IMMIGRATION

NEW USCIS REGULATIONS TO RETAIN HIGH-SKILLED NONIMMIGRANT WORKERS

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The US Citizenship and Immigration Services ("USCIS") published new regulations effective January 17, 2017 which modernize and improve aspects of certain employment-based nonimmigrant and immigrant visa programs. The regulations also purport to better enable U.S. employers to hire and retain foreign workers who are beneficiaries of approved employment-based, immigrant visa petitions, and who are waiting to become lawful permanent residents.

The new rules cover the following topics:

- Clarify when a "priority date" is established
- Provides for 1-year employment authorization for certain backlogged employment-based green card applicants who demonstrate compelling circumstances
- Sets bright-line for I-140 revocations after 180 days of change of employer or after business closure/termination
- Provides 10-day grace period before and after visa status validity period
- Provides 60-day grace period after termination of employment
- Clarifies points on H-1B portability and successive H-1B portability
- Enacts H-1B license requirement changes
- Re-defines H-1B cap exempt employers
- Clarifies time spent abroad for H-1B time recapture
- Clarifies points and limits some H-1B extensions beyond six year eligibility period in 1-year and 3-year situations
- Provides protections for H-1B whistleblowers
- Clarifies points related to Portability for Adjustment of Status applicants
- Defines "same or similar" employment
- Enacts I-9 Employment Verification Eligibility changes
- Provides for automatic Employment Authorization Document extensions for 180 days in certain categories

Clarification On When A Priority Date Is Established And Retained

The new rules clarify when a "priority date" is established. For immigrant visa ("IV") petitions filed which do not require an Alien Labor Certification ("ALC"), the priority date is the date the completed and signed employment-based ("EB") IV petition is filed with the USCIS.

The new rules confirm that an EB-IV filed under EB-1, 2 and 3 accords the foreign national a priority date of the approved petition for any subsequently filed petition under ***any*** classification under EB-1, 2 or 3. If there are multiple petitions, the foreign national will be entitled to the earliest priority date.

The priority date of an IV petition will not be retained if:

1. USCIS denies the initial IV Petition or revokes the Petition because of fraud, or willful misrepresentation of a material fact;

2. Either the USCIS or U.S. Department of Labor ("DOL") revokes the approved permanent ALC that accompanied the IV petition;

3. The USCIS or Department of State ("DOS") invalidates the ALC that accompanied the IV petition; or,

4. The USCIS determines that the IV petition was approved based on material error.

The new rules also clarify that a denied IV petition will not establish a priority date, and that a priority date is not transferable to another foreign national.

Employment Authorization For EB Nonimmigrants

The new rules permit a ***1-year*** extension of employment authorization for those in E-3, H-1B, H-1B1, O-1 or L-1 status, ***including a new 10 day and 60 day grace period if:***

- The principal has an approved IV Petition under EB-1, 2 or 3;
- An IV is not available because the principal's priority date is not current; and,
- The principal can demonstrate "compelling circumstances."

Eligibility of Employment Authorization for Spouses and Children

Spouses and children are eligible for the 1-year employment authorization if they are in valid nonimmigrant status and the principal has been granted employment authorization which has not been terminated or revoked. Family members may apply for employment authorization concurrently with the principal, but it won't be granted unless the principal is authorized and they cannot extend employment authorization beyond the date extended to the principal.

Eligibility for Renewal of Employment Authorization: Principal and Family Members

A foreign national ***may*** be eligible to renew the 1 year grant of employment authorization prior to expiration of employment authorization in the case of an approved IV, if:

1. He or she is the principal of an approved IV petition for classification under EB-1, 2 or 3, and either:

   a) His or her priority date is not current, and the USCIS determines compelling circumstances exists; or

   b) The difference between the principal's priority date and the "final action date" upon which IV's are authorized for ***issuance under the principal's EB preference category and country of chargeability is 1 year or less according to the DOS's Visa Bulletin which is in effect on the date that the***

application for an Employment Authorization Document ("EAD"), Form I-765, is filed.

2. ***Family members*** of the principal can also be granted a renewal of employment authorization under the above provision and can file concurrently with the principal but cannot be approved unless the principal's application is granted and cannot exceed that granted to the principal. Employment Authorization for the 1-year extension based on an approved IV will only be granted in 1-year increments.

Criminal Ineligibility for Employment Authorization

A foreign national is not eligible for the 1-year grant of employment authorization, including renewal of employment authorization, if the foreign national has been convicted of any felony or two or more misdemeanors.

Revocation of Approved IV Petitions

In EB IV cases, if the Petitioner withdraws the IV Petition less than 180 days after the approval of the IV petition, unless an associated Adjustment of Status ("AOS or I-485") application has been pending for more than 180 days, the IV petition is deemed withdrawn. A IV petition that is withdrawn 180 days or more after its approval, or 180 days or more after the associated AOS application has been filed, remains approved unless its approval is revoked on other grounds.

Upon ***termination of the Petitioning employer's business*** less than 180 days after the Petition is approved, under an EB-1, 2 or 3 Petition, unless an associated AOS application has been pending for 180 days or more, the IV is deemed withdrawn. If a Petitioning employer's business terminates 180 days after petition approval, or 180 days or more after an associated adjustment of status application has been filed, the petition remains approved unless the approval is revoked on other grounds.

10-Day And 60-Day Grace Periods For Nonimmigrants

Individuals in E-1, E-2, E-3, H-1B, L-1 or TN classification as well as his or her dependents **may** be admitted to the U.S. for an initial period of up to 10 days before the validity period of the nonimmigrant status begins and up to 10 days after the validity period ends, except that the foreign national may not work except during the 10-day grace period. ***The new rules state that H-2B beneficiaries must be provided a 10 day grace period before and after the nonimmigrant status validity period.***

The new law authorizes a 60-day grace period for individuals in E-1, E-2, E-2, H-1B, H-1B1, L-1, O-1 or TN classification and his or her dependents and will not be considered to have failed to maintain nonimmigrant status solely because employment was terminated for up to 60 consecutive days or until the end of authorized validity period on the Petition, whichever is shorter, ***once*** during each authorized validity period. There is no employment authorization during the 60 day period.

Provisions For H-1B Nonimmigrants

H-1B Portability

An H-1B nonimmigrant is authorized to start concurrent or new employment (through either an amended or extension of stay petition) upon the filing of a non-frivolous H-1B petition ***or as of the requested start date, whichever is later*** so long as:

- The individual has been lawfully admitted to the U.S. in or otherwise provided H-1B status; and,
- The H-1B worker has not worked without authorization from the time of the last admission to the U.S. through to the filing of the H-1B petition by the new employer:

  Portability provisions automatically terminate upon the adjudication of the H-1B petition.

Successive H-1B Portability Petitions

An H-1B worker may begin working under a successively filed H-1B petition when the new H-1B petition is filed ***or from the requested start date whichever is later*** even if the previously filed H-1B petition remains pending and regardless of whether the validity period of an approved H-1B petition filed on behalf of the H-1B worker expired during such pendency. The successively filed petition cannot be approved if any proceeding H-1B portability petition in the succession is denied, unless the beneficiary's previously approved period of H-1B status remains valid.

Denial of successive portability petitions do not affect the ability of the H-1B beneficiary to continue or resume working under an H-1B petition previously approved on behalf of the beneficiary so long as the H-1B petition approval remains valid and the beneficiary has maintained H-1B status or has been in a period of authorized stay, and has not been employed in the U.S. without authorization.

H-1B Petitions without a License to Practice the Profession

Petitions for H-1B workers without a state license to work in a particular profession who can work under the supervision of senior or supervisory personnel face new scrutiny. The USCIS must now examine the nature of the duties and the level at which they are performed as well as evidence about the identity, physical location and credentials of the individuals who will supervise the H-1B workers including proof of compliance with state law. Such H-1B Petitions will only now be approved for up to one year at a time.

If the license would otherwise be issued provided the H-1B worker was authorized for employment or the worker cannot met a similar technical requirements such as lack of a Social Security Number, the Petitioner can demonstrate that the worker is fully qualified to

receive the state or local license but for the H-1B petition approval. Additionally, the foreign national must have filed an application for the license or meet similar technical requirements to be approved without the license.

H-1 Cap Exempt Employers

The term "related or affiliated nonprofit entity" is defined for purposes of the ACWIA fee and for cap exemption purposes to include nonprofit entities that satisfy one of the following conditions:

1. The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or controls by the same board or federation;

2. The nonprofit entity is operated by an institute of higher education;

3. The nonprofit entity is attached to an institution of higher education as a member, branch cooperative or subsidiary, or

4. The non-profit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes ***an active working relationship between the nonprofit entity and the institution of higher education*** for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or educational mission of the institution of higher education.

Definition of Nonprofit and Government Research Organizations

A nonprofit research organization and governmental research organization are defined as a federal, state or local entity whose primary mission is the performance or promotion of basic research and/or applied research. The H-1B worker who is not directly employed by a qualifying institution may qualify for an exemption if the H-1B worker will spend the majority of his or her work time performing job duties at a qualifying institution, organization or entity and those job duties directly and predominately further the essential purpose, mission, objective or function of the qualifying institution. A state or local entity can now be an H-1B exempt employer.

New Rules on When Cap Exempt Employment Ends

If the H-1B cap-exempt employment ends and the H-1B worker is not the beneficiary of a new cap-exempt petition, then the H-1B worker will become subject to the cap if the worker was not previously counted against the cap. The validity period for concurrent H-1B cap-subject employment cannot extend beyond the validity period of the cap-exempt H-1B employment, which is a major change. If cap-exempt employment converts to cap-subject employment, the H-1B holder will be subject to the cap and USCIS can revoke the cap-subject petition. Under the new regulation, concurrent H-1B employment in a cap-subject position qualifies for an exemption if:

1. The H-1B employment with the cap-exempt employer is expected to continue after the new cap-subject petition is approved; and,

2. The H-1B worker can reasonably perform both the cap-exempt and cap-subject employment.

Calculating The Maximum Period Of Admission Of H-1B

Time spent physically outside of the U.S. exceeding 24 hours by the H-1B beneficiary during the validity of an H-1B petition is not counted against the foreign national's total period of permissible stay (6 years) regardless of the reason for the H-1B worker's absence and such time can be recaptured. Evidence demonstrating 24-hour absence can be shown by providing copies of passport stamps, Arrival-Departure Records (Form I-94), or airline tickets together with relevant independent documentary evidence. USCIS may grant all, part or none of the recaptured days requested.

If the beneficiary was ***ever*** previously counted toward the H-1B numerical cap, the H-1B petition to recapture a period of stay will not subject the beneficiary to the H-1B numerical cap, whether or not he or she has been physically outside the U.S. for one year or longer, and would be otherwise eligible for a new period of admission of six years.

H-1B Exemptions For Lengthy Adjudication Delays

H-1B Extensions In One Year Increments

If an application for an ALC was filed at least 365 days prior to the 6-year limitation of H-1B status, the Petitioner may file extensions in 1-year increments until the ALC expires, the ALC or EB IV is denied, revoked or otherwise closed or a decision is reached to grant or deny permanent resident status. A decision to deny or revoke an ALC or IV petition will not be considered final until all administrative appeals have been exhausted.

Advance Filing

The Petitioner can file an H-1B petition seeking a 1-year extension within the 6 months of the requested start date. The Petition may be filed before 365 days have elapsed since the ALC or IV petition was filed with the DOL or the USCIS provided that the ALC or IV must have been filed at least 365 days prior to the date the period of admission authorized under the exemption will take effect. Time remaining to the H-1B worker under the maximum period of admission or any recapture time unused in H-1B, L-1A or L-1B time spent outside of the U.S. can be included in the 1-year extension request.

Petitioners Seeking H-1B Cap Exemptions

The H-1B Petitioner need not be the employer that filed the application for ALC or IV Petition that is used to qualify for the exemption. The qualifying ALC or IV petition need not be the same as that used to qualify for the initial exemption. Only the principal and H-4 dependents can benefit from the 1-year extension. Spouses in H-1B status cannot benefit from this provision.

Aggregate Time Not Permitted

A Petitioner cannot aggregate the number of days that have elapsed since the filing of one ALC or IV petition with the number of days that have elapsed since the filing of another such application or petition to meet the 365 days to obtain the 1-year H-1B extension.

Limits On Future Extensions

An H-1B worker is ineligible for the 1-year lengthy adjudication delay exemption if he or she is the beneficiary of an approved IV petition and fails to file an AOS application or apply for an IV within 1 year of an IV being authorized for issuance based on his or her preference category and country of chargeability. If the accrual of such 1-year period is interrupted by the unavailability of an IV, a new 1 year period required for filing is afforded when an IV again becomes immediately available.

The USCIS may excuse a failure to file if the foreign national establishes that the failure to file was due to circumstances beyond his or her control. The limitations apply to any approved IV petition, including petitions withdrawn by the Petitioner or those filed by a Petitioner whose business terminates 180 days or more after approval.

3-Year Per-Country Limitation Exemption from H-1B-Cap

A foreign national who currently maintains or previously held H-1B status, who is the beneficiary of an approved IV Petition for classification under EB-1, 2 or 3, and who is eligible to be granted immigrant status ***but for the per country limitation***, is eligible for H-1B status beyond the 6-year limitation. The Petitioner must demonstrate visa unavailability as of the date the H-1B visa petition is filed with the USCIS.

The USCIS may grant validity periods for IV Petitions approved in 3-year increments so long as the foreign national remains eligible. H-1B approvals for per-country limitation exemptions can be granted until a final decision has been made to revoke an approved IV, approve or deny an IV application, or approve or deny an AOS case. A foreign national who is not in the U.S. or not currently in H-1B status, may seek a 3-year extension of the 6 year limitation.

The H-1B petitioner need not be the employer that filed the IV petition that is used to qualify for this exemption. An H-1B Petition may be approved with respect to any approved IV petition filed on behalf of the same foreign national.

Advance Filing of H-1B Extension Under the Per-Country Limitation Exemption

A Petitioner may file a 3-year extension of an H-1B petition under the per-country limitation exemption within 6 months of the requested start date and may request any time remaining to the beneficiary under the maximum period of admission along with the exemption request. The per country limitation exemption only applies to the H-1B worker, and not a spouse holding H-1B status.

Retaliatory Actions By Employer

The USCIS may consider that a beneficiary faced retaliatory action from his or her employer for reporting a violation of that employer's labor condition application obligation as "extraordinary circumstances" if the beneficiary failed to maintain continuous H-1B status because of the retaliatory actions.

Portability For Adjustment Of Status

An individual with a pending AOS application based on an approved EB IV petition, must have a valid offer of employment based on a valid IV petition at the time the AOS is filed as well as at the time the principal's AOS application is adjudicated. Additionally, the principal must intend to accept the offer of employment.

Prior to a final administrative decision on an AOS application, the USCIS may require that the applicant demonstrate, or the applicant may demonstrate to the USCIS, on a new Form I-485 Supplement J, evidence that:

1. The employment offer by the Petitioner is continuing; or,

2. The applicant has a new offer of employment from the Petitioning employer or a different U.S. employer, or a new offer based on self-employment, in the "same or a similar" occupational classification as the employment offered under the qualifying petition, provided that:

    a) The I-485 (AOS Application) has been pending for 180 days; and

    b) The IV petition has already been approved, or the IV petition has been approved but not revoked for 180 days or more after filing the AOS application and is subsequently approved.

After 180 days, adjudication of the pending IV petition shall be without regard to the requirement to establish the "ability to pay" the proffered wage rate, and until the beneficiary obtains lawful permanent residence. The Petition will be approved if it was eligible for approval at the time it was initially filed and the foreign national's AOS application has been pending for at least 180 days, unless approval of the qualified IV petition at the time of the adjudication is inconsistent with a requirement of U.S. law, and the approval of the qualifying petition has not be revoked.

In all cases, the applicant and his or her intended employer must demonstrate the intention for the applicant to be employed under the continuing or new employment offer (including self-employment) as applicable within a reasonable period upon the applicant's grant of lawful permanent resident status.

Same or Similar Occupational Classification Defined

The term "same occupational classification" is now defined under USCIS regulations and means an occupation that resembles in every relevant respect the occupation for which the underlying employment-based IV petition 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 IV petition was approved.

Verification Of Employment Authorization

USCIS regulations have been amended to permit an employee to produce a Notice of Action (Form I-797C) confirming that the original employment authorization document ("EAD") has been automatically extended for up to 180 days. If the employee can present the Form I-797C, then employment authorization ends in 180 days after the expiration of the EAD rather than the date on the face of the EAD, ***except in the case of H-1Bs***. The employer must re-verify on the Form I-9 to reflect that the individual is still authorized to work in the U.S. Re-verifying employment authorization on Form I-9 must occur not later than the date work authorization ends.

To re-verify the Form I-9, the employee must present a document that either shows continuing employment eligibility or that there is a new grant of work authorization. The employer must review the document and re-verify by noting the document's I.D. number and expiration date, if any, on the Form I-9 and by signing the attestation by a handwritten signature or electronic signature.

Employment Re-Verification For H-1Bs

In the case of H-1B worker, employment authorization will automatically continue upon the filing of a qualifying petition ***until such petition is adjudicated***.

Automatic 180-Day Extension Of EAD Or Employment Authorization

Except as otherwise provided, the validity period of an expiring EAD and for individuals who are not employment-authorized incident to status (such as H-1Bs and L-1As and L-1Bs) will be automatically extended for an additional period not to exceed 180 days from the date of such expiration if a request for renewal is:

1. Filed before the expiration date shown on the face of the EAD, or during the filing period described in the applicable Federal Register notice regarding procedures for obtaining Temporary Protected Status-related EADs, etc.;

2. Eligibility to apply for employment authorization continues notwithstanding expiration of the EAD and is based on an employment authorization category that does not require additional adjudication of an underlying application or petition for adjudication of the renewal application as may be announced on USCIS's website.

The 180-day period after the expiration of the EAD, or upon issuance of notification of a decision denying the renewal request is automatically terminated. Nothing in this section affects DHS' ability to otherwise terminate any employment authorization or EAD, or extension period of such employment or document by written notice to the applicant, by notice to a class of aliens published in the Federal Register, or as otherwise provided by U.S. law.

The new regulations require adjudication of an EAD application within 90 days of receipt, and requires the issuance of interim EADs with validity periods of up to 240 days when such an application is not adjudicated within the 90 day period.

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