masuda funai

News & Types: Immigration Update

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Practices: Immigration

On November 18, 2016, the Department of Homeland Security ("DHS") published a final rule, effective January 17, 2017, relating to various issues affecting certain employment – based immigrant and nonimmigrant visa categories. The changes are intended to benefit U.S. employers and foreign workers by providing more flexibility to accept promotions, change positions, and change employers during the elongated permanent residency process. Some of the significant provisions include the following:

IMMIGRANT PETITIONS

PRIORITY DATE

- The priority date of any petition which is accompanied by a Labor Certification from the Department of Labor is the date that the Labor Certification Application was accepted for processing by the Department of Labor.
- The priority date of a petition which does not require a Labor Certification from the Department of Labor is the date that the application is properly filed with the USCIS.
- The priority date of any petition accompanied by an Application for Schedule A designation is the date that the petition is properly filed with the USCIS.
- The priority date of a foreign national who filed for classification as a special immigrant and who is the beneficiary of an approved petition for special immigrant status filed after October 1, 1991, is the date that the alien applied for an immigrant visa or adjustment of status.

RETENTION OF PRIORITY DATES

- The priority date of a petition may be retained unless it is revoked by the USCIS due to:
- Fraud, or willful misrepresentation of a material fact
- Revocation by the Department of Labor of the approved permanent labor certification that accompanied the petition
- Invalidation by the USCIS or the Department of State of the permanent labor certification
- A determination by the USCIS that there was material error in the petition approval.

ELIGIBILITY FOR EMPLOYMENT AUTHORIZATION IN COMPELLING CIRCUMSTANCES

- Principal beneficiaries of an approved immigrant petition for classification who are in the United States in E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status may be eligible for employment authorization in compelling circumstances even if they cannot obtain an immigrant visa due to priority date regressions.
- Family members of a principal beneficiary may also apply for and be granted employment authorization as long as the principal beneficiary has been granted employment authorization and it has not been terminated or revoked.

REVOCATION OF APPROVAL OF PETITIONS

- Automatic revocation occurs if the petitioner files a written notice of withdrawal less than 180 days after approval of the petition unless it is associated with an adjustment of status application that has been pending for 180 days or longer.
- However, a petition that is withdrawn 180 days or more after it is approved remains approved unless it is revoked on other grounds. When the job offer of the petitioning employer is rescinded, the alien must obtain a new employment-based petition to seek adjustment of status or issuance of the immigrant visa.
- Automatic revocation occurs if the petitioning employer's business terminates less than 180 days after approval of the petition unless it is associated with an adjustment of status application that has been pending for 180 days or longer.
- However, if the petitioning employer's business is terminated 180 days or more after the petition is approved, or 180 days or more after an adjustment of status application has been filed, the petition remains approved unless it is revoked on other grounds. When the petitioning employer terminates the job offer, the beneficiary must obtain a new employment-based preference petition in order to seek adjustment of status or issuance of an immigrant visa.

NONIMMIGRANT CLASSES

GRACE PERIODS

- Foreign nationals in E-1, E-2, E-3, H-1B, L-1 or TN classification and their dependents may be admitted to the United States for up to 10 days prior to the validity period of the petition and 10 days after the validity period ends. However, employment is not authorized except during the validity period.

60-DAY NONIMMIGRANT GRACE PERIOD

- Foreign nationals in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1 or TN classification and their dependents will not be considered to have failed to maintain nonimmigrant status solely on the basis of termination of employment for up to 60 consecutive days or until the end of the authorized validity period, whichever is shorter, only once during each authorized validity period. However, this period may be eliminated or shortened by the Department of Homeland Security as a matter of discretion.
- During the grace period, the foreign national does not have continued authorization for employment.

SPECIAL REQUIREMENTS FOR ADMISSION, EXTENSION, AND MAINTENANCE OF STATUS

H-1B PORTABILITY

- H-1B nonimmigrants are authorized to start concurrent or new employment upon the filing of a non-frivolous H-1B petition if: 1) they have been lawfully admitted into the U.S. in or were otherwise granted H-1B status; 2) a non-frivolous petition for H-1B employment has been filed; and 3) they have not been employed without authorization since their last admission to the U.S. through to the filing of the new petition.
- Employment pursuant to portability ceases upon the adjudication of the H-1B petition.
- A foreign national whose I-94 has expired is considered to be in lawful status and can take advantage of the portability provisions even if an underlying H-1B petition is pending and regardless of whether the validity period of an approved H-1B petition has expired during the pendency.
- If any petition in the portability succession change is denied, a subsequent request to extend or amend cannot be granted unless the beneficiary's previously approved period of H-1B status remains valid.
- In the denial of a successive portability petition, the H-1B beneficiary may continue to work on the basis of a previously approved H-1B petition if it remains valid, the beneficiary has maintained H-1B status or has been in a period of authorized stay, and has not engaged in unauthorized employment.

DUTIES WITHOUT LICENSURE

- H-1B petitions may be approved in certain occupations which require licensure when the state allows the person to fully practice the occupation without licensure but under the supervision of a licensed senior or supervisory personnel in that occupation.
- The approval of an H-1B petition may be contingent on behalf of a foreign national who does not have a valid state or local license evidence must be provided that the foreign national is fully supervised and that the license would otherwise be issued prior to obtaining H-1B status but for certain technical reasons. Substantial evidence must be submitted to document the foreign national's qualification, subject to requirements of licensing and that the alien has filed an application for the license.
- Petition approval may only be for a period of up to one year if the license would be issued if the person has a valid Social Security number; was authorized for employment in the U.S. or met a similar technical requirement and this is documented by substantive state or local licensing requirements.

H-1B RECAPTURE TIME

- Time spent physically outside of the United States during the validity of an H-1B petition can be recaptured in a subsequent H-1B petition at any time before the H-1B applicant uses the full period of authorized H-1B admission.

LENGTHY ADJUDICATION DELAY EXEMPTIONS

- One year extensions beyond the 6 year limitation in H-1B status may be granted if, at least 365 days have elapsed since the filing of a Labor Certification with the Department of Labor or the filing of the Form I-140, Immigrant Petition.

- Subsequent approvals may be granted in 1-year increments until the approved labor certification expires or a final decision has been made to deny or revoke the labor certification.
- Advance filing of an H-1B petition seeking a lengthy adjudication delay exemption can be made within 6 months of the requested start date. The petition may be filed before 365 days have elapsed since the labor certification or immigrant petition was filed as long as the labor certification or immigrant petition was filed at least 365 days prior to the date the period of admission authorized under the exemption will take effect.
- Time remaining to the beneficiary may include recapture time.
- The H-1B petitioner seeking the exemption does not need to be the employer that filed the labor certification or immigrant visa petition.
- Exemptions after the 7th year do not need to be based on the qualifying labor certification or immigrant petition used for the 6th year extension.
- The lengthy adjudication delay exemption may not be invoked if the beneficiary fails to file an adjustment of status application or apply for an immigrant visa within 1 year of an immigrant visa being authorized for issuance based upon the preference category and country of chargeability.
- If the 1 year period is interrupted by the unavailability of an immigrant visa, a new 1 year period will attach once an immigrant visa becomes available again.

PER COUNTRY AND WORLDWIDE LIMITS

- H-1B visa holders who are the beneficiaries of approved immigrant visa petitions and who are eligible to be granted that classification except for the application of per country limitations may be eligible for 3 year extensions if visas are not available as of the date the H-1B petition is filed with the USCIS.
- The exemption may be approved with respect to an employer who was not the petitioner of the immigrant visa or with respect to a different approved visa petition.

ADJUSTMENT OF STATUS

VALIDITY OF PETITION FOR CONTINUED ELIGIBILITY FOR ADJUSTMENT OF STATUS

- A person with a pending adjustment of status application based upon an approved employment based immigrant petition, must have a valid offer of employment based on a valid petition when the adjustment application is filed and when it is adjudicated. Furthermore, the foreign national must intend to accept the offer of employment.
- An offer of employment may be based on an offer from the petitioning employer, a new employer, or on a new offer based on self-employment, as long as it is in the same or similar occupational classification as the original offer on the labor certification.
- This portability provision can be invoked when the adjustment application has been pending for 180 days or more; or the qualifying immigrant visa petition has been approved or is pending when the beneficiary notifies the USCIS of a new job offer 180 days or more after the date the adjustment application has been filed.

- The adjudication of this provision can be completed without the need to continuously establish the ability to pay the proffered wage in the labor certification application after the filing and until the beneficiary obtains permanent resident status.
- In all cases, the applicant and the intended employer must demonstrate the intention for the applicant to be employed under the continuing or new employment offer, including self-employment, within a reasonable period upon the grant of permanent resident status.
- Same or similar is defined as an occupation that resembles in every relevant respect the occupation for which the underlying employment based immigrant visa petition was approved. The occupation must share essential qualities or have a marked resemblance or likeness with the initial occupation on the application.

EMPLOYMENT AUTHORIZATION

- The validity period of an expiring Employment Authorization Document (EAD) is automatically extended for up to 180 days when the renewal application is: 1) properly filed before the expiration date shown on the face of the document (or during the filing period described in the Federal Register for TPS applicants); 2) is based on the same employment authorization category that is listed on the document; and 3) is based on a class of aliens whose eligibility to apply for employment authorization continues notwithstanding expiration of the document and is based on a category that does not require adjudication of an underlying application or petition before adjudication of the renewal application.
- The authorized period under this section will automatically terminate the earlier of up to 180 days after the expiration of the EAD or upon issuance of notification of a denial. The Department of Homeland Security maintains authority to otherwise terminate any employment authorization or EAD by written notice to any class of aliens.
- An EAD that has expired is considered unexpired when combined with a Notice of Action (Form I-797C) which demonstrates the timely filing of the application.

CONCLUSION

As previously indicated, this regulation is scheduled to become effective on January 17, 2017. However, there has been some indication that the next Congress will attempt to overturn the regulation after it is seated in January 2017. If Congress passes such legislation to overturn this regulation and it is then signed by President Trump after he is sworn into office on January 20, 2017, the provisions of the regulation will then no longer be effective.

Additional information about whether this regulation is overturned or remains effective after the new Congress and Trump administration is sworn into office will be contained in our firm's future Immigration Updates when it becomes available.