



Summary of January 2017 Regulation Regarding EB Modernization

1. EAD Renewal Applications Automatically Extend Work Authorization

- a. EAD renewal applications now have automatic extensions that extend work authorization for up to 180 days beyond the expiration of the EAD if: the renewal application is filed timely and it requests renewal based on the same category as the original EAD. This automatic extension works similar to H-1B extensions in that, as long as the EAD extension is filed before the current EAD expires, it does not need be approved in order to have continued work authorization beyond the expiration of the original EAD card.
- b. The automatic extension rule does not apply to EAD cards filed on the basis of H-4, L-2, and E-3 status. The employees who will benefit most are those with EAD cards based on a pending I-485 Application to Adjust Status.

2. Ability to Change Jobs when I-485 Application to Adjust Status has been Pending for at least 180 days

- a. In the past foreign nationals may have submitted what has been called a "porting packet" when they changed employers while their I-485 Application was pending. That packet may or may not have been accepted and reviewed by the USCIS, leaving employees to wonder if the job change complied with the USCIS regulations. Now the USCIS has developed a special form, called a J Supplement, to notify them of such job changes. Currently, there is no USCIS filing fee to file the Supplement J Form, but the USCIS reserved the right to change that at any time.
- b. The USCIS has defined the term "Same or Similar" Occupational Classification to determine if a foreign national is eligible to change job. This definition, however, is not very specific and it is still advisable to thoroughly review any job changes in advance of the change, to see whether it meets the USCIS standards.

3. Continued Immigration Benefits with a Withdrawn I-140 Approval

- a. If foreign national has an approved I-140 Petition with a prior employer that is withdrawn, the foreign national is able to maintain their priority date on a future Green Card application and also seek H-1B extensions beyond 6 years on the basis of such I-140 Approval.

4. 60 Day Grace Period

- a. The USCIS instituted a formal grace period of up to 60 days for certain nonimmigrant visa classifications: E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN. Foreign nationals in these visa categories shall not be considered to have failed to maintain status solely on the basis of cessation of employment for up to 60 consecutive days, or the end of their period of authorized stay, whichever is shorter. This means that if someone is between jobs, they have 60 days from end of employment to file a petition change status to another visa category or to file a change of employer request for a new employer. If the current I-94 expires before the 60 day grace period, then the I-94 expiration trumps and is the 'deadline' by which the foreign national must leave the U.S.



5. H-1B Cap Exempt Status

- a. The definition of cap exempt status for nonprofit entities affiliated with institutions of higher education has been updated to also include the following types of affiliations:
 - i. A nonprofit entity that has entered into a formal written affiliation agreement with an institution of higher education which establishes an active working relationship between the nonprofit entity and the institution of higher education for purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education.
- b. This new regulation also, unfortunately, has removed the 'grandfather' clause that allowed organizations to claim cap exempt status by virtue of the fact that they had been previously approved for cap exempt status. Thus, entities who have utilized the grandfather clause to claim cap exempt status for a long time need to make proper plans to deal with these changes as new petitions and extensions could potentially prove to be problematic. This may require a re-examination of formalized agreements with institutions of higher education or may require certain individuals to subject themselves to the H-1B cap. Either way, it will require careful evaluation to determine the best path forward.

6. EAD Card for Compelling Circumstances

- a. The USCIS has provided an opportunity for individuals in certain visa categories (E-3, H-1B, H-1B1, O-1, or L-1) to obtain EAD cards if they are able to show compelling circumstances. In order to qualify, the foreign national must be in an approved nonimmigrant status, have an approved I-140, have a retrogressed priority date, AND prove to the USCIS that there is a compelling circumstance that justifies the issuance of the EAD.
- b. EAD's issued in these instances will be approved for one year and spouses are also eligible to obtain an EAD card.
- c. Individuals that take advantage of this compelling circumstances EAD need to be mindful of the consequences of such action. Loss of the underlying nonimmigrant status may impact the ability to file to extend the nonimmigrant status or an I-485 Application Adjustment of Status. These factors make this otherwise seemingly positive immigration benefit less effective or beneficial in many circumstances.