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US IMMIGRATION & NATIONALITY LAW

H-1B EXTENSION BEYOND SIX YEARS WILL NOT BE GRANTED IF PRIORITY DATE IS CURRENT AND GREEN CARD IS NOT APPLIED FOR WITHIN ONE YEAR

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The Immigration and Nationality Act (INA) § 214(g)(4) limits the amount of time that H-1B nonimmigrant workers may extend their H-1B status to six years. Under certain situations, however, H-1B status may be extended beyond the statutory six-year maximum, namely by way of a "Lengthy Adjudication Delay Exemption" or a "Per-Country Limitation Exemption".

On January 17, 2017, regulations for high-skilled workers incorporating provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) were implemented. Under AC21 §106(a), H-1B status may be extended beyond the statutory six-year maximum for H-1B nonimmigrant workers if, *inter alia*, a labor certification or immigrant petition was filed 365 days prior to the end of the sixth year. Under AC21 §104(c), H-1B status may be extended for three years at a time if the individual is the beneficiary of an employment-based I-140 immigrant visa petition, and is eligible to adjust status but for backlogs, caused by per-country limitations, in the employment-based first (EB-1), second (EB-2), or third preference (EB-3) categories. Therefore, a petitioner seeking an H-1B extension on behalf of an H-1B beneficiary pursuant to §104(c) must establish that at the time of filing for such extension, the beneficiary is not eligible to be granted lawful permanent resident (LPR) status on account of the per country immigrant visa limitations. In other words, if at the time of filing Form I-129 to extend H-1B status, the beneficiary's priority date is not current under the Department of State's Immigrant Visa Bulletin, the USCIS is authorized to grant the H-1B extension request for three additional

years. Beneficiaries born in India and China can generally avail of the exemption under §104(c).

Based on §106(a) of AC21, 8 CFR § 214.2(h)(13)(iii)(D) provides a Lengthy Adjudication Delay Exemption by allowing extensions of H-1B status beyond the statutory six-year maximum if at least 365 days have elapsed since the filing of a labor certification with the DOL or an immigrant visa petition with USCIS. § 214.2(h)(13)(iii)(D)(2) further adds that H-1B approvals may be granted in up to one-year increments until either the approved permanent labor certification expires or a final decision has been made to, *inter alia*, approve or deny the application for permanent labor certification, immigrant visa petition, or adjustment of status application. Based on §104(c) of AC21, 8 CFR § 214.2(h)(13)(iii)(D)(10) precludes a noncitizen from taking advantage of the aforementioned Lengthy Adjudication Delay Exemption if the noncitizen is the beneficiary of an approved I-140 and fails to file an adjustment of status application or apply for an immigrant visa within one year of an immigrant visa being authorized for issuance based on his or her preference category and country of chargeability. Notably, this section also provides that USCIS may excuse a failure to file in its discretion if the noncitizen establishes that the failure to apply was due to circumstances beyond his or her control. 8 CFR § 214.2(h)(13)(iii)(E) provides a Per-Country Limitation Exemption by allowing H-1B extensions beyond the statutory six-year maximum if the noncitizen is the beneficiary of an approved I-140 and is eligible to be granted that immigrant status but for application of the per country limitations. The petitioner must demonstrate such visa unavailability as of the date the H-1B petition is filed with USCIS. 8 CFR § 214.2(h)(13)(iii)(E)(1) authorizes USCIS to grant H-1B extensions of up to three years for as long as the noncitizen remains eligible for this exemption.

Even though the preamble to the rule is not binding, it at least suggests that for purposes of determining when an individual becomes eligible for the Lengthy Adjudication Delay Exemption, DHS will look to see if he or she failed to apply for adjustment of status or an immigrant visa within one year of the date an immigrant visa is authorized for issuance based on the applicable Final Action Date in the Visa Bulletin. In practice, it is advantageous for clients that visa availability be measured by the Final Action Date, instead of the Dates for Filing, as they are eligible to obtain three-year extensions, until their priority date becomes current under the Final Action Date. This is also consistent with the

position that the USCIS has taken with respect to relying on the Final Action Date to freeze the age of the child under the Child Status Protection Act (see our blog criticizing use of the Final Action Date for CSPA purposes).

In other words, an H-1B nonimmigrant worker may hold H-1B status for more than six years if either 365 days have elapsed since an employer filed a labor certification or immigrant visa petition on his or her behalf. Whether the H-1B worker may extend his or her status in one or three year increments depends on a different set of factors. H-1B status may be extended in one-year increments if a labor certification was filed 365 days prior to the end of the worker's sixth year in H-1B status, and if the worker is the beneficiary of an approved I-140, he or she files an adjustment application or applies for an immigrant visa within one year of his or her priority date becoming current unless the failure to file timely was due to circumstances beyond the worker's control. Meanwhile, H-1B status may be extended in three-year increments if the H-1B worker if the beneficiary of an approved I-140 and is eligible to be granted that immigrant status but for his or her priority date not being current. Thus, the key differentiating factor between the one and three year extensions is whether the H-1B worker's I-140 priority date is current. If the H-1B worker's priority date is current and he or she has filed an adjustment application within one year of the priority date becoming current, then he or she may only extend H-1B status in one-year increments. If the H-1B worker's priority date is not yet current, then he or she may extend H-1B status in three-year increments provided the I-140 petition is approved.

Keep in mind that to qualify for a one-year extension, a labor certification must have been filed on the beneficiary's behalf 365 days prior to the end of the H-1B worker's sixth year, and to qualify for the three-year extension, the I-140, which could have been filed at any time, needs to be approved and the immigrant visa must be unavailable. But what happens when an H-1B worker's priority date has become current and he or she has not filed an adjustment application or immigrant visa within one year? If an immigrant visa is available, then only the one year extension must be requested and proof must also be provided that the worker has applied for adjustment of status or immigrant visa within one year of the Final Action Date. If an employer mistakenly requests three years instead of one year in the H-1B extension request, USCIS will likely issue a Request for Evidence (RFE) questioning why a three year extension was requested and also whether an adjustment of status application

has been filed if more than one year has elapsed since the visa became available.

Fortunately, under 8 CFR § 214.2(h)(13)(iii)(D)(10), USCIS may excuse failures to file timely upon a successful showing that the failure to apply was due to circumstances beyond the noncitizen's control. Indeed, there are certain instances in which a noncitizen may not file an adjustment application or immigrant visa within one year of his or her priority date becoming current, for example, where the noncitizen switches employers. Under AC21 §§ 106(a) and 104(c), the worker is eligible for H-1B extensions even if a prior employer filed the labor certification or immigrant visa petition. Given that an adjustment of status application cannot be filed with the prior employer when there is no job offer, the current employer must start the PERM labor certification process anew and then file a new I-140 petition with the prior priority date recaptured. We believe that such facts present circumstances beyond the noncitizen's control that warrant a waiver of the of the requirement that adjustment applications be filed within one year of the immigrant visa becoming available.

Skilled workers born in India who are caught in the EB-2 and EB-3 backlogs already face several obstacles while waiting for the green card. We have pointed out one more minefield that the worker needs to successfully overcome in remaining in the US in H-1B status while waiting for permanent residency.

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