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STILL DISADVANTAGED EVEN WHEN YOUR PRIORITY DATE BECOMES CURRENT

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By Cyrus D. Mehta and Kaitlyn Box*

Individuals who are caught in the employment-based immigrant visa backlogs must navigate myriad issues that are associated with waiting for their priority dates to become current and applying for adjustment of status. Generally, it is cause for celebration when these individuals' priority dates become current, as then are eligible to apply for adjustment of status. When the Final Action Date becomes current, the individual should receive permanent residence. But a Final Action Date becoming current can also bring about a number of additional issues that must be considered carefully. In our previous blog, we discussed the problems that can arise when workers do not apply for adjustment of status within one year of their priority date becoming current. For individuals who are the beneficiaries of more than one I-140 petition, another set of questions can come about when one I-140 is current but the other is not.

Pursuant to § 104(c) of the American Competitiveness in the 21st Century Act (AC21), an individual who is the beneficiary of an I-140 petition and would be eligible for adjustment of status "but for application of the per country limitations applicable to immigrants", is eligible for extensions of his nonimmigrant status in three-year increments until the adjustment of status application has been processed. Similarly, 8 CFR § 214.2(h)(13)(iii)(E) provides that "an alien who currently maintains or previously held H-1B status, who is the beneficiary of an approved immigrant visa petition…and who is eligible to be granted that immigrant status but for application of the per country limitation, is eligible for H-1B status beyond the 6-year limitation…". 8 CFR §214.2(h)(13)(iii)(E) plainly requires that an individual must be the beneficiary of an approved I-140 petition under the first, second, or third preference category

in order to obtain H-1B extensions beyond the sixth year, but provide little further guidance, especially concerning individuals who may the beneficiaries of more than one I-140 petition.

One conundrum arises when an individual is the beneficiary of two approved I-140s, one under EB-2 and the other under EB-3, but she has filed her adjustment of status application in connection with only one of I-140s and the other remains unutilized. In recent months, EB-2 dates have raced ahead while EB-3 dates have retrogressed, so many individuals' priority dates may have become current under the second preference category, but are not current under the third. If an adjustment applicant has already filed her I-485 in connection with her approved EB-2 I-140, may she still seek a three-year extension of her H-1B status based on her EB-3 I-140, which is not current? The language of AC21 § 104(c), and 8 CFR §214.2(h)(13)(iii)(E) do not seem to prohibit an application for an extension in this scenario. The regulations do not specify that the individual seeking an H-1B extension must not have another I-140 petition that is current, or must be seeking adjustment of status pursuant to the same I-140 petition being utilized for the H-1B extension.

Another difficult situation arises when an individual is similarly the beneficiary of two approved I-140s, one under EB-2 and one under EB-3, but filed his adjustment of status application in conjunction with the EB-3 I-140 when his priority date was current, but it has now retrogressed. If this individual's priority date has become current under EB-2, he would likely want to consider filing a transfer of underlying basis request to connect his adjustment of status application to the EB-2 I-140 instead, hopefully ensuring more expeditious approval. Complications arise, however, when an applicant in this situation has not yet filed a transfer of underlying basis request but also wants to seek an H-1B extension beyond the sixth year based on the EB-3 I-140, which is no longer current. Given the ambiguity regarding USCIS stating that the 180 day portability clock starts again upon an interfiling request, some have chosen not to interfile and remain in EB-3 especially when they have changed to new employers. As in the above-described scenario, the regulations may not preclude an individual in this situation from seeking a three-year H-1B petition.

Individuals who find themselves in this situation may find some refuge in AC21 § 106, which states that an H-1B nonimmigrant may receive extensions of status in one-year increments if more than one year has passed since either the labor certification or the I-140 has been filed. Even if the labor certification

and/or I-140 petition have been approved, the individual can continue obtaining one-year extensions until an adjustment of status application can be filed. An individual whose priority date is current cannot ensure continued H-1B extensions by delaying filing an adjustment of status application, though. Proof must also be provided that the worker applied for adjustment of status within one year of his priority date becoming current, and if not, demonstrate that the failure to apply was due to circumstances beyond her control. To err on the side of caution, individuals who are the beneficiaries of one I-140 petition that is current and another that is not may consider requesting a three-year extension of H-1B status, but disclosing the existence of the second I-140 and asking in the alternative that USCIS grant a one-year extension, provided that either the labor certification or the I-140 petition was filed more than one year before the individual's sixth or final year in H-1B status. Adopting this approach could prevent an outright denial of the petition if USCIS declines to approve a three-year extension.

In addition to requiring frequent renewal, one-year H-1B extensions are subject to other pitfalls as well. If H-1B visa holders are confined to one-year extensions of their statuses, H-4 spouses seeking initial EADs are disadvantaged. Many are in this situation as the USCIS has been so slow in approving adjustment applications even when the Final Action Dates have been current for several months. Based on current USCIS processing times, an initial application for an H-4 EAD can take up to 8.5 months to be issued. Because the expiration date of the EAD will be tied to the validity of the H-1B petition itself, an EAD based on a one-year H-1B extension might only be valid for a couple of months by the time it is issued. Similarly, it can take several months for EADs and advance parole based on a pending adjustment application to be issued, potentially leaving H-4 spouses without work authorization if the H-4 EAD is issued with a very limited validity.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

**Kaitlyn Box graduated with a JD from Penn State Law in 2020, and is an Associate at Cyrus D. Mehta & Partners PLLC.*