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ANALYSIS OF KEY PROVISIONS OF THE HIGH SKILLED WORKER FINAL RULE

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The Department of Homeland Security issued final regulations on November 17, 2016 entitled "Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High Skilled Nonimmigrant Workers" to provide relief to high skilled workers born mainly in India and China who are caught in the crushing backlogs in the employment-based preferences. While the final rule does not make too many modifications from the proposed rule, I will highlight some of the provisions that can potentially alleviate the problems caused by the long waits. This blog's focus is not to explain every aspect of the proposed rule, and refers readers to Greg Siskind's excellent summary, but will analyze some of the most relevant provisions that affect backlogged immigrants.

The centerpiece of the rule is to provide a basis to apply for an employment authorization document (EAD) to beneficiaries of I-140 petitions in the United States on E-3, H-1B, H-1B1, O-1 or L-1 nonimmigrant status if they can demonstrate compelling circumstances and whose priority dates are not current. While compelling circumstances have not been defined in the rule, DHS has suggested illustrative circumstances in the preamble, which includes serious illness and disabilities, employer dispute or retaliation, other substantial harm and significant disruptions to the employer. Regarding what may constitute significant disruption, DHS has suggested loss of funding for grants that may invalidate a cap-exempt H-1B status or a corporate restructure that may no longer render an L-1 visa status valid.

It appears from the discussion in the preamble that compelling circumstances have to be out of the ordinary. The fact that the process may be taking a long time does not constitute a compelling circumstance. The DHS also stated in the

preamble that mere unemployment would not rise up to the level of compelling circumstances, but more will have to be shown such as that the unemployment was as a result of a serious illness or employer retaliation. However, under the "other substantial harm" discussion, a beneficiary who loses a job based on the closure of a business where the beneficiary has been applying a skill set in high technology for years (such as artificial intelligence) and will not be able to establish that the same industry exists in the home country would be able to demonstrate compelling circumstances. Interestingly, compelling circumstances could also include circumstances relating to a business startup, and that the beneficiary of an approved I-140 petition through the national interest waiver would be able to demonstrate compelling circumstances. Similarly, physicians working in medically underserved areas may also be able to demonstrate compelling circumstances.

Despite the extensive discussion of what may constitute compelling circumstances in the preamble of the rule, the plain language at 8 CFR 204.5(p)(iii) simply states:

> USCIS determines, as a matter of discretion, that the principal beneficiary demonstrates compelling circumstances that justify the issuance of employment authorization

When making a case for compelling circumstances, it should be argued that the plain language of the regulation takes precedence over the preamble. Until there are administrative interpretations, the term "compelling circumstances" is like a blank canvass, which can be colored with any sort of creative and credible argument. The applicant making the argument for compelling circumstances can invoke the U.S. Supreme Court's opinion in *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945) for support that it is the plain language of the rule that governs:

> Since this involves an interpretation of an administrative regulation, a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. The legality of the result reached by this process, of course, is quite a different

> matter. In this case, the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. **Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.**

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-414 (1945)

In *Samirah v. Holder*, 627 F.3d 652, 659 (7th Cir. 2010), the Seventh Circuit distinguished other Federal Register text in a regulatory announcement from the regulation itself. The following passage from the decision is worth noting:

> **The government's argument is based rather desperately on a footnote in a request for comment on a proposed rule.** Eligibility of Arriving Aliens in Removal Proceedings, 71 Fed.Reg. 27,585-01, 27,586 n. 1 (May 12, 2006). The footnote states that "`advance parole' is the determination of an appropriate DHS officer that DHS should agree to the exercise of the parole authority under Section 212(d)(5)(A) of the Act before the alien's actual arrival at a port-of-entry. The actual decision to parole, however, is made at the port-of-entry. Since any grant of parole may be revoked, 8 C.F.R. § 212.5(e), a decision authorizing advance parole does not preclude denying parole when the alien actually arrives at a port-of-entry." **A request for comments is not a regulation**; the request to which the footnote was appended was only peripherally concerned with parole (the aim of the proposed rule was to resolve a circuit split over whether an immigrant placed in removal proceedings could apply for adjustment of status); and the footnote is inconsistent with the parole regulation, which states that "when parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued Form I-512," 8 C.F.R. § 212.5(f)— the advance-parole travel document."

Samirah v. Holder, 627 F.3d at 659 (emphasis added).

The EAD may be renewed on an annual basis if such compelling circumstances continue to be met, even if it is a different sort of compelling circumstance from the initial, or if the beneficiary's priority date is within one year of the official cut-off date.

How will this work? The job offer supporting the I-140 petition must still be valid. In other words, there is no legal basis under the final rule to port to another job on a standalone I-140 petition. If the employer withdraws the job

offer supporting the I-140 petition, the worker could have another employer offer a position, and sponsor the worker through a new labor certification and I-140 petition. The priority date from the old I-140 petition can be recaptured.

Unless the worker is maintaining a valid nonimmigrant status (or can seek the exemption under either INA 245(i) or 245(k)), he or she will not be able adjust status in the United States and would need to process the immigrant visa at an overseas US consulate. The worker's stay under a compelling circumstances EAD will be considered lawful presence, and will not trigger the 3 or 10 year bars upon departure. Alternatively, the worker can leave and return to the United States in a nonimmigrant status such as an H-1B, and then file for adjustment of status here. It is unfortunate that the rule does not provide for routine travel through advance parole while on a compelling circumstances EAD. The applicant will need to show urgent humanitarian reasons or a significant public benefit in order to seek advance parole. A person who returns to the United States under advance parole will not be able to adjust status under INA 245(k) as this provision requires a lawful admission in order to adjust status. A person on advance parole is considered paroled and not lawfully admitted into the United States.

Although the centerpiece proposal is disappointing as the basis for EAD need not have been cabined by compelling circumstances, there are some bright spots in the rule. I-140 petitions that have been approved for at least 180 days would not be subject to automatic revocation due to a business closure or withdrawal by the employer. DHS has invoked its discretion under INA 205 to retain an I-140 even if an employer withdraws it or the business closes. This assurance would allow workers who have pending I-485 applications for 180 days or more to safely exercise job portability under INA 204(j), although this dispensation is not possible if USCIS revokes the I-140 based on a prior error. Even those without pending I-485 applications could take advantage of this provision to obtain H-1B extensions beyond six years under the American

Competitiveness in the 21st Century Act (AC 21). They would also be able to keep their priority dates if a new employer files another I-140 petition. The ability to retain the original priority date is crucial for those in the EB queues, as they do not lose their place even if they move jobs and again get sponsored for green cards through new employers.

The proposed rule provides key grace periods to nonimmigrant visa holders. It

provides for a 10 day grace period at the start and end of the validity period, and would also allow workers whose jobs are terminated a grace period of 60 days if they are holding E-1, E-2, E-3, H-1B, H-1B1, L-1 or TN status. The 60 day grace period is indeed a salutary feature. Up until now, whenever a worker in nonimmigrant status got terminated, they were immediately rendered to be in violation of status. There was also no grace period to depart the United States. So, if a worker got terminated on a Friday, and did not depart on the same day, but only booked the flight home on Sunday, this individual would need to disclose on a future visa application, for all times, that s/he had violated status. Derivative family members, whose fortunes are attached to the principal's, would also be rendered out of status upon the principal falling out status. Thus, the 60 day grace period not only gives the worker more time to leave the United States, but it also provides a window of opportunity to find another employer who can file an extension or change of status within the 60 day period. Similarly, the worker could also potentially change to some other status on his or her own, such as to F-1, after enrolling in a school.

On a related note, the final rule also provides whistleblowers who report H-1B violations with protection from retaliation. Evidence of such retaliation may be presented when submitting an extension or change of status application, which would be considered as an "extraordinary circumstance" under 8 CFR 214.1(c)(4) and 8 CFR 248.1(b) when considering granting a late filing.

There will also be automatic extensions of an EAD for 180 days if filed on the same basis as the initial EAD, but will take away the mandatory processing time for an EAD within 90 days. The lack of a 90 day mandatory processing timeframe may result in delays of the issuance of the initial EAD.

Another noteworthy feature is the ability of nonprofit organizations affiliated to universities to seek H-1B cap exemption. Till now, the USCIS has insisted on an affiliation based on shared ownership or control by the same board or federation, or where the nonprofit is attached to the university as a member, branch, cooperative or subsidiary. Under the new rule, it can also be demonstrated that the "nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity ad the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education." By way of example, if

the nonprofit entity enters into an agreement to house students of the university as interns, it will now be possible for this nonprofit entity to show that it is affiliated to the university, and thus seek H-1B cap exemption status.

We had written a series of blogs when the proposed rule was published, such as here, here, and here. In one blog we were concerned that beneficiaries of I-140 petitions might not receive notice when USCIS revokes their I-140 petition. The USCIS has the authority to revoke the I-140, for example, when the "petition approval was in error" pursuant to 8 CFR 204.5(e)(2)(iv), and so should no longer confer a priority date. USCIS would look to the I-140 petitioner for further information, even though that petitioner might lack any interest in providing it. A hostile petitioner who would have wished to withdraw a petition, or a petitioner which had innocently gone out of business, could give rise to a revocation by failing to respond to notice from USCIS, and in so doing undermine the exercise of the beneficiary's ability to exercise §204(j) portability. This is not merely a theoretical concern. A recent precedential opinion of the U.S. Court of Appeals for the Second Circuit, *Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015) and a host of other decisions require notification to be provided to either the I-140 beneficiary or the new employer. In the preamble to the final rule, the DHS acknowledges that several commenters raised this issue, but stated that it is unable to address these concerns in the final rule because they are outside the scope of this rulemaking, although DHS is considering separate administrative action outside the final rule to address these concerns. In the absence of a rule requiring notification to the beneficiary, those affected by revocations due to lack of notice should continue to invoke precedents such as *Mantena v. Johnson* when challenging revocations.

The rule also confirms the ability of the beneficiary of a labor certification that was filed 365 days prior to the end of the sixth year under section 106(a) of the American Competitiveness in the 21st Century Act (AC 21) to seek a one year H-1B extension beyond the sixth year. The rule also confirms the ability of the beneficiary of an approved I-140 petition to seek a three year extension beyond the sixth year if the priority date has not become current. What is new is that the extensions under both sections 106(a) and 104(c) of AC 21 cannot be sought if the beneficiary fails to file for adjustment of status or apply for an immigrant visa within 1 year upon the visa becoming available, i.e, when the priority date becomes current with respect to the final action date in the visa bulletin. In the event that the 1 year period is interrupted by the unavailability

of visas, a new 1 year period shall start to run when an immigrant visa again becomes immediately available. USCIS may excuse a failure to file if the alien establishes that the failure to apply was due to circumstances beyond his or her control. Now here lies the problem. If the beneficiary is using an old I-140 petition of a prior employer for an AC 21 H-1B extension with a new employer, and the priority date on that old I-140 petition becomes current, the beneficiary must apply for adjustment of status within one year of visa availability. If the I-140 petition is no longer being supported by the job offer, and was being used to only seek an AC 21 extension, the beneficiary must have the new employer file a new labor certification and I-140, and recapture the old priority date. This process may take over a year. It is hoped that the USCIS exercises its discretion favorably in excusing the failure to file within 1 year when the beneficiary is in the process of having a new labor certification and I-140 processed on his or her behalf.

On a related note, the final rule shot down suggestions, as provided in our blog, that if there were two H-1B spouses, and only one spouse was the beneficiary of a labor certification or an I-140 petition, then both spouses can obtain AC 21 extensions as there is clearly a legal basis. The other spouse would have to now change to H-4 status, and separately apply for an EAD as an H-4 spouse, which will result in delays.

The rule also confirms the ability of an I-485 adjustment of status applicant to be able to port to a same or similar job if the I-485 has been pending for 180 days or more, but it now for the first time requires the applicant to complete Form I-485 Supplement J, with supporting material and credible documentary evidence to demonstrate that either the employment offer by the petitioning employer is continuing or "the applicant has a new offer of employment from the petitioning employer or a different employer, or a new offer based on self-employment in the same or similar occupational classification as the employment offered under the qualifying petition." Interesting, the rule confirms what was previously confirmed in a 2005 USCIS memo by William Yates, but never completely followed, is the ability of an adjustment applicant to even port off an unapproved I-140. Of course the petition must be ultimately approved, but the rule states that it can be approved without regard to establishing the original employer's continuing ability to pay after filing and that the I-140 petition was approvable at the time of filing. In defining same or similar occupation, the rule says it "means an occupation that resembles in

every relevant respect the occupation for which the underlying employment-based immigrant visa petition was approved. The term "similar occupational classification" means an occupation that shares essential qualities or has a marked resemblance or likeness with the occupation for which the underlying employment-based immigrant visa petition was approved." The rule broadly defines "same or similar occupation" without regard to similarities in SOC codes that was indicated in a USCIS Memo on Portability, which again would provide flexibility for a backlogged beneficiary to easily port to a new job. One should argue that a promulgated rule takes precedence over a policy memo, which insists on determining same or similar through the SOC codes of the old and the new job.

The final rule is not perfect, but does provide several benefits to high skilled workers. It would have been preferable if EADs could have been issued to beneficiaries of I-140 petitions without demonstrating compelling circumstances. Until Congress acts, there can be other administrative reforms, as we commented, such as moving the filing dates in the visa bulletin much ahead of the final action dates so that more beneficiaries of approved I-140 petitions can file I-485 adjustment of status applications. Once an I-485 is filed, one can exercise job portability under INA 204(j) and also obtain an EAD and travel benefits. Life as a pending adjustment of status applicant is preferable to life on a compelling circumstance EAD. The rule will also take effect on January 17, 2016, three days ahead of the inauguration of President Trump. Although Trump as a candidate promised to do away with regulations from the Obama administration, it will be difficult for the new administration to repeal this rule as it applies only to immigrant workers who are already here and in the pipeline for the green card. They will anyway get the green card, and have been in the United States legally. The United States must be an attractive destination for high skilled foreign workers. Our immigration system does not meet this objective as workers from countries like India and China have to wait decades for the green card. Even if the rule survives the Trump administration, much more will need to be done to alleviate the backlogs for skilled immigrant workers who have contributed so much to the United States.