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PRESERVING H-1B EXTENSION FOR SPOUSE AND FREEZING AGE OF CHILD IN RULE IMPACTING HIGH-SKILLED NONIMMIGRANT WORKERS

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The purpose of this blog is to draw attention to two little know legal concepts, which must either be preserved or introduced through the proposed rule entitled Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High Skilled Nonimmigrant Workers". They are concepts worthy of promotion since they would greatly benefit delayed green card applicants, especially with respect to extending H-1B status beyond the six years and freezing the age of a child under the Child Status Protection Act under a new I-140 petition. While there are many other proposals in need of repair and improvement, I focus on these two since I have dwelt on them with passion in past blogs, here and here, and now is a time to advocate for their inclusion in the proposed rule.

This rule when finalized will provide relief to skilled immigrants who are presently on nonimmigrant visas and are caught in the crushing employment-based backlogs. The centerpiece of this rule would allow beneficiaries of approved employment based immigration visa petitions, known as I-140 petitions, to apply for an employment authorization document (EAD), although it has disappointed many by setting stringent criteria, which would deter most from taking advantage of it. This has been addressed in my prior blog – Allowing Early Adjustment Filing in Proposed Rule Impacting Skilled Workers Would Give Big Boost to Delayed Green Card Applicants. Those who are disappointed must continue to forcefully advocate so that EADs can be granted to deserving beneficiaries of approved I-140 petitions less restrictively in the final rule.

Preserving the Ability Of H-1B To Seek H-1B Extension Based On Other

Spouse's Labor Certification

The American Competitiveness in the 21st Century Act (AC 21) allows for an extension of H-1B visa status beyond the statutory time limitation of six years for those who cannot obtain a green card within this period. There are two pivotal provisions. AC 21 §106(a) allows for one year H-1B extensions beyond the sixth year if a labor certification application or I-140 petition was filed at least one year prior to the last day of the alien's authorized admission in H-1B status. Under second provision, AC 21 §104(c), the beneficiary of an approved I-140 petition can seek an H-1B extension for three additional years if it can be demonstrated that he or she is eligible for permanent residence but for the per country limitation.

The proposed rule seeks to provide this benefit only to the principal beneficiary and not to the spouse, assuming both are in H-1B status. While it is true that the other spouse who is not the direct beneficiary of a labor certification or I-140 petition can change status from H-1B to H-4 status, and seek an EAD as an H-4 spouse under the recently promulgated rule that allows for this, experience has shown that this can be a long process. Changing from H-1B to H-4 status can take several months, and there would also be additional delays in receiving the EAD. Even if the H-1B spouse proceeds overseas to apply for an H-4 visa, it would take at least 90 days before the H-4 spouse can obtain the EAD after being admitted into the US in that status. It is thus more convenient for the spouse who is also in H-1B status to continue to extend that H-1B status, and not disrupt his or her employment.

The rationale for not allowing a spouse who is also on an H-1B visa to use the other spouse's labor certification or I-140 petition is not very convincing. The preamble discusses AC 21 §104(c), which limits H-1B nonimmigrant status beyond the six-years to the 'beneficiary of a petition filed under section 204(a) of for a preference status under paragraph (1), (2), or (3) of section 203(b) ." According to DHS's logic, INA §203(b) applies only to principal beneficiaries, but not to derivative beneficiaries who are separately addressed in INA §203(d). The preamble also emphasizes that §104(c) refers to "the beneficiary" in the singular. The DHS uses this same logic to deprive the other H-1B spouse from extending H-1B status one year at a time based on the other spouse's labor certification or I-140 petition filed 365 days prior under AC 21 106(a).

Unlike AC 21 104(c), which the DHS focused on, there is a clearer basis in AC 21

106(a) to allow an H-1B spouse to seek a one year extension of H-1B status beyond six years when the other spouse is the beneficiary of an appropriately filed labor certification.

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

Previously, AC21 § 106(a) only permitted one-year extensions beyond the sixth-year limitation if the H-1B nonimmigrant was the beneficiary of a labor certification or an I-140 petition, and 365 days or more had passed since the filing of a labor certification application or the I-140 petition. See Pub. L. No. 106-313, 114 Stat. 1251 (2000). The term "any application for labor certification" was absent in the original version of AC 21§106(a). 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 I-140 petition and the H-1B nonimmigrant's current employment. This is now fortunately preserved in the proposed rule, but there is no reason to also not allow a spouse to use "any" application for labor certification, which could be the labor certification filed on behalf of the other spouse.

With regards to the absence of INA §203(d) in AC21 §104(c) or §106(a), does this suggest that that only the principal spouse can immigrate under INA §203(b) and the derivative needs INA §203(d)? 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. 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).

In conclusion, there is a very good argument under AC 21 §106(a) that the H-1B spouse can use "any" labor certification, which includes the labor certification filed on behalf of the other spouse, to seek an additional one year H-1B extension. Furthermore, there is also an equally good argument, applicable under both AC 21 §106(a) and §104(c), that the exclusion of the mention of INA §203(d) is not fatal as a derivative spouse also ultimately immigrates under INA §203(b). The fact that "beneficiary" is mentioned in the singular and not in the plural should also not undermine support for the notion that any beneficiary, either as principal or spouse, can qualify for an AC 21 H-1B extension who is capable of immigrating under a labor certification or I-140 petition, or both. DHS must interpret existing ameliorative provisions in AC 21 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 a separate note, there is also no need to penalize an H-1B worker from availing from an AC 21 H-1B extension if s/he fails to file an adjustment application or make an application for an immigrant visa within 1 year of availability. If the rule allows an H-1B extension based on a labor certification or I-140 petition filed by another employer, it may take some time for the new employer to obtain another labor certification and I-140 approval. The exception provided in the rule for failure to file within 1 year should include this circumstance, where the applicant is waiting for another labor certification and I-140 petition through a new employer.

Freezing The Age Of A Child Under The Child Status Protection Act Even Through A New Petition

One of the bright spots in the proposed rule at 8 CFR §204.5 is to clarify that even if an I-140 petition is revoked by the employer, the priority date of that

I-140 petition can still be used if a new employer files another I-140 petition. Even if the earlier I-140 petition is not revoked, and the same employer wishes to upgrade from an EB-3 I-140 to an EB-2 I-140 petition, the priority date of the earlier EB-3 I-140 petition can still be retained. The ability to retain an old priority date always existed in the rule, but the proposed rule also clarifies that retention of the priority date is further permissible when an employer revokes a petition or goes out of business.

The key issue is whether the new I-140 petition would be able to continue to protect the age of the child under the CSPA even if it is filed after the child has turned 21. We assume that the prior I-140 petition froze the age of the child under the CSPA age protection formula because it was filed prior to the child turning 21, the date became current, and an I-485 adjustment application was filed within one year of visa availability. There are many beneficiaries under this scenario, including the class of 2007 adjustment applicants whose priority dates under the India EB-3 have not become current after they retrogressed in August 2007.Alternative, we assume that when the priority date of the earlier I-140 becomes current, it would still potentially be able to protect the age of the child. At issue is whether the new I-140 petition continues to protect the age of the child.

The CSPA, as codified in INA 203(h), applies to the “applicable” petition, and without further clarification it may be difficult to bootstrap the new I-140 onto the “applicable” prior I-140 petition, which is no longer being utilized but was

filed before the child’s 21st birthday. There is room to interpret the term “applicable” petition to include the new I-140 petition, especially since the new I-140 petition recaptured the priority date of the old I-140 petition. This should be made explicit in the final rule where the new I-140 petition is considered the “applicable” petition for purposes of protecting the age of the child under the old petition. If an old I-140 petition revoked by an employer can be used for purposes of preserving the priority date in a new petition, port to another employer or seek an AC 21 H-1B extension, it should also be preserved for preserving the age of a child under the CSPA. Similarly, even if the I-140 petition is not revoked, a new I-140 petition, filed either by the same or new employer should be able to freeze the age of the child if the old I-140 petition was able to do so.

Conclusion

It is important that everyone impacted by this rule should strive to improve it by submitting comments. We will continue to blog on this rule with the goal of providing stakeholders with good ideas for comments. While there is no guarantee that the DHS will incorporate all good and worthy ideas, it is important to continue to float such ideas as they can never really die, and have the potential to be included in other rules or even subsequently through legislation. The deadline for submitting comments to this proposed rule is February 29, 2016.