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DON'T GET TOO COMFORTABLE: STATUS AFTER THE GRANT OF AN H-1B EXTENSION UNDER AC 21

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The American Competitiveness in the 21st Century Act (AC 21) has been a great benefit for those whose applications for permanent residency cannot be completed before the sixth year in H-1B status. Under Section 106(a) of AC 21, an individual is able to extend H-1B status beyond six years if, *inter alia*, a labor certification was filed 365 days prior to the end of the 6th year. In companion Section 104 (c) of AC 21, the H-1B status may be extended for three years at a time if one is a beneficiary of an employment-based I-140 immigrant visa petition, and is eligible to adjust status but for the backlogs in the employment-based first (EB-1), second (EB-2) or third preferences (EB-3).

AC 21 is therefore a generous ameliorative measure against delays in processing of permanent residency application, or even if there are no processing delays, against delays caused by backlogs in the EB preferences. For example, a beneficiary of an I-140 petition in the EB-3 for India may well have to wait for the green card for over a decade, and AC 21 allows the H-1B status to be extended long after the six year limitation has ended, thus allowing the intending immigrant to work in the US and remain in status.

This benefit to extend H-1B status comes to an end if one of the applications that served as the basis for the extension – the underlying labor certification, I-140 petition or adjustments of status application - gets denied. The authors will argue that once the H-1B status is extended under AC 21, it cannot be switched off if there is a denial of the underlying application or petition during either the one year or three year extension period. Such a denial, on the other hand, should only preclude a further H-1B extension under AC 21.

We give great credit to immigration scholar and guru, Naomi Schorr, for bringing to our attention in her recent article, *It Makes You Want To Scream: Who Knows?* 15 Bender's Immigr. Bull. 1387 (Oct. 15, 2010), that there is ambiguity in a not so clearly written USCIS memorandum that seems to suggest that the H-1B status may no longer be valid after the denial of the underlying application or petition. In a Memorandum from William R. Yates on a number of AC 21 issues dated May 12, 2005, http://bit.ly/aMjERW, one section indicates that the H-1B extension under AC 21 could be applied during the remainder of the sixth year for whatever time was left for that year plus the additional extra year under AC 21. Question 3 is worth repeating:

Question 3. Are there cases where an alien, who has been granted an H-1B extension beyond the 6th year, will nonetheless only be allowed to remain for the 6-year maximum period of stay?

Answer: Yes. As addressed in the April 24, 2003 guidance memorandum, USCIS is required to grant the extension of stay request made under section 106(a) of AC21, in one-year increments, until such time as a final decision has been made to:

A. Deny the application for labor certification, or, if the labor certification is approved, to deny the EB immigrant petition that was filed pursuant to the approved labor certification;

B. Deny the EB immigrant petition, or

C. Grant or deny the alien's application for an immigrant visa or for adjustment of status.

If at any time before or after the filing of the single (combined) extension request a final decision is made on the above-stated grounds, the beneficiary of the extension request will not be entitled to an extension beyond the time remaining on his or her 6-year maximum stay unless another basis for exceeding the maximum applies.

We agree with Ms. Schorr that we cannot precisely understand what this question and answer actually means. It could mean, as Ms. Schorr suggests, a situation "where a petition for a sixth year has been approved, but the underlying basis for the extension is denied before the end of the six years? Or, does it reach someone who's already in an extended period of H-1B status and act to immediately, by operation of law, put an end to that status? If so, it's

certainly a trap for the unwary."

The authors offer an alternative reading of this question and answer. We note that the Yates Memorandum talks about the extension rather than the revocation of status. It could mean that the USCIS may deny the H-1B after the filing but before it is adjudicated during the sixth year. For example, an H-1B extension is filed requesting an additional three months remaining in the sixth year (based on 3 months of time spent abroad that can be recaptured towards the sixth H-1B year) and an additional 7th year under AC 21. If at the time of adjudication, the USCIS examiner finds that the underlying labor certification has been denied, the extension request can still be granted for an additional 3 months, which is the remainder of the sixth year, but not for the 7th year. Once the USCIS has allowed the H-1B temporary worker to cross the 6th year Rubicon, that decision remains intact even if the labor certification or I-140 immigrant petition later go down in flames. Denial of any of these applications does not mean that the 7th year extension was improvidently granted nor is it a reason to revisit it.

Our reading suggests that once the H-1B extension is approved, it cannot terminate by operation of law based on a denial of the underlying application. Such a radical interpretation, if at all the government meant it that way in the Yates Memorandum, contravenes the plain language of the AC 21 statute and also defies logic with respect to prior USCIS polices regarding how it treats status violations. Section 106(b) of AC 21 states that "he Attorney General shall extend the stay of an alien who qualifies for an exemption under section (a) in one-year increments until such time as a final decision is made" This can be clearly read as allowing H-1B extensions so long as there is no final decision at the time of filing the extension but not after the extension has been granted. Indeed, a later USCIS Memorandum dated May 30, 2008 further interpreting AC 21 by Donald Neufeld, http://bit.ly/c5YV4j, further supports our position. Mr. Neufeld instructs USCIS adjudicators that the State Department visa bulletin regarding whether the priority date is current or not should be checked at the time of filing the H-1B extension. This suggests that if during the three year H-1B extension period, the priority date does become current, the H-1B status continues and will not terminate.

This reading is further supported by the fact that if the Yates Memorandum is construed broadly, the alien would go out of status as soon as the underlying application is denied, even though the alien has the right to continue to pursue

it further on appeal within a few days or weeks. If the labor certification gets denied, the H-1B status will extinguish, but then it ought to get revived when an appeal to the Board of Alien Labor Certification Appeals BALCA) is filed within 30 days. If BALCA affirms the denial of the labor certification, the H-1B status will again get extinguished, but the employer has 6 years to seek review in federal court under Chapter 7 of the Administrative Procedures Act and continue to pursue the labor certification beyond the BALCA denial. If an APA action is taken prior to the filing of the next extension request, the H-1B status ought to get revived again.

Under different circumstances, however, H-1B status and any other nonimmigrant status cannot be switched on and off like a light bulb. We wish this were the case, but it is not so. Once an alien falls out of status, say by failing to work for a few months, H-1B status does not get revived when the alien reports back to work. The right way to rectify status is to leave the US and reenter or file a new extension and ask that the status violation be excused under 8 CFR §214.1(c)(4).

Similarly, with respect to three year H-1B extensions under AC 21 § 104(c), the alien "may apply for and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon." If the Yates Memorandum also applies to a § 104(c) extension, which the plain reading of the text suggests may not be the case, and if the adjustment of status application is denied, under a literal reading of the Yates memo, the H-1B status comes to an end within the 3 year period. But, pause and take a deep breath. If USCIS denies the AOS, the application may be renewed in a removal proceeding pursuant to 8 CFR § 245.2(a)(5)(ii). And at the time of the renewal of the AOS before the Immigration Judge, the same regulation provides that an applicant does not have to meet the statutory requirements of § 245(c) again so long as she or he met them at the time the renewed application was initially filed. This event, the placing of the alien in removal proceeding, ought to again "turn on" the H-1B status, which if it does, would also be an instant ground to terminate removal proceedings as the alien is in status and should not be removed. Thus, the very act of placing the alien in removal proceedings would automatically give grounds to terminate the removal proceeding. How logical (or illogical) will that be from a policy perspective?

Also, neither the employer nor the H-1B worker may know about the

termination of status. It is possible for an H-1B extension under AC 21 to occur with a new employer based on the prior employer's labor certification or I-140 petition, *See On The Edge Of The Precipice – Being Laid Off During The 7th year H-1B*, http://bit.ly/cqmC16. If the prior employer yanks the I-140 petition during the three year extension period, and the H-1B is no longer in status, what does this portend for the new employer's obligation under the Form I-9, Employment Eligibility Verification? What if the H-1B beneficiary files for adjustment of status unwittingly not knowing that his or her H-1B status switched off some time ago and is now not found to be eligible for the benefit?

Clearly, the termination of H-1B status could not have been intended by Congress when it enacted AC 21, otherwise the Congress would have been more explicit about it. Therefore, a sensible reading of both § 106(a) and § 104(c) ought to support the argument that once the AC 21 extension is granted, the H-1B beneficiary is home free until it is time to again request a further extension. Still, as our teacher Naomi Schorr rightly reminds us, there is not much in immigration law these days that is safe from challenge. So, no matter how confident we are that our views on AC 21 make sense, the authors feel it prudent to pay homage to the sage counsel of baseball immortal Satchel Paige: " Don't look back. Something might be gaining on you."