DHS Publishes Long-Awaited Rule to Improve Employment-Based Immigration Process for Select Nonimmigrant and Immigrant Visa Categories

On November 18, 2016, the Department of Homeland Security (DHS) published its long awaited final rule aimed at improving aspects of several employment-based immigrant and nonimmigrant visa classifications. Going into effect January 17, 2017, the rule codifies many of USCIS' prior policies and practices related to the American Competitiveness in the Twenty-First Century Act (AC21), enacted in 2000; and the American Competitiveness and Workforce Improvement Act (ACWIA), enacted in 1998. Specifically, the rule intends to benefit U.S. employers seeking to retain highly-skilled immigrant and non-immigrant foreign workers while also increasing job flexibility for those workers. In addition, the rule increases transparency and consistency in the application of DHS policies in relation to AC21 and ACWIA.

Estimated Impact:

The rule includes several provisions affecting foreign workers, who are waiting to become lawful permanent residents, and their employers. Notably, the rule:

- Clarifies the criteria USCIS will consider in determining whether foreign workers awaiting employment-based permanent residency may change positions or employers without jeopardizing their prospective lawful permanent residence. AC21 grants employees with an adjustment of status application pending for 180 days or more the flexibility to change employers without requiring a new labor certification so long as the new job is in the "same or a similar occupational classification". The final rule provides an expansive definition of what is a "same or similar occupational classification", and indicates that employers may notify USCIS by filing a newly created Form Supplement J.

- Outlines the circumstances under which an I-140 petition that has been approved for 180 days or more will remain valid despite an employer withdrawing the petition or going out of business. Specifically, an approved I-140 will remain valid unless revoked by USCIS for: material error, fraud or willful misrepresentation of a material fact, or revocation/invalidation of the labor certification accompanying the petition.

- Allows for a pre-employment and post-employment 10-day grace period for a broad range of nonimmigrant classifications, including E-1, E-2, E-3, L-1 and TN. Previously the 10-day grace period was extended primarily to the H-1B nonimmigrant classification.

- Establishes a grace period for up to 60 consecutive days for individuals in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1 or TN status. The grace period allows highly skilled workers to seek new employment and employers to facilitate changes in employment for current and prospective highly skilled workers. The time period may also be used by workers to wind up their affairs in the U.S. after their employment ends.

- Eliminates the 90-day adjudication period for various EADs, but in turn has created provisions allowing for the automatic extension of EADs for up 180 days so long as the renewal is based on the same employment authorization category (or is for an individual approved for Temporary Protected Status (TPS)), is timely filed and the beneficiary remains eligible throughout the duration of the EAD. Notably L-2s and H-4 are excluded.

As noted above, this new rule will benefit both employers and highly skilled foreign workers by providing clarification and additional flexibility. If you are a U.S. employer and would like to review your immigration policies in light of the new rule, please reach out to our office.

Need more info?

As always, if you have any questions or concerns, please contact your immigration lawyer at Guberman Garson LLP (416 363 1234).