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A Bridge Over Troubled Waters: The High-Skilled Worker Rule and Its Impact on Employment-Based Immigration

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A BRIDGE OVER TROUBLED WATERS: THE HIGH-SKILLED WORKER RULE AND ITS IMPACT ON EMPLOYMENT-BASED IMMIGRATION

Robert D. Aronson[†] & Debra A. Schneider^{††}

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I. INTRODUCTION

Over roughly the past twenty years, Congress has passed various statutory measures intended to align business immigration with the demands of the marketplace and to stabilize the role of foreign nationals in contributing to U.S. economic interests. But in the aftermath of these Congressional enactments, these measures never went through the rulemaking process to provide consistency in implementing Congressional intent. This article deals with one such measure, the High-Skilled Worker Rule,¹ which is the initial attempt to provide regulatory clarity to the statutory effort to strike a balance between the contributions of foreign professionals and high-skilled workers. The High-Skilled Worker Rule was created with the desire to preserve employment opportunities for U.S. workers in the new economy.²

There are three major Congressional actions that form the basis for the regulations discussed in this article. First, the American Competitiveness and Workforce Improvement Act (ACWIA)³ purported to address high-skilled worker immigration to the U.S.—in particular, immigration through the H-1B Temporary Worker nonimmigrant visa program—to protect U.S. workers and to help retrain workers for the challenges in the new economy.⁴

1. Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

2. *See id.* at 82,400.

3. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, div. C, tit. IV, 112 Stat. 2681-642 (1998).

4. See Jung S. Hahm, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa Program*, 85 CORNELL L. REV. 1673, 1686–88 (2000) (discussing the various measures in the legislation such as money for training American workers and requirements that employers provide equal benefits to H-1B workers in order to discourage hiring foreign workers as a cost-saving measure).

Although the Act was somewhat restrictionist in substance,⁵ it temporarily increased H-1B visas to remediate the oversubscription of H-1B visas that occurred for the first time just before the statute's enactment.⁶

Shortly thereafter, Congress enacted the American Competitiveness in the 21st Century Act (AC21).⁷ AC21 had a wide-ranging and generally promotive set of initiatives intended to increase stability to foreign nationals—particularly H-1B workers.⁸ AC21 was passed in light of changing business circumstances, the strength of the U.S. economy, a greater recognition of the positive role of foreign workers to U.S. economic development, and the increase in immigrant visa backlogs lengthening the time required for many beneficiaries of approved immigrant visa petitions to attain permanent resident status.⁹ Among the main provisions introduced by AC21 were: (1) the portability provisions enabling foreign nationals to change jobs without jeopardizing their immigration status;¹⁰ (2) provisions allowing for the temporary expansion of the H-1B numerical allotments;¹¹ (3) the extension of H-1B status in designated circumstances beyond the statutorily-imposed six-year limit;¹² and (4) the creation of exemptions from the H-1B quota (cap exemption) for “institutions of higher education” and certain qualifying entities and/or employment situations.¹³

Finally, the H-1B Visa Reform Act of 2004¹⁴ created a permanent—although incremental—amelioration to the ongoing oversubscription of the H-1B visa numbers by adding 20,000 H-1B visas for foreign nationals holding advanced degrees from U.S.

5. ACWIA created a series of stringent penalties, fines, and debarments for violations of an employer's wage or working obligations, increased substantially the H-1B filing fees, and required new attestations from many employers seeking to hire an H-1B worker—particularly from H-1B dependent employers. *See, e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, div. C, tit. IV, 112 Stat. 2681-642, §§ 412-14 (1998).

6. Retention of EB-1, 81 Fed. Reg. at 82,408.

7. American Competitiveness in the 21st Century Act, Pub. L. No. 106-313, 14 Stat. 1251 (2000) (codified at 8 U.S.C. § 1184 (2000)).

8. *See id.*

9. *See id.* at §§ 106(a), 104(c).

10. INA § 214(n).

11. *Id.* § 214(g)(1).

12. American Competitiveness in the 21st Century Act, 8 U.S.C. § 1184 (2000).

13. *Id.* § 214(g)(5)(A), 8 U.S.C. § 1184.

14. Omnibus Appropriations Act for FY 2005, Pub. L. 108-447, div. J, tit. IV, § 118 Stat. 2809, 3351 (2004).

universities.¹⁵ While these enactments arguably did not go far enough in aligning U.S. immigration law and policy with the demands for workers in the new economy, they collectively represent initiatives intended to provide a greater measure of stability both to employers and foreign nationals. Moreover, these enactments recognize the benefits provided by certain classes of foreign nationals—in particular, high-skilled workers—to economic growth.

In the aftermath of these statutes, implementation was left to a hodgepodge of administrative directives, isolated adjudications, administrative decisions, and administrative actions, rather than undergoing the rigors of regulatory rulemaking.¹⁶ It is beyond the purview of this article to speculate on the causes of this inaction in the issuance of regulations. But the authors note that the role of foreign nationals, their contributions to the nation's welfare, and their impact on job creation and retention for U.S. workers is a subject of ongoing debate.¹⁷

In anticipation of a sharp change in immigration law and policy, the long-percolating regulations implementing the three above-cited statutes were released with an effective implementation date of January 17, 2017—three days before the inauguration of President Donald J. Trump.¹⁸ The Final Rule, entitled “Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers” (“High-Skilled Worker Rule” or “Rule”)¹⁹ intends to provide regulatory guidance—particularly to AC21 and to a somewhat lesser extent, ACWIA—in

15. Press Release, U.S. Citizenship and Immigration Services, USCIS To Implement H-1B Visa Reform Act of 2004 (Dec. 9, 2004) https://www.uscis.gov/sites/default/files/files/pressrelease/H-1B_12_9_04.pdf [<https://perma.cc/GK2D-FLF9>].

16. Naomi Schorr & Stephen Yale-Loehr, *Still Crazy After All These Years: AC21 in 2003*, 9 BENDER'S IMMIGR. BULL. 483, 483–89 (Apr. 15, 2004).

17. See, e.g., Bill Whitaker, *Are U.S. Jobs Vulnerable to Workers With H-1B Visas?*, CBS, (Aug. 13, 2017), <https://www.cbsnews.com/news/are-u-s-jobs-vulnerable-to-workers-with-h-1b-visas-2/> [<https://perma.cc/K5TM-KUUF>].

18. Leigh Cole, *New Immigration-Related Cases and Regulations of Interest to Vermont Employers*, VT. EMP. L. LETTER 3, 21 NO. 10 (2016) (“Immigration is a hot topic; it was a key issue in this year’s presidential campaign and postelection analysis. Meanwhile, new immigration regulations will take effect in January 2017, and courts and administrative agencies have issued several interesting decisions in recent months.”).

19. See Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

order to create “improved processes and increased certainty for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers; greater stability and job flexibility for those workers; and increased transparency and consistency in the application of DHS policy related to affected classifications.”²⁰

This article is focused on three main objectives. First, the article analyzes the High-Skilled Worker Rule’s role in synthesizing previous policy and practice as well as in identifying new measures relating to H-1B workers, the eligibility of foreign nationals to obtain and maintain employment authorization, and greater stability and predictability in the employment-based permanent resident process.²¹ Second, the article identifies areas of employment-based immigration that have yet to be addressed through regulations, even though statutory enactments have set the foundation.²² And finally, the article provides initial thoughts on the relevance of the High-Skilled Worker Rule in light of new policies and sentiments expressed in the “Buy American/Hire American” initiatives that perceive immigration as a zero-sum game that acts largely to the detriment of U.S. workers.²³

II. H-1B TEMPORARY WORKER: IN SEARCH OF THE ELUSIVE CAP EXEMPTION

Based on H-1B utilization patterns occurring over the past years, the number of H-1B visa numbers continues to remain woefully inadequate to meet the demand for H-1B professionals. The statute sets an annual limitation of 65,000 H-1B visa numbers, with an additional 20,000 available to holders of advanced degrees issued by U.S. universities.²⁴ In contrast, United States Citizenship and Immigration Services (USCIS) has received petitions far in excess of the allotment of H-1B cap-subject visa numbers with the number of petitions recurrently exceeding 200,000.²⁵ This means that, in

20. *See id.* at 82,398.

21. *See infra* Part III.

22. *See infra* Part IV.

23. *See infra* Part V.

24. *See* INA § 214(n), 8 U.S.C. § 1184 (2015).

25. *See generally* Neil G. Ruiz, *Key Facts About the U.S. H-1B Visa Program*, PEW RES. CTR. (Jan. 16, 2018, 10:22 PM), <http://www.pewresearch.org/fact-tank/2017/04/27/key-facts-about-the-u-s-h-1b-visa-program/> [https://perma.cc/YV3M-Z8ZW]. Over the past five years, the volume of cap subject H-1B petitions has consistently exceeded the H-1B numerical limit. *Id.* For FY 2014, USCIS received

addition to having to meet the substantive standards for H-1B approval, a petition subject to the H-1B cap enters a lottery in which random selection becomes a major determining factor to the petition's approval.²⁶ Therefore, the approvability of an H-1B petition increases if the petition falls outside of the numerical limitation—that is, if it is H-1B cap exempt.

The Immigration and Nationality Act (INA) recognizes a number of circumstances in which a petitioner can claim an exemption from the H-1B cap. Perhaps the most notable and frequently used situation applies to academic institutions or qualifying academically affiliated institutions, as identified in the following statutory provision:

The numerical limitations . . . shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) who—(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of title 20), or a related or affiliated nonprofit entity²⁷

In essence, this statutory provision recognizes three possible paths for attaining cap exemption:

- (1) Working for an Institution of Higher Education
- (2) Working for a Related or Affiliated Nonprofit Entity
- (3) “Working At” (but not for) a qualifying entity.²⁸

While a series of previous guidance memoranda and administrative pronouncements made piecemeal attempts to define these terms,²⁹

roughly 124,000 petitions, followed by 172,5000 for FY 2015, 233,000 for FY 2016, 236,000 for FY 2017, and just under 200,000 for FY 2018. *Id.*

26. See Emily C. Callan, *Is the Game Still Worth the Candle (or the Visa)? How the H-1B Visa Lottery Lawsuit Illustrates the Need for Immigration Reform*, 80 ALB. L. REV. 335, 335–36 (2017) (stating “The H-1B Visa Lottery is the mechanism employed by the U.S. government (through its agency, the U.S. Citizenship and Immigration Services (“USCIS”)) to allocate the 65,000 H-1B visas that are available to foreign nationals every fiscal year. The H-1B visa is exceedingly popular because it provides foreign nationals who possess a bachelor’s degree or equivalent with temporary authorization to work in the United States for a specific employer for a period of up to six years.”).

27. American Competitiveness in the 21st Century Act, Pub. L. 106-313, § 103 (codified at 8 U.S.C. § 1184) (2000)).

28. 8 U.S.C. § 1184(g)(5).

29. Peter Choi, *Immigration As Business Strategy: Simplifying American Immigration Law in A Global Economy*, 10 U. MASS. L. REV. 164, 192 (2015) (“For comprehensive

the High-Skilled Worker Rule gives regulatory clarification and consistency to these core grounds for seeking H-1B cap exemption.

A. *H-1B Cap Exemption Based on Employment by an “Institution of Higher Education”*

The first basis for claiming H-1B cap exemption occurs when the alien beneficiary is employed by an “institution of higher education.” This category is reflective of the perception that “Congress deem[s] such employment advantageous to the U.S., based on the belief that increasing the number of high-skilled foreign nationals working at U.S. institutions of higher education would increase the number of Americans who will be ready to fill specialty occupation positions upon completion of their education.”³⁰

The definition of “institution of higher education” is sourced in section 101(a) of the Higher Education Act of 1965, establishing five criteria required for designation as a qualified institution:

- (1) Admits as regular students those who have graduated from a high school or its equivalent;
- (2) Authorized within the State to provide a program of education over and above the secondary school level;
- (3) Provides an educational program culminating in the award of a Bachelor’s degree or provides not less than a tier program that is acceptable for full credit toward a degree, or awards a degree acceptable for admission to a graduate or professional degree program;
- (4) Is a public or other nonprofit institution; and
- (5) Is accredited by a nationally recognized accrediting agency or association or its equivalent.³¹

This definition relates to the classical model of American education embodied in the college and university systems, including the junior college and community college systems which also provide

immigration reform to work, ‘comprehensiveness’ must encompass not only substantive changes, but also structural ones. Patchwork reform efforts over the years have merely ‘layered additional burdens on an already inadequate law,’ further complicating an already disarrayed system.”).

30. Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398, 82,409 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

31. Higher Education Act of 1965 § 101(a), 20 U.S.C. § 1001(a)(1)–(5) (2012).

academic credit recognized under the classical university model system.³²

But the Act also recognizes that an entity can qualify as an “institution of higher education” if it develops and administers accredited, recognized programs of academic or professional training and study which culminate in a certificate of program completion that is recognized and accepted for admission into a profession.³³ Consider, for example, a hospital institution that maintains an accredited Residency or Clinical Fellowship program in a given medical discipline. The program itself must subscribe to exacting professional standards in order to gain accreditation from the Accreditation Council of Graduate Medical Education, the organization recognized by the Secretary of Education for certifying programs of Graduate Medical Education.³⁴ Would the development of such a program, which unquestionably has a highly developed and recognized academic training component, in and of itself qualify the entire hospital as an “institution of higher education” for H-1B cap exemption purposes? Or, would the H-1B exemption vest only if the alien beneficiary was working within the accredited program? Or does such an institution’s issuance of a Certificate accepted for Specialty Board Certification, rather than a more traditional academic degree credential, invalidate the hospital’s claim to being an “institution of higher education”? In an environment where the demand for H-1B visas substantially exceeds the supply, a practitioner may well need to explore the expanding nature of higher education to claim an exemption from the H-1B quota.

B. H-1B Cap Exemption Based on Employment by a “Related or Affiliated” Nonprofit Academic Entity

The second possible basis for obtaining cap exemption is employment by a related or affiliated nonprofit academic entity. Over the years, the identification of stable, predictive standards for determining a “related or affiliated” academic entity has proven extremely problematic. The High-Skilled Worker Rule seeks to articulate new standards to define this concept for H-1B cap

32. *Id.*

33. *Id.* § 1001(b).

34. *See, What We Do*, ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., <http://www.acgme.org/What-We-Do/Overview> [<https://perma.cc/3SL6-RLAN>].

exemption purposes.³⁵ Previous to the Rule, USCIS issued a series of policy memoranda that, at best, created unduly constrictive and equivocating standards for claiming this type of exemption.³⁶ More realistically, these memoranda failed to meaningfully address the definitional standards created by AC21.³⁷

Historically, USCIS went through three phases in recognizing H-1B cap exemptions under the “related or affiliated” provision of section 214(g)(5)(A) of the INA:

- (1) An initial and liberalized attitude largely consistent with the employment promotive policies articulated by AC21, in which a wide range of factors were considered in approving H-1B cap exemptions under the “related or affiliated” standards (2000 – mid-2006);
- (2) The imposition of corporate concepts, such as “branch,” “subsidiary,” and “shared ownership/common control” that became the determining feature in recognizing academic affiliation for H-1B cap exemption purposes (June 6, 2006 – March 18, 2011); and
- (3) A “wait and see” policy that basically stated that USCIS would give deference to previous approvals of H-1B cap exempt status without the need to establish a “shared ownership/common control” relationship which, while providing a certain level of predictability, failed to identify realistic standards utilized within the academic community in creating affiliated educational relationships (March 18, 2011 – January 17, 2017).³⁸

35. See generally, DHS Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers Rule, 81 Fed. Reg. 82,398, 82,400–06 (Nov. 18, 2016) (summarizing the purpose of the rule).

36. See, e.g., Memorandum from Michael Aytes, Assoc. Dir. Domestic Operations, USCIS, Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313 (June 6, 2006) [hereinafter Aytes Memorandum]. For an excellent analysis of the fluidity of the “related or affiliated nonprofit” standards in H-1B adjudications, see Naomi Schorr, *Curb Your Enthusiasm: An Analysis of the AAO’s H-1B Texas School District Case*, 12 BENDER’S IMMIGR. BULL. 467, 480–82 (2007).

37. Robert D. Aronson, *The Cock Crows: Denial of Affiliation for H-1B Cap Exemptions*, in IMMIGRATION OPTIONS FOR ACADEMICS AND RESEARCHERS, SECOND EDITION 161, 162–63 (AILA 2011).

38. *Id.* at 161.

In the initial period following enactment of AC21, USCIS was liberal in its adjudication patterns of H-1B cap-exempt claims.³⁹ USCIS relied on a wide range of factors to determine whether an organization qualified as an affiliated or related nonprofit entity, including the importance the related institution of higher education placed on the contributions of its affiliated institution in furthering its education and research interests.⁴⁰ But starting in mid-2006 when the pro-business immigration initiatives in AC21 started to erode, USCIS issued guidance, through a series of policy memoranda, that restrictively defined the term “affiliated and related nonprofit entity.”⁴¹

Initially, USCIS issued a policy memorandum⁴² that became memorialized in revisions to the Adjudicator’s Field Manual (Aytes Memorandum).⁴³ The Aytes Memorandum conflated the ACWIA fee exemption provisions with the AC21 H-1B cap exemption provisions for related or affiliated academic institutions.⁴⁴ Specifically, ACWIA stipulated that an entity was exempt from the worker retaining fee for “affiliated or related nonprofit” entities that maintained “shared ownership or control by the same board or federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.”⁴⁵ But the entire public policy impetus of ACWIA was to create restrictionist H-1B policies, particularly in its fee schedules, whereas AC21 was a liberalizing, expansive enactment that created an exemption from the H-1B numerical restrictions for academically “‘related’ or ‘affiliated’ nonprofit” entities.⁴⁶

There were five inherent fallacies in this reliance on the ACWIA H-1B worker retraining fee exemption standard as the basis for determining H-1B cap exemptions:

39. *Id.*

40. *See id.*

41. *See, e.g.,* Aytes Memorandum, *supra* note 36.

42. *Id.*

43. *See* UNITED STATES DEP’T HOMELAND SEC., REVISIONS TO THE ADJUDICATOR’S FIELD MANUAL (AFM) CHAPTER 31.3 (AFM UPDATE AD06-27), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-13593/0-0-0-13813.html> [<https://perma.cc/ZL9L-KNL4>].

44. *See* Aytes Memorandum, *supra* note 36.

45. 8 C.F.R. § 214.2(h)(19)(iii)(B).

46. *See* Naomi Schorr & Nathan A. Waxman, *So Quick Bright Things Come to Confusion: AC21 and the H-1B Cap*, 9 BENDER’S IMMIGR. BULL. 700, 700–08 (2004).

- (1) ACWIA was intended to create certain restrictive provisions for the protection of the domestic work force, while the H-1B cap exemption provisions of AC21 were intended to be a liberal and expansive initiative recognizing the contributions of H-1B skilled workers and thought leaders;
- (2) The concepts appearing in the Aytes Memorandum used corporate concepts of ownership and control, whereas academic affiliations involve expansive cooperative understandings in which the affiliated entities provide supplementary training, education, or research opportunities acting pursuant to formal understandings concluded with an institution of higher education;
- (3) While the statutory language of “related or affiliated” has an “ordinary, contemporary common meaning,” the Aytes Memorandum added in corporate ownership and control concepts that not only failed to recognize the purpose of academic affiliations, but failed to recognize the plain meaning of the words appearing in the statutory provisions;
- (4) There are multiple measures to determine the existence of academic affiliation, as well as stipulated standards that must be met by institutions in forming academic affiliations that simply do not conform to the corporate model appearing in the Aytes Memorandum;
- (5) The articulated standards appeared in guidance letter form, thereby lacking the rigor of the regulatory rulemaking process, and ignoring the role and value of precedent in determining eligibility for academic affiliation.⁴⁷

Even after the issuance of the Aytes Memorandum, USCIS continued to irregularly utilize a broad range of factors separate from “shared ownership or common control” in granting H-1B cap exemptions. On April 28, 2011, USCIS released a policy memorandum that established interim guidance on requests for H-1B cap exemption under the “affiliated or related” standard under a two-pronged approach⁴⁸:

47. See Aronson, *supra* note 37, at 163–68.

48. Memorandum from U.S. Citizenship and Immigration Services, Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation (Apr. 28, 2011).

- (1) If a petitioning entity could show that it had previously received a recognition as an H-1B cap exempt institution since June 6, 2006, which was the date on which the initial Aytes Memorandum was issued; or
- (2) If the petitioning entity could show that it merits H-1B cap exemption under the ACWIA standards of “shared ownership and common control,” and, even here, any approval of a claim for H-1B cap exemption would require the review of the Service Center Operations Director.⁴⁹

In short, before the High-Skilled Worker Rule, the H-1B cap exemption was based on: (1) a grandfathered situation where an H-1B petitioner was previously granted a cap exemption under unclear adjudicatory standards; or (2) met a “shared ownership and control” standard, a rarely encountered situation in the academic world. What was missing was a consistent, predictable standard of approving H-1B cap exemption cases for academically related or affiliated entities that would further the AC21 policy objectives recognizing that:

[B]y virtue of what they are doing, people working in universities are necessarily immediately contributing to educating Americans. The more highly qualified educators in specialty occupation fields we have in this country, the more Americans we will have ready to take positions in these fields upon completion of their education.⁵⁰

1. Standards of H-1B Cap Exemption to “Related or Affiliated” Academic Entities Appearing in the High-Skilled Worker Rule

The High-Skilled Worker Rule attempts to resolve this inconsistency by creating a three-part standard for determining H-1B cap exemption under the “related or affiliated” provisions by:

- (1) Eliminating the grandfathered exemptions, meaning that USCIS will no longer honor previous determinations of cap exemption granted to an H-1B petitioner;⁵¹

49. *Id.*

50. S. Rep. No. 106-260, at 21–22 (2000) (analyzing section 3 of AC21).

51. Memorandum from U.S. Citizenship and Immigration Services, Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status (Oct. 23, 2017).

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- (2) Retaining concepts of shared ownership/common control, branch, ownership, and subsidiary for cap exemption purposes;⁵² and
 - (3) Recognizing “related or affiliated” institutions for cap exemption purposes based on three factors:
 - (A) The existence of a formal, written affiliation agreement;
 - (B) An active working relationship in which the affiliated or related entity actively participates in and supports the education or research function of the university institution; and
 - (C) Proof that the petitioning entity maintains a fundamental (although not principle) activity related to the education and research goals of the university institution.⁵³

In many ways, the standards appearing in the Rule conform closely to the relationship governing institutions of higher education and their affiliated entities. Of particular note is the following:

- (1) The H-1B cap exemption vests to the petitioner, meaning that the employment activities of the H-1B beneficiary do not have to be in the area of work covered by the affiliation.⁵⁴ This enables the alien beneficiary to work in a specialty occupation entirely unconnected with the subject matter of the affiliation.
- (2) A fundamental (although not primary) activity of the petitioning entity needs to be in support of the education or research mission of the institution of higher education.⁵⁵ As such, it is entirely possible for a petitioner seeking H-1B cap exemption to have a number of fundamental activities, including those that support the education or research mission of its affiliated university institution.⁵⁶ The petitioning institution bears the

52. 8 C.F.R. § 2(h)(8)(ii)(F)(2).

53. *Id.* § 2(h)(8)(ii)(F)(2)(iv).

54. *Characteristics of H-1B Specialty Occupation Workers Fiscal Year 2016 Annual Report to Congress Oct. 1, 2015–Sept. 30, 2016*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. 3 (2017), <https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-1B/h-1B-FY16.pdf> [<https://perma.cc/T542-KGZN>].

55. *Id.*

56. Retention of EB–1, EB–2, and EB–3 Immigration Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,443,

burden of establishing that it maintains as part of its overall scope of operations a fundamental—but by no means primary or exclusive—commitment to educational, training, and/or research objectives of its affiliated institution of higher education.⁵⁷

2. *Concepts of Nonprofit Status*

A further requirement for H-1B cap exemption purposes under the “related or affiliated” academic provisions is that the petitioning entity needs to be a nonprofit.⁵⁸ In its initial consideration of the nonprofit issue, USCIS took the position that the petitioning entity establishes its nonprofit identity under the following provisions of the Internal Revenue Code: 501(c)(3), 501(c)(4), or 501(c)(6).⁵⁹ But this was unhelpful since the statutes require the petitioning entity to be a “nonprofit” without actually defining the term.⁶⁰

Consider a governmental agency, perhaps at the municipal or county level. It would not qualify for nonprofit status under these provisions. Yet, it would qualify for nonprofit status under section 115(1) of the Internal Revenue Code.⁶¹ Furthermore, the preamble to the Rule specifically asserts that the “DHS will assess on a case-by-case basis whether a governmental organization has established that it is a nonprofit entity related to or affiliated with an institution of higher education for purpose of the ACWIA fee and H-1B numerical restrictions.”⁶² The ultimate objective is to show that the petitioning employer has been designated as a nonprofit entity

82,444 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

57. *Id.*

58. *Id.*

59. 8 C.F.R. § 214.2(h)(8)(ii)(F)(3) (2017).

60. *Id.* § 214.2(h)(19)(vi)(A) (2017).

61. *Governmental Informational Letter*, IRS (Aug. 9, 2017), <https://www.irs.gov/government-entities/federal-state-local-governments/governmental-information-letter> [<https://perma.cc/WE9E-DHVL>].

62. Retention of EB-1, EB-2, and EB-3 Immigration Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,443, 82,444 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)). Practitioners should further consider obtaining an affirmative statement from the Internal Revenue Service on the tax-exempt status of the petitioning organization by contacting the IRS Customer Account Services to request an affirmation letter. *Exempt Organizations – Affirmation Letters*, IRS (Aug. 16, 2017), <https://www.irs.gov/charities-non-profits/exempt-organizations-affirmation-letters> [<https://perma.cc/ED22-FTGA>].

rather than to constrict the nonprofit designation to certain specified provisions of the Internal Revenue Code.

C. H-1B Cap Exemptions Based on “Working At” a Qualifying Related or Affiliated Academic Institution

The discussion above relates to situations where a qualifying related or affiliated institution is directly employing the foreign worker.⁶³ Yet in many instances, the H-1B alien beneficiary is employed by a for-profit (a normally cap-subject employer), but the *situs* of the alien’s employment is on the physical premises of an H-1B exempt entity. Under the clear language of INA § 214(g)(5)(A), which exempts an employee “who is employed (or has received an offer of employment) *at* an institution of higher education . . . or a related or affiliated nonprofit entity,”⁶⁴ such employment situations would also merit exemption from the H-1B cap.

But here, the High-Skilled Worker Rule creates a three-step analysis to establish the H-1B cap exemption under the “employed at” situation:

- (1) Using the analysis appearing above, the physical location at which the alien beneficiary will work needs to be cap exempt;
- (2) The alien beneficiary needs to spend a majority of his/her time working at the exempt placement site; and
- (3) The alien’s job duties need to “directly and predominantly further the purpose, mission, objectives or functions of the qualifying institution, organization or entity, namely, either higher education, nonprofit research or government research.”⁶⁵

In contrast to the “employed by” situation described above in which an entity was granted H-1B cap exemption, the “employed at” situation requires a direct nexus between the alien’s job duties and the academic mission of the higher education institution. Additionally, employers must confirm that the H-1B beneficiary will spend a majority of time working at the exempt placement site.⁶⁶ This eliminates the possibility that the H-1B employment becomes a

63. *See supra* Part II.B.

64. INA § 214(g)(5)(A) (emphasis added).

65. 8 C.F.R. § 214.2(h)(8)(ii)(F)(4) (2017).

66. *Id.*

casual endeavor, possibly intended to establish H-1B cap exemption for petitioners who would normally be subject to the H-1B cap.

The H-1B cap exemption granted in the “employed at” situation does not entirely eliminate the concurrent employment provisions appearing at INA § 214(g)(6).⁶⁷ In this situation, once H-1B cap exemption is established, successive H-1B petitions derive H-1B cap exemption, even if the petitioner would normally be subject to the H-1B cap.⁶⁸ But the Rule does restrict the ability to claim H-1B cap exemption in concurrent employment situations in two important manners. First, it requires the H-1B worker to spend a majority of time working at the H-1B cap exempt employer, the temporal commitment to employment at a cap subject location becomes quite restricted. Second, if employment at the H-1B cap exempt entity ceases, then USCIS “may revoke the petition authorizing such employment” and subsequent H-1B petitions filed for the H-1B worker will then become subject to the H-1B cap.⁶⁹

But in addition to the temporal requirement that the H-1B beneficiary needs to spend a majority of time working at the exempt placement site, the Rule also imposes a qualitative standard requiring that the H-1B worker’s duties “directly and predominantly further the purpose, mission, objectives or functions of the qualifying institution, organization or entity, namely, either higher education, nonprofit research or government research.”⁷⁰ The initial question, then, becomes whether this commitment needs to be made on an exclusive, dedicated basis or whether the H-1B worker can concurrently fulfill various functions performed at the job placement site. To some extent, there is a parallel in the requirement set for “related or affiliated” entities that need to show that a fundamental—although certainly not primary or exclusive—function be related to the education or research mission of its affiliated entity.⁷¹

Consider the following employment situation. A for-profit (normally cap-subject) healthcare agency employs an alien physician for placement at an affiliated hospital where graduate students of a higher education institution rotate for clinical experience and training. In the course of direct patient clinical service, the H-1B

67. *Id.* § 214.2(h)(8)(ii)(F)(6); INA § 214(g)(6).

68. *See id.*

69. *Id.* § 214.2(h)(8)(ii)(F)(5).

70. *Id.* § 214.2(h)(8)(ii)(F)(4).

71. *Id.*

worker is in large measure performing clinical services in the presence of medical trainees. Thus, the H-1B worker is providing clinical instruction and guidance as recognized under the established norms of graduate medical education and training to provide clinical experience for the student's academic program. Presumably, this activity would meet the standard for "directly and predominantly" furthering the academic mission of the higher education institution. Although the ostensible duties of the H-1B physician would be on patient care, from the standpoint of the affiliated academic entity, clinical instruction is an indispensable component of its overall program of Graduate Medical Education.

As a practice pointer, the establishment of the H-1B worker's vital contributions to an academic program might best be established by assertions made directly from that institution in the H-1B petition. In many instances, it would be possible for the H-1B worker to receive an appointment as an adjunct instructor from an institution of higher education. Such a placement would reaffirm the indispensable contributions of the foreign worker to the program of academic instruction, and therefore help qualify the worker for H-1B status.

But in any case, in the "employed at" scenario for H-1B cap exemption purposes, there are two dimensions that need to be established over and above the H-1B cap exempt status of the employment site: (1) showing that a majority of the H-1B beneficiary's time is spent physically working on the premises of the H-1B exempt entity; and (2) qualitatively, the H-1B alien is intrinsically and indispensably involved in advancing the academic interests of the higher education institution.⁷²

III. NOTABLE PROVISIONS OF THE HIGH-SKILLED WORKER RULE

A. *Grace Periods for Preservation of Status*

Foreign nationals holding nonimmigrant visa status based on employment generally require the petitioning employer's involvement in order to maintain status.⁷³ Not only is the beneficiary

72. *Id.* § 214.2(h)(8)(ii)(F)(4).

73. *Nonimmigrant-Based Employment*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. 3, https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Custom%20Service%20Reference%20Guide/Nonimmigrant_Empl.pdf [<https://perma.cc/3BBZ-GKPV>].

dependent on the willingness of his or her employer to engage in the sponsorship process, but the foreign national's maintenance of status is dependent on the continuation of employment in a manner consistent with the terms of the nonimmigrant status.⁷⁴

While not entirely eliminating this dependency on ongoing employment to maintain status, the High-Skilled Worker Rule creates a 60-day grace period for maintaining status upon the cessation of employment in which the foreign national's nonimmigrant status is based.⁷⁵ Prior to the Rule, nonimmigrant workers were out of status if their sponsored employment ceased. There was no grace period to allow for a change of employer or change of status once the employment ended prior to the expiration of status.⁷⁶

The Rule creates a 60-day grace period covering H-1B status in addition to the following nonimmigrant classifications: E-1, E-2, E-3, H-1B1, L-1, O-1, and TN.⁷⁷ This grace period enables the foreign national to explore other possibilities either to extend or to change his or her nonimmigrant status.⁷⁸ Cessation of employment triggers the grace period, regardless of whether the employer terminates the employment or if the foreign national's departure results from other reasons, including the worker's own decision to depart.⁷⁹ The grace period is limited to sixty consecutive days or until the end of the foreign national's authorized validity period, whichever is shorter. The grace period extends to both the foreign national and his or her dependents.⁸⁰

USCIS can eliminate or shorten this grace period.⁸¹ Therefore, if the H-1B worker ceases employment within sixty days of the end of his or her current period of status, the grace period for maintaining status does not extend for the full sixty days, but rather is limited

74. 8 C.F.R. § 214.1(e) (2017).

75. *Id.* § 214.1(l)(2).

76. Cyrus Mehta, *Analysis of the 60-Day Grace Period for Nonimmigrant Workers*, THE INSIGHTFUL IMMIGR. BLOG (Jul. 10, 2017), <http://blog.cyrusmehta.com/2017/07/analysis-of-the-60-day-grace-period-for-nonimmigrant-workers.html> [https://perma.cc/GZ49-YNHA].

77. *Id.*

78. 8 C.F.R. § 214.1(l)(3).

79. Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398, 82,438 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

80. *Id.*

81. *Id.*

to the remaining period of status.⁸² It is unclear what circumstances would lead USCIS to eliminate or shorten the grace period and at what point this decision would become known.

Furthermore, the foreign national is eligible for recourse of the grace period only once for each period of authorized stay.⁸³ But conversely, if he or she receives multiple periods of status, he or she can qualify on multiple occasions for the grace period.⁸⁴ Consider the situation in which an H-1B worker is in the first period of H-1B status, at which time he or she ceases employment at the H-1B employer. The foreign national qualifies for the 60-day grace period if the H-1B worker has at least sixty days of current status remaining. The foreign national is then hired by another employer that successfully qualifies the alien for an additional period of H-1B status—or, for that matter, for status under the enumerated nonimmigrant classifications appearing in the Rule. If the employment with the new employer ceases, the foreign national would then be entitled to another full grace period because he or she qualifies for a new authorized period of employment. Given the backlog in the immigrant visa quota lines lengthening the time required to attain permanent residence and the concurrent need to maintain nonimmigrant status until an immigrant visa number becomes available, this flexibility in preserving status independent of the sponsoring employment provides some measure of stability to the individual in the event of changed employment circumstances.

The invocation of the nonimmigrant grace period provisions carries the following rights and responsibilities:

- (1) The alien needs to be maintaining valid status in one of the following nonimmigrant classifications: H-1B, H-1B1, E-1, E-2, E-3, L-1, O-1, or TN.⁸⁵
- (2) The alien does not possess work authorization during the grace period.⁸⁶
- (3) However, the grace period is considered to be valid nonimmigrant status (albeit without work authorization) for the purposes of eligibility for extension or change of status.⁸⁷

82. *Id.*

83. *Id.*

84. *Id.*

85. 8 C.F.R. § 214.2(l)(2).

86. *Id.*

87. 8 C.F.R. § 214.1(l)(3).

- (4) Of significant benefit is that a qualifying alien can port to a new employer upon the timely submission of an H-1B extension for an alien already maintaining H-1B status. As such, while an H-1B nonimmigrant cannot work during the initial grace period, once a new petition has been filed, the alien can then recommence employment upon the submission of the new H-1B extension rather than having to await its approval.⁸⁸
- (5) Further to this point, a qualifying H-1B nonimmigrant can repeatedly port, provided that the interim H-1B petition(s) are approved or the alien's previous period of H-1B status remains valid.⁸⁹
- (6) In addition to the term of the grace period, the alien retains eligibility for a 10-day add-on period of non-employment authorized status at the end of the authorized period of stay.⁹⁰
- (7) The additional 10-day period of status has been expanded to cover not only H-1B and L-1 status, but also E-1, E-2, E-3, and TN status.⁹¹

B. Employment Authorization Document Reforms

The ability to work in the U.S. through the issuance of an Employment Authorization Document (EAD) is desperately important to foreign nationals building a life in U.S. For decades, a USCIS regulation required adjudication of the EAD applications within ninety days of receipt.⁹² The High-Skilled Worker Rule eliminated this 90-day regulatory period, increasing processing times for decisions and the stress of applicants waiting for work authorization.⁹³ The Rule also eliminated the regulatory requirement of issuing interim EADs if the application is not adjudicated within the 90-day period (though in practice, the interim EAD had not been issued for years).⁹⁴

88. 8 C.F.R. § 214.2(h)(2)(i)(H) (2017).

89. *Id.*

90. 8 C.F.R. § 214.1(l)(1).

91. *Id.*

92. 8 C.F.R. § 274a.13(d) (2011).

93. *Compare* 8 C.F.R. § 274a.13(d) (2017), *with* 8 C.F.R. § 274a.13(d) (2011) (reflecting the U.S. Citizenship and Immigration Services' change from ninety days to 180 days).

94. 8 C.F.R. § 274a.13(d) (2017).

The basis for the removal of the 90-day regulatory period stemmed from the mistaken belief “that such scenarios will be rare and mitigated by the new 180-day automatic extension provision.”⁹⁵ But contrary to the prediction appearing in the Rule, the processing period for first-time EAD applications has only lengthened. Indeed, current processing times at the Service Centers range from three to over six months for first-time EAD employment based applicants.⁹⁶ While the processing time report still indicates that inquiries can be made to USCIS after the case has been pending for seventy-five days, responses from the Service Centers inevitably state that the case is still within processing times, and the applicant will have to wait sixty days for a response.⁹⁷ As such, the elimination of the 90-day regulatory processing rule is a detriment to immigrants trying to legally work in the U.S.

There is a significant benefit to the new Rule, however, which is the new automatic 180-day extension upon the timely filing of an EAD extension for certain categories.⁹⁸ While this automatic extension provision does not benefit first-time EAD applications (which generally require possession of an EAD to commence employment), the provision provides a great deal of stability in EAD renewal cases. This new 180-day automatic extension provides for a change to the I-9 receipt rule to allow the submission of the I-797 receipt⁹⁹ for continued work authorization for 180 days.¹⁰⁰ Once an EAD is timely filed, the applicant is granted an additional 180 days of work eligibility while the EAD is pending.¹⁰¹ This is a positive result, as in the past a late filing or delayed adjudication could mean the applicant would have to stop working, risking the loss of a job or cessation of employment. The automatic 180-day extension

95. Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398, 82,407 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

96. *Id.*

97. *Id.*

98. 8 C.F.R. § 274a.13(d)(1). See eligibility codes A03, A05, A07, A08, A10, C08, C09, C10, C16, C20, C22, C24, C31 and A12 or C19. *Id.*

99. The I-797C receipt is confirmation that the I-765 Application for Employment Authorization was received by USCIS and is being processed. *Form I-797: Types and Functions*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/i-797-info> [<https://perma.cc/TNZ4-JWD4>] (last updated Feb. 23, 2016).

100. 8 C.F.R. § 274a.13(d)(4).

101. *Id.* 8 C.F.R. § 274a.13(d)(1).

provision does not apply to EAD applications filed with the adjudication of a benefit (for example H-4 EADs or L-2 EADs).¹⁰² For adjustment applicants who now may face well over one year for adjudication of their I-485 adjustment of status petition, the automatic 180-day extension of their EAD after receipt is a much needed benefit. Furthermore, EAD extensions can now be filed 180 days prior to expiration, allowing six months of lead time before an EAD becomes invalid.¹⁰³

One novel change to the EAD regulations is the new provision regarding the Compelling Circumstances EAD (CCEAD).¹⁰⁴ Prior to the High-Skilled Worker Rule, there was limited discretion to provide for employment authorization in exigent circumstances that could cause a worker to fall out of status when dealing with personal emergencies or humanitarian factors. To address this, the CCEAD was created, which allows an individual who is the principal beneficiary of an approved employment-based immigrant visa petition (EB-1, EB-2 or EB-3) to receive a one-year EAD if the individual is in E3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status.¹⁰⁵ Further, an immigrant visa is not authorized for issuance to the principal beneficiary based on the priority date, but rather USCIS determines, as a matter of discretion, whether the principal beneficiary demonstrates compelling circumstances that justify the issuance of employment authorization.¹⁰⁶ Importantly, after satisfying these factors, the eligibility for a one-year EAD also extends to the spouse and children of the principal beneficiary if they are in nonimmigrant status when the principal applies.¹⁰⁷ Their EADs are only approved if the principal beneficiary's is approved and is limited to the same duration as the principal.¹⁰⁸ Renewals of EADs are possible if the compelling circumstances continue and the backlog in priority date remains.¹⁰⁹ However, if the priority date of the immigrant visa is one year or less under the visa bulletin (Final

102. *Id.*

103. *Id.*

104. 8 C.F.R. § 204.5(p) (2017); 8 C.F.R. § 274a.12(c) (35)–(36) (2017).

105. *Employment Authorization in Compelling Circumstances*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (2017), <https://www.uscis.gov/working-united-states/employment-authorization-compelling-circumstances> [<https://perma.cc/86T5-S6YH>].

106. 8 C.F.R. § 204.5(p) (2017).

107. *Id.* § 204.5(p) (2).

108. *Id.*

109. *Id.* § 204.5(p) (3) (i).

Action Date) when applying for the EAD renewal, compelling circumstances for the renewal do not have to be shown.¹¹⁰ EADs will be denied if the applicant is convicted of any felony or two or more misdemeanors.¹¹¹ Moreover, nonimmigrants with approved I-140s in F or M student status, E-1/2, H-2, H-3, J, Q, P, R, or TN are not eligible for this benefit.¹¹²

The CCEAD could help current workers (and family members) who are already in lawful nonimmigrant status and are in the process of obtaining lawful permanent residence, but cannot (due to the long priority date backlog) work through a difficult circumstance that prevents them from maintaining nonimmigrant status. The CCEAD was created as a “stop-gap measure,” not a long-term solution, to the extensive backlogs in priority dates for certain nationals.¹¹³ Once the CCEAD is used, the applicant is no longer in valid nonimmigrant status.¹¹⁴ Ironically, while one stated purpose of the CCEAD is to allow foreign nationals who are contributing to the US economy to continue in legal status, the loss of nonimmigrant status statutorily prevents them from adjusting status.¹¹⁵ But the CCEAD does allow for work authorization and should not be considered unlawful presence.¹¹⁶

USCIS states that it will issue policy guidance to confirm that holders of CCEADs are considered to be in a period of stay authorized by the Attorney General, but to date, no such policy has been issued.¹¹⁷ This means that while the workers and their families may remain in the U.S. and continue working, the workers need to obtain an immigrant visa stamp from the U.S. consulate abroad when the priority date is current, and cannot adjust status in the U.S. Once beneficiaries begin working on the CCEAD, they will no longer be considered maintaining nonimmigrant status.¹¹⁸ Should the principal beneficiary be able to secure a nonimmigrant visa and the family-dependent nonimmigrant visas and reenter, he or she could

110. *Id.* § 204.5(p)(3)(i)(B).

111. *Id.* § 204.5(p)(5).

112. *Id.* § 204.5(p)(1).

113. Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398, 82,424 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

114. Retention of EB-1, 81 Fed. Reg. at 82,425.

115. INA § 245(c)(2); 8 U.S.C. § 1255 (2017).

116. Retention of EB-1, 81 Fed. Reg. at 82,425.

117. *Id.*

118. *Id.*

then meet the requirements of INA § 245(c)(2) and then file for adjustment of status.¹¹⁹ It is this lack-of-status issue that makes the CCEAD merely a stop-gap measure and not a long-term solution.

USCIS has preserved its flexibility and discretionary authority as to what qualifies as a “compelling circumstance” by providing neither a definition nor an exhaustive list.¹²⁰ USCIS has provided guidance, however, that includes illustrations of the type of circumstances that may justify the granting of an EAD.¹²¹ Examples of qualifying circumstances include serious illness or disabilities, employer dispute or retaliation, other substantial harm to the applicant, and significant disruption to the employer.¹²² In totality, USCIS wants to see concrete evidence that the compelling circumstances were outside the applicant’s control and that harm will befall the individual, her family, or her employer.¹²³ The rules clarify that beneficiaries of approved I-140 National Interest Waivers (NIW) and physicians working in medically underserved areas “are eligible to apply for compelling circumstances, as long as they meet all other applicable requirements.”¹²⁴

Those seeking the CCEAD may include foreign workers who are subject to the visa backlogs and who have been prevented from maintaining nonimmigrant status in the normal course due to unfortunate circumstances. This could include foreign workers required to leave their employment to move across the country for medical treatment for a child. This could also include a foreign worker forced to quit due to sexual harassment at work. The appropriateness of requesting the CCEAD is determined on a case-by-case basis, and there is no right to appeal a denied EAD application.¹²⁵

One serious limitation to the framework of the CCEAD is the assumption that the foreign worker will be able get a green card abroad and remain on the path toward permanent residence. This would not hold true for all CCEAD eligible applicants. For example, an EB-3 India applicant would need these compelling circumstances to last for twenty-five years or more before the priority date would

119. *Id.* at 82,425–82,426.

120. Retention of EB-1, 81 Fed. Reg. at 82,428–30.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. 8 C.F.R. § 274a.13(c) (2017).

become available under current visa bulletin backlogs.¹²⁶ Realistically, the foreign national would need to start the EB-2 or EB-3 process over by finding a new company and having a new I-140 approved.¹²⁷ If the compelling circumstances are not long-term, then the foreign national would need to secure and obtain a new visa abroad. Indeed, once the principal applicant's priority date has been current for over one year, CCEAD is no longer available.¹²⁸

In sum, the CCEAD buys time to find a new path towards lawful permanent residence and allows the foreign national and his or her family to continue working during this interim period based on compelling need. For a few cases, it may be just enough time if the foreign worker has a priority date within two years and has an approved self-petition allowing for consular processing without a bona fide job offer. This limited work eligibility may provide the emergency support needed and still allow for overseas consular green card processing. For most, however, it is a limited opportunity to sustain work and residence in the U.S. until a more secure nonimmigrant status is secured again. It is better than nothing, but it does not resolve the real issue at hand—the painful backlog for EB-2 and EB-3 applicants from India and China.¹²⁹

C. *Permanent Residence Provisions*

Passed in October 2000, AC21 is one attempt at addressing the backlogs that cause the need for so much new rulemaking.¹³⁰ In sum, backlogs for green card visa applications—which can be more than thirty years for Indian employees and up to eight years for Chinese employees—are creating a subclass of workers, who, in order to maintain residence in the U.S., are directly tied not only to their employers, but also to their specific occupational classifications. This has caused tremendous harm to these workers and the industries in

126. Bureau of Consular Affairs, *Visa Bulletin for April 2018*, U.S. DEP'T OF ST., <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html> [https://perma.cc/3UQ3-WFMS] (last visited June 20, 2018).

127. 8 C.F.R. § 205.1(a)(3)(iii)(C)–(D) (2017); 8 C.F.R. § 245.25(a)(2) (2017).

128. 8 C.F.R. § 204.5(p)(3)(i)(B) (2017).

129. *See* Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

130. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251. *See generally* Pub. L. No. 106-311, 114 Stat. 1247 (2000); 146 CONG. REC. H9004–06 (daily ed. Oct. 5, 2000).

which they work. Many of these workers have children who have spent most of their lives in the U.S. in dependent status awaiting a green card, only to turn twenty-one and lose that option. Others, by taking a career advancement opportunity or promotion from their own employer or changing to a new company, risk having to start the entire green card process over again. Many risk having to leave the country if they lose their job, saying good-bye to everything they have built and established in the U.S. In response to what seemed quite unfair, no doubt, Congress passed AC21 to provide for greater flexibility in job transitions while pursuing a green card.¹³¹ Despite this increased flexibility, AC21 did not fix the backlog issue. For example, AC21 failed to increase employment-based immigrant numbers or to change its scheme to exclude dependents in the overall allotment each year.¹³²

To provide continued work eligibility and design a framework for priority date retention during the backlog, USCIS issued a series of policy memoranda to interpret AC21. The High-Skilled Worker Rule codified much of these interpretations. The most important codifications concerning employment-based permanent residence include priority date retention, changes to automatic revocation, and INA § 204(j) portability.¹³³

The Rule states that priority dates are secured upon the proper filing of a labor certification, or, for an employment-based immigrant visa petition that does not require a labor certification, upon the date the completed and signed petition is properly filed with DHS.¹³⁴ Prior to the Rule, the regulations only addressed priority dates established by labor certification filings.¹³⁵ Moreover, the new regulations provide that the priority date for EB-1, EB-2, or

131. See Enid Trucios-Haynes, *Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 40 BRANDEIS L.J. 967, 1014 n.197 (2002) (“Some specific measures to be considered by the House Subcomm. on Immigration and Claims included . . . the portability of H-1B visas so that workers can easily change jobs which would make employees less dependent and make the labor market more competitive . . .”).

132. See Mauhan M. Zonoozy, *America’s Stutter Towards H-1B Immigration Reform in America*, 26 GEO. IMMIGR. L.J. 655, 657 (2012) (noting that the AC21 raised the H-1B visa cap from 130,000 to 195,000).

133. Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

134. 8 C.F.R. § 204.5(d) (2017).

135. 20 C.F.R. § 656.17(c) (2017); 8 C.F.R. § 204.5(d) (2017).

EB-3 petitions may be used for subsequently filed EB-1, EB-2, or EB-3 petitions.¹³⁶ The same date may also be used for purposes of 204(j) portability, unless USCIS denies the initial petition or revokes the petition's approval due to fraud, willful misrepresentation of a material fact, a determination that the petition was granted based upon a material error, or if the labor certification used in the EB petition was revoked or invalidated.¹³⁷

Further changes involve what is known as "automatic revocation." Prior to the High-Skilled Worker Rule, the petitioner of the I-140 could revoke the petition at any time for any reason, leaving the beneficiary without the benefit of I-140 portability and priority date retention.¹³⁸ Until USCIS's 2017 policy memorandum, which instructs the agency to provide notice of an I-140 revocation to a beneficiary who has filed Form I-485(j),¹³⁹ the foreign worker would not even know if his or her employer had revoked the I-140. The revocation would have serious consequences to the beneficiary, who could lose the ability to extend the H-1B beyond the sixth year.

To benefit the foreign worker, the Rule provides that if the I-140 has been approved for 180 days or more (or if the I-485 application has been pending 180 days or more), the I-140 will not be automatically revoked based only on withdrawal by the petitioner or termination of its business. Instead, provided that the revocation was not based upon fraud, material misrepresentation, invalidation or revocation of a labor certification, or material USCIS error, USCIS will treat the approved I-140 as valid for certain purposes, including: (1) retention of priority date; (2) job portability under INA § 204(j); and (3) extensions of status under AC21 §§ 104(c), 106(a), and 106(b).¹⁴⁰ This means that, if the petitioner revokes the I-140 within the first six months of approval, the beneficiary loses all corresponding AC21 benefits.

However, if the I-140 is affirmatively revoked by the employer after 180 days, the beneficiary may still maintain the priority date for

136. 8 C.F.R. § 204.5(e)(1) (2017).

137. 8 C.F.R. § 204.5(e) (2016).

138. 8 C.F.R. § 103.3(a)(1)(iii)(B) (2011).

139. *Guidance on Notice to, and Standing for, AC21 Beneficiaries About I-140 Approvals Being Revoked After Matter of V-S-G- Inc.*, U.S. CITIZENSHIP & IMMIGRATION SERV.'S (Nov. 11, 2017), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-11-PM-602-0152-Guidance-Beneficiary-Standing-Matter-of-V-S-G.pdf> [<https://perma.cc/FN82-EC7T>].

140. 8 C.F.R. § 205.1(a)(3)(iii)(C)-(D) (2016).

a subsequent I-140 petition, retain portability under INA § 204(j) (that is, find another position in the same or similar occupation if the I-485 has been pending for 180 days), and extend the H-1B beyond the sixth year.¹⁴¹ This amendment, combined with the new notice provision, allows I-140 beneficiaries with pending I-485s to have greater knowledge of their immigration files and their ability to maintain nonimmigrant status while waiting for approval of their adjustment status. As the 180 days runs from I-140 approval, it may benefit the foreign worker to file for premium processing of the I-140 when allowed, especially when filing for adjustment of status is not possible due to priority dates.

It is extremely important for foreign workers to have the ability to change employers or change jobs and not lose their place in line for a green card. INA § 204(j) states that an individual whose application for adjustment of status under INA § 245 “has been filed and remains unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or similar occupational classification as the job for which the petition was filed.”¹⁴²

Finally, after sixteen years, regulations have created a new form (Supplement J to Form I-485) to provide the notice of portability to USCIS.¹⁴³ The regulations have clarified that a bona fide offer of employment is required at the time the adjustment is filed and adjudicated.¹⁴⁴ The beneficiary must also intend to accept the offer of employment.¹⁴⁵ Moreover, the offer of employment must be in the same or similar occupational classification as the employment offer listed in the original qualifying petition.¹⁴⁶ The form itself is signed by both the current employer and the employee.¹⁴⁷ By signing the form, the employee attests to the job offer, job duties, salary, worksite

141. *See id.*

142. INA § 204(j), 8 U.S.C. § 1154 (2012).

143. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., *I-485 Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j)*, <https://www.uscis.gov/i-485supj> [<https://perma.cc/94EV-AQBA>] (last updated Jan. 3, 2018).

144. *Id.*

145. 8 C.F.R. § 245.25(a) (2017).

146. *Id.* § 245.25(a) (2).

147. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., *I-485 Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j)*, <https://www.uscis.gov/i-485supj> [<https://perma.cc/94EV-AQBA>] (last updated Jan. 3, 2018).

location, type of business, year established, number of employees, gross and net income, full time or part time, and when the position began.¹⁴⁸ Whether filed concurrently with an I-485 petition or on its own, USCIS generates a receipt notice to confirm its delivery.¹⁴⁹ The form is not required for I-140 petitions that do not require a job offer from employers, including EB-1 extraordinary ability petitions and EB-2 NIW petitions.¹⁵⁰

Importantly, USCIS will not review a portability request under INA § 204(j) unless the I-140 is approved.¹⁵¹ In instances where both the I-140 and I-485 are pending over 180 days, USCIS will “assess a petitioner’s ability to pay as of the date the Form I-140 petition was filed and all other issues as of the date on which the application for adjustment of status was pending 180 days, regardless of the date on which the petition is actually adjudicated.”¹⁵² This means the original employer needs to establish the ability to pay at the time of filing.¹⁵³ USCIS will then review the I-140 petition under the preponderance of the evidence standard to determine whether the I-140 is approvable or would have been approvable had it been adjudicated before the I-485 was pending 180 days.¹⁵⁴

When evaluating portability under INA § 204(j) to see if the new job offer is within the “same or similar occupation,” USCIS will evaluate all relevant evidence provided. The types of relevant evidence can include, but are not limited to, a description of the job duties, description of skills needed to perform the job, experience and education requirements, wages offered, and Standard Occupational Classification (SOC) code.¹⁵⁵ Recently, the 797 I-140 approval notices based upon labor certification now list the SOC code directly on the notice. I-140 approvals that do not require labor certification, but do require a job offer, list the occupational field on the approval notice. USCIS notes it will continue to rely on prior

148. *Id.*

149. *Id.*

150. *Id.*

151. 8 C.F.R. § 245.25(a)(2)(ii)(A)–(B) (2017).

152. Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398, 82,420 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

153. 8 C.F.R. § 245.25(a)(2)(ii)(B)(1).

154. Retention of EB-1, 81 Fed. Reg. at 82,420.

155. *Id.* at 82,421.

policy guidance to define “same or similar” for occupational classifications.¹⁵⁶

The use of the Supplemental J form provides some uniformity in making INA § 204(j) portability requests. Usage of the Supplemental J form ensures that it will get matched up with the pending I-485 petition, and both the employer and employee have the ability to include information with the form. Significantly, the Supplemental J form is not required if the I-485 petition is filed concurrently with the I-140 petition.¹⁵⁷ However, a subsequent job change after a 180-day period would require a Supplemental J filing to establish portability qualifications under INA § 204(j).¹⁵⁸ Oddly, if the I-140 is approved and the I-485 is filed even one day later, the Supplemental J form would then be required, even when portability is not being requested.

D. Miscellaneous Nonimmigrant Provisions

While the main clarifications to nonimmigrant visa status are discussed above, the High-Skilled Worker Rule addresses and clarifies a number of other provisions, including:

- (1) The approvability of an H-1B petition requires, in part, establishing that the alien is fully authorized to work in the subject position. In many regulated professions, this would require that the H-1B beneficiary possess a license issued by the state in which the services are to be performed. Yet, many jurisdictions refrain from issuing a license because of technical reasons, including the lack of H-1B status or the absence of a social security number. The Rule provides increased flexibility to issue H-1B status for up to one year upon a showing that the failure to possess a license is due to a technical requirement and that the foreign national is, in substance, fully eligible for the license.¹⁵⁹

156. U.S. Citizenship and Immigration Servs., Policy Memorandum, Determining Whether a New Job is in the ‘the Same or a Similar Occupational Classification’ for Purposes of Section 204(j) Job Portability (Mar. 18, 2016).

157. U.S. CITIZENSHIP AND IMMIGRATION SERVS., *I-485 Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j)*, <https://www.uscis.gov/i-485supj> [<https://perma.cc/94EV-AQBA>] (last updated Jan. 3, 2018).

158. 8 C.F.R. § 245.25(a).

159. 8 C.F.R. § 214.2(h)(4)(v)(C)(ii).

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- (2) In concurrent H-1B employment situations where the alien gains H-1B cap exemption leveraged off of employment at a cap exempt entity, the Rule not only states that a cessation of employment in the cap exempt position will render future H-1B extensions subject to the H-1B cap, but grants USCIS enhanced flexibility to revoke an otherwise cap-subject petition given that the underlying grounds for the exemption have been removed.¹⁶⁰
 - (3) The Rule reiterates the grounds and the method of calculation for extensions beyond the normal six-year limit of H-1B eligibility for qualifying cases for permanent residence facing backlogs in the immigrant visa quota lines and/or lengthy case adjudication. The Rule affirms that periods of appeal (PERM or I-140) will be recognized for purposes of H-1B extension given that there has been no final decision on the PERM or I-140 during the appeal process.¹⁶¹
 - (4) For purposes of calculating the periods of H-1B status, the Rule stipulates that periods of recapture require the physical absence from the U.S. for a full 24-hour day, regardless of whether such times of absence meaningfully interrupts the alien's stay in H-1B status.¹⁶²
 - (5) The Rule stipulates that an H-1B extension may be filed up to six months prior to the expiration of status and that the requested period of extension can include the full period of H-1B extension over and above the six-year limit that would exist upon adding in the recaptured period of time.¹⁶³
 - (6) The Rule recognizes the exemption from the worker retaining fee schedule established in ACWIA under the same terms and conditions established for the H-1B cap exemption provisions for related and affiliated nonprofit entities, government research organizations having "primary mission" of basic and/or applied research, primary or secondary educational institutions, and/or nonprofit entities that engage in an established curriculum-related clinical training for students.¹⁶⁴

160. *Id.* § 214.2(h)(8)(ii)(F)(6)(ii).

161. *Id.* § 214.2(h)(13)(iii)(D)(3).

162. *Id.* § 214.2(h)(13)(iii)(C).

163. *Id.* § 214.2(h)(13)(iii)(D)(5).

164. *Id.* § 214.2(h)(19)(iii)(C).

IV. WHERE THE HIGH-SKILLED WORKER RULE FALLS SHORT

The Rule, issued nearly sixteen years after AC21, provides an easier path for H-1B workers and their families to secure status in the U.S.¹⁶⁵ It creates a complex path of greater security for foreign nationals who are subject to increasingly lengthy processing times to obtain permanent residence.¹⁶⁶ The Rule focuses on allowing workers to change jobs, work longer than six years, keep their place in the immigration preference line, and continue working in the event of emergencies.¹⁶⁷ It provides an H-1B cap exemption definition to aid certain segments of U.S. employers, but makes it more difficult to work at otherwise qualifying institutions or maintain concurrent H-1B employment.¹⁶⁸ It also eliminates any cap exempt grandfathering, and helps employers applying for H-1B extensions for current workers or new hires.¹⁶⁹

But the Rule fails to solve the long-term problems facing temporary workers and their employers. For example, the limited number of H-1Bs continues—by statute—to be only 65,000, shutting out nearly one-third of employers attempting to hire high-skilled workers.¹⁷⁰ It does not eliminate the extensive and unjust preference wait times, where by virtue of location of birth, a green card could be attained as quickly as one year or as long as thirty.¹⁷¹ The Rule creates further uncertainty for workers who use the CCEAD, leaving them without a proper path to continue to pursue permanent residence. It does little to end the H-1B lottery or provide more

165. See generally Shane Dizon & Nadine K. Wettstein, *Validity of Approved Petitions—Change of Employer After Adjustment Application Filed*, 2 IMMIGRATION L. SERV. 2D § 8:182 (2017) (offering background information about aliens who have applied for adjustment of status).

166. *Id.*

167. See Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398, 82,400, 82,410 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

168. See *id.* at 82,400.

169. See *id.* at 82,410.

170. See *H1B Visa Cap Reach Dates History 2000 to 2018 – Graph – USCIS Data*, REDBUS2US (June 19, 2017), <https://redbus2us.com/h1b-visa-cap-reach-dates-history-graphs-uscis-data/> [<https://perma.cc/F2J3-CB82>].

171. See Bureau of Consular Affairs, *supra* note 126; see also *Green Card Waiting Times Projections – EB2 and EB3 Categories for India*, ILW.COM, <https://www.ilw.com/govttimes/GreenCardTrackerIndia.shtm> [<https://perma.cc/6FPH-Z8BD>] (last visited June 20, 2018).

certainty in the H-1B process. It creates additional paperwork and complexity in the INA § 204(j) process, requiring filings of new 485(j) petitions with every job change that could potentially go on for decades before final approval.¹⁷² It fails to maintain a 90-day deadline for EAD adjudication, allowing USCIS to drag on its processing times to the detriment of immigrants on the path to permanent residence.¹⁷³

The Rule was a long time coming, but it is not groundbreaking by any means. The Rule essentially follows USCIS policies set forth by memoranda for over a decade, with some minor concessions related to the policy behind AC21 to allow for an easier path to permanent residence for high-skilled workers.

V. CONCLUSION: WHAT'S NEXT?

Immigration law and policy have never expressed a unitary narrative on the role of foreign nationals in the U.S. There have been, and probably always will be, disagreements on the extent to which foreign nationals contribute to the economic advancement and national betterment of the U.S. versus the threat that they pose to job stability and job opportunities for U.S. workers. The High-Skilled Worker Rule and the statutes it implements reflect, in many ways, an underlying policy determination that foreign nationals with employment-based immigration visas are desired economic contributors, who should be granted greater protections to enhance their welfare. To this end, the Rule provides liberalizing initiatives areas, such as the H-1B cap exemption standards, the grace periods following cessation of employment, both H-1B and adjustment of status portability, H-1B extensions beyond the normal six-year limit, and expanded provisions for employment authorization. In essence, these measures reflect a more nuanced response to the fluidities in the marketplace and a determination to accommodate changed employment situations that may occur during the immigration process.

The current narrative emerging under the general rubric of “Buy American, Hire American”¹⁷⁴ suggests a much different attitude

172. See Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398, 82,419 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

173. See *id.* at 82,463.

174. Exec. Order No. 13,788, 82 Fed. Reg. 13,788 (Apr. 18, 2017).

toward the role and contributions of foreign nationals. Rather than seeing foreign nationals as contributors to economic growth and catalysts to job creation, the current approach sees foreign nationals—particularly H-1B workers—as taking jobs away from their U.S. counterparts while also undercutting the wages and working conditions of American workers.¹⁷⁵

Unquestionably, the High-Skilled Worker Rule creates a certain binding construct governing USCIS adjudications and provides certain stabilities to foreign nationals who are developing their lives and careers in the U.S. But there is a broad range of adjudicatory issues existing outside of the specific directives in the Rule that regulate the presence and scope of activities of foreign nationals holding employment-based status. In the H-1B space, USCIS issued challenges to the sufficiency of the proffered wage—particularly for entry-level positions—and has taken constrictive positions on recognizing positions as “specialty occupations.”¹⁷⁶ For example, in employment-based cases for permanent residence, USCIS recurrently challenges prevailing wage determinations and has also adopted an increasingly restrictive attitude in exercising discretion in case adjudications.¹⁷⁷ There have been repeated reports that the Trump Administration will seek to enact wholesale immigration reforms that will impose substantially new wage and recruitment obligations on U.S. employers seeking to recruit foreign workers.¹⁷⁸

What emerges is a dueling narrative between the promotive provisions of the High-Skilled Worker Rule, the statutes it implements, and the emerging doctrine that verges on creating a Manichean duality between U.S. and foreign national workers. The High-Skilled Worker Rule creates liberalizing provisions governing USCIS adjudications of certain employment-based immigration

175. See Bill Whitaker, *Are U.S. Jobs Vulnerable to Workers with H-1B Visas?* CBS NEWS: 60 MINUTES (Aug. 13, 2017), <https://www.cbsnews.com/news/are-u-s-jobs-vulnerable-to-workers-with-h-1b-visas-2/> [https://perma.cc/3BNB-AMDL]; Michael D. Shear, *Planned Trump Order Will Discourage Hiring of Low-Wage Foreign Workers*, N.Y. TIMES (Apr. 18, 2017), <https://www.nytimes.com/2017/04/18/us/politics/trump-executive-order-h1b-visas-technology-workers.html> [https://perma.cc/2QWW-R4DC].

176. See Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82,398, 82,401 (Nov. 18, 2016) (to be codified at 8 C.F.R. pts. 204, 205, 214, 245 and 247(a)).

177. 8 C.F.R. § 103.3(a)(1)(iii)(B) (2011).

178. RAISE Act, S. 354, 115th Cong. (2017).

benefits, but its impact on defining an attitude toward immigration policy in light of the current narrative is open to question.

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