Insight

IN-DEPTH DISCUSSION

JANUARY 19, 2016

DHS Proposes New Rule for Certain Immigrant and Nonimmigrant Programs Affecting Employment

BY HECTOR GALEANO AND JORGE LOPEZ

The Department of Homeland Security (DHS) recently issued a proposed rule to amend employment-based immigrant and nonimmigrant visa programs.[1] The new rule is intended to benefit both U.S. employers and foreign national workers by allowing employers more flexibility in employing and retaining high-skilled workers. The proposed changes include new regulations on the retention of employment-based immigrant visa petitions and priority dates for such petitions. The rule also clarifies the criteria for determining cap-exempt employers,[2] adds grace periods for certain nonimmigrant visa categories, including a 60-day grace period to allow foreign workers more flexibility in changing jobs, extends employment authorization in compelling circumstances, and automatically extends Employment Authorization Documents (EAD) in certain circumstances. The immigrant visa categories pertain to the processing of U.S. Legal Permanent Residence Status. The following are some of the rule's notable changes.

Changes to Automatic Revocation Regulations for Employment-Based Immigrant Visas

DHS proposes to amend current regulations so that immigrant visas that have been approved for 180 days or longer will no longer be automatically revoked if the original petitioner withdraws the petition or the petitioning business ceases to exist. Under existing regulations, foreign workers who are the beneficiaries of approved immigrant visas (commonly known as form I-140s) may lose critical benefits, such as the ability to extend their H-1B visa beyond a sixth year, if they terminate employment with the company that filed the I-140.

The proposed amendment would allow the foreign worker to keep the benefit of the I-140 approval, including retaining the priority date, as long as the I-140 was approved

1 180 Fed. Reg. 81899 -81945 (Dec. 31, 2015), available at https://www.federalregister.gov/articles/2015/12/31/2015-32666/retention-of-eb-1-eb-2-and-eb-3-immigrant-workers-and-program-improvements-affecting-high-skilled.

2 See Michelle A. White, *Proposed Rule Would Expand Cap Exempt Status for Non-Profit Entities that are 'Related or Affiliated' with Institutions of Higher Education*, Littler ASAP (Jan. 6, 2016).

for at least 180 days. Petitions revoked based on fraud, material misrepresentation, invalidation or revocation of a labor certification, or error by U.S. Citizenship and Immigration Service (USCIS), would be treated differently and the foreign worker would not derive benefits from such petitions.

Amendment and Expansion of Grace Periods

The proposed regulations further seek to add a 10-day grace period for additional nonimmigrant categories including E-1, E-2, E-3, L-1 and TNs. Under existing regulations, H-1B nonimmigrants are allowed to enter the United States 10 days prior to commencement of their employment and are allowed an additional 10 days post completion of their H-1B assignment to leave the country.[3] The proposed rule change would extend this grace period to the above enumerated nonimmigrant visa categories. This should not be interpreted to mean there is an extension prior to completion in the case of a termination.

In addition, DHS seeks to create a new 60-day grace period for E-1, E-2, E-3, H-1B1, L-1, TN and H-1B visa holders where employment ends early for those workers. Under existing regulations, foreign workers whose employment ends—whether voluntarily or through termination—are considered to be in violation of their status and must depart the United States immediately. The proposed regulations would give a one-time 60-day grace period after the end of employment for the foreign worker to seek alternative employment, nonimmigrant visa classification, or some other option.

Employment Authorization in Compelling Circumstances

DHS proposes to add a rule that would extend employment authorization to high-skilled workers who are the beneficiaries of approved employment-based immigrant visa petitions and are in the United States in nonimmigrant status. This new employment authorization would be separate and distinct from the foreign worker's previous nonimmigrant status. For most non-immigrant visas, employment authorization is incident to status on that nonimmigrant visa. Under the proposed change, the individual would be able to seek an employment authorization document that is not a continuation of the nonimmigrant status but rather an independent basis for employment authorization. In order to qualify, the following requirements apply:

1. the nonimmigrant worker needs to be in the United States and maintain an E-3, H-1B, H-1B1, O-1 or L-1 visa status,
2. the worker needs to be the beneficiary of an approved immigrant visa petition under EB-1, EB-2, or EB-3 visa classification,
3. the immigrant visa cannot be immediately available, and
4. the individual must demonstrate compelling circumstances that justify an independent grant of employment authorization.

Examples of compelling circumstances provided by DHS include: serious illness and disabilities, employer retaliation, other substantial harm to the applicant, and significant disruption to the employer.

Automatic Extensions of EADs

Under the new proposed rule by DHS, certain individuals would be able to continue employment without first obtaining a renewal of an EAD. These individuals would automatically get their employment authorization extended for 180 days if:

1. the individual files a renewal of the EAD prior to the expiration of the existing EAD,
2. the individual is requesting renewal based on the same employment authorization category under which the expiring EAD was granted, and
3. the individual either continues to be employment authorized "incident to status" – meaning the visa category he or she holds confers the right to work – beyond the expiration of the EAD or is applying for renewal under a category that does not first require adjudication of an underlying application, petition or request.

---

3 This 10-day, post competition grace period exists only where the H-1B validity period is fulfilled and not when the employee's work is terminated early.

If the individual qualifies under the above-mentioned criteria, then the expired EAD in combination with a Notice of Action (I-797C, commonly referred to as a receipt notice) would be considered an unexpired EAD for purposes of complying with Employment Eligibility Verification (Form I-9) requirements.

This proposed rule will be open for public comment for 60 days, after which time DHS may move forward with implementation of the final rule.