



USCIS BROADENS COMPELLING CIRCUMSTANCES PARAMETERS FOR SKILLED IMMIGRANTS IN THE GREEN CARD BACKLOGS SO THAT THEY CAN CONTINUE TO WORK IN THE US EVEN AFTER JOB LOSS

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By Cyrus D. Mehta and Kaitlyn Box*

In our [previous blog](#), we suggested several ways that the Biden administration could follow to allow nonimmigrant workers who have been laid off to remain in the U.S. As major tech companies continue to lay off workers, nonimmigrant employees are often left with few pathways to continue working in the U.S. if they cannot quickly secure alternate employment. H-1B visa holders are allowed only a 60-day grace period to change or extend their nonimmigrant status in the U.S. following a termination, after which they must depart the country. Layoffs have a particularly harsh impact on Indian born H-1B workers who are caught in the employment based green card backlogs. Skilled workers born in India must wait decades to become permanent residents, remaining dependent on their employers to file continued nonimmigrant visa petitions on their behalf in the meantime. In recent months, the [State Department Visa Bulletin](#) has reflected that all countries of the world are now subjected to retrogression in most of the employment based preferences although Indians still bear the brunt due to additional per country limits within each employment based preference.

Among the suggestions posed in our previous blog was the recommendation that the Biden administration employment authorization documents (EADs) to laid off nonimmigrant workers based on compelling circumstances under [8 CFR § 204.5\(p\)](#). As discussed in the prior post, this provision allows EADs to be

issued to individuals in E-3, H-1B, H-1B1, O-1 or L-1 nonimmigrant status if they can demonstrate compelling circumstances and are the beneficiaries of approved I-140 petitions, but their priority dates are not current. Although DHS has never precisely defined what constitutes “compelling circumstances”, the examples provided in the [preamble to the high skilled worker rule](#) that took effect on January 17, 2017 included serious illness and disabilities, employer dispute or retaliation, other substantial harm to the worker, and significant disruptions to the employer. DHS has also suggested loss of funding for grants that may invalidate a cap-exempt H-1B status or a corporate restructure that render an L-1 visa status invalid might constitute significant disruption to the employer. USCIS has historically issued EADs based on compelling circumstances very seldomly as mere unemployment would not rise up to the level of compelling circumstances, and more needed to have been shown such as that the unemployment was as a result of a serious illness, employer retaliation or the skills used by the worker in the US could not be utilized in the home country.

USCIS recently implemented a version of this suggestion, broadening the criteria for implementing EADs based on compelling circumstances specifically linked to job termination. It is no coincidence that the parameters for compelling circumstances have broadened now that beneficiaries of approved I-140 petitions from all countries are facing visa retrogression as opposed to only India. In a June 14, 2023 [Policy Alert](#), USCIS states that it “may provide employment authorization to beneficiaries of approved employment-based immigrant visa petitions who face delays due to backlogs in immigrant visa availability. Beneficiaries who face adverse circumstances resulting from termination from employment and loss of nonimmigrant status, may qualify for an Employment Authorization Document (EAD) if they face compelling circumstances beyond the usual hardship associated with job loss.” According to the [USCIS Policy Manual](#), principal applicants must demonstrate that they are the beneficiaries of an approved I-140 petition, in valid E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status or authorized grace period at the time Form I-765 is filed, have not filed a Form I-485 Application to Register Permanent Residence or Adjust Status, and that an immigrant visa is not available based on the applicant’s priority date according to the relevant Final Action Date in the U.S. Department of State (DOS)’s Visa Bulletin in effect at the time the applicant files Form I-765 in order to be eligible for an EAD based on compelling

circumstances. USCIS does not provide an exhaustive list of the scenarios that could constitute compelling circumstances, but outlines several examples in the Policy Manual, which include “a serious illness or disability that substantially changes employment circumstances” or financial hardship “when coupled with circumstances beyond those typically associated with job loss”, such as when termination would cause an applicant with a serious medical problem to lose their health insurance. Applicants who can demonstrate that their inability to change or extend their status would result in a serious disruption to their employers, such as where “due to the principal applicant’s knowledge or experience, their loss would negatively impact projects and result in significant monetary loss or other disruption to the employer”, may also be eligible for EADs based on compelling circumstances. The Policy Manual further states that “reaching the maximum statutory or regulatory period of allowed nonimmigrant status does not, without compounding factors, constitute compelling circumstances. An officer may consider this factor in determining whether the applicant merits a favorable exercise of discretion”. EADs based on compelling circumstances will be valid for up to one year, and spouses and children of a principal applicant who receives a compelling-circumstances EAD are also eligible. The EAD is renewable for an additional year based on 1) either a continuing showing of compelling circumstances or 2) if the difference between the applicant’s priority date and the Final Action Date for the applicant’s preference category and country of chargeability is 1 year or less according to the Visa Bulletin in effect on the date the applicant filed the renewal application.

While some nonimmigrant workers who have been laid off will no doubt be able to benefit from the broadened criteria to obtain EADs and remain in the U.S., the measure is still quite narrow in scope. The expanded criteria will apply primarily to nonimmigrant workers who have been laid off or terminated from their jobs, not those who remain employed, and applicants must still demonstrate compelling circumstances, such as being “forced to sell their home for a loss, pull the children out of school, and relocate to their home country” due to the job loss. Furthermore, an EAD based on compelling circumstances confers no nonimmigrant status, and is intended only as a stopgap measure to assist nonimmigrants whose lives who be severely upended if their were forced to return to their home countries on short notice. USCIS considers recipients of a compelling circumstances EAD to be in a period

of “authorized stay”. Thus, recipients will not accrue unlawful presence or trigger the 3- or 10-year bars to reentry, but are not provided with any path to permanent residence. USCIS has not indicated that any automatic extension will apply to EADs based on compelling circumstances, so recipients who need to apply for a renewal may temporarily lose work authorization while the application is pending. Even the initial request for the EAD will take several months as the USCIS has not indicated that applicants will be able to use premium processing and there is also a biometrics requirement that can further hobble the process. One of the conditions for eligibility is that the applicant and dependents have not been convicted of a felony or two or more misdemeanors.

Recipients of an EAD based on compelling circumstances will likely need to look for other solutions if they wish to remain and work in the U.S. on a long-term basis until they obtain permanent resident status. An individual who finds new employment under a compelling circumstances EAD would need to have their new employer file a new labor certification and I-140 petition on their behalf, which could recapture the old priority date from the previous I-140 petition under 8 CFR § 204.5(e). The foreign worker and derivative family members such as the spouse and minor children could then go abroad for consular processing when the priority date becomes current under the Final Action Date. Due to lengthy backlogs for oversubscribed countries, there is a risk that older children may “age out”, or reach the age of 21, before the principal applicant’s priority date becomes current.

A new employer could also file a new H-1B visa petition for the foreign worker alongside the new labor certification and I-140 petition. Recipients of a compelling circumstances EAD will be in a period of authorized stay in the U.S. and will not be maintaining their nonimmigrant status. Thus, recipients cannot extend their H-1B status in the U.S. If the new employer files an H-1B petition for consular processing, however, this would allow the foreign worker and their family to return to the U.S. in H-1B/H-4 status after obtaining visa stamps at an overseas consulate and file for adjustment of status in the U.S. when the recaptured priority date becomes current.

In the end, the compelling circumstances EAD is just a band aid and not a solution. There is no need for [decade long backlogs in the legal immigration system](#), and Congress must pass legislation to infuse more visas in each category as well as eliminate per country limits. While previously only India and

to a lesser extent China were impacted by the backlogs, now all countries have been impacted, and so [everyone must unite to demand more visas](#) to ensure that skilled workers with approved petitions be granted permanent residence within a reasonable period of time.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

**Kaitlyn Box is a Senior Associate at Cyrus D. Mehta & Partners PLLC.*