

9111-97

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 204, 214, 248, and 274a

[CIS No. 2515-11; DHS Docket No. USCIS-2012-0005]

RIN 1615-AC00

**Enhancing Opportunities for H-1B1, CW-1, and E-3 Nonimmigrants and EB-1
Immigrants**

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

ACTION: Proposed rule.

SUMMARY: The Department of Homeland Security (DHS) proposes to update the regulations to include nonimmigrant high-skilled specialty occupation professionals from Chile and Singapore (H-1B1) and from Australia (E-3) in the list of classes of aliens authorized for employment incident to status with a specific employer, to clarify that H-1B1 and principal E-3 nonimmigrants are allowed to work without having to separately apply to DHS for employment authorization.

DHS also is proposing to provide authorization for continued employment with the same employer if the employer has timely-filed for an extension of the nonimmigrant's stay. DHS also proposes this same continued work authorization for Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker (CW-1) nonimmigrants if a Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I-129CW, is timely filed to apply for an extension of stay.

In addition, DHS is proposing to update the regulations describing the filing procedures for extensions of stay and change of status requests to include the principal E-3 and H-1B1 nonimmigrant classifications. These changes would harmonize the regulations for E-3, H-1B1, and CW-1 nonimmigrant classifications with the existing regulations for other, similarly situated nonimmigrant classifications.

Finally, DHS is proposing to expand the current list of evidentiary criteria for employment-based first preference (EB-1) outstanding professors and researchers to allow the submission of evidence comparable to the other forms of evidence already listed in the regulations. This proposal would harmonize the regulations for EB-1 outstanding professors and researchers with other employment-based immigrant categories that already allow for submission of comparable evidence.

DHS is proposing these changes to the regulations to benefit these highly skilled workers and CW-1 transitional workers by removing unnecessary hurdles that place such workers at a disadvantage when compared to similarly situated workers in other visa classifications.

DATES: Written comments must be received on or before [Insert date 60 days from date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by DHS Docket No. USCIS-2012-0005 by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: You may submit comments directly to DHS by e-mail at

USCISFRComment@uscis.dhs.gov. Include DHS Docket No. USCIS-2012-0005 in the subject line of the message.

- Mail: Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-2140. To ensure proper handling, please reference DHS Docket No. USCIS-2012-0005 on your correspondence. This mailing address may be used for paper, disk, or CD-ROM submissions.
- Hand Delivery/Courier: Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-2140. Contact telephone number is (202) 272-8377.

FOR FURTHER INFORMATION CONTACT: Paola Rodriguez Hale, Adjudications Officer (Policy), Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-2141. Contact telephone number is (202) 272-1470.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Public Participation

II. Executive Summary

- A. Purpose of the Regulatory Action
- B. Summary of the Major Provisions of the Regulatory Action
- C. Cost and Benefits

III. Background

- A. E-3 nonimmigrant classification
- B. H-1B1 nonimmigrant classification
- C. CW-1 nonimmigrant classification.
- D. EB-1 outstanding professor and researcher immigrant classification
- E. Need for regulatory improvements
 - 1. E-3, H-1B1, and EB-1 classifications
 - 2. CW-1 nonimmigrant classification

IV. Proposed Rule

- A. Employment authorization for E-3 and H-1B1 nonimmigrants
 - 1. Employment authorization incident to status with a specific employer
 - 2. Automatic employment authorization while extension of stay request is pending
- B. Employment authorization for CW-1 nonimmigrants while extension of stay request is pending.
- C. Application requirement for E-3 and H-1B1 nonimmigrants requesting changes of status or extensions of stay
- D. Comparable evidence for EB-1 outstanding professors and researchers

V. Statutory and Regulatory Requirements

- A. Executive Orders 12866 and 13563
 - 1. E-3 and H-1B1 nonimmigrant workers
 - 2. CW-1 nonimmigrant workers
 - 3. EB-1 outstanding professors and researchers
- B. Regulatory Flexibility Act
- C. Unfunded Mandates Reform Act of 1995
- D. Small Business Regulatory Enforcement Fairness Act of 1996
- E. Executive Order 13132
- F. Executive Order 12988
- G. Paperwork Reduction Act

I. Public Participation.

All interested parties are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule. DHS and U.S. Citizenship and Immigration Services (USCIS) also invite comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to USCIS in implementing these changes will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that supports a recommended change.

Instructions: All submissions must include the agency name and DHS Docket No. USCIS-2012-0005 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the

Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <http://www.regulations.gov>.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

II. Executive Summary

A. Purpose of the Regulatory Action.

DHS proposes to amend its regulations in several ways to improve the programs serving the E-3, H-1B1, and CW-1 nonimmigrant classifications and the EB-1 immigrant classification for outstanding professors and researchers. The proposed changes would harmonize the regulations governing these classifications with regulations governing similar visa classifications by removing unnecessary hurdles that place E-3, H-1B1, CW-1 and certain EB-1 workers at a disadvantage.

B. Summary of the Major Provisions of the Regulatory Action.

The rulemaking includes the following changes:

- Designates E-3 and H-1B1 classifications as authorized to work for the specific employer listed in their petition without requiring separate approval for work authorization from USCIS(8 CFR 274a.12): This designation would update DHS

regulations to match current practice, under which E-3 and H-1B1 nonimmigrant visa holders are authorized to work for the duration of their authorized stay in the United States without applying separately for employment authorization. The E-3 and H-1B1 nonimmigrant classifications were established by statute in 2005 and 2003, respectively. See REAL ID Act of 2005, Public Law 109-13, § 501, 119 Stat. 231; United States-Singapore Free Trade Agreement Implementation Act, Public Law 108-78, § 402, 117 Stat. 948 (2003); United States-Chile Free Trade Agreement Implementation Act, Public Law 108-77, §§ 402-404, 117 Stat. 909 (2003). Since that time, the DHS employment authorization regulations at 8 CFR 274a.12 have not been updated to include principal E-3 and H-1B1 nonimmigrants as aliens authorized to accept employment in the United States as authorized by statute. This rule proposes to specifically include these two classifications in the regulation at proposed 8 CFR 274a.12(b)(25) and 8 CFR 274a.12(b)(9). This reflects statutory authority and codifies current practice into the regulation.

- Automatically extends employment authorization to E-3 and H-1B1 nonimmigrants with pending extension of stay requests (8 CFR 274a.12): The regulations at 8 CFR 274a.12(b)(20) authorize aliens in specific nonimmigrant classifications to continue employment with the same employer for a 240-day period beyond the authorized period specified on the Arrival-Departure Record, Form I-94, as long as a timely application for an extension of stay is filed. This means that these individuals can continue to work with the specific employer listed in their petition, even after their authorized stay expires, as long as their extension petition is still pending. Congress created the E-3 and H-1B1 nonimmigrant classifications after that regulation was promulgated. As such, E-3 and H-

1B1 nonimmigrant workers are not included in that provision and cannot continue to work with the same employer beyond the existing authorization while waiting for USCIS to adjudicate an extension of stay request. This rule proposes to amend DHS regulations at 8 CFR 274a.12(b)(20) to accord principal E-3 and H-1B1 nonimmigrants the same treatment as other, similarly situated nonimmigrants, such as H-1B, E-1, and E-2 nonimmigrants.

- Updates the regulations describing the filing procedures for extension of stay and change of status requests to include the principal E-3 and H-1B1 nonimmigrant classifications (8 CFR 214.1(c)(1) and 8 CFR 248.1(a)): Current regulations describing the filing procedures list nonimmigrant classifications that are subject to these procedures, but do not include H-1B1 and principal E-3 nonimmigrants. Although the form instructions for H-1B1 and principal E-3 extension of stay and change of status requests (Instructions for Form I-129, Petition for a Nonimmigrant Worker) were updated to include H-1B1 and principal E-3 nonimmigrants when these categories were first established, the regulations were not. This rule proposes to amend the regulations to add H-1B1 and principal E-3 nonimmigrants to the list. This amendment is consistent with statutory authority and codifies current practice into the regulation. See INA sections 214(g)(8)(C)-(D) and (g)(11), 248, 8 U.S.C. 1184(g)(8)(C)-(D) and (g)(11), 1258.
- Automatically extends employment authorization for CW-1 nonimmigrant workers with pending extension of stay requests (8 CFR 274a.12): The current regulations provide continued work authorization for a CW-1 nonimmigrant worker seeking to change to a new employer, including a change resulting from early termination, and for an employee under the previous CNMI immigration system. 8 CFR 214.2(w)(7) and 8

CFR 274a.12(b)(23). Currently, a CW-1 nonimmigrant worker cannot continue to work with the same employer beyond the existing authorization while waiting for DHS to adjudicate an extension of stay request. DHS is proposing to amend 8 CFR 274a.12(b)(20) to add the CW-1 nonimmigrant classification to the list of employment-authorized nonimmigrant classifications allowing for an automatic extension of employment authorization of up to 240 days while the employer's timely filed extension of stay request remains pending. This change would harmonize the treatment of CW-1 nonimmigrants waiting for a decision from USCIS on their pending request for an extension of stay with those CW-1 nonimmigrants awaiting a decision on a petition to change employers.

- Allows a petitioner who wants to employ an outstanding professor or researcher to submit evidence comparable to the evidence otherwise described in 8 CFR 204.5(i)(3)(i) that demonstrates that the beneficiary is recognized as an outstanding professor or researcher. The current EB-1 regulations do not allow petitioners for outstanding professors and researchers to submit evidence that the beneficiary is recognized internationally as outstanding in a specific academic area such as, in certain circumstances, important patents or prestigious peer-reviewed funding grants. This rule proposes to modify the regulatory limitation on initial evidence for outstanding professors and researchers to allow a petitioner to submit evidence that is comparable to the list of currently accepted evidence and that demonstrates that the beneficiary is recognized as outstanding. The new regulatory criterion for initial evidence would be similar to those found under the aliens of extraordinary ability and the aliens of exceptional ability classifications. This would broaden the range of evidence that

professors and researchers may submit and therefore provide petitioners with an opportunity to present additional or alternative documentation demonstrating the beneficiary's achievements if the evidence otherwise described in 8 CFR 204.5(i)(3)(i) does not readily apply.

C. Cost and Benefits.

The proposed rule, if finalized, would not impose any additional costs on employers, workers or any governmental entity.

The portion of the proposed rule addressing E-3, H-1B1, and CW-1 nonimmigrant classifications would extend the period of authorized employment while requests for an extension of stay for these employment-based nonimmigrant classifications are being reviewed. The regulations at 8 CFR 274a.12(b)(20) generally provide aliens in specific nonimmigrant classifications with authorization to continue employment with the same employer for a 240-day period beyond the period specified on the Arrival-Departure Record, Form I-94, as long as a timely application for an extension of stay is filed on an alien's behalf. This provision applies only to the classifications specified in the regulation—which does not currently include the E-3, H-1B1, and CW-1 nonimmigrant classifications. By harmonizing the regulations for E-3, H-1B1, and CW-1 nonimmigrants with the other listed nonimmigrant classifications, this proposed rule would provide equity for these nonimmigrants relative to other nonimmigrant classifications.

The proposed rule also would help employers of E-3, H-1B1, and CW-1 nonimmigrants avoid potential interruptions of employment for E-3, H-1B1, and CW-1 employees during the period that requests for an extension of these employment-based

nonimmigrant visa classifications are being reviewed. DHS recognizes that these disruptions could result in lost wages for an employee and lost productivity for an employer. In fact, stakeholders have indicated to USCIS that providing automatic extensions of employment authorization would help alleviate potential disruptions to the petitioning employer's business arising out of their inability to keep their nonimmigrant workers on the payroll while the extension request is still pending. DHS does not have data on the number of employers or E-3, H-1B1, and CW-1 nonimmigrants experiencing disruption in employment by not receiving an approval of the extension before the expiration date specified on the Arrival-Departure Record or the duration (length of time) of any disruption, but specifically welcomes comment on this issue.

The portion of the proposed rule addressing the evidentiary requirements for the EB-1 outstanding professor and researcher employment-based immigrant classification would allow for the submission of comparable evidence (e.g., achievements not currently listed in the regulation as available evidence, such as important patents or prestigious, peer-reviewed funding grants) in addition to that listed in 8 CFR 204.5(i)(3)(i)(A) – (F) to establish that the EB-1 professor or researcher is recognized internationally as outstanding in his or her academic field. Similar to the benefits of harmonizing E-3, H-1B1, and CW-1 provisions, the harmonization of the evidentiary requirements for EB-1 outstanding professors and researchers with other comparable employment-based immigrant classifications would provide equity for EB-1 outstanding professors and researchers relative to those other employment-based visa categories. The proposed rule may also facilitate petitioners' recruitment of the EB-1 outstanding professors and researchers by expanding the range of evidence that may be provided to support their

petitions.

Table 1: Summary of Costs and Benefits		
Costs	Proposed Change	Benefits and Avoided Costs
	E-3, H-1B1 and CW-1 Nonimmigrants	
None	Automatic extension of stay of 240 days for an H-1B1, E-3 or CW-1 nonimmigrant while a petition to extend stay is pending.	Avoided cost of lost productivity for U.S. employers of E-3, H-1B1 and CW-1 nonimmigrants and avoided lost wages by the nonimmigrant workers. Not quantified.
		Would provide equity for E-3 and H-1B1 nonimmigrants relative to other employment-based nonimmigrants listed in 8 CFR 274a.12.(b)(20) and provide equity for CW-1 nonimmigrants whose extension request is filed by the same employer relative to other CW-1 nonimmigrants who change employers. Qualitative benefit.
	Clarify that E-3 and H-1B1 nonimmigrants are work authorized incident to status, and specify current filing procedures for requesting change of status or extension of status.	Ensures the regulations are consistent with statutory authority and codifies current practice.
	EB-1 Outstanding Professors and Researchers	
	Allow the use of comparable evidence to that listed in 8 CFR 204.5(i)(3)(i)(A) – (F) to establish that the EB-1 professor or researcher is recognized internationally as outstanding in his or her academic field.	May facilitate recruitment of EB-1 outstanding professors and researchers for U.S. employers. Not quantified.
		Would provide equity for EB-1 immigrants relative to other employment-based immigrants listed in 8 CFR 204.5. Qualitative benefit.

III. Background.

The Immigration Act of 1990 (IMMACT90), among other things, reorganized immigrant classifications and created new employment-based immigrant classifications.

See Public Law 101-649, 104 Stat. 4978. The new employment-based immigration provisions were intended to cultivate a more competitive economy by encouraging increased immigration of skilled individuals to meet our economic needs.¹ Those IMMACT90 provisions were enacted to address the need of American businesses for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel could not be found. See Employment-Based Immigrants, 56 FR 30703 (July 5, 1991). The need for high-skilled workers was based on an increasing skills gap in current and projected U.S. labor pools. Id.

American businesses continue to need skilled nonimmigrant and immigrant workers. As such, our legal immigration system can be improved by reducing barriers for these workers.² By attracting the “best and brightest” from around the world, the United States can harness their talents, skills, and ideas to help the U.S. economy grow.³ Attracting and retaining highly-skilled workers is critical to sustaining our nation’s global competitiveness. Governments seeking to make the most of their highly skilled immigration face the challenge of identifying, attracting, and retaining those with the best prospects for success.⁴ Not only does the U.S. economy lose opportunities for expansion, but the loss is compounded when highly-skilled immigrants leave the United States and

¹ See Statement by President upon Signing of the Immigration Act of 1990, 1990 U.S.C.C.A.N 6801-1 (Nov. 29, 1990), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=19117#ixzz1KvDIYZql>. See also H.R. Rep. No. 101-723(I), at 6721 (1990) (“[I]mmigration can and should be incorporated into an overall strategy that promotes the creation of the type of workforce needed in an increasingly competitive global economy without adversely impacting on the wages and working conditions of American workers.”).

² See White House, Building a 21st Century Immigration System May 2011, at 9, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf.

³ See White House, Building a 21st Century Immigration System, May 2011, at 1, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf.

⁴ See Demetrios G. Papademetriou and Madeleine Sumption, Attracting and Selecting from the Global Talent Pool. Policy Challenges, Migration Policy Inst., Sept. 2013, at 4, available at <http://www.migrationpolicy.org/research/attracting-and-selecting-global-talent-pool-%E2%80%94-policy-challenges>.

fuel innovation and economic growth in countries that compete with the American economy.⁵ Consistent with this vision of attracting and retaining foreign workers, DHS has identified four employment-based (EB) classifications for which simple harmonizing changes to the regulations would further the goal of removing unnecessary obstacles for highly-skilled workers or transitional workers to continue working in the United States or seek admission as an immigrant. These classifications are the E-3, H-1B1, and CW-1 nonimmigrant classifications and the EB-1 outstanding professor and researcher immigrant classification.

A. E-3 nonimmigrant classification.

The E-3 nonimmigrant visa provisions became effective upon signing of the REAL ID Act of 2005. See Pub. L. 109-13, sec. 501, 119 Stat. 231. The E-3 classification permits certain Australian nationals to apply for admission to the United States solely to perform services in a specialty occupation. See Immigration and Nationality Act (INA) section 101(a)(15)(E)(iii), 8 U.S.C. 1101(a)(15)(E)(iii). USCIS's role with respect to the E-3 classification is limited primarily to adjudicating requests for either a change from another nonimmigrant status to E-3 status, see 8 CFR part 248, or for an extension of stay in E-3 classification, See 8 CFR 214.1(c). Both types of requests also are governed by the pertinent instructions accompanying the Petition for a Nonimmigrant Worker, Form I-129. See Instructions to Petition for a Nonimmigrant Worker, Form I-129; 8 CFR 103.2(a).

⁵ See Madeline Zavodny, Immigration and American Jobs, Am. Enter. Inst. & the Partnership for a New Am. Econ., Dec. 2011, at 5, available at http://www.aei.org/files/2011/12/14/-immigration-and-american-jobs_144002688962.pdf.

The E-3 nonimmigrant visa classification is similar in many respects to the H-1B nonimmigrant classification. See INA section 101(a)(15)(H)(i)(b), 8 U.S.C.

1101(a)(15)(H)(i)(b). As with the H-1B classification, the E-3 classification requires the position in which the alien will work to be a specialty occupation. The INA defines a specialty occupation as one that requires the theoretical and practical application of a body of highly specialized knowledge, and a bachelor's or higher degree in the specific specialty (or its equivalent). See INA section 214(i)(1), 8 U.S.C. 1184(i)(1). E-3 nonimmigrant workers also must meet any other occupational requirements specified by the jurisdiction in which the alien will be employed, such as licensure or other official permission required to immediately and fully perform the duties of the occupation in question. See INA section 214(i)(2), 8 U.S.C. 1184(i)(2); see also 9 Foreign Affairs Manual (FAM) 41.51 N.16.7.

Similar to procedures governing the H-1B classification, a U.S. employer seeking to employ E-3 nonimmigrant workers must obtain a Labor Condition Application (LCA) issued by the U.S. Department of Labor (DOL). See INA section 101(a)(15)(E)(iii), 8 U.S.C. 1101(a)(15)(E)(iii). After DOL approves an LCA, individuals who are outside the United States may apply for an E-3 visa directly at a consular office overseas, similar to other E nonimmigrant visa applicants. See 22 CFR 41.51(c); 9 FAM 41.51 N16.1. For individuals in the United States in another nonimmigrant status, the employer may instead file a Petition for a Nonimmigrant Worker, Form I-129, with USCIS to change the alien's nonimmigrant status to that of an E-3 nonimmigrant. See Adjudicator's Field Manual (AFM) Chapter 34.6 (b); see also Instructions to Petition for a Nonimmigrant

Worker, Form I-129, page 2. This petition may also be used to request an extension of stay for an E-3 nonimmigrant worker in the United States. Id.

E-3 nonimmigrant workers may be admitted initially for a period not to exceed 2 years, the maximum validity period of the accompanying LCA. See AFM Chapter 34.6 (a)(3); see also INA 101(a)(15)(E)(iii); 20 CFR 655.750(a); 22 CFR 41.51(c)(1)(iv).

USCIS may grant extensions of stay in increments not to exceed the validity period of the accompanying LCA (in increments of up to 2 years each). Id. USCIS may extend an E-3 nonimmigrant worker's status indefinitely. Id.

The E-3 nonimmigrant receives from USCIS his or her approval notice on Form I-797 with an attached Arrival-Departure Record, Form I-94, which serves as evidence of lawful immigration status. Currently, E-3 nonimmigrant workers may work for the petitioning employer only until the expiration date noted on the Arrival-Departure Record, Form I-94. The E-3 nonimmigrant must stop working if USCIS does not approve the petition for an extension of stay before the expiration date noted on the individual's Arrival-Departure Record, Form I-94.

Principal E-3 aliens are subject to an annual numerical limitation of 10,500 initial E-3 visas per fiscal year (FY). See INA section 214(g)(11), 8 U.S.C. 1184(g)(11). To determine numerical limitation compliance, USCIS counts initial E-3 visa applications submitted abroad, initial petitions for a change of status to E-3, and E-3 applications for an extension of stay requesting a change of employers against the numerical limitation. See INA section 214(g)(11)(A), 8 U.S.C. 1184(g)(11)(A); AFM Chapter 34.6 (a)(3) Note 3. USCIS does not count the dependent spouse and children of E-3 principal aliens

against the numerical limitation. See INA section 214(g)(11)(C), 8 U.S.C. 1184(g)(11)(C); 22 CFR 41.51(c)(2).

B. H-1B1 nonimmigrant classification.

Similar to the E-3 and H-1B nonimmigrant visa classifications, the H-1B1 nonimmigrant visa classification also involves the performance of services in a specialty occupation, except that it specifically applies to nationals of Chile and Singapore. See INA section 101(a)(15)(H)(i)(b1), 8 U.S.C. 1101(a)(15)(H)(i)(b1); INA section 214(g)(8)(A), 8 U.S.C. 1184(g)(8)(A). Congress created the H-1B1 nonimmigrant classification in sections 402-404 of the United States-Chile Free Trade Agreement Implementation Act, Public Law 108-77, 117 Stat. 909 (2003), and in section 402 of the United States-Singapore Free Trade Agreement Implementation Act, Public Law 108-78, 117 Stat. 947 (2003), both effective on January 1, 2004.

To employ an H-1B1 nonimmigrant, a U.S. petitioner must first obtain a certification from the U.S. Department of Labor (DOL) generally confirming that the petitioner has filed a Labor Condition Application (LCA) in the occupational specialty in which the nonimmigrant will be employed and has made the requisite attestations. See INA sections 101(a)(15)(H)(i)(b1), 212(t), 8 U.S.C. 1101(a)(15)(H)(i)(b1), 1182(t). The validity period of an LCA issued for an H-1B1 nonimmigrant must not exceed three years; an LCA for an extension must not exceed two years. See 20 CFR 655.750(a). After receiving a certified LCA, individuals who are not in the United States may apply for an H-1B1 visa directly at a consular office overseas. See 9 FAM 41.53 N26.2 and N26.3. For individuals in the United States in another nonimmigrant status, the U.S. employer may instead choose to file a Petition for a Nonimmigrant Worker, Form I-129,

with USCIS to change the alien's status to that of an H-1B1 nonimmigrant. See AFM Chapter 30.3(a); Instructions to Petition for a Nonimmigrant Worker, Form I-129, page 17. This petition may also be used to request an extension of stay for an H-1B1 nonimmigrant worker in the United States. Id.

H-1B1 nonimmigrant workers may initially be admitted for 1 year, and may only be extended in one-year increments. See INA section 214(g)(8)(C), 8 U.S.C. 1184(g)(8)(C). Extensions of stay may only be granted if there is a certified H-1B1 LCA for the period requested. See INA section 212(t), 8 U.S.C. 1182(t). USCIS may indefinitely extend H-1B1 nonimmigrant status. See INA 214(g)(8)(C). Currently, the H-1B1 nonimmigrant may work for the petitioning employer until his or her authorized period of stay expires, as noted on the latest Arrival-Departure Record, Form I-94. If USCIS has not approved the petition for an extension by this expiration date, the H-1B1 nonimmigrant cannot continue working past this date. See AFM Chapter 30.2(d).

A numerical limitation of 1,400 initial H-1B1 visas per FY applies to H-1B1 principal aliens who are nationals of Chile. See INA section 214(g)(8)(B)(ii)(I), 8 U.S.C. 1184 (g)(8)(B)(ii)(I). A numerical limitation of 5,400 initial H-1B1 visas per FY applies to principal aliens who are nationals of Singapore. See INA section 214(g)(8)(B)(ii)(II), 8 U.S.C. 1184 (g)(8)(B)(ii)(II). These numerical limitations apply to all initial H-1B1 visa applications submitted abroad and to all petitions seeking change of status to H-1B1 nonimmigrant classification submitted to USCIS. USCIS does not count the dependent spouses and children of H-1B1 principal aliens against the numerical limitations. See INA section 214(g)(8)(B)(iii), 8 U.S.C. 1184(g)(8)(B)(iii).

C. CW-1 nonimmigrant classification.

The CW classification includes CW–1 nonimmigrants, referring to principal workers, and CW–2 nonimmigrants, referring to dependent spouses and minor children. See 8 CFR 214.2(w)(2) and (3). The CW nonimmigrant classification was created in accordance with title VII of the Consolidated Natural Resources Act of 2008 (CNRA). See Pub. L. 110-229, 122 Stat. 754, 853 (2008). Title VII of the CNRA made effective the immigration laws of the United States in the CNMI and replaced the immigration laws of the CNMI. Id. The CNRA included provisions for a “transition period” to phase-out the CNMI’s nonresident contract worker program and phase-in the U.S. Federal immigration system in a manner that minimizes the adverse economic and fiscal effects and maximizes the CNMI’s potential for future economic and business growth. See section 701 of the CNRA, 48 U.S.C. 1806 note. The CNRA authorized DHS to create a nonimmigrant classification that would ensure adequate employment in legitimate businesses in the CNMI, while preventing adverse effects on wages and working conditions of workers already authorized to be employed in the United States, during the transition period, which is set to end on December 31, 2014, unless extended by the Secretary of Labor.⁶ See id.; 48 U.S.C. 1806(d)(2).

Consistent with the CNRA, DHS published a final rule⁷ on September 7, 2011, effective October 7, 2011, amending its regulations to add a new provision at 8 CFR

⁶ The Secretary of Labor is authorized to extend the transitional worker program beyond December 31, 2014 for additional periods of up to 5 years each. See section 701 of the CNRA, 48 U.S.C. 1806(d)(5).

⁷ On October 27, 2009, DHS published an interim rule which provided a 30-day comment period. See Commonwealth of the Northern Mariana Islands Transitional Worker Classification, 74 FR 55094 (Oct. 27, 2009). The interim rule was to become effective on November 27, 2009. However, as a result of a lawsuit filed by the CNMI government, a preliminary injunction was entered enjoining the interim final rule. See CNMI v. United States, 670 F. Supp. 2d 65 (D.D.C. 2009). On December 9, 2009, DHS published a notice in the Federal Register reopening and extending the public comment period for an additional 30 days. See Commonwealth of the Northern Mariana Islands Transitional Worker Classification; Reopening the Public

214.2(w) that implemented a temporary CW classification. See Commonwealth of the Northern Mariana Islands Transitional Worker Classification, 76 FR 55502 (Sept. 7, 2011) (hereinafter, 2011 CW classification final rule). With limited exception, the CW classification provides a method for certain aliens to transition from the former CNMI foreign worker permit system to the U.S. immigration system. Id. at 55502.

A CW-1 nonimmigrant worker is an alien worker who is ineligible for another nonimmigrant classification under the INA and who performs services or labor for an employer in the CNMI during the 5-year transition period in an occupational category designated by DHS. See 8 CFR 214.2 (w)(2)(i) and (vi). CW-1 nonimmigrant workers cannot be present in the United States, other than in the CNMI. See 8 CFR 214.2(w)(2)(iii). In addition, their presence in the CNMI must be lawful. See 8 CFR 214.2(w)(2)(iv). Moreover, if they are inadmissible to the United States as a nonimmigrant, they must have been granted a waiver of each ground of inadmissibility. See 8 CFR 214.2 (w)(2)(v). The alien seeking CW-1 nonimmigrant status must also meet any other occupational requirements as specified by the CNMI or local jurisdiction in which the alien will be employed, such as licensure or other official permission required to fully perform the duties of the occupation in question. See 8 CFR 214.2(w)(6)(ii)(E), (iii); Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I-129CW Classification Supplement, page 10.

Unlike the nonimmigrant specialty occupation worker classifications, this classification does not require a certified LCA from DOL prior to filing a petition with USCIS. Instead, a U.S. employer seeking to classify an alien as a CW-1 nonimmigrant

Comment Period, 74 FR 64997 (Dec. 9, 2009). The comments received during both comment periods were addressed in the final rule.

worker must first file a petition with USCIS. See 8 CFR 214.2(w)(5). Specifically, such employer must file a Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I-129CW, or other form prescribed by USCIS, with the accompanying CW Supplement and supporting evidence. See 8 CFR 214.2(w)(1)(x), (w)(5), and (w)(6). For individuals in the CNMI in another nonimmigrant status, the Form I-129CW may also be used to change status to that of a CW-1 nonimmigrant worker. See 8 CFR 214.2(w)(18); Instructions to Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I-129CW, page 1. Employers may also file a Form I-129CW to request an extension of stay for a CW-1 nonimmigrant worker in the CNMI or to petition to change employers. See 8 CFR 214.2(w)(7), (17); Instructions to Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I-129CW, page 1. Upon obtaining CW-1 nonimmigrant status, CW-1 nonimmigrant workers are employment authorized incident to status, but only in the CNMI and with the petitioning employer. 8 CFR 214.2(w)(22)(iv). This means that CW-1 nonimmigrants are authorized to work for the specific employer listed in their petition without requiring separate approval for work authorization from USCIS.

Under certain circumstances, the Form I-129CW may be filed on behalf of multiple beneficiaries, but the petitioning employer must submit one CW Supplement per beneficiary. See 8 CFR 214.2(w)(9); Instructions to Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I-129CW, page 2.

CW-1 nonimmigrant workers may be admitted for a period of up to 1 year. See 8 CFR 214.2(w)(13). USCIS may grant extensions of CW-1 status of up to 1 year until the end of the transition period, subject to the annual numerical limitation per FY. See 8

CFR 214.2(w)(17)(iii). The CW visa classification is valid only in the CNMI. See 8 CFR 214.2(w)(22).

The CW-1 nonimmigrant in the CNMI receives from USCIS a Notice of Action, Form I-797, or another form as USCIS may prescribe with an attached Arrival-Departure Record, Form I-94, which serves as evidence of lawful immigration status. See 8 CFR 214.2 (w)(12). Currently, CW-1 nonimmigrant workers may work for the petitioning employer only until the expiration of the petition validity period, even if an employer has filed a timely application for an extension of stay on the CW-1 nonimmigrant's behalf. See 8 CFR 214.2(w)(13). The CW-1 nonimmigrant must stop working if USCIS does not approve the petition for an extension of stay before the expiration of the petition's validity period.

CW-1 nonimmigrant workers are subject to an annual numerical limitation per FY. See 8 CFR 214.2(w)(1)(viii). The CNRA mandates an annual reduction in the number of transitional workers and total elimination of the CW classification by the end of the transition period.⁸ Consistent with this mandate, DHS established the CW-1 numerical limitation for FY 2011 at 22,417 and for FY 2012 at 22,416. See 8 CFR 214.2(w)(1)(viii)(A) and (B). The numerical limitation for FY 2013 was set at 15,000. See CNMI-Only Transitional Worker Numerical Limitation for Fiscal Year 2013, 77 FR 71287 (Nov. 30, 2012). The numerical limitation was set at 14,000 for FY 2014. See Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker Numerical Limitation for Fiscal Year 2014, 78 FR 58867 (Sept. 25, 2013). USCIS

⁸ The CNRA mandated that DHS provide the CNMI with flexibility to maintain existing businesses and develop new economic opportunities, yet required an annual reduction in the number of permits and total elimination of the CW classification by the end of the transition period. See section 701(b) of the CNRA, 48 U.S.C. 1806 note; 48 U.S.C. 1806(d)(2).

counts initial petitions for a change of status to CW-1, CW-1 petitions for an extension of stay, and requests for a change of status from another nonimmigrant status to CW-1 status against the numerical limitation. USCIS does not count CW-2 nonimmigrant dependent spouses and children of CW-1 principal aliens against the numerical limitation. Id. at 58868.

D. EB-1 outstanding professor and researcher immigrant classification.

The outstanding professor and researcher immigrant classification constitutes one of the three EB-1 immigrant worker categories.⁹ See INA section 203(b)(1)(B), 8 U.S.C. 1153(b)(1)(B). The professor or researcher must:

- Be recognized internationally as outstanding in a specific academic area;
- Have at least 3 years of experience in teaching or research in his or her academic area; and
- Seek to enter the United States for a tenured or tenure-track position within a university or institution of higher education to teach in the academic area, for a comparable position with a university or institution of higher education to conduct research in the area, or for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least three full-time persons in research activities and has achieved

⁹ The employment-based first-preference classification (EB-1) also consists of: (1) persons of extraordinary ability (must be able to demonstrate extraordinary ability in the sciences, arts, education, business, or athletics through sustained national or international acclaim); and (2) executives and managers of multinational employers (must have been employed in the three years preceding filing of the petition for at least one year by a firm, corporation, other legal entity, or affiliate or subsidiary thereof and must be seeking to enter the United States to continue service to that entity or a subsidiary or affiliate thereof in a capacity that is managerial or executive). This rule only proposes changes to EB-1 outstanding professors and researchers.

documented accomplishments in an academic field. See INA section 203(b)(1)(B), 8 U.S.C. 1153(b)(1)(B).

A prospective U.S. employer submitting a petition on behalf of an outstanding professor or researcher is not required to obtain an approved labor certification application from DOL, but the U.S. employer must submit an Immigrant Petition for Alien Worker, Form I-140, along with an offer of employment and other supporting evidence. See 8 CFR 204.5(i)(1) and 204.5(i)(3)(iii).

E. Need for regulatory improvements.

DHS recognizes that attracting and retaining these highly-skilled workers is important given the contributions of these individuals to the U.S. economy, including advances in entrepreneurial and research and development endeavors, which are highly correlated with overall economic growth and job creation. By some estimates, immigration was responsible for one-third of the explosive growth in patenting in past decades, and these innovations have the potential to contribute to increasing U.S. gross domestic product (GDP).¹⁰ According to one study, in over 25 percent of technology companies founded in the United States from 1995 to 2005, at least one key founder was foreign-born.¹¹ Likewise, in 2012, the Kauffman Foundation reported that immigrants were more than twice as likely to start a business in the United States as the native-born

¹⁰ See generally Jennifer Hunt & Marjolaine Gauthier-Loiselle, How Much Does Immigration Boost Innovation?, Nat'l Bureau of Econ. Research, Sept. 2008, available at <http://www.nber.org/papers/w14312>.

¹¹ See Vivek Wadhwa et al., Intellectual Property, the Immigration Backlog, and a Reverse Brain-Drain – America's New Immigrant Entrepreneurs, Part III, Ctr. for Globalization, Governance & Competitiveness, Aug. 2007, at 2, available at http://www.cggc.duke.edu/documents/IntellectualProperty_theImmigrationBacklog_andaReverseBrainDrain_003.pdf; Vivek Wadhwa et al., America's New Immigrant Entrepreneurs, Duke School of Engineering and the Univ. of Cal. Berkeley School of Info., Jan. 4, 2007, at 11, available at http://people.ischool.berkeley.edu/~anno/Papers/Americas_new_immigrant_entrepreneurs_I.pdf; Julia Preston, Work Force Fueled by Highly Skilled Immigrants, N.Y. Times, Apr. 15, 2010, available at http://www.nytimes.com/2010/04/16/us/16skilled.html?_r=1.

and a report by the Partnership for a New American Economy found that more than 40 percent of 2010 Fortune 500 companies were founded by immigrants or their children.¹²

DHS intends to harmonize regulations governing filing procedures, continued work authorization, and evidentiary requirements, with other similarly situated worker classifications. The proposals remove current regulatory obstacles that may cause unnecessary disruptions to the petitioning employers' ability to maintain productivity. In doing so, the proposals also remove obstacles for these workers to remain in or enter the United States and provide equity among the similar classifications.

1. E-3, H-1B1, and EB-1 classifications.

When Congress established the E-3 and H-1B1 nonimmigrant classifications, it authorized certain foreign workers to apply to the Department of State (DOS) for a visa without first obtaining a petition approval from USCIS. See REAL ID Act of 2005, Public Law 109-13, § 501; United States-Singapore Free Trade Agreement Implementation Act, Public Law 108-78, sec. 402; United States-Chile Free Trade Agreement Implementation Act, Public Law 108-77, secs. 402-404; see also 22 CFR 41.51(c); 9 FAM 41.51 N16.1; 9 FAM 41.53 N27.2 and N27.3 (respectively). In this regard, the procedures for obtaining status under the E-3 and H-1B1 classifications require fewer administrative steps than those required for the similar H-1B nonimmigrant classification.¹³ U.S. employers of E-3 and H-1B1 nonimmigrants save associated petition filing fees and processing times as a result.

¹² See Robert Fairlie, Kauffman Index of Entrepreneurial Activity: 1996–2012, The Ewing Marion Kauffman Found., Apr. 2013, at 10, available at <http://www.kauffman.org/what-we-do/research/2013/04/kauffman-index-of-entrepreneurial-activity-19962012>; Partnership for a New Am. Econ., 2011, The "New American" Fortune 500, June 2011, at 2 available at http://www.nyc.gov/html/om/pdf/2011/partnership_for_a_new_american_economy_fortune_500.pdf.

¹³ Under 8 CFR 214.2(h)(2), a United States employer or agent seeking to classify an alien as an H-1B temporary worker must file a petition with USCIS.

For the EB-1 outstanding professor and researcher immigrant classification, the prospective U.S. employer must file an Immigrant Petition for Alien Worker, Form I-140, and supporting evidence. Unlike most other employment-based immigrant classifications, however, the employer is not required to obtain and submit an approved labor certification application issued by DOL prior to filing the petition with USCIS.¹⁴ See 8 CFR 204.5(i)(1) and 204.5(i)(3)(iii).

While the procedures for the E-3, H-1B1, and EB-1 classifications may contain fewer administrative steps than procedures for other nonimmigrant or immigrant classifications, statistics indicate that these classifications are still underutilized. Even though there are 10,500 E-3 visas and 6,800 H-1B1 visas available per FY, DOS and USCIS statistics indicate that in FY 2013, DOS issued 3,946 new E-3 nonimmigrant visas and USCIS approved 622 extensions of stay requests and 102 requests for change of status to the E-3 nonimmigrant classification. Also in FY 2013, DOS issued 571 new H-1B1 visas and USCIS approved 411 extensions of stay requests and 315 requests for change of status to the H-1B1 nonimmigrant classification.¹⁵ In FY 2012, the most recent

¹⁴ See INA section 212(a)(5)(A). A permanent labor certification issued by the DOL is typically the first step in allowing an employer to hire a foreign worker to work permanently in the United States. Via the labor certification process, DOL certifies that there are not enough U.S. workers who are able, willing, qualified, and available in the geographic area where the immigrant is to be employed and that the employment of such alien will not adversely affect the wages and working conditions of similarly employed workers in the United States. Generally, petitioners for employees in the second preference categories (members of the professions holding advanced degrees and aliens of exceptional ability) (EB-2) and in the third preference categories (skilled workers, professionals and other workers) (EB-3) must obtain a permanent labor certification from DOL prior to filing an Immigrant Petition for Alien Worker, Form I-140, on behalf of a prospective foreign national employee. See INA section 203(b)(2)-(3), 8 U.S.C. 1153(b)(2)-(3); 8 CFR 204.5(k), (l).

¹⁵ For visas issued: See DOS, Fiscal Year 2013 Annual Report, Table XVI(B), Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards) Fiscal Years 2009-2013, available at <http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXVIB.pdf>. Source for USCIS processing volumes: USCIS Office of Performance and Quality, April 2014.

year that data has been released, a total of 3,394 persons obtained lawful permanent resident status in the EB-1 outstanding professor and researcher category, 16 of whom were new arrivals admitted to the United States as EB-1 immigrants whereas the remaining 3,378 individuals adjusted their status in the United States.¹⁶

In reviewing the existing regulations, DHS has identified changes to the regulations that can be made to significantly improve the process for these individuals seeking to remain in the United States in the E-3, H-1B1, or EB-1 classifications. The changes address stakeholders' concerns regarding the lack of the continued work authorization for E-3 and H-1B1 nonimmigrants with pending extension of stay requests and regarding the inability of EB-1 outstanding professors and researchers to submit comparable evidence for establishing eligibility. These changes would remove unnecessary obstacles for these workers to remain in or enter the United States under these classifications, while harmonizing the regulations of these similarly related classifications.

2. CW-1 nonimmigrant classification.

For the CW nonimmigrant classification, facilitating the retention of workers is not the objective, since Congress specifically directed a reduction in the number of aliens extended CW-1 nonimmigrant status during the transition period.¹⁷ Instead, the express

¹⁶ See DHS, Office of Immigration Statistics, 2012 Yearbook of Immigration Statistics Table 7, available at <https://www.dhs.gov/yearbook-immigration-statistics-2012-legal-permanent-residents.pdf>.

¹⁷ The CNRA requires an annual reduction in the number of transitional workers (and complete elimination of the CW nonimmigrant classification by the end of the transition period) but does not mandate a specific reduction. 48 U.S.C. 1806(d)(2). In addition, 8 CFR 214.2(w)(1)(viii)(C) provides that the numerical limitation for any fiscal year will be less than the number established for the previous fiscal year, and it will be reasonably calculated to reduce the number of CW-1 nonimmigrant workers to zero by the end of the transition period. DHS established the CW-1 numerical limitation for FY 2011 at 22,417 and for FY 2012

congressional intent of the CNRA provisions is to minimize the potential adverse economic and fiscal effects of the federalization of immigration in the CNMI. See 48 U.S.C. 1806(d)(2). While DHS believes that it issued implementing regulations consistent with congressional intent, see 76 FR 55502, DHS has identified improvements that can be made to the regulations to further minimize the effects of federalization and, therefore, better facilitate eligibility for continuing employment of CW-1 nonimmigrant workers during the transition period.

IV. Proposed Rule.

In this rule, DHS proposes to amend DHS regulations in several ways in order to improve the programs serving the E-3, H-1B1, and CW-1 nonimmigrant classifications and the EB-1 immigrant classification by harmonizing regulations for these classifications with regulations for other similar classifications. First, DHS proposes to amend 8 CFR 274a.12 to:

- Designate the principal E-3 and H-1B1 nonimmigrant classifications as employment authorized incident to status with a specific employer; and
- Automatically extend employment authorization to principal E-3, H-1B1, and CW-1 nonimmigrants with timely filed, pending extension of stay requests.

DHS recognizes that the current limitation on continued employment authorization, while the petition extension is pending, may cause disruption to a

at 22,416. See 8 CFR 214.2(w)(1)(viii)(A) and (B). DHS set the numerical limit of CW-1 temporary visas at 15,000 for FY 2013 and 14,000 for FY 2014. See Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker Numerical Limitation for Fiscal Year 2014, 78 FR 58867. For FY 13, employers filed petitions for a total of 8,133 beneficiaries (Source: USCIS Office of Performance and Quality).

petitioning employer's business. Through this rule, DHS intends to remove that potential disruption, as well as to provide equity with similar classifications.

Second, consistent with these changes and form instructions on the Petition for a Nonimmigrant Worker, Form I-129, DHS proposes to amend 8 CFR 214.1(c)(1) and 8 CFR 248.3(a) to add the principal E-3 and H-1B1 nonimmigrant classifications to the list of nonimmigrant classifications that must file a petition with USCIS to make an extension of stay or change of status request.

Third, DHS is proposing to amend 8 CFR 204.5(i)(3) by adding a provision allowing a petitioner seeking to employ an outstanding professor or researcher to submit comparable evidence to establish the beneficiary is recognized internationally as an outstanding professor or researcher.

A. Employment authorization for E-3 and H-1B1 nonimmigrants

1. Employment authorization incident to status with a specific employer.

DHS regulations at 8 CFR 274a.12 list the classes of aliens authorized to accept employment in the United States. Some classes of aliens are extended employment authorization automatically upon attaining their status. See 8 CFR 274a.12(a) and (b). On the other hand, other classes of aliens are employment authorized only after receiving a specific grant of employment authorization from USCIS following an application process. See 8 CFR 274a.12(c). Such nonimmigrants must apply for an Employment Authorization Document (EAD) which indicates that the individual is allowed to work in the United States as a result of the specific nonimmigrant status. For principal E-3 or H-1B1 nonimmigrants, the INA describes their employment with a specific, petitioning employer as the very basis for their presence in the United States; they do not have to

apply for an EAD. See INA section 101(a)(15)(E)(iii), 8 U.S.C. 1101(a)(15)(E)(iii); INA section 101(a)(15)(H)(i)(b1), 8 U.S.C. 1101(a)(15)(H)(i)(b1). Similarly situated nonimmigrants, such as H-1B nonimmigrants, are classified in the regulations as employment authorized incident to status with a specific employer. See 8 CFR 274a.12(b)(9). However, following the establishment of the E-3 and H-1B1 nonimmigrant categories by statute, the provisions in 8 CFR 274a.12(b) have not been updated to include principal E-3 and H-1B1 nonimmigrants.

Through this rule, DHS is proposing a new provision at 8 CFR 274a.12(b)(25) to add principal E-3 nonimmigrants to the list of aliens employment authorized incident to status with a specific employer. DHS is also proposing to amend 8 CFR 274a.12(b)(9), which currently applies to various H nonimmigrant classifications, to include the H-1B1 nonimmigrant classification as employment authorized incident to status with a specific employer. While these nonimmigrants have been treated as work authorized incident to status for a specific employer, they are not classified as such in the regulations. As a result of this rule, the current practice will be codified into existing regulation.

2. Automatic employment authorization while extension of stay request is pending.

Attracting and retaining high-skilled workers is critical to sustaining our nation's global competitiveness. In fact, according to the Congressional Budget Office, doing so will lead to greater economic growth because it will add more high-demand workers to the labor force, increase capital investment and overall productivity, and lead to greater

numbers of entrepreneurs starting companies in the United States.¹⁸ These individuals add to real GDP growth by boosting investment and raising productivity.¹⁹ Once these skilled workers are here, it is important to provide employers with continued access to their current foreign workers if and when they decide to extend the stay of such workers. The regulations at 8 CFR 274a.12(b)(20) provide aliens in specific nonimmigrant classifications with authorization to continue employment with the same employer for a 240-day period beyond the period specified on the Arrival-Departure Record, Form I-94, as long as a timely application for an extension of stay is filed on an alien's behalf. This provision applies only to the classifications specified in the regulation—not to all nonimmigrants.

Consequently, certain nonimmigrants automatically receive continued work authorization if an application for an extension of stay with the same employer is timely filed. The alien is authorized by regulation to continue employment with the same employer for a period not to exceed 240 days, beginning on the date of the expiration of the authorized period of stay. Such authorization is subject to any conditions and limitations noted on the initial authorization. If the petition is adjudicated prior to the expiration of the 240-day period and denied, the continued employment authorization is automatically terminated as of the date of the denial notice. See 8 CFR 274a.12(b)(20).

¹⁸ See Executive Office of the President, White House Report: The Economic Benefits of Fixing Our Broken Immigration System (July 10, 2013), at 4, available at <http://www.whitehouse.gov/sites/default/files/docs/report.pdf>; Congressional Budget Office, The Economic Impact of S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act (June 18, 2013), at 5, available at: <http://www.cbo.gov/publication/44346>.

¹⁹ See Economic Report of the President (Mar. 10, 2014), at 88, available at: http://www.whitehouse.gov/sites/default/files/docs/full_2014_economic_report_of_the_president.pdf.

The E-3 and H-1B1 nonimmigrant classifications did not exist when the provision authorizing an extension of employment authorization while an extension of stay request is pending was promulgated.²⁰ As a result, although principal E-3 and H-1B1 nonimmigrants may remain in the United States without accruing unlawful presence until USCIS renders a decision on a timely filed petition for an extension of stay, they may not continue to work for the petitioning U.S. employer while the petition is pending once their authorized stay has expired. See INA 212(a)(9)(B)(iv), 8 U.S.C. 1182 (a)(9)(B)(iv); see also Memo from Donald Neufeld, Acting Assoc. Dir., Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212 (a)(9)(C)(i)(I) of the Act 35 (May 6, 2009). To avoid gaps in employment authorization, U.S. employers of principal E-3 and H-1B1 nonimmigrants must file a petition to extend the nonimmigrant status of their E-3 and H-1B1 workers well before their period of authorized stay in the United States expires (the expiration date is indicated on the Arrival-Departure Record, Form I-94).²¹ As of March 2014, processing times at the USCIS Vermont Service Center for Petitions for Nonimmigrant Workers, Form I-129,

²⁰ The provision establishing employment authorization to certain nonimmigrants for a limited period while an extension request is pending became effective on June 1, 1987. See Control of Employment of Aliens, 52 FR 16216, 16220, 16227 (May 1, 1987). At that time, certain H, J, and L nonimmigrants aliens became eligible for an extension of employment authorization with the same employer incident to status for up to 120 days, and were authorized to request employment authorization beyond 120 days, if necessary, by applying for an Employment Authorization Document (EAD). The provision was amended in 1991 to change the period of employment authorization incident to status from the original 120 days to the current 240 days, and remove the ability to apply for an EAD to permit employment for additional periods. See Powers and Duties of Service Officers; Availability of Service Records, Control of Aliens, 56 FR 41767, 41781 (Aug. 23, 1991). In this later version, the authorization was expanded to encompass employment-based nonimmigrants more generally.

²¹ See AFM Chapter 30.2 (general requirements regarding extension of stay for nonimmigrants); see also 8 CFR 214.1. As previously noted, an H-1B1 nonimmigrant is only admitted in one-year increments. See INA section 214(g)(8)(C), 8 U.S.C. 1184(g)(8)(C).

filed for E-3 and H-1B1 extensions average 2 months.²² Alternatively, rather than apply for an extension of stay with USCIS, principal E-3 and H-1B1 nonimmigrants may choose to leave the United States, apply for a new visa at a U.S. consulate, and seek readmission to the United States in E-3 or H-1B1 status once the visa is issued. This process can involve substantial expense and may result in unanticipated delays related to issuance of a new visa or readmission to the United States. In either case, both employers and employees could face a gap in employment. The potential gap in the work authorization period can be disruptive for aliens and may be a determining factor in whether or not they decide to come to the United States on these visas.

Stakeholders have raised concerns to USCIS that, since E-3 and H-1B1 nonimmigrants are not included in 8 CFR 274a.12(b)(20) for automatic extensions of employment authorization while extension of stay requests are pending, U.S. employers experience difficulties because they cannot keep their nonimmigrant workers on the payroll and productive during this time. DHS agrees that it is important to ensure U.S. employers have uninterrupted access to these high-skilled nonimmigrants, just as U.S. employers have uninterrupted access to H-1B nonimmigrants in specialty occupations while an extension of stay request is pending. Accordingly, DHS concludes that 8 CFR 274a.12(b)(20) should be amended to include principal E-3 and H-1B1 nonimmigrant aliens, thereby giving these nonimmigrant aliens and their employers the same treatment as H-1B nonimmigrant aliens.

By automatically extending employment authorization to principal E-3 and H-1B1 nonimmigrants requesting extensions of stay, employers would gain the same

²² See USCIS Processing Time Information, available at <https://egov.uscis.gov/cris/processTimesDisplayInit.do>.

predictability in the employment authorization of their E-3 and H-1B1 employees as employers of similar employment-based nonimmigrants under 8 CFR 274a.12(b)(20). Thus, U.S. employers would not have to face a potential gap in employment of these nonimmigrant employees. Additionally, employees would avoid lost wages and the costs of having to seek a visa abroad.

B. Employment authorization for CW-1 nonimmigrants while extension of stay request is pending

The CW regulations do not currently treat requests for extensions of stay and requests for change of employment consistently. The CW regulations at 8 CFR 214.2(w) do not presently provide for continued employment authorization for CW-1 nonimmigrant workers based on timely filed extension of stay requests filed by the same initial employer. However, the regulations do provide continued work authorization for certain CW-1 nonimmigrant workers seeking to change to a new employer, including a change resulting from early termination, and for an employee under the previous CNMI immigration system. See 8 CFR 214.2(w)(7) and 8 CFR 274a.12(b)(23). Without continued work authorization for extension of stay requests, this inconsistency results in the disruption of employment for those CW-1 workers that are awaiting USCIS adjudication of their extension of stay requests with the same employer.

For individuals authorized to work under the previous CNMI immigration system, the regulation at 8 CFR 274a.12(b)(23) provides continuing work authorization in certain situations while the initial application for CW status is pending. Under this provision, an alien authorized to be employed in the CNMI can continue in that employment until a decision is made on a CW petition filed by the employer if the petition was filed on or

before November 27, 2011. DHS made this accommodation in the 2011 CW classification final rule implementing the CW nonimmigrant classification to address the unique circumstances in the CNMI. See Commonwealth of Northern Mariana Islands Transitional Worker Classification, 76 FR 55502. These circumstances included: the lack of familiarity in the CNMI with Federal immigration processes; the expiration of CNMI-issued employment authorization on November 27, 2011; the adverse economic situation in the CNMI; and the legislative direction in the CNRA to seek to minimize adverse economic effects of the federalization of immigration authority. See id. at 55513.

Similarly, a CW-1 nonimmigrant worker changing employers may work for the prospective employer once a non-frivolous Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I-129CW, is filed, and work authorization continues until the petition is adjudicated. See 8 CFR 214.2(w)(7). The CW-1 nonimmigrant worker is covered by this provision as long as: (1) the petition is filed before the date of expiration of the CW-1 nonimmigrant worker's authorized period of stay; and (2) subsequent to his or her lawful admission, the CW-1 nonimmigrant worker has not been employed without authorization in the United States. See 8 CFR 214.2(w)(7)(iii). Employment authorization ceases if the new petition is denied. See 8 CFR 214.2(w)(7)(iv).

The CNMI change-of-employer provisions also provide continuing work authorization when a CW-1 status violation results solely from termination of CW-1 nonimmigrant employment. See 8 CFR 214.2(w)(7)(v). Under these provisions, CW-1 nonimmigrant status expires 30 days after the date of termination, rather than on that date itself, as long as a new employer files a non-frivolous petition within that 30-day period, and the CW-1 nonimmigrant worker does not otherwise violate the terms and conditions

of his or her status. Id. Thus, the CW-1 nonimmigrant worker is able to begin work pending petition adjudication of the non-frivolous petition. See 8 CFR 214.2(w)(7)(iii). This provides a limited period of time after the termination of employment for CW-1 nonimmigrant workers to obtain new qualifying employment. See Commonwealth of Northern Mariana Islands Transitional Worker Classification, 76 FR 55502, 55515.

The change of employer provisions at 8 CFR 214.2(w)(7) were included in the 2011 CW classification final rule to provide a mechanism for employees to freely transfer between employers as mandated by the CNRA. See 48 U.S.C. 1806(d)(4). However, DHS did not include provisions to address employees who decide to extend their stay with the same employer. Such employees may experience gaps in employment authorization after their CW-1 nonimmigrant status expires while awaiting a decision on their request for an extension of stay with the same employer. While the 2011 CW classification final rule was silent regarding employment authorization in this situation, long-standing regulations at 8 CFR 274a.12(b)(20) covering other nonimmigrant classifications provide for continued employment authorization for up to 240 days.

Therefore, in the CW nonimmigrant worker context, current regulations have placed new employers petitioning for CW-1 nonimmigrant workers in a better position than existing employers of CW-1 nonimmigrant workers. The new petitioner has the advantage of work authorization for the alien beneficiary based on filing the petition, rather than upon it being granted. This effectively allows the beneficiary to work for a new employer pending adjudication of the petition as long as it is filed before the date of expiration of the CW-1 nonimmigrant worker's authorized period of stay, but the beneficiary cannot continue to work for his or her current employer on the same

terms. This disparity may serve as an incentive for CW-1 nonimmigrant workers to change employers. To remedy this effect and to ensure that current and new employers are on equal footing, DHS is proposing to amend the regulations to harmonize the CW nonimmigrant provisions regarding continued employment authorization during the pendency of requests for either change of employers or extension of stay. Specifically, DHS is proposing to amend 8 CFR 274a.12(b)(20) to add the CW-1 nonimmigrant classification to the list of employment-authorized nonimmigrant classifications that receive an automatic extension of employment authorization of 240 days while the employer's timely filed extension of stay request remains pending.²³ While processing times vary, USCIS expects to adjudicate within the 240-day time period.

C. Application requirement for E-3 and H-1B1 nonimmigrants requesting changes of status or extensions of stay.

As mentioned earlier in the Background section of the Supplementary Information, when the E-3 and H-1B1 nonimmigrant classifications were established by statute effective in 2005 and 2004 respectively, DHS provided a means for E-3 and H-1B1 nonimmigrants to request changes of status and extensions of stay through amendments to the instructions for the Petition for a Nonimmigrant Worker, Form I-129, to include the E-3 and H-1B1 nonimmigrant classifications in the change of status and extension of stay section. See Part 2 of Instructions to Petition for a Nonimmigrant Worker, Form I-129, pages 2, 17, and 19.

²³ Although the provisions are not exactly the same (continuing employment with the same employer is authorized for up to 240 days, while there is no fixed end to the work authorization pending adjudication of the petition in a change of employer situation), in practice USCIS does not expect this to result in any substantive difference as both types of petitions are normally adjudicated within 240 days.

In addition to the instructions to this form, application filing procedures are also contained in the regulations at 8 CFR 214.1(c) for extensions of stay and 8 CFR 248.3(a) for change of status. To update the regulations in conformity with the application filing procedures specified in the form instructions, DHS is amending 8 CFR 214.1(c) and 8 CFR 248.3(a) to add the E-3 and H-1B1 nonimmigrant classifications to the list of nonimmigrant classifications that must file a petition with USCIS to make an extension of stay or change of status request. This will update the regulation to reflect information already provided in the Instructions for Form I-129, Petition for a Nonimmigrant Worker (page 2). The amendment also removes references in 8 CFR 214.1(c) to the specific form that is currently used for such requests, the Petition for a Nonimmigrant Worker, Form I-129. Specific reference to this form and form title need not be included in the regulations. By removing it, the regulations will maintain necessary flexibility to accommodate future changes to the form title.

In addition to these changes, DHS also is proposing to delete the term “employer” in the description in 8 CFR 214.1(c) and 248.3(a)(1) of who may file requests for a change of status or extension of stay. DHS has determined that use of the term “employer” in the change of status and extension of stay provisions may be misleading if not read in a manner consistent with the regulations governing the petition requirements specific to each nonimmigrant classification governed by 8 CFR 214.2. In the classification-specific regulatory provisions in 8 CFR 214.2, individuals and entities that may file petitions on behalf of alien workers are fully described and vary from classification to classification. For example, those who may file H-1B, H-2A or H-2B petitions include certain agents, and petitions on behalf of athletes or entertainment

groups under INA 101(a)(15)(P), 8 U.S.C. 1101(a)(15)(P), can be filed by a U.S. sponsoring organization. See 8 CFR 214.2(h)(2)(i)(F), (p)(2)(i). To eliminate inconsistency between the change of status and extension of stay provisions and the classification-specific provisions in 8 CFR 214.2, DHS is proposing to amend the change of status and extension of stay provisions by replacing the narrow term “employer” with the more general term “petitioner.” Proposed 8 CFR 214.1(c) and 248.3(a)(1). DHS expects this change would eliminate any confusion that the current inconsistency in the regulatory text may have caused.

D. Comparable evidence for EB-1 outstanding professors and researchers.

Professors and researchers play a vital role in the educational and economic future of the United States by enhancing our competitiveness within the global marketplace. The United States is in constant competition with other developed nations to attract and retain the greatest number of high-skilled researchers and professors to enhance economic and educational stability.²⁴ Providing for a seamless immigration system is important to attract and retain high-caliber foreign national professors and researchers.

In implementing the employment-based immigrant classifications in 1991, the former Immigration and Naturalization Service (INS) recognized the importance of establishing a system which provided access to these high-skilled and specially-trained personnel for American businesses. See Employment-Based Immigrants, 56 FR 60897 (Nov. 29, 1991). In the regulations implementing IMMACT90, INS provided for petitioning procedures and eligibility and admission requirements for these employment-

²⁴ See Jonathan Rothwell et al. Patenting Prosperity: Invention and Economic Performance in the United States and its Metropolitan Areas. Metropolitan Policy Program at Brookings, Feb. 2013, at 33, available at <http://www.brookings.edu/~media/research/files/reports/2013/02/patenting%20prosperity%20rothwell/patenting%20prosperity%20rothwell.pdf>.

based immigrants. Id. INS recognized the importance of providing petitioners with some flexibility in the documentation that could be submitted to establish a beneficiary's eligibility. Id. The final rule retained or added the comparable evidence provision for certain employment-based immigrant categories, including EB-1 aliens of extraordinary ability under section 203(b)(1)(A) of the INA, 8 U.S.C. 1153(b)(1)(A), and the employment-based second preference (EB-2) aliens of exceptional ability under section 203(b)(2) of the INA, 8 U.S.C. 1153(b)(2). INS retained or added the comparable evidence provision in response to commenters' concerns that the proposed evidentiary criteria could exclude some aliens from qualifying for either the EB-1 aliens of extraordinary ability or the EB-2 aliens of exceptional ability classification. See 56 FR at 60900. The EB-1 classification consists of three types of skilled workers (persons of extraordinary ability, outstanding professors and researchers, and executives and managers of multinational employers) but INS only extended the comparable evidence provision to one of those categories – persons of extraordinary ability. However, INS did not extend the comparable evidence provision to EB-1 outstanding professors and researchers because the public did not suggest a similar change to this EB-1 provision. See 8 CFR 204.5(i)(3); 56 FR at 60899 and 60906. In the rule, INS limited the initial evidence for demonstrating that the alien is recognized internationally as an outstanding professor or researcher in their academic field, to six criteria. See 8 CFR 204.5(i)(3)(i).

Stakeholders in the educational and research arena have recently expressed concern that the current regulations at 8 CFR 204.5(i)(3) do not allow petitioners to submit comparable evidence that the beneficiary is recognized internationally as an outstanding professor or researcher, as allowed for related classifications. These

stakeholders believe that the current list at 8 CFR 204.5(i)(3) is dated and may no longer be reasonably inclusive.²⁵ They have opined that changing the regulations to permit petitioners to submit comparable evidence would provide petitioners with the opportunity to fully document the alien’s achievements, as they relate to the classification, without the constraints of a limited list of acceptable initial evidence.

Following review of the applicable regulatory provisions, DHS agrees that amending 8 CFR 204.5(i)(3) to include a comparable evidence option is appropriate in order to attract eligible professors and researchers to emigrate to the United States. In this rule, DHS proposes to modify the regulatory limitation on initial evidence for outstanding professors and researchers to allow a petitioner to submit “comparable evidence” in lieu of or in addition to the current list at 8 CFR 204.5(i)(3) that demonstrates that the beneficiary is internationally recognized as outstanding, if the evidence listed in the current regulation does not readily apply. See proposed 8 CFR 204.5(i)(3)(ii) (re-designating current 8 CFR 204.5(i)(3)(ii) and (iii) as 8 CFR 204.5(i)(3)(iii) and (iv), respectively). The new regulatory criterion for initial evidence would be similar to those found under the aliens of extraordinary ability and the aliens of exceptional ability classifications.²⁶ See 8 CFR 204.5(h)(4) and (k)(3)(iii). This change

²⁵ See Letter from Marlene M. Johnson, Executive Director and CEO of NAFSA: Association of International Educators, to Ivan K. Fong, General Counsel, DHS (April 13, 2011), available at <http://www.nafsa.org/uploadedFiles/DHSregreviewcommentApr122011%20public.pdf>.

²⁶ The aliens of extraordinary ability and aliens of exceptional ability classifications encompass a broad range of occupations (sciences, arts, education, business, or athletics for extraordinary ability aliens; and the sciences, arts, or business for exceptional ability aliens). See INA section 203(b)(1)(A), (2)(A). Employers filing petitions under such classifications thus may submit comparable evidence if they are able to establish that the standards listed in the regulation do not directly apply to the beneficiary’s occupation. See 8 CFR. 204.5(h)(4), (k)(3)(iii). In contrast, the outstanding professor or researcher classification encompasses only two overarching types of occupations, and the current eligibility criteria generally readily apply to both. Consequently, limiting submission of comparable evidence for outstanding professors and researchers only to instances in which the criteria do not readily apply “to the alien’s occupation” would be unavailing and would not adequately serve the goal of this regulatory change.

will allow the petitioner to submit additional evidence to establish eligibility for the classification; it will not change the standard for meeting the eligibility requirements.

V. Statutory and Regulatory Requirements.

A. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. DHS considers this to be a “significant regulatory action,” although not an economically significant regulatory action, under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation.

This proposed rule, if finalized, would not impose any additional costs on employers, individuals or government entities, including the Federal government. The proposed rule would make certain changes to the regulations, improving the process for obtaining or retaining status under the E-3, H-1B1, and CW-1 nonimmigrant classifications. Specifically, DHS is proposing to allow E-3, H-1B1, and CW-1 nonimmigrant workers up to 240 days of continued work authorization beyond the expiration date noted on their Form I-94, provided that their extension of stay request is timely filed. As previously noted, this change would put principal E-3, H-1B1, and CW-1 nonimmigrants on par with other, similarly situated nonimmigrants. The proposed provisions would not result in any additional costs, burdens, or compliance procedures

for either the U.S. employer of these nonimmigrant workers, nor to the workers themselves.

Additionally, DHS proposes to allow petitioners on behalf of EB-1 outstanding professors and researchers to submit comparable evidence, in lieu of or in addition to the evidence listed in 8 CFR 204.5(i)(3)(i), that the professor or researcher is recognized internationally as outstanding in his or her academic field. The allowance for comparable evidence for EB-1 outstanding professors and researchers would harmonize the evidentiary requirements with those of similarly situated employment-based immigrant classifications.

DHS notes that the above-referenced changes are part of DHS’s Retrospective Review Plan for Existing Regulations. During development of DHS’s Retrospective Review Plan, DHS received a comment from the public requesting specific changes to the DHS regulations that govern continued work authorization for E-3 and H-1B1 nonimmigrants when an extension of status petition is timely filed, and to expand the types of evidence allowable in support of immigrant petitions for outstanding researchers or professors. This rule is responsive to that comment, and with the retrospective review principles of Executive Order 13563.

The costs and benefits of the proposed rule are summarized in Table 2.

Table 2 Summary of Costs and Benefits		
Costs	Proposed Change	Benefits and Avoided Costs
E3, H-1B1, and CW-1 Status Holders		
None	Automatic continued employment authorization of up to 240 days for an H-1B1, E-3, or CW-1 nonimmigrant worker while an extension of stay petition is pending.	Avoided cost of lost productivity for U.S. employers of E-3, H-1B1, and CW-1 workers. Not quantified.
		Would provide equity for E-3 and H-1B1 status holders relative to

		other employment-based nonimmigrants listed in 8 CFR 274a.12.(b)(20) and provides equity for CW-1 nonimmigrant workers whose extension is filed by the same employer , similar to other CW-1 nonimmigrant workers. Qualitative benefit.
	Clarify that E-3 and H-1B1 nonimmigrants are work authorized incident to status, and specify current filing procedures for requesting change of status or extension of status.	Ensures the regulations are consistent with statutory authority and codifies current practice.
EB-1 Outstanding Professor and Researcher Classification		
	Allow the use of comparable evidence to that in listed in 8 CFR 204.5(i)(3)(i)(A) – (F) to establish that the EB-1 professor or researcher is recognized internationally as outstanding in his or her academic field.	May facilitate recruitment of EB-1 outstanding professors and researchers for U.S. employers. Not quantified.
		Would provide equity for EB-1 status holders relative to other employment-based immigrants listed in 8 CFR 204.5. Qualitative benefit.

A summary of the visa types affected by this proposed rule is shown in Table 3.

Visa Type	Beneficiary Restrictions	Immigration Status	Maximum Duration of Stay	Annual Limitations
E-3	Nationals of Australia	Nonimmigrant (temporary workers)	2 years, indefinite extensions	10,500
H-1B1	Nationals of Chile or Singapore	Nonimmigrant (temporary workers)	1 year, indefinite extensions	1,400 for Chilean nationals; 5,400 for Singaporean nationals
CW-1	Limited to workers in the CNMI during the transition to U.S. Federal immigration regulations	Nonimmigrant (temporary workers)	1 year, extensions available through December 31, 2014 unless extended by DOL	Maximum of 14,000 in FY 2014

EB-1 outstanding professor and researcher	Outstanding professors and researchers (any nationality)	Immigrant (permanent workers)	None	Apportioned from the approximate 40,000 available annually to first preference employment-based immigrant visas.
--	---	-------------------------------------	------	--

1. E-3 or H-1B1 nonimmigrant workers.

Under current regulations, employers of E-3 or H-1B1 nonimmigrants must generally file a petition requesting the extension of the individual employee's stay well before the initial authorized period of stay expires in order to ensure continued employment authorization throughout the period that the extension request is pending. The petition requesting an extension may be filed as early as 6 months prior to the expiration of their authorized period of stay and, as noted previously, the average processing time for these extension requests is 2 months as of March 2014. If, however an extension request is not granted prior to the expiration of the authorized period of stay, the E-3 or H-1B1 nonimmigrant cannot continue to work while his or her extension petition remains pending.

In this rule, DHS proposes to amend its regulations to permit principal E-3 and H-1B1 nonimmigrants to continue their employment with the same employer for a period not to exceed 240 days beyond the expiration of their authorized period of stay specified on their Arrival-Departure Record, Form I-94, while their petitions requesting extensions are pending. To obtain this 240-day automatic employment bridge, employers would be required to timely file a Petition for a Nonimmigrant Worker, Form I-129, to request an extension of the employee's stay. See proposed 8 CFR 274a.12(b)(20). Under current regulations, employers must file Form I-129 in order to request an extension of stay on

behalf of the employee, so there are no additional filing requirements for employers to comply with this proposed rule.

Through this rule, DHS intends to harmonize the provisions of extended employment authorization (generally through the adjudication period of an extension) of principal E-3 and H-1B1 nonimmigrant classifications with the related provisions of other employment-based nonimmigrant classifications in 8 CFR 274a.12(b)(20).

This provision of the proposed rule would not create additional costs for any petitioning employer or for the E-3 or H-1B1 nonimmigrant worker. The benefits of the proposed rule would be to provide equity for E-3 and H-1B1 nonimmigrants relative to other employment-based nonimmigrants listed in 8 CFR 274a.12.(b)(20). Additionally, this provision may allow employers of E-3 or H-1B1 nonimmigrant workers to avoid the cost of lost productivity resulting from interruptions of work while an extension of stay petition is pending.

In addition, DHS is proposing to amend the regulations to codify current practices. Specifically, DHS would amend 8 CFR 274a.12 to clarify in the regulations that the principal E-3 and H-1B1 nonimmigrant classifications are employment authorized incident to status with a specific employer. DHS is also proposing to amend 8 CFR 214.1(c)(1) and 8 CFR 248.3(a) to add the principal E-3 and H-1B1 nonimmigrant classifications to the list of nonimmigrant classifications that must file a petition with USCIS to make an extension of stay or change of status request. Again, both of these regulatory clarifications are consistent with current practice.

Table 4 shows that USCIS received a total of 5,221 extension of stay petitions for H-1B1 and E-3 nonimmigrant workers in the FYs from 2009 through 2013 (an average of

1,044 petitions per year). Approvals of extensions of stay petitions in the same period totaled 3,828 (an average of 766 per year). Extension of stay petitions received and petition approvals are not meant for direct comparison because decisions regarding a petition received in one year may be made in another year.

FY	Petitions Received			Petition Approvals		
	H-1B1	E-3	Total	H-1B1	E-3	Total
2009	490	611	1,101	231	618	849
2010	444	624	1,068	185	571	756
2011	438	555	993	220	410	630
2012	489	563	1,052	180	380	560
2013	417	590	1,007	411	622	1,033
Total	2,278	2,943	5,221	1,227	2,601	3,828

Source: Data provided by USCIS Office of Performance and Quality (OPQ), April, 2014.

USCIS does not have an estimate of either the number of cases where E-3 and H-1B1 nonimmigrants have lost work authorization because their petition for an extension of stay was not adjudicated before the expiration of their authorized period of stay or the duration of the lost work authorization.²⁷ Because of this data limitation, we are unable to quantify the total aggregate estimated benefits of this provision of the rule. To the extent that this rule would allow U.S. employers to avoid interruptions in productivity that could result if the extension of stay is not adjudicated prior to the expiration date noted on the nonimmigrant worker’s Form I-94, the rule would result in a benefit for U.S. employers.

²⁷ USCIS acknowledges that in part 3 of the Petition for a Nonimmigrant Worker (currently Form I-129), information is collected about the beneficiary that is currently in the United States. While this information is collected and considered for purposes of adjudication of benefit, this information is not captured in a database.

DHS requests public comment from impacted stakeholders on additional information or data that would permit DHS to estimate the benefits of this rule as it relates to avoiding productivity losses or other benefits to U.S. employers or E-3 and H-1B1 high-skilled workers, including whether this rule may facilitate recruitment of high-skilled workers.

2. CW-1 nonimmigrant workers.

This provision of the proposed rule would apply to the CW-1 classification which is issued solely to nonimmigrant workers in the CNMI. The CW-1 nonimmigrant visa classification was created to allow workers who are otherwise ineligible for other nonimmigrant visa classifications under the Federal immigration system to work in the CNMI during the period in which the immigration regulations of the CNMI transition to those of the U.S. Federal immigration system. This transition period will end on December 31, 2014, after which CW-1 nonimmigrant status will cease, unless the transitional worker program is extended by DOL.

CW-1 nonimmigrants may be admitted to the CNMI for a period of 1 year. USCIS may grant extensions in 1-year increments until the end of the transition period. The CW-1 nonimmigrant visa classification is valid only in the CNMI and does not require a certified LCA from the DOL.

DHS has determined that current regulations contain an inconsistency. While current regulations provide continued work authorization for CW-1 nonimmigrant workers during the pendency of USCIS adjudication of petitions for a change of employers and for certain beneficiaries of initial CW petitions filed on or before November 27, 2011, continued work authorization is not currently provided for CW-1

nonimmigrant workers requesting extensions of stay with the same employer. This inconsistency in the regulations may create an incentive for CW-1 nonimmigrant workers to change employers, as they would have the advantage of uninterrupted work authorization.

The proposed revision to the regulations would allow for equitable treatment of CW-1 nonimmigrant workers by extending continued employment authorization for up to 240 days while a request for an extension of stay with the same employer is being adjudicated. As with the similar proposal in this rule regarding H-1B1 and E-3 nonimmigrants, current employers of CW-1 nonimmigrant workers may also avoid productivity losses that could be incurred if a CW-1 nonimmigrant is not permitted to continue employment during adjudication of the extension request.

The CW-1 nonimmigrant visa classification is temporary. DHS has established numerical limitations on the number of CW-1 nonimmigrant visas that may be granted, as shown in Table 5. The numerical limitations apply to both initial petitions and extension of stay requests, including change of employer petitions, in a given FY. DHS has not yet determined the reduction in the numerical limitation for the remainder of the transition period from October 1, 2013 (beginning of FY 2014) to December 31, 2014 (the end of the transition period, unless the transition period is extended by the Secretary of Labor).

FY	Numerical Limit
2011	22,417
2012	22,416
2013	15,000
2014	14,000

Period from October 1, 2014 through December 31, 2014	To be determined
--	------------------

Source: FYs 2011 and 2012, 8 CFR 214(w)(viii). FY 2013, Federal Register volume 77, no. 231, page 71287. FY 2014, Federal Register volume 78, no. 186, page 58867.

DHS set the numerical limit of CW-1 temporary visas at 15,000 for FY 2013 and petitioning employers filed initial petitions for 696 beneficiaries; extension of stay requests from the same employer for 6,079 beneficiaries; and extension of stay requests from new employers for an additional 1,358 beneficiaries.²⁸ The population affected by this provision of the proposed rule would be those CW-1 nonimmigrant workers whose subsequent extensions of stay requests were filed by the same employer. Accordingly, if this proposal were in place in FY 2013, all of the 6,079 CW-1 nonimmigrant workers with extension of stay requests with the same employer would receive the continued 240-day employment bridge, generally putting these workers on par with CW-1 nonimmigrant workers with extension of stay request for new employers.

This proposed provision would not impose any additional costs for any petitioning employer or for CW-1 nonimmigrant workers. The benefits of the proposed rule would be to provide equity for CW-1 nonimmigrant workers whose extension of stay request is filed by the same employer relative to other CW-1 nonimmigrant workers. Additionally, this provision would mitigate any potential distortion in the labor market for employers of CW-1 nonimmigrant workers created by the differing provisions for retained workers versus provisions for workers changing employers and prevent a potential loss of productivity for current employers. Currently these benefits would be

²⁸ Source: USCIS Office of Performance and Quality.

limited in duration, as the transition period in which CW-1 visas are issued is to expire on December 31, 2014, unless extended by DOL.

While USCIS does not have data to permit a quantitative estimation of the benefits²⁹ of this provision, the provision is offered in response to a request from stakeholder organizations to provide for continuing work authorization pending adjudication of extension of stay requests filed on behalf of original CW-1 nonimmigrant workers.³⁰

DHS invites impacted stakeholders to provide any additional information or data that would permit DHS to quantitatively estimate the benefits of this rule as it relates to CW-1 nonimmigrant workers in the CNMI and preventing a potential loss of productivity for employers who retain their CW-1 nonimmigrant workers.

3. EB-1 outstanding professors and researchers.

For the EB-1 outstanding professor and researcher immigrant classification, under current regulations a petitioner must submit initial evidence that the beneficiary is recognized internationally as outstanding in his or her specific academic field. The type of evidence that is required is outlined in 8 CFR 204.5(i)(3).

In this rule, DHS is proposing to allow the substitution of comparable evidence (examples might include important patents and prestigious, peer-reviewed funding or grants) for that listed in 8 CFR 204.5(i)(3)(i)(A) – (F) to establish that the EB-1 professor or researcher is recognized internationally as outstanding in his or her academic field.

²⁹ The aggregate value of benefits would depend on several non-quantifiable factors including: the number of CW-1 workers prompted to change employment because of the automatic extension versus those changing for reasons of promotion, advancement or termination by their previous employer and whether the Secretary of Labor decides to extend the transition period.

³⁰ Joint letter to the Director, USCIS, from the Saipan Chamber of Commerce, the Hotel Association of the Northern Mariana Islands and the Society for Human Resource Management CNMI (Dec. 20, 2012).

See proposed 8 CFR 204.5(i)(3)(ii). The other requirements remain unchanged. This change is being proposed in response to stakeholder concerns that the current evidentiary list is dated and may not allow the beneficiary to present the full documentation of their talents.³¹

By allowing the submission of comparable evidence, DHS would harmonize the evidentiary requirements of the EB-1 outstanding professor and researcher category with those currently available to employment-based petitioners in both the aliens with extraordinary ability category as well as the second-preference employment category for a person of exceptional ability.

This provision of the proposed rule would not create additional costs for any petitioning employer or for the EB-1 outstanding professor and researcher classification. The benefits of this provision are qualitative, as it would provide equity for EB-1 outstanding professors and researchers relative to other employment-based immigrant status holders listed in 8 CFR 204.5. Because of the expanded types of evidence that could be used to support an EB-1 petition, it is possible that qualified U.S. employers would find the recruitment of EB-1 outstanding professors and researchers eased due to this proposed provision.

As shown in Table 6, over the past ten FYs, an average of 91.9 percent of EB-1 petitions for outstanding professors and researchers are approved under the current evidentiary standards. USCIS does not have data to indicate which, if any, of the 2,896 petitions that were not approved from FY 2003 through FY 2013 would have been

³¹ See Letter from Marlene M. Johnson, Executive Director and CEO of NAFSA: Association of International Educators, to Ivan K. Fong, General Counsel, DHS (April 13, 2011), available at <http://www.nafsa.org/uploadedFiles/DHSregreviewcommentApr122011%20public.pdf>.

approved under the proposed evidentiary standards. Furthermore, we are not able to estimate whether the proposed evidentiary standards would alter the demand for EB-1 outstanding professors and researchers by U.S. employers. Because of this data limitation, the further quantification of this benefit is not possible.

FY	Receipts³²	Approved³³	Denied	Percent Approved
2003	3,434	2,403	278	89.63%
2004	2,864	2,021	375	84.35%
2005	3,089	5,455	391	93.31%
2006	3,111	3,139	165	95.01%
2007	3,560	2,540	300	89.44%
2008	2,648	2,223	187	92.24%
2009	3,209	3,991	309	92.81%
2010	3,522	3,199	332	90.60%
2011	3,187	3,090	218	93.41%
2012	3,112	3,223	194	94.32%
2013	3,350	3,180	147	95.58%
Total	35,086	34,464	2,896	10-Yr Avg: 91.88%

Source: Data provided by USCIS Office of Performance and Quality (OPQ), April 2014.

DHS welcomes public comments from impacted stakeholders, such as employers or prospective employers of an EB-1 outstanding professor or researcher, providing information or data that would enable DHS to calculate the resulting benefits of the proposed provision.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121

³² Receipts are those filed within the FY indicated and include petitions from new arrivals and those that are seeking to adjust status.

³³ Approved and denied petitions may have been received in a previous FY.

(March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. With this rule, DHS proposes these revisions to allow for additional flexibilities; harmonize the conditions of employment of E-3, H-1B1 and CW-1 nonimmigrant workers with other, similarly situated nonimmigrant categories; and harmonize the allowance of comparable evidence for EB-1 outstanding professors and researchers with evidentiary requirements of other similar employment-based immigrant categories. As discussed previously, DHS does not anticipate that the additional flexibilities and harmonization provisions proposed would result in any costs for impacted U.S. employers including any additional costs for small entities.

As discussed extensively in the regulatory assessment for Executive Orders 12866 and 13563 and elsewhere throughout the preamble, this proposed rule does not impose any costs on U.S. employers. The proposed amendments provide automatic flexibilities and harmonization for U.S. employers under current application practices, and do not impose any new or additional compliance procedures for these employers.

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

C. Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore,

no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Small Business Regulatory Enforcement Fairness Act of 1996

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

E. Executive Order 13132

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

F. Executive Order 12988

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

G. Paperwork Reduction Act.

Under the Paperwork Reduction Act (PRA) of 1995, Pub. L. 104-13, all agencies are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting requirements inherent in a rule. See 44 U.S.C. 3506.

The information collection requirement contained in this rule, Immigrant Petition for Alien Worker, Form I-140, has been previously approved for use by OMB under the PRA. The OMB control number for the collections is 1615-0015.

Under this rule, DHS is proposing to revise the Immigrant Petition for Alien Worker, Form I-140, instructions to expand the current list of evidentiary criteria to include comparable evidence so that U.S. employers petitioning for an EB-1 outstanding professor or researcher may submit additional or alternative documentation demonstrating the beneficiary's achievements if the evidence otherwise described in 8 CFR 204.5(i)(3)(i) does not readily apply. Specifically, DHS proposes to add a new paragraph b. under the "Initial Evidence" section of the form instructions, to specify that employers filing for an outstanding professor or researcher may submit comparable evidence to establish the alien's eligibility if the listed standards do not readily apply. DHS also proposes minor clarifying language updates to the form instructions to maintain parity among USCIS forms.

Accordingly, DHS is requesting comments on revisions for 60-days until [Insert date 60 days from date of publication in the FEDERAL REGISTER]. Comments on this information collection should address one or more of the following four points:

1. Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of information collections for Immigrant Petition for Alien Workers, Form I-140:

- a. **Type of information collection:** Revision of a currently approved information collection.
- b. **Abstract:** This information collection is used by USCIS to classify aliens under INA sections 203(b)(1), 203(b)(2), or 203(b)(3).
- c. **Title of Form/Collection:** Immigrant Petition for Alien Workers.
- d. **Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:** Form I-140; USCIS.
- e. **Affected public who will be asked or required to respond:** Businesses or other for-profit organizations.
- f. **An estimate of the total number of annual respondents:** 77,149 respondents.
- g. **Hours per response:** 1 hour 5 minutes (1.08 hours) per response.
- h. **Total Annual Reporting Burden:** 83,321 annual burden hours.

Comments concerning this information collection can be submitted to Chief, Regulatory Coordination Division, Office of Policy and Strategy, USCIS, DHS, 20 Massachusetts Avenue, NW., Washington, DC 20529-2140.

List of Subjects

8 CFR Part 204

Administrative practice and procedures, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping, Students.

8 CFR Part 248

Aliens, Reporting and recordkeeping requirements.

8 CFR Part 274a

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

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 204—IMMIGRANT VISA PETITIONS

1. The authority citation for part 204 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1184, 1186a, 1255, 1641; 8 CFR part 2.

2. Section 204.5 is amended by:

- a. Redesignating paragraphs (i)(3)(ii) and (i)(3)(iii) as paragraphs (i)(3)(iii) and paragraph (i)(3)(iv), respectively; and
- b. Adding a new paragraph (i)(3)(ii).

The addition reads as follows:

§ 204.5 Petitions for employment-based immigrants.

* * * * *

(i) * * *

(3) * * *

(ii) If the standards in paragraph (i)(3)(i) of this section do not readily apply, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

* * * * *

PART 214—NONIMMIGRANT CLASSES

3. The authority citation for part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Pub. L. 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; Title VII of Pub. L. 110-229; 8 CFR part 2.

4. Section 214.1 is amended in paragraph (c)(1) by :

a. Revising the paragraph heading; and

b. Removing the first and second sentences, and adding one sentence in their place.

The revision and addition read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(c) * * *

(1) Extension of stay for certain employment-based nonimmigrant workers. A petitioner seeking the services of an E-1, E-2, E-3, H-1B, H-1B1, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q-1, R-1, or TN nonimmigrant beyond the period previously granted, must apply for an extension of stay on the form designated by USCIS, with the

fee prescribed in 8 CFR 103.7(b)(1), with the initial evidence specified in § 214.2, and in accordance with the form instructions. * * *

* * * * *

PART 248—CHANGE OF NONIMMIGRANT CLASSIFICATION

5. The authority citation for part 248 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1258; 8 CFR part 2.

6. Section 248.3 is amended by revising the section heading and paragraph (a) to read as follows:

§ 248.3 Petition and application.

* * * * *

(a) Requests by petitioners. A petitioner must submit a request for a change of status to E-1, E-2, E-3, H-1C, H-1B, H-1B1, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q-1, R-1, or TN nonimmigrant.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

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

Authority: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2.

8. Section 274a.12 is amended by:

- a. Revising the first sentence of paragraph (b)(9);
 - b. Revising the first sentence of paragraph (b)(20);
 - c. Removing the term “or” at the end of paragraph (b)(23);
 - d. Removing “.” at the end of paragraph (b)(24) and adding in its place “; or”;
- and

e. Adding new paragraph (b)(25).

The revisions and addition read as follows:

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

* * * * *

(b) * * *

(9) A temporary worker or trainee (H-1, H-2A, H-2B, or H-3), pursuant to § 214.2(h) of this chapter, or a nonimmigrant specialty occupation worker pursuant to section 101(a)(15)(H)(i)(b1) of the Act. * * *

* * * * *

(20) A nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (b)(5), (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), (b)(13), (b)(14), (b)(16), (b)(19), (b)(23) and (b)(25) of this section whose status has expired but who is the beneficiary of a timely application for an extension of such stay pursuant to §§ 214.2 or 214.6 of this chapter. * * *

* * * * *

(25) A nonimmigrant treaty alien in a specialty occupation (E-3) pursuant to section 101(a)(15)(E)(iii) of the Act.

* * * * *

Jeh Charles Johnson,
Secretary of Homeland Security.

[FR Doc. 2014-10733 Filed 05/09/2014 at 8:45 am; Publication Date: 05/12/2014]