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Avoiding Employment Disruptions With E-3 And H-1B1 Visas

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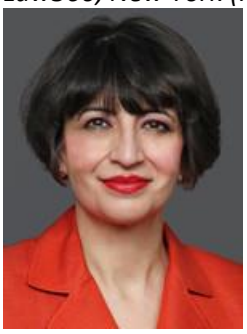
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Recent rulemaking by the U.S. Department of Homeland Security has updated U.S. immigration regulations for employers with workers from Australia, Singapore and Chile. The regulations, effective on Feb. 16, 2016, allow workers in the E-3 and H-1B1 visa categories to continue working for 240 days following initial petition expiration for the duration of their employers' timely filed extension petitions. The revised rules align these visa categories with the grace period for extensions afforded to H-1B and other nonimmigrant visa categories, and further allow U.S. employers to avoid disruptions in employment authorization caused by visa processing delays.

Employers seeking to hire highly skilled workers from Australia, Singapore and Chile have the special advantage of petitioning in visa categories not subject to highly competitive visa limits such as the annual cap on H-1B visas. Special bilateral treaty provisions between the U.S. and Australia, Singapore and Chile, respectively, allow U.S. employers to petition for nationals from these countries in the E-3 (Australia) and H-1B1 (Singapore and Chile) visa categories, which are similar to H-1B visas for qualified professionals. While each of these visa categories is capped at an enumerated limit, rarely is this limit approached in any given year. Thus, U.S. employers can apply for E-3 and H-1B1 visas throughout the year, rather than in an initial rush due to visa scarcity.

The E-3 and H-1B1 visas, however, cannot be filed via premium processing, which ensures processing by U.S. Citizenship and Immigration Services within 15 days, and may be extended no more than six months in advance of visa expiration. Therefore, many employers have sustained disruptions in the work authorization of workers in these visa categories as a result of USCIS processing delays of six months or more for E-3 and H-1B1 extension petitions. For instance, the USCIS recently listed processing times for regularly processed H-1B extension petitions is approximately 180 to 210 days.

To date, if the E-3 or H-1B1 extension petition remains pending beyond the worker's petition expiration

date, the worker was forced to terminate U.S. employment and depart the U.S. until the extension petition was approved by the USCIS, resulting in substantial disruption to the employer, the employee and the employee's family. Alongside the primary visa holder, the dependents of E-3 and H-1B1 workers were forced to depart the U.S. during the pendency of the extension petition.

The revised regulations from the DHS will avoid disruptions in work authorization, as well as the attendant disruption in employees' personal lives caused by delays in processing of extension petitions, as of the Feb. 16, 2016, effective date of enactment. The new rules will align the E-3 and H-1B1 visa categories with more frequently used nonimmigrant visa categories, including H-1B, L-1, O-1, and TN, which already benefit from automatic 240-day extensions in work authorization during the pendency of extension petitions.

The E-3 and H-1B1 visa categories provide for several limitations, however, that are not experienced by H-1B visas. Most significantly, change of status to another nonimmigrant visa category or adjustment of nonimmigrant to legal permanent residency is not permitted. While a worker may depart the U.S. and reenter in another visa category at any time, the seamless processing in-country through the change or adjustment of status procedural vehicles is not permitted.

Nonetheless, employers seeking to employ workers in the H-1B visa category should strongly consider the E-3 and H-1B1 visa categories for workers from Australia, Singapore and Chile. These visa categories are relatively underutilized by U.S. employers, and employers may petition for work authorization for these highly skilled workers throughout the year, rather than at the start of a visa filing period based on visa limits.

For instance, in 2015 nearly 233,000 petitions were filed in the first five days of filing for the 65,000 regular H-1B petitions and the 20,000 H-1B petitions reserved for graduates of U.S. master's programs, available each year. The annual cap on available H-1B visas resulted in roughly 64 percent of H-1B petitions being returned for lack of available visa numbers. The 2016 filing period, which begins April 1, is expected to result in a similar, highly competitive petitioning process, with an excess of petitions returned to employers.

The E-3 and H-1B1 visas also offer other benefits, including the ability to be renewed indefinitely without a limitation on a worker's time spent in these visa classifications. While the visa categories do require maintaining ties to the home country, there is no formal upper limit on the number of renewals or maximum years that an individual may hold the classification.

Employers are encouraged to consider contingency plans well in advance of H-1B visa filing. With visa numbers readily available, the E-3 and H-1B1 visa categories may offer such an alternative.

The text of the updated E-3 and H-1B1 regulations is available here.

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