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# WORKING : H-4 SPOUSES GET TO TAKE A STEP FORWARD, BUT IS IT A GIANT ONE?

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**By Gary Endelman and Cyrus Mehta**

Sometimes it takes a while for a sound idea to gain acceptance. Granting employment authorization to H-4 spouses is a good example. In late March 2010, the authors urged In The Tyranny of Priority Dates that this be done, with or without an employment authorization document (EAD). A few months later, then USCIS General Counsel Roxanna Bacon, Service Center Operations Head Donald Neufeld and Field Operations Chief Debra Rogers recommended precisely this same step to USCIS Director Alejandro Mayorkas, but only for those "H-4 dependent spouses of H-1B principals where the principals are also applicants for lawful permanent residence under AC 21." *Memorandum, Administrative Alternatives to Comprehensive Immigration Reform (posted as AILA InfoNet Doc. 10073063 on July 30, 2010).* The memo was leaked by those who wanted to defeat any administrative initiatives and they did so. There matters stood until a few days ago on January 31, 2012 when the Department of Homeland Security brought this idea back to life. The announcement includes other goodies too, but this is what it specifically says about the possibility for an H-4 spouse to work:

- ***Provide work authorization for spouses of certain H-1B holders.***

*This proposed change to the current DHS regulation would allow certain spouses of H-1B visa holders to legally work while their visa holder spouse waits for his or her adjustment of status application to be adjudicated. Specifically, employment will be authorized for H-4 dependent spouses of principal H-1B visa holders who have begun the process of seeking lawful permanent resident status through employment after meeting a minimum period of H-1B status in the U.S. This effort will help retain talented professionals who are valued by U.S. employers and who seek to contribute*

*to our economy.*

Those who dig a bit deeper on the government's regulatory agenda site find a key qualifier that severely limits the benefit granted. Some H-4 spouses it seems are more deserving of the right to work than others: employment authorization is to be extended only to those "H-4 spouses of principal H-1B nonimmigrants who have begun the process of seeking lawful permanent resident status through employment and have extended their authorized period of admission or "stay" in the U.S. under section 104(c) or 106(a) of Public Law 106-313 also known as the American Competitiveness in the 21st Century Act." This means that no H-4 spouse whose H-1B principal has not spent more than 6 years in the USA will be eligible to apply for an EAD. At a minimum, a PERM labor certification or I-140 would have to have been filed, and even approved to qualify for the 3 year H extension under Section 104(c) of AC 21, if less than 365 days had elapsed since submission. After all this, while it seems as if we should celebrate, how loud should the cheering be?

There is no need for the USCIS to adopt such an exceedingly narrow interpretation. After all, if we look at the essentially unlimited authority granted by INA 274A(h)(3)(B), it seems clear that the USCIS can grant employment authorization to anyone at any time for any purpose. As our insightful colleague David Isaacson has cogently pointed out, under these circumstances, an EAD can be issued to someone who is not attached to either a PERM or an approved I-140. Indeed, an H-4 spouse whose H-1B principal is the beneficiary of an approved family-based third preference I-130 benefits not at all since such approval would not sustain a 7th H year under AC 21. Save for National Interest Waivers and Persons of Extraordinary Ability, which do not need a job offer, the right of an H-4 spouse to work is conditioned upon the willingness of the H-1B principal's employer to sponsor his/her mate for LPR status, something over which the H-4 spouse has no control.

There is nothing in the INA that prevents an H-4 spouse from working. This prohibition is purely an act of regulation. That being the case, what prevents the USCIS from taking a more generous view? We would do well to remember that the unavailability of an EAD outside the adjustment of status context forces people into the H-1B category who might not otherwise need or even want to be there. Allowing all H-4 spouses to work would ease the pressure on the H-1B category and, by so doing, serve to diminish opposition to all employment-based immigration. While it is true that the H-1B is subject to an

annual limitation each year, most other nonimmigrant work visas do not have an annual cap. Beyond that, America suffers when the nation forgets that many talented H-1B beneficiaries choose not to stay here because their H-4 spouses are unable to work. *See Matt Richtel , Tech Recruiting Clashes with Immigration Rules, N.Y.Times, Apr.12, 2009.*

Truth be told, there is no need for any H-4 spouse to apply for an EAD. Why not simply include H-4 spouses as part of 8 CFR Section 274a.12(a) so that they could work incident to status? This is a simple yet elegant way to ameliorate the extreme economic hardship that our system needlessly inflicts upon H-4 spouses. In fact , why limit this to H- 4 spouses? There is nothing to prevent the Executive from granting work authorization to teenage children on H-4 visa status.

There is no reason why an H-4 spouse should have to wait for years before being allowed to work. Since both the H and L categories are clothed with dual intent - both visa categories allow the holder to apply for a green card from the very outset - the H-4 spouse should be treated exactly like the L-2 spouse when it comes to applying for an EAD. Indeed, the H-4 spouse may be more deserving of a work permit if the wait for the green card under the employment based second and third preferences can take several years, or even decades, especially if the spouses are born in India or China. In fact, despite a cap on H1B visas compared to unlimited L migration, AC21 makes it possible, and certainly more frequent, for the H4 spouse to remain in the USA far longer than the L-2 counterpart, thus making the need for employment authorization more not less compelling. If the USCIS wants to limit the scope of this benefit, allow it to be conditioned upon the filing of a non-frivolous labor certification, or I-140 if no labor certification is required, regardless of how long the H-1B has been in the United States. This would advance the national interest by enhancing the incentive for H-1Bs to come to the United States and remain here, despite chronic visa backlogs.

Ours is a policy of audacious incrementalism designed to maximize the remedial possibilities within the INA as it now exists while waiting for something better, namely congressional enactment of comprehensive immigration reform. Not only is it fitting and proper for the USCIS to formulate immigration policy on highly minute technical issues of surpassing importance, it is no exaggeration to contend that the Constitution expects this to happen. Indeed, without this, who would do it? Far from crossing the line and infringing

upon the authority of Congress, what we ask the USCIS to do augments Congressional prerogatives by providing a practical way forward. For those who say that we ask too much too soon, we respond with one simple question, the same one that Hillel the Sage asks in *Ethics of the Fathers*: "If not now, when?"

(The views expressed by guest author, Gary Endelman, are his and not of his firm, FosterQuan LLP)