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Why H-4 Spouse Work Authorization Rescission Will Hurt US

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The Trump administration's "Buy American, Hire American" agenda is likely to bring about a drastic end to a program that allows certain H-4 spouses to work. H-4 immigration status is given to dependent spouses and children under 21 of temporary nonimmigrant workers (H-1B, H-1A, H-2B and H-3).[1] Thus, H-4 status is contingent on the principal's H status, which for most H categories is subject to a limited annual quota and difficult to obtain. Allowing dependents to accompany their spouses or parents is rooted in the concept of keeping families intact which is a hallmark of U.S. immigration laws.

The program granting work authorization to H-4 holders was implemented in 2015 and provides this valuable benefit to only a small set of H-4 spouses who are the dependents of H-1B workers. Pursuant to the current rule, H-4 spouses can apply for work authorization only if their spouse, the H-1B principal, falls into one of two categories. The first category includes those H-1B principals who have an approved Form I-140 petition, which is an employment-based immigrant petition that is filed with U.S. Citizenship and Immigration Services, and is the step immediately before filing the green application. The second category includes those H-1B principals granted H-1B status beyond the 6-year limit because their prospective employer filed a labor certification application with the U.S. Department of Labor, the first step in the employment-based green card process, or I-140 petition with USCIS, and at least 365 days have elapsed since filing. As these two categories clearly show, the H-4 EAD benefit is available only to spouses of H-1B workers who are on track for permanent resident status. Notably, those who fall in the first category cannot complete the last green card step because of the extremely long wait imposed on certain foreign nationals.

The wait time for filing for a green card is owing to the annual limit on green cards set by the Immigration and Nationality Act, which allocates visas for different immigrant categories based on quota and preference category. Through this allocation system, there is a limit, or quota, on how many immigrant visas, or green cards, can be issued to various categories of immigrants, including the various employment- and family-based categories. The quote requirement set a

maximum number of visas that can be allocated to each country, which Congress established as a 7 percent maximum per country. In addition to quota limitations, visa wait time is controlled by what is known as "priority," which is determined by the preference category applied to the green card application. Preference categories are the smaller categories in which the broader employment- and family-based immigration classifications are divided. Each preference category has a wait time based on the number of green card applications that were filed and are pending in line with USCIS in that category. For example, in the employment-based category, Congress assigned a higher preference to those who have advanced degrees. This higher preference category has higher level requirements resulting in fewer green card applications in that category. As a result, the wait line for immigrant visas in that preference category generally is shorter than the wait line for a lower level preference category for which more foreign nationals qualify. While quota restrictions do not impact immigrant visa availability for nationals of most countries, certain foreign nationals are significantly impacted because they come from countries have more applicants for immigrant visas than there are immigrant visas available for that country (i.e. China, India, Philippines, Mexico). These foreign nationals are subjected to longer waits because demand exceeds the visa quota set by Congress.

Based on an article published by the National Foundation for American Policy in December 2017, Indian-born professionals are looking at a 10 to 25 year or longer wait until immigrant visas become available.[2] In fiscal year 2017, a total of 136,393 H-4 visas were issued (this is the number of visas issued, but not necessarily how many foreign nationals use the visa to enter the U.S.) and 86 percent of H-4 dependents were of Indian nationality.[3] With current immigrant visa delays, H-4 spouses of Indian nationals with H-1B status who are on route to receiving green cards, are looking at over one or two decades before they can enter the workforce. Thus, the program granting employment authorization to these H-4 spouses is only a stop-gap remedy for those who would have already received a green card but for the long wait due to per-country limits.

On April 4, 2018, the USCIS director indicated in a letter to the Committee on the Judiciary that he intended to rescind the provision allowing work authorization for H-4 spouses. Based on a status report filed by U.S. Department of Homeland Security with the D.C. Circuit Court, rescission is expected to be finalized in June 2018.[4] This status report was filed for a pending case in which a group called, "Save Jobs USA" sued DHS under the Obama administration to revoke the work authorization given to a small set of H-4 holders soon after such regulation was implemented in 2015.[5] The Trump administration's policy is in line with Save Jobs USA's assertion that U.S. workers are losing their jobs to H-1B and H-4 workers; hence, the expected rescission.

Those opposing work authorization for this small group of H-4 holders argue that rescinding employment authorization for H-4 spouses will protect jobs for U.S. workers; however, the impacts of rescission could be grave on not just the H-4 holders already granted work permits, but also on the U.S. economy which is likely to lose skilled foreign workers who decide to take their talents to other countries where their spouses will not face the same restriction.

The negative impacts on rescinding work authorizations for these H-4 dependents could be extensive. There are findings showing that the majority of H-4 holders are female, the majority

of them hold at least a college degree and the majority of them are in the most productive career age bracket, 26-35 years old.[6] Studies have shown that taking away their work benefits could potentially threaten their psychological well-being as well as the furtherance of their interests because confidence and self-worth tends to decrease without work authorization.[7] This also means that without work authorization, these educated female H-4 holders would have to put their personal career paths on hold or, even worse, be prevented from fulfilling their goals in the future due to long visa wait times. Long periods of unemployment also present difficulties for reentering the workforce because employers prefer to recruit those with experience and updated skillsets.[8] In sum, the work benefit empowers female H-4 spouses and gives them the opportunity to contribute to the U.S. economy by putting their skills to use

The negative factors associated with the inability to work and contribute to household and society coupled with increasingly long waits to complete the permanent residence process is likely to discourage highly skilled and knowledgeable workers from seeking opportunities in the U.S. and pursuing permanent resident status for themselves and their dependent family members.[9] Retention of such highly skilled foreign workers is imperative to the national interest as it contributes to the growth of our economy.[10] Economic growth can be driven by the advancement of business entities and investing in research and development leading to increased job opportunities and, in turn, increased consumer spending.[11] If the U.S. cannot retain nor attract the most talented people who can produce the most, it could negatively impact U.S. economy.[12]

Overall, it is important to note that H-4 dependents who are currently eligible for work authorization are all on the path to becoming lawful permanent residents. The H-4 spouse employment authorization program strives to provide some relief to those who are simply in the waiting period and authorized to remain in the U.S. With the rising cost of living in the U.S, highly skilled foreign nationals whose spouses cannot work may be forced to abandon their hope for permanent residence in the U.S. and seek opportunities in other countries; thereby negatively impacting the U.S. economy by driving high skilled talent away from the U.S. Moreover, granting work authorization to highly educated female H-4 holders will contribute to empowerment of women's rights and give them a chance to contribute to the U.S. economy.

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[1]8 U.S.C. §1101(a)(15)(H)(i)(b)-(iii)

[2] National Foundation for American Policy, "Understanding America's Legal Immigration System" page 22.

[3] U.S. Department of State Bureau of Consular Affairs, "Nonimmigrant Visa Issuances by Visa

Class and by Nationality: FY 1997-2017 NIV Detail Table.

[4] Defendant-Appellee Status Update, Save Jobs USA v. US DHS, 15-cv-615

[5] http://immigrationimpact.com/2015/09/02/restrictionists-continue-to-attack-h-4-work-authorization/

[6] https://www.theguardian.com/us-news/2017/apr/03/us-immigration-h1b-visa-spouse-trump-right-to-work;

https://www.seattletimes.com/business/technology/spouses-of-h-1b-visa-holders-worry-theyll-lose-jobs-or-need-to-leave-u-s/; http://h4-visa-a-curse.blogspot.com/p/survey-results.html; https://www.washingtonpost.com/news/wonk/wp/2017/04/07/more-than-200000-foreign-spouses-could-lose-their-right-to-work-under-trump/?noredirect=on&utm_term=.155f0264cb13

[7] Divya Ravindranath, "Visa Regulations and Labour Market Restrictions: Implications for Indian Immigration Women in the u.S., Indian Journal of Labour Economics 60, no. 2, 217-232 (June 2017)

[8] Matther La Corte, "Modernizing the H-4 Visa for Spouses of Temporary Workers", Policy Brief, Niskanen Center, (April 30, 2018) (https://niskanencenter.org/wp-content/uploads/2018/04/H4-Policy-Brief_April-2018.pdf (accessed May 18, 2018) page 2; https://www.recruiter.com/i/how-to-re-enter-the-workforce-after-a-lengthy-break/ (accessed May 18, 2018)

[9] Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. at 10285

[10] Matther La Corte, "Modernizing the H-4 Visa for Spouses of Temporary Workers", Policy Brief, Niskanen Center, (April 30, 2018) (https://niskanencenter.org/wp-content/uploads/2018/04/H4-Policy-Brief_April-2018.pdf (accessed May 18, 2018) page 2

[11] 80 Fed. Reg. 10283; Matther La Corte, "Modernizing the H-4 Visa for Spouses of Temporary Workers", Policy Brief, Niskanen Center, (April 30, 2018) (https://niskanencenter.org/wp-content/uploads/2018/04/H4-Policy-Brief_April-2018.pdf (accessed May 18, 2018) page 2

[12] "Modernizing the H-4 Visa for Spouses of Temporary Workers", Policy Brief, Niskanen Center, (April 30, 2018) (https://niskanencenter.org/wp-content/uploads/2018/04/H4-Policy-Brief_April-2018.pdf (accessed May 18, 2018) page 2