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Some H-4 Dependent Spouses Eligible For Work Authorization

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The long-awaited final rule on H-4 work authorization has now been introduced by U.S. Citizenship and Immigration Services. USCIS Director León Rodríguez has announced that the U.S. Department of Homeland Security through this final rule is extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B work visa holders who are seeking employment-based lawful permanent residence. Although many commenters requested that the H-4 work authorization rule be expanded to all H-4 dependent spouses, USCIS decided to keep the language of the proposed rule and not expand the H-4 work authorization rule to all H-4 spouses at this time.

Background

In May 2014, DHS issued a proposed rule to amend current immigration regulations to allow for the employment authorization of certain H-4 dependent spouses. DHS accepted comments on the proposed rule until mid-July. On Nov. 20, 2014, President Obama announced executive action on a variety of immigration issues, including specific direction that the H-4 work authorization rule be finalized to support the overall goal of attracting and retaining highly skilled foreign workers. In the final rule, DHS is amending its regulations at 8 CFR 214 and 274a to allow for and extend employment eligibility to certain H-4 dependent spouses of H-1B workers who are on the path to lawful permanent residence.

In implementing the final rule, DHS expects that this change will help H-1B workers and their families to reduce economic and personal stresses while waiting to become lawful permanent residents. DHS also provides that this change will minimize disruptions to U.S. businesses and to support the overall U.S. economy with the benefits and contributions that are made by H-1B workers in the areas of research, development and entrepreneurship as well as overall economic growth and job creation.

Criteria for H-4 Work Authorization

As outlined in the final rule and press release of USCIS Director Rodríguez, the following individuals will be eligible for H-4 work authorization:

Eligible individuals include certain H-4 dependent spouses of H-1B nonimmigrants who:

- Are the principal beneficiaries of an approved Form I-140, Immigrant Petition for Alien Worker; or

- Have been granted H-1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-First Century Act of 2000 as amended by the 21st Century Department of Justice Appropriations Authorization Act. The act permits H-1B nonimmigrants seeking lawful permanent residence to work and remain in the United States beyond the six-year limit on their H-1B status.

Section 106(a) under the AC21 rule allows for H-1B status to be extended in one-year increments beyond the six-year time limitation as long as a labor certification application, I-140 immigrant visa petition or I-485 adjustment of status application was filed at least 365 days prior to the six-year expiration of H-1B status.

With these categories of H-4 spouses, USCIS estimates that the number of H-4 dependent spouses who could potentially be eligible to file under this rule could be as high as 179,600 in the first year and 55,000 annually in future years. Although many comments submitted in response to the proposed rule requested that DHS expand the eligibility of H-4 work authorization to ALL H-4 spouses, the government declined to make such a sweeping regulatory change at this time. However, DHS indicated that it was not precluded from implementing further changes or expanding the H-4 work authorization rule at a later date.

Applications for H-4 Work Authorization

USCIS will only start accepting applications for H-4 work authorization on May 26, 2015. One reason for the delay in implementation was to allow H-1B cap filings to be completed on or about April 1, 2015, before USCIS started accepting filings of H-4 work authorization applications. Accepting these applications starting on May 26 will allow USCIS to allocate government resources to both the processing and adjudication of the potentially thousands of H-1B cap petitions that will be filed within the first five business days after April 1, along with the potentially thousands of H-4 work authorization applications that will be filed on or after May 26, 2015. USCIS Director Rodríguez specifically noted in the press release on this new rule that individuals should not submit an application before the May 26 effective date.

USCIS has announced the following guidelines to be followed with the filing of these H-4 work authorization applications:

- H-4 dependent spouses must file Form I-765, Application for Employment Authorization, with supporting evidence and the required $380 filing fee in order to obtain employment authorization and receive a Form I-766, Employment Authorization Document (EAD).

- Form I-765 is being revised to reflect changes based on this rule. H-4 dependent spouses will be added to the classes of individuals eligible to file the form, and

the form will include a specific box to check for an eligible H-4 dependent spouse.

- Supporting evidence to include proof of marriage, proof of H-1B and H-4 status, along with both primary and/or secondary evidence regarding the I-140 approval or AC21 eligibility. This evidence will be further outlined in the revised instructions to Form I-765.

- The final rule allows for H-4 dependent spouses to concurrently file an Application for Employment Authorization (Form I-765) with an Application to Extend/Change Nonimmigrant Status (Form I-539).

Upon approval of the application, USCIS will issue the H-4 spouse an EAD. DHS indicates that when issuing the EAD, DHS generally will authorize a validity period that will match up with the H-4 spouse's remaining authorized period admission, which may be as long as three years. According to DHS, "[t]his policy will ensure that USCIS does not grant employment authorization to an H-4 dependent spouse who is not eligible for the benefit. It will also likely reduce the number of times that H-4 dependent spouses may need to request renewal of their employment authorization." See Final Rule.

DHS also explained in the final rule that DHS will allow the H-4 work authorization application to be filed concurrently with Form I-539, Application to Extend/Change Status, and if applicable the spouse's Form I-129 petition to extend H-1B status. These applications will be allowed to be filed up to six months in advance of the requested start date. Keep in mind that the processing of the Form I-765 application for these H-4 work authorization benefits will not be made until a determination has been made on both the underlying H-B and H-4 applications.

Additional DHS Commentary On the New H-4 Work Authorization Rule

In implementing the final rule, DHS indicated that nearly 13,000 public comments were received. The final rule includes over 109 pages of commentary and discussion by DHS on the comments raised by the public both in support and opposition to the H-4 work authorization rule. The following is highlighted:

- DHS confirms that under the final rule, H-4 dependent spouses with pending adjustment of status applications are still eligible for employment authorization on the basis of their H-4 classification. Such individuals can choose to apply for employment authorization based on either the H-4 dependent spouse category established by this rule or as part of an I-485 adjustment of status filing.

- DHS did not expand this rule to AC21 six-year extensions under Section 104(c) as H-4 spouses have the ability to apply for work authorization under the new rule if an I-140 petition has been approved. Since approval of an I-140 petition is

encompassed within the extension under 104(c), these H-4 spouses were already covered by the new rule.

- H-4 work authorization will NOT apply to H-4 dependent spouses in the H-1B1, H-2 and H-3 categories.

- DHS specifically addressed the many comments requesting that H-4 work authorization be expanded to all H-4 spouses and not just the spouses enumerated in the final rule. Many comments indicated that H-4 spouses should be treated similarly to the spouses of L-1, E-1, E-2 and E-3 visa holders. DHS emphasized that a significant difference between work authorization for the H-4 spouse and the spouses of these categories is that Congress specifically enacted legislation allowing for the overall work authorization of the L-1 and E visa spouses. DHS noted that in its review of the AC21 legislation that "[a]lthough Congress has not specifically required extending employment authorization to dependent spouses of H-1B nonimmigrants, Congress did recognize in AC21 the importance of addressing the lengthy delays faced by such workers seeking to obtain LPR status." See Final Rule.

- H-4 work authorization "incident to H-4 status" is not allowed under the final rule. All eligible H-4 spouses must apply for and obtain an Employment Authorization Document before being eligible to work.

- H-4 work authorization only applies to approved I-140 petitions. The rule does NOT apply to H-1B spouses with pending PERM applications or pending Form I-140 petitions.

- Rule only applies to H-4 spouses. H-4 children are not eligible for work authorization under this new rule.

- In the future, USCIS will accept electronic filings of Applications for Employment Authorization by eligible H-4 spouses. USCIS will notify the public when it is ready to accept electronic filings under USCIS ELIS for these types of filings.

- With the concurrent filing allowed under this new rule, the 90-day clock on the processing of the EAD card will start AFTER a determination has been made on the underlying H-1B status, H-4 status or both.

- No premium processing is available for these H-4 work authorization applications.

- DHS will not allow an application for H-4 work authorization to be concurrently filed with an I-140 immigrant visa petition.

Conclusion

With the issuance of this rule, certain H-4 individuals whose spouses are pursuing lawful permanent residence will now have the ability to apply for and obtain work authorization as part of their H-4 status and do not need to wait to file for work authorization only when they have the ability to file an I-485 adjustment of status application. As emphasized by President Obama, this rule will allow H-4 workers to have additional stability as they wait to become lawful permanent residents. This rule will also bring U.S. immigration policies more in line with those of other countries that are competing to attract highly skilled workers.

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