Connecticut Law Tribune
JUNE 2, 2014
VOL. 40 • NO. 22
An ALM Publication
CTLAWTRIBUNE.COM

Immigration Waiting Games

Government proposes employment authorization for spouses of H-1B workers

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On May 12, the U.S. Citizenship and Immigration Services proposed a rule to amend current regulations so that certain spouses of temporary H-1B specialty occupation workers may work in the U.S. USCIS does not now extend work authorization to H-4 spouses of H-1B workers. The purpose of the rule is to entice foreign professionals to remain in the U.S. pending lengthy waits to obtain green cards. A brief review of the H-1B temporary worker program and the green card process will provide useful background to understand the significance and potential controversy surrounding this proposed rule.

The H-1B Program for Professional Foreign Workers

The H-1B program permits employers to hire foreign professional workers for jobs that require at least a bachelor's degree in a field related to the beneficiary employee's course of study. The employer does not need to prove that a qualified U.S. worker is not available, unless the employer has employed large numbers of H-1B workers or has been a willful violator of program requirements. Employers must attest that they will pay the H-1B employee at least the prevailing wage for the occupation in the area of intended employment and that employing the H-1B worker will not adversely affect working conditions of U.S. workers.

The law sets a numerical limitation of 65,000 H-1B visas annually, plus 20,000 additional annual numbers for beneficiaries who have earned an advanced degree in the U.S. Institutions of higher education, related or affiliated nonprofit entities, as well as nonprofit research and government research organizations are exempt from this cap.


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Demand has never been greater. USCIS received about 172,500 H-1B petitions during the filing period that began April 1 for the 85,000 visas available in fiscal year 2015, which starts Oct. 1.

The Immigration and Nationality Act permits H-1B workers to have the intent to remain in the U.S. not only temporarily but also permanently. This "dual intent" doctrine makes it possible for H-1B workers to seek status as lawful permanent residents while properly maintaining temporary H-1B status.

The Green Card Process

Lawful permanent resident status is highly desirable because it allows foreign workers to remain and work in the U.S. indefinitely. In order to become a lawful permanent resident based on employment, two to three steps are required, depending on the qualifications of the employee. Labor certification, which is the first step, is not necessary for persons of extraordinary ability, multinational managers or foreign workers performing work in the national interest. If labor certification is required, then the employer must first demonstrate to the U.S. Department of Labor through prescribed recruitment efforts that it could not find a qualified U.S. worker. In this first step, the employer files an Application for Permanent Employment Certification (PERM application) with the DOL.

The next step requires that an immigrant petition be filed with USCIS. In the final step, the employee may process his or her application to adjust status to lawful permanent resident with the USCIS or file an immigrant visa application at a U.S. Consulate abroad. The final step may not be commenced or completed unless an immigrant visa number is available.

Oversubscription of Employment-Based Immigrant Visa Numbers

The INA provides for 140,000 employment-based immigrant visa numbers each fiscal year. Dependent spouses and children count against this numerical limitation. No one country can claim more than 7 percent of this total number.

The date on which an employer files a PERM labor certification application with the DOL or, if not required, an immigrant petition with USCIS establishes the foreign employee's place in line or "priority date." The U.S. Department of State publishes a monthly visa bulletin that sets cutoff dates. The priority date must be earlier than the cutoff date in order for the foreign worker to start or complete the final step of the green card process. Depending on the nature of the job offer and country of birth, foreign workers currently endure waits of up to 10 years or more to complete the final step.

H-1B Six-Year Limitation of Stay and Exceptions

USCIS grants H-1B status initially for a three-year period, and then employers may

petition for an additional three-year period. H-1B workers are subject to an overall six-year limitation of stay.

On Oct. 17, 2000, Congress promulgated the American Competitiveness in the 21st Century Act of 2000, later amended by the 21st Century Department of Justice Appropriations Authorization Act (collectively, AC21), which established a method for H-1B workers to remain in the U.S. to complete the green card process. AC21 sets forth two methods for H-1B workers to establish eligibility for an extension of stay beyond the six-year limit. First, the law permits employers to file a petition to extend the stay of an H-1B worker in one-year increments beyond the six-year limit, where a PERM application or immigrant petition has been pending for at least 365 days. Second, the law permits employers to file such H-1B petitions to request extensions in three-year increments beyond the six-year limit, where the employee is the beneficiary of an approved I-140 immigrant petition and was born in a country that is subject to per-country immigrant visa limitations (such as China, India, Mexico and the Philippines).

Eligibility Requirements for H-4 Work Authorization

The proposed regulation would allow spouses of H-1B workers to submit applications for employment authorization to USCIS if they can prove that the H-1B spouse has received an extension of stay pursuant to AC21 or is the beneficiary of an approved immigrant petition. The fee to apply would be $380. USCIS plans to issue the employment authorization documents (EADs) valid for two-year periods. The H-4 spouse must first receive the EAD in order to work.

Policy Considerations

Unlike their H-1B spouses, who must work in positions that require a bachelor's degree in a field related to their job duties, H-4 nonimmigrants who obtain EADs will have "open market" work authorization. They can work in any position, whether full time or part time.

The new rule brings parity to some H-4 spouses, who for years have seen that their counterpart spouses of L-1 intracompany transferees and E-1/E-2 treaty traders/investors have received authorization to work. The new rule will certainly raise the question as to why spouses of foreign workers in other nonimmigrant classifications are not eligible to work in the U.S. Indeed, the bigger question is why USCIS saw fit to designate merely a subset of H-1B spouses for work authorization, estimated to number roughly 100,000, instead of extending the benefit to all spouses of H-1B workers.

Assuming that USCIS issues a final rule along the lines of the proposal, it seems logical, if not likely, that foreign professionals will perceive a greater incentive not only to remain in the U.S. while awaiting the green card, but also to make that initial decision to come to the U.S. in the first place. To the limited extent that H-4 spouses may also have sought H-1B classification, however, the proposal could possibly reduce demand for H-1B numbers.

Finally, the proposed rule could be viewed as another sign of the current administration's frustration with Congress' inaction on immigration reform. This proposal only highlights the need to reform the H-1B cap, as well as the limitation on employment-based immigrant visa numbers. The executive branch will likely continue to search for ways to bring about whatever measure of reform through regulation as possible within the confines of current law. Meanwhile, the immigration waiting games will continue. ■

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