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U.S. Department of Homeland Security
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Submitted via www.regulations.gov

**Re: Department of Homeland Security Reducing Regulatory Burden; Retrospective Review under Executive Order 13563, 76 Fed. Reg. 13526 (Mar. 14, 2011)**
**Docket No.: DHS–2011–0015**

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) implementation of 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 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. The organization has been in existence since 1946 and is affiliated with the American Bar Association. Our mission includes 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 implementation of Executive Order 13563 as it pertains to U.S. immigration law, policy, and procedure, contained in Title 8 of the Code of Federal Regulations. We believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

**The Abbreviated Comment Period Is Inadequate for the Submission of Meaningful Remarks**

Although we applaud DHS for reaching out to the public to solicit information and comments on the retrospective review of existing regulations, we point out that a 30-day comment period is inadequate

for the provision of thoughtful and considered remarks. The President's Executive Order was issued on January 18, 2011, directing agencies to develop and submit to the OMB's Office of Information and Regulatory Affairs (OIRA), a preliminary plan for periodic review of existing regulations within 120 days (May 18, 2011). The Executive Order was followed by a February 2, 2011, memorandum from OIRA providing additional guidance to agencies and requesting draft plans within 100 days (May 13, 2011). While the time period for plan submission seems disproportionate to the monumental undertaking assigned to the agencies, DHS neglected to publish notice of its request for public comment until March 14, 2011, and as a result, has provided only 30 days for comment.

We note that in commencing this regulatory review, the Department is embarking upon a significant and important project, the results of which have the potential for far-reaching impact on the lives of individuals who seek temporary immigration benefits, as well as those coming to live permanently in the United States with their American families or to work for a U.S. employer. DHS regulations also affect individuals seeking relief from removal from the United States and their families. As such, DHS regulations have a major impact on international travel and tourism, family unity principles, and the economic interests of U.S. employers and the country as a whole. Given the abbreviated comment period, it is difficult to provide extensive, meaningful remarks at this time.

**How Can the Department Best Promote Meaningful Periodic Reviews of Its Existing Significant Regulations and How Can It Best Identify Those Rules That Might Be Modified, Streamlined, Expanded, or Repealed?**

The Regulatory Flexibility Act requires agencies to conduct a decennial review of existing regulations. 5 USC §610. As it has done here, the Department should solicit input from the public when conducting its periodic reviews. However, in order for DHS to receive meaningful and thoughtful comments, an adequate comment period—a minimum of 90 days—must be provided. In order to reduce the burden on both the agency and the public, the Department should also consider staggering its periodic reviews and requests for public input according to the various Titles of the Code of Federal Regulations (CFR) (e.g., Title 6, Title 8, Title 19, etc.). Moreover, proposed regulations that result from the reviews should be published in the Federal Register with a full 120-day comment period to achieve the highest level of public participation.

It is important to note that visa policy and procedures are further detailed in numerous memoranda and various government manuals including the U.S. Citizenship and Immigration Service (USCIS) *Adjudicator's Field Manual*, the Customs and Border Protection (CBP) *Inspectors Field Manual*, and the Immigration and Customs Enforcement (ICE) *Detention and Removal Operations Policy and Procedure Manual*. Changes to these manuals and the issuance of policy memoranda are not subject to the notice and comment requirements of the Administrative Procedure Act. However, any meaningful review of immigration policy and procedure must include a thorough review of memoranda and government manuals, in conjunction with Title 8 of the CFR.

**Factors to Consider in Selecting and Prioritizing Rules and Reporting Requirements for Review**

The Department should conduct its regulatory review in a methodical manner with a focus on substance. Factors to consider in selecting and prioritizing rules should include (1) the impact/benefit to the public; (2) significant economic considerations; (3) historical context; (4) nexus to the underlying statute/congressional intent; and (5) national interest considerations. In addition, DHS should consider conducting its review by individual CFR Title, as opposed to reviewing all DHS regulations at one time.

**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 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. Finally, the fixed 12-week time frame for responding to RFEs and the 30-day fixed time frame for responding to NOIDs should be reinstated.

- **8 CFR §103.2(b)(13)(ii): Biometrics.** This regulation states that the failure to appear for a biometrics appointment, interview, or other required in-person process results in the denial of the application unless USCIS receives a timely change of address or rescheduling request that warrants excusing the failure to appear. Biometrics capture is typically done domestically by a USCIS Application Support Center (ASC). However, there are many instances where it is impractical, if not impossible for an individual to appear in the U.S. for biometrics capture. The biometrics process should be changed to better accommodate individuals with an urgent need to travel abroad. DHS should consider expanding the availability of biometrics abroad for reentry permits and other applications, such as the I-751 Petition to Remove the Conditions on Residence.

- **8 CFR §103.3(a)(1)(ii) (and §1103.3(a)(1)(ii)): Denials and Appeals—Formal Process for Contributions of Amici at the Administrative Appeals Office (AAO).** Currently, amicus briefs must be submitted through the attorney of record on an

individual case. 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.

- **8 CFR §103.8–10: Freedom of Information Act (FOIA).** The current regulations regarding definitions, materials, and requests for records under FOIA are outdated and have been superseded by the FOIA regulations contained at 6 CFR §5.1 et. seq.

***Part 204—Immigrant Petitions***

- **8 CFR Part 204, Immigrant Petitions; 8 CFR Part 214, Nonimmigrant Classes—Standard of Proof.** As stated in the *Adjudicator's Field Manual* Chapter 11.1(c), "[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.

- **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 local office adjudicators from readjudicating the underlying I-360 petition. The regulations should state that the officer many not question the applicant or look behind an I-360 approval on the bona fides of the marriage or details of the abuse.

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

- **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, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability." However, 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 as such to foster the intent of the statute (encouraging the immigration of highly educated professionals) and eliminate purely technical and irrelevant hurdles.

- **8 CFR §204.12: National Interest Waivers for Physicians Serving in a Medically Underserved Area or VA Facility.** The regulation provides that a second-preference physician may be granted a national interest waiver if he or she agrees to work full-time in a clinical practice for an aggregate of five years (not including time spent in J-1 status) in a Medically Underserved Area, Primary Medical Health Professional Shortage Area, Mental Health Professional Shortage Area, or a VA facility. The regulation should be amended to clearly provide that physicians are not obligated to continue working in a designated area or VA facility once the five year commitment has been completed. In addition, the regulation should be amended to clarify that both primary care and specialist physicians working in underserved areas may qualify for a national interest waiver regardless of whether the employment occurs at a VA facility or private practice location/hospital.

- **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 208—Procedures for Asylum and Withholding of Removal***

- **8 CFR §208.7: Employment Authorization for Asylum Applicants.** The INA requires asylum applicants to wait 150 days after filing an application for asylum to apply for employment authorization. However, due to problems with the employment authorization document (EAD) asylum clock – a clock that tracks the 150-day time

period for EAD eligibility – applicants often wait much longer than the legally permitted timeframe to receive a work permit. Many of these problems arise from inconsistent and overly broad interpretations by asylum officers as to what constitutes "delay requested or caused by the applicant," which, under 8 CFR §208.7(a)(2), causes the clock to stop. For example, some asylum officers stop the clock when a case is referred to an immigration judge. However, the clock should not stop upon referral to EOIR because referral, on its own, is not a delay requested or caused by the applicant. Moreover, in adjudicating EAD applications for respondents in removal proceedings, USCIS regularly defers to improper interpretations of the regulations by immigration judges and often confuses the EAD *asylum* clock with EOIR's 180-day asylum *adjudication* clock, which is intended to promote timely case completion and may be stopped for reasons other than applicant-caused delay. We recommend that the regulations be expanded to clarify the types of delays that will stop the EAD clock and to clearly distinguish the EAD clock from EOIR's asylum adjudication clock.

- **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: Waiver of Certain Grounds of Inadmissibility.** Regulations or guidance should be issued to identify factors to be weighed in determining whether, by the preponderance of the evidence, an applicant has established extreme hardship for waivers of inadmissibility.

- **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: Special Requirements for Admission, Extension, and Maintenance of Status.** Individuals in H, L, E, O, or other employment-based nonimmigrant status often bring their families to the United States, enroll their

children in school, and buy a home, or sign a long-term lease. To accommodate individuals who unexpectedly lose their job, the regulations should provide for a flexible, reasonable time period to wrap up one's affairs following termination of employment, without incurring unlawful presence or being deemed out of status.

- **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 17-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(h)(1)(ii)(B)(1): Temporary Employees—Labor Condition Application.** This regulation provides that H-1B status may be conferred upon an individual coming temporarily to the United States to perform services in a specialty occupation for whom "the Secretary of Labor has determined and certified to the Attorney General that the prospective employer has *filed* a labor condition application...." (emphasis added). USCIS has interpreted this provision to require inclusion of a certified LCA with the H-1B petition, and has rejected H-1B petitions that are filed with proof that the LCA has been submitted, but not yet certified by DOL. To avoid adverse consequences that may arise due to delays in LCA certification by DOL, this regulation should be amended to clearly permit the filing of an H-1B petition with proof that the LCA has been submitted to DOL.

- **8 CFR §214.2(h)(19)(iii): Definition of "Affiliated or Related."** The regulation defines "affiliated or related" too narrowly. This has had a negative impact on H-1B adjudications for teaching hospitals and other nonprofit petitioners related to or affiliated with institutions of higher education. The regulation should be amended to adopt a more flexible definition that accounts for a broader range of relationships between universities and non-profit entities.

- **8 CFR §214.2(k)(5): Spouses, Finacées and Finacés of United States Citizens.** The regulation currently provides that an approved K-1 petition is valid for 4 months. By the time the beneficiary attends the interview at a U.S. consulate, it is not unusual for the petition to have expired. Although the regulation provides that an expired petition may be revalidated by a director or a consular officer for a period of four months under certain conditions, the regulation should be amended to provide for an initial one year validity period to better conform to the processing times at many consular posts. The revalidation provision should remain.

- **8 CFR §214.2(l)(1)(ii) and 8 CFR §204.5(j)(2): Multinational Executives and Managers.** There is a general lack of coordination and precision in the parallel language of 8 CFR §214.2(l)(1)(ii) for L-1 nonimmigrants and 8 CFR §204.5(j)(2) for first preference employment-based multinational executives and managers.

- **8 CFR §214.2(l)(3)(v): New Office L Petitions for Managers and Executives.** The regulation has been interpreted to require the petitioner to demonstrate that subordinate employees will perform non-managerial functions of the managerial or executive position. This fails to recognize the realities of opening a "new office," which by definition will often not include subordinate employees within the initial launch and development phase. This interpretation makes it almost impossible to qualify for an L-1A for the purpose of opening a new office. The regulation should be amended to clarify that subordinate employees are not required for an L-1A in a new office setting.

- **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(o)(2)(iv)(D): Nonimmigrant Aliens of Extraordinary Ability or Achievement.** This regulation provides that "in the case of a petition filed for an artist or entertainer, a petitioner may add additional performances or engagements during the validity period without filing an amended petition, provided the additional performances or engagements require an alien of O-1 caliber." There is no authoritative basis for the requirement that the additional engagements require an alien of O-1 caliber. The regulation should be amended to remove this requirement.

- **8 CFR §214.2(p)(4)(i)(B): Artists, Athletes, Entertainers.** This regulation states that a P-1 entertainment group or athletic team "must be internationally recognized as outstanding in the discipline and must be coming to perform services which require an internationally recognized entertainment group or athletic team." There is no statutory basis for the requirement that the services to be performed require an internationally recognized entertainment group or athletic team. This portion of the regulation should be removed.

***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 in cases where it can be demonstrated that emergent travel is required.

***Part 235—Inspection of Persons Applying for Admission***

- **8 CFR §235.1(f)(1)(iv): Aliens Exempt from US-VISIT.** In accordance with the Secretary of State and Secretary of Homeland Security's joint authority to exempt certain classes of aliens from the US-VISIT program, the regulations should be amended to exempt lawful permanent residents.

***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 240—Proceedings to Determine Removability of Aliens in the United States***

- **8 CFR §240.62 (and §1240.62): Jurisdiction over NACARA Applications.** The regulations require certain NACARA-eligible applicants to have their cases adjudicated by an immigration judge. However, in order to get the case to the judge, the applicant must first file the application with USCIS, attend an interview, and be issued a referral. Because these individuals are statutorily eligible for NACARA benefits, it is a waste of judicial resources to require them to go through this process.

The regulations should be amended to provide USCIS with jurisdiction over these cases in order to streamline the process and improve efficiency.

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

- **8 CFR §245.2(a)(2)(i)(B): Concurrent Filing of I-140/I-485.** 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."

- **8 CFR §245.13(k)(1): Parole Authorization for Purposes of Travel.** The regulation provides, "[u]nless the applicant files an advance parole request prior to departing from the United States, *and the Service approves such request*, [the] application for adjustment of status ... is deemed to be abandoned as of the moment of ... departure" (emphasis added). Due to the often lengthy processing times for applications for advance parole, the regulations should be amended to require than at applicant be physically present in the U.S. only when the application is filed, and to remove the requirement that the applicant wait for final approval before departing the United States.

***Part 264—Registration and Fingerprinting of Aliens in the United States***

- **8 CFR §264.1: Special Registration.** Under the National Security Entry-Exit Registration System (NSEERS), certain persons who enter, exit or remain in the United States are required to register their presence with DHS. NSEERS is ineffective, burdensome on both the government and the registrants, and has had a negative impact on the Arab, Muslim and South Asian-American communities. In addition, with the implementation of US-VISIT, which requires the collection of

biometrics from international travelers at U.S. visa-issuing posts and ports of entry, NSEERS is fast-becoming obsolete. The regulations should be rescinded.

***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. Alternatively, the I-9 form should be integrated electronically into the E-Verify system. Providing an electronic I-9 with instructions, prompts, and drop-down menus would provide a more efficient and effective means of completing the basic verification process and reduce or eliminate the risk of inadvertent paperwork violations.

- **8 CFR §274a.2(b): Employment Verification Requirements—Option to File I-9s with DHS.** Employers should have the option of filing completed I-9s with DHS and receive immunity from civil money penalties for paperwork violations if DHS fails to notify the employer of errors and omissions within 10 days of filing.

- **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. We recommend that ICE provide guidance for completing I-9s for remote hires that incorporates increased 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. We ask that guidance be issued in the form of regulations, or a memorandum of understanding among ICE, OSC, and USCIS, to allow an exception to the normal I-9 deadline for employers who complete new I-9s

in a merger, acquisition, or reorganization. If an employer documents its protocol for I-9 completion as part of the merger, acquisition, or reorganization process and completes new I-9s in a 180-day time frame (like the 180-day window for a full workforce review in the FAR E-Verify context), we would encourage the application of prosecutorial discretion uniformly.

- **8 CFR §274a.9: ICE Enforcement Procedures—Notice of Suspect Documents**: The notice of suspect documents may be issued during the ICE inspection process to inform employers that certain workers may possess questionable work authorization documents. There is no timeline provided to employers in which to respond to the notice. Some auditors refuse to provide any time frame for responding, others provide 3 days, and still others provide several weeks. Regulations should be promulgated to provide 180 days to respond to a notice of suspect documents.

- **8 CFR §274a.10(b)(2): Civil Penalties for Employer Verification Violations.** In November 2009, ICE released guidance on I-9 inspection and the calculation of civil penalties. This guidance should be rescinded in favor of new regulations that place primary weight on the five regulatory factors set forth in 8 CFR §274a.10(b)(2). Recent decisions published by OCAHO have either disregarded the ICE fine-setting guidance or given it minimal weight. In addition, the factor of the employer's "good faith" should incorporate post-audit activities such as enrollment in E-Verify and the development of improved corporate immigration compliance policies and training.

- **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.** This regulation should be amended to include spouses of L-1 intracompany transferees, E-1 treaty traders and E-2 treaty investors, "as evidenced by an employment authorization document, with an expiration date issued by the Service." Alternatively, include spouses of L-1s, E-1s and E-2s in this section, but eliminate the requirement that they obtain an EAD card.

- **8 CFR §274a.12(b)(5): Aliens Authorized for Employment with a Specific Employer Incident to Status.** This regulation should be amended to include E-3, Australian specialty occupation workers.

- **8 CFR §274a.12(b)(20): Aliens Authorized for Employment with a Specific Employer Incident to Status.** This regulation, allowing for an automatic 240-day extension of work authorization for certain classes of nonimmigrant aliens who

timely file an application to extend nonimmigrant status, should be amended to include more recently created categories such as H-1B1s and E-3s.

- **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): Interim EADs.** While the regulation provides for issuance of an interim EAD where USCIS fails to adjudicate the application within 90 days, USCIS has ceased local production of EADs. Local EAD production should be reinstated to give meaning to this regulation. Alternatively, employment authorization should be extended automatically upon receipt of an application to extend employment authorization, or the regulation should be amended to mandate approval of EAD applications within 45 days.

***Part 287—Field Officers; Powers and Duties***

- **8 CFR §287.7: Detainers.** A detainer is a request to a local law enforcement agency (LEA) to notify ICE when a noncitizen will be released so that ICE can assume custody. The regulations permit an LEA to hold the 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 June 30, 2010 memorandum by ICE Assistant Secretary John Morton. 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 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 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 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. In response to a nationwide survey AILA conducted with the American Immigration Council, widespread reports of restrictions on access to counsel during clients' interactions with USCIS, CBP, and ICE were received. 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. However, the experience of immigration lawyers across the country demonstrates that USCIS, CBP and ICE either disregard this regulation completely or construe it much too narrowly. 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. 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.

- **Minors.** Establish a rule that persons under the age of 18 have no capacity to trigger fraud bars of any kind.

- **Traveler Redress Inquiry Program (TRIP).** The current TRIP system continues to provide unsatisfactory results for persons referred for additional screening but who are always admitted after further inspection. Regulations should be developed to make the TRIP system more effective, including a process to clear persons with old or innocuous prior violations in order to facilitate travel and free up agency resources to focus on actual threats.

**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