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Immigration Client Alert

- *USCIS issues new regulations regarding H-1B and Employment Authorization Documents*
- *USCIS adopts as binding a new court decision that helps entrepreneurs obtain permanent residency*

Below are two press releases from US Alliance for International Entrepreneurs (www.usaie.org), of which Jeff Goldman is a founding member. The press releases highlight important changes for our clients.

If you have any questions, please contact Jeff Goldman at jeff@jgilaw.com

USAIE { U.S. ALLIANCE FOR INTERNATIONAL ENTREPRENEURS }

USAIE comments on USCIS Final Rules on Employment-Based Immigration

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. 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.

USAIE { U.S. ALLIANCE FOR INTERNATIONAL ENTREPRENEURS }

USAIE applauds new immigration decision to help entrepreneurs get green cards (Matter of Dhanasar)

This week USCIS fulfilled another of its 2014 goals to reform employment-based immigration for high-skilled employees. The Secretary of Homeland Security has designated as precedent the Administrative Appeals Office's decision in Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016), Int. Dec. 3882 (December 27, 2016).

Precedent decisions are binding on DHS employees in all future proceedings involving the same issue or issues. The original goal in 2014 was to clarify the criteria for qualifying for a green card in the national interest waiver (NIW) category. USAIE applauds DHS for this action.

In particular, Dhanasar opens the NIW category to entrepreneurs. The decision is worth reading because it reviews the history of NIWs and what did and didn't work in the past. NAFSA has provided a very useful extract of the relevant parts of the decision's new three-prong "national interest" standard on the NAFSA website.

INITIAL ANALYSIS & KEY POINTS
USCIS is cautiously optimistic that this new decision will make NIW green cards more accessible in general, and specifically for entrepreneurs. However, the standards are still relatively broad so it will take some time to see how this actually plays out.

We note a few aspects of the new decision:

1. The case allows using the person's degrees and experience. This benefits highly educated entrepreneurs.
2. The case allows teaching as evidence. So an entrepreneur who also teaches in his or her

field will now get a boost in the NIW category.

3. The benefit to the U.S. interest can be local, such as helping to create jobs in a depressed area or creating a specialized local product. Entrepreneurs can argue the impact of their work on the economy, starting regionally, and then adding national supply chain implications if applicable.
4. Dhanasar specifically notes that entrepreneurial work can lead to an NIW. This has been on the USCIS website for a couple of years, but now it is even clearer. The decision notes that "evidence that the endeavor has significant potential to employ US workers or has other substantial positive economic effects... may well be understood to have national importance."
5. The decision also notes that the entrepreneurial venture does not need to succeed: "many innovations and entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution. We do not, therefore, require petitioners to demonstrate that their endeavors are more likely than not to ultimately succeed." The business just needs to be "well positioned to advance the proposed endeavor." This stresses the importance of a high quality business plan for entrepreneur NIW cases.
6. The decision requires an NIW applicant to show that it would be "impractical" to go through the normal labor certification process. Labor certification, or PERM as it is also called, is the most common form of employer-sponsored green card. But for entrepreneurs, it can be difficult because labor certification requires a full time job offer at a competitive salary and evidence that the company has the ability to pay that salary.

   As always, NIWs are a chance for creativity in showing a foreign national's talents. USAIE members have been successful in representing NIW applicants in the past, and look forward to representing even more people using this new case.