

**Comment on Proposed Rule:  
Retention of EB–1, EB–2, and EB–3  
Immigrant Workers and Program  
Improvements Affecting High-Skilled  
Nonimmigrant Workers**

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This is a Comment on the U.S. Citizenship and Immigration Services (USCIS) Proposed Rule: Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers

The proposed regulation does not sufficiently increase worker flexibility, portability, and entrepreneurial capacity. While a slight improvement, this regulation should go further:

1. Employment Authorization Document (EAD)
  - a. The regulation should remove the “compelling circumstances” language, priority date within 1 year of visa bulletin cut-off date, and increase the time span of the validity of the EAD to at least 3 years. Ideally, the EAD’s validity should be extended until the priority date becomes current in every circumstance. If such extended EAD term is not possible, the applicant should not have to make a fresh showing of their qualification when the EAD must be renewed.
  - b. Advanced Parole should accompany the EAD to allow the applicant to travel to and from the United States.
2. Portability
  - a. Applicants for employment-based green cards should be able to switch employers freely and their new employers should not have to file new labor certification or I-140 petitions. One initial application should be sufficient. The labor certification should follow the worker; it should not be attached to the employer.
  - b. The definition of “same or similar” jobs under INA 204(j) is too restrictive. Instead of meaning “marked resemblance” or “resembled in every relevant respect,” there should just be a simple employer attestation that the occupations are similar.

The reasons for increasing portability are manifold:

1. Basic labor market economics
  - a. The labor market operates similarly to other markets with some important caveats. On the X-axis are the quantity of hours worked and on the Y-axis is the price per hour worked, or the wage.
  - b. The supply of labor can increase due to more workers entering the occupation or each worker being employed for more hours. The former is affected by immigration, the latter by the so-called labor/leisure trade off. In the latter, the higher the wage the more time the worker will spend laboring and the less time he or she will spend on leisure. This is called the substitution effect. However, there is also an income effect, which is that when a worker earns more money he or she will demand more goods and services – including leisure time. The fascinating effect with labor economics is that the income effect produces a backward bending labor supply curve at certain high wages.
  - c. Labor demand is entirely determined by the marginal productivity of the worker in question. The marginal value product (MVP) of a worker is the quantity of goods he or she produces multiplied by the market price.

- d. The wage for workers in the same occupations is determined by the intersection of the labor supply and labor demand curves. These wages are determined market wide in a free market.
2. Portability increases market efficiency
  - a. Restrictions on the mobility of foreign workers likely lower the wages of those workers by increasing the supply of labor available to the specific employer. Government rules restricting the movement of these workers make the labor market local to the firm itself, insulating it from wage changes in the rest of the economy. This allows for an inefficient use of resources by the firm. Unconstrained by changing market prices, firms will allocate resources less efficiently when worker wages are fixed by law. Also, wage windfalls in one area from foreign workers could increase the MVP of complementary workers not on visas, partially vitiating the supposed labor savings. Furthermore, the worker will also earn less than his MVP. Finally, workers in other firms will have fewer employment options due to the foreign worker restrictions. In short, everybody loses from restrictions on worker portability in the long run although some firms may face windfalls in the form of lower wages for some employers in the short run.
3. Better employer behavior
  - a. If foreign workers are more portable, U.S. firms will not be able to use them to lower the wages of similarly-skilled American workers. If firm X pays foreign workers below their market value, those workers would leave to seek higher paid employment and firm X would be forced to raise wages to the market level to attract workers.
4. More productive workers
  - a. Foreign workers paid below market wages and legally impeded from seeking more gainful employment could constrain human capital acquisition. After all, what would be the point of becoming more productive if wages are capped due to portability restrictions? Increasing portability increases the incentive for these workers to acquire firm and county-specific human capital.
5. Streamlined government
  - a. The Department of Labor and other government agencies are tasked with investigating wage complaints and confirming that firms pay foreign workers market wages. These tasks would be eased significantly by allowing foreign workers greater portability. The worker is the best regulator of his or her own wages as he or she has the incentive to monitor and find a new employer to take advantage of higher market wages. Increased portability would increase wage compliance without an increase in government investigative capacity.

Conclusion:

1. Any regulatory reform contemplated here should increase the portability of foreign workers by removing the legal barriers and costs for the worker *and* the employer. The regulation proposed here does not nearly go far enough.
2. Employees, employers, and the government would all benefit from regulatory changes toward greater portability.

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