Welcome Changes For Cos. Hiring Foreign Talent: Part 1

By Andrew Greenfield
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Andrew Greenfield

This article is the first in a series analyzing a new immigration regulation[1] that went into effect on Jan. 17, 2017. The regulation implements provisions of the American Competitiveness in the Twenty-First Century Act (AC21), which Congress passed in 1999. The new regulation provides for greater flexibility in the ways U.S. employers can recruit and sponsor foreign professionals for temporary visas and U.S. permanent residence (the "green card").

It is now easier for U.S. employers to recruit foreign talent that have been laid off by a prior sponsor in the preceding 60 days. When employers need to recruit the skills and services of these recently unemployed professional workers, the rule makes the process faster and less costly.[2]

Foreign professionals working temporarily in the United States, along with their dependents, were previously required to depart the U.S. immediately upon termination, regardless of the reason. No grace period applied. Thus, upon the cessation of their employment, these professionals had no time to finalize their affairs, were unable to remain in the country lawfully in order to seek other employment or change to another visa status, and immediately became removable from the United States. While U.S. Citizenship and Immigration Services (USCIS) has the discretion, upon request by a new employer, to excuse a gap in lawful status when a sponsored individual has already left his or her prior job, the agency considers these requests for good cause on a case-by-case basis and historically has been reluctant to forgive status gaps of more than 30 days.[3] As a result of this discretion, employers were uncertain as to their ability to recruit and hire foreign professionals who were recently terminated by their previous employers.

With the implementation of this new rule, when a foreign professional loses his or her job, USCIS will in most cases[4] grant him or her a 60-day grace period, during which he or she can remain legally in the United States and seek sponsorship by a new employer. This benefit also naturally extends to U.S. employers seeking to fill open positions, who may now enhance their recruiting efforts to include foreign professionals still in the U.S. and whose employment terminated in the preceding two months. In the past, when a foreign professional was a recruiter's top candidate and he or she had already left a previous job, employers were burdened with the risk of delays in the onboarding process while a new work permit was adjudicated, as well as with the costs and delays of international travel in order to allow the employee to apply for a new visa and/or cure the gap in status through departure and re-entry.

Despite this new benefit for both foreign professionals and U.S. employers, the new 60-day grace period lacks clarity in a key respect, especially with regard to H-1B and other petition-based workers. Specifically, according to the new regulation, a foreign professional may only use the grace period one time during each authorized validity period, for up to 60 consecutive days.[5] It is unclear how this will apply operationally. For example, when a petition-based worker (e.g., H-1B) is terminated, hired by a new employer, and then USCIS approves a petition for the new employer sponsor, the rule leaves uncertain whether the H-1B worker would benefit from another 60-day grace period if later terminated by the new employer.

Even for professionals whose U.S. work authorization is not based on an approved petition, such as TN, E-1 and E-2 professionals, there is ambiguity as to which validity period the one-time 60-day grace period applies. If, for example, the relevant validity period is the authorized period of stay notated on an individual's I-94 record, then it would appear that an employee could "gain" eligibility for a new 60-day grace period simply by leaving the U.S. and re-entering, which would grant the employee a new authorized period of stay.[6] As this may not be what USCIS intended when promulgating the new rule, it remains unclear in what instances USCIS will deem a foreign professional eligible for a subsequent grace period, particularly given that the new rule authorizes USCIS to limit or shorten the 60-day grace period as a matter of discretion.[7]

Another uncertainty raised by the 60-day grace period is how it would apply to foreign professionals who are terminated and then rehired by the same employer. This could be especially problematic for employers of H-1B, H-1B1 and E-3 professionals, as these employers must adhere to wage obligations imposed by the U.S. Department of Labor.[8] Under DOL regulations, these employers may be held liable to pay terminated foreign professionals their full

salaries until the employer formally withdraws the approved petition. While the new rule would allow an employer to terminate an H-1B worker for up to 60 days and then rehire him or her without jeopardizing the worker's legal status, given its DOL obligations — and the presumption that employers don't wish to pay employees after terminating them — the employer could not simply have the employee resume the previously approved employment, since DOL rules require the employer to withdraw the prior petition to avoid continuing wage liability. Instead, to effect the rehire, the employer would need to file a new petition and, if approved, the employee would potentially benefit from another 60-day grace period if there were a subsequent termination.

The one-time grace period may be clearest in the L-1 visa context. An L-1 intracompany transferee may enter the United States pursuant to, for example, a three-year approved petition. If the foreign professional's employment is terminated before the petition expires, the worker would remain in status for up to 60 days. If the employer elected to rehire the worker during this time frame, it could do so without the need to file a new petition, so long as the originally granted three-year petition had not yet expired. But if the employer terminated the L-1 worker once again during this three-year period, no grace period would be available, and — perhaps ironically — the worker would fall out of legal status immediately upon termination.

In addition to the 60-day grace period, the new regulation also brings other temporary visa categories; i.e., E, L-1, O-1 and TN in line with a different type of grace period that has been part of the H-1B regulations for many years.[9] Specifically, the regulations now explicitly permit professionals in these visa categories to enter the United States up to 10 days before their approved employment begins, and to remain in the United States for up to 10 days after the approved period of employment expires. This 10-day grace period does not apply to individuals whose employment terminates prior to the period of employment authorized by the government. It is important to note that the 10-day grace period cannot be combined with the 60-day grace period, although USCIS in its discretion may permit this in limited circumstances.[10]

During this 10-day grace period, foreign professionals and their dependents are considered to be in valid status, but are not authorized to work. In other words, although a foreign professional may enter the United States up to 10 days before their petition validity date, they may not begin working until the start date shown on their approved petition.

With this new regulation, U.S. employers have an opportunity to recruit and hire essential staff without the potential costs and delays involved before the AC21 rule was implemented. As with

any new regulation, the practical impact of the new grace period, including how the agency will further interpret the "one-time" limitation in policy and practice, will play out over time, but in the meantime, the new rule is welcome news for U.S. employers and foreign nationals alike.

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

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[1] Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 FR 82398, Nov. 18, 2016.

[2] 8 CFR 214.1(l)(2)

[3] 8 CFR 214.1(c)(4)

[4] The new rule allows USCIS to “eliminate or shorten” the 60-day grace period in its discretion. See 8 CFR 214.1(l)(2)

[5] Id.

[6] While petition-based workers like H-1B’s may argue that they are entitled to a new 60-day grace period every time they depart and re-enter the U.S. with a new I-94 record, the regulatory reference to “validity period” is most consistent with the way the agency refers to a petition validity period, rather than a period of admission or period of authorized stay, which is how USCIS typically refers to the period shown on an I-94 card.

[7] Supra note 4.

[8] 20 CFR 655 Subparts H & I

[9] 8 CFR 214.1(l)(1)

[10] Supra note 1, see DHS response at pg. 82437.