PULLMAN &COMLEY

More Executive Action on Immigration Reform: Work Authorization For H-4 Spouses

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In a new draft rule notable not only for its substantive content but also for the fact that it represents another incremental immigration reform measure undertaken by executive action in lieu of stalled Congressional legislation, the U.S. Citizenship & Immigration Service is proposing to grant some spouses of H-1B visa holders employment authorization of their own under the spouses' derivative H-4 visas. The rule would apply to spouses of certain H-1B holders in the process of seeking employment-based permanent resident visas – colloquially known as "green cards" – in the United States. Specifically, if a person in H-1B status is the beneficiary of an approved employment-based permanent residence petition, or the H-1B holder has been granted an extension of his or her H-1B status under the American Competitiveness in the Twenty-first Century Act of 2000, then the proposed rule would permit the H-1B visa holder's spouse to obtain employment authorization during the spouse's corresponding stay in H-4 status.

The need for the rule arises in part from the enormous backlogs in many categories of employment-based permanent resident visas. Because those backlogs can leave H-1B workers whose green card petitions have already been approved waiting more than a decade to actually claim permanent resident status, they also leave the visa holders' trailing spouses in unemployable limbo if the spouses choose to remain in the United States during the wait.

In recent debates over comprehensive immigration reform, advocates of reform have pointed out that logistical problems of this kind throughout the immigration system are a barrier to national economic competitiveness, and the administration's announcement of the new proposed rule echoes this theme. USCIS says it is promulgating the rule in order to "foster[ ] the goals of attracting and retaining high-skilled foreign workers and minimizing disruption to U.S. businesses employing H-1B workers that would result if such workers were to leave the United States."

This current proposal is narrower, however, than an H-4 reform provision in the "Gang of Eight" comprehensive immigration reform bill that has been stalled in Congress since last year. In its amended form passed by the Senate last summer, that bill that would extend work authorization to all H-4 spouses, not just spouses of those H-1B visa holders with approved permanent resident petitions (although it would give the administration discretion to suspend such authorization for nationals of countries who do not extend reciprocal work rights to U.S. citizens residing in their jurisdictions). While the Gang of Eight provision would give H-4 spouses no wider work rights than those that the law already extends to spouses of many other

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temporary foreign workers, including L-1 and E-1 visa holders, it has nonetheless been a source of some controversy in its own right in the wider immigration reform debate.

The administration's choice to limit the proposed work permission to a narrower set of H-4 spouses also means that even though the proposed rule does not change visa procedures for H-1B employees themselves, it may indirectly become a matter for human resources attention. This is because a trailing spouse of an H-1B employee will not be able to take advantage of the new work permission until an employer's I-140 petition for the lead spouse has been approved. Married H-1B employees are likely to feel, then, that any permanent resident petitions their employers are considering pursuing for them have taken on increased urgency, and should be pursued earlier in the employees' H-1B stay periods.

The public comment period on the proposal expired on July 11, 2014, but the specific date on which the proposed rule would take effect, should it go forward, is not yet known.

Tags: Immigration, Visas