

Immigration

E-Verify Loses Reauthorization Amid Government Shutdown

E-Verify, the EB-5 regional center program, and various other immigration programs experienced a lapse in authorization with the most recent government shutdown that began Jan. 20.

Although Congress avoided a longer government shutdown this time around, the agreement to pass another short-term spending bill sets up another potential shutdown in the near future.

There's an "additional wrinkle" to this particular shutdown, immigration attorney Matthew Galati of Green & Spiegel in Philadelphia told Bloomberg Law Jan. 22. During the last shutdown, in 2013, the E-Verify electronic employment verification program only lost funding temporarily, he said. But this time, its authorization expired entirely.

"This is a new development with E-Verify," said Galati, who leads his firm's U.S. Investors and Entrepreneurs Division. In 2012, Congress reauthorized the program for three years, and so the 2013 government shutdown only affected its funding, not its authorization to operate, he said.

The same is true for the three other programs usually tied together with E-Verify: the EB-5 regional center program, the Conrad 30 program for foreign physicians, and the special immigrant nonminister religious visa program. These programs "no longer exist" under the law once they expire, but "practically speaking" they're just on hold until Congress reopens the government, William Stock of Klasko Immigration Law Partners in Philadelphia told Bloomberg Law Jan. 22.

"They were all done as pilot programs, but everyone likes them," so they're not likely to expire permanently any time soon, said Stock, the immediate past president of the American Immigration Lawyers Association.

E-Verify Guidance Issued The effect of a lapse in E-Verify authorization appears to be the same as a lapse in funding: Employers can't use E-Verify to check their employees' eligibility to work in the U.S., according to a Jan. 22 notice from U.S. Citizenship and Immigration Services. Employees who receive a "tentative nonconfirmation" from the system—indicating a mismatch between their personal information and what's in government records—also can't get it resolved during a shutdown, the USCIS said.

A TNC indicates an information mismatch and isn't a final determination that someone isn't authorized to work in the U.S., according to E-Verify program rules.

The agency's guidance on E-Verify during a shutdown is "very clear" that employers can't take any adverse action against employees who receive a TNC, even if it can't be corrected for the time being, Galati said. But "when the norm for employers is temporarily suspended, a lot of confusion will result," he said.

The USCIS didn't respond to Bloomberg Law's request for comment on the effect of a shutdown.

Employers can continue to hire workers and still have to complete an I-9 employment verification form even if they can't get into E-Verify, Stock told Bloomberg Law. The only potential glitch might be employers with electronic onboarding systems in which an E-Verify check is "built into the workflow," he said.

If those employers didn't institute some kind of override in the event that E-Verify isn't available, there could be some hiring difficulties, Stock said.

Some Effect on Employment Visas Immigration programs that are handled exclusively within the USCIS aren't affected by a shutdown because the agency is funded primarily by user fees, Galati said. That includes O-1 extraordinary ability visas and most L-1 intracompany transferee visas, he said.

Similarly, the State Department says it's continuing normal passport and visa procedures abroad "as the situation permits."

"Consular operations domestically and abroad will remain 100% operational as long as there are sufficient fees to support operations," a State Department official said in a Jan. 22 email to Bloomberg Law.

Even with the EB-5 regional center program, which also lost its authorization with the shutdown, there shouldn't be too much disruption, Galati said. The EB-5 program awards green cards to immigrants who invest at least \$500,000 in a commercial enterprise that creates 10 U.S. jobs. The regional center program allows immigrants to pool their investments and count indirect job creation toward the visa requirements.

Regional centers are businesses, "so they'll continue to exist," Galati said. And anyone who already has a green card through the program isn't affected, he said. But those whose petitions are pending have to wait until the government reopens to see a result, he said.

There are petitions that can't be filed today, but "as a general matter, the immigration service has sort of been forgiving on these things for short shutdowns," Stock added.

The same is true for immigrants seeking green cards under the religious visa program for nonministerial workers. Congress would have to enact separate legislation revoking the green cards of immigrants who already received them under the program, even if its authorization expires, Stock said. And the USCIS is likely to suspend adjudications rather than denying petitions during a short-term shutdown, he said.

No Labor Certification Many other employment-based visas will be affected because of the need to first go through the Labor Department, which has shut down its Office of Foreign Labor Certification. That includes H-2B seasonal worker visas, which experienced a threefold increase in applications this year, prompting a change in the DOL's labor certification procedures.

A representative for the DOL couldn't be reached for comment because of the government shutdown.

But even with the large number of H-2B applications, a short-term shutdown "won't be an issue," Stock said.

"If you were pushing a deadline on a labor certification application" and it happened to fall on a day the government was shut down, the DOL in the past has given some leeway, he said. But for very short shutdowns, the agency may be "a little less forgiving," he said.

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