CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

SHAPING IMMIGRATION POLICY THROUGH EADS

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By Cyrus D. Mehta and Kaitlyn Box*

In the face of Congressional inaction to fashion an immigration solution for the United States, the Administration does have broad authority to grant an employment authorization document (EAD) to noncitizens. It also has the ability to extend the validity of an EAD.

On September 27, 2023, USCIS announced that it will increase the maximum employment authorization document (EAD) validity period for "certain noncitizens who are employment authorized incident to status or circumstance" to five years. This five-year EAD validity period also applies to some "initial and renewal EADs for certain noncitizens who must apply for employment authorization". Refugees, asylees, individuals granted withholding of removal, and those with pending asylum application or applications for adjustment of status under INA 245, are among the categories of noncitizens who will be issued EADs with a five-year validity period, according to a USCIS Policy Alert. USCIS stated that this change is aimed at "significantly reduc the number of new Forms I-765, Application for Employment Authorization, we receive for renewal EADs over the next several years, contributing to our efforts to reduce associated processing times and backlogs". This announcement is the one of the most recent in a series of DHS measures that have the effect of shaping immigration policy through EADs.

INA 274A(h)(3) provides DHS a basis for providing employment authorization to noncitizens when not specifically authorized under the INA. The provision states:

> *(3) Definition of unauthorized alien – As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien*

> *at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.*

DHS has relied on INA 274A(h)(3) as the authority for issuing EADs to H-4 spouses of H-1B workers under 8 CFR 274.12(c)(26). Save Jobs USA, an organization representing California IT workers, is currently challenging the DHS rule that grants work authorization to H-4 nonimmigrants before the Supreme Court. Although the policy was upheld at the district court level in March and no court of appeals decision has yet been rendered, Save Jobs has already sought review by the Supreme Court. Save Jobs is arguing that the issue of H-4 EADs in one of "extraordinary practical importance" because it represents "just the tip of a regulatory-work-authorization iceberg" that threatens the jobs of U.S. workers. Save Jobs further claimed that providing work authorization to noncitizens paroled into the U.S. for humanitarian purposes will "will allow aliens to hold 18 percent of the jobs created in an average year." In a September 2023 brief, DHS contended that Save Jobs does not have standing to challenge the regulation, and urged the Court to deny certiorari, stating that: "The case would… not warrant certiorari even had the court of appeals already affirmed the district court's ruling. That petitioner seeks to skip that critical step and obtain certiorari before judgment makes denial of the petition all the more appropriate."

Although employment authorization is specifically provided for recipients of Temporary Protected Status (TPS) under INA 244(a)(1), INA 274A(h)(3) also affords DHS a basis for providing interim EADs to applicants who have pending TPS applications under 8 CFR 274.12(c)(19). Pursuant to a recent announcement, DHS is redesignating and extending TPS for Venezuela for 18 months. The redesignation will allow Venezuelan nationals who have been continuously residing in the United States since July 31, 2023 and meet the other eligibility criteria to apply for TPS. EADs for current Venezuelan TPS beneficiaries will be automatically extended through March 10, 2025. The redesignation of Venezuela for TPS will relieve the pressure for cities like New York that have accepted recent migrants from Venezuela, as these individuals will be able to legally work with EADs even while they have pending TPS applications rather than relying only on housing and other services provided by NYC.

Other examples where the Administration has relied on INA 274A(h)(3) include the granting of EADs to those who have been paroled into the United States under humanitarian parole under 8 CFR 274.12(c)(11), F-1 students who are in a period of practical training (8 CFR 274.12(c)(3)), applicants with pending I-485 applications (8 CFR 274.12(c)(9)), applicants with pending cancellation of removal applications (8 CFR 274.12(c)(10)), recipients of Deferred Action for Childhood Arrivals (DACA) (8 CFR 274.12(c)(33)), and beneficiaries of approved I-140 petitions, as well as their spouses and children, based on compelling circumstances (8 CFR 204.5(p)). Under these regulations, some EADs are linked to the noncitizen's nonimmigrant visa status such as F-1 or H-4 while other EADs are not linked to such visa status and allow the noncitizen to remain lawfully present in the US.

Some of the programs that have provided the basis for EADs have been challenged in addition to the H-4 EAD program, such as the DACA program, which the U.S. District Court for the Southern District of Texas recently struck down once again. In a September 13, 2023 order, Judge Hanen stated that the 2022 Final Rule promulgated by the Biden administration to formalize the DACA program was not "materially different" from the 2012 policy that first created the program, and held that "the Final Rule suffers from the same legal impediments" as the 2012 policy. The 2012 policy was ruled unlawful in by the 5th Circuit in October 2022. In a 2015 opinion authored by Judge Hanen, the 5th Circuit struck down the "Deferred Action for Parents of Americans and Lawful Permanent Residents" program (or "DAPA") and questioned whether INA 274A(h)(3), which the court characterized as a definitional provision, even affords DHS the authority to grant employment authorization or related benefits.

The administration's humanitarian parole program, which allows 30,000 qualifying nationals of Cuba, Haiti, Nicaragua and Venezuela to be admitted to the United States every month for up to two years and apply for work authorization, is currently facing a challenge by Texas and nineteen other states. The plaintiff states allege that the program "amounts to the creation of a new visa program that allows hundreds of thousands of aliens to enter the United States who otherwise have no basis for doing so". In an October 2022 Court of Appeals case, the Washington Alliance of Technology Workers (Washtech) similary argued that the F-1 STEM Optional Practical Training (OPT) rule should be struck down on the ground that INA § 101(a)(15)(F)(i) authorizes

DHS to allow F-1 students to remain in the U.S. only until they have completed their course of study and does not specifically authorize post-graduation practical training. The U.S. Court of Appeals for the D.C. Circuit, however, upheld STEM OPT as a valid exercise of DHS' authority under in INA § 214(a)(1) to promulgate regulations that authorize an F-1 student's stay in the U.S. beyond graduation. The Supreme Court recently denied certiorari allowing STEM OPT and the EAD emanating under 8 CFR 274.12(c)(3) to continue.

Notwithstanding these legal challenges on specific executive actions, the Administration continues to have the authority to issue and extend EADs to a broad swath of noncitizens. Some of the beneficiaries of EADs are those who are in the queue for permanent residence but are unable to obtain it due to backlogs in the employment categories while others are in the US based on humanitarian reasons. The authority and flexibility that INA 274A(h)(3) provides to the Administration to fashion immigration policy through the grant EADs and transform the lives of hundreds of thousands of noncitizens fills an important gap that complements the immigration benefits provided in the INA.

*Kaitlyn Box is a Senior Associate