

# GMS Flash Alert

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## United States - USCIS Final Rule Contains Significant Changes for "AC21" Provisions

At the end of 2016, the United States Citizenship and Immigration Services ("USCIS") issued a final rule<sup>1</sup> that affects several provisions of *The American Competitiveness in the Twenty-First Century Act* ("AC21")<sup>2</sup>, which was enacted in October 2000. The Act contained several provisions that brought benefits to U.S. employers and foreign workers alike, which are now affected by the final rule, amongst those "portability" for green card applicants and H-1B holders, I-140 petition validity, establishment of grace periods for certain non-immigrant categories, and updated rules for Employment Authorization Card applications.

The rule's provisions are due to come into effect on January 17, 2017.

We highlight below the most significant changes introduced by the new rule.

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### WHY THIS MATTERS

The provisions in the new rule seek to alleviate some of the difficulties faced by foreign nationals while trying to change jobs and progress in their careers, with an existing employer or an altogether new employer. They also introduce more flexibility and opportunities for employers in respect of attracting and hiring foreign nationals.

Generally speaking, the changes aim to foster the appeal of the United States as a destination for skilled and talented individuals.

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## The Rule's Provisions in More Detail

### Retention of Employment-Based Immigrant (I-140) Petitions and Priority Dates

- Approved I-140 petitions, which have been approved for 180 days or more, will not be automatically revoked if the company that filed the I-140 petition withdraws the petition or the business terminates.
- The priority date of a revoked I-140 petition can be ported or, in other words, transferred to a subsequent I-140 petition, unless the reason for revocation was due to fraud, material misrepresentation, invalidation, or revocation of the underlying labor certification or material USCIS error.
- The beneficiary of an I-140 petition and I-485 adjustment of status application, which has been pending for 180 days or more, will be eligible to port or transfer to new employment in the same or similar position as long as the I-140 petition was approvable when filed and remains approvable for 180 days after the filing of the petition.

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### KPMG NOTE

The new rules seek to alleviate some of the difficulties faced by foreign nationals while trying to change jobs and progress in their careers, with an existing employer or an altogether new employer. The rule also provides additional clarity as to when an I-140 petition has been revoked and when a priority date can be ported. The effect of the new rule is to allow foreign nationals career progression and certainty, thus making the United States a more desirable destination for skilled workers.

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### H-1B Portability under AC21

The H-1B portability provisions discuss the ability of H-1B beneficiaries to commence employment with a new employer upon filing of a non-frivolous petition. Further, it permits "bridging" – when a beneficiary files multiple successive H-1B port (transfer) petitions. In order to comply with the rule for a second successive port (transfer) while the first port is pending, the I-94 card with the original employer must remain unexpired, the petition must have been timely filed, and the beneficiary must have maintained status throughout.

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### KPMG NOTE

This should provide more flexibility for U.S. companies to more readily adjust to needs in the market and for skilled beneficiaries to change jobs.

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## New Grace Periods for Specified Non-immigrant Categories

- **10-day grace period for E-1, E-2, E-3, L-1, and TN beneficiaries** – This provision “bookends” a grace period onto a validity period, allowing beneficiaries of the above-referenced categories to enter the U.S. 10 days prior to commencing employment and 10 days after ending employment in the country.
- **60-day grace period for E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN** – This creates a grace period of 60 consecutive days during *each validity period* for beneficiaries of the above-referenced categories. The provision includes employees whose employment ends prior to the validity end date.

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### KPMG NOTE

The 10-day grace period could allow workers in those enumerated categories more flexibility to settle in at the commencement of a validity period, as well as wrap up business at the conclusion of a validity period. The 60-day grace period may encourage both employers and workers to capitalize on opportunities.

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## Extended Validity for Renewal of Employment Authorization (EAD) and New EAD Eligibility Rules

- Removes the regulatory requirement that EAD cards be processed in 90 days or less, as well as the issuance of “interim” EAD cards.
- Adds provisions for automatic extension of timely filed EAD renewal applications for up to 180 days past the expiry date. EAD validity will be automatically extended if the following conditions are met:
  - Renewal EAD application must be based on the same authorization category as the previously issued EAD card (some exceptions for TPS applicants);
  - Renewal application is filed prior to the expiration of the current EAD card (again, some exceptions for TPS); and
  - The applicant continues to be eligible for the employment authorization past the expiration date of the current card and independent adjudication is not a prerequisite for continued/extended work authorization.

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### KPMG NOTE

While the exact process for I-9 verification in these situations is unclear, we anticipate that an I-765 Receipt Notice showing that the application was timely filed and within the same category, along with the original expired EAD card, will be sufficient to verify the employee.

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## More on Extended Validity for Renewal of Employment Authorization (EAD) and New EAD Eligibility Rules

- New provisions for allowing principal and dependent beneficiaries of approved EB-1, EB-1, and EB-3 immigrant visa petitions to apply for EAD cards while waiting for an immigrant visa to become available under “compelling circumstances”:
  - To qualify for this category, the applicant must demonstrate compelling circumstances, and the category is only granted at the discretion of the reviewing officer;
  - Compelling circumstances is not defined *per se*, but the rule does outline four (4) examples of compelling circumstances.

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### KPMG NOTE

Even despite the current 90-day processing requirement, EAD processing times frequently range between 90 to 120 days, which often cause gaps in work authorization for eligible applicants and can seriously disrupt the business of the U.S. employers that wish to hire them. Please note that **work authorization gaps may still occur** – especially when an individual is applying for an EAD card for the first time under a particular authorization category. By removing the 90-day processing requirement, delays for processing renewal applications is anticipated. However, the automatic extension of work authorization will definitely help several classes of EAD applicants (H4 and L2 applicants however will not benefit from the new automatic extension provisions). We encourage anyone applying for EAD work authorization – whether as an initial or renewal application – to work closely with your immigration counsel to determine the best strategy to avoid or mitigate disruptions from gaps in work authorization.

The “compelling circumstances” EAD card does expand work authorization for specific individuals who might otherwise fall through the cracks. The four (4) instances of compelling circumstances defined by the rule are as follows: (1) Serious Illness or Disability of the Applicant or Dependent(s); (2) employer retaliation against the non-immigrant worker; (3) other substantial harm to the applicant; and (4) significant disruption to the employer.

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### FOOTNOTES:

1 For the final rule, as published in the *Federal Register*, see: <http://www.cilawgroup.com/wp-content/uploads/2016/11/I-140-Final-Rule-Federal-Register.pdf>.

2 The Act aimed to create opportunities for businesses and encourage growth by expanding flexibility for non-immigrant workers who had started the employment-based immigration process.

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## Contact us

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