H-4 WORK AUTHORIZATION
WHAT TO EXPECT

New Department of Homeland Security regulations affect H-1B spouses, companies

By Delisa Bressler and Stephanie Paver

For many years H-4 nonimmigrant spouses have subordinated their career objectives to those of their H-1B spouses while their families move through the lengthy U.S. lawful permanent residency process. While certainly a sacrifice, it isn't always a willing one. The problem has been the lack of work authorization.

BACKGROUND

It has been a long-standing rule that the spouses of H-1B visa holders are not eligible to apply for work authorization. Although H-4 spouses may apply for employment authorization once the H-1B visa holder reaches the third and final stage in the permanent residency process, backlogs in immigrant visa availability under the annual immigrant quota system often mean long wait times to reach this third stage. The wait times are especially long for Indian and Chinese applicants, whose spouses must wait several years to apply for work authorization. While Congress extended work authorization benefits to spouses of L-1 and E visa holders in 2002, it made no accommodation for the spouses of H-1B visa holders.

Accordingly, the U.S. Department of Homeland Security (DHS) has sought to remedy the burden and hardship on H-1B families by extending work authorization to the H-4 spouses of certain H-1B visa holders. On February 25, DHS published a long-anticipated regulation allowing certain H-4 spouses to apply for work authorization beginning on May 26.[1]

ELIGIBILITY

Benefits do not extend to H-4 children, or even to all H-4 spouses. Under the new regulation, H-4 nonimmigrants may apply for work authorization only if their H-1B spouses have reached certain milestones in the permanent residency process. Triggering milestones are roughly aligned with those that allow for H-1B extensions beyond the normal sixth year of H-1B eligibility under the American Competitiveness in the Twenty-first Century Act (AC-21). Specifically, the new regulation benefits spouses of H-1B nonimmigrants who either:

a. are the principal beneficiary of an approved I-140 Immigrant Visa Petition, or
b. have been granted an extension of H-1B visa status beyond the normal six-year limitation on H-1B eligibility based on certain provisions of AC-21.

Based on these limitations on eligibility, it is clear that the regulatory intent is to benefit those H-4 spouses of H-1B visa holders who are burdened by the long backlogs in immigrant visa availability and, therefore, experience long wait times to file their I-485 Applications to Adjust Status to Permanent Resident ("green card") applications.

RATIONALE

The new regulation has been widely received as a welcome change by the immigration community, and it has been long-awaited by H-1B nonimmigrants and their spouses. Although the final rule was released amid discussion of recent immigration-related executive actions, DHS initially proposed the new rule on May 12, 2014, months before President Barack Obama announced his immigration executive actions on November 20, 2014. Among its reasons for proposing the new rule, DHS cited a desire to ease the economic burden to H-1B principals and H-4 dependent spouses during the transition from temporary visa status to lawful permanent residency.

In comments to the regulation, DHS has suggested that the new rule will benefit the U.S. economy through retention of high-skilled workers. DHS underscored the goal of attracting and retaining such high-skilled foreign workers and noted that the change will place the U.S. on a level playing field with other countries with which the U.S. must compete for these workers. Finally, DHS referenced positive support from the immigrant community, indicating that, while the restriction against H-4 employment was known to H-1B principals prior to coming to the U.S., few anticipated the length of time it would take to secure permanent residency, nor were they prepared for the emotional or psychological toll the process takes on their families.

COMMENTS

Among the nearly 13,000 public comments DHS received during the required notice and comment period following publication of the proposed rule, DHS indicated most comments supported the rule. Some commentators even mentioned additional benefits such as promoting family unity, furthering women's rights, and promoting the financial independence of H-4 spouses. Other comments noted the rule's significance as a reflection of U.S. core values and fundamental rights to work. Still others cited

additional economic rationales such as the creation of more disposable income, additional tax revenues, and potentially improved homesales.

According to DHS, only about 10 percent of the comments were negative. Most negative comments cited concerns about potential displacement of U.S. workers and potential adverse impacts on the wages and working conditions of U.S. and other workers.

UNANSWERED QUESTIONS

Important questions about implementation of the rule remain unanswered. U.S. Citizenship and Immigration Services (USCIS) indicated in a February 26 call with various stakeholders that the agency intended to iron out these details prior to the implementation of the rule on May 26.

Among the questions that remain unanswered at the time of this writing is whether spouses of H-1B principals with time remaining on their initial six years of H-1B eligibility will be entitled to employment authorization before the principals have entered into the post-six-year period of H-1B status. USCIS has not yet indicated whether it will require that the H-1B principal have first exhausted his or her full six-year eligibility before the H-4 spouse will become eligible to apply for work authorization, nor whether an H-4 dependent spouse will remain eligible for employment if an H-1B principal's approved I-140 petition is later withdrawn or revoked.

PROCEDURES

As of this writing, USCIS has not published the procedures for acceptance and adjudication of applications for H-4 employment authorization. USCIS indicated details such as the application mailing address would be published closer to the May 26 effective date. USCIS also indicated that the agency has developed a new Application for Employment Authorization, which was also to be published closer to May 26.

TIME FRAMES

H-4 spouses who are planning to enter the U.S. workforce should take into account practical considerations when planning for the first day of work. One important consideration is the time frame for issuance of an Employment Authorization Document (EAD). Spouses of H-1B principals will be eligible to begin work only after the EAD card has been received "in hand" by the H-4 spouse. USCIS has indicated that the time frame for adjudicating EAD applications will be 90 days. For EAD applications concurrently filed with a petition and application to extend H-1B and H-4 status beyond the normal six-year H-1B limitation based on the provisions of AC-21, USCIS has confirmed that the 90-day clock will not start until USCIS has approved the underlying qualification for H-1B and H-4 dependent status. USCIS has also confirmed that the validity period of the EAD card, once issued, should match the length of the H-4 spouse's period of authorized stay, which typically may be up to three years.

LIMITATIONS

In a call with stakeholders on February 26, USCIS has also confirmed that an EAD card, once issued, will not confer independent travel authorization. Therefore, H-4 spouses will continue to require a valid H-4 visa stamp in order to re-enter the U.S. after international travel. USCIS has further confirmed that it will not offer premium processing service for H-4 EAD applications, nor will it adopt any provisions to allow for an automatic extension of work authorization for a period of time following the expiration of an H-4 spouse's EAD.

Instead, USCIS reiterates the need to verify an H-4 spouse's continued eligibility for an EAD, including the underlying status of both the H-1B and H-4 visa holders. Accordingly, applications for H-4 status extensions and EAD renewals should be filed in a timely manner. USCIS has acknowledged that the agency will accept EAD applications up to six months in advance when filed concurrently with a petition and application to extend H-1B and H-4 status. USCIS will traditionally accept nonconcurrently filed EAD applications up to four months in advance of expiration.

WHAT TO EXPECT

With the onset of this new filing opportunity, employers can anticipate additional requests from their current H-1B employees, which may include requests for copies of immigration documents that traditionally have been held by the company and perhaps not previously shared with the employees. Employers may expect employees to ask for copies of I-140 Approval Notices and/or copies

of the Form ETA-9089 Application for Permanent Employment Certification. Employees may even request that employers begin the permanent residency process earlier so that their dependent spouses will be able to take advantage of H-4 employment authorization sooner. Employers also should expect employees to request "premium processing" (15-day adjudication) of the I-140 Immigrant Visa Petition or AC-21 H-1B Extension Petition so their spouses can document eligibility for H-4 work authorization as quickly as possible.

In considering these requests, employers will want to give due weight to the implications of their responses. Employers should establish corporate immigration policies that take into account employee mobility, morale, and equal treatment to similarly situated employees. For instance, companies may want to consider implementing uniform policies concerning whether and when they will provide certain documentation to employees. After all, with the advent of the new H-4 work authorization rule, document requests may be related to the opportunity for H-4 dependent spouses to seek employment authorization rather than the H-1B worker's desire to seek other H-1B employment.

In response to requests to begin the permanent residency process earlier than normal under existing policy, companies may want to consider revisiting corporate immigration policy regarding when they will begin the permanent residency process, bearing in mind that some employees may be subject to longer-than-normal backlogs in the green card process.

Finally, companies may want to determine in advance whether they will agree to pay the $1,225 government filing fee associated with premium processing of the I-140 Immigrant Visa Petition or H-1B AC-21 Extension Petition. If an employer agrees to pay the fee, it should establish guidelines for when the company will pay it. Otherwise, employers may wish to consider a uniform policy that permits employees to pay the premium-processing fee. Generally, employers should establish rules that can be implemented easily and consistently based on objective criteria. Inconsistent treatment of employees who are similarly situated may invite complaints of unequal treatment.

Premium processing of the I-140 petition can serve as a great benefit to H-1B employees who are seeking to gain work authorization for H-4 dependent spouses. On the other hand, the more rapid adjudication of the I-140 petition can facilitate additional extensions of H-1B status, which would not be limited to the original petitioning employer. Additionally, expedited approval of the I-140 petition provides the employee with a "locked-in" or "vested" priority date, which serves to preserve his or her place in line in the permanent residency process. The practical impact is to reduce the risk and burden on the H-1B employee changing H-1B employers. These are factors employers may wish to consider, but they should be weighed against the adverse impact on morale and employee retention should the employer adopt a policy of not allowing premium processing or not providing documents concerning the Program Electronic Management Review System (PERM) and I-140 process. Few employers would welcome a reputation of effectively denying valuable benefits to H-1B workers and their families.

POLICY REVIEW

USCIS indicates that as many as 179,600 H-4 dependent spouses may benefit from this new rule during the first year of its implementation, with as many as 55,000 H-4 spouses becoming eligible in subsequent years. Given the numbers involved, human resources and mobility managers are likely to encounter at least some of the issues raised by the new H-4 work authorization rule.

Because the new rule has policy implications for an employer's H-1B workforce, employers should take this opportunity to review existing immigration and permanent residency policies. Old policies should be updated as needed to accommodate changes in immigration-related benefits. Periodic policy review can help ensure the employer has adopted reasonable policies that take into account the needs of both the organization and its workforce. *M*

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1. Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10283 (proposed Feb. 25, 2015) (to be codified at 8 C.F.R. pt. 214 & 274).