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Blog Post

Employers Relying On H-4 Dependent Spouse Visas Better Move Fast as April 1 Lottery Looms

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Proposed changes to the rule authorizing employment for H-4 status holders could spell an increase in H-1B petitions this upcoming fiscal year, and ultimately, increased sponsorship costs for employers. Consequently, employers with workers who presented an H-4 EAD card as their I-9 employment eligibility documentation are strongly advised to consider sponsoring such workers who qualify for H-1B status in the upcoming fiscal year quota. Employers can submit H-1B petitions on behalf of eligible workers in H-4 status during the first week of April for entry in the FY2019 lottery selection process. Employers must be prepared to submit their paperwork to USCIS during the first five business days of April, which takes place this year from Monday, April 2 to Friday, April 6, 2018. Employers wanting more information on H-1B eligibility requirements and the FY2019 lottery season can click here for further details.

The Department of Homeland Security first announced its intention to propose a new rule entitled "Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization" last December, prompted by the Buy American, Hire American Executive Order by the Trump Administration. Originally, DHS intended to publish the new rule in February 2018, however DHS now anticipates submitting the draft rule to the

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Office of Management and Budget for review and clearance in time for June 2018.

Under current immigration policy, certain spouses of H-1B temporary workers who maintain H-4 nonimmigrant status are eligible to apply for an employment authorization document (also known as the "EAD" card). Eligibility under the existing H-4 work permit rule requires the principal H-1B worker to either (a) be the beneficiary of an approved U.S. employment-based permanent residency ("green card") petition, or (b) have received an extension of H-1B status beyond the regulatory six-year limit due to backlogged yearly quotas and per-country limits that ultimately delay the adjustment process to lawful permanent residence. The EAD card allows qualified H-4 spouses to seek unrestricted employment with any U.S. employer.

DHS originally introduced the final rule extending employment authorization to certain H-4 spouses under the Obama administration through publication in the Federal Register on February 25, 2015. The rule, which became effective May 26, 2015, was intended to reduce personal and economic burdens faced by H-1B nonimmigrants and their family members during the lengthy transition process from nonimmigrant to permanent resident status—a process that can take years, and in some cases, decades to complete.

At that time, the Department envisioned the extension of work authorization to certain H-4 nonimmigrants would better support the goals of attracting and retaining highly skilled foreign workers in the U.S., while alleviating barriers for talented non-U.S. workers to pursue permanent residence, which, in turn, created disruption among U.S. businesses. As stated by DHS in 2015, the H-4 rule would "bring U.S. immigration policies concerning this class of highly skilled workers more in line with those of other countries that are also competing to attract and retain similar highly skilled workers."

Fast forward three years later, and the Department's positon on immigration policy and H-4 work authorization has shifted dramatically. In fact, on February 22, 2018, the United States Citizenship and Immigration Services (USCIS)—the branch of DHS that administers the H-4 visa program—changed its official mission statement by dropping language to describe America "as a nation of immigrants." The Federal Agency responsible for granting visa petitions, citizenship and other permits that allow foreign nationals to visit, live and work in the United States, now describes itself as an organization that "administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values." The previous mission statement, according to the Agency's new director, L. Francis Cissna, fostered the erroneous belief that visa applicants and petitioners, rather than the American people, are whom USCIS ultimately serves.

Consistent with the Agency's new mission, USCIS reevaluated the H-4 program and the Department's draft proposal to rescind H-4 work authorization in January 2018. As a result, USCIS determined that significant revisions to the draft proposal were necessary, including a new economic analysis that would take several weeks to perform. As such, changes to the draft rule and the revised economic analysis forced DHS to postpone its anticipated publication of the new rule rescinding H-4 work authorization until June.

Employers are cautioned that rescission of the H-4 EAD rule will have far-reaching consequences. According to data compiled by USCIS, more than 104,000 H-4 spouses have received employment authorization under the current rule. Until DHS submits its formal Notice of Proposed Rulemaking to the Office of Management and Budget, the specifics on how the government intends to implement its revised regulations remain unknown.

Until then, employers with H-4 workers on staff can be proactive by preparing and filing applications for renewed employment authorization with USCIS as early as possible. Applications to extend employment authorization under the current H-4 rule can be submitted to USCIS as early as 180 days prior to the EAD expiration date.