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USCIS New Rule Implements Old Laws with a Few Twists

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USCIS has published a final rule, to take effect January 17, 2017, ensconcing in regulations most of the policies it had long ago worked out in memorandums implementing provisions of 1998 and 2001 laws intended to bridge some gaps in the employment immigration law processes particularly relating to H-1B workers. The regulation also turns a few new twists that employers must be aware of.

The two laws mainly implemented by the regulations are the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21") and the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), and their relevant provisions mainly have provided flexibility to H-1B workers who could more easily take promotions, switch employers and jobs, and maintain H-1B status while waiting for processing to permanent residence.

The finalized rule make the favorable interpretations from prior memorandums more dependable for workers and employers who rely on them, because regulations are more binding on adjudicators and less changeable by the agency than memorandums. But the few restrictive interpretations in the rule will tend to garner more deference from courts if challenged.

Permanent Portability Form and Requirements. The regulation creates and requires a new Form I-485 Supplement J for workers who had filed for adjustment of status based on one employer's I-140 and after the I-485 was pending for 180 days seeks to maintain the application based on new employment. DHS comments to the rule (but not the regulation itself) clarify that an unadjudicated I-140 can be approved after an adjustment application based on it has been pending 180 days as long as the employment offer was valid and the employer had the ability to pay the proffered wage at the time of being filed and new employment in the same or similar occupation is in place.

I-140 Revocations. The new regulation newly clarifies that withdrawal of an I-140 petition by a former employer will not result in revocation of the petition for various purposes as long as at the time of withdrawal it has been 180 days since the I-140 has been approved for since an I-485 adjustment application based on it was filed. Rather, an I-140 approval remains valid indefinitely for purposes of retaining the worker's place in the visa number queue, allowing adjustment to permanent residence with new employment lined up in the same or similar occupation, extension of H-1B status beyond six years, and "compelling circumstances" employment authorization discussed below. An I-140 petition can be revoked only because of fraud, willful misrepresentation of a material fact, the invalidation or revocation of a labor certification, or material error.

New Interim Work Authorization. The regulation allows workers in E-3, H-1B, H-1B1, L-1, and O-1 (including any grace period) who have an approved I-140 and are waiting on a visa number to apply for discretionary work authorization if they can show "compelling circumstances" such as loss of current authorizing employment through serious illness, disability, major disruption to the employer, or employer retaliation against the worker. Workers can renew the interim authorization even after compelling circumstances have subsided if their "priority date" is within one year of the published cut-off date. Derivative family members also can apply for work cards. People obtaining such authorization will be considered in a period of authorized stay, but they will not be allowed to adjust status until returning in proper nonimmigrant status.

Work Authorization Pending Renewal, but no Interim Cards. The regulation "gives and takes away" concerning work cards. It "gives" by automatically extending for up to 180 days the temporary employment authorization (and document) for a worker who timely files Form I-766 to renew the employment authorization document (Form I-766). Apparently on the rule's effective date USCIS will start issuing receipt notices for the filing of Form I-765 (the form to renew work cards) reflecting that the I-766 work card is automatically extended for 180 days (apparently from the date of USCIS receipt of the renewal application, not from date of expiration of the card). Employers MUST accept such receipt notices as evidence of work authorization under the I-9 "receipt rule," and many state Departments of Motor Vehicles should be willing to accept them for driver license renewal. USCIS receipt notices will not indicate 180 day automatic extensions for applications to renew work authorization for H-4, E, and L-2 spouses, whose authorization depends on prior adjudication of the principal worker's status, but those spouses may apply for work card renewal along with their and the principal worker's filings for extension of stay up to six months before status expiration. The regulation also allows work card renewals to be filed as long as 180 days before current card expiration (rather than the prior 120 day policy). The regulation "takes away" a prior regulation that had required issuance of an interim work card if USCIS takes longer than 90 days to adjudicate a work authorization request. Now a worker requesting an initial card must wait as long as USCIS needs to take for adjudication.

Entry and Exit Grace Periods. Following up on existing rules for H-1B and O-1 workers, the regulation extends to the E-1, E-2, E-3, L-1, and TN classifications the ability to obtain an I-94 record upon admission that allows admission to the U.S. up to 10 days before the planned start of work and allows the worker to remain in the U.S. (and be the subject of a filing to extend stay or change status) up to 10 days after the end of approved work. The pre-work period makes the most sense in categories in which a preliminary petition to USCIS for approval of specific work for a specific period is required, such as for H-1B and L-1 status. It makes less sense for the E and TN classifications for which visas can be obtained directly at the consulate or, for Canadian TNs, at the port of entry, since generally the visa can be used as soon as it is issued. Workers may need to make a specific request to the port of entry officer for an I-94 record covering these grace periods and must understand that they are not authorized to work during the grace periods and they must file any petition to extend work authorizing stay before the approved post-work grace period (not during the grace period) in order to have uninterrupted work authorization under the "240-day rule."

Work Termination Grace Periods. Workers in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1 or TN status who lose their jobs before the end of their status can remain in the U.S. and be sponsored for change of employer or change of classification status within the period of their I-94 admission and for 60 days after such employment termination. Adjudicators already had sometimes exercised this kind of mercy, but now it is less discretionary.

H-1B Whistleblowers. The regulation finally implements an AC21 provision to provide some kind of status protection to workers H-1B who report H-1B labor violations in situations that otherwise would invalidate the whistleblower's status. The rule says USCIS may consider whistleblowers to be forgiven for violations of status due to extraordinary circumstances beyond their control when applying for extension of stay or change of status.

H-1B cap exemptions. The regulation importantly confirms the sometimes criticized prior policy allowing workers who have cap-exempt H-1B employment to take on concurrently otherwise non-exempt employment as long as they do not cease the cap-exempt employment. The regulation says that it can revoke the otherwise capped petition if it learns that the cap exempt employment ended. The new regulation does not specify how USCIS would become so aware, but the regulations already require any H-1B employer (including the cap-exempt employer) to notify USCIS if its sponsored employment ends before the end of the period of H-1B approval. But it also expands two other cap exemption paths. First, it establishes cap exemption for nonprofit entities that show their affiliation or relation to a cap-exempt institution through a formal written agreement establishing an active working relationship for the purposes of research or education as long as a "fundamental

activity" (not necessarily "primary purpose," as originally proposed) of the nonprofit entity is to directly contribute to that research or education. Second, it clarifies exemption for federal, state, and local government research organizations whose primary mission is the performance or promotion of basic or applied research. The regulation also fine tunes the current interpretation about workers who are employed "at" rather than "by" an exempt institution, so it must be show that the worker will spend a majority of work time performing duties that directly and predominantly further the essential purpose, mission, objectives, or functions of the qualifying organization.

H-1B Portability. The rule formalizes a few restrictive interpretations and by forging them in regulation makes them more likely to receive deference from courts if challenged. The statute allowing H-1B workers to start work in a changed occupation, employer, or location upon the filing (rather than waiting for approval) of the petition with USCIS is not clear on whether that applies only to workers who currently hold H-1B status or also to workers who previously held H-1B status and now hold another status such as B-1, F-1, etc. The regulation maintains the restrictive approach that USCIS already had chosen in some informal announcements and adjudications. But the new rule also confirms some flexible approaches, particularly that (1) the interim H-1B authorization lasts as long as USCIS takes to adjudicate the petition and not just 240 days as in some extension situations; (2) workers can be the subject of successive "bridge petitions" taking advantage of the rule as long as the successive petitions are approved; (3) the worker may travel internationally and even get a new visa while taking advantage of the petition for change; and (4) if a petition that gave rise to portability gets denied but the worker still has time left on an approved petition, the worker may promptly return to such employment without being considered to have violated status (that is, if the former employer will take the worker back!).

H-1B Extensions Beyond 6 Year Maximum. The rule confirms many flexible interpretations of the past concerning AC21 sections 104(c) and 106(a) and (c) and, so that petitions for H-1B status beyond the normal six year maximum based on permanent processing may be filed even if the worker is not currently in H-1B status and even if the petition for extra time is actually filed before the full year after the qualifying labor certification application or I-140 was filed. But the rule establishes for the first time that a worker who is using section 106(a) and (c) based on delayed adjudication (not based on approved I-140) must have applied for adjustment of status or immigrant visa within one year of an immigrant visa number becoming available. The rule's preamble clarifies that H-1B extensions based on an approved I-140 must be *filed* at a time when a visa number is unavailable based on per country *or worldwide* limits even if a visa number becomes available while the H-1B petition is pending. The rule continues the longstanding USCIS policy that a worker's spouse cannot receive H-1B extensions beyond their own 6 year limit based on permanent processing delays affecting the worker.

Effective Date and Prospects for Change. The regulation takes effect on January 17, 2017, but it contains policy interpretations of laws that have been enacted for more than 15 years, so in reality most of the regulation already applies. It is conceivable that, given some of the flexible interpretations, Congress could seek to use its power to invalidate the rule before it takes effect, but given that the law mainly implements existing ameliorating legislation this seems unlikely. The Trump Administration could seek to roll back some of the interpretations, particularly in relation to H-1B cap exemptions, but it seems more likely that efforts in this regard would be focused on legislative reversal of some of the provisions of AC21 and ACWIA themselves.

Stakeholder Meeting. USCIS has stated it intends to hold a national stakeholder meeting about this rule but has not yet announced a date.