When And In Which Form The H-4 Employment Authorization Rule Will Come Out?

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On May 6, 2014, the Department of Homeland Security (DHS) announced the publication of a proposed rule to extend employment authorization to dependent spouses (not dependent children) of certain H-1B workers. On May 12, 2014, DHS published the Notice of Proposed Rulemaking ("NPRM") in the Federal Register. The NPRM was subject to a sixty-day public comment period which ended on July 11, 2014. More than 12,000 comments were received. At present, DHS is reviewing those comments to finalize the rule.

So, the obvious questions are: (1) when and in which form the final rule is going to come out; and (2) when it will become effective? Before discussing that, it is important to briefly discuss the proposed rule and some of the comments received so far, and how those may or may not impact the final rule.

The Proposed Rule

The change proposed by DHS would allow H-4 dependent spouses of certain H-1B nonimmigrant workers to request employment authorization, as long as the H-1B worker has already started the process of seeking lawful permanent residence through employment. Eligible individuals would include H-4 dependent spouses of principal H-1B workers who: (1) Are the beneficiaries of an approved Form I-140, Immigrant Petition for Alien Worker; or (2) Have been granted an extension of their authorized period of stay in the United States under the American Competitiveness in the Twenty-first Century Act of 2000 ("AC21") as amended by the 21st Century Department of Justice Appropriations Authorization Act.

AC21 permits H-1B workers seeking lawful permanent residence to work and remain in the United States beyond the six-year limit. Specifically AC21 §§106(a) and (b) provide for a one-year extension of H-1B status beyond the six-year limitation established by INA §214(g)(4) if the H-1B nonimmigrant is the beneficiary of a labor certification application or an I-140 petition that has been pending for at least 365 days prior to reaching the end of the sixth year of H-1B status.

Specifically, DHS is proposing to limit employment authorization to H-4 dependent spouses *only* during AC21 extension periods granted to the H-1B principal worker or after the H-1B principal has obtained an approved Immigrant Petition for Alien Worker. In essence, DHS is proposing to provide benefits to those H-1B nonimmigrants who have demonstrated intent to permanently contribute to and participate in the U.S. economy and who have already made significant strides towards achieving the ability to do so upon being granted lawful permanent resident status. DHS also believes that tying the H-4 spouse employment authorization to such H-1B nonimmigrants would allow for more accurate identification of H-1B nonimmigrants who are on the path to becoming LPRs pursuant to their employment, and avoid the encouraging of "frivolous" filings.

Expanding employment authorization eligibility to all H-4 dependent spouses?

One of the comments submitted by stakeholders, including American Immigration Lawyers Association (AILA), asked for expanding employment authorization eligibility to all H-4 dependent spouses. While proposing the rule, DHS rejected this alternative as overbroad, since such an alternative would offer eligibility for employment authorization to those spouses of nonimmigrant workers who have not taken steps to demonstrate a desire to continue to remain in and contribute to the U.S. economy by seeking lawful permanent residence. Further, based on DHS reasoning, in enacting AC21, Congress was especially concerned with avoiding the disruption to U.S. businesses caused by the required departure of H-1B nonimmigrant workers (for whom the businesses intended to file employment-based immigrant visa petitions) upon the expiration of workers' maximum six-year period of authorized stay.

How long the H-4 employment authorization will remain valid?

Another comment relates to the clarification regarding how long the H-4 employment authorization will remain valid? Specifically, whether or not the employment authorization will match the validity end date of the principal H-1B beneficiary? Per the proposed rule the period of employment authorization, reflected on the card, would be determined at the discretion of USCIS. Generally, USCIS issues EADs with a one-year validity period. DHS has stated in the proposed rule that that EADs valid for two years may be issued in cases where an individual has a pending adjustment application (i.e. filed an Application to Register Permanent Resident or Adjust Status,

Form I-485), but are unable to adjust status because an immigrant visa number is not currently available. USCIS is considering a validity period of up to two years for eligible H-4 dependents which may even match the principal's H-1B validity period.

Is the final rule going to be different from the proposed rule?

In short, it could be but not substantially. The final rule should be "logical outgrowth" of the proposed rule otherwise it could be challenged in a court of law and judicially reviewed under the arbitrary and capricious standard. *See Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985). In general terms, the "logical outgrowth" test focuses on whether the final rule differs so much from the proposed rule that parties were not on notice so as to be able to participate in the comment process and protect their interest.

When the final rule will become effective?

Once the comment period ends, the Agency reviews public comments received and may revise the rule. When the Agency makes its final rulemaking decision, it must again submit the final rule, as it did before publishing the proposed rule in the Federal Register, to the Office of Information and Regulatory Affairs (OIRA)[1] for review. Executive Order 12866 assigns OIRA the responsibility of coordinating interagency Executive Branch review of "significant" regulations before publication. This final OIRA review may involve further negotiations with the Agency, and the Agency must again wait for the conclusion of OIRA review. The period for OIRA review is limited by Executive Order 12866 to 90 days. There is no minimum period for review.[2]

Since the proposed rule has been designated as a "significant regulatory action" (although not economically significant) as per Executive Order 12866, DHS is required to submit the final rule to OIRA for review. The OIRA review could take up to 90 days or longer. OIRA could review it soon as there is no minimum period for review.

Eventually, when an Agency publishes a final rule, generally the rule is effective no less than thirty days after the date of publication in the Federal Register. If the Agency

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[1] The Office of Information and Regulatory Affairs (OIRA) is a Federal office that Congress established in the 1980 Paperwork Reduction Act (44 U.S.C Chapter 35). OIRA is part of the Office of Management and Budget (OMB), which is an agency within the Executive Office of the President.

[2] The review period may be extended indefinitely by the head of the rulemaking agency; alternatively, the OMB Director may extend the review period on a one-time basis for no more than 30 days.

wants to make the rule effective sooner, it must cite "good cause" (persuasive reasons) as to why this is in the public interest. Significant rules (defined by Executive Order 12866) and major rules (defined by the Small Business Regulatory Enforcement Fairness Act) are required to have a 60 day delayed effective date.

Thus, even though the proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996 but because the proposed rule has been has been designated as a "significant regulatory action" (although not economically significant), it will take another 60 days for it to become effective after being published in the Federal Register.

Based on the foregoing, it is hard to predict when the final rule will come out and when exactly it will go into effect. This totally depends on when DHS will send the final rule to OIRA for review and how much time OIRA will take to review it. All in all, this may take at least few months for the final rule to get published in the Federal Register and to become effective.