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TWO H-1B SPOUSES AND ONE LABOR CERTIFICATION: BOTH SPOUSES SHOULD BE ABLE TO SEEK SEVENTH-YEAR H-1B EXTENSIONS UNDER AC21

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By Gary Endelman and Cyrus D. Mehta

We post some of the ideas that we have proposed in the forthcoming article, *The Tyranny of Priority Dates*, http://blog.cyrusmehta.com/news.aspx?SubIdx=ocyrus20103925436, on this blog. This post advocates that an H-1B seeking an extension beyond the six years may do so even though the other spouse is the beneficiary of a labor certification.

There is a clear basis in § 106(a) of the American Competitiveness in the 21st Century Act ("AC21") to allow an H-1B spouse to seek an extension of H-1B status beyond six years when the other spouse is the beneficiary of an appropriately filed labor certification. There is no need for two spouses to have their own labor certifications, when only one will be required for both spouses to obtain permanent residence. USCIS must interpret existing ameliorative provisions that Congress has specifically passed to relieve the hardships caused by crushing quota backlogs in a way that reflects the intention behind the law.

On November 2, 2002, the 21st Century Department of Justice Appropriations Authorization Act ("21st Century DOJ Appropriations Act") took effect and liberalized the provisions of AC21 that enabled nonimmigrants present in the United States in H-1B status to obtain one-year extensions beyond the normal sixth-year limitation. See Pub. L. No. 107–273, 116 Stat. 1758 (2002). The new amendments enacted by the 21st Century DOJ Appropriations Act liberalized AC21 § 106(a) and now permits an H-1B visa holder to extend her status beyond the sixth year if:

*1. 365 days or more have passed since the filing of **any** application for labor certification that is required or used by the alien to obtain status under the Immigration and Nationality Act ("INA") § 203(b), or*

2. 365 days or more have passed since the filing of an Employment-based immigrant petition under INA § 203(b). Id. (Emphasis added).

Previously, AC21 § 106(a) only permitted one-year extensions beyond the sixth-year limitation if the H-1B nonimmigrant was the beneficiary of an EB petition or an application for adjustment of status and 365 days or more had passed since the filing of a labor certification application or the Employment-based (EB) immigrant petition. See Pub. L. No. 106-313, 114 Stat. 1251 (2000). Even under this more restrictive version of AC21 § 106(a), the Service applied a more liberal interpretation, permitting H-1B aliens to obtain one-year extensions beyond the normal sixth-year limitation where there was no nexus between the previously filed and pending labor certification application or EB immigrant petition and the H-1B nonimmigrant's current employment. This broad reading was recently affirmed in the Memorandum of William R. Yates, Associate Director for Operations. *See* William Yates, Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), Memo # USCIS HQPRD 70/6.2.8-P, May 12, 2005 ("Yates Memo").

If a labor certification was filed on behalf of one spouse, the other should be permitted to benefit from the labor certification application that was filed, and remains pending, on behalf of her husband, because under the liberalized provision of AC21, as amended by the 21st Century DOJ Appropriations Act, "365 days or more have passed since the filing of any application for labor certification." *See* Pub. L. No. 107–273, 116 Stat. 1758 (2002). The derivative spouse will use this application upon its approval to obtain status pursuant to INA § 203(b).

The Yates Memo unfortunately suggests that an H-1B spouse must meet all the requirements independently of the H-1B spouse's eligibility for a seventh-year extension. *See* Yates Memo at 10. Now, both spouses need to have labor certifications filed on their behalf to obtain the benefit of AC21 § 106(a), which is unnecessary and absurd. The statute itself has more flexibility and speaks of "any application for labor certification…in a case in which certification is

required or used by the alien to obtain status under such § 203(b)." *See* Pub. L. No. 106-313, 114 Stat. 1251, § 106(a) (2000). This interpretation is very much in keeping with spirit of AC21, which is to soften the hardship caused by lengthy adjudications and we certainly have that now with respect to China and India, as well as worldwide EB-3. The current interpretation placed upon AC21 § 106(a) is contrary to the intent of Congress. It is not enough to say that the H-1B spouse for whom a labor certification has not been filed can change to non-working H-4 status. Given the backlogs facing India and China in the EB-2, as well as worldwide EB- 3, it is simply unrealistic and punitive to deprive degreed professionals of the ability to work for years at a time but force them to remain here to preserve their eligibility for adjustment of status.

Finally, the USCIS has also argued that the absence of INA § 203(d) in AC21 § 106(a) - "any application for labor certification that is a required or used by the alien to obtain status under § 203(b)." - suggests that only the principal spouse can immigrate under INA § 203(b) and the derivative needs INA § 203(d). *See id*. But INA § 203(d) states that the spouse is "entitled to the same status, and the same order of consideration provided in the respective subsection (INA § 203(a), § 203(b), or § 203(c)), if accompanying or following to join, the spouse or parent." *See* INA § 203(d) . Thus, the derivative spouse still immigrates under INA § 203(b). INA § 203(d), which was introduced by the Immigration Act of 1990 ("IMMACT90"), is essentially superfluous and only confirms that a derivative immigrates with the principal. *See* Pub. L. No. 101-649, 104 Stat. 4978 (1990). Prior to IMMACT90, there was no predecessor to INA § 203(d), and yet spouses immigrated with the principal. Thus, it is clear that a spouse does not immigrate via INA § 203(d), and the purpose of this provision is merely to confirm that a spouse is given the same order of consideration as the principal under INA § 203(b).

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