The Proposed I-140 EAD Rule - FAQ's

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Submitted by Chief Editor on Jan 11th 2016

ANSWER:

Question 1: Redo the PERM or just the I-140. If redoing the PERM again then what's new in this regulation?

Answer: After 180 days, you can extend H-1 even if 140 is withdrawn.

Question 2: It seems that there is no easy provision for EAD/AP for approved 140 applicants. So is there any point in waiting for this rule or Should I consider Visa stamping is only option for traveling outside US? Please suggest as I waited for a year or long thought they are going to give AP.

Answer: Your observation about EAD/AP is correct- no easier. I will be surprised if USCIS changes these proposed rules in any significant manner when they finalize.

Question 3: If I have consumed my 6 years of H-1B and I have approved I-140. If I go to India and of some reason I got stuck in India. After a while I want some other employer to file my H-1B petition other then with approved I-140 employer. Do the new employer can apply for my new H1b cap exempt petition based on approved i-140 from my old employer. OR New H-1B petition from the new employer comes under H-1 cap count?

Answer: You have raised two separate issues. One, the I-140 can be used to extend your H-1 through ANY employer, if it is not withdrawn within 180 days of approval. Two, you are exempt from H-1 cap if your H-1 was approved any time within the last 6 years.

Question 4: Is there any provision for promotions internally within a company that filed the petition and the I-140 is approved more than 180 days previously?

Answer: These regs will only clarify (I am not sure they really do that) what "same or similar" jobs are. That concept is crucial when your I-140 has been approved and I-485 has been pending 180 days. At that time, you can accept a same or similar job anywhere, including within the same company, and NOT have to start your green card all over again. That comes under the topic of AC21 portability.

Question 5: Is direct portability of I-140 across multiple employers, ever possible. because I-

140 is a property of the Employer and not the Employee (unlike 1-485) ?.Can we suggest any other creative options, of working around this legal hurdle. a. Can PERM be made portable across multiple employers. So employees donot have to go through the hassle of the PERM filing, repeatedly. This will save, almost 4 months of pre PERM filing effort and another 8-10 months of PERM processing window.

b. Or, can the I 140 be made an Employee?s property after 180 days it is approved. If that can be done then portability of the same may be legally possible across different Employers

Answer: The Priority date IS the "property" of the employee, NOT of the employer. So, an employee can port it to any job, anywhere, any number of times. But, I do not think they are excusing us from having to refile the PERM.

Question 6: Does the 60 day grace period is accepted in this case; H-1 Ext filed before expiry of I-94, then Current H-1 and I-94 expired, then H-1 Ext denied. Can we use 60 day grace period for filing new H-1 with new employer? In what cases does this 10 day validity before and after petition dates is used. The 60-day grace period appears to apply only in those cases where an approved H-1 employment abruptly comes to an end. The proposed regs say, upto 60 days may be given: "on the basis of the cessation of the employment on which the alien?s classification was based".

Answer: The 10 days allow you enter (but, not work) upto 10 days before the date your "validity period" (approval of petition) begins, and another 10 days to leave the USA (but, not work), after that period ends.

Question 7: Emp A - I-140 Approved and Moved to Emp B. Got i-140 with Emp B and priority date retained. submitted Emp A Experience letter while fling PERM. Now I want to move to Emp C. Do I still need to get experience letter from Emp B? If I am not able to get experience letter from Emp B, Can Emp C file PERM. if so and filed new PERM and I-140 with Emp C, Can I still retain priority date even though if its not same or similar job?

Answer: There are two fundamental principles that you need to apply to your case:

1. Priority date transfer does NOT require that your jobs must be same or similar.

2. Experience letters are NOT required for priority date transfer or retention.

Question 8: Now that it is clear that there is almost nothing much in the so called reform, how can the immigrant community represent themselves forcefully, while the public comment period is in place? I understand that each one of us can go and put our comments, but is your firm, or someone else, planning to represent us? For lack of proper words, these so called reforms are a piece of trash, and only done to pretend as if reforms are taking place. It could not be worse actually.

Answer: There is a limit on what USCIS can do without action from the Congress. You can certainly write your comments and several organizations will place their comments on the record as well. NORMALLY, USCIS does not change the rules much once they have been proposed. I think US immigration policy in "skilled" immigration is distressingly short-sighted. Our adopted country does not recognize the value brought in by us.

Question 9: My I-140 already withdrawn/revoked after 180 days of initial approval date. Now after implements new rule, will it apply for my case to extend my H-1 beyond 6 years?

Answer: I cannot say for sure whether USCIS intends to apply these rules retroactively. I hope they do.

Question 10: Can you comment on what date will this become effective ? Is it after the comment period is over?

Answer: The effective date is unpredictable. Usually, it is a few months after the comments are over.

Question 11: I need to clarify regarding the I-140 EAD for H-4. If the principal applicant has I-140 approved but the priority date for that category and country in the visa bulletin is more than 10 years back, Can the dependents, such as H-4, apply for I-140 EAD without the documentation for compelling evidence? If no, what are the examples of compelling evidence?I think the regulation does very little incremental for the EB categories. As mentioned, it provides clarification rather than provide more flexibility to the household or family of EB categories. I am disappointed with the revisions that have been made.Also, the compelling evidence was not required till now. What happens to those H-4 EADs which were issued since USCIS started applications from May 27, 2015? How would those H-4 EADs which are approved on the basis of I-140 approval of principal applicant be dissolved?Also, if the spouse moves from H-4 to H-4 EAD. Can he/she move from H-4 EAD to H-1B or any other non-immigrant category? Does the form I-539 allows movement among all categories?

Answer: H-4 EAD does NOT require compelling evidence. That is a different rule: http://www.immigration.com/blogs/form-i-140-form-i-765/h-4-ead-rule-cont [2]...

I-594 does allow movement between all categories. H-4 to H-1 is definitely no problem. I agree; I am not too thrilled with the regs. But there is a limit to what Pres. Obama can do, folks.

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Unless the context shows otherwise, all answers here were provided by Rajiv [28] and were compiled and reported by our editorial team from comments and blog on immigration.com [29]

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Links:
[1] https://immigration.com/faq/adjustment-status-ac21-aos-portability-ead-aos-eb1-green-card-eb2-green-card-eb3-green-card-form
[2] http://www.immigration.com/blogs/form-i-140-form-i-765/h-4-ead-rule-cont
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