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Work Authorization for H-4 Spouses of H-1B Temporary Workers: Frequently Asked Questions

Updated April 24, 2018

Congressional Research Service

<https://crsreports.congress.gov>

R45176

Summary

H-4 nonimmigrant visas allow spouses and unmarried children (under 21 years of age) of H-1B temporary workers to join them in the United States. Eligibility for employment authorization for H-4 nonimmigrants was instituted by regulation in 2015 and is limited to those whose spouses are H-1B nonimmigrants who are in the process of obtaining employment-based lawful permanent resident (LPR) status.

The Trump Administration is proposing to rescind this regulation, thus removing eligibility for work authorization for H-4 nonimmigrants. Congress has expressed interest in the background and impact of this proposed change, as well as legislative approaches to addressing work authorization for this group. This report provides answers to frequently asked questions about work authorization for H-4 visa holders.

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Background on H-1B and H-4 Visas

The Immigration and Nationality Act (INA) provides for the temporary admission of foreign nationals, also classified as nonimmigrants. Nonimmigrants are admitted for a designated period of time and a specific purpose. The INA provides the Secretary of Homeland Security with the authority to prescribe the conditions of nonimmigrants' admissions to the United States, including whether they are authorized to work. There are 24 major nonimmigrant visa categories and more than 80 specific types of nonimmigrant visas, commonly referred to by the letter and numeral that denote their subsection in the INA.¹

H-1B nonimmigrant visas are for temporary workers in specialty occupations and generally require the worker to have attained a bachelor's degree.² H-1B visas are issued for periods of stay of up to three years, with the possibility of renewal for up to six years in total.

Prospective employers of H-1B workers must submit a labor attestation to the Secretary of Labor³ and then file a petition for the worker with the Department of Homeland Security's (DHS's) Citizenship and Immigration Services (USCIS). If the petition is approved, the prospective worker may apply for an H-1B visa. Current law generally limits annual H-1B visa issuances to 85,000, but most approved H-1B petitions are not subject to the cap because they are for workers who are extending their stay (and thus have already been counted against the cap in a prior year) or they are for employment at an institution of higher education, a nonprofit research organization, or a governmental research organization. Many H-1B visa holders are eventually sponsored by an employer for permanent employment-based visas, which allows them to obtain lawful permanent resident (LPR) status, through a process known as "adjustment of status." Due to the numerical limits on the number of permanent employment-based visas issued each year, as well as a 7% per-country cap, prospective immigrants often must wait years to adjust their status.⁴

H-4 nonimmigrant visas allow spouses and unmarried children (under 21 years of age) of H-1B workers to join them in the United States. H-4 visas are also used by the immediate family

¹ For more information, see CRS Report R45040, *Nonimmigrant (Temporary) Admissions to the United States: Policy and Trends*.

² The regulations define "specialty occupation" as requiring theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor—including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, law, accounting, business specialties, theology, and the arts—and requiring the attainment of a bachelor's degree or its equivalent as a minimum. Law and regulations also specify that fashion models deemed "prominent" may enter on H-1B visas. See 8 C.F.R. §214.2(h). For more information about H-1B and other temporary professional workers, see CRS Report R43735, *Temporary Professional, Managerial, and Skilled Foreign Workers: Policy and Trends*.

³ The H-1B labor attestation is a statement of intent rather than a documentation of actions taken. In the labor attestation for an H-1B worker, the employer must attest that the firm will pay the nonimmigrant the greater of the actual wages paid to other employees in the same job or the prevailing wages for that occupation, that the firm will provide working conditions for the nonimmigrant that do not cause the working conditions of the other employees to be adversely affected, and that there is no applicable strike or lockout. The firm must provide a copy of the labor attestation to representatives of the bargaining unit or—if there is no bargaining representative—post the labor attestation in conspicuous locations at the worksite. INA §212(n); 8 C.F.R. §214.2(h)(4). For a further discussion of labor attestations, see archived CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*.

⁴ The INA specifies that each year, countries are held to a numerical limit of 7% of the worldwide level of U.S. immigrant admissions, known as per-country limits or country caps. For more information about the per-country caps and numerical limits of permanent visas, see CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*.

members of H-2 (seasonal) and H-3 (trainee) temporary workers.⁵ H-4 visas are issued for the same period of admission or extension as the principal spouse or parent.

In light of its “Buy American and Hire American” executive order,⁶ the Trump Administration is proposing to eliminate eligibility for employment authorization for certain spouses of H-1B temporary workers.⁷ This action could result in more than 90,000 lawful residents on H-4 visas who are in the process of obtaining permanent status losing their jobs. Congress has expressed interest in the background and impact of this proposed change, as well as legislative approaches to addressing work authorization for this group. This report provides answers to frequently asked questions about work authorization for H-4 visa holders.

What is H-4 work authorization?

H-4 work authorization allows spouses of certain H-1B visa holders to work in the United States. Eligibility for employment authorization is limited to those H-4 nonimmigrants whose spouses are H-1B nonimmigrants who are in the process of obtaining employment-based LPR status.⁸ In order to obtain work authorization, an H-4 visa holder must first submit USCIS’s form I-765, *Application for Employment Authorization*, to the agency, along with supporting evidence of eligibility and a \$410 filing fee. If approved, USCIS will issue an Employment Authorization Document (EAD), which the H-4 visa holder must receive before beginning work.

How and when was H-4 work authorization established?

DHS issued a final rule,⁹ effective May 26, 2015, extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who are in the process of obtaining employment-based LPR status.

Who qualifies for H-4 work authorization?

The 2015 rule providing work authorization applies only to a subset of H-4 visa holders: spouses of H-1B nonimmigrants who are in the process of obtaining employment-based LPR status. Such an H-1B nonimmigrant must be the principal beneficiary of an approved USCIS Form I-140, *Immigrant Petition for Alien Worker*, or have been waiting at least a year since an employer began the process of sponsoring him or her for LPR status.¹⁰

⁵ For a general description of these and other temporary visa classifications, see CRS Report R45040, *Nonimmigrant (Temporary) Admissions to the United States: Policy and Trends*. For information on H-2A and H-2B workers, see CRS Report R44849, *H-2A and H-2B Temporary Worker Visas: Policy and Related Issues*.

⁶ Executive Order 13788, “Buy American and Hire American,” 82 *Federal Register* 18837-18839, April 21, 2017.

⁷ U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, “Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization,” *Unified Agenda of Federal Regulatory and Deregulatory Actions*, fall 2017, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1615-AC15>.

⁸ Such H-1B nonimmigrants must be the principal beneficiaries of an approved Immigrant Petition for Alien Worker (Form I-140), or have been granted H-1B status in the United States under the American Competitiveness in the Twenty-first Century Act of 2000, as amended by the 21st Century Department of Justice Appropriations Authorization Act. 8 C.F.R. §214.2(h)(9)(iv).

⁹ *Ibid.*

¹⁰ That is, he or she must have been granted H-1B status under Sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 (P.L. 106-313), as amended by the 21st Century Department of Justice Appropriations Authorization Act (AC21, P.L. 107-273).

Why was H-4 work authorization established?

The H-4 visa was established to allow H temporary workers and their families to live together in the United States. Before 2015, H-4 visa holders were not eligible for work authorization. As the visa queue increased for individuals—in particular, those from India and China—awaiting employment-based LPR status, policymakers and others raised concerns about the lack of employment authorization for spouses hindering the United States’ ability to attract and retain highly educated workers.¹¹ The 2015 *Federal Register* notice establishing work authorization for certain H-4 spouses referred to three anticipated benefits: reducing personal and financial burdens on H-1B and H-4 nonimmigrants, reducing disruption to U.S. businesses, and attracting and retaining highly skilled workers.¹²

The financial burden to H-1B visa holders and their H-4 spouses can be considerable. The couple must rely on one income while waiting to complete the process of obtaining legal permanent residence. Wait times for employment-based visas have increased in recent years; India and China—which account for a disproportionate share of H-1B nonimmigrants—have some of the longest wait times (up to 10 years).

Disruption to U.S. businesses may occur when H-1B nonimmigrants abandon their efforts to obtain LPR status in the United States, leaving U.S. employers to find replacements. The Obama Administration also argued that allowing H-4 spouses to work would support the U.S. economy because H-1B nonimmigrants and their spouses have historically made significant contributions to entrepreneurship and research and development.¹³

Finally, this rule may facilitate attracting and retaining highly skilled workers by bringing U.S. immigration policies more in line with those of other countries that compete for similarly skilled workers.¹⁴

Are there restrictions on where an H-4 visa holder with work authorization can work?

Unlike work authorization for H-1B visa holders, employment authorization that is granted based on H-4 status is not restricted to a specific employer and does not require the employer to get approval from the Department of Labor. H-4 work authorization also does not prohibit self-employment, starting a business, or hiring employees.

What change is the Trump Administration proposing?

The Administration is proposing to remove from regulation H-4 spouses of H-1B nonimmigrants as a class of foreign nationals eligible for employment authorization. The result would be that H-4 visa holders would not have authorization to work in the United States. The Administration

¹¹ H.R. 2161 in the 112th Congress and S. 169 and S. 744 in the 113th Congress would have provided work authorization to H-4 spouses of H-1B nonimmigrants. In addition, the proposed rule to establish employment eligibility explains the Obama Administration’s reasoning behind the rule. See Department of Homeland Security, U.S. Citizenship and Immigration Services, “Employment Authorization for Certain H-4 Dependent Spouses,” 79 *Federal Register* 26886-26901, May 12, 2014.

¹² Department of Homeland Security, U.S. Citizenship and Immigration Services, “Employment Authorization for Certain H-4 Dependent Spouses,” 80 *Federal Register* 10283, February 25, 2015.

¹³ Ibid.

¹⁴ Ibid.

anticipates publishing the proposed rule in the *Federal Register* in June 2018, which would be followed by a public comment period before a final rule would be published.¹⁵

Why is the Trump Administration proposing to remove this rule?

According to the Unified Agenda,¹⁶ the Administration is proposing this change in light of Executive Order 13788, “Buy American and Hire American,” which President Trump signed on April 18, 2017.¹⁷ According to USCIS, the order “seeks to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering our immigration laws.”¹⁸

What are the anticipated costs and benefits of this change?

According to the Unified Agenda, “DHS anticipates that there would be two primary impacts that DHS can estimate: the cost-savings accruing to forgone future filings by H-4 spouses, and labor turnover costs that employers of H-4 workers could incur.”¹⁹

How many H-4 visa holders have obtained work authorization?

As of December 25, 2017, USCIS had approved 126,853 applications for employment authorization for H-4 visa holders. These count all approvals since May 2015 when the rule was implemented. This number includes 90,946 initial approvals, 35,219 renewals, and 688 replacements for lost cards.²⁰

Where do H-4 visa holders with work authorization live?

H-4 visa holders are not geographically constrained by law, and approvals for employment authorization documents (EADs) have been issued to H-4 nonimmigrants living in all 50 states, the District of Columbia, and the U.S. territories. California accounts for more than one-fifth (28,033), and Texas and New Jersey together account for another 20%. **Table 1** displays these data for all states.

¹⁵ The fall 2017 Unified Agenda stated an anticipated publication date of February 2018 for the proposed rule. A recent court filing, however, revised the timeline to June 2018. *Save Jobs USA v. United States Department of Homeland Security*, No. 16-5287 (D.C. Cir. 2016). For information on the federal rulemaking process, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*.

¹⁶ The Unified Agenda, typically published twice each year, is a government-wide publication of rulemaking actions that federal agencies expect to take in the coming months. It contains both regulatory actions (i.e., new regulations) and deregulatory actions (i.e., reductions in or elimination of current regulations). For more information, see CRS Report R45032, *The Trump Administration and the Unified Agenda of Federal Regulatory and Deregulatory Actions*.

¹⁷ Executive Order 13788, “Buy American and Hire American,” 82 *Federal Register* 18837-18839, April 21, 2017.

¹⁸ Department of Homeland Security, United States Citizenship and Immigration Services, “Buy American, Hire American: Putting American Workers First,” <https://www.uscis.gov/laws/buy-american-hire-american-putting-american-workers-first>.

¹⁹ U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, “Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization,” *Unified Agenda of Federal Regulatory and Deregulatory Actions*, fall 2017, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1615-AC15https://www.reginfo.gov/public/do/eAgendaMain>.

²⁰ Data provided to CRS by USCIS.

H-4 EADs have been issued to residents of almost 4,000 cities across the United States. The cities with the highest numbers are around large “tech hubs” such as the Silicon Valley, northern New Jersey, Seattle, Dallas-Fort Worth, Houston, Austin, the Washington, DC, region, and Atlanta.

Table I. Approved Applications for Employment Authorization for H-4 Visa Holders

As of December 25, 2017

State	Number	State	Number
California	28,033	Arkansas	645
Texas	13,579	South Carolina	642
New Jersey	11,996	New Hampshire	602
Washington	6,717	Kentucky	580
Illinois	6,258	Utah	515
Virginia	5,324	Nebraska	506
Georgia	4,579	Rhode Island	325
Massachusetts	4,565	Oklahoma	283
North Carolina	4,382	Alabama	281
Pennsylvania	4,050	Nevada	255
Michigan	3,684	Louisiana	228
Florida	3,541	New Mexico	168
Ohio	3,331	Maine	157
New York	3,183	Idaho	148
Maryland	2,705	Mississippi	147
Arizona	2,280	West Virginia	107
Minnesota	2,090	North Dakota	92
Connecticut	1,937	South Dakota	62
Wisconsin	1,597	Hawaii	55
Indiana	1,380	Vermont	48
Colorado	1,315	District of Columbia	38
Oregon	1,205	Guam	29
Tennessee	1,198	Virgin Islands	20
Missouri	1,177	Wyoming	18
Kansas	907	Montana	16
Iowa	811	Alaska	9
Delaware	726	Puerto Rico	3

Source: Data provided to CRS by USCIS.

Notes: Data may include multiple approvals for a single beneficiary. State represents state of residence at the time of application.

What is the gender breakdown for H-4 visa holders with work authorization?

Ninety-three percent of granted applications for employment authorization were issued to women; 7% were issued to men.²¹

What nationalities have received H-4 work authorization?

Ninety-three percent of approved applications for H-4 employment authorization were issued to individuals born in India, and 5% were issued to individuals born in China. Individuals born in all other countries combined make up the remaining 2% of approved applications.²²

Has any related legislation been proposed in recent Congresses?

Congress has considered several related pieces of legislation. The Immigration Innovation Act of 2018 (S. 2344), as introduced in the 115th Congress, would codify the current regulation providing work authorization to H-4 spouses of certain H-1B nonimmigrants and would require the employer of the H-4 spouse to attest that they will pay her or him the greater of the prevailing wage for that occupation in the area of employment or the actual wage paid to other workers in the same job with similar qualifications (i.e., applying the same pay standard to the hiring of H-4 visa holders as is applied to their H-1B spouses).

Previous versions of this bill (S. 153, as introduced in the 114th Congress, and S. 169, as introduced in the 113th Congress) would have provided employment authorization to the spouse of any H-1B or L (intra-company transferee) nonimmigrant, regardless of whether the H-1B or L nonimmigrant had begun the process of obtaining LPR status. These bills would not have required labor attestation.

Likewise, immigration reform bills in the 113th Congress (S. 744, as passed by the Senate, and H.R. 15, as introduced) would have provided employment authorization to the spouse of any H-1B or L nonimmigrant, regardless of whether the H-1B or L nonimmigrant had begun the process of obtaining LPR status.

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²¹ Data provided to CRS by USCIS. Numbers represent approvals from May 26, 2015, when the regulation was enacted, through December 25, 2017.

²² Ibid.

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