**USCIS Issues Proposed Rules Affecting Highly-Skilled Workers**

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On November 20, 2014, the White House announced a variety of executive actions on immigration that purported to have broad-reaching effect. The more widely publicized aspects of these executive actions purported to expand the Deferred Action program for Childhood Arrivals, to expand the deferred action program to include certain parents of U.S. Citizens and lawful permanent residents, and to strengthen a variety of border protection initiatives. While the expanded deferred action programs have been mired in Federal Court Litigation from the onset and the subject of broad coverage in the national media, the deferred action initiatives related to highly skilled immigrants have received far less attention, both from the press and the agencies involved in implementing the executive actions.

On December 31, 2015, more than one year after the executive actions were first announced, USCIS released a Proposed Rule related to the portions of the executive action aimed at retaining highly-skilled workers in the U.S. At 181 pages, these rules potentially affect a very large segment of the nation’s highly skilled immigrant worker population. While this is a Proposed Rule, and subject to change in its final version, it benefits any employer currently employing highly skilled workers to know at least the basic outline of the Proposed Rule. Some segments of the Rule have the potential to be highly beneficial to employers and their highly skilled immigrant workers, others only raise questions and concerns.

The Proposed Rule provides guidance in the following areas:

**1. Extending H-1B status beyond six years** –The Proposed Rule implements existing agency guidance and legislation that is already in place authorizing the approval of H-1B status beyond the usual six years for beneficiaries of approved EB-1, EB-2 and EB-3 immigrant visa petitions when an immigrant visa is not available at the time the H-1B petition is filed because the immigrant visa classification is already over-subscribed. In these instances, H-1B extensions beyond the initial six years of H-1B status will be allowed in three year increments until USCIS adjudicates the adjustment of status application. These extensions apply only to the principal beneficiary of the immigrant visa petition, and not any derivatives who might be in H-1B status. Unless they independently qualify for this H-1B extension based on an approved immigrant visa petition that was filed on their behalf, they will have to change to H-4 status.

The proposed rule also implements current agency guidance and legislation authorizing approval of H-1B status beyond six years in one year increments for H-1B nonimmigrants seeking permanent residence status if 365 days or more have passed since the filing of a labor certification application or the filing of an employment-based immigrant visa petition on their behalf. Again, this extension will apply only to the principal beneficiary of the labor certification or immigrant visa petition and not any beneficiaries who might be in H-1B status.

**2. Job Portability for Certain Applicants for Adjustment of Status** – The proposed rule provides that an I-140 Immigrant Visa Petition for an EB-1, EB-2 or EB-3 (although not for an EB-1 “extraordinary ability” petition) remains valid if the petition is approved and either:

**a.** The employment offer from the petitioning employer is continuing and remains bona-fide; or

**b.** The beneficiary has a new offer of employment in the “same or similar” occupation, the application for adjustment of status based on the petition has been pending for 180 days or more, and the approval of the I-140 has not been revoked. The proposed rule makes it clear that the new offer of employment can be for a different job with the same employer, a new U.S. employer, or it can be based on self-employment.

**3. Job Portability for H-1B Nonimmigrant Workers** – follows existing guidance and legislation to provide H-1B nonimmigrants who are the beneficiaries of new H-1B petitions seeking an amendment or extension of their H-1B status a path to start employment with a new H-1B petitioning employer once the new employer files a non-frivolous H-1B petition.

**4. Recapture of Time for H-1B Nonimmigrants** – implements existing guidance that allows H-1B beneficiaries to “recapture” time spent outside of the U.S. during the validity of an H-1B petition.

**5. H-1B cap exemption** – applies existing guidance on cap-exemption that allows H-1B nonimmigrants to be exempt from the cap if they are employed directly by any of the following entities:

**a. An institution of higher education**

**b. A nonprofit entity related to or affiliated with an institution of higher education**

**c. A governmental research institution**

The proposed regulations uses a definition of “institution of higher education” that mirrors the definition that is set forth in the Higher Education Act, meaning that for-profit educational institutions won’t be able to claim the exemption from the H-1B cap.

The Proposed Regulation also states that an H-1B petitioner that is not a qualifying institution or organization may still claim exemption from the cap on the number of H-1B petitions issued each year if the following conditions are met:

* The majority of the individual’s work will be performed at a qualifying institution, organization, or entity; and
* The individual’s job duties “directly and predominantly” further the essential purpose, mission, objectives or functions of the qualifying institution, organization, or entity.

The Proposed Rule also defines the term “related or affiliated nonprofit entity” to include nonprofit entities that are:

* Connected to or associated with an institution of higher education through shared ownership or control by the same board or federation;
* Operated by an institution of higher education; or
* Attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

**6. Moving from H-1B cap-exempt employer to H-1B cap subject** – codifies existing policy whereby an individual with a cap-exempt H-1B authorization is counted against the camp when changing employers to a cap-subject employer.

**7. Licensure for H-1B nonimmigrants** – allows issuance of an H-1B petition with a one year validity if the occupation requires a state or local license and the appropriate licensing authority will not issue the license absent evidence that the beneficiary has been issued a social security number or granted employment authorization. Individuals issued an H-1B with a one year validity may not extend their H-1B status without proof of licensure.

**8. Grace Periods for Nonimmigrants** –provides for two new grace periods for individuals in certain employment related immigration statuses.

**a.** Ten day grace period –individuals in E-1, E-2, E-3, L-1, and TN classification and their dependents will be allowed to enter the U.S. up to ten days prior to the beginning and depart up to ten days after the end of their period of authorization, similar to what is currently allowed for H-1B nonimmigrants.

**b.** 60 day grace period – In order to deal with unexpected changes in their employment status, such as a loss or change of their job, individuals in E-1, E-2, E-3, H-1B, H-1B1, L-1 and TN classification would get a sixty day grace period, or up until the expiration of their current validity period, whichever is shorter, to allow them time to seek new employment, file for a change of status to another visa classification, or depart the U.S.

**9. Employment Eligibility in “compelling circumstances”** – allows for one year of employment authorization for individuals who are currently in the U.S. in E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status who are the beneficiaries of approved EB-1, EB-2, or EB-3 immigrant visa petitions but do not have immigrant visas immediately available if they can demonstrate “compelling circumstances” that justify an independent grant of employment authorization.

The regulation does not give a definition of “compelling circumstances” that would justify the granting of employment authorization. However, they have identified four circumstances in which it may consider granting employment authorization under the proposed rule. These include the following:

* **Serious Illness and Disabilities** – causing the nonimmigrant worker to move to a different geographic area for treatment or otherwise substantially changing his employment circumstances.
* **Employer Retaliation** – The nonimmigrant is involved in a dispute regarding the employer’s illegal or dishonest activity as evidenced by, for example, a complaint filed with a relevant government agency or court, and the employer has taken retaliatory action.
* **Substantial Harm to the Applicant** – Due to compelling circumstances, the individual is unable to timely extend or otherwise maintain status, or obtain another nonimmigrant status, and absent continued employment authorization the applicant and his or her family would suffer substantial harm.
* **Significant Disruptions to the Employer** – Due to compelling circumstances, the individual is unexpectedly unable to file a timely petition to extend or change status, there are no other possibilities for the immediate employment of that individual with their current employer, and the worker’s departure would cause the employer substantial disruption to a project for which the individual is a critical employee.

An Employment Authorization Document issued under this provision can be renewed if the individual can show that they continue to be the beneficiary of an approved EB-1, EB-2, or EB-3 immigrant visa petitions and they either continue to face the compelling circumstances or they have a priority date that is less than one year from the current cut-off date for the relevant classification listed in the most recent Visa Bulletin issued by the Department of State.

Under this section, no individual is eligible for a new or extended EAD if at the time of filing for the EAD their priority date is more than one year beyond the date on which immigrant visa numbers were authorized to be issued to individuals with the same priority date for their classification and country of nationality. Issuance of an EAD under this section is also prohibited if the individual is convicted of a felony or two misdemeanors.

**10. Adjudication of Applications for Employment Authorization** – eliminates the current 90 day time limit for USCIS to adjudicate EAD applications to address “national security and fraud” concerns. However, it automatically extends EADs for up to 180 days if an application for a new EAD card was filed before the current card expires, the application is in the same permanent residence category (except for TPS-based applications), and the individual continues to be employment authorized incident to status. The proposed regulation lists 15 categories where an EAD renewal applicant would receive an automatic extension of their EAD under the proposed rule, including those with a pending application for adjustment of status based on an approved employment-based immigrant petition.

The President’s November 2014 announcements related to the deferred actions were quite broad and promised that the administration would be modernizing, improving and clarifying immigrant and nonimmigrant employment-related visa programs to grow our economy and create jobs. The administration claimed it would be working to modernize the visa bulletin system to more simply and reliably make determinations on visa availability, provide clarity for individuals seeking career progression and job mobility, and to clarify the instances whereby a national interest waiver or parole may be granted to foreign inventors, researchers, and entrepreneurs. Despite the length of these new regulations, they are actually quite modest in scope when compared to the goals listed in the November 2014 announcement. Some changes outlined in the Proposed Rule are quite welcome, such as clarification and expanding on current guidance related to continued validity of I-140s when an individual changes jobs, clarification of the H-1B cap exemption, and automatic extensions of employment authorization when an individual files for an extension. However, many business immigration practitioners and employers of foreign nationals are hopeful that the final version of the regulations aims higher in keeping with the goals of the administrative actions.

The attorneys in the Business Immigration and Compliance Group at Hughes, Socol, Piers, Resnick and Dym Ltd will continue to monitor the advancement of this rule, and will be providing comments to USCIS to encourage a final rule that will better meet the needs of our clients and the goals stated in the President’s executive actions on immigration. If you would like to add your comments to our own, or discuss the details of this Proposed Rule with us, please feel free to contact us at iwagreich@hsplegal.com or (312) 604-2726

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