

CORPORATE COUNSEL

H-1B Spouses Now Can Work in the US Too

*By Rebekah Mintzer,
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A little less than one month remains before the door closes on this year's round of applications for H-1B visas, the certifications reserved for highly skilled workers—often in tech jobs—who want to work in the United States. These visas are in high demand, and may be even more desirable in the near future thanks to a new rule from the federal government that will benefit H-1B workers with families.

U.S. Citizenship and Immigration Services recently announced that as of May 26, some spouses of H-1B visa holders will be able to apply for authorization to work in the United States. The U.S. Department of Homeland Security's decision to extend this opportunity to H-1B spouses, who currently hold H-4 visas, hopefully will help companies attract talented foreigners who once balked at the idea of bringing their families to a country where their spouses could not have careers.

The new rule, the finalization of which was part of President Barack Obama's executive actions on immigration issued in November, allows H-4 dependent spouses to apply for work authorization if the primary H-1B holder meets one of two standards: the H-1B grantee either must be the principal beneficiary of an approved Form I-140—a permanent residency petition—or must have H-1B status under the American Competitiveness in the Twenty-First Century Act of 2000.

This law allows foreign workers seeking permanent residency to stay beyond the six-year limit on H-1B visas. USCIS estimated that the number of H-4 dependent spouses eligible to apply under the new rule will be substantial. It may reach 179,600 applicants within the first year and 55,000 per year in the years following.

Matt Faustman, co-founder and CEO of UpCounsel, a web platform that matches companies with contract attorneys, works with many tech companies that seek to fill their ranks with foreign talent. He told CorpCounsel.com that he sees this move by DHS as very positive, but not enough to fulfill demand.

“It’s a good step because it reduces the barriers and the hurdles to convince someone to come over here,” Faustman said. “But ultimately, you’re still bumping up against the caps on H-1B visas.” The number of H-1Bs issued per year typically is limited to a cap of 65,000, a number far exceeded by demand in recent years. During the last round of petitions, USCIS received around 172,500 petitions during the first five business days of submissions. Allowing spouses to work won’t solve this discrepancy between supply and demand.

“It’s like putting a cork in a dam that’s already overflowing,” said Faustman, who reported that his company’s attorneys are dealing with an abundance of H-1B-related work. “But it’s definitely a step in the right direction.”

As a result of this change, companies looking to hire H-1B visa holders will have to be cognizant of the immigration processes that these potential employees will be going through to get work authorization. Ian Macdonald, a shareholder at Greenberg Traurig, told CorpCounsel.com that employers can’t forget about the costs of getting authorization for workers from outside the U.S. in light of the rule change.

Under U.S. immigration law, companies don’t have to pay for processing the Form I-140 or the H-4 work authorization. They can leave that cost to the applicant and their family. However, said Macdonald, that doesn’t

mean that companies shouldn't consider paying, as having the employer take care of legal and administrative fees associated with these applications can be a good incentive to attract high-quality foreign talent in competitive job markets. "Companies are going to have to do a cost-benefit analysis as to whether they decide to pay for that or pass that on to the H-1B worker and their spouse," he noted.

If the company does decide it wants to foot the bill for the I-140 application, it should be ready for the possibility that the H-1B holder will ask for premium processing, which makes the review faster, but more expensive. "What we expect to see is the increased pressure from H-1B employees to expedite the green card process for them," Macdonald said. When H-1B workers become aware that the new rules allow spouses to get work authorization through the H-1B holder's I-140, they will surely want to get the wheels in motion with USCIS as soon as they can.

Another important issue to consider, according to Macdonald, is that of timing, if the number of H-1B spouses seeking authorization to work is as high as USCIS anticipates. "That volume of filings is likely to result in lengthy delays for the approval of EAD [employment authorization document] applications," he said, adding that the last time USCIS saw a similar surge in applications back in 2007, it often took 120 days or more for the process to be completed. Therefore, companies need to have contingency plans for potential applicants who may get stuck in the backlog and cannot get work authorization on time.