Department of Homeland Security Issues Proposed Regulations Regarding Retention and Portability of High-Skilled Workers

Insights
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On December 31, 2015, the Department of Homeland Security ("DHS") issued proposed regulations to address the retention and portability of high-skilled foreign workers. The new regulations were promulgated in furtherance of the Obama Administration's goal to modernize and streamline the U.S. immigrant visa system. The proposed regulations are subject to a 60-day comment period ending on February 29, 2016.

The proposed regulations 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 currently exist as agency guidance memorandums and nonbinding agency communications.

The proposed changes are 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). The highlights of the regulatory changes are summarized as follows:

Clarifications to AC21 and ACWIA

1. 1. **Three-Year H-1B Extensions for Workers with I-140 Approvals.** The proposed regulations require that the beneficiary of an approved I-140 petition seeking a three-year AC21 extension must apply for adjustment of status or an immigrant visa within one year of an immigrant visa becoming available.
   2. **AOS Portability clarifications.** The regulatory changes confirm that an immigrant visa petition for EB-1 (but not "extraordinary ability"), EB-2, or EB-3 remains valid if the petition is approved and the beneficiary has a new offer of employment in the same or a similar occupational classification as the employment offer listed in the approved petition, the application for adjustment of status based on this petition has been pending for 180 days or more, and the approval of the petition has not been revoked. A new offer of employment may be from the petitioning employer, from a different U.S. employer, or based on self-employment. The proposed regulation does NOT expand portability to those foreign nationals

who are the beneficiary of an approved I-140 immigrant visa petition but who do not have an I-485 application for adjustment of status that has been pending for more than 180 days.

3. **New AOS Portability supplement.** A new supplementary form to the application for adjustment of status (Form I-485) will assist the Department in adjudicating "same or similar." There is no fee attached to the supplement but DHS may consider a fee in the future.
4. **Same or similar occupational classification.** The proposed regulation codifies the following language regarding the current DHS interpretation of "same or similar":
5. The term "same occupational classification" means 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.
6. **H-1B Cap Exempt Organizations.** The rule changes include "additional means by which nonprofit entities may establish a sufficient relation or affiliation with an institution of higher education" in order to qualify for an exemption from the annual H-1B quota.
7. **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.
8. **Recapture of time outside of the United States.** The proposed rule also clarifies, among other things, 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.

Improving Foreign Worker Stability and Job Flexibility:

1. 1. **Revocation of Approved I-140 Immigrant Petition.** The proposed regulations provide that an I-140 immigrant petition approved for at least 180 days is not automatically revoked by the employer's withdrawal of the petition or termination of the employer's business. The employer's withdrawal will not impact the foreign worker's continued eligibility for H-1B extensions of status nor will it impact the foreign worker's ability to retain the established priority date. The automatic revocation would still apply to circumstances where the U.S. Citizenship and Immigration Services revokes the approval because of fraud or a finding that it was approved in error.
2. **New one-time 60-day grace period after termination of employment.** Under the new rule, Foreign workers in E-1, E-2, E-3, H-1B, L-1, or TN status are granted a one-time 60-day grace period where employment ends due to voluntary or involuntary termination or lay off. Foreign workers are not authorized to work during the grace period.
3. **Extending the discretionary 10-day grace period.** The proposed regulations allow the 10-day 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.

4. **New one-year Employment Authorization Document (EAD card)**. The rule creates a new one-year EAD for individuals in E-3, H-1B, H-1B1, L-1 or O-1 status with an approved I-140 but no available visa number if *compelling circumstances* can be shown. No definition of "compelling circumstances" is included, but DHS did list "serious sickness or disabilities, employer retaliation, major disruption to an employer or other substantial harm to the applicant" as possible examples. 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.

Certain applications for employment authorization documents (EAD cards):

1. **Eliminating the 90-day EAD card processing time requirement** but providing 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 status.

DHS will continue to accept comments to their proposed regulatory changes until February 29, 2016. Any regulatory changes will not take effect until the date indicated in the Final Rule. Therefore, it is uncertain as to the specifics of any regulatory changes until the Final Rule is published in the Federal Register.

Fisher Phillips will continue to monitor and report on the developments as they occur regarding these proposed regulatory changes. Please contact your Fisher Phillips legal professional should you have any questions.