U.S. Department of Homeland Security Issues Final Rule on Immigrant Visa Petition Retention and Program Improvements Affecting High-Skilled Nonimmigrant Workers

Insights
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On November 18, 2016, the Department of Homeland Security (DHS) issued its final rule in the Federal Register which addresses the retention and portability of high-skilled foreign workers. The new regulations, which take effect January 17, 2017, allow greater flexibility to certain foreign workers subject to long green card quota backlogs to change employers without negatively affecting their pending green card applications. The new regulations also codify many agency interpretations that exist as agency guidance memorandums and nonbinding agency communications.

The main provisions of the regulations can be grouped into three sections, (1) clarifying and further implementing certain provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), (2) improving stability and job flexibility for certain long-delayed foreign workers, and (3) processing of certain applications for employment authorization documents (EAD cards), as follows:

Clarifications to AC21 and ACWIA

1. AOS Portability under INA 204(j): The rule codifies DHS policy and practice regarding requests to port under INA section 204(j), as follows:

a) **There must be a valid offer of employment at the time the Form I-485 is filed and adjudicated.** The job offer may either be the original job offer or, pursuant to INA 204(j), a new offer of employment, including qualifying self-employment, that is in the same or similar occupational classification as the original job offer.

b) **AOS Portability in cases where I-140 remains unadjudicated after 180 days.** DHS clarified in its comments to the final rule that there may be instances where an individual can request job portability pursuant to section 204(j) because the individual's Form I-485 application has been pending for 180 days or more, but the Form I-140 petition has not yet been adjudicated. The new rule allows DHS to approve an I-140 if eligibility requirements (separate and apart from ability to pay) were met at the time of fling and until the foreign national's application for adjustment of status has been pending for 1780 days.

c) **New I-485 Supplement J.** The rule creates a new supplementary form (Supplement J) to the application for adjustment of status (Form I-485). The stated purpose of the new supplement is to ensure uniformity in the collection of information and submission of initial evidence. The new supplement will be used to confirm that the job offer described in Form I-140 petition is still available at the time an individual files an application for adjustment of status, or a qualifying job offer otherwise continues to be available to the individual before final processing of his or her application for adjustment of status. Supplement J will also be used by applicants to request AOS Portability under INA 204(j).

d) **Same or similar occupational classification.** The final regulation codified current DHS interpretation of "same or similar" occupational classification. Under the final rule, the term "same" occupational classification is interpreted to mean an occupation that resembles in every relevant respect the occupation for which the underlying employment-based immigrant visa petition was approved. The term "similar" occupational classification means an occupation that shares essential qualities or has a marked resemblance or likeness with the occupation for which the underlying employment-based visa petition was approved.

2. H-1B Portability under INA 214(n). The final rule codifies DHS policy and practice regarding requests to port H-1B status under INA section 214(n), as follows:

a) **Must be in valid H-1B status or have H-1B extension pending**. The rule clarifies that an H-1B worker must be maintaining valid H-1B status or is in a period of authorized stay based on a timely filed H-1B extension petition. H-1B portability does not apply to a nonimmigrant who is in a valid status other than H-1B.

b) **H-1B Employment authorization remains until adjudication.** DHS clarified in comments to the final rule that the so-called "240-day rule" at 8 CFR 274a.12(b)(20), which applies to timely filed H-1B extensions with the same employer, is not relevant in H-1B portability situations.

c) **"Bridge petitions" are allowed.** The final rule allows H-1B employers to file successive H-1B portability petitions on behalf of an H-1B worker. An H-1B worker who has changed employment based on H-1B portability may again change employers based on the filing of a new H-1B portability petition even if the former H-1B portability petition remains pending. However, if the former H-1B portability petition is ultimately denied and the individual's I-94 card expired before the subsequent H-1B portability petition was filed, the request for an extension of stay in any successive H-1B portability petition(s) will be denied.

d) **International travel**. The rule clarifies that the beneficiary of an unadjudicated H-1B portability petition may travel internationally if they meet certain requirements.

3. AC21 H-1B Extensions. The new regulations clarify that an H-1B worker qualifies for the one-year extension under section 106(a) of AC21 if 365 days have passed since the filing of the permanent labor certification or Form I-140 petition even if the permanent labor certification or Form I-140

labor certification or Form I-140 petition even if the permanent labor certification or Form I-140 petition was not filed 365 days or more prior to the end of the 6-year limitation. The rule also clarifies that the foreign worker applying for an AC21 extension need not be in H-1B status to be eligible as long as they previously held H-1B status. The new rule also requires that the beneficiary of an approved I-140 petition seeking a 3-year AC21 extension must have applied for adjustment of status or an immigrant visa within one year of an immigrant visa becoming available.

4. H-1B Cap-Exempt Organizations. The final rule codifies DHS policy interpretations on determining which employers are exempt from the numerical H-1B cap. The rule clarifies that a nonprofit entity only needs to meet one of the criteria in 8 CFR 214.2(h)(8)(ii)(F)(2) and 8 CFR 214.2(h)(19)(iii)(B) to show that it is "related to or affiliated with" an institution of higher education.

5. H-1B Licensure Requirement. The rule expands the evidence USCIS will examine in cases where a state allows an individual without licensure to fully practice the occupation under the supervision of licensed senior or supervisory personnel.

6. H-1B Whistleblower Protections. The proposed rule grants additional protections to H-1B and other workers from retaliation by an employer for cooperating in an investigation of the employer's violations of its Labor Condition Application attestations.

7. Recapture of time outside of the United States. The final rule clarifies current agency practice that, for purposes of determining the maximum validity period of H-1B status, an H-1B petitioner may "recapture" on behalf of the H-1B nonimmigrant worker any time the worker spent physically outside the United States for a period that exceeds 24 hours. The final rule clarified that there is no time limitation on recapturing the remainder of the initial 6-year period of H-1B admission under INA 214(g)(4), the also clarified that any time granted pursuant to an AC21 extension cannot be recaptured.

Improving Foreign Worker Stability and Job Flexibility:

1. Revocation of Approved I-140 Immigrant Petition. The final rule provides that an approved I-140 immigrant petition is not automatically revoked solely by the petitioning employer's withdrawal of the petition or termination of the employer's business if it has been at least 180 days since: (1) the I-140 has been approved; or (2) an associated I-485 application was filed. These approved I-140 petitions will continue to be valid for the following purposes: (1) priority date retention; (2) AOS portability; (3) post six-year H-1B extensions; and (4) eligibility for an EAD card if "compelling circumstances" can be shown under new 8 C.F.R. 245.25(a)(2). The automatic revocation would still apply to circumstances where the U.S. Citizenship and Immigration Services (USCIS) revokes the I-140 approval because of fraud, willful misrepresentation of a material fact, invalidation/revocation of a labor certification, or material error.

2. Clarification of priority date for I-140 Immigrant Petitions not supported by a Labor Certification. The rule clarifies that the priority date of a Form I-140 petition that does not require a labor certification is the date such petition is properly filed with USCIS.

3. 60-day grace period after termination of employment. Under the final rule, workers in E-1, E-2, E-3, H-1B, H-1B, L-1, O-1 or TN status are granted a 60-day grace period where employment ends due to voluntary or involuntary termination or layoff. Foreign workers are not authorized to work during the grace period. A separate 60-day grace period applies to each authorized validity period.

4. Extending the discretionary 10-day grace period. The final rule applies the 10-day discretionary grace period granted to H-1B workers to individuals holding E-1, E-2, E-3, L-1, or TN status. No work authorization is allowed during the grace period.

5. New one-year Employment Authorization Document (EAD card) for those with I-140 approvals but backlogged priority dates and a showing of "compelling circumstances." The final rule creates a new one-year EAD for individuals in E-3, H-1B, H-1B1, L-1 or O-1 status (including any applicable grace period) with an approved I-140 but no available visa number if *compelling circumstances* can be shown. Adjudicators will make a determination of whether compelling circumstances exist on a case-by-case basis with the understanding that workers should not be penalized by situations beyond their control. The final rule provided a non-exhaustive list of examples that what would be considered compelling: 1. serious sickness or disabilities; 2. employer retaliation; and 3. major disruption to an employer or other substantial harm to the applicant. The one-year EAD card can be renewed only if the individual can show that he or she continues to be the principal beneficiary of an approved EB-1, EB-2 or EB-3 immigrant visa petition and either: (1) the worker continues to face compelling circumstances; or (2) the worker has a priority date that is less than one year from the current cut-off date for the relevant employment-based category and country of nationality in the most recent Visa Bulletin. Dependents are also eligible for an EAD card.

<u>Certain applications for employment authorization documents (EAD cards):</u>

1. Elimination of 90-day EAD card processing time requirement. The final rule eliminates the requirement that an EAD application must be adjudicated within 90 days.

2. Automatic 180-day extension of certain expired EAD work authorization. The final rule provides for a new 180-day automatic extension of an expired EAD card if the extension was timely filed. This includes individuals with pending adjustment of status applications, but excludes nonimmigrants seeking renewals of EADs based on H-4 and L-2 status as those categories are dependent on the prior adjudication of underlying benefit requests for the principal worker.

3. Earlier filing for EAD renewals. DHS comments to the final rule state that DHS will be adopt a filing policy that permits the filing of a renewal EAD application as early as 180 days in advance of the expiration of the applicant's current EAD.

These regulatory changes will not take effect until January 17, 2017. Please contact your Fisher Phillips legal professional should you have any questions.