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Sweeping New Immigration Regulations for Highly Skilled Workers: Implications for Employers and Foreign Workers

Navigating Homeland Security's Final Rule Impacting H-1B Extensions, Portability for I-140 Beneficiaries and More

WEDNESDAY, MARCH 15, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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What Does the Regulation Cover?

- On November 18, 2016, the US Department of Homeland Security (DHS) published a final rule that amends DHS regulations consistent with certain worker portability and other provisions in the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), as amended, as well as the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). In addition, the final rule addresses a host of issues, some included in the proposed rule and some added as a result of public comment, that are unrelated to AC21 and ACWIA.

Exceptions to H-1B Maximum Period of Stay H-1B and I-140 Portability

Specifically, the final rule codifies and/or revises policies and practices related to:

- H-1B extensions of stay under AC-21. The ability of H-1B nonimmigrant workers who are being sponsored for lawful permanent residence (and their dependents in H-4 nonimmigrant status) to extend their nonimmigrant status beyond the otherwise-applicable six-year limit pursuant to AC21.
- Form I-140 Portability. The ability of certain workers who have pending applications for adjustment of status to change employers or jobs without endangering the approved employment-based immigrant visa petitions filed on their behalf.
- H-1B portability. The ability of H-1B nonimmigrant workers to change jobs or employers, including: (1) the ability to begin employment with new H-1B employers that have filed non-frivolous petitions for new H-1B employment and (2) the ability of H-1B employers to file successive H-1B portability petitions (often referred to as ‘‘bridge petitions’’) and how these petitions affect lawful status and work authorization.

H-1B Cap and Whistleblower Protections

- Counting against the H-1B annual cap. The way in which H-1B nonimmigrant workers are counted against the annual H-1B numerical cap, including: (1) the method for calculating when such workers may access so-called ‘‘remainder time’’ (i.e., time when they were physically outside the United States), thus allowing them to use their full period of H-1B status and (2) the method for determining which H-1B nonimmigrant workers are ‘‘cap-exempt’’ as a result of previously being counted against the cap.
- H-1B cap exemptions. The method for determining which H-1B nonimmigrant workers are exempt from the H-1B numerical cap due to their employment with an institution of higher education, a nonprofit entity related to or affiliated with such an institution or a governmental or nonprofit research organization, including a revision to the definition of the term ‘‘related or affiliated nonprofit entity’’ for such purposes.
- Protections for H-1B whistleblowers. The ability of H-1B nonimmigrant workers who are disclosing information in aid of, or otherwise participating in, investigations regarding alleged violations of Labor Condition Application obligations in the H-1B program to provide documentary evidence to US Citizenship & Immigration Services (USCIS), the DHS bureau that administers H-1B petitions, to demonstrate that their resulting failure to maintain H-1B status was due to ‘‘extraordinary circumstances.”

Validity of Employment-Based Immigrant Petitions

- Form I–140 petition validity. The circumstances under which an approved Immigrant Petition for Alien Worker (Form I-140 petition) remains valid, even after the petitioner withdraws the petition or the petitioner's business terminates, including for purposes of status extension applications filed on behalf of the beneficiary and job portability of H-1B nonimmigrants.
- Establishment of priority dates. The priority date for purposes of determining a foreign national's place in the queue for immigrant (permanent residency) status is generally established based upon the filing of certain applications or petitions.
- Retention of priority dates. Priority date retention generally would be available so long as the initial immigrant visa petition was approved and this approval has not been revoked for fraud, material misrepresentation, the invalidation or revocation of a labor certification or USCIS error. The term ''error'' is clarified to mean ''material error'' in final 8 CFR 204.5(e)(2)(iv), which now states that a priority date may not be retained if USCIS revokes the approval of the Form I–140 petition because it determined that there was a material error with regard to the petition's approval. This provision would improve the ability of certain workers to accept promotions, change employers or accept other employment opportunities without fear of losing their place in line for immigrant visas based on the skills they contribute to the US economy.

Employment Authorization in Compelling Circumstances

- Retention of employment-based immigrant visa petitions. Form I-140 petitions that have been approved for 180 days or more would no longer be subject to automatic revocation based solely on withdrawal by the petitioner or the termination of the petitioner's business.
- Eligibility for employment authorization in compelling circumstances. Allowing beneficiaries in the United States on E-3, H-1B, H-1B1, L-1 or O-1 nonimmigrant status to apply for separate employment authorization on Form I-766 (for issuance of Employment Authorization Documents known as "EADs") for a limited period if there are compelling circumstances that, in the discretionary determination of DHS, justify the issuance of such employment authorization. Principal beneficiaries may be eligible to file applications for such EADs during the authorized periods of admission that immediately precede or follow the validity periods of their nonimmigrant classifications (i.e., ''grace periods''). The final rule also addresses applications for extension of EADs issued in compelling circumstances.

Ten and Sixty-Day Grace Periods

- 10-day nonimmigrant grace periods. Providing two grace periods of up to 10 days, consistent with those already available to individuals in the E-1, E-2, E-3, L-1 and TN classifications. The rule allows an initial grace period of up to 10 days prior to the start of an authorized validity period, which provides nonimmigrants in the above classifications a reasonable amount of time to enter the United States and prepare to begin employment in the country. The rule also allows a second grace period of up to 10 days after the end of an authorized validity period, which provides a reasonable amount of time for such nonimmigrants to depart the United States or take other actions to extend, change or otherwise maintain lawful status.
- 60-day nonimmigrant grace periods. Establishing a one-time grace period, during an authorized validity period, of up to 60 days whenever employment ends for individuals holding E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1 or TN nonimmigrant status. This will allow these highly skilled workers to more readily pursue new employment should they be eligible for other employer-sponsored nonimmigrant classifications or for the same classification with a new employer. Conversely, the rule allows US employers to more easily facilitate changes in employment for existing or newly recruited nonimmigrant workers.

Processing of Applications for Employment Authorization

- H-1B licensing. Clarifying exceptions to the requirement that make approval of an H-1B petition contingent upon licensure where such licensure is required to fully perform the duties of the specialty occupation.
- Processing of applications for employment authorization. Amending the regulations governing processing of applications for employment authorization are amended to automatically extend the validity of EADs (Forms I–766) in certain circumstances based on the timely filing of an application to renew such EADs. Specifically, DHS would automatically extend the employment authorization and validity of existing EADs issued to certain employment-eligible individuals for up to 180 days from the date of the card's expiration, so long as:
  - (1) A renewal application is filed based on the same employment authorization category as the previously issued EAD (or the renewal application is for an individual approved for Temporary Protected Status (TPS));
  - (2) Such renewal application is timely filed prior to the expiration of the EAD and remains pending; and
  - (3) The individual's eligibility for employment authorization continues beyond the expiration of his or her EAD, and an independent adjudication of the individual's underlying eligibility is not a prerequisite to the extension of employment authorization.

Cap Exemptions and Recapture of H-1B Time Elimination of Interim EADs

- Interim employment authorization. Eliminating the current regulatory provisions that require adjudication of EAD applications within 90 days of filing and that authorize interim EADs in cases where such adjudications are not conducted within the 90-day timeframe.
- Exemptions to the H-1B numerical cap and ACWIA fees. Codifying the definition of ‘‘institution of higher education’’ and adds a broader definition of ‘‘related or affiliated nonprofit entity.’’ Also, it revises the definition of ‘‘related or affiliated nonprofit entity’’ for purposes of the ACWIA fee to conform it to the new definition of the same term for H-1B numerical cap exemption. The rule expands the interpretation of ‘‘governmental research organizations’’ for purposes of the ACWIA fee and aligns definitions for H-1B cap and fee exemptions.
- Calculating the maximum H-1B admission period. Amending the regulatory text to clarify that there is no temporal limit on recapturing time. The amendment makes clear that such time may be recaptured in a subsequent H-1B petition on behalf of the foreign worker at any time before the alien uses the full period of authorized H-1B admission.

Exemption from H-1B Maximum Period of Stay

- Lengthy adjudication delay exemption from H-1B maximum period of stay. Providing that a qualifying labor certification or Form I-140 petition is not required to be filed 365 days before the six-year limitation is reached in order for the individual to be eligible for an exemption under section 106(a) of AC21; instead, the labor certification or Form I–140 petition would need to be filed at least 365 days before the day the exemption would take effect.