
TPS Status and the I-9 Process

Temporary Protected Status (TPS) is one of those categories that seem to cause employers many problems. Generally, the reverification process contained in Section 3 of the Form I-9 requires employers to obtain copies of new work authorization documents when a foreign national's temporary work authorization expires. If the employee cannot provide a document showing current work authorization, then the employee is supposed to be terminated.

When an extension of TPS status is announced, USCIS typically announces that the employment authorization documents (EADs) of individuals with TPS status are automatically extended for a defined period of time. This is done to save the agency the considerable work that would be involved in issuing new cards so quickly to people with TPS for the particular country that is designated in the notice.

This automatic extension means that employers are faced with the situation where the documentation provided to complete the Form I-9 has an expiration date that is no longer valid. The only way the employer would know that the EAD is automatically extended is to check on the United States Citizenship and Immigration Services (USCIS) website or to have this extension confirmed by counsel.

Failing to recognize an employee's valid EAD, which has been extended by notice in the Federal Register can have severe consequences for employer. Generally, the employer has a system that notifies HR that an employee's work authorization is about to expire. The HR manager calls the employee so that the employee can provide new work authorization documentation. An employee with TPS whose EAD is automatically renewed will only have either the US CIS press release or a copy of the Federal Register notice extending both the availability of TPS for nationals of a designated country and the validity of current TPS holders' EADs. Unfortunately, some overzealous employers terminate the employee rather than verify that the notice is itself sufficient under the I-9 regulations.

Terminating the employee in this situation is problematic at best. In addition to Title VII issues, there are anti-discrimination provisions in the Immigration and Nationality Act. Employees who are terminated for purportedly lacking a valid employment document can bring a charge of an unfair immigration practice to the Department of Justice (DOJ), which takes these types of complaints very seriously. The DOJ will investigate and demand reinstatement, backpay, and possibly a fine because the employer has rejected a valid EAD. Clearly, this is not the outcome that anyone would want.

If you have any concerns about dealing employees who have TPS and how that status is treated in the I-9 process, please make sure to consult with knowledgeable counsel. Making the wrong decision can result in penalties, possibly substantial, in cases where an employer has numerous employees with TPS.