SEYFARTH SHAW

Management Alert

Department of Homeland Security (DHS) Publishes Final Rule Improving Certain Employment-Based Immigrant and Nonimmigrant Visa Programs

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***Seyfarth Synopsis**: Employers and foreign nationals should take note of critical changes to DHS' regulations impacting employment-based immigration for highly skilled workers.*

On January 17, 2017, the Department of Homeland Security (DHS) will amend its regulations to improve certain employment-based immigrant and nonimmigrant visa programs. The amended regulations, announced through publication of the agency's final rule, are designed to improve processes and increase certainty for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers, create greater stability and job flexibility for those workers, and increase transparency and consistency in the application of DHS policy related to affected visa classifications.

The following significant changes and clarifications are described in more detail below:

1. In most cases, I-140 immigrant visa petitions that have been approved for 180 days or more will remain valid for supporting three-year H-1B extensions even after employer revocation.

2. Workers holding E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN status will be eligible for up to a 60-day grace period during which they may remain lawfully in the U.S. and seek new employment.

3. Certain applicants, particularly those with pending adjustment of status applications, seeking to renew their EAD cards, will be eligible for an automatic 180-day extension of their work authorization beyond the card's expiration date while their renewal application is pending.

4. Under limited circumstances, USCIS may approve EAD applications for certain nonimmigrants who have reached specific milestones in the green card process and can "demonstrate compelling circumstances."

5. Longstanding H-1B portability policies have been codified and clarified.

6. Various provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) are codified and clarified, specifically those relating to H-1B recapture and H-1B extensions beyond the six-year limitation.

7. H-1B petitions for jobs requiring licensure must be filed with evidence of a license or evidence that the H-1B worker may fully perform the duties of the position under a licensed supervisor.

1. I-140 Petition Validity

Under the amended regulations, an I-140 immigrant visa petition that has been approved for 180 days or more, or an I-140 petition that was filed concurrently with an I-485 adjustment of status application that has been pending for 180 days or more, may not be automatically revoked based solely on the petitioner's withdrawal. Moreover, the beneficiary of an approved I-140 petition will be eligible to retain his/her priority date indefinitely unless U.S. Citizenship and Immigration Services (USCIS) subsequently revokes the I-140 petition based on a finding of fraud, willful misrepresentation, or material error.

Once an I-140 petition has been approved for 180 days or more, USCIS may only revoke the petition based on a finding of: fraud or willful misrepresentation of a material fact; revocation by the Department of Labor (DOL) or invalidation by USCIS of the underlying labor certification; or a finding of material error in the petition's initial approval.

Due to significant immigrant visa backlogs in certain preference categories, many employment-based immigrants rely on an approved I-140 petition to maintain their priority date while waiting (sometimes upwards of 10 - 12 years) for an immigrant visa to become available. These individuals also typically rely on an approved I-140 petition to maintain eligibility to continuously extend their H-1B nonimmigrant status while they wait. Under the previous regulations, if an immigrant sought new H-1B employment during this waiting period, their previous employer could create instability by simply withdrawing the I-140 petition, resulting in an automatic revocation of the petition and a loss of the benefits conferred by that petition.

Under the new rule, approved I-140 petitions will remain valid for priority date retention purposes unless the petition is revoked because of fraud, willful misrepresentation of a material fact, the invalidation or revocation of a labor certification, or material error. I-140 petitions that have been approved for 180 days or more will remain valid, for various other purposes, including job portability under INA section 204(j), H-1B AC21 extensions, and eligibility for employment authorization in *compelling circumstances* (more below) under final 8 CFR 204.5(p), absent a particular finding.

2. 10-day and 60-day Nonimmigrant "Grace" Periods

The H-1B program's 10-day pre- and post-employment grace periods will extend to other types of nonimmigrant workers, including E-1, E-2, E-3, L-1 and TN workers. In addition, DHS will permit up to sixty (60) consecutive days of potential unemployment during each petition validity period for workers in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN classification.

The current regulations afford H-1B, O, and P nonimmigrants two ten-day grace periods immediately preceding and following their period of authorized stay. With a view toward improving fairness towards other highly-skilled workers, DHS will now extend the same privilege to workers in E-1, E-2, E-3, L-1 and TN status. While DHS affords no work authorization incident to status during these periods, the foreign national may use this time to enter the U.S. prior to employment and/or to file a change or extension of status.

Moreover, DHS will now permit up to 60 consecutive days of potential unemployment during each petition validity period for workers in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN classification, during which unemployment the worker will remain lawfully in the U.S. A worker can benefit from an unlimited number of 60-day grace periods, but only one may be granted during each petition validity period. DHS may exercise its discretion to truncate an individual's sixty-day period, as it deems appropriate.

Individuals in either the 10-day or 60-day grace period may apply for an extension or change of status and benefit from H-1B portability. However, unless or until the foreign national procures new sponsorship or independent work authorization, he or she may not accept employment during this period.

3. EAD Renewals

Certain applicants, particularly those with pending adjustment of status applications, who seek to renew their Employment Authorization Document (known as an EAD card) under the same eligibility category will enjoy an automatic 180-day extension of their work authorization beyond the card's expiration date while their renewal application is pending, provided that the Form I-765 application for employment authorization is timely filed. It is important to note that this benefit will only be available to EAD renewal applicants who continue to be authorized to work incident to status beyond the expiration of the EAD or for applicants who are applying for renewal under a category that does not first require adjudication of an underlying benefit application, petition, or request. As such, EAD renewal requests for L-2, H-4, or E spouses would not be eligible for this benefit. Renewal applicants whose cases are not covered by the 180-day automatic extension rule may continue to file service requests with the National Customer Service Center (NCSC) if the application is pending for 75 days or more to request priority processing.

In addition, EAD renewal requests may now be filed up to 180 days prior to the current card's expiration date, instead of the current 120-day filing threshold, However, USCIS will no longer be bound by the 90-day deadline for processing Forms I-765 which means that EAD renewal requests for L-2, H-4, and E spouses should be filed as early as possible.

4. Compelling Circumstances Employment Authorization Documents (EADs)

Certain nonimmigrants (and their family members) who have taken significant steps towards procuring employment-based green cards but who are unable to complete the process due to ever-expanding immigrant visa backlogs, and who can demonstrate compelling circumstances, may apply for EAD cards.

Under the amended regulations, DHS will grant employment authorization to individuals who establish, on the date of filing, that (1) they hold E-3, H-1B, H-1B1, O-1, L-1 nonimmigrant status, or are within any applicable "grace" period; (2) they are the principal beneficiary of an approved immigrant visa petition (Form I-140); (3) an immigrant visa number is currently unavailable to them; and (4) compelling circumstances justifying the favorable exercise of discretion are present. While DHS has not defined "compelling circumstances" in the new regulations, in the Comments to the Final Rule, DHS noted that compelling circumstances are generally "situations outside a worker's control that warrant DHS' exercise of discretion" such as in situations of serious illnesses and disabilities, employer disputes or retaliation, other substantial harm to the applicant, and a significant disruption to the employer. DHS indicated that the anticipated field of eligible applicants will be narrow.

The temporary employment authorization, if granted, will be valid for one year and may be extended in one-year increments if the applicant can establish continued eligibility under the four factors above. Alternatively, an applicant may renew his/her employment authorization without having to establish compelling circumstances if he/she can demonstrate that the difference between his/her priority date and the visa bulletin "Final Action" date for their preference category is one year or less at the time of filing.

The regulation permits qualifying family members (i.e., spouses and under-21 children) to receive work authorization for periods not to exceed that granted to the principal applicant. Note that the derivative family member need only prove his/her relationship to the principal applicant; he/she is not required to meet the four primary criteria.

5. H-1B Portability

The final rule codifies H-1B portability provisions and confirms that an H-1B worker may work for a new employer provided that the H-1B change of employer petition is filed while the worker maintains H-1B status or is in a period of authorized stay based on a timely filed H-1B extension. In addition, the final rule permits H-1B workers who have already ported to a new employer to port again to a third employer without waiting for USCIS to approve the second petition, provided that the second petition remains pending and the worker's I-94 record remains unexpired.

In addition, the final rule rejects previous USCIS policy guidance and confirms that an H-1B worker who is employed with a cap-exempt employer and who is also the beneficiary of a cap-subject H-1B petition may not port to the cap-subject employer prior to October 1st. The H-1B worker must wait until October 1st to commence his/her employment with the cap-subject employer.

6. Clarifications to H-1B Maximum Period of Stay

In addition to codifying a number of policies regarding the H-1B recapture of time spent outside of the U.S., such as when an H-1B employee may request to recapture time spent abroad (anytime), what qualifies as a recapturable day (a 24-hour trip), and whether seeking to recapture renders the H-1B worker subject to the H-1B cap again (it does not), the final rule provides clarification regarding the ability to extend H-1B status beyond the six-year H-1B limitation.

Specifically, under AC21 § 104(c), which provides an H-1B worker with an additional three years of H-1B status provided that the worker is the beneficiary of an approved and unrevoked I-140 immigrant visa petition as well as a priority date that is not current, the final rule confirms that the H-1B worker does not need to be physically present in the U.S. when the H-1B petition is filed, the H-1B petition can be filed by an employer other than the I-140 petitioner, and the determination of eligibility for the three-year extension will be made at the time of filing rather than at the time of adjudication. This latter point is particularly important in light of the monthly movement of immigration visa cut-off dates by the Department of State.

The final rule makes significant changes to AC21 § 106(a) eligibility which provides an H-1B worker with a one-year H-1B extension provided that the worker is the beneficiary of an unexpired and unrevoked permanent labor certification (PERM) that was filed at least 365 days prior to the expiration of the worker's six-year H-1B end date. Similar to the AC21 § 104(c) changes, the rule clarifies that the H-1B worker does not need to be physically present in the U.S. when the H-1B petition is filed and the H-1B petition can be filed by an employer other than the employer that filed the PERM application. However, the final rule makes one important clarification and imposes one significant condition on future eligibility. The rule clarifies that a PERM application is not required to be filed 365 days before the six-year H-1B limitation is reached for the H-1B worker to be eligible for a one-year extension. We expect USCIS to issue additional clarifying guidance regarding how this rule will work in practice. However, the rule states that AC21 § 104(c) one-year H-1B extensions will not be granted if the H-1B worker has not filed an adjustment of status application or immigrant visa application within one year of his/her priority date becoming current. The one year will be reset following any period in which a priority date retrogresses.

7. H-1B Licensing Requirements

The final rule confirms that H-1B petitions for jobs that normally require status licensure must be filed with evidence of either a license or evidence that the H-1B worker may fully perform the duties of the position under a licensed supervisor. However, the rule carves out an exception to this requirement in situations where the H-1B worker is unable to obtain a license due to technical reasons such as the inability to obtain a social security number. Under this exception, USCIS may approve the H-1B petition for up to one year and will require inclusion of the license in a subsequent extension petition.

8. Clarification of H-1B Cap Exempt Employers, Cap Exempt Employment, and Concurrent Employment

Currently, employers are eligible for H-1B cap exemption if they are a nonprofit institution of higher education, a nonprofit entity related to or affiliated to an institution of higher education, or a nonprofit research organization or a government research organization. The final rule lowers the standard for demonstrating whether a nonprofit entity is related to or affiliated to an institution of higher education. Specifically, the rule allows nonprofit entities seeking cap exemption to provide evidence of a written affiliation agreement that demonstrates an active working relationship and that a "fundamental activity" of the nonprofit entity is to directly contribute to the research or education mission of the institution.

In addition, the final rule clarifies the issue of concurrent H-1B employment with both a cap-exempt employer and a cap-subject employer. When an H-1B worker is employed with a cap-exempt employer pursuant to a cap-exempt H-1B petition, the worker may concurrently work with a cap-subject H-1B employer without having to be counted against the H-1B cap. The rule confirms that once the H-1B cap-exempt employment ends, the H-1B worker becomes subject to the H-1B cap and is not authorized to work for the H-1B cap-subject employer until a cap number is obtained.

9. Immigration and Nationality Act (INA) Section 204(j) Portability and the New Supplement J Form

The final rule codifies DHS policy and practice requiring an applicant for adjustment of status to present evidence of a valid offer of employment at the time the I-485 adjustment of status application is filed an adjudicated.

USCIS has developed a new form - Supplement J to I-485 - to standardize the collection of information confirming the existence of a bona fide job offer. The offer of employment may either be the original job offer or a new offer that is in the "same or a similar occupational classification" as the original job. The term "same occupational classification" means "an occupation that resembles in every relevant respect the occupation for which the underlying employment-based immigrant visa was approved." The term "similar occupational classification" means "an occupation that shares essential qualities or has a marked resemblance or likeness with the occupation for which the underlying employment-based immigrant visa petition was approved." On March 18, 2016, USCIS published a policy memorandum outlining the factors used to determine whether a new job is in "the same or a similar occupational classification for purposes of Section 204(j)."

Supplement J collects necessary information about the job offer and includes attestations from the foreign national and the employer regarding essential elements of the portability request. DHS may require individuals to use Supplement J to confirm existing or new job offers prior to adjudication of the application to adjust status. DHS will allow a portability request to be made before an I-140 petition has been approved if the associated I-485 adjustment of status application has been pending for 180 days or more. However, DHS will not adjudicate a Supplement J portability request until the underlying I-140 petition has been approved.

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