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NOVEMBER 28, 2016 BULLETIN TO ALL IMMIGRATION CLIENTS

New Employment-Based Nonimmigrant and Immigrant Visa Regulation

On November 18, 2016, the Department of Homeland Security (DHS) issued its Final Rule amending regulations related to certain employment-based immigrant and nonimmigrant visa programs. **The new rule, summarized below, will take effect on January 17, 2017.**

New Employment-Based Visa Regulations

The new employment-based visa regulation will codify, modernize, and improve several aspects of certain employment-based nonimmigrant and immigrant visa programs and is intended to help enable U.S. businesses to retain and develop highly-skilled foreign workers while reducing the burdens of lengthy immigrant visa backlogs on employment-based adjustment applicants. The main provisions of the regulations cover the following areas: (1) clarifying and further implementing certain provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA); (2) improving stability and job flexibility for certain long-delayed foreign workers; and (3) processing certain applications for employment authorization documents (EAD). While many of these changes are primarily aimed at improving the ability of U.S. employers to hire and retain high-skilled workers who are beneficiaries of approved employment-based immigrant visa petitions (Form I-140) and are waiting to adjust status (based on Form I-485), several of the new regulations will also apply to/ benefit employment-based nonimmigrant visa holders. Below please find a summary of several key provisions included in the new Final Rule:

- **Portability and Priority Date Retention for I-140 Beneficiaries**
    - A foreign national whose I-140 petition has been approved for 180 days or more will not have the petition automatically revoked (and lose his/her priority date) if the employer goes out of business or withdraws the petition. However, to adjust status or qualify to transfer the approved immigrant visa under the immigrant visa portability rule, the applicant must still obtain a new approved immigrant visa petition.
    - An I-140 beneficiary whose petition is revoked will be able to use the priority date for a subsequent I-140 petition, unless the reason for revocation was fraud, material misrepresentation, revocation or invalidation of the underlying labor certification, or a material USCIS error.
    - Consistent with current policy, the beneficiary of a pending I-140 petition will be able to port to a new employer after his or her adjustment of status application (Form I-485) has been pending for 180 days or more, as long as the pending I-140 petition was approvable when filed and remained approvable for 180 days after the filing of the adjustment application.

- **New Employment Authorization for Certain Approved Form I-140 Beneficiaries**
    - The new regulation allows nonimmigrant visa holders in E-3, H-1B, H-1B1, L-1 and O-1 status (and their dependents), who have an approved I-140 petition, to apply for a one-year EAD card if their priority date is backlogged and they can show compelling circumstances to justify the need for employment authorization.
    - While DHS has not definitively defined "compelling circumstances," it has suggested that circumstances that fall within this category may include: (i) serious illness or disability faced by the nonimmigrant worker or his or her dependent; (ii) employer retaliation; (iii) substantial harm to the applicant; or (iv) a significant disruption to the employer (i.e., a loss of funding for grants that may invalidate an employee's cap-exempt H-1B status or a corporate restructure that may no longer render an L-1 employee's visa status valid).
    - DHS has also made clear that the fact that the adjustment of status process is taking a long time and an immigrant visa is not yet unavailable does not constitute as a "compelling circumstance" in and of itself.
    - Moreover, it is within the discretion of USCIS to determine whether the principal beneficiary's situation constitutes a "compelling circumstance" that justifies the issuance of employment authorization and, until there are administrative interpretations, the term "compelling circumstances" is still open to interpretation and will be decided on a case-by-case basis, which may involve facts that vary from those situations provided above.

- **H-1B Extensions Beyond the Sixth Year**
    - Consistent with current policy, post-sixth year extensions will be available to foreign nationals who are not currently in H-1B status, e.g., in H-4 status or an adjustment of status applicant, as long as they previously held that status and remain eligible for an additional period of H-1B admission.
    - An H-1B nonimmigrant will become ineligible for a one-year post-sixth year extension if he or she fails to apply for adjustment of status or an immigrant visa within one year of the date on which an immigrant visa becomes available.
    - A one-year post-sixth year H-1B extension will cease to be available if, at the time the extension is filed, the foreign national's labor certification is no longer valid, his or her I-140 petition has been denied or revoked, or an adjustment application or an immigrant visa petition has been approved or denied.
    - An H-1B nonimmigrant whose approved I-140 petition was withdrawn 180 days or more after approval will remain eligible for a three-year extension unless the I-140 petition was withdrawn for fraud, material misrepresentation, revocation or invalidation of the underlying labor certification, or material error by the United States Citizenship and Immigration Services (USCIS).

- **60 Day Grace Periods for E, H-1B, H-1B1, L-1, O-1 and TN Nonimmigrant Beneficiaries**
    - Nonimmigrant visa holders in these classifications (and their dependents) will now be entitled to a 60-day grace period following early termination of employment, provided that their authorized period of stay (as reflected on Form I-94) is valid for at least 60 days after such termination, which will allow them to extend, change or otherwise maintain status or, in the H-1B context, to port to new employment. For those will less than 60 days of authorized stay, the grace period will end on the date the authorized date is set to expire.

- **10 Day Grace Periods for E, H-1B, L-1 and TN Classifications**
    - Nonimmigrant visa holders in these classifications will now be entitled to a mandatory 10 day grace period before the petition or status begins as well as a 10-day grace period after the petition or status ends. Therefore, foreign nationals in these nonimmigrant visa classifications will be able to enter the United States up to 10 days before their status is due to begin and can leave up to 10 days after status expires, allowing them to take action to extend, change or otherwise maintain status, or prepare for departure from the United States.
    - Please note that employment is not authorized during the grace periods, except for H-1B foreign nationals who are porting to new employment.

- **Automatic Renewal of Work Authorization Upon Timely Filing Form I-765 Renewal Application**
    - The new regulation provides for an automatic 180-day work authorization extension to certain foreign nationals who timely file for EAD renewal, including individuals with pending adjustment of status applications. Please note that the automatic extension will not be available to H-4, L-2, or E nonimmigrant spouses seeking renewal of employment authorization.
    - DHS comments to the Final Rule also state that DHS will be adopt a filing policy that permits the filing of a renewal EAD application as early as 180 days (as opposed to the current 120 day period) in advance of the expiration of the applicant's current EAD.
    - The new Form I-9 rule is also updated to permit an I-797 receipt notice to be accepted as a permissible I-9 document, in conjunction with the expired EAD, to re-verify the foreign national's work authorization.

Please also note that while it is not yet clear whether the new Presidential administration will seek to make changes to or withdraw the regulation in 2017, any such action would require notice and an opportunity for the public to provide feedback, which typically takes several months to complete.

We will continue to learn more about the new rule's benefits and implications as we utilize it for/with our clients and are happy to assist you in deciding whether a certain provision applies to an employee as well as how to best implement the new rule in your business.

Please contact any member of the Cohen & Grigsby Immigration Department if you have any questions regarding the above at 412.297.4900. To receive future bulletins and news alerts, please send an e-mail to bulletins@cohenlaw.com