Seismic Business Immigration Policy Shift in the Works for 2018

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New changes to H-1B Lottery; H-4 EADs on the chopping block; AC 21 H-1B extensions in trouble; and how to plan for it all

Changes to the H-1B Program and the H-1B Visa Lottery

The Department of Homeland Security (DHS) plans to revise the lottery process for the upcoming fiscal year. The announcement may come as early as next month. It proposes a pre-registration system for cap-subject H-1B visa applicants. DHS appears to be looking to revive a 2011 proposal where employers would submit certain specified information about desired H-1B beneficiaries to USCIS through an online registration system and USCIS would then run the lottery against those submissions and, if that registration is selected in the lottery, only then would the complete H-1B petition be submitted to USCIS for processing.

The agency indicated it may also modify the selection process, currently completed through a random electronic lottery, so that visas would be awarded to the "most-skilled or highest-paid petition beneficiaries," as was contemplated in Trump's "Buy American Hire American" executive order in April 2017 (click here for our summary). To date, there are very few details available about how the new selection process will work and what criteria will be used to evaluate the H-1B petition during the pre-registration process. There is speculation that this may mean that during the H-1B Lottery selection process, priority may be given to those with highest salaries, which is essentially a move intended to prevent US employers from hiring foreign professional for level 1 wages.

The Administration has also already started to informally implement significant changes the way that it applies some of the substantive rules for the H-1B program. For example, USCIS has doubled the amount of RFEs (requests for further evidence) notices issued on H-1B petitions, and the denial rate on H-1B petitions has also increased by the same measure. The requests and denials by USCIS seem to focus on (1) whether the H-1B position truly requires a bachelor's degree in a specific field, and (2) whether a position using a Level 1 prevailing wage under the Department of Labor's (DOL) prevailing wage guidance truly qualifies as a "specialty occupation." USCIS's adjudicative actions seem to be instructive and consistent with the notion that the new lottery process would favor that a greater number of H-1B visas be awarded to the "most-skilled or highest-paid" foreign nationals.

In addition, DHS reportedly plans to propose a rule later this year that would revise the definition of specialty occupation to increase focus on truly obtaining the "best and brightest" foreign nationals under the H-1B program. It is reported that USCIS intends to revise the definition of employment and employer-employee relationship to help better protect US workers and wages. The target effective date of this change is October 2018.

Termination of H-4 EADs

DHS is also preparing to issue a new proposed regulation in February 2018 to rescind the provisions on H-4 spousal work authorization. DHS stated this in a motion they filed with the US Court of Appeals for the District of Columbia Circuit last week. The court was hearing an appeal in the case of *Save Jobs USA v. DHS*, a lawsuit brought by a group of US technology workers challenging the H-4 EAD rule. The lawsuit was dismissed, but the plaintiffs are seeking an appeal. DHS asked the court to place the appeal on hold for another six months (this is DHS's fourth extension request) while it considers its position on the regulation. The court will need to decide whether to proceed and hear the merits of the case or hold the litigation in abeyance as requested.

Regardless of what the court decides to do in the litigation, it appears that DHS will move forward with publishing new regulations as planned next month. If they rescind the H-4 EAD as reported, then it will likely go into effect this summer. What we do not know is whether DHS will allow current EADs to remain valid through their expiration, whether there will be a grace period during at which time

H-4 EAD holders can renew their EADs as they phase out this program, or if H-4 EADs will be invalid the date the final rule is published.

Policy Shift on AC 21 H-1B Extension

The Administration also seems to be considering a new policy to prevent H-1B visa extensions under the American Competitiveness in the 21st Century Act (AC21) of 2002. Under AC21 Act, H-1B visa holders were allowed to extend their status beyond the normal 6 year limit if their Form I-140 Immigrant Petition was approved, but were unable to adjust status to permanent residency due to per country limits. It appears that DHS is specifically looking at whether it can reinterpret the "may grant" language in AC21 to limit extension grants. DHS has made no formal announcement regarding this policy change. In fact, because the existing rules were established by statute, it would likely require Congressional action to make this change.

Conclusion

It appears that we will continue to see, through some combination of rulemaking, policy memoranda, and operational changes in line with the President's executive orders, continuing restrictions in the use of skilled foreign labor. As we continue to monitor these developments, employers need to consider the need to affirmatively act to make the needs of US employers heard in this area to try to prevent unreasonable restrictions on the use of skilled foreign labor.

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