

GMS Flash Alert



Immigration Edition

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United States - Proposed Rule Ending Work Authorization for H-4 Visa Holders

In line with the U.S. administration's plans to end the ability of spouses of H-1B visa holders to be granted work authorization¹, the Department of Homeland Security (DHS) has submitted a proposal to rescind the H-4 spousal work authorization regulation to the Office of Management and Budget (OMB) for review.²

Following the federal rule-making process, the work authorization for H-4 spouses is expected to be rescinded later this year.

WHY THIS MATTERS

The rescission of the H-4 employment authorization will have significant consequences. According to data compiled by the U.S. Citizenship and Immigration Services (USCIS), over 104,000 H-4 spouses have been issued employment authorization under the current rule. As such, thousands of people will be adversely affected.

This change disproportionately impacts H-4 dependents of those born in India and the People's Republic of China ("China") as individuals born in these countries are most commonly eligible for use of the H-4 EAD for their dependents.

In terms of immediate impact, it is important to note that USCIS will continue to accept and adjudicate new H-4 EAD applications and renewals until the new rule is finalized and implemented.

Context

The U.S. Department of State sets quota limits on the number of immigrant visas issued for each country. Demand for immigrant visas from individuals born in India and China is significantly greater than the supply provided by this quota. Accordingly, immigrant visa priority dates for individuals born in these countries are commonly retrogressed and they

must wait years before they can apply for permanent residence. Individuals born in countries other than India and China are usually eligible to apply for permanent residence concurrently or soon after the filing of their employment-based immigrant petitions. However, those born in India and China rely on the H-4 EAD as the only opportunity for employment authorization while they wait for their priority date to become current.

Since May 2015, certain H-4 dependent spouses of H-1B nonimmigrants who are seeking employment-based lawful permanent resident (LPR) status have been eligible to apply for employment authorization. This rule was intended to alleviate personal and economic hardship experienced by the families of H-1B nonimmigrants (who have reached certain stages in green card sponsorship) by allowing their spouses to work while they await finalization of the green card process – a process that can take upwards of 10 years, for example for individuals born in China or India. Prior to the above, H-4 visa holders, sometimes as skilled as their H-1B spouses, were not authorized to work.

Recent Steps to Remove Employment Authorization for H-4 Dependent Spouses

On December 15, 2017, DHS announced its intention to propose a new rule entitled “Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization,” thereby rescinding work authorization for certain H-4 spouses.³ On February 20, 2019, DHS sent for OMB review, a new proposed rule to overturn the current Obama-era initiative.

Process

The OMB has up to 90 days to review the proposal, before issuing a formal notice of the proposed rule by publication in the *Federal Register*; however, the rule may clear the OMB review stage sooner. The publication would then be followed by a period for public comments before a final rule is issued.

Organizations and individuals will have 30-60 days to provide feedback during this comment period.

After the public comment period ends, DHS will review the feedback it receives and prepare a final rule, which will be issued to OMB for review and publication so that the H-4 EAD may be rescinded. Details of the proposal remain unknown at this time.

KPMG NOTE

Affected employers and employees should begin planning for this potential loss in work authorization by exploring independent employment authorization options.

At present, the proposed rule does not have any immediate impact on H-4 spouses. USCIS will continue to accept and adjudicate new H-4 EAD applications and renewals until the new rule is finalized and implemented. Foreign nationals who plan to apply for or renew an EAD under the H-4 program should do so as soon as they are eligible.

KPMG LLP Law in Canada will endeavour to keep readers informed of developments as and when they occur.

FOOTNOTES:

- 1 For related coverage, see GMS [Flash Alert 2018-014](#) (January 18, 2018).
- 2 You may view the rule ("[Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization](#) ") on the Office of Management and Budget Web site.
- 3 For related coverage, see GMS [Flash Alert 2018-014](#) (January 18, 2018).

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