AMERICAN IMMIGRATION LAWYERS ASSOCIATION

November 10, 2016

U.S. Department of Homeland Security
245 Murray Lane
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Washington, DC 20528-0485

Submitted via www.regulations.gov

Re: DHS Retrospective Review of Existing Regulations
81 Fed. Reg. 70060 (Oct. 11, 2016)
Docket No.: DHS–2016–0072

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the request for information on the Department of Homeland Security's (DHS) retrospective review of existing regulations pursuant to Executive Order 13563, "Improving Regulation and Regulatory Review," issued by the President on January 18, 2011.

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the regulatory review and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

Regulations that Should Be Modified, Streamlined, Expanded, or Repealed

Though DHS regulations encompass a number of Titles in the CFR, our focus is on the regulations pertaining to U.S. immigration law, policy, and procedure, contained in Title 8. The list of regulations that we have identified herein is not exhaustive.

Part 103—Powers and Duties; Availability of Records

- **8 CFR §103.2(b)(8): Request for Evidence; Notice of Intent to Deny.** The regulation should be amended to eliminate summary denial of petitions and applications for immigration benefits without first issuing a request for evidence (RFE) or a notice of intent to deny (NOID). In addition, the regulation should clarify when issuance of a

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NOID, as opposed to an RFE, is warranted. The regulation should require supervisory review of an adjudicator's decision to issue an RFE or NOID before it is served on the petitioner/applicant and attorney of record.

- **8 CFR §103.3 (and §1103.3): Denials and Appeals—Formal Process for Contributions of Amici at the Administrative Appeals Office (AAO).** As stated in the AAO Practice Manual, "An amicus curiae brief that has not been solicited by the AAO must be submitted by the appellant."[1] The regulations should be amended to provide for a formal process for the submission of amicus briefs to the AAO and for notice to the public where the AAO is requesting input from amici on specific cases and/or legal issues.[2]

Part 204—Immigrant Petitions

- **8 CFR Part 204, Immigrant Petitions; 8 CFR Part 214, Nonimmigrant Classes—Standard of Proof.** As stated in the USCIS Policy Manual Volume 2 Chapter 3 (D), "[t]he standard of proof applied in most administrative immigration proceedings is the 'preponderance of the evidence' standard." A preponderance of the evidence is evidence that the applicant or petitioner is "more likely than not" eligible for the benefit sought. *See Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). The regulations should be amended to clearly designate "preponderance of the evidence" as the standard of proof in most immigrant and nonimmigrant petition adjudications. These regulations should improve the quality and fairness in adjudications by enforcing the application of the appropriate standard of proof to the totality of the evidence.

- **8 CFR §204.2: Self-Petition by Spouse of Abusive Citizen or Lawful Permanent Resident.** I-360 petitions for spouses abused or subject to extreme cruelty are filed and adjudicated at the Vermont Service Center (VSC). The VSC unit is specially trained in issues relating to domestic violence. Once the I-360 is approved, the adjustment of status must be adjudicated and will generally require an interview at a local USCIS office. The regulations should be amended to specifically prohibit field officers from readjudicating the underlying I-360 petition. The regulations should state that the officer may not question the applicant or look behind an I-360 approval on the bona fides or validity of the marriage or details of the abuse.

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[1] *See* AAO Practice Manual, Chapter 3: Appeals, Part (e) Amicus Curiae, pg. 22, *available at* https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/practice-manual/aao-practice-manual-table-contents.

[2] *See, e.g.* AILA/AIC Amicus Brief on Notice to Employment-Based Beneficiaries Seeking Adjustment of Status, May 21, 2015, AILA Doc. No. 15052807, *available at* http://www.aila.org/infonet/amicus-brief-with-aao-to-receive-notice-under-ac21.

- **8 CFR §204.2: Surviving Relatives**. These regulations should be updated to incorporate the provisions of newly enacted INA §204(l). A patchwork of memoranda, teleconference notes, and stakeholder Q&As has been created since enactment of this section of the law. The public, including legal counsel, have not been as well-served by this compilation of informal guidance as it would if regulations were promulgated. Full notice and comment is required due to the significant public impact and interest in these provisions, and the fact that the agency's interpretation is at odds with the views expressed by commenters in response to the informal memorandum.

- **8 CFR §204.5(k)(2): Aliens Who are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability.** The regulations state that "[p]rofession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." USCIS should amend this regulation to acknowledge that any occupation which appears on the DOL list of occupations requiring "professional" recruitment qualifies as a professional occupation. This would eliminate uncertainty and inconsistency in adjudications.

- **8 CFR §204.5(k)(4)(i): Aliens Who are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability.** This regulation provides, "The job offer portion of the individual labor certification … must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability." However, INA §203(b)(2)(A) allocates employment-based second preference visas to "members of the professions holding advanced degrees or their equivalent …." Therefore, if the job offered is a "professional" position, and if the alien has an advanced degree, the alien should qualify for the second-preference employment-based classification whether the labor certification requires an advanced degree or not. The regulation should be amended to foster the intent of the statute (encouraging the immigration of highly educated professionals) and eliminate purely technical and *ultra vires* requirements.

- **8 CFR §204.12(c)(1): National Interest Waivers for Certain Physicians.** The regulation should define "required period of clinical medical service," as appearing in 8 CFR §204.12(c)(1) to mean the balance of the five years not already worked at the time of filing the national interest waiver petition. Consistent with the statute, physicians should be required to present a contract for the balance of the five years and evidence of whatever time was previously worked toward the five-year commitment at the time of filing the petition.

Part 205—Revocation of Approval of Petitions

- **8 CFR §205.1: Revocation and Humanitarian Reinstatement**. These regulations should be updated to incorporate the provisions of newly enacted INA §204(l). Death of the qualifying relative, in and of itself, should no longer serve as good and sufficient cause to automatically revoke the approval of a petition. While it is necessary for a post-death evaluation of the beneficiary's U.S. residence and the affidavit of support requirements, this analysis can occur during the individual's adjustment of status or at the consular processing stage, as both consular officers and field office adjudicators are well-versed in these issues. Contrary to USCIS's position, as stated in teleconferences and in a response to a CIS Ombudsman recommendation, this evaluation need not be performed on an already approved petition. At the same time, the revocation and reaffirmation process leads to extreme delays of many months or years, and is a waste of government resources. The regulations should be amended accordingly.

Part 208—Procedures for Asylum and Withholding of Removal

- **8 CFR §208.21(c) and (d): Admission of the Asylee's Spouse and Children.** At present, the regulations require the asylee to file a separate I-730 petition for each qualifying family member within two years of the date that asylum status was granted, unless it is determined that the filing period "should be extended for humanitarian reasons." The regulation should be amended to eliminate the 2-year filing deadline or to create broader criteria for waiver of the deadline.

Part 212—Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole

- **8 CFR §212.7(c)(9): H-4 Nonimmigrant Status for J-2 Spouses of J-1 Waivered Physicians**. The regulation currently states that J-2 dependents of J-1 waivered physicians *may* change status to H-4 upon the issuance of a J-1 waiver approval. While the regulation does not require a change of status to H-4, USCIS in practice now prohibits the J-2 from changing status to anything other than H-4 until the J-1 waivered spouse has completed the J-1 clinical waiver commitment. This position finds no support in the statute or the legislative history of the clinical J-1 waiver program and has been criticized by former Senator Kent Conrad (the legislative author of the clinical J-1 waiver program), AILA, and most recently, the CIS Ombudsman. The regulation should be amended to clarify that the J-2 spouse may change status to H-4 ***or*** to any other nonimmigrant status for which he or she is otherwise eligible upon approval of the J-1 waiver application.

- **8 CFR §212.7(c)(9)(iii): H-1B Status for Foreign Medical Graduates Completing J-1 Waiver Commitments**. The regulation requires physicians who are completing a J-1 waiver commitment pursuant to INA §214(l) to do so in H-1B nonimmigrant status

only. While the enabling statute provides for H-1B cap exemption for physicians needing to complete a J-1 waiver clinical service commitment, it does not *require* the physician to complete the waiver commitment in H-1B status. Physicians should be free to complete the J-1 waiver commitment in any work-authorized status, including but not limited to, H-1B. This would also be consistent with language elsewhere in 8 CFR §212.7(c)(9) stating that a J-1 waivered physician *may* – not must – apply for a change of status to H-1B upon J-1 waiver approval. The regulation should be amended accordingly.

- **8 CFR §212.7(d): Criminal Grounds of Inadmissibility Involving Violent or Dangerous Crimes.** This provision was added in 2002 to require, in cases involving "violent or dangerous" crimes, a demonstration of exceptional and extremely unusual hardship in order to waive the criminal grounds of inadmissibility. Even where the applicant meets this high standard, the waiver can still be denied depending on the gravity of the offense. This rule arbitrarily limits the exercise of discretion by focusing solely on the nature of the crime involved rather than giving full consideration of all positive and negative factors in each case. The regulation should be rescinded.

Part 214—Nonimmigrant Classes

- **8 CFR §214.2 (Various Sections): Dual Intent.** INA §214(h) recognizes the concept of dual intent for H-1B, H-1C, L-1 and V nonimmigrants. The concept has been expanded to O nonimmigrants [8 CFR §214.2(o)(13)] and P nonimmigrants [8 CFR §214.2(p)(15)]. DHS should issue regulations further expanding dual intent to other nonimmigrant categories such as F, TN and E.

- **8 CFR §214.2(f)(10)(ii)(C): Optional Practical Training for STEM Graduates.** This provision allows for a 24-month extension of post-completion optional practical training (OPT) for students with a science, technology, engineering, or mathematics (STEM) degree. The regulation should be expanded to provide for OPT extensions for individuals with degrees in other fields, to persons working in Schedule A positions, or to all graduates with a U.S. bachelor's degree.

- **8 CFR §214.2(l)(5)(ii)(A): Blanket L Procedures.** The current regulations governing the blanket L visa process include requirements to produce documentation in triplicate. This appears to be an outdated requirement as DOS and/or CBP personnel seldom, if ever, retain their assigned copies. This appears to be a result of the increasingly automated, paperless immigration procedures.

- **8 CFR §214.2(l)(7)(i)(A)(3): Approval of New Office L Petition.** The regulation states, "If the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year …" Small business

development and entrepreneurship are the cornerstone of the American economy. One year is, quite simply, insufficient for most businesses to launch and establish themselves as viable, growing entities. We should encourage new business development by giving new office L nonimmigrants a real chance at getting the U.S. entity off the ground. This regulation should be amended to provide for an initial validity period of two years.

- **8 CFR §214.2(o)(2)(iv)(D); 8 CFR 214.2(o)(5)(ii)(A); 8 CFR 214.2(o)(5)(iii): Nonimmigrant Aliens of Extraordinary Ability or Achievement**. In 2004, USCIS confirmed that an "O-1 nonimmigrant may be admitted even if the work to be performed in the United States does not require a person of extraordinary ability or achievement." *See* USCIS Office of Business Liaison, Employer Information Bulletin 15, "Aliens with Extraordinary Ability (O-1) and Accompanying/Assisting Aliens (O-2)" (Dec. 8, 2004). In addition, the Adjudicator's Field Manual (AFM) ch. 33.4 states, "[i]n support of all O-1 petitions, the petitioner must establish that the beneficiary has met the standards or demonstrated that he or she possesses sustained national or international acclaim and recognition in his or her particular field and that the alien is coming to work in that field (but not necessarily that the particular duties to be performed require someone of such extraordinary ability.)" However, these three regulatory provisions still make reference to the fact that the assignment or event must require the services of an individual with extraordinary ability. Because there is no authoritative basis for this requirement, the regulations should be amended to remove this language.

- **8 CFR §214.2(o)(2)(iv)(E) and 8 CFR §214.2(p)(2)(iv)(E):** These regulations permit a United States agent to act as petitioner for "workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf." The regulations go on to describe only three of the many types of agency relationships: A U.S. agent *may* be (1) the actual employer of the beneficiary; (2) the representative of both the employer and the beneficiary; or (3) a person or entity authorized by the employer to act for or in place of the employer as its agent. The regulations then set forth "conditions" for O and P petitions filed by agents, which specific evidentiary requirements.

  Although use of the word "may," indicates that USCIS will consider other types of agency relationships, USCIS has recently interpreted these provisions more strictly to *require* one of the three described relationships. Moreover, the evidentiary conditions set forth in the regulations often do not apply to real-world agency relationships.

  To resolve this situation, 8 CFR §214.2 (o)(2)(iv)(E) and 8 CFR §214.2(p)(2)(iv)(E) should be amended to read:

Agents as petitioners. A United States agent may file a petition in cases involving workers who are traditionally self-employed, workers who use agents to arrange short-term employment on their behalf with numerous employers, or where a foreign employer authorizes the U.S. agent to act on its behalf. A petition filed by a U.S. agent must include:

(1) a contract or brief summary of the terms of the relationship between the agent and the beneficiary; and

(2) an itinerary stating the anticipated dates and locations of performances, engagements, or services.

(3) In the case of a foreign employer, the petition must also include:

(a) the contract or brief summary of terms of the relationship between the foreign employer and the U.S. agent; and

(b) a statement by the foreign employer stating that it is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274A.

Part 223—Reentry Permits and Refugee Travel Documents

- **8 CFR §223.2(b)(1): Reentry Permits—Eligibility.** The regulation requires the reentry permit application to be filed while the applicant is in the United States. However, the need to travel often arises suddenly, leaving limited time to file the necessary paperwork. The regulations allow for refugee travel documents to be applied for at certain overseas USCIS offices [8 CFR §223.2(b)(2)(ii)]. The regulation should be amended to permit overseas reentry permit applications.

- **8 CFR §223.2(d): Reentry Permits—Effect of Travel Before a Decision Is Made.** Although this regulation permits an individual to travel after filing the reentry permit application, there are practical difficulties with this regulation. Before proceeding abroad, reentry permit applicants must wait for a biometrics notice to be issued, and appear for an appointment at an ASC, a process which can take several weeks, even with an expedite request. This is unrealistic for people with medical or family emergencies, or for executives or other personnel who are transferred overseas by a multinational organization. Provision should be made for biometrics capture at a U.S. embassy or consulate, or for more immediate biometrics capture domestically upon filing.

- **8 CFR §223.3(a)(2): Refugee Travel Documents (RTDs)—Validity.** Currently, USCIS issues RTDs for asylees and refugees with validity dates of only one year. This short validity period interferes with asylees and refugees right to travel abroad for business and

personal reasons and generally disrupts their freedom of movement. While current processing times for these documents are reported at three months, processing times have been much longer in the past, forcing asylees and refugees to plan international travel far in advance to ensure that their RTD has the required validity period for entry into certain countries and re-entry to the United States. Additionally, according to the Form I-131 instructions, a new RTD may not be issued if the current document is still valid, and many countries require visitors to have at least three months of validity (sometimes more) on their travel document before admission will be granted. A U.S. refugee or asylee applying for admission to one of these countries may be barred from entry until he or she can obtain a new travel document with a longer validity period. However, he or she cannot obtain the new document until his or her current document has expired.

AILA asks USCIS to consider publishing regulations that will permit a longer, multi-year validity period for RTDs, akin to those of numerous other countries.[3] Longer validity periods would bring the United States into conformity with its obligations under the U.N. Refugee Convention and Protocol, would be consistent with UNHCR's guidance with regard to travel documents for refugees, and would increase USCIS staffing and processing efficiency, among other benefits.

Part 236—Apprehension and Detention of Inadmissible and Deportable Aliens

- **8 CFR §236.1: Apprehension, Custody, and Detention.** The regulations generally authorize DHS to set the terms of release, including the posting of bond or other conditions. Under 8 CFR §236.1(d), a noncitizen may seek amelioration of DHS's custody decision by an immigration judge. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days. It has been interpreted that the imposition of an ankle bracelet or other alternative to detention (ATD) does not fall within the definition of "custody," such that an individual who is required to wear an ankle bracelet must request redetermination before the IJ within seven days of "release" on the ankle bracelet. The regulations should be amended to include ATDs in a definition of "custody" such that these individuals can seek amelioration of custodial conditions at any time before a removal order becomes final. In addition, the regulations should be amended to prohibit the involuntary transfer of a detained alien who is represented by counsel.

Part 245—Adjustment of Status to that of Person Admitted for Permanent Residence

[3] For example, the United Kingdom (10 years), Ireland (10 years), South Africa (5 years), Italy (2 years), Chile (2 years), and Australia (2 years).

- **8 CFR §245.2(a)(2)(i)(B): Concurrent Filing of I-140/I-485.** DHS should eliminate the policy to deny a concurrently filed I-485 Application to Register Permanent Residence or Adjust Status, where the related I-140 Petition for Alien Worker is denied. The I-485 should be held in abeyance pending any I-140 appeal or motion to reopen, or until the time period to appeal has lapsed. Holding the I-485 in abeyance during the pendency of an appeal or motion to reopen would allow the applicant to continue to receive employment authorization and advance parole.

- **8 CFR §245.2(a)(4)(ii)(C): Travel Outside the U.S. by Adjustment of Status Applicants in Lawful H-1 or L-1 Status.** The regulation currently allows an applicant for adjustment of status, who is not in removal proceedings, and who is in lawful H-1 or L-1 status to travel without advance parole, and reenter the U.S. with a valid H-1 or L-1 visa, assuming the individual remains eligible for H or L status, and is coming to resume employment with the same H or L employer. This regulation should be expanded to adjustment of status applicants in other valid nonimmigrant classifications such as E-1, E-2, E-3, O-1 and P-1. Moreover, the admission of individuals who hold both a valid nonimmigrant visa and advance parole document should be governed in accordance with the procedures contained in Question 5 of the May 16, 2000 legacy INS Memorandum by Michael D. Cronin, "AFM Update: Revision of March 14, 2000 Dual Intent Memorandum."[4]

Part 274a—Control of Employment of Aliens

- **8 CFR §274a.2(b): Employment Verification Requirements—One-Step Verification for E-Verify Employers.** Completion of I-9 forms in addition to the E-Verify process is duplicative and the cost of retaining I-9 forms for E-Verified employees imposes unnecessary costs. Reduction of the I-9 paperwork burden would encourage voluntary employer registration for E-Verify, reduce costs, and promote efficiency.

[4] **Should an alien returning to the United States from travel abroad who has a valid 1-512 and a valid H-1 or L-1 nonimmigrant visa be paroled in or readmitted in H-1 or L-1 status?**
If an alien has a valid H-1or L-1 nonimmigrant visa and is eligible for H-1 or L-1 nonimmigrant status and also has a valid Form I-512, he or she may be readmitted into H-1 or L-1 status or be paroled into the United States. It is the alien's prerogative to present either document at inspection. However, if an alien presents both a valid H-1 or L-1 nonimmigrant visa and a valid Form I-512, and the alien is eligible for the H-1 or L-1 nonimmigrant classification, the Service should inform the alien that H-1 and L-1 nonimmigrants no longer need to use advance parole to preserve pending applications for adjustment of status and should admit the alien in H-1 or L-1 nonimmigrant status. The fact that an alien has applied for advance parole and received Form I-512 does not compel him or her to use the advance parole. If the alien is not admissible as an H-1 or L-1 nonimmigrant, then he or she cannot be readmitted as an H-1 or L-1 nonimmigrant. Instead, such an alien may be paroled into the United States.

- **8 CFR §274a.2(b)(1)(ii)(A): Verification of Identity and Employment Authorization—Examination of Documents.** Currently, employers must complete I-9 forms by conducting an in-person review of the original documents to determine if they are "genuine looking" and appear to relate to the employee. Many employers hire staff remotely and find it difficult to delegate I-9 completion to a third party unrelated to the employer's business. The regulation should be amended to reflect 21st century business practices by incorporating guidance for completing I-9s for remote hires using technological capabilities, such as video conferencing, to view employees and their documents.

- **8 CFR §274a.2(b)(1)(viii)(A)(7): Employment Verification Requirements—Acquisitions and Mergers.** In most mergers and acquisitions, human resource departments are overwhelmed in their efforts to comply with applicable laws and regulations and to timely complete I-9s for hundreds or thousands of employees based on an effective acquisition date. If an acquiring or surviving entity chooses to reduce its exposure by electing to complete new I-9s for all acquired employees, the company should not be required to complete I-9s for the transitioning workforce in just three days. The company's good faith efforts to complete the I-9s within a reasonable time from the effective date of the acquisition should be treated as acceptable. Under 8 CFR §274a.2(b)(1)(viii)(A)(7), the receiving/surviving employer is allowed to claim that the employee continues employment for I-9 purposes; but the employer who does not trust old I-9s or applies stricter I-9 standards is provided no additional time for new I-9 completion. The regulations should allow an exception to the normal I-9 deadline for employers who complete new I-9s in a merger, acquisition, or reorganization.

- **8 CFR §274a.10(b)(2): Civil Penalties for Employer Verification Violations.** Employers enrolled in E-Verify who use the system in good faith should be able to avail themselves of a specific exemption for technical violation fines and a reduction in fine percentage for substantive violations.

- **8 CFR §274a.12(a): Aliens Authorized for Employment Incident to Status.** Spouses of L-1s, E-1s and E-2s should be included in this section, but the requirement that they obtain an EAD card should be eliminated.

- **8 CFR §274a.12(c)(17): Aliens Who Must Apply for Employment Authorization—Domestic Workers.** The regulations should be amended to include B-1 domestic workers as aliens authorized for employment incident to status, and to eliminate the need for domestic workers to apply for a work authorization document.

- **8 CFR §274a.13(d): Automatically Extend Work Authorization Upon Filing a Renewal I-765 EAD Application.** An application to extend an EAD may not be filed

more than 120 days before the expiration of the prior EAD. Though USCIS must adjudicate an EAD application within 90 days of filing, or issue interim work authorization,[5] USCIS is not always able to meet the 90-day deadline and local offices no longer have the authority or capability to issue interim EADs. To avoid hardship for employers and employees who risk losing their jobs if USCIS is unable to timely adjudicate such requests, USCIS should amend the regulations to provide for an automatic extension of employment authorization upon filing a timely EAD extension. In addition, the regulation should provide that the receipt for the extension application, when accompanied by the expired EAD is satisfactory proof of employment authorization for I-9 purposes.

AILA strongly opposes DHS's proposal to eliminate the 90-day/interim EAD rule under current 8 CFR §274a.13(d).[6] The proposed amendments would eliminate a definite adjudicatory time frame and common sense remedy to the potential detriment of thousands of individuals. We ask DHS to withdraw the proposal to eliminate the 90-day adjudication and interim EAD rule.[7]

Part 287—Field Officers; Powers and Duties

- **8 CFR §287.7: Detainers.** The regulations permit a local law enforcement agency to hold a noncitizen against whom a detainer has been lodged for up to 48 hours (excluding weekends and holidays) after they would have otherwise been released. ICE often fails to take custody within the designated timeframe, and LEAs continue to detain individuals in violation of this policy. The regulations should be amended to ensure effective oversight over the issuance of detainers in order to protect individuals subject to detainers. The regulations should prioritize the issuance of detainers in accordance with ICE's enforcement priorities, as set forth in the October 20, 2014 memorandum by DHS Secretary Jeh Johnson. The regulations should also include a notice requirement, and a system for challenging improvidently issued detainers. In addition, ICE should be required to collect data to monitor regulatory compliance.

Part 292—Representation and Appearances

- **8 CFR §292.3(b): Professional Conduct for Practitioners—Grounds of Discipline.** Under 8 CFR §292.3(b), disciplinary sanctions may be imposed against a practitioner who falls within one or more of the categories enumerated in the EOIR disciplinary scheme under 8 CFR §1003.102. The wholesale adoption of the EOIR disciplinary

[5] 8 CFR §274a.13(d).
[6] *See* https://www.gpo.gov/fdsys/pkg/FR-2015-12-31/pdf/2015-32666.pdf#page=2.
[7] *See* http://www.aila.org/infonet/comments-rule-affecting-high-skilled-nonimmigrants.

scheme is flawed in that it fails to acknowledge the stark differences between representing individuals in removal proceedings before EOIR, and representing individuals in a benefits adjudication setting before DHS. The rule also inappropriately interferes with the attorney/client relationship, fails to provide adequate due process protections to attorneys, fails to address the unauthorized practice of law, and is ultimately, unnecessary. On March 2, 2011, during the reopened comment period, AILA submitted extensive comments on the rules of professional conduct for practitioners, and made a number of recommendations, including withdrawal of 8 CFR §1003.102(t).[8]

- **8 CFR §292.4(a): Authority to Appear and Act.** This provision requires an attorney or accredited representative to file a Notice of Entry of Appearance, Form G-28, in each case in which they appear. DHS and all of its component agencies should likewise be required to send copies of all notices of action on each case in which a G-28 has been filed to the attorney of record in addition to the petitioner or applicant.

- **8 CFR §292.5(b): Right to Representation.** This regulation provides for the right to representation by an attorney or accredited representative during any DHS examination, except for primary and secondary inspection. The importance of the role of counsel in DHS proceedings cannot be overstated. Access to counsel is vital for immigrants attempting to navigate our complex immigration system, and improves the quality and efficiency of immigration decision making. Additional regulations are needed to clarify that that the right to counsel applies in all DHS proceedings. Given the importance of the role of counsel in the immigration process, we further recommend that the proviso indicating the right to representation does not apply to primary or secondary inspection be rescinded.

Issues Requiring the Promulgation of Rules

In addition to the review of the existing regulations described above, we have identified a few areas where the promulgation of proposed rules, along with the commencement of a full notice and comment period, is required.

- **Repapering.** Under §309(c)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act, the Attorney General may elect to terminate deportation proceedings, in which a final administrative decision has not been entered, and reinstate the proceedings as removal proceedings to allow non-lawful permanent residents who are ineligible for suspension of deportation because of the stop-time rule under INA §240A(d)(1), to apply for cancellation of removal under INA §240A(b). Though proposed rules were published in the Federal Register on November 30, 2000 (65 Fed.

[8] *See* http://www.aila.org/infonet/aila-supplementary-comments-dhs-prof-conduct.

Reg. 71273), to date, interim or final regulations have not been promulgated. Such regulations which would pave the way for these cases to finally be resolved.

- **Full Discovery.** We submit that proposed regulations be promulgated to permit attorneys and respondents in removal proceedings to request administrative discovery of non-confidential A file documents, in order to forego the FOIA process and avoid a lengthy wait for disclosure of documents that are essential to effective representation and a full and fair hearing.

- **Deferred Action.** Deferred action is the discretionary decision to not prosecute or deport an alien. Guidance on deferred action was contained in the now withdrawn INS Operating Instructions. Though the relief is still available, there are currently no regulations that would facilitate a more meaningful and consistent application of prosecutorial discretion in context of deferred action. We ask that such regulations be promulgated.

- **Unlawful Presence.** The concept of unlawful presence as it relates to the three-, ten-year and permanent bars to admissibility under INA §212(a)(9)(B) and (C) was established in 1996 with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act. Though extensive memoranda have been released interpreting unlawful presence, no regulations have issued. The promulgation of regulations on unlawful presence could help fix a number of issues and inconsistencies in interpretations that have arisen over the years. We ask that such regulations include:

    - **Minors**. Provide that the statutory exceptions to unlawful presence under INA §212(a)(9)(B)(iii), including no accumulation of unlawful presence for minors (under age 18), apply to INA §212(a)(9)(C).

    - **Removal Proceedings.** Unlawful presence should not be deemed to accumulate while an individual is in removal proceedings, until a removal order becomes final.

    - **Asylum Applicants.** The statutory exception to unlawful presence under INA §212(a)(9)(B)(iii)(II), which states that no period of time in which an alien has a bona fide application for asylum pending shall be counted as unlawful presence "unless the alien during such period was employed without authorization...." should be interpreted to require 180 days of unauthorized employment, not one day.

    - **D/S for Canadian Visitors.** USCIS and DOS have taken the position that a Canadian visitor who enters the United States and is not provided an I-94 arrival/departure record, is admitted for an authorized period of "duration of status" (D/S). Conversely, CBP has taken the position that a visa-exempt Canadian visitor is admitted for a

maximum of 6 months, and begins to accrue unlawful presence if he or she remains beyond 6 months. The regulations should codify the long-standing USCIS/DOS interpretation to avoid disparate treatment among DHS components.

Conclusion

We appreciate the opportunity to comment on this request for information and look forward to a continuing dialogue with the Department during the regulatory review process.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION