

GMS Flash Alert

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United States - Details on Rules for Employment Authorizations in Compelling Circumstances

Under new rules¹ in the United States, an individual may apply for the "Compelling Circumstances" Employment Authorization Document (EAD), if he or she meets the following eligibility requirements:

- 1) Is present in the U.S. with the E-3, H-1B, H-1B1, O-1, or L-1 status;
- 2) Is the principal beneficiary of an Approved I-140 Petition;
- 3) Demonstrates that no Immigrant Visa is available due to priority date back-logs (as of the date the EAD is filed); and
- 4) Demonstrates "compelling circumstances."

WHY THIS MATTERS

Foreign nationals who are in the process of obtaining lawful permanent residence ("LPR") sometimes face constantly expanding back-logs to processing their applications. As a consequence, these individuals and their dependents may lose their work authorization to continue working in the U.S. through no fault of their own. The Final Rule attempts to provide a stop-gap measure to assist specific categories of foreign nationals in different hardship circumstances by providing them with Employment Authorization while they continue to wait for eligibility to apply for LPR status.

Obtaining Employment Authorization under Compelling Circumstances

If granted, the EAD card will be issued in one-year increments, with the possibility to renew, provided that:

- 1) the foreign national can still demonstrate compelling circumstances, and a back-logged priority date without an immigrant visa available; **OR**
- 2) the difference between the priority date and the 'Final Action' date is less than one year (without need to demonstrate compelling circumstances).

Compelling Circumstances

The term "compelling circumstances" is not specifically defined, but the rule provides four (4) examples of persons who meet the compelling circumstances requirement:

- 1) **Serious illness or disability of the foreign national (or dependents)** – In this example, the foreign worker or his dependent is facing a serious illness or disability that may require moving to a different area for treatment or substantially changing employment due to new limitations of the ailment or disability.
- 2) **Employer retaliation against the foreign national** – If the worker can show that she is involved in a dispute or is the subject of retaliation based on the employer's alleged illegal or dishonest conduct (including harassment), this would be a potential ground for compelling circumstances.
- 3) **Other substantial harm to the foreign worker** – This example is sort of a catch-all, and appears to be intentionally generic. The examples raised in the commentary indicate that the totality of circumstances will be considered, including the well-being of the dependents. Note that approaching a visa status "max" date (the date after which the visa is no longer valid), or other circumstances that are generally considered within the control of the foreign national, will not be considered as compelling circumstances.
- 4) **Significant disruption to the employer** – If, for example, the beneficiary is unable to timely extend or change nonimmigrant status, and the loss of the worker would cause the petitioning employer significant disruption, this would constitute compelling circumstances. The comments cite in particular L-1 beneficiaries who, due to restructuring, no longer are eligible for L-1 status. Another example is an H-1B worker employed by a cap-exempt employer, who, due to restructuring, is no longer cap-exempt.

How to Apply

Foreign nationals interested in filing for this type of relief must file the form Form I-765 with the accompanying fees and follow all relevant form instructions. Individuals seeking this form of relief are encouraged to contact an immigration attorney prior to applying, and if possible, having an attorney file the application on their behalf.

KPMG NOTE

As the diversity of the examples given for compelling circumstances demonstrates, United States Citizenship and Immigration Services (USCIS) recognizes that there are situations which foreign workers may face with regard to continuing their valid working status while awaiting their permanent residence applications. It appears that USCIS acknowledges these challenges may unfairly prohibit foreign workers from continuing to work in the U.S. and/or

continue to pursue their LPR applications altogether. Thus, the Final Rule provides limited relief for specified foreign workers who can demonstrate compelling circumstances.

FOOTNOTE:

1 See the [Final Rule](#), as published in the *Federal Register*.

For prior coverage, see GMS [Flash Alert 2017-002](#) (January 6, 2017).

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Contact us

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