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+++ ALERT +++ New Rule +++ ALERT +++

Retention of EB-1, EB-2, and EB-3 Immigrant Workers & Program Improvements Affecting High Skilled Nonimmigrant Workers

The USCIS has published a new Final Rule to make improvements as enumerated in the title above and to clarify and codify sections of The American Competitiveness in the 21st Century Act (AC21). The new rule will go into effect on **January 17, 2017**.

NOTICE: The following is merely a summary of the upcoming changes. For comprehensive analysis whether and how your current and future case(s) may be impacted by the new rule, contact any of our offices.

If you have a pending case which comes within the purview of the new rule and your case is pending on the effective date, January 17, 2017, your case will be adjudicated under the new rule.

The final rule provides various benefits to participants in certain employment-based immigrant and nonimmigrant visa programs, including the following: improved processes and increased certainty for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers; greater stability and job flexibility for those workers; and increased transparency and consistency in the application of DHS policy related to affected classifications.

Many of these changes are primarily aimed at improving the ability of U.S. employers to hire and retain high-skilled workers who are beneficiaries of

approved employment-based immigrant visa petitions and are waiting to become lawful permanent residents, while increasing the ability of those workers to seek promotions, accept lateral positions with current employers, change employers, or pursue other employment options.

Specifically, the final rule clarifies and improves policies and practices related to:

- H–1B:

1. Changes in Cap Limits
    - There is no change in the numerical cap limits. There is also no change in the classes of foreign workers who qualify for H-1B visas.
2. Changes for Cap-exempt employers
    - The final rule enlarges the definition of "government research organizations" to now encompass state agencies as well as federal agencies.
    - The new rule also revised the definition of "related or affiliated nonprofit entity". Shared ownership or control is no longer determinative of affiliation. So long as there is a formal, written affiliation agreement in place, and the fundamental activity of the non-profit furthers the mission of the institute of higher learning, it will come within the purview of the new definition of a cap-exempt employer.
    - For a non-profit that is affiliated with an institute of higher education, "primary activity" is no longer the key. Key words are "formal written agreement" and "fundamental activity".
3. Concurrent Employment
    - Workers working at cap-subject and at cap-exempt employers must prove that they can "reasonably" work for both employers.
    - The period of validity for employment with the cap-subject employer cannot exceed the period of validity for employment with the cap-exempt employer.
4. H-1B extensions of stay under AC21. The final rule addresses the ability of H-1B nonimmigrant workers who are being sponsored for LPR status (and their dependents in H-4 nonimmigrant status) to extend their nonimmigrant stay beyond the otherwise applicable 6-year limit pursuant to AC21.
    - Remaining H-1B time may be recaptured at any time before the foreign worker uses the full period of H-1B admission

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    - To be eligible for extension of stay beyond the 6 year maximum period, the individual must have had an application for labor certification or a Form I-140 petition filed on his or her behalf at least 365 days before the date the exemption would take effect.
    - The individual becomes ineligible for the lengthy adjudication delay exemption if he or she fails to apply for adjustment of status or an immigrant visa within 1 year of the date an immigrant visa is authorized for issuance.
    - Exemptions pursuant to section 106(a) of AC21 may only be made in 1-year increments.
    - For H-1B extensions beyond the 6-year period, individuals who are beneficiaries of filed I-140's need only show that visa was not available due to per-country limits at the time of filing the H1B extension petition.
5. H-1B portability.
    - An H-1B nonimmigrant worker who has changed employment based on an H-1B portability petition filed on his or her behalf may again change employment based on the filing of a new H-1B portability petition, even if the former H-1B portability petition remains pending.
    - Eligibility for employment pursuant to a second or subsequent H-1B portability petition, however, would effectively depend on

(1) whether any prior H-1B portability petitions have been approved or remain pending, and
(2) whether the individual's Form I-94, issued upon admission or extended pursuant to an approved H-1B petition, has expired.

- If the request for an extension of stay was denied in a preceding H-1B portability petition and the individual's Form I-94 authorizing admission in or extension of H-1B status has expired, a request for an extension of stay in any successive H-1B portability petition(s) must also be denied. See 8 CFR 214.2(h)(2)(i)(H)(3).
- Successive H-1B portability petitions thus may provide employment authorization as long as each such H-1B portability petition separately meets the requirements for H-1B classification and for an extension of stay.
    - An H1B beneficiary can start working for a new employer upon filing of the petition.

There is no need to wait for the approval to port to the new position.
    - Beneficiary must be in H1B status at the time of filing the petition to port.
    - If the old H1B expires while the new petition is pending under portability, the nonimmigrant worker is not in any status, but he or she is not accruing unlawful presence.
    - H1B nonimmigrant worker can port during the grace period (see Grace Period section below).
    - Travel during a pending port petition. If the original H-1B petition has not yet expired, the beneficiary of an H-1B portability petition who travels abroad may be admissible if, in addition to presenting a valid passport and visa (unless visa-exempt), he or she provides a copy of the previously issued Form I-94 or Form I-797 approval notice for the original H-1B petition (evidencing the petition's validity dates), and a Form I-797 receipt notice demonstrating that the new H-1B petition requesting an amendment or extension of stay was timely filed on the individual's behalf. *The inspecting officer at the port of entry will make the ultimate determination as to whether the applicant is admissible to the United States as an H-1B nonimmigrant...*

6.Licensing Requirements.

- If a license is required for the position and the H1B applicant who is substantively qualified for licensure but cannot get the required license because of lack of SS# or EAD or for some other technical reason, he or she may still file for H1B and get a provisional 1 year H1B visa.
- If the evidence demonstrates that the unlicensed H-1B nonimmigrant may fully perform the duties of the occupation under the supervision of licensed senior or supervisory personnel, H-1B classification may be granted. The identity, physical location, and credentials of such supervisor must be provided.

Petitioners filing H-1B petitions on behalf of such beneficiaries are required to submit evidence from the relevant licensing authority indicating that the only obstacle to the beneficiary's licensure is the lack of a Social Security number or the lack of employment authorization.

- **Nonimmigrant Grace Periods:**
    - The new rule allows for a discretionary 10-day grace period before the petition validity period, and 10 day grace period after the validity period ends for E-1, E-2, E-3, L-1, and TN classifications.
    - Similar grace periods are currently already available for H-1B, O and P classifications.
    - If an individual in E-1, E-2, E-3, H-1B, H-1B1, L-1, O or TN classification loses his or her job, he or she may be granted a grace period up to 60-days to find new employment. This is at the sole discretion of the adjudicating officer, and can only be granted once per validity period.

The grace period will be the lesser of 60 days or until the expiration of the current nonimmigrant validity period, or as long as the officer deems appropriate for the circumstances.

- If granted, the grace period would allow such nonimmigrants to remain in the United States without violating their status and potentially obtain new job offers from employers that seek to file new nonimmigrant petitions, and requests for an extension of stay, on their behalf. In such cases, even though prior employment may have terminated several weeks prior to the filing of the new petition, DHS may consider such an individual to have not violated his or her nonimmigrant status and allow that individual to extend his or her stay with a new petitioner, if otherwise eligible. If the new petition is granted, the individual may be eligible for an additional grace period of up to 60 days in connection with the new authorized validity period.
- The nonimmigrant worker can apply for an extension of stay or adjustment of status during the 10-day or 60-day grace period.
- The clause that reads, "to prepare for departure from the United States or to seek an extension or change of status based on a subsequent offer of employment" has been removed from the 10-day grace period provision. Now the time can be used to change status or for vacationing prior to leaving.
- In limited instances it may be possible for a nonimmigrant worker to qualify for both grace periods, but it is at the discretion of DHS.
- Employment is not authorized during the grace periods.

- **Continuing Bona Fide Job Offer and Supplement J:**

- A foreign worker seeking to adjust status must have a valid job offer at the time the I-485 is filed and adjudicated.
- Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability under INA Section 204(j), to Form I-485 is required to be submitted. The final rule makes clear that any supporting material and credible documentary evidence may be submitted along with Supplement J, according to the form instructions.
- Supplement J collects necessary information about the job offer and includes attestations from the foreign national and employer regarding essential elements of the portability request.
- Job offer can be either the original job offer, or a new offer of employment that is in the same or similar occupational classification as the original job offer.
- Individuals applying for adjustment of status on the basis of a national interest waiver (NIW), as well as aliens of extraordinary ability, are not required to use Supplement J.

- **Portability:**
  - A qualifying immigrant visa petition must be approved before DHS examines a portability request under INA 204(j) and determines an individual's eligibility or continued eligibility to adjust status on the basis of the underlying visa petition.
  - How USCIS will assess specific Form I-140 petition eligibility requirements, including the petitioner's ability to pay, when a porting request has been made on a pending Form I-140 petition:
    - It will be adjudicated in accordance with the standards described in final 8 CFR 245.25(a)(2)(ii).
    - The burden is on the applicant to demonstrate eligibility or otherwise maintain eligibility for adjustment of status to lawful permanent residence.
    - In determining whether a Form I-140 petitioner meets the "ability to pay" requirements under the Code for a pending petition that a beneficiary seeks to rely upon for portability, DHS reviews the facts in existence at the time of filing.
    - Petitioner no longer has to prove continuing ability to pay until the

beneficiary obtains lawful permanent residence. "To require that the original Form I-140 petitioner demonstrate a continuing ability to pay when the beneficiary no longer intends to work for that petitioner is illogical and would create an incongruous obstacle for the beneficiary to change jobs".

- **Issuance of Employment Authorization**:

1. Compelling Circumstances Employment Authorization
    - Applicant must be in the U.S. in E-3, H-1B, H-1B1, O-1 or L-1 status when the EAD application is filed. Being in the grace period is okay.
    - EAD application must be filed prior to expiration of prior EAD.
    - Applicant must have an approved I-140.
    - Must show that no visa number is available for applicant's priority date.
    - Applicant cannot have a history of criminal activity (felony conviction or 2 or more misdemeanors). These applicants are ineligible for this extension.
    - Must demonstrate that there are compelling circumstances to justify the issuance of an EAD.
        - "Compelling circumstances" have not been defined and will be considered on a case by case basis.
        - Examples of "compelling circumstances" can include:
          - Serious illness or disability of applicant or family member
          - Employer dispute or retaliation against the nonimmigrant worker.
          - Other substantial harm to the applicant. Financial hardship, inability to find job in home country, etc. Job loss alone is not enough, must have other compounding factors.
          - Employer disruption – issues outside the control of the worker, such as if the L organization is no longer a qualifying organization and the L1B worker would be unable to continue under the current status.
        - These are NOT compelling circumstances:
          - Extraordinary wait times for priority dates to become current, as

is the case for India and China.
- If a person wants to change jobs because he or she is dissatisfied with the job/pay/conditions.
- Impact on children's/spouse's school/future career.

- If the above conditions are proven, a 1-year EAD will be issued. It can be renewed in 1-year increments if the compelling circumstances continue.
- If the difference between the applicant's priority date and the relevant Final Action Date is 1 year or less, he or she can get the EAD extension without having to show compelling circumstances.

IMPORTANT: LOSS OF NONIMMIGRANT STATUS

"Although individuals eligible for compelling circumstances EADs must have lawful nonimmigrant status at the time they apply, such individuals will generally lose that status once they engage in employment pursuant to such an EAD. Such a foreign national will no longer be maintaining his or her nonimmigrant status, but he or she will generally not accrue unlawful presence during the validity period of the EAD or during the pendency of a timely filed and non-frivolous application. This means that if an individual who was employed under a compelling circumstances EAD leaves the United States to apply for a nonimmigrant or immigrant visa at a consular post abroad, the departure will not trigger the unlawful presence grounds of inadmissibility, as long as he or she is not subject to those grounds by virtue of having otherwise accrued periods of unlawful presence."

APPLICANT CANNOT ADJUST STATUS IN THE U.S. HE OR SHE WILL NEED TO CONSULAR PROCESS

"Although the foreign national may remain in the United States and work under a compelling circumstances EAD, and generally will not accrue unlawful presence while the EAD is valid, he or she may be unable to adjust status to lawful permanent residence in the United States when his or her priority date becomes current. An individual who is seeking lawful permanent residence based on classification as an employment-based immigrant is generally barred by statute from applying to adjust status in the United States if he or she is not in lawful nonimmigrant status."

1. Automatic Extensions for up to 180 Days
    - USCIS is no longer required to adjudicate EAD applications within 90 days.
    - In order to help prevent gaps in employment authorization, the DHS will allow most EAD applicants to apply for extensions up to 180 days prior to the EAD expiration date.
    - In addition, EAD applicants in certain categories will be granted "automatic extension of expiring EADs...for up to 180 days with respect to individuals who are seeking renewal of their EADs based on the same employment authorization categories under which they were granted.

- **I-140:**
    - Once 180 days have passed following the approval of an I-140 petition, the USCIS will not revoke the I-140 petition solely based on the petitioner's withdrawal of the petition or termination of the business. The same holds true in cases where 180 days or more have passed after an associated application for adjustment of status (form I-485) has been filed.
    - The beneficiary of an approved I-140 petition can retain his or her priority date unless the petition is revoked due to fraud, willful misrepresentation, material error by the U.S. Citizenship and Immigration Services (USCIS), or the invalidation or revocation of the underlying labor certification.
    - An approved I-140 still CANNOT be ported to a new employer.

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