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News & Types: Immigration Update

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Practices: Immigration

USCIS ISSUES DRAFT OF "SAME OR SIMILAR" MEMORANDUM

The US Citizenship and Immigration Services (USCIS) has issued the draft of a policy memorandum clarifying when a position is in a "Same or Similar" occupation for purposes of green card portability. Green card portability was an important provision of the American Competitiveness in the Twenty-First Century Act (AC21) enacted in October 2000. However, the law left many unanswered questions as to when a new position would qualify for green card portability. This new draft memorandum was one of the many initiatives proposed by President Obama in November of 2014 to clarify the law. The draft memorandum is open for public comment until January 4, 2016. Instructions for commenting are available at: http://www.uscis.gov/outreach/feedback-opportunities/draft-memoranda-comment/draft-memorandum-comment. Below is a summary of the draft memorandum:

1. The memorandum will supersede all previous memoranda issued by the USCIS that discusses when two jobs qualify as same or similar.
2. Reiterates that the legal standard that the green card applicant must meet is "preponderance of the evidence" meaning "more likely than not."
3. Stipulates that USCIS officers should look at all available evidence, such as the position's duties, skills, experience, education, training, licenses, wages, and anything else submitted by the applicant in determining eligibility for green card portability.
4. Applicants that establish that the Standard Occupational Classification (SOC) code of the former position and the new position are exactly the same should be eligible.
5. Applicants that establish that the former position and the new position are not in the same SOC code, but are in the same broad occupational code (fourth and fifth digits of the six digit SOC code) should be eligible, except in cases where the two positions do not share the same duties, experience or education.
6. Clarifies that career progression is permitted, but is to reviewed under the totality of the circumstances. Managerial or supervisory roles that are primarily responsible for supervising individuals in same or similar jobs as the former position should qualify.

7. Applicants may establish that two positions that "share essential qualifies or have a marked resemblance or likeness" will qualify even if they are not within the same major SOC code.
8. Wages can be used to determine eligibility, but are not by themselves, sufficient proof to establish eligibility.

DOS ISSUES CABLE ON H-1B CHANGE OF WORKSITE PROVISIONS

The Department of State (DOS) has issued a cable on the precedential decision, Matter of Simeio Solutions, LLC. The cable reiterates the USCIS memorandum issued on July 21, 2015, available here: http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf. Specifically, the cable advises consular officers that an H-1B employer must file an amended petition for an employee that is changing work locations to a new geographical area. The cable clarifies that "geographical area" means a normal commuting distance from the worksite or within the same Metropolitan Statistical Area (MSA). Also, the cable indicates that the H-1B employee can begin working at the new worksite upon the employer's filing of the amended or new H-1B petition and does not have to wait for an approval of the petition. The cable also indicates the scenarios when an amended/new H-1B petition is not needed, for example, worksite changes within the same geographical area, short-term placements, and non-worksite locations. The cable outlines what a consular officer should and shouldn't do when adjudicating H-1B visas. This includes not verifying the Labor Condition Application or worksite location of every single visa application, but only when inconsistent information is presented at the time of application. Lastly, the cable outlines an H-1B employer's obligations after the Simeio ruling which were stipulated in the USCIS memorandum and which are summarized here: http://www.masudafunai.com/showarticle.aspx?Show=8516.

DHS ISSUES IMPORTANT PROPOSED REGULATION

The Department of Homeland Security (DHS) and the USCIS have issued a proposed regulation covering a variety of important programs, including employer sponsored green cards, work visas and employment authorization documents (EAD). Below is a summary of the proposed regulations provisions:

I-140 IMMIGRANT PETITION

1. **No automatic revocation of I-140 immigrant petitions** approved for 180 days or more when the employer withdraws the petition or goes out of business. Exceptions: fraud, material misrepresentation, USCIS error or revocation/invalidation of labor certification. The beneficiary could use the I-140 petition for green card portability and H-1B extensions beyond six years. However, the beneficiary will have to find a new employer to file a new I-140 or, in cases of green card portability, a new offer of employment.
2. **Preservation of Priority Dates** as long as the I-140 immigrant petition was approved. Exceptions: fraud, material misrepresentation, USCIS error or revocation/invalidation of labor certification.

WORK VISAS

1. Establishment of a **one-time 60 day grace period** for E-1, E-2, E-3, H-1B, H-1B1, L-1 and TN nonimmigrants at the end of their employment during which the nonimmigrant would not be eligible

to work. The DHS retains the discretion to cancel or shorten the grace period. This period would allow workers to find new employment, settle their affairs, leave the country, change to a different status, etc. This period would also cover their dependents.

2. Employment authorization for E-3, H-1B, H-1B1, L-1 and O-1 nonimmigrants **for a one-year period granted** on a discretionary basis if they can demonstrate **compelling circumstances**. This would include medical emergencies, employer retaliation, substantial harm, disruption to the employer, etc. In addition to showing compelling circumstances, to qualify, an applicant would have to demonstrate that they are the beneficiary of an approved I-140 in EB-1, EB-2 or EB-3 employment based preference category and that their priority date is not current.
3. Extension of **10-day grace period** currently enjoyed by H-1B workers to the following other nonimmigrants: E-1, E-2, E-3, L-1 and TN. This grace period allows an H-1B worker to enter the United States 10 days before the initial start date on the approved petition. Additionally, a 10-day grace period can be added by US Customs and Border Protection to the end of the petition validity. During these grace periods, the nonimmigrant cannot work in the United States.

EMPLOYMENT AUTHORIZATION DOCUMENTS (EADS)

1. **Extension of employment authorization for 180 days** for certain categories so long as 1) the I-765 application is requesting the same employment authorization category, 2) the application is filed before expiration of the EAD or is still pending, 3) the applicant remains eligible for employment authorization after the expiration of the current EAD, and 4) the employment authorization is not dependent on any other approval/process. This extension will only be available to 15 categories of employment authorization, including adjustment of status applicants. Most importantly, this extension will **not be available to the employment authorized dependent spouse categories, such as H-4, L-2 and E-2/-1.**
2. **Elimination of 90-Day Processing Period for EADs** and regulation allowing for issuance of interim EADs.

AC21 PROVISIONS

1. Incorporation of various provisions from the American Competitiveness in the Twenty-First Century Act (AC21) enacted in October 2000 regarding **three-year H-1B extensions** beyond six years for extensions **under 104(c),** including clarifying: 1) three year-extensions are available until the priority date becomes current; 2) eligibility even though the H-1B nonimmigrant is not physically present in the United States at the time of the petition filing; 3) eligibility in cases where a different employer files the H-1B petition than the employer that filed the I-140 petition. Lastly, the regulations clarifies that this provision does not apply to dependent spouses and children in H-1B status.
2. Incorporation of various provisions from AC21 **regarding one-year H-1B extensions** beyond six years for extensions under **106(a) and (b)**, including clarifying: 1) eligibility even though the H-1B nonimmigrant is not physically present in the United States at the time of the petition filing; and 2) eligibility in cases where a different employer files the H-1B petition from the employer that filed the

I-140 petition. Additionally, the new regulation will incorporate current policy that the H-1B petition must demonstrate that the individual previously held H-1B status, that the labor certification or immigrant petition was filed over 365 days before the six-year maximum period of stay, as well as when the labor certification or immigrant petition cannot be used. Importantly, the new regulation stipulates that each new one-year extension beyond the six years will "re-set" the six years. Any subsequent one-year extensions must demonstrate that a valid labor certification or immigrant petition was filed 365 before that new six year period. The regulation clarifies that the benefit does not apply to dependent spouses and children and that the H-1B nonimmigrant must file the green card applications within one year of their priority date becoming current. The clock is reset during times of priority date retrogression.

3. Incorporates current policies regarding **green card portability** for EB-1 (except extraordinary ability), EB-2 and EB-3 petitions, including in cases of self-employment. The regulations will also provide definitions for "same or similar." Additionally, individuals with I-485 applications have been pending for at least 180 days and whose employers go out of business will continue to be eligible for green card portability. Furthermore, the regulations calls for the creation of a supplement to the Form I-485 which will request information the second job offer. The supplement will have to be accompanied by a statement outlining the new position and requirements signed by the applicant and the new employer, description of how the positions are same or similar and a copy of the I-485 receipt to demonstrate that it has been pending for at least 180 days.

H-1B SPECIFIC PROVISIONS

1. Creates an exception for H-1B petitions for occupations that require a **license**. These petitions are eligible for approval in situations where the license cannot be issued without issuance of a social security number or employment authorization. Additionally, confirms eligibility for H-1B status of unlicensed individuals working in occupations generally requiring a license in states that allow employment in that occupation under the supervision of a licensed individual.
2. **Harmonizes the regulations with current policies regarding H-1B portability**, specifically, that portability is only available to nonimmigrants lawfully admitted, that have not worked without authorization after admission, and are currently in valid status. Furthermore, employment authorization for H-1B workers will continue until the petition is adjudicated. Additionally, the regulation clarifies that portability is only available to those physically present in the United States in H-1B status. Lastly, for "bridge petitions," approval of the last petition will depend on approval of all interim petitions (unless the H-1B worker's H-1B status has not expired).
3. Formalizes an H-1B worker's ability to **"recapture" time** spent outside of the United States.
4. Clarifies several provisions regarding **H-1B cap-exempt workers**.
    a. "Employed at" includes situations where the "majority of" the H-1B worker's duties are performed for the qualifying employer and these duties "directly and predominantly" promote the goals of the qualifying employer.

   b. Adoption of the definition of "institution of higher education" from the Higher Education Act for cap-exemption, thereby excluding for-profit entities.
   c. Adoption of definitions for "nonprofit research organization" and "governmental research organization" as well as "nonprofit entity".
   d. Broadening of the definition of "affiliated or related nonprofit entities" to include "nonprofit entities that have entered into formal written affiliation agreements with institutions of higher education" and can meet one of two requirements. First, there has to be a working relationship between the educational institution with the purpose of engaging in research or education. Second, a primary purpose must be to "directly contribute to the research or education mission" of the educational organization.
   e. H-1B workers that stop working for their cap-exempt employer, that have not previously been counted toward the cap, will be subject to the statutory cap.
5. Incorporates **whistleblower protections** for H-1B workers, including the discretionary grant of an employment authorization extension to allow the worker to obtain other employment when credible documentary evidence of the retaliation is presented.

REAL ID TO BE ENFORCED IN ILLINOIS

A law enacted a decade ago is about to make a lot of people very unhappy. At some point in 2016, driver's licenses and identifications issued by the State of Illinois will no longer be valid for federal identification purposes. This includes the identifications accepted by the Transportation Security Administration (TSA) needed to pass through airport security as well as enter federal buildings. The only other forms of identification that would be accepted are a US passport, US military identification, permanent residence card or a trusted traveler card such as Global Entry or NEXUS. Unfortunately, only four in ten Americans have a valid US passport.

In 2005, Congress enacted the REAL ID Act which required states to increase security on issuance of driver's licenses and identification cards. All states were required to comply by May 11, 2008. At that point, Illinois indicated that it would comply with REAL ID. However, it, along with several other states, obtained several extensions of the implementation of the law. These extensions were granted as long as they promised to comply with REAL ID and they met certain benchmarks. The initial extensions were granted to nine states: Alaska, California, Illinois, Missouri, New Jersey, New Mexico, South Carolina and Washington, as well as Puerto Rico, Guam and the US Virgin Islands, and are due to expire on January 10, 2016. As of January 6th, the DHS has issued extensions to Alaska, California, New Jersey and South Carolina until October 10, 2016.

Due to the Paris and San Bernardino terrorist attacks, the federal government is making implementation of REAL ID a priority. Illinois' last extension expired in October 2015 and the Department of Homeland Security (DHS) has indicated that it will not grant a further extension of REAL ID to the State. DHS has indicated that it will give Illinois a 120-day notice before enforcement of REAL ID begins.