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USAIE applauds United States Citizenship and Immigration Services (USCIS) for issuing a final rule clarifying a wide variety of issues with employment-based immigration, specifically concerning H-1B visa petitions and permanent residency petitions. Many of these clarifications were previously addressed by USCIS through a series of non-binding policy memoranda over the past 15 years, with no definitive rules in place. The new rules offer foreign national entrepreneurs some clarity in their immigration options, and thus the USCIS action is welcome.

The final rule takes effect on January 17, 2016. Read it here: https://www.federalregister.gov/documents/2016/11/18/2016-27540/retention-of-eb-1-eb-2-and-eb-3-immigrant-workers-and-program-improvements-affecting-high-skilled.

For international entrepreneurs, the changes are mostly positive. A summary of the key changes is below:

10-Day Grace Period to Enter and Leave the U.S.
H-1B workers will now receive an automatic 10-day grace period before and after their employment. That was possible before, but depended on a U.S. Customs and Border Protection officer making a subjective decision to allow an extra ten days on the I-94 entry card.

60-Day Grace Period after a H-1B Job Ends
More importantly, H-1B workers now have a 60-day grace period after a job ends. For example, if an international entrepreneur is working a "day job" on an H-1B while trying to set up a company, and the entrepreneur loses that "day job," she can still stay in the United States in H-1B status for up to 60 days. That gives time to transition to another H-1B or other visa at the new startup. Any flexibility in the visa system is beneficial to entrepreneurs.

EAD Issued with Approved I-140 with "Compelling Circumstances"
It is now possible for people with an approved I-140 immigrant visa petitions to receive an Employment Authorization Document (EAD) if there are "compelling circumstances." This is particularly good news for Indian and Chinese entrepreneurs who have an approved National Interest Waiver green card petition but whose priority date is not yet current. An unrestricted EAD offers more flexibility than an H-1B, which is valuable because startups evolve rapidly. The

H-1B requires a specific salary, and that may hard for a startup with uneven cash flow. For example, consider an entrepreneur working for a startup on an H-1B, with an approved labor certification and I-140 (the first two steps of a green card). If the startup restructures or goes through a "major change," the entrepreneur may now be able to apply for an EAD based on "compelling circumstances." The new rule seems to imply that anyone with a National Interest Waiver approved will qualify for this "compelling circumstances" work card. NOTE: those who use an EAD rather than H-1B status may be creating an issue when it comes time to adjust status to permanent residency, as maintaining a valid nonimmigrant status is required in most, but not all, cases.

Automatic 180-Day EAD Extension

The new rule provides a 180-day automatic extension when an EAD extension application is timely filed before the current EAD expires. This will be a huge benefit because USCIS often takes more than 90 days to adjudicate such extension requests. NOTE: This automatic extension does not cover EADs for spouses of L-1, J-1, and E-1/E-2 workers. Moreover, there is no automatic extension for advance parole, even though this privilege to enter the United States is noted on the EAD.

Changing Jobs while in H-1B Status/Green Cards Pending

The new rule also clarifies key provisions about being able to change jobs while in H-1B status, change employers toward the end of the green card process, and for Chinese and Indian employees, to keep old "priority dates" from a prior green card application filed with a previous employer.

Cap Exempt H-1Bs

A particularly positive part of the new rules is that USCIS has kept intact the regulation permitting private companies to obtain a cap-exempt H-1B when it locates its H-1B employee "at" a university, a nonprofit research organization, or a government research organization. This could include university-owned properties such as incubator or accelerator space. The rule clarifies that the H-1B employee must spend a majority of his/her time while located at the cap-exempt organization, and the employee's job duties must "directly and predominantly" further the goals of the organization. The rule provides examples of higher education, nonprofit, and governmental research.

Concurrent Employment

One negative change for international entrepreneurs relates to "concurrent" employment. The rule permits an entrepreneur who obtains a full-time or part-time cap-exempt H-1B sponsored by a college or university to then also obtain a concurrent cap-exempt H-1B to work concurrently for a private startup. In the past, based on formal guidance, if the college or university job ended, the H1-B for the startup could still continue until its expiration. This provision has been the basis of a wide variety of campus programs for entrepreneurs. Under the new rule, USCIS reserves the right to cancel the second H-1B for the startup, reasoning that the individual is no longer exempt from the cap. It is unclear at this time whether USCIS will actively revoke the

concurrent H-1B, so for now USAIE recommends continuing cap-exempt employment in all concurrent employment situations. Clearly such an individual will want to have the employer file for a cap-subject H-1B the following April 1, because if that petition should win the H-1B lottery, the employee will no longer tied to the concurrent employment by the university.

Overall, USAIE welcomes the new rules, and hopes that regulations for the new “entrepreneur parole” category are next to come. Please contact info@usaie.org if you have any questions.