Unacceptable EAD Processing Delays

Monday, August 31, 2020

As we noted in a recent post, on August 21st, on August 18, 2020 U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE) announced that as a result of EAD (“employment authorization document”) production processing delays, until December 1, 2020 employers would be able to accept an I-765 approval notice (instead of the employment card itself) for I-9 purposes, as long as USCIS issued an approval notice dated between December 1, 2019, and August 20, 2020.

While it is a good thing that the government has extended this flexibility to employers, their existing employees and their eagerly waiting future employees, the underlying reason for this action is troubling and remains a concern. DHS’s accommodation of the employer community is the result of a Consent Decree, effectively a settlement, between the agency and plaintiffs in a class action lawsuit that had been filed in U.S. District Court for the Southern District of Ohio.

The lawsuit was filed on behalf of the approximately 75,000 EAD applicants in the
U.S. whose applications were approved but who never received their employment cards because USCIS did not produce them following the approval of their applications.

The settlement and resulting I-9 accommodation helps those whose EAD applications have been approved. But what will DHS do for all the applicants whose EAD applications have been pending for months with no action taken at all?

In January 2017, DHS eliminated from the immigration regulations the requirement that the agency adjudicate EAD applications within 90 days of receipt. Over the ensuing months and years, the timeframe for adjudication of EAD applications has lengthened to an unacceptable degree, with many applications pending for four or five months before approval. The same January 2017 regulations extended the work authorization of certain EAD renewal applicants for 180 days while their applications are pending, but did not provide any accommodation to first-time EAD applicants. First-time EAD applicants of course may not work until they receive their employment cards. Many are new college graduates with little means of financial support, and their lives and livelihoods are at risk with each passing day that their EAD is delayed.

Despite stripping the 90-day adjudication requirement from the regulations, as a matter of proper agency management and public accountability, USCIS should adjudicate EAD applications within 90 days. It is unfair to the fee-paying public to do otherwise, and despite COVID constraints, a failure to do so will only invite further lawsuits.

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National Law Review, Volume X, Number 244

Source URL: https://www.natlawreview.com/article/unacceptable-ead-processing-delays