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New rules on employment authorization documents

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Final rules relating to certain employment-based immigrant and nonimmigrant visa programs were published by the Department of Homeland Security on Nov. 18, 2016. These rules, which went into effect on Jan. 17, 2017, also make changes to the processing of employment authorization documents, or EADs, by: (1) automatically extending employment authorization for certain individuals who file timely applications to renew their EADS; and (2) eliminating the regulatory provision that requires the U.S. Citizenship and Immigration Service to adjudicate EAD applications within 90 days of submission. Both of these changes are described below.

Automatic EAD Extensions

Revised regulation 8 CFR § 274a.13(d) provides an automatic 180-day extension of an EAD for those individuals who: (1) file a request for renewal of their EAD prior to its expiration date or during the filing period described in the country-specific requirements related to obtaining Temporary Protected Status-related EADS; (2) request a renewal based on the same employment authorization category under which the expiring EAD was granted, or on an approval for TPS even if the expiring EAD was issued based on being a TPS applicant; and (3) either continue to be employment authorized incident to status beyond the expiration of the EAD or are applying for renewal under a category that does not first require the adjudication of an underlying benefit request.

Currently, DHS has identified 15 employment categories that meet these conditions, as follows:

- Refugees
- Asylees
- Parents or dependent children of aliens granted permanent residence under INA § 101(a)(27)(I) of the INA (relating to certain Panama Canal Company and Panama Canal Zone employees)
- Individuals admitted to the United States as citizens of the Federated States of Micronesia, the Marshall Islands or Palau under agreements between the United States and those nations
- Grantees of withholding of deportation or removal
- Temporary Protected Status grantees

- Individuals who have properly filed applications for TPS and who have been deemed prima facie eligible for TPS under 8 CFR § 244.10(a) and have received an EAD as a “temporary treatment benefit”
- Individuals with properly filed applications for asylum or withholding of deportation or removal
- Applicants for adjustment of status under INA § 245
- Applicants for suspension of deportation under INA § 244 (as it existed prior to April 1, 1997), cancellation of removal under INA § 240A, or special rule cancellation of removal under § 309(f)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996
- Individuals who have filed applications for creation of record of lawful admission for permanent residence (registry)
- Applicants for legalization pursuant to INA § 210
- Applicants for legalization pursuant to INA § 245A
- Applicants for adjustment of status pursuant to Life Act § 104
- Approved self-petitioners under the Violence Against Women Act, or VAWA, and qualified children of approved VAWA self-petitioners, under the employment authorization category “(c)(31)”

Once this new regulation goes into effect, EAD renewal applicants in any of the categories listed above will benefit from an automatic extension of employment authorization for 180 days while the renewal application is pending. Legal advocates should be prepared for requests from clients to explain this new provision to current and new employers.

Elimination of 90-Day Processing Timeframe

The current text of 8 CFR § 274a.13(d) directs USCIS to adjudicate employment authorization applications within 90 days of filing and to issue interim employment authorization documents if the EAD adjudication is delayed beyond the 90-day period. As of Jan. 17, 2017, this regulation will be eliminated. Although many comments were submitted to DHS in opposition to the elimination of this provision, USCIS reasoned that the impact of the elimination is softened by the new provision providing automatic extensions to certain renewal applicant categories. DHS has also noted an intent to adopt a more “flexible filing” policy regarding the filing of renewal applications, allowing for earlier filings up to 180 days in advance of the applicant’s current EAD. Departures from the current policy limiting renewal filings to 120 days before EAD expiration will be based on factors including USCIS “workload, resources, filing surges, processing times and specific regulatory provisions that mandate specific filing windows.” Filing time periods for renewal EAD applications will be posted on the USCIS website.

As these new provisions go into effect, we encourage our affiliates to alert us to any problems, complications or issues in need of clarification related to automatic EAD extensions, delays in EAD adjudications and posting of EAD renewal filing periods.

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