upon visa availability, which differs based on the preference category and the country of nationality. H-4 dependent spouses needing to renew their employment authorization will still face a per-application cost of $436.18.

ii. Government Costs

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including administrative costs and services provided without charge to certain applicants and petitioners. See INA section 286(m), 8 U.S.C. 1356(m). DHS has established the fee for the adjudication of Form I-765 in accordance with this requirement. As such, there are no additional costs to the Federal Government resulting from this rule.

iii. Impact on States

Currently, once visas are determined to be immediately available, H-1B nonimmigrants and their dependent family members may be eligible to apply for adjustment of status to that of a lawful permanent resident. Upon filing an adjustment of status application, the H-4 dependent spouse is eligible to request employment authorization. This rule will significantly accelerate the timeframe by which qualified H-4 dependent spouses are eligible to enter the U.S. labor market. As a result of the changes made in this rule, certain H-4 dependent spouses will be eligible to request employment authorization well before they are eligible to apply for adjustment of status.

Even with the change in the maximum number of H-4 dependent spouses who may be impacted as reported in the proposed rule and this final rule, DHS maintains that the expected outcomes are the same. DHS believes that this regulatory change will encourage families to stay committed to the immigrant visa process during the often lengthy wait for employment-based visas whereas, otherwise, they may leave the United States and abandon immigrant visa processing altogether. As such, DHS presents the geographic labor impact of this rule even though this rule does not result in "new" additions to the labor market; it simply accelerates the timeframe by which they can enter the labor market. As mentioned previously, DHS estimates this rule can add as many as 179,600 additional persons to the U.S. labor force in the first year of implementation, and then as many as 55,000 additional persons annually in subsequent years. As of 2013, there were an estimated 155,389,000 people in the U.S. civilian labor force.[58] Consequently, 179,600 additional available workers in the first year (the year with the largest number of eligible applicants) represent a little more than one-tenth of a percent, 0.1156 percent, of the overall U.S. civilian labor force (179,600/155,389,000 X 100 = 0.1156 percent).[59]

The top five States where persons granted LPR status have chosen to reside are: California (20 percent), New York (14 percent), Florida (10 percent), Texas (9 percent),

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[58] See News Release, United States Dep't of Labor, Bureau of Labor Statistics, Local Area Unemployment Statistics, Regional and State Unemployment –2013 Annual Averages, Table 1 "Employment status of the civilian noninstitutional population 16 years of age and over by region, division, and state, 2012-13 annual averages" (Feb. 28, 2014), available at http://www.bls.gov/news.release/archives/srgune_02282014.pdf.

[59] Note that even with the changed estimate from the proposed rule, the finding remains consistent; the overall impact to the U.S. labor force is a fraction of one percent.

and New Jersey (5 percent).[60] While allowing certain H-4 dependent spouses the opportunity to work will result in a negligible increase to the overall domestic labor force, the states of California, New York, Florida, Texas, and New Jersey may have a slightly larger share of additional workers compared with the rest of the United States. Based on weighted average proportions calculated from FY 2009-2013, and assuming the estimate for first year impacts of 179,600 additional workers were distributed following the same patterns, DHS anticipates the following results: California could receive approximately 35,920 additional workers in the first year of implementation; New York could receive approximately 25,144 additional workers; Florida could receive approximately 17,960 additional workers; Texas could receive approximately 16,164 additional workers; and New Jersey could receive approximately 8,980 additional workers. To provide context, California had 18,597,000 persons in the civilian labor force in 2013.[61] The additional 35,920 workers who could be added to the Californian labor force as a result of this rule in the first year would represent less than two-tenths of a percent of that state's labor force (35,920/18,597,000 X 100 = 0.1931 percent). As California is the state estimated to receive the highest number of additional workers, the impact on the states civilian labor force is minimal.

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[60] DHS Office of Immigration Statistics, Annual Flow Reports, "U.S. Legal Permanent Residents" for 2009-2012 and "U.S. Lawful Permanent Residents: 2013," available at http://www.dhs.gov/immigration-statistics-publications#0. Author calculated percentage distributions by State weighted over FY 2009-2013 (rounded).

[61] See News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Local Area Unemployment Statistics, Regional and State Unemployment –2013 Annual Averages, Table 1, Employment status of the civilian noninstitutional population 16 years of age and over by region, division, and state, 2012-13 annual averages (Feb. 28, 2014), available at http://www.bls.gov/news.release/archives/srgune_02282014.pdf.

5. Benefits

As previously mentioned, once this rule is finalized, these amendments will increase incentives of certain H-1B nonimmigrants who have begun the process of becoming LPRs to remain in the United States and contribute to the U.S. economy as they complete this process. Providing the opportunity for certain H-4 dependent spouses to obtain employment authorization during this process will further incentivize H-1B nonimmigrants to not abandon their intention to remain in the United States while pursuing LPR status. Retaining highly skilled persons who intend to become LPRs is important when considering the contributions of these individuals to the U.S. economy, including advances in research and development and other entrepreneurial endeavors. As previously discussed, much research has been done to show the positive impacts on economic growth and job creation from highly skilled immigrants. In addition, these regulatory amendments will bring U.S. immigration policies more in line with the policies of other countries that seek to attract skilled foreign workers. For instance, in Canada spouses of temporary workers may obtain an "open" work permit allowing them to accept employment if the temporary worker meets certain criteria.[62] As another example, in Australia, certain temporary work visas allow spousal employment.[63]

This final rule will result in direct, tangible benefits for the spouses who will be eligible to enter the labor market earlier than they would have otherwise been able to do so due to the lack of immigrant visas. While there will be obvious financial benefits to

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[62] See Canadian Government, Citizenship and Immigration Canada, Help Centre under Topic "Work Permit – Can my spouse or common-law partner work in Canada?", available at http://www.cic.gc.ca/english/helpcentre/index-featured-can.asp#tab1 (last visited Jan. 13, 2015).

[63] See Australian Government, Dep't of Immigration and Citizenship, Temporary Work (Skilled) visa (subclass 457), available at http://www.immi.gov.au/Visas/Pages/457.aspx (last visited Jan. 13, 2015).

the H-4 dependent spouse and the H-1B nonimmigrant's family, there is also evidence that participating in the U.S. workforce and improving socio-economic attainment has a high correlation with smoothing an immigrant's integration into American society.[64]

Prior to this rule being effective, H-4 dependent spouses were not able to apply for employment authorization until they were eligible to submit their applications for adjustment of status or otherwise acquire a nonimmigrant status authorizing employment. The amendments to the regulations made by this final rule accelerate the timeframe by which H-4 dependent spouses of H-1B nonimmigrants who are on the path to being LPRs are able to enter into the U.S. labor market.

6. Alternatives Considered

One alternative considered by DHS was to permit employment authorization for all H-4 dependent spouses. As explained in both the proposed rule and in response to public comments, DHS declines to extend the changes made by this rule to H-4 dependent spouses of all H-1B nonimmigrants at this time. Such an alternative would offer eligibility for employment authorization to those spouses of nonimmigrant workers who have not taken steps to demonstrate a desire to continue to remain in and contribute to the U.S. economy by seeking lawful permanent residence. In enacting AC21, Congress was especially concerned with avoiding the disruption to U.S. businesses caused by the required departure of H-1B nonimmigrants (for whom the businesses intended to file employment-based immigrant visa petitions) upon the expiration of the

[64] See Jimenéz, Tomás, Immigrants in the United States: How Well Are They Integrating into Society? (2011) Washington, DC: Migration Policy Institute, available at http://www.migrationpolicy.org/research/immigrants-united-states-how-well-are-they-integrating-society; see also Terrazas, Aaron, The Economic Integration of Immigrants in the United States: Long- and Short-Term Perspectives (2011) Washington, D.C.: Migration Policy Institute, available at http://www.migrationpolicy.org/research/economic-integration-immigrants-united-states.

workers' maximum six-year period of authorized stay. See S. Rep. No. 106-260, at 22 (2000). This rule further alleviates these concerns.

Another alternative considered was to limit employment eligibility to just those H-4 dependent spouses of H-1B nonimmigrants who extended their status under the provisions of AC21. As discussed in Section 3.b of this Executive Order 12866/13563 assessment, DHS databases began tracking the number of extensions of H-1B status that were approved pursuant to AC21 on October 17, 2014. Historically DHS did not capture this information. Based on approximately 90 days of case history, DHS believes that approximately 18.3 percent of all extension of stay applications filed on behalf of H-1B nonimmigrants are approved pursuant to AC21. DHS estimates that there could be as many as 27,643[65] H-1B nonimmigrants with extensions of stay requests that were approved pursuant to AC21. Further, DHS estimates that there could be as many as 20,400[66] married H-1B nonimmigrants who are granted an extension of stay pursuant to AC21. This alternative would also result in some fraction of the backlog population being eligible for employment authorization in the first year after implementation, but DHS is unsure of what portion of the backlog population has been granted an extension under AC21. However, DHS believes that this alternative is too limiting and fails to recognize that other H-1B nonimmigrants and their H-4 dependent spouses also experience long waiting periods while on the path to lawful permanent residence. One of the primary goals of this rulemaking is to provide an incentive to H-1B nonimmigrant

[65] Calculation: 151,053 (5-year average of I-129 extension of stay approvals) x 18.3 percent = 27,643 extensions approved pursuant to AC21.

[66] Calculation: 27,643 (extensions approved pursuant to AC21) x 73.6 percent (average percentage of H-1B nonimmigrants who adjust to LPR status that report being married)= 20,345 or 20,400 (rounded up).

families to continue on the path to obtaining LPR status in order to minimize the potential for disruptions to U.S. businesses caused by the departure from the United States of these workers. The Department believes that also extending employment authorization to the spouses of H-1B nonimmigrants who are the beneficiaries of approved Form I-140 petitions more effectively accomplishes the goals of this rulemaking, because doing so incentivizes these workers, who have established certain eligibility requirements and demonstrated intent to reside permanently in the United States and contribute to the U.S. economy, to continue their pursuit of LPR status. Thus, extending employment authorization to H-4 dependent spouses of H-1B nonimmigrants with either approved Form I-140 petitions or who have been granted H-1B status pursuant to sections 106(a) and (b) of AC21 encourages a greater number of professionals with high-demand skills to remain in the United States.

D. Regulatory Flexibility Act

USCIS examined the impact of this rule on small entities under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601(6). A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business under the Small Business Act, 15 U.S.C. 632), a small not-for-profit organization, or a small governmental jurisdiction (locality with fewer than fifty thousand people). After considering the impact of this rule on such small entities, DHS has determined that this rule will not have a significant economic impact on a substantial number of small entities. The individual H-4 dependent spouses to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). Accordingly,

DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities.

E. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting requirements inherent in a rule. See Pub. L. 104-13, 109 Stat. 163 (May 22, 1995). This final rule requires that eligible H-4 dependent spouses requesting employment authorization complete an Application for Employment Authorization (Form I-765), covered under OMB Control number 1615-0040. As a result of this final rule, this information collection will be revised. DHS has received approval of the revised information collection from OMB.

DHS submitted the proposed revisions to Form I-765 to OMB for review. DHS has considered the public comments received in response to the publication of the proposed rule.

Over 180 commenters raised issues related to employment authorization requests, including filing procedures, premium processing, validity periods, renewals, evidentiary documentation, concurrent filings for extension of stay/change of status, automatic extensions of employment authorization, filing fees, and marriage fraud. One commenter asked for clarification regarding whether H-4 dependent spouses under this rule are required to demonstrate economic need for employment authorization using the Form I-765 Worksheet (I-765WS).

DHS's responses to these comments appear under Part III.E. and F. USCIS has submitted the supporting statement to OMB as part of its request for approval of this revised information collection instrument.

DHS has revised the originally proposed Form I-765 and form instructions to clarify the supporting documentation that applicants requesting employment authorization pursuant to this rule must submit with the form to establish eligibility, and to state that USCIS will accept Forms I-765 filed by such applicants concurrently with Forms I-539. DHS has also revised the Form I-765 to include a check box for the applicant to identify him or herself as an H-4 dependent spouse. The inclusion of this box will aid USCIS in its efforts to more efficiently process the form for adjudication by facilitating USCIS's ability to match the application with related petitions integral to the adjudication of Form I-765. DHS does not anticipate any of these changes will result in changes to the previously reported time burden estimate. The revised materials can be viewed at www.regulations.gov.

Lastly, DHS has updated the supporting statement to reflect a change in the estimate for the number of respondents that USCIS projected would submit this type of request from 1,891,823 respondents to 1,981,516 respondents. This change of the initially projected

number of respondents is due to better estimates regarding the general population of I-765 filers, in addition to this final rule's revised estimate on the new number of applicants that will request EADs, which results in a change of the estimated population of aliens that DHS expects could file Form I-765. Specifically, in the proposed rule USCIS estimated that approximately 58,000 new respondents would file requests for EADs as a result of the changes prompted by this rule. USCIS has revised that estimate and projects in this final rule that approximately 117,300 new respondents will be able to file a Form I-765. With this change on the number of Form I-765 application filers, the estimate for the total number of respondents has been updated. The current hour inventory approved for this form is 7,140,900 hours, and the requested new total hour burden is 8,159,070 hours, which is an increase of 1,018,170 annual burden hours.

V. Regulatory Amendments

DHS adopted most of the proposed regulatory amendments without change, except for conforming amendments to 8 CFR 214.2(h)(9)(iv) and 8 CFR 274a.13(d) and minor punctuation and wording changes in 8 CFR 214.2(h)(9)(iv) to improve clarity and readability.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, DHS amends chapter I of title 8 of the Code of Federal Regulations as follows:

PART 214 -- NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a,1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Public Law 104-208, 110 Stat. 3009-708; Public Law 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

2. Section 214.2 is amended by revising paragraph (h)(9)(iv) to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(h) * * *

(9) * * *

(iv) H-4 dependents. The spouse and children of an H nonimmigrant, if they are accompanying or following to join such H nonimmigrant in the United States, may be admitted, if otherwise admissible, as H-4 nonimmigrants for the same period of admission or extension as the principal spouse or parent. H-4 nonimmigrant status does not confer eligibility for employment authorization incident to status. An H-4 nonimmigrant spouse of an H-1B nonimmigrant may be eligible for employment authorization only if the H-1B nonimmigrant is the beneficiary of an approved Immigrant Petition for Alien Worker, or successor form, or the H-1B nonimmigrant's period of stay

in H-1B status is authorized in the United States under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Pub. L. 106-313, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273 (2002). To request employment authorization, an eligible H-4 nonimmigrant spouse must file an Application for Employment Authorization, or a successor form, in accordance with 8 CFR 274a.13 and the form instructions. If such Application for Employment Authorization is filed concurrently with another related benefit request(s), in accordance with and as permitted by form instructions, the 90-day period described in 8 CFR 274.13(d) will commence on the latest date that a concurrently filed related benefit request is approved. An Application for Employment Authorization must be accompanied by documentary evidence establishing eligibility, including evidence of the spousal relationship and that the principal H-1B is the beneficiary of an approved Immigrant Petition for Alien Worker or has been provided H-1B status under sections 106(a) and (b) of AC21, as amended by the 21st Century Department of Justice Appropriations Authorization Act, the H-1B beneficiary is currently in H-1B status, and the H-4 nonimmigrant spouse is currently in H-4 status.

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PART 274a -- CONTROL OF EMPLOYMENT OF ALIENS

3. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; Title VII of Public Law 110-229; 48 U.S.C. 1806; 8 CFR part 2.

4. Section 274a.12 is amended by adding a new paragraph (c)(26), to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(26) An H-4 nonimmigrant spouse of an H-1B nonimmigrant described as eligible for employment authorization in 8 CFR 214.2(h)(9)(iv).

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5. Section 274a.13 is amended by revising the first sentence of paragraph (d), to read as follows:

§ 274a.13 Application for employment authorization.

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(d) Interim employment authorization. USCIS will adjudicate the application within 90 days from the date of receipt of the application, except as described in 8 CFR 214.2(h)(9)(iv), and except in the case of an initial application for employment authorization under 8 CFR 274a.12(c)(8), which is governed by paragraph (a)(2) of this section, and 8 CFR 274a.12(c)(9) in so far as it is governed by 8 CFR 245.13(j) and 245.15(n). * * *

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Jeh Charles Johnson,
Secretary

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