Welcome Changes For Cos. Hiring Foreign Talent: Part 2

By Andrew Greenfield
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Andrew Greenfield

This is the next in a series of articles discussing a new immigration regulation, "The Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," which went into effect on Jan. 17, 2017.[1] The regulation implements various aspects of the American Competitiveness in the Twenty-First Century Act of 2000 (AC-21)[2] and, among other things, recognizes a novel type of employment authorization available to temporary workers facing "compelling circumstances." Part 1 of the series discusses an aspect of the regulation that now makes it easier for U.S. employers to recruit foreign talent that have been laid off by a prior sponsor in the preceding 60 days.

Foreign nationals experiencing long delays in the processing of their permanent residence (green card) cases may now pursue a new type of temporary U.S. work permit designed to bridge a gap in employment authorization while the employee seeks alternate green card sponsorship. U.S. Citizenship and Immigration Services may grant this new type of employment authorization document (EAD) only if the agency determines the foreign employee has compelling personal or professional reasons for seeking new employment.

The new EAD is valid for one year, can be renewed in one-year increments, and is also available to the employee's dependents. In addition to providing eligible applicants the ability to change jobs while an employer pursues green card sponsorship on their behalf, the new EAD also enables U.S. employers to recruit and retain key foreign talent who would otherwise lack work authorization.

Processing Delays Caused by the Green Card Quota System

The green card allocation or quota system is complex. Depending on where an employee was born, the type of job a U.S. employer sponsors him or her to fill, and the date an employer initiates the sponsorship process (known as the “priority date”), the wait for a green card can be extraordinarily long.

Only 7 percent of the annual allotment of 140,000 employment-based green cards can be issued to natives of any one country and their eligible dependents.[3] In addition to this per-country quota, the law imposes a five-tier preference category system that stratifies the annual allocation of green cards and favors foreign nationals with demonstrably high achievement in their fields, as well as multinational executives and managers.[4] The system also gives preference, although to a lesser extent, to those with advanced educational credentials.[5] For natives of certain populous countries with high emigration rates to the United States, like India and China, and/or for employees classified in lower preference categories, the sponsorship process is exceptionally long.

Even where USCIS has approved the request by a U.S. employer — known as an "I-140 Immigrant Petition for Alien Worker" or immigrant petition — to classify an employee within the preference system, the employee and his or her eligible dependents may nevertheless wait years before the government permits them to file applications for adjustment of status, which typically represents the final step in the green card process. Employees who are able to file adjustment of status applications may still find their applications pending for a long time due to the unpredictably of the quota system.

Delays imposed by the quota system are often exacerbated by a requirement that the employer and employee intend for the employee to perform the job described in the immigrant petition as of the date the green card is approved, and for a reasonable period of time thereafter.[6] This can have the practical impact of preventing sponsored employees from pursuing career growth through new job opportunities, including new positions with their green card sponsors. It can also inhibit employers from utilizing staff with advancing skills in new roles and deter them from recruiting foreign talent already in the green card process with other employers. USCIS sought to ease these constraints in promulgating the new regulation by crafting an opportunity for employment authorization in compelling circumstances.[7]

Eligibility for a Compelling Circumstances EAD

In order to qualify for this new type of EAD, the applicant must:

- Be physically present in the United States and maintaining valid E-3, H-1B, H-1B1, O-1, or L-1 visa status, including any applicable grace period, on the date the EAD application is filed using Form I-765;

- Be the principal beneficiary of an approved immigrant petition;

- Establish that he or she cannot be granted adjustment of status or an immigrant visa under the quota system, given his or her country of birth, preference category and priority date;

- Demonstrate that compelling circumstances exist such that USCIS should use its discretion to issue an independent grant of employment authorization; and

- Not have been convicted of any felony or of two misdemeanors.[8]

The regulation also clarifies how employees and their dependents can renew their EADs in one-year increments, either by demonstrating that the same and/or new compelling circumstances exist or that the employee is within one year of eligibility to complete the green card process, based on his or her country of birth, preference category and priority date.[9]

What are "Compelling Circumstances"?

The commentary to the proposed rule provides, “DHS anticipates that a limited number of nonimmigrant workers … will be able to demonstrate *compelling* circumstances …” (emphasis in original).[10] USCIS explicitly declined to define “compelling circumstances” in the final rule, citing the agency’s desire for flexibility and the broad range of convincing circumstances that may be “outside a worker’s control” and, in their totality, warrant a grant of work authorization.[11] The government received numerous comments to the proposed rule asking USCIS to identify certain circumstances as compelling. In response to these comments, USCIS provides useful feedback in the commentary to the rule, stating that burdens associated with “an extraordinary wait,” “job loss,” “an aging out child,” “home ownership,” “notable academic qualifications,” and “dissatisfaction with a position or salary” do not rise to the level of compelling circumstances on their own, but when combined with other factors may be compelling in their totality.[12]

The commentaries to the proposed and final rules illustrate four sets of circumstances the agency may find compelling. The commentary to the final rule brought forward the same four examples depicted in the proposed rule, but for each example added language to emphasize USCIS's desire to broaden the circumstances foreign nationals might put forward for consideration.[13] The first three examples include compelling circumstances arising from a (1) serious illness or disability, (2) employer retaliation, or (3) other substantial harm to applicant.[14]

Unlike the first three examples, which focus on hardships to the sponsored employee, the fourth and final example in the rules' commentaries — "significant disruption to the employer"— recognizes that U.S. employers may also suffer compelling commercial hardships when sponsored employees lose employment authorization and must depart the United States indefinitely for the remainder of the green card process.[15] The commentary to the proposed rule specifically refers to "substantial disruption to a project for which the worker is a critical employee."[16] The commentary to the final rule adds that while project delay alone may not be compelling, when such delays are combined with other factors, such as the cost to train or recruit a replacement for the foreign worker, or harm to an employer's reputation in the marketplace, compelling circumstances may arise.[17]

This fourth example, coupled with USCIS's clear and repeated desire to broaden the variety of circumstances it may find compelling, presents an opportunity for U.S. employers facing the loss of key employees for whom they've invested in green card sponsorship. USCIS depicts two scenarios that might lead to the loss of a foreign worker and prompt a request for an EAD under the new regulation: corporate reorganizations causing international assignees to lose eligibility for L-1 visa status; and funding changes resulting in the loss of an employer's H-1B cap-exempt status and its ability to extend the stay of H-1B employees.[18]

There are other important circumstances where employers may wish to assist current or prospective employees in applying for this new EAD option. They include:

- **Maxing Out L-1 workers**: Unlike H-1B workers, L-1 employees are not eligible to extend their stay in the United States beyond the statutory maximum periods of five or seven years. Unless the employee is a qualifying multinational executive or manager, the path to green card status is lengthy. Depending on when the sponsorship process begins, among other factors, there may be insufficient time to complete the green card process before an employer depletes its ability to extend the employee's L-1 work authorization. When this

happens, an employer must often terminate the employee or ask him or her to work abroad, if possible, for the remainder of the green card process. Now, under the new rule, if an employer is able to demonstrate the significant business harm it will suffer without the employee's continued presence in the U.S., the employer may be able to assist the employee in applying for a temporary, renewable, EAD in order to bridge the gap until the green card process is complete; and

- **Critical New Hires**: A compelling circumstances EAD may also serve as a recruiting tool for employers making mission-critical new hires. The first three examples suggested by USCIS involve significant hardships faced by an employee who is seeking new employment, and the final example illustrates a remedy for employers seeking to retain vital talent. Given the agency's expressed desire to consider the broadest range of compelling circumstances, it is reasonable to expect that the agency would consider seriously the critical and compelling business needs of a U.S. employer in combination with that of a prospective employee for whom no work permit would be available absent compelling circumstances. While it is often possible for an employer to secure an H-1B work permit for prospects already holding H-1B visa status and for whom an immigrant petition has been approved, there are typically few if any options for employers when recruiting candidates holding other statuses, such as L-1, E-1 and E-2 status, as well as H-1B workers employed by institutions of higher education and other nonprofits exempt from the annual H-1B quota. For candidates holding these latter statuses, and whose green card processes have been impeded by the quota system, the ability of a prospective employer to fill a critical need may depend on USCIS issuing the candidate a compelling circumstances EAD under the new regulation.

It is unclear how restrictive USCIS will be in adjudicating these applications, as the option to apply for a compelling circumstances EAD is new and untested. Given the myriad of circumstances leaving employers and valuable foreign national employees without work permit alternatives in the face of an unforgiving green card quota system, this new type of EAD promises to offer relief for those negatively impacted by the most challenging and consequential of these circumstances.

Andrew Greenfield is managing partner at Fragomen, Del Rey, Bernsen & Loewy LLP in Washington, D.C.

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[1] 81 FR 82398 (Nov. 18, 2016).

[2] Public Law 106-313, 114 Stat. 1251 (Oct. 17, 2000).

[3] 8 U.S.C. § 1152(a)(2), INA § 202(a)(2); 8 U.S.C. § 1151(d)(1), INA § 201(d)(1).

[4] 8 U.S.C. § 1153(b), INA Sec. 203(b).

[5] Id.

[6] 8 CFR 245.25(a)(3).

[7] Note i, supra, at 82399.

[8] 8 CFR 204.5(p).

[9] Id.

[10] 80 FR 81900, 81924 (Dec. 31, 2015).

[11] Note i, supra, at 82428.

[12] Id. at 82429, 82430.

[13] Id. at 82428, 82429.

[14] Id.

[15] Id.

[16] Note x, supra, at 81925.

[17] Note i, supra, at 82429.

[18] Id.