

H-4 Work Authorization Does Not Unfairly Impact American Workers, Says DHS in Court Filing: Possible ‘Contradiction’?

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April 5, 2019

Allowing work authorization for the spouses of H-1B visa holders who are on track to get a green card does not unfairly impact American workers, stated the Department of Homeland Security in a court filing April 1.

DHS, however, is continuing its quest to end the H-4 EAD program, an Obama-era initiative implemented in 2015 which allows about 90,000 H-4 visa holders, overwhelmingly women from India, to work legally in the U.S. A draft of its rule is currently being considered by the Office of Information and Regulatory Affairs at the Office of Management and Budget. DHS submitted the draft rule in February, but had not received a response from OMB as of press time April 4.

New York-based immigration attorney Cyrus Mehta told India-West: “DHS has contradicted itself. This will be good basis for a court challenge to the final rule once it is issued.”

In its court filing with the DC Circuit Court of Appeals, which is currently reviewing a decision from a lower court that found against the plaintiffs Save Jobs USA, the Justice Department, which is representing DHS, the defendants in the case, noted: “Save Jobs never established how its members, who work only in the information technology sector, would clearly or immediately be harmed by the H-4 Rule — which affords employment authorization eligibility across a far broader range of economic sectors.”

“Instead, Save Jobs pressed a capacious and boundless view of competitor standing that would allow anyone to challenge an agency action that may result in more people entering the U.S. job market as a whole, in any occupation,” said the Justice Department for DHS.

“Other than the prospect of a statistically insignificant increase in the number of legally authorized workers in the job market as a whole, Save Jobs presented no evidence to support a conclusion that those authorized workers will actually seek employment in the same industry as Save

Jobs’ members,” wrote the Justice Department, arguing that Save Jobs had failed to demonstrate that its members were in direct competition with H-4 visa holders with work authorization.

“It is entirely uncertain whether H-4 dependents would apply specifically for, or be qualified to perform, the information-technology jobs for which Save Jobs’s members are in competition,” wrote the defendants.

The filing mentioned the draft rule now being reviewed by OMB and argued that this case should be mooted in light of DHS’s proposed rule. The Justice Department asked the DC Court of Appeals to uphold the lower court’s decision, which found against Save Jobs USA.

Mehta told India-West that DHS will base its arguments to defend its rescission of the H-4 on the constitutionality of the initiative. The agency will argue that there’s no explicit provision in the Immigration and Nationality Act which allows an administration to issue work authorization to alien non-residents.

But the Indian American attorney said Section 274-A of the INA explicitly allows the Attorney General to provide work authorization to anyone who is an alien. President Barack Obama used this section of the Act to make his case for the Deferred Action for Parents of Americans initiative, which would have provided work authorization to undocumented immigrants who were parents of U.S. citizens. That initiative was initially blocked, with states arguing that it violated the Constitution. The Trump Administration rescinded the rule in 2017.

Once OMB has handed its determination back to DHS, the agency must address any issues brought up by OMB. The draft rule must then undergo a 30-60 day public comment period, and DHS must address those comments before it issues a final rule.

Mehta predicted it would take about a year before a final rule is issued. He then expects it will immediately be challenged in court, and a preliminary injunction will be issued which could stay in place until “a kinder, friendlier administration comes through.”

The attorney also predicted that DHS would phase out the program, issuing no new EADs or renewals, rather than revoking work authorization outright.

In related news, a group of Indian American volunteers from the ad-hoc organization SaveH4EAD met with OMB officials in Washington, DC to present “concrete data” to the agency that is reviewing the draft rescission rule.

The group presented data from a recent survey by the CATO Institute which summated that H-4 visa holders with work authorization benefits the U.S. economy. The data presented showed that H-4 visa holders come from a wide range of professional backgrounds, including health care and business management, along with IT. Seven percent of those surveyed had created their own businesses.

The CATO Institute noted that H-4 EAD holders added an estimated \$5.5 billion annually to the U.S. GDP. (see survey here: <https://bit.ly/2Ujob1K>)

“We hope this will be the beginning to the end of the danger that hovers over the 100K H-4 EAD recipients,” wrote Chinmay Sathe, an administrator for SaveH4EAD’s Facebook page, in a post.