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## **Trump Administration: H-1B and H-4 EAD concerns**

*update:* As of 1/9/2018, the USCIS denied any truth to the rumors about any changes to the reading of AC21 in regards to H-1B extensions (i.e. H-1B extensions beyond the 6th year).

Our firm has received a number of inquiries about H-1B and H-4 EAD uncertainties in the Trump administration. DHS has indicated that it may make changes to H-1B and H-4 EAD regulations. With respect to *possible* H-1B rulemaking, there are rumors that DHS may publish "tougher" H-1B rules defining what qualifies as a specialty occupation, what constitutes an employer-employee relationship, and modifying prevailing wages. However, *nothing has yet been published* with respect to possible H-1B changes. For the H-4 EAD, DHS recently published in its Fall 2017 Regulatory Agenda that a *proposed* rule to discontinue the H-4 EAD is in the works. However, **rulemaking can take a long time**. There are typically several steps between the government's notification of a proposed rule and the publication of final regulations.

Below is what you need to know:

### **H-1B Petitions**

- H-1B eligibility is governed by laws and regulations. Again, there presently are **no official changes** to H-1B laws and regulations. H-1Bs are available for professional specialty occupations that require a minimum of a Bachelor's degree. For an overview of the Non-immigrant H-1B visa, please visit [https://docs.wixstatic.com/ugd/31e12d\\_009e087bd4b54204bdd855ae55fe3d2f.pdf](https://docs.wixstatic.com/ugd/31e12d_009e087bd4b54204bdd855ae55fe3d2f.pdf).
- In the absence of new regulations, the USCIS is nevertheless looking much more closely at job descriptions, particularly for entry-level positions. If the position is not clearly a professional specialty occupation, the USCIS is issuing Requests for Evidence, and is more likely to deny a borderline case, where in the past such a case may have been approved (i.e. lower level computer programmers, study abroad coordinators, marketing coordinators, etc.) In my office, we have not seen issues with straightforward professional occupations (architects, engineers [including software engineers], economists, architects, physicians, teachers, biologists, etc.), and we have been able to successfully respond to Requests for Evidence. However, vague job duties or unusual occupations are more likely to be questioned than in the past.
- The USCIS is also looking more closely at consulting positions, where a worker is contracted by one employer to provide services for another employer. While this situation has always raised red flags as to whether the legally required employer/employee relationship exists, the USCIS appears to be requesting evidence more often than in the past.
- Under prior agency policies, the USCIS would give deference to H-1B extensions for the same job with the same employer; meaning if the petition was approved previously, it would be approved again (absent clear USCIS error for the first approval). Under the current administration, this "deference" policy has changed, and the USCIS will review an H-1B each time it is filed to assure it meets statutory and regulatory requirements.

In summary, if your position is clearly a professional/specialty occupation (and you do not work offsite for another employer), at this point, the H-1B extension should be routine. We will update our website if/when the DHS publishes anything official that would impact current regulations. Until and unless such documents **are actually published**, possible changes are only rumors, and my office is unable to provide a response to concerns that is not merely speculation.

*If we were to speculate*, we can say that we were encouraged by the 2017 High Skilled Worker regulations published in January. For those regulations (which took nearly two decades to be implemented, by the way), the Department of Homeland Security largely codified existing USCIS policies; meaning, they turned USCIS memoranda and guidance into official regulations. If that were the case, *if we were to speculate*, we would expect lower level IT jobs and program coordinator-type jobs to be even more difficult or removed from eligibility under new H-1B regulations. We would also expect more rigidity for off-site workers (i.e. consultants performing work for another employer), and possible new prevailing wage determination guidance. However, we cannot know for certain what the DHS has up its sleeve until it publishes proposed regulations, after which time, there will be a notice and comment period, and other steps before any new regulations become final. **There is also a rumor that the Trump administration will try to change AC21 H-1B extensions (i.e. H-1B extensions beyond the 6th year). An agency has power to change regulations but not the law. The AC21 law states that H-1Bs shall be granted in one-year increments where the LC or I-140 has been filed 365 days before the end of the 6th year. While the three-year extension language is not quite so strong, if we were to speculate, we would anticipate quite a fight from a rulemaking perspective as well as in the courts should DHS try to limit the three-year extension for individuals with approved I-140's with no available visa (see above update from 1/9/2018 as this rumor has now been denied by the USCIS).**

#### **H-4 EAD Applications**

- **H-4 EAD** eligibility is governed by regulations, which became effective in May of 2015. There are currently **no** changes to H-4 EAD regulations; however, DHS published a notice that it is in the proposed rulemaking stage of *amending* regulations to remove the H-4 EAD option.
- There has been a lawsuit pending since 2015 by *Save Jobs USA* which states that the DHS did not have authority to grant the H-4 EAD in the first place, and that the regulation harms US workers. The lawsuit was dismissed, then appealed. The Trump administration has failed to file a brief and has asked for several extensions to get a brief on file.

In summary, there is some **future** risk to the H-4 EAD program, but even very fast rulemaking can take several months. Moreover, although not impossible, it would be **very odd** for **approved** H-4 EADs to be revoked or rescinded. *If we were to speculate*, we would expect little **imminent** risk for H-4 EAD spouses. For upcoming H-1B/H-4 extensions, individuals may want to consider filing as early as possible (6 months in advance of the expiration date) and to use premium processing to obtain the H-4 EAD as quickly as possible. H-4 spouses who have not yet filed for the H-4 EAD may want to consider filing as soon as they are eligible (i.e. when the H-1B spouse is the beneficiary of an approved I-140 petition).

*The above information is a high-level summary of information available as of 1/2/2018. Individuals should consult with a qualified immigration specialist regarding whether new regulations or USCIS policies may impact a particular case.*