

Enrolling in E-Verify limits the Employer's use of H-1B Portability

The American Immigration Lawyers Association (AILA) has reported that E-Verify will not confirm clearance of employment authorization until "approval" of H-1B petitions filed under the portability provisions for an employee who previously held H-1B status but has since been holding an intervening status; for example, an employee who previously held H-1B status but has since switched to H-4 or F-1. While holding H-4 or F-1 status, for example, the foreign national is sponsored by a new employer for an H-1B change of status. Previously, E-Verify has issued employment authorization confirmation under the H-1B portability provisions for employees in similar situations where the new H-1B petition has been filed and pending but has not been approved. However, E-Verify has begun to issue non-confirmations for such employees. E-Verify's justification has been that, upon advice from the Office of Chief Counsel at USCIS, such employees should be issued a non-confirmation because "the H-1B Portability Rule does not apply to a nonimmigrant who was in H-1B status at one time, but who is currently in another valid status and for whom a non-frivolous I-129 Petition to obtain H-1B status has been filed." Therefore, employers enrolled in E-verify may not be able to immediately benefit from the portability provision of the H-1B regulations. Until this issue is resolved or a subsequent policy change occurs, it will be advisable for the new employers to take a conservative approach not to run into unauthorized employment immigration enforcement. In this regard, it has been recommended that employers file such new H-1B petitions under Premium Processing to mitigate the time between filing the petition and its subsequent approval. Please contact our office if you have any questions relating to this issue.