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USCIS Issues Major New Immigration Regulations for Highly Skilled Workers

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On November 18, 2016, USCIS issued an extensive set of revisions to immigration regulations affecting highly skilled workers. The new rules, which go into effect on January 17, 2017, clarify longstanding agency practices and create several process improvements that impact highly skilled immigrant and nonimmigrant workers. Among the most significant changes are new 60-day grace periods for certain nonimmigrants following cessation of employment, automatic 180-day extension of work eligibility for those who timely file extensions of their work authorization cards, a uniform process for applying the "portability rule" for green card applicants who change employers and/or jobs, and a new discretionary work authorization category for green card applicants adversely impacted by immigrant visa backlogs. These new rules impact employers of nonimmigrants in the H-1B, H-1B1, E-1, E-2, E-3, L-1, O-1, P, and TN categories and EB-1, EB-2 and EB-3 immigrants (including PERM labor certification beneficiaries) as well as their dependents.

The new regulations make the following changes:

Clarification of Cap Exempt Employment

The regulation clarifies existing USCIS policy and practice regarding "cap exempt" H-1B employment. Generally, first-time H-1B applications are subject to the numerical cap, with an exemption for certain institutions of higher education and their affiliated non-profits, as well as other government research organizations.

8 CFR § 214.2(h)(8)(ii)(F), which controls H-1B employment by an institution of higher education, an affiliated non-profit entity, and a non-profit or government research organization (cap exempt entity) is amended to provide as follows:

a) The definitions of cap exempt entities are clarified.

b) An alien not directly employed by a cap exempt entity may take advantage of the exemption if the alien will spend a majority of the time working in a job closely related to a cap exempt entity.

c) If cap exempt employment ceases, further H-1B employment will be subject to the cap.

d) A cap exempt H-1B employee may have concurrent employment in cap subject employment, but the cap subject employment cannot extend beyond the authorized cap exempt employment, and the cap subject employment automatically terminates if the cap exempt employment terminates.

Calculating the Maximum H-1B Admission Period and the "Recapture Rule"

This change is also a clarification of long-standing agency practice with respect to the H-1B recapture rule. The most important clarification may be that the time outside the US must be in excess of 24 hours, meaning that that H-1B recapture rules do not apply to absences of less than a day. For example, if the H-1B holder departs the US on Monday morning and returns Wednesday evening, only Tuesday would count towards the recapture rule.

8 CFR § 214.2(h)(13)(iii)(C) is added to provide as follows:

a) Any amount of time exceeding 24 hours spent outside the U.S. during an approved H-1B period does not count toward the maximum 6 year allowed H-1B period.

b) This period outside the U.S. may be recaptured in a new petition upon approved proof of absence.

c) An alien previously counted against the H-1B numerical cap who has not been within the U.S. for the maximum allowed 6 year admission period may apply for a new admission for the remaining portion of his maximum period without being outside the U.S. for 1 year.

H-1B Extension of Stay Under AC 21

Existing policies and practices implementing the provisions of AC 21 allow H-1B holders who are reaching the expiration of their maximum 6 year period of stay to extend H-1B status while permanent residence processing continues. Many of these are now formalized in new regulations.

8 CFR § 214.2(h)(13)(D) is added to provide that an alien who is in H-1B status, or who previously held H-1B status, even if the alien is not in the U.S., may extend H-1B status if at least 365 days have passed since the non frivolous filing of either (i) a labor certification application with the Department of Labor or (ii) an immigrant visa petition with USCIS. The extensions are granted under the following conditions:

a) In 1 year increments until the underlying application or petition is finally denied, revoked, permanent residence is obtained, or permanent residence is denied.

b) Following denial of an application or petition, extensions may be continued through any appeal period.

c) Unless a beneficiary was substituted for another alien prior to July 16, 2007, the alien must be the beneficiary named in the pending or approved labor certification.

d) An H-1B extension petition may be filed within six months of the requested start date.

e) The extension petition may be filed before the 365 days has passed as long as the 365 days will have elapsed before the requested petition effective date.

f) The petition may request any remaining 6 year time and/or recaptured time under H-1B or L status.

g) The H-1B petitioner need not be the employer which filed for the labor certification or immigrant visa.

h) Extensions past the 7th year extension need not be based upon the same labor certification or immigrant petition used for the 7th year extension.

i) Pending time under separate labor certification or permanent resident petitions may not be aggregated to reach 365 days.

j) Extension petitions may not be filed if the alien has not sought permanent residence within 1 year of the approval of an immigrant petition unless a period of non-availability for permanent residence has occurred within the 1 year.

This regulation expresses current USCIS policy which had previously been expressed through agency memoranda.

8 CFR § 214.2(13)(e) is added to provide that an alien who is in H-1B status, or who previously held H-1B status, even if the alien is not in the U.S., and who is the beneficiary of an approved immigration petition and who is eligible for immigrant status except for per country limits, (priority date is not current) may extend H-1B status under the following conditions:

a) In 3 year increments as long as the alien remains eligible for the extension and the immigrant petition has not been revoked or the immigrant petition has not been denied or approved.

b) The H-1B petition need not be filed by the employer that filed the immigrant petition.

c) A subsequent extension may be approved based upon a different immigrant petition for the same alien.

d) The extension petition may be filed within six months of the requested start date.

e) The extension petition may request any remaining 6 year time and/or recaptured time under H-1B or L status.

This is an important and welcome clarification of policy that ensures H-1B holders who leave the country are not disqualified from the benefits of AC21 merely because they are not physically present.

Protection of H-1B Holders Against Retaliatory Action

8 CFR § 214.2(h)(20) is added to provide that an H-1B alien who falls out of H-1B compliance because of retaliation for filing a report alleging violations of the employer's labor condition application obligations will be deemed to have been in violation because of "extraordinary circumstances" which may excuse the status violation.

The intent of this regulation is to ensure that H-1B holders who report immigration violations will receive modest protection. In essence, if such worker is terminated in retaliation for reporting an employer's possible H-1B violation(s), the worker may be treated as in compliance with their H-1B status for purposes of future petitions. It remains to be seen whether this regulation would trump the portability criteria discussed in the following section.

H-1B Portability Criteria are Clarified and Expanded

8 CFR § 214.2(h)(2)(i)(H) is amended to clarify the rules for so-called "bridge petitions" whereby a new employer files an H-1B petition for someone already in H-1B classification.

The new employer's petition allows the H-1B to start working for that new employer upon filing. Under the newly clarified rules, even if the H-1B is currently awaiting adjudication of another H-1B petition, the bridge rules apply. It is still somewhat unclear whether the "authorized period of stay" requirement would also include H-1B workers who are terminated by their employers in retaliation for reporting alleged H-1B violations.

The portability rule is amended to provide as follows:

a) An H-1B holder is permitted to port to a new job or new employer and begin working upon the filing of the petition if the holder is in lawful H-1B status, the port petition is filed prior to the expiration of the current authorized H-1B period, and the individual has not been employed without authorization.

b) Permitted employment pending adjudication ceases upon adjudication of the port petition.

c) The alien is considered to be within an authorized period of stay while the petition is pending.

d) An alien may begin working under a new port petition even if a previous port petition has not yet been adjudicated.

e) A successive port petition cannot be approved if a prior port petition was denied unless the original H-1B approval continues to be valid, and the denial of a port petition does not prevent the alien from returning to a still approved position.

Workers With Adjustment of Status Petitions Pending 180 Days or More Will Have the Immigration Petition Approved, and the Worker May Change Jobs or Employers Under Section 204(j) of the Immigration and Naturalization Act

8 CFR § 245.25 is amended to provide that if an adjustment of status petition has been pending for 180 days or more:

a) The underlying immigrant petition if not already approved will be approved if it was eligible for approval at the time of filing and remains eligible until the application for permanent residence has been pending for 180 days or more unless approval would be inconsistent with any statute, or the petition has been revoked within the 180 days.

b) An alien with a pending application to adjust status (I-485) which has been pending for 180 days or more and is based upon an employment based immigrant petition with an offer of employment which was valid at the time the application is filed may work for a different employer, in a different job, or in self employment, under the following conditions:

   i. The underlying immigrant petition has been approved or is pending when the beneficiary notifies USCIS of the new job, and the petition is subsequently approved.

   ii. The original or new employer and the applicant must show the applicant intends to be employed within a reasonable period after the grant of permanent residence status.

iii. Any new job must be in the same or similar occupational classification as defined in the regulation.

A related amendment to 8 CFR § 205.1 provides that the withdrawal of an employment based petition, or the termination of the petitioning employer's business, less than 180 days after petition approval, terminates the petition. However, if a related adjustment of status application has been pending for 180 days or more at the time of the withdrawal or business termination, the petition remains approved despite the withdrawal or business termination unless revoked on other grounds.

These regulations provide much-needed clarity on the issue of whether an alien worker may still rely on the portability rules to work for a new employer if the original petitioning employer withdraws the approved I-140. USCIS confirms that a withdrawal request will not result in revocation of the I-140 if it has been pending for at least 180 days or has already been approved.

Establishment and Retention of Priority Dates for Employment Based Petitions

8 CFR § 204.5 is amended to provide as follows:

a) Current practice is confirmed that the priority date for a petition requiring an individual labor certification is the date the application was accepted by DOL, and the priority date for a classification not requiring a labor certification is the date a properly filed petition is received by USCIS. Priority dates for special immigrants are also established.

b) Current practice is confirmed that the priority date for an employment based petition is applicable to any subsequent approved employment based petition unless the earliest petition is invalidated.

c) Priority dates are not transferrable to another alien.

d) Approved petitions are valid indefinitely unless revoked.

Surprisingly, the existing regulations never specifically stated that the priority date for non-PERM immigrant visa petitions was the date the immigrant visa petition (Form I-140) was filed with USCIS. However, this has long been the agency practice and is now safely embedded in the regulations.

Employment Authorization in Compelling Circumstances

The new skilled worker regulations create a new form of work authorization that allows skilled workers who are beneficiaries of approved immigrant visa petitions to continue to work in situations where their underlying status has expired. For example, an H-1B with an approved I-140 petition who for technical reasons is no longer eligible for an extension under the AC21 provisions might apply for a special work authorization under this rule. Although it may have only limited applicability, this new rule allows highly skilled workers to continue employment in circumstances that were not covered under prior law.

8 CFR § 204.5(p) is added to provide as follows:

a) A principle alien who is the beneficiary of an approved employment petition may be eligible to receive an initial employment authorization if on the date an I-765 EAD application is filed.

   i. The individual is in E-3, H-1B, H-1B1, O-1 or L-1 status, including during periods of authorized admission before or after a validity period, and

   ii. The individual's priority date is not current, and

   iii. USCIS in its discretion determines that compelling circumstances exist to authorize employment.

b) An alien who has previously received authorization under a) may request renewal of authorization if either:

   i. The priority date is not current and USCIS exercises discretion, or

   ii. The difference between the individual's priority date and the priority date for the individual's category and country is 1 year or less.

c) Spouses and children of principle aliens may be entitled to work authorization under similar circumstances as described in the regulations.

Authorized Periods of Admission Before or After Validity Period

These new rules provide much-needed clarity on the impact of a layoff or termination of employment on a worker's nonimmigrant status. The regulations provide that cessation of employment prior to the validity period of the nonimmigrant petition will result in a 60-day grace period during which the alien can find new work. Under prior law the alien was considered out of status immediately upon cessation of employment, and the new employer had to rely on the agency exercising favorable discretion. In addition to this 60-day grace period following cessation of employment, there is a new 10-day period added to the beginning and end of the validity period (normally shown on the USCIS-issued approval notice) for E, H-1B, L and TN nonimmigrants. This 10-day grace period allows the worker to enter the US 10 days prior to commencing employment, and gives them 10 days after employment eligibility ends to prepare for departure.

8 CFR § 214.1 is added to provide as follows:

a) An alien admissible in E-1, E-2, E-3, H-1B, L-1 or TN classification and any dependents may be admitted or retain such status for a period up to 10 days before and 10 days after the authorized validity period. Unless otherwise authorized, employment is not authorized during any such period.

b) An alien and dependents in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, or TN shall not be considered as having failed to maintain nonimmigrant status solely upon the basis of cessation of employment for a period of 60 consecutive days, or the end of the petition validity period, whichever comes first. This provision may be applied only once during each validity period. Unless otherwise authorized, employment is not authorized during such period.

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H-1B Authorization for Individuals Without Required State License

Under prior law, H-1B approvals could be difficult for persons whose occupations required licensure. In many cases, the H-1B applicant could not get a license without having a valid immigration status, and could not get immigration status without the license. This new rule resolves this Catch 22 by creating a process for dealing with license issues. In situations where the job on an H-1B petition requires a license, and the foreign worker does not yet have such license due to technical reasons (such as not having US work authorization), USCIS will now provisionally approve such petitions for one year. After this one-year provisional H-1B, the worker would need to present proof of their license in order to extend immigration status.

8 CFR § 214.2 is amended to allow the approval of H-1B petition even though the alien does not have a state required license in two (2) circumstances:

a) The state allows a non licensed individual to work under the supervision of a licensed professional and the petition shows that the alien will perform the duties of the occupation under the required supervision.

b) A petition will be granted for a 1 year period for an otherwise qualified individual who is eligible for a required license except because of the lack of a social security number, lack of employment authorization, or similar technical requirements. Approval may be granted if the alien is otherwise qualified and has filed an application for a license. An extension beyond the 1 year may be granted only if the license has been acquired, or the alien is in a position requiring a different license, or is working where a license is not required.

Automatic Extensions of Certain Employment Authorization Documents (EAD's)

The new rules make a significant change to the extension of employment authorization documents (EADs). Under current law, if an EAD card expires, the timely filing of an extension request has no bearing on the expired card. In order to resume employment, the foreign national had to wait to receive the new EAD, which took around 90 days to obtain. In many instances, foreign nationals lost the right to work while waiting for the new EAD to arrive. The new regulations solve this problem by automatically extending the validity of the EAD for 180 days when a timely extension application is filed. These welcome changes should make it much easier for persons with work authorization to remain employed when filing for renewals.

8 CFR § 274a.13 provides for the automatic extension for 180 days of previously issued employment authorization upon the filing of a renewal application under the following conditions:

a) The extension petition must be properly filed before the expiration of the current EAD; and

b) The extension petition must be based upon the same employment authorization category as shown on the expiring EAD; and

c) The extension petition is based upon a class of aliens who are eligible to apply for employment despite the expiration of the current EAD and is based upon an

employment authorization category that does not require adjudication of an underlying application or petition prior to adjudicating the employment authorization; and

d) Any limitations contained in the expiring EAD shall continue; and

e) The extension shall terminate upon the earlier of 180 days, or the denial of the extension request; and

f) An EAD which has expired on its face is considered as not expired if the prior conditions are met.

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