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DMV Benefits Teleconference Recap

On February 25, 2016, the Citizenship and Immigration Services Ombudsman's Office hosted a public teleconference on issues related to Department of Motor Vehicles (DMV) benefits for certain nonimmigrant workers, including H and L nonimmigrants. Individuals whose employers timely file for extension of nonimmigrant status receive an automatic 240-day extension of work authorization while the petition remains adjudicated. Representatives from the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), the California DMV, and a private immigration attorney responded to questions posed by the Ombudsman's Office and the public. The discussion focused on the impact of the REAL ID Act on how states DMVs treat individuals subject to the 240-day rule for non-immigrant workers.

During the call, the Ombudsman framed the topic of discussion as follows: Federal regulations provide for a 240-day extension of work authorization after a temporary worker's status expires, if the worker has a pending petition to extend that status. But whether or not those workers can get and maintain a drivers' license during that time remains an issue. The REAL ID Act requires state drivers' licenses to conform to certain federal standards. The Act also requires that states verify an individual's immigration status before issuing a REAL ID-compliant identification card, including a drivers' license. The lack of guidance as to how state DMVs should handle drivers' licenses for temporary foreign workers with pending extension of stay petitions has led to a patchwork of state responses.

The DHS Office of Policy indicated that the REAL ID Act complicated state interpretation of the 240-day rule because it links drivers' licenses to whether or not an individual has lawful immigration status, a distinct legal term which is different from lawful presence. The 240-day work authorization extension provides for lawful presence, but not lawful status. There have been attempts in the past to amend the REAL ID Act to address this and other related issues, but these efforts were unsuccessful. As a result, several categories of immigrants -- not just temporary workers -- are disadvantaged by the statute's requirement that licenses be tied to lawful status rather than to lawful presence.

Shannon Napier Barnes, an attorney with Mehlman Barnes in San Diego and the national Chair of the American Immigration Lawyers Association's (AILA's) SSA/DMV/SAVE Taskforce discussed the impact on employers and nonimmigrant workers. Workers on a 240-day work authorization extension are provided only with a Form I-797C, the receipt for the filed extension-of-stay petition. There has been little guidance as to how state DMVs should treat that document. The language on the I-797C makes it even more difficult to obtain DMV benefits because it explicitly states that the form doesn't grant any immigration status or benefit. Many states rely on this language to deny a license to immigrant workers on the 240-day extension. The struggle for employers is that the 240-day rule becomes less useful where the worker cannot drive to get to work. Payment of the premium processing fee for the extension-of-stay petition guarantees adjudication of the petition within an expedited time frame and could alleviate the problems associated with the gap in status. However, not all employers can afford the additional fee, and it is not always an option, particularly where its only purpose would be to allow the worker to obtain a drivers' license.

Relying on surveys conducted by AILA, attorney Shannon Barnes explained that some states that comply with REAL ID or are moving toward compliance have taken a hybrid approach. In those states, immigrants whose status has not expired can obtain a REAL ID-compliant license, while those without lawful status -- but perhaps who are lawfully present -- get a license that is not compliant with the law. A few states offer limited drivers' licenses or "driver privilege cards" for undocumented immigrants. Foreign workers in the 240-day extension window could request one of those licenses, but they would have to reapply for a regular drivers' license once their extension-of-stay petitions are approved. Some states that are not compliant with the REAL ID Act accept the I-797C as a document establishing lawful presence, as long as the document can be verified in SAVE.

A representative of USCIS's Systematic Alien Verification for Entitlements (SAVE) system explained that the agency issued guidance on this issue to state DMVs in 2014. That guidance essentially punted to the states on their treatment of the 240-day extension. SAVE only provides information on an individual's immigration status -- it does not indicate whether a state-level benefit should be granted. In that regard, the states have to look at their own rules and regulations for how to treat the provision of state benefits that are based on immigration status.

The Ombudsman concluded the call by saying that the Ombudsman's Office is aware of and is closely monitoring longer USCIS processing times for non-immigrant worker adjudications and the resulting backlogs.

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