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H-1B PORTABILITY WHEN THERE IS A GAP IN STATUS

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Most within the H-1B visa community are familiar about being able to "port" under INA § 214(n) to a new employer upon the filing of a new H-1B petition without waiting for the petition to be approved. This article endeavors to creatively draw more out of § 214(n) to benefit the H-1B worker in troubled economic times.

If the worker in H-1B status is laid off, and there is a gap between the termination of the employment and the filing of the H-1B petition, it may still be possible for this worker to commence employment upon the new H-1B filing despite a gap in status. § 214(n)(B) provides for such a possibility so long as the new "employer has filed a non-frivolous petition for new employment before the date of expiration of the period of stay authorized by the Attorney General." Also, the H-1B beneficiary should not have worked for the new employer prior to filing the new H-1B petition, or otherwise worked without authorization. In other words, so long as the validity period of the prior H-1B petition has not expired when the new employer files the H-1B petition (as determined by Form I-94), § 214(n) allows employment authorization despite a lapse in status to "continue for such alien until the new petition is *adjudicated* (emphasis added). If the new petition is denied, such authorization shall cease."

Of course, even if employment authorization continues under § 214(n), the worker who has failed to maintain H-1B status, by virtue of being terminated from the employment, must still request an extension of status under 8 CFR § 214.1(c)(4). Fortunately, § 214.1(c)(4) provides the USCIS with broad discretion to approve an H-1B extension of status even where there has been a lapse, and the USCIS has been known to forgive long lapses of many months if one can demonstrate exceptional circumstances. This discretion has generally been exercised rather favorably if there has been a short lapse of status, the rule of thumb being less than 30 days between the termination and the new H-1B

filing. Since 8 CFR § 214.1(c) (4) is discretionary, there are bound to be cases where the examiner may be fervently unwilling to excuse even a day's lapse in status. Hence, while the new H-1B petition is approved, the corresponding extension of status may get denied. Under the portability provision, § 214(n), employment authorization shall cease "f the new petition is denied." While this phrase is ambiguous as it does not specifically refer to the denial of the request for extension of status, even while the H-1B petition is approved, most practitioners are of the opinion that the worker can no longer exercise portability and must cease working for the new employer.

The beneficiary of the H-1B visa petition, in such an eventuality, is advised to immediately leave the United States and apply for a new H-1B visa at a US Consulate overseas. Since the denial of the extension of the H-1B status would invariably be based on an adverse status finding, INA § 222(g) would also trigger and void the previously issued H-1B visa in the passport. § 222(g) would require the H-1B worker to apply for a brand new H-1B visa, and to apply for this visa and any other nonimmigrant visa in his or her home country, subject to some narrow exceptions, for the rest of his or her life.

To avoid the risk of a trigger of § 222(g), but to allow the H-1B worker to still "port" despite a lapse in status, it has been suggested that the H-1B petition can be filed for consular notification without an accompanying request for extension of H-1B status. Nothing in § 214(n) prevents the filing of the new H 1B petition (even without an extension of status) and allowing the worker to "port" to a new employer until the adjudication of the H-1B petition. If the H-1B petition is denied, this person can no longer continue to port. But if the H-1B petition is approved, this person, if s/he already has a valid H-1B visa stamp in the passport, can leave the United States and enter from a contiguous country such as Canada without having to travel to the home country.

The intriguing question is whether such an alien can continue "porting" even after the H-1B petition has been "adjudicated" (which means approved) without an accompanying extension of status. As noted, INA § 214(n) contemplates a situation where employment authorization under "portability" continues until the petition is "adjudicated," but § 214(n) goes on to state, "If the new petition is denied, such authorization shall cease." There is no reference to "approval" in § 214(n). Could the term "adjudicated" only refer to instances where the H-1B petition has been denied but not approved? The USCIS in 2007 seemed to agree, in an exchange of correspondence between attorney Naomi Schorr and

Efren Hernandez, Chief, Business and Trade Branch, USCIS (posted on AILA InfoNet at Doc. No. 07052563). This scholarly exchange admittedly occurred in the context of whether an H-1B worker who was with a cap-exempt employer (such as a university) was able to 'port" to a cap subject employer prior to October 1, the start of the new Fiscal Year when H-1B numbers once again become available. While Mr. Hernandez agreed that § 214(n) would allow the alien to "port" even if there were no H-1B visa numbers prior to October 1, he also agreed that it would be unfair for this person to stop porting if the H-1B got approved before October 1. Such an H-1B worker would be disadvantaged with the early approval of the H-1B especially if the H-1B petition was filed through premium processing over someone who filed the H-1B petition regularly.

This extract from Mr. Hernandez' response to Ms. Schorr is worth noting:

> Congress appears to have not contemplated a situation in which H-1B status would not be immediately conferred upon the portability worker upon approval of the H-1B petition. By addressing the result of a denial but not an approval Congress seems to have assumed that the alien would immediately be covered by the approval and would no longer require the employment authorization conferred by 214(n), and thus drafted 214(n) so that the employment authorization it provides ends upon "adjudication." I agree that a result in which an alien with a pending petition is in a better situation than one with an approved petition makes no sense. A reading of 214(n) such as the one you suggest that continues employment authorization until H- I B *status* is available is a logical one, and USCIS will explore this position in future rulemaking.

The possibility of continuing to port after an H-1B with consular notification is only discussed here as an intellectual exercise. It would be an extremely aggressive position for the H-1B worker to continue to assert "portability" even after the H-1B petition, sans a request for extension of status, is approved. Moreover, Mr. Hernandez rendered his opinion on the continuance of porting after the H-1B was approved in the context of an H-1B worker who was already maintaining status, and would continue to do so as of October 1. At the very least, the alien must depart within 180 days from the expiration of the previous employer's H-1B validity period as s/he would begin to accrue unlawful presence after the expiration date of the prior H-1B validity and potentially trigger the 3 and 10 year bars to reentry.

In sum, this author prefers to file an H-1B, with an extension of status, even if the status has lapsed especially if there are extenuating circumstances. Such extenuating circumstances exist when the H-1B worker is suddenly terminated, and it takes more than a week to file and obtain a new Labor Condition Application prior to filing the H-1B petition. The upside is great if the H-1B and extension gets approved. If the H-1B is approved, but the extension is not approved, one has to weigh the burden of triggering the penalties under INA § 222(g) but still be able to successfully obtain the H-1B visa in the home country versus a situation where it would not be tenable for the alien to visit the home country. If the petitioner and beneficiary opt for the H-1B consular notification approach only while also opting to exercise portability, they need to fully understand the consequences before undertaking this strategy.