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New immigration regulations for highly skilled workers take effect

By Eli M. Kantor

There has been much speculation about changes to immigration regulation under the Trump administration. He made immigration one of his signature issues during the campaign. What remains to be seen is whether Trump will carry out his campaign promises to “build a wall,” deport undocumented workers and restrict legal immigration.

What we do know is that in the waning days of the Obama administration, U.S. Citizenship and Immigration Services issued major new regulations for highly skilled workers. These regulations went into effect on Jan. 17. The new rules clarify some longstanding agency practices and create several procedural improvements for highly skilled immigrants, nonimmigrant workers and their employers.

The new regulations are designed to help U.S. employers hire and retain high skilled foreign workers who are waiting to become lawful permanent residents, even as wait times for employment based green cards become longer. They are intended to provide foreign workers greater job flexibility to accept lateral positions, promotions or accommodate other job changes while they are stuck in extremely long green card backlogs.

Among the most significant changes are: new 60-day grace periods for certain nonimmigrant’s following cessation of employment; automatic 180 day extensions of work eligibility for certain nonimmigrant’s who timely file extensions of their employment authorization cards; new procedures for applying the “portability” rule for green card applicants who change jobs or employers; and other positive changes.

Improves job portability. The new

rule will amend 8 CFR Section 245.25 to improve job portability and flexibility for some foreign workers with approved Form I-140 petitions by preserving the petitions validity despite the filing employer’s withdrawal of the petition or the closure of the employer’s business, provided that the alien had a pending application for at least 180 days.

Automatic extensions of certain employment authorization documents. The new rule provides for an automatic 180-day extension of employment authorization for individuals who timely file to renew their Employment Authorization Document (EAD). This eliminates the problem under current law where a foreign national could lose his right to work while waiting for Immigration to process his request for renewal of his EAD.

Temporary work authorization for certain highly skilled individuals while they are waiting for their green cards. The new rule will allow certain highly skilled individuals in the U.S. with E-3, H-1B, H-1B1, L-1 or O-1 status to apply for employment authorization if they have an approved Form I-140 petition, even if their priority date is not yet current, if they can demonstrate compelling circumstances that justify exercise of Immigration discretion to grant employment authorization while their case is pending.

Establishes a grace period of up to 60 days to find new employment. The new law established a grace period of up to 60 days for certain nonimmigrant workers in the E-1, E-2, E-3, H1-B, H-1B1, L-1, O-1 and TN categories to pursue new employment opportunities when their employment ends before the end of their authorized stay. For example, if a highly skilled computer systems analyst come to the U.S. to work for a U.S. employer for a period of three years on an H-1B visa, and after two

years, their employer experiences a downturn in business causing them to be laid off, the foreign worker now has a period of 60 days in which to find a new employer where he could work for the remaining year on his H-1B visa, instead of having to return immediately to India.

The Takeaway

The new rule clarifies and codifies many established Immigration policies and operating procedures. The rule is beneficial since it formalizes through regulation existing internal Immigration operating procedures, providing predictability about their application. It will allow U.S. employers to hire and retain highly skilled foreign workers, while their green card applications are being processed. The question is whether Trump will let them stand or rescind them — only time will tell.

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