



HQ 70/6.2  
AD 08-06

May 30, 2008

## Memorandum

TO: Field Leadership

FROM: Donald Neufeld /s/  
Acting Associate Director, Domestic Operations

SUBJECT: Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277.

Revisions to Adjudicator's Field Manual (AFM):

Chapter 20.2(d) Petition Validity

Chapter 31.2(d) Limits on a Temporary Stay

Chapter 31.3(g) H1-B Classification and Documentary Requirements

(AFM Update AD 08-06)

### I. Purpose

The purpose of this memorandum is to incorporate certain portions of previously issued guidance into the Adjudicator's Field Manual, as well as to provide additional guidance on adjudication of:

- (1) H-1B petitions in connection with the extension provisions of AC21 §106(a);
- (2) H-1B petitions in connection with the extension provisions of AC21 §104(c) for aliens subject to per country visa limitations;
- (3) H-1B petitions requesting concurrent employment on behalf of certain H-1B cap-exempt aliens;
- (4) INA § 212(n)(2)(C)(v) Guidance Relating to Changes in Employment by H-1B Aliens who

- report LCA violations; and
- (5) I-140 petitions and Form I-485 applications in connection with the portability provisions of AC21 §106(c).

### **Prior AC21 Guidance**

- On January 29, 2001, the Office of Field Operations issued a memorandum entitled *Interim Guidance for Processing H-1B Applications for Admission as Affected by the American Competitiveness in the Twenty-First Century Act of 2002, Public Law 106-313*.
- On June 19, 2001, the Office of Programs issued a follow-up memorandum entitled *Initial Guidance for Processing H-1B Petitions as Affected by the American Competitiveness in the Twenty-First Century Act (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396)*.
- On February 28, 2003, the Immigration Service Division issued a memorandum entitled *Procedures for concurrently filed family-based or employment-based Form I-485 when the underlying visa petition is denied*.
- On April 24, 2003, the Office of Operations issued a memorandum entitled *Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273)*.
- On August 4, 2003, the Office of Operations issued a memorandum entitled *Continuing Validity of Form I-140 Petition in Accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)*.
- On September 23, 2005, the Office of Field Operations issued a memorandum entitled *Interim Guidance Regarding the Impact of the Department of Labor's (DOL) PERM Rule on Determining Labor Certification Validity, Priority Dates for Employment-Based Form I-140 Petitions, duplicate Labor Certification Requests and Requests for Extension of H-1B Status Beyond the 6<sup>th</sup> Year*.
- On October 18, 2005, the Acting Deputy Director, designated a decision of the Administrative Appeals Office (AAO) in *Matter of Al Wazzan* (January 12, 2005) as a USCIS Adopted Decision.
- On December 27, 2005<sup>1</sup>, the Office of Field Operations issued a memorandum entitled *Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*.

All of the provisions of these memoranda remain in effect except where noted herein. This memorandum supplements the existing guidance.<sup>2</sup>

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<sup>1</sup> This memorandum reissued prior guidance provided in a memorandum with the same title on May 12, 2005 without change except to clarify the answer to question 1 in Section I.

<sup>2</sup> At a future date, USCIS plans to incorporate all previous still applicable guidance into forthcoming rulemaking relating to various AC21 and ACWIA statutory provisions.

## **II. Background and Field Guidance**

### **1. AC21 §106(a) Guidance Relating to Recent DOL Final Rule-Making**

USCIS hereby clarifies the impact of two recently published DOL rules on the adjudication of H-1B petitions pursuant to AC21 §106(a), and § 104(c) and Form I-140 petitions pursuant to §106(c) of AC21, INA 204(j). The two DOL rules are the “Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System”, [69 FR 77326], hereinafter called the “Perm Rule” (published on December 27, 2004, and effective as of March 28, 2005); and the DOL Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, published in the Federal Register, hereinafter call the “Perm Fraud” rule, published on May 17, 2007, (71 FR 27904), which took effect on July 16, 2007.

#### **Revocation of Approved Labor Certifications**

The DOL Perm rule, at 20 CFR 656.32 provides for the revocation of approved labor certifications by DOL if a subsequent finding is made that the certification was not justified. In such instances, DOL provides notice to the employer in the form of a Notice of Intent to Revoke an approved labor certification that contains a detailed statement of the grounds for the revocation and the time period allowed for the employer's rebuttal. The employer may submit evidence in rebuttal within 30 days of receipt of the notice. If rebuttal evidence is not filed by the employer, the Notice of Intent to Revoke becomes the final decision of the Secretary. If the employer files rebuttal evidence and DOL determines the certification should nonetheless be revoked, the employer may file an appeal under 20 CFR 656.26 within 30 days of the date of the adverse determination. If the labor certification is revoked, DOL will also send a copy of the notification to USCIS and the Department of State.

#### **Approved Labor Certification Validity Period**

The DOL Perm Fraud rule, at 20 CFR 656.30(b) provides for a 180-day validity period for labor certifications that are approved on or after July 16, 2007. Petitioning employers will have 180 calendar days after the date of approval by DOL within which to file an approved permanent labor certification in support of a Form I-140 petition with USCIS. Likewise, revised CFR 656.30(b)(2) established an implementation period for the continued validity of labor certifications that were approved by DOL prior to July 16, 2007; such labor certifications must have been filed in support of an I-140 petition within 180 calendar days after the effective date of the DOL final rule in order to be valid, i.e., prior to January 13, 2008.<sup>3</sup>

#### **DOL Rules Impact Adjudication on H-1B Extension Requests:**

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<sup>3</sup> For more information, see USCIS published on May 24, 2007, addressing the validity period for a DOL-Approved Labor Certification: Employers must file an approved labor certification in support of a Form I-140 with USCIS within the applicable validity period established by DOL. USCIS will reject all Form I-140 petitions that require an approved labor certification if the validity period of the labor certification application has expired. USCIS will deny all petitions that are accepted in error when it discovers that the petition was filed with an expired labor certification.

As addressed in the April 24, 2003 and December 27, 2005, guidance memoranda, USCIS is required to grant the extension of stay pursuant to §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.

The previous published guidance outlined above does not take into account that approved labor certifications may now be revoked by DOL, or that approved labor certifications must be filed with a Form I-140 petition within the validity period stipulated by DOL in order to remain valid. In light of these regulatory changes implemented by DOL, the existing guidance on this topic is revised as follows:

USCIS will grant the 106(a) extension of stay in one-year increments, unless a final decision is made to:

- (i) Deny the application for labor certification;
- (ii) If the labor certification is approved, to revoke the approved labor certification;
- (iii) Deny the EB immigrant petition; or
- (iv) 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 extension request one of the above occurs, the H-1B alien 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.

Also, because approved labor certifications must be filed with a Form I-140 petition within the validity period stipulated by DOL in order to remain valid, USCIS looks to see if, at the time an extension request under 106(a) is filed, the labor certification is unexpired.

USCIS adjudicators may grant an extension of stay under AC21 §106(a) if evidence is provided that:

- A labor certification is unexpired at the time of filing of the Form I-129 H-1B extension petition; and
- The labor certification was filed with DOL or the I-140 petition was filed with USCIS at least 365 days prior to the date the alien beneficiary will have exhausted 6 years of H-1B status in the United States pursuant to 214(g)(4); and
- The extension and I-129 petition are otherwise approvable.

USCIS will *not* grant an extension of stay under AC21 §106(a) if, at the time the extension request is filed, the labor certification has expired by virtue of not having been timely filed in support of an EB immigrant petition during its validity period, as specified by DOL. USCIS sees no reason to consider a labor certification that has expired through the passage of time differently than one that has been denied or, for that matter, revoked. In addition, the filing of an immigrant petition with an expired labor certification would result in the automatic rejection, or if accepted in error, denial of that EB immigrant petition, which in turn, acts as a statutory bar to the granting of an extension beyond the 6-year maximum.

Extension requests under AC21 §106(a) may be made in a petition that also contains a request for an extension of stay that reaches the maximum 6 year limit. USCIS adjudicators should first determine the amount of H-1B extension time that may be granted to reach the 6-year limitation of stay, then determine if the labor certification or I-140 petition was filed at least 365 days by the conclusion of the 6-year limitation of stay in such instances. If so, then the one year AC21 106(a) extension may be granted. However, in no case can an extension be granted for more than a three-year period of time.

#### **Evidence of Pending Pre-PERM (ETA-750) and PERM (ETA-9089) Labor Certifications**

USCIS takes administrative notice that all labor certification applications filed with DOL prior to March 28, 2005, have received a final determination with the exception of still-active cases pending on appeal at BALCA or those cases still noted as pending in the BECs' Public Disclosure System (PDS) [<http://pds.pbis.doleta.gov/>].

USCIS will accept the following documents as evidence that an application for labor certification filed on behalf of the H-1B beneficiary is still pending, or has been certified and is still valid:

- If the labor certification is a Form ETA-750 that is still pending with DOL, a screen-print from the BECs' PDS that shows that the status of the labor certification application is *In Process* or is actively *On Appeal* that includes the name of the petitioning employer, the date that the Form ETA-750 was filed, the name of the alien beneficiary<sup>4</sup>, and the case number assigned to the pending Form ETA-750; or,
- If the labor certification is a Form ETA-9089 that was denied but is on appeal, documentation from DOL or BALCA that shows that the labor certification is on appeal; or

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<sup>4</sup> If the H-1B alien beneficiary is requesting an extension based upon a Form ETA-750 or Form ETA-9089 labor certification that has been pending 365 days or more but was certified in the name of another alien, the H-1B alien beneficiary may be eligible for the extension provided the H-1B petitioner submits evidence that the beneficiary is using the labor certification to obtain status as an EB immigrant and that a Form I-140 substitution petition was filed on his or her behalf prior to July 17, 2007. This means that the H-1B alien beneficiary must be the beneficiary of a pending or approved Form I-140 based on that labor certification.

- If the labor certification application was certified on or before July 16, 2007, a complete copy of the Form ETA-750 or Form ETA-9089 which shows the date of certification and a copy of the Form I-140 petition receipt notice for the petition filed on behalf of the H-1B beneficiary; or
- If the labor certification application was certified after July 16, 2007, a complete copy of the Form ETA-750 or Form ETA-9089 which shows the date of certification and the date upon which the labor certification will expire, along with a copy of the Form I-140 petition receipt notice for the petition filed on behalf of the H-1B beneficiary, if any.

If an applicant for extension of stay cannot present a screen print from the PDS, he or she may present a letter from DOL issued within the previous 60 days prior to the filing of the extension petition instead. The DOL letter must explain why the PDS screen print is unavailable and verify that an application for a labor certification is pending.

## **2. AC21 §104(c) Guidance for Aliens Subject to Per Country Visa Limitations**

Pursuant to AC21 §104(c), an alien is eligible for an extension of H-1B status if the alien is the beneficiary of an I-140 petition and would be eligible to be granted immigrant status but for the application of per country limitations applicable to immigrants under INA § 203(b)(1), (2) or (3). Despite the title of AC21 §104(c), referring to “one-time” protection, USCIS may grant such H-1B extensions, in a maximum of three year increments, until such time as the alien’s application for adjustment of status has been processed and a decision made thereupon.

AC21 § 104(c) is applicable when an alien, who is the beneficiary of an *approved* I-140 petition, is eligible to be granted lawful permanent resident status but for application of a per country limitation to which that alien is subject or, alternatively, if the immigrant preference category applicable to that alien is, as a whole, “unavailable”. Any petitioner seeking an H-1B extension on behalf of an H-1B alien beneficiary pursuant to AC21 §104(c) must thus establish that at the time of filing for such extension, the alien is not eligible to be granted lawful permanent resident status on account of the per country immigrant visa limitations or, alternatively, because the immigrant preference classification applicable to the alien is “unavailable”.

In order to make a determination as to the H-1B alien beneficiary’s eligibility for an extension of H-1B status under the provisions of §104(c) of AC21, USCIS adjudicators are instructed to review the Department of State Immigrant Visa Bulletin that was in effect at the time of *filing* of the Form I-129 petition. If, on the date of filing of the H-1B petition, the Visa Bulletin shows that the alien was subject to a per country or worldwide visa limitation in accordance with the alien’s immigrant visa “priority date”, then the H-1B extension request under the provisions of §104(c) of AC21 may be granted. To establish the alien’s priority date, USCIS may accept a copy of the H-1B alien beneficiary’s Form I-140 petition approval notice.

## **3. INA § 214(g)(6) Guidance relating to Concurrent Employment Requests for certain H-1B Cap-Exempt Aliens**

H-1B “cap-exempt” petitions, as referenced here, include petitions filed by:

- Institutions of higher education, as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a);
- Nonprofit organizations or entities related to or affiliated with institutions of higher education; and
- Nonprofit research organizations or governmental research organizations, as defined in 8 CFR 214.2(h)(19)(iii)(C).

Petitions filed on behalf of aliens who will be employed by certain types of educational, nonprofit or governmental organizations (these types of petitioners are normally referred to as “cap-exempt” because an H-1B alien employed by such an entity is not subject to the H-1B numerical limitations) are not counted towards the numerical limitations in INA § 214(g)(1) H-1B. *See* section 214(g)(5)(a) and (b) of the Immigration and Nationality Act (INA); and 8 CFR 214.2 (h)(8)(i)(A).

Pursuant to the provisions of INA §214(g)(6), USCIS does not require that an alien who is cap-exempt by virtue of the above types of employment, be counted towards the limitation contained in 214(g)(1)(a) if they accept concurrent employment with a non-exempt employer. INA §214(g)(6) reads as follows:

Any alien who **ceases** to be employed by an employer described in paragraph (5)(A) shall, if employed as a nonimmigrant alien described in section 1101(a)(15)(H)(i)(b) of this title, who has not previously been counted toward the numerical limitations contained in paragraph (1)(A), be counted toward those limitations the first time the alien is employed by an employer other than one described in paragraph (5). (Emphasis added.)

Documentary evidence, such as a current letter of employment or a recent pay stub, should be provided in support of such a concurrent employment petition at the time that it is filed with USCIS in order to confirm that the H-1B alien beneficiary is still employed in a cap-exempt position.

At the time of filing of a concurrent employment H-1B petition that is subject to the numerical limitation of 214(g)(1)(a):

- a. If the H-1B alien beneficiary has not “ceased” to be employed in a cap-exempt position pursuant to INA § 214(g)(5)(A) and (B), then he or she will not be counted towards the cap.
- b. If the H-1B alien beneficiary has “ceased” to be employed in a cap-exempt position, then the alien will be subject to the H-1B numerical limitation, and the concurrent employment petition may not be approved unless a cap number is available to the alien beneficiary.
- c. If USCIS determines that an H-1B alien beneficiary has ceased to be employed in a cap-exempt position after a new cap-subject H-1B petition has been approved on his or her behalf,

USCIS will deny any subsequent cap-subject H-1B petition filed on behalf of the H-1B alien beneficiary if no cap numbers are available.

#### **4. INA § 212(n)(2)(C)(v) Guidance Relating to Changes in Employment by H-1B Aliens who report LCA violations**

ACWIA provides for enhanced penalties against H-1B employers who violate attestations made on a Labor Condition Application filed with the Secretary of Labor. Among these provisions for enhanced enforcement are measures designed to enable and encourage H-1B workers to report employers who violate certain attestations. As a result, §212(n)(2)(C)(v) of the Act calls for a process under which an H-1B alien beneficiary who files a complaint regarding a violation of §212(n)(2)(C)(iv) and is otherwise eligible to remain and work in the United States may be allowed to seek other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such nonimmigrant classification. A more formalized process for the adjudication of H-1B petitions containing such extension requests will be incorporated into a forthcoming rulemaking relating to various AC21 and ACWIA statutory provisions.

USCIS adjudicators are instructed that, if credible documentary evidence is provided in support of an H-1B petition that the alien beneficiary faced retaliatory action from his or her employer based on a report regarding a violation of INA § 212(n)(2)(C)(iv), then USCIS adjudicators may consider any related loss of H-1B status by the alien as an “extraordinary circumstance” as defined by 8 CFR 214.1(c)(4). This process may allow the alien additional time to acquire new H-1B employment and remain eligible to apply for a change of status or extension of stay notwithstanding the termination of employment or other retaliatory action by his or her employer.

Credible documentary evidence should include a copy of the complaint filed by the H-1B alien beneficiary, along with corroborative documentation that such a complaint has resulted in the retaliatory action against the H-1B alien beneficiary as described in 20 CFR 655.801 in pertinent part:

- (a) No employer subject to this subpart I or subpart H of this part shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee has--
  - (1) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of sections 212(n) or (t) of the INA or any regulation relating to sections 212(n) or (t), including this subpart I and subpart H of this part and any pertinent regulations of DHS or the Department of Justice; or
  - (2) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of sections 212(n) or (t) of the INA or any regulation relating to sections 212(n) or (t).



### **5. AC21 §106(c), INA § 204(j) Portability Guidance relating to USCIS Adopted Decision, *Matter of Al Wazzan***

Pursuant to AC21 § 106(c), the approval of a Form I-140 employment-based (EB) immigrant petition shall remain valid when an alien changes jobs or employers, if:

- A Form I-485, Application to Adjust Status, on the basis of the EB immigrant petition has been filed and remained un-adjudicated for 180 days or more; and
- The new job is in the same or similar occupational classification as the job for which the petition was filed.

On October 18, 2005, USCIS designated *Matter of Al Wazzan*, A95 253 422 (Jan. 12, 2005) as a USCIS Adopted Decision. This AAO decision established that a petition that is deniable (i.e. not approvable) will not be considered “valid” for purposes of INA 204(j). An *unadjudicated* Form I-140 petition is not made “valid” merely through the act of filing the petition with USCIS or through the passage of 180 days. A *denied* Form I-140 petition is also not considered valid regardless of whether the I-140 petition is denied 180 days or more after the filing of the adjustment of status application and regardless of when a request to invoke the portability provision of INA § 204(j) is made. In order to be considered valid, an I-140 petition must have been filed on behalf of an alien who was entitled to the employment-based classification at the time that the petition was filed, and therefore must be approved prior to a favorable determination of a portability request made under INA § 204(j).

The holding in this decision is consistent with the guidance previously provided in the answer to Question 1, Section 1, on page 3 of the December 27, 2005 memorandum entitled *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*. The guidance provided in that section of the memorandum is now being incorporated into Chapter 20.2(d) of the Adjudicator’s Field Manual.

### **III. Questions**

Questions regarding this memorandum should be directed through channels to Alexandra Haskell in the Business and Trade Branch of Service Center Operations.

### **IV. AFM Update**

Accordingly, the Adjudicator’s Field Manual is revised as follows:



1. Paragraph (d) of Chapter 20.2 is revised to read:

#### **20.2 Petition Validity.**

\* \* \*

(d) Form I-140 Petition Must be Approved Prior to a Favorable Determination of a §106(c) AC21 portability request.

On October 18, 2005, USCIS designated *Matter of Al Wazzan*, A95 253 422 (Jan. 12, 2005) as a USCIS Adopted Decision. This AAO decision established that a petition that is deniable (i.e., not approvable), whether or not the petition is denied 180 days or more after the filing of the adjustment of status application, cannot serve as the basis for approval of adjustment of status to permanent residence under the portability provision of INA § 204(j). An un-adjudicated Form I-140 petition is not made valid merely through the act of filing the petition with USCIS or through the passage of 180 days. Rather, the petition must have been filed on behalf of an alien who was entitled to the employment-based classification at the time that the petition was filed, and therefore must be approved prior to a favorable determination of a §106(c) AC21 portability request.

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2. Paragraph (d)(4) of Chapter 31.2 is revised to read:

(d) Limits on a Temporary Stay.

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(4) Exemptions to Limitations of Stay. The limitation on the total period of stay does not apply to H-1B aliens when, as of the date of filing the extension request:

- 365 or more days have passed since the filing of any application for labor certification, Forms ETA-750 or ETA-9089, that is required or used by the alien to obtain status as an EB immigrant; and the labor certification, if approved, has not been revoked, is unexpired or has been timely filed with an EB petition within the labor certification's validity period; or
- 365 or more days have passed since the filing of an EB immigrant petition that is still pending; or
- The alien is the beneficiary of an approved EB immigration petition and is not able to file to adjust status to U.S. permanent legal residence based on the unavailability of an immigrant visa number.

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3. Paragraph (g)(8) of Chapter 31.3 is revised to read:

### **31.3 H1-B Classification and Documentary Requirements.**

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#### **(g) Adjudicative Issues.**

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#### **((8) Extension of H-1B Status Based on a Pending Labor Certification Application or Employment-Based (EB) Immigrant Petition.**

#### **(A) Conditions for the Granting of an H-1B Extension of Stay Under AC21 §106(a).**

Assuming the alien is otherwise qualified for an extension of H-1B status, USCIS will grant an extension beyond the 6th year if evidence is provided that:

- A labor certification is unexpired at the time of filing of the Form I-129 H-1B extension petition; and
- The labor certification was filed with DOL or the I-140 petition was filed with USCIS at least 365 days prior to the date the alien beneficiary will have exhausted 6 years of H-1B status in the United States pursuant to 214(g)(4); and
- The extension and the I-129 petition are otherwise approvable.

An extension of stay under AC21 §106(a) should **not** be granted if, at the time the extension request is filed, the labor certification has expired by virtue of not having been timely filed in support of an EB immigrant petition during its validity period, as specified by DOL.

#### **(B) Cut off for Granting of an H-1B Extension of Stay Under AC21 §106(a).**

USCIS will grant an extension of stay to such H-1B nonimmigrants in one-year increments until a final decision is made to:

- (i) Deny the application for labor certification;
- (ii) If the labor certification is approved, to revoke the approved labor certification;
- (iii) Deny the EB immigrant petition; or

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

A decision to certify, deny or revoke an application for labor certification is made by one of the Department of Labor's certifying officers.

If the application is denied or revoked, the employer is advised that there is a period of time within which the decision may be appealed to the Board of Alien Labor Certification Appeals (BALCA):

- For denied Form ETA-750 labor certification applications filed prior to March 28, 2005, the employer must file an appeal within 90 days.
- For denied or revoked Form ETA-9089 labor certification applications, the employer must file an appeal within 30 days.

If the employer does not file an appeal within the required timeframe, the denial becomes the final decision of the Secretary of Labor. USCIS will not consider a DOL decision to be final until either the time for appeal has run and no appeal has been filed or, if an appeal is taken, the date a decision is issued by BALCA. Therefore, the labor certification will still be considered "pending" while the denial or revocation of the labor certification application may be appealed, or while the appeal is actually pending, for the purposes of determining if an H-1B nonimmigrant is eligible for extension of stay.

(C) Combined pre and post 6<sup>th</sup> year extension requests.

USCIS will grant, in certain instances, extensions that request time remaining towards the 6-year maximum under 214(g)(4) and additional time allowed under AC21 § 106(a).

7<sup>th</sup> year extension requests under AC21 §106(a) may be made in a petition that also contains a request for an extension of stay that reaches the maximum 6 year limit. USCIS adjudicators should first determine the amount of H-1B extension time that may be granted to reach the 6 year limitation of stay, then determine if the labor certification or I-140 petition was filed at least 365 days by the conclusion of the 6 year limitation of stay. If so, then the one year AC21 106(a) extension may be granted. However, in no case can an extension be granted for more than a three year period of time. If the alien beneficiary would no longer be in H-1B status at the time that 365 days from the filing of the labor certification application or immigrant petition has run, then the extension of stay request cannot be granted.

(D) Documentation for Form ETA-750 Labor Certifications Filed Pre-PERM and Still Pending, and for Form ETA-9089s filed in PERM.

USCIS will accept the following documents as evidence that an application for labor certification filed on behalf of the H-1B beneficiary is still pending, or has been certified and is still valid:

- If the labor certification is a Form ETA-750 that is still pending with DOL, a screen-print from the DOL Public Disclosure System (PDS) [<http://pds.pbis.doleta.gov/>] that shows that the status of the labor certification application is *In Process* or is actively *On Appeal* that includes the name of the petitioning employer, the date that the Form ETA-750 was filed, the name of the alien beneficiary, and the case number assigned to the pending Form ETA-750; or
- If the labor certification application was certified on or before July 16, 2007, a complete copy of the Form ETA-750 or Form ETA-9089 which shows the date of certification and a copy of the Form I-140 petition receipt notice for the petition filed on behalf of the H-1B beneficiary; or
- If the labor certification application was certified after July 16, 2007, a complete copy of the Form ETA-750 or Form ETA-9089 which shows the date of certification and the date upon which the labor certification will expire, along with a copy of the Form I-140 petition receipt notice for the petition filed on behalf of the H-1B beneficiary, if any.

If an applicant for extension of stay cannot present a screen print from the PDS, he or she may present a letter from DOL issued within the previous 60 days prior to the filing of the extension petition instead. The DOL letter must explain why the PDS screen print is unavailable and verify that an application for a labor certification is pending.

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(10) Requests for an extension of H-1B status under the provisions of AC21 §104(c) for aliens subject to per country visa limitations.

USCIS interprets AC21 §104(c) as only applicable when an alien, who is the beneficiary of an approved I-140 petition, is eligible to be granted lawful permanent resident status but for application of the per country limitations. Any petitioner seeking an H-1B extension on behalf of an H-1B alien beneficiary pursuant to §104(c) of AC21 must thus establish that at the time of *filing* for such extension, the

alien is not eligible to be granted lawful permanent resident status on account of the per country immigrant visa limitations.

USCIS will accept a copy of the H-1B alien beneficiary's Form I-140 petition approval notice which shows that an immigrant visa is not immediately available to him or her based on the approved petition's priority date as evidence of the H-1B alien beneficiary's eligibility for an extension of H-1B status under the provisions of §104(c) of AC21.

Adjudicators are instructed to review the Department of State Immigrant Visa Bulletin that was in effect at the time of the *filing* of the Form I-129 petition in which a request for an §104(c) of AC21 H-1B extension request is made. If the H-1B alien beneficiary is shown to be ineligible to be granted lawful permanent resident status because of the per country visa limitations, then the H-1B extension request under the provisions of §104(c) of AC21 may be granted for a maximum of three year increments, until such time as the alien's application for adjustment of status has been processed and a decision made thereupon.

\* \* \*

(11) H-1B Portability Provisions of INA § 214(n), AC21 § 105.

INA § 214(n), provides that a nonimmigrant who was previously issued an H-1B visa or provided H-1B nonimmigrant status may begin working for a new H-1B employer as soon as that new employer files a nonfrivolous H-1B petition on the nonimmigrant's behalf, if:

- The nonimmigrant was lawfully admitted to the United States;
- The nonfrivolous petition for new employment was filed before the end of their period of authorized stay; and
- The nonimmigrant has not been employed without authorization since his or her lawful admission to the United States, and before the filing of the nonfrivolous petition.

In order to port, an alien must meet all the requirements of INA § 214(n), including the requirement that the new petition must be filed while the alien is in a "period of stay authorized by the Attorney General."

Successive H-1B portability petitions may be filed for an alien while the previous H-1B petitions remain pending (i.e. creating a "bridge" of H-1B petitions). However, to be approved every H-1B portability petition must separately meet the

requirements for H-1B classification and for an extension of stay. In the event that the alien's nonimmigrant status has expired while the petitions are pending, the denial of any filing in the string of extension of stay and/or change of status filings undercuts the "bridge", meaning that any petition to extend or change status that was filed after the expiration of the alien's status that is denied will result in the denial of all successive requests to extend or change status.

The status of a dependent of a principal nonimmigrant that is working pursuant to portability benefits is linked to the status of the principal nonimmigrant.

\* \* \*

(12) Changes in Employment by H-1B Alien Beneficiary under the Provisions of INA §212(n)(2)(C)(v).

The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277, was enacted on October 21, 1998. ACWIA provides for enhanced penalties against H-1B employers who violate attestations made on the LCA. Among these provisions for enhanced enforcement are measures designed to enable and encourage H-1B workers to report employers who violate certain attestations. As a result, §212(n)(2)(C)(v) of the Act requires the creation of a process under which an H-1B alien beneficiary who files a complaint regarding a violation of §212(n)(2)(C)(iv) and is otherwise eligible to remain and work in the United States may in some circumstances be allowed to seek other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such nonimmigrant classification.

If credible documentary evidence is provided in support of an H-1B petition that the H-1B alien beneficiary faced retaliatory action from his or her employer based on a report regarding a violation of INA § 212(n)(2)(C)(iv), then USCIS adjudicators may consider any related loss of H-1B status by the alien as an "extraordinary circumstance" as defined by 8 CFR 214.1(c)(4). This may allow the alien time to acquire new H-1B employment and remain eligible to apply for a change of status or extension of stay notwithstanding the termination of employment or other retaliatory action by his or her employer.

Such credible documentary evidence should include a copy of the complaint filed by the H-1B alien beneficiary, along with corroborative documentation that such a complaint has resulted in the termination of employment of the H-1B alien beneficiary or other retaliatory action by his or her employer as described in 20 CFR 655.801 in pertinent part:

- (A) No employer subject to this subpart I or subpart H of this part

shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee has--

- (i) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of sections 212(n) or (t) of the INA or any regulation relating to sections 212(n) or (t), including this subpart I and subpart H of this part and any pertinent regulations of DHS or the Department of Justice; or
- (ii) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of sections 212(n) or (t) of the INA or any regulation relating to sections 212(n) or (t).

In addition, adjudicators are reminded that the portability provisions of AC21 §105 may also apply to the whistleblower H-1B alien beneficiary should he or she choose to use them to seek new employment and obtain relief.

\* \* \*

(13) Cap Exemptions Pursuant to 214(g)(5) of the Act. [Chapter 31.3(g)(13) added June 6, 2006]

\* \* \*

(D) Requests for Changes in Employment or Concurrent Employment Requests for Certain Cap-Exempt Aliens.

H-1B “cap exempt” petitions, as referenced here, include petitions filed by:

- Institutions of higher education, as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a);
- Nonprofit organizations or entities related to or affiliated with institutions of higher education; and
- Nonprofit research organizations or governmental research organizations, as defined in 8 CFR 214.2(h)(19)(iii)(C).

Petitions filed on behalf of aliens who will be employed by certain types of educational, nonprofit or governmental organizations (these types of petitioners are normally referred to as “cap-exempt” because an H-1B alien employed by such an entity is not subject to the H-1B numerical limitations) are not counted towards the numerical limitations in INA § 214(g)(1). See section 214(g)(5)(a) and (b) of the Immigration and Nationality Act (INA); and 8 CFR 214.2 (h)(8)(A).



Pursuant to the provisions of INA §214(g)(6), USCIS has not required that an alien who is cap exempt by virtue of the above types of employment, be counted towards the limitation contained in 214(g)(1)(a) if they accept concurrent employment with a non-exempt employer. INA §214(g)(6) reads as follows:

Any alien who **ceases** to be employed by an employer described in paragraph (5)(A) shall, if employed as a nonimmigrant alien described in section 1101(a)(15)(H)(i)(b) of this title, who has not previously been counted toward the numerical limitations contained in paragraph (1)(A), be counted toward those limitations the first time the alien is employed by an employer other than one described in paragraph (5). (Emphasis added.)

Documentary evidence, such as a current letter of employment or a recent pay stub, should be provided in support of such a concurrent employment petition at the time that it is filed with USCIS in order to confirm that the H-1B alien beneficiary is still employed in a cap-exempt position.

At the time of filing of a concurrent employment H-1B petition that is subject to the numerical limitation of 214(g)(1)(a):

- If the H-1B alien beneficiary has not “ceased” to be employed in a cap-exempt position pursuant to INA §§ 214(g)(5)(A) and (B), then he or she will not be counted towards the cap.
- If the H-1B alien beneficiary has “ceased” to be employed in a cap-exempt position, then the alien will be subject to the H-1B numerical limitation, and the concurrent employment petition may not be approved unless a cap number is available to the alien beneficiary.
- If USCIS determines that an H-1B alien beneficiary has ceased to be employed in a cap-exempt position after a new cap-subject H-1B petition has been approved on his or her behalf, USCIS will deny any subsequent cap-subject H-1B petition filed on behalf of the H-1B alien beneficiary if no cap numbers are available.

\* \* \* \* \*

 4. The AFM Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read:

AD08-06	Chapter 20 & Chapter	This memorandum revises chapters
[INSERT	31	20 and 31 regarding issues relating to
SIGNATURE		the adjudication of employment-based
DATE OF THIS		benefits under the AC21 and ACWIA

MEMO]

provisions.

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