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FAQ RELATING TO SKILLED WORKERS IN THE GREEN CARD BACKLOGS DURING COVID-19

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Skilled workers caught in the employment-based backlogs face great uncertainty during the COVID-19 crisis. They have to continue to work for employers who have sponsored them green cards while maintaining H-1B status. As explained in my previous FAQ relating to changes in working conditions for H-1B workers, the DOL rules do not provide much flexibility to employers who may be forced to cut wages or furlough employees in order to preserve jobs. If an H-1B worker's position is terminated, he or she has a 60 day grace period to leave the US or to change to another status. This FAQ focuses on immigration issues facing foreign nationals who are waiting for their green cards while in H-1B status, although some may also be in L-1 status. They are mainly born in India, and as a result of the "per country limits" in the employment-based first, second and third preferences, they have faced disproportionate waiting times (going into decades) when compared to those born in other countries. But for their country of birth, they would have been green card holders, or even US citizens, by now, and would not be facing peril during COVID-19 with respect to their immigration prospects.

> **1. My employer can no longer afford to employ staff and terminated me yesterday. I am in H-1B status and am also the beneficiary of an I-140 petition in the employment-based second preference. I was born in India and have a January 1, 2013 priority date. While I am in the 60 day grace period, can I request an employment authorization document (EAD) under "compelling circumstances?"**

An Obama era regulation entitled "Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High Skilled Nonimmigrant Workers" was promulgated to provide modest relief to high skilled workers

born mainly in India and China who were caught in the crushing backlogs in the employment-based preferences.

One significant provision in this regulation provides 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 to the regulation 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.

Notwithstanding the various examples of compelling circumstances provided in the preamble to 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

Anecdotal evidence suggests that USCIS has been very niggardly in issuing EADs under compelling circumstances since the promulgation of the rule in the fading days of Obama's presidency in January 2017. Unemployment in itself may not be a basis as stated in the preamble, but one can try to argue compelling circumstances in the COVID-19 period more forcefully. When making a case for compelling circumstances, it should be argued, that the plain language of the regulation takes precedence over the preamble or the government's subjective interpretation of the term. Until there are formal administrative interpretations, the term "compelling circumstances" is like a blank canvass, which can be colored by any credible and reasonable argument by the applicant. Still, one cannot bank on the USCIS issuing an EAD under compelling circumstances as a result of unemployment even during the COVID-19 period. Something more in addition to unemployment should be shown in order to make a convincing argument for compelling circumstances.

2. How long will I be able to stay in the US if I am given a work authorization under "compelling circumstances", and how can I still get a green card?

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

Unless the beneficiary 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 beneficiary'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 beneficiary 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. The rule, unfortunately, does not provide for routine travel through advance parole while on a compelling circumstances EAD.

3. Will my spouse and teenage child be able to also get a compelling circumstances EAD?

Yes. Derivative family members can also apply for the EAD concurrently with the principal beneficiary of the I-140 petition, but they will only be issued the EAD after the principal family member is first granted the EAD. They too must be in nonimmigrant status at the time of filing the initial application.

4. I have a pending I-485 application, although the final action date in the State Department Visa Bulletin is not current this month. My employer can no longer afford to employ me and is in the process of shutting down the business.

If the Form I-485 application has been pending for 180 days or more, you can exercise job portability under INA 204(j) by taking up a job or being offered a job in a same or similar occupation with another employer. The underlying labor certification and I-140 will still remain valid upon exercising portability under INA 204(j). The applicant will need to submit Form I-485, Supplement J.

Under 8 CFR 245.25(b), "he term "same occupational classification" 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."

It is also possible for an adjustment applicant to "port" to self-employment if employment prospects are bleak during the COVID-19 era.

5. My employer cannot afford to employ me during the COVID-19 period and has terminated my employment in H-1B status, but still wants to continue to sponsor me for the green card hoping that the economic situation will change for the better by the time my priority date becomes current. I have not yet filed for adjustment of status.

Since the employment-based green card sponsorship is based on a prospective

position, your employer can still continue with the I-140. If you leave for India within the 60 day grace period after cessation of employment and have not options to remain in H-1B status through another employer or change status, you can ultimately process the immigrant visa at a US consulate overseas upon your priority date becoming current. Given the current wait times in the employment-based first, second and third preferences for India, it may take many years, even decades, before you can get back to the US as a permanent resident. However, your employer will still be able to file an H-1B petition on your behalf in the future to bring you back before you obtain the green card. This H-1B petition will not be counted against the H-1B cap as you have been previously counted against the cap, and you will be entitled to three year extensions beyond the 6 year H-1B limitation.

6. Since there are no flights to India at this time, how can I depart the US within the 60 day grace period?

You could try requesting a change of status to B-2 visitor status before the end of the 60 day grace period by filing Form I-539, and asking for an additional six months in that status. Although you are the beneficiary of the an I-140 immigrant visa petition, which must be disclosed on Form I-539, the fact that you intend to ultimately apply for permanent residence should not conflict with your request for a change of status to B-2 if you can demonstrate your genuine inability to depart the US and that it will take a long time before you even become eligible for a green card. Furthermore, you can also argue that your intention is to apply for an immigrant visa at the US Consulate before you can come to the US as a permanent resident.

7. I am in my sixth year of H-1B status with an approved I-140 petition. If the employer who filed the I-140 petition no longer wishes to employ me now or in the future, how can I still take advantage of this I-140 petition and get a green card through another employer?

If another employer files a new labor certification and I-140 petition on your behalf, the priority date of the original I-140 petition can still be retained even if the former employer withdraws the petition. Since you have already been counted under a prior H-1B cap, the new employer can file another H-1B petition so that you can reenter the US in H-1B status. You will be eligible for 3 year extensions beyond the six year limitation of the H-1B visa until your priority date becomes current.

8. Will President Trump's latest green card ban impact me or my family?

President Trump's Proclamation will ban people seeking immigrant visas at a US Consulate for 60 days from April 23, 2020. Therefore, it will not impact those who are already in the US and seeking permanent residence through adjustment of status. Even if you depart the US to process for an immigrant visa at a US Consulate, the ban will not apply to one who was in the US on the effective date of the Proclamation, which was April 23, 2020. The Proclamation will nevertheless ban derivative family members who are processing for immigrant visas at a US consulate even if the principal applicant adjusted status in the US unless they were in the US on April 23, 2020.