U.S. Department of Justice
Immigration and Naturalization Service

HQPGM 70/6.2.8

Office of the Executive Associate Commissioner

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JUN 19 2001

MEMORANDUM FOR MICHAEL A. PEARSON
EXECUTIVE ASSOCIATE COMMISSIONER
OFFICE OF FIELD OPERATIONS

FROM: Michael D. Cronin
Acting Executive Associate Commissioner
Office of Programs

SUBJECT: 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 October 17, 2000, former President Clinton signed into law The American Competitiveness in the Twenty-First Century Act, (AC21) Public Law 106-313. The new law increases the Fiscal Year (FY) H-1B cap and establishes new benefits in the H-1B nonimmigrant classification. All provisions in AC21 are effective upon the date of enactment, October 17, 2000. The H-1B nonimmigrant classification was also modified by the Act of October 17, 2000, Public Law 106-311 which increases the H-1B petition fee, and the Visa Waiver Permanent Program Act, Public Law 106-396 §401 (2000) which affects the requirements for amended H-1B petitions. These statutes are attached to this memorandum.

On January 29, 2001, the Office of Field Operations issued a memorandum entitled "Interim Guidance for Processing H-1B Applicants for Admission as Affected by the American Competitiveness in the Twenty-first Century Act of 2000, Public Law 106-313," (the January 29, 2001, memo). The January 29, 2001 Memo provides interim guidance to Ports of Entry (POEs) for the processing of H-1B applicants for admission. The January 29, 2001, memo remains in effect and is also attached to this memorandum.

The following guidelines establish interim procedures for use by Service personnel in the processing of new benefits under AC21 and the related legislation. Forthcoming regulations will promulgate substantive standards to be utilized in the adjudication of these new benefits.

I. EFFECTIVE DATES

- All provisions in AC21 are effective upon the date of enactment, October 17, 2000.
- The numerical limitations and the exemptions from the numerical limitations for the FY 2001 cap commence with petitions filed on September 1, 2000.
- Public Law 106-311 provides for new fee exemptions for certain entities identified below. These exemptions are effective for cases filed on or after October 17, 2000.
- Unless exempt from the fee, all H-1B petitions received by the Service on or after December 17, 2000 must be accompanied by the $1,000 H-1B Nonimmigrant Petitioner Account fee.
- Public Law 106-396, effective as of October 30, 2000, stipulates that amended H-1B petitions will not be required for petitioning employers who are involved in certain forms of corporate restructuring.

II. AC21

A. AC21 §102 -- Temporary Increase in Visa Allotments

The AC21 §102 provides that all H-1B petitions approved between the date the numerical limit was reached in FY 1999,[1] and September 30, 1999, are to be counted retroactively against the FY 1999 limit. This provision covers the H-1B petitions that were approved over the FY 1999 cap.

All approved H-1B petitions filed beginning October 1, 1999, up to and including August 31, 2000, are to be counted retroactively against the FY 2000 cap, regardless of the date of approval.

AC21 also increases the yearly number of H-1B nonimmigrant visas available to 195,000 for FYs 2001, 2002, and 2003. Starting in FY 2004, the number of H-1B nonimmigrant visas available will return to 65,000 per year. The statute specifies that the FY 2001 cap count starts with H-1B petitions filed on or after September 1, 2000.

B. AC21 §103 and §114 -- Exemptions from the H-1B FY Cap

As of October 17, 2000, the following beneficiaries of approved H-1B petitions are exempt from the H-1B FY cap:

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[1] See Notice, Information Regarding the H-1B Numerical Limitation for FY 1999, 64 Fed. Reg. 32151 (June 15, 1999). The Service reported that there were sufficient numbers of H-1B petitions pending at the Service Centers to reach the cap for FY 1999.

(a) beneficiaries who are in J-1 nonimmigrant status in order to receive graduate medical education or training pursuant to Immigration and Nationality Act (INA) §212(e)(iii), and who have obtained a waiver of the 2-year home residency requirement under the provisions of the INA first §214(l)(1)(B) (commonly referred to as the Conrad State 20 program); or

(b) beneficiaries who are employed at, or who have received an offer of employment at, an institution of higher education (as defined in the Higher Education Act of 1965 §101(a), 20 USC §1001(a)), or a related or affiliated non-profit entity; or

(c) beneficiaries who are employed by, or who have received an offer of employment from, a non-profit research organization; or

(d) beneficiaries who are employed by, or who have received an offer of employment from, a governmental research organization; or

(e) beneficiaries who are currently maintaining, or who have held within the last 6 years, H-1B status, and are ineligible for another full six year stay as an H-1B; or

(f) beneficiaries who have been counted once toward the numerical limit, and are the beneficiary of multiple petitions.

It is noted that section 103 of the law amends section 214(g)(6) of the Act as follows. An H-1B worker not previously counted toward the annual cap who leaves the employment of an institution of higher education or a related or affiliated non-profit entity to work as an H-1B at an employer other than one defined in Section 214(g)(5) of the Act will be counted toward the annual cap at that time.

C. AC21 §104(c) – "One –Time Protection" Benefits, Extension of H-1B Status Permitted where Adjustment Pending under Per Country Limitations

The AC21 §104(c) enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. An H-1B nonimmigrant is eligible for this benefit even if he or she has exhausted the maximum 6-year period of authorized stay for H-1B nonimmigrants under 8 U.S.C. §1184(g)(4), INA §214(g)(4). The statute states that the beneficiary must:

(a) have a petition filed on his or her behalf for a preference status under INA § 203(b)(1), (2), or (3) (an employment based ("EB") petition); and

(b) be eligible to be granted that status except for the per-country limitations.

Any H-1B nonimmigrant who meets the statutory requirements above may be approved as the beneficiary of a request for an extension of H-1B nonimmigrant status until a decision is made on the nonimmigrant's application for adjustment of status.

1. Procedure for processing "one –time protection" benefits

In order for a nonimmigrant to obtain an extension of H-1B nonimmigrant status under AC21 §104(c), a petitioner must file a Form I-129, Petition for Nonimmigrant Worker, with the appropriate signature, fees, and supporting documentation on behalf of the nonimmigrant. Existing guidelines in the instructions to the Form I-129W, "H-1B Data Collection and Filing Fee Exemption" for payment of the $1,000 H-1B Nonimmigrant Petitioner Account Fee shall be followed. For example, if the petitioner is a nonprofit research organization or the petition is a second or subsequent request for extension of stay filed by that petitioner on behalf of that beneficiary, the petitioner is exempt from payment of the $1,000 H-1B Nonimmigrant Petitioner Account Fee. If the petition and request for extension of stay are otherwise approvable, adjudicating officers shall not deny a petition because the nonimmigrant has exhausted the maximum 6-year limit provided for by INA § 214(g)(4). Extensions of stay under AC21 §104(c) shall be made in increments of three years.

The status of a dependent of an H-1B nonimmigrant is derivative of and linked to the status of the principal H-1B nonimmigrant. Therefore, dependents are eligible for H-4 status upon the filing of an H-1B petition on behalf of the principal alien and the filing of a Form I-539, Application to Extend/ Change Nonimmigrant Status with filing fee and all necessary supporting documentation for the dependent. Dependents should be advised to file the Form I-539 concurrently, whenever possible, with the H-1B petition filed on behalf of the principal H-1B nonimmigrant.

D. AC21 §105 -- Visa portability

The AC21 §105 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:

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

The status of a dependent of a principal nonimmigrant who is working pursuant to portability benefits is derivative of and linked to the status of the principal nonimmigrant. Therefore, dependents will remain in H-4 status if the principal nonimmigrant is lawfully working pursuant to portability benefits.

There are four contexts in which the question of whether a nonimmigrant has lawfully worked or maintained lawful status under the §105 portability provisions may arise:

(a) Adjustment of status, when determining whether a nonimmigrant has maintained lawful status or engaged in unauthorized employment; or

(b) Request for extension of stay, when determining whether a nonimmigrant has maintained lawful status; or
(c) Request for change of nonimmigrant status, when determining whether a nonimmigrant has continued to maintain status; or
(d) Removal proceedings under INA §237(a)(1)(C)(i), failure to maintain nonimmigrant status.

Until the Service promulgates final regulations addressing the above questions, Service personnel shall consult with Tracy Renaud/Headquarters Immigration Services Division on a case by case basis before denying benefits or issuing Notices to Appear (NTA's) on the grounds that the nonimmigrant was not lawfully working or maintaining lawful status under the requirements of the AC21 §105 portability provisions. Headquarters may direct Service personnel to hold certain applications in abeyance until a final regulation becomes effective, permitting adjudication of the application. It should be noted that 8 C.F.R. §214.1(c)(4) and 8 C.F.R §248.1(b) permit the discretionary excuse, in certain circumstances, of a nonimmigrant's failure to timely file a request for an extension of stay or change of status, and may be applicable in some cases involving portability provisions.

The Service is formulating a proposed regulation to address the AC21 §105 portability provisions. One key issue involves the scope of the portability provisions. On the one hand, Congress does not appear to have limited portability benefits only to those who are working lawfully in H-1B status at the time a new employer files a new H-1B petition on their behalf. Nor, on the other hand, does Congress appear to have extended portability benefits to any alien who has ever held H-1B status, no matter how long ago or what the alien's current status in the United States. The Service expects, therefore, to propose a rule that would afford H-1B beneficiaries, who are no longer working for the initial H-1B employer, some reasonable period of time such as 60 days after leaving the initial H-1B employer to begin working for a new H-1B petitioning employer under the portability provisions. It is important to note that such a proposed rule would not, of course, take effect until it has been published as a final rule, after notice and comment, and any revisions. This prospective statement of policy is provided solely for informational purposes to Service personnel and shall not be utilized as a standard of adjudication in cases involving portability issues, unless and until promulgation of a final rule implementing AC21 §105 with such an interpretation. Service personnel will be notified of any changes in the processing of AC21 benefits that may occur upon the effective date of a final rule.

1. Admission Procedures for Nonimmigrants Claiming Portability

The following procedures reflect the Service's January 29, 2001, memo. An H-1B applicant for admission who is no longer working for the original petitioner is admissible at a Port of Entry (POE) pursuant to the portability provisions, upon presentation of the following evidence:

(a) that the applicant is otherwise admissible;
(b) that the applicant, unless exempt, is in possession of a valid, unexpired passport and visa (including a valid, unexpired visa endorsed with the name of the original petitioner);

(c) that the applicant was previously admitted as an H-1B or otherwise accorded H-1B status. If a visa exempt applicant is not in possession of the previously issued Form I-94, Arrival/ Departure Record, or a copy of the previously issued I-94, the applicant may present a copy of the Form I-797, Notice of Action, with the original petition's validity dates; and

(d) that an H-1B petition was timely filed on behalf of the applicant, before expiration of the validity dates of the applicant's previously authorized period of stay. This evidence shall be in the form of a copy of a dated Form I-797 receipt notice reflecting that a new petition has been filed, or other credible evidence of timely filing that is validated through a CLAIMS query.

The nonimmigrant applicant is admissible to the validity date of the previously approved petition, plus 10 days.

Applicants for admission who are dependents of nonimmigrants working pursuant to portability must present the following evidence when seeking admission at a POE:

(a) that the dependent is otherwise admissible;

(b) that the dependent is in possession of a valid, unexpired passport and visa, unless exempt;

(c) that the principal nonimmigrant on whom the applicant is dependent was previously admitted as an H-1B or otherwise accorded H-1B status. If the principal nonimmigrant was visa exempt and not in possession of the previously issued Form I-94, Arrival/ Departure Record, or a copy of the previously issued I-94, the applicant may present a copy of the principal nonimmigrant's Form I-797, Notice of Action, with the original petition's validity dates; and

(d) that an H-1B petition was timely filed on behalf of the principal nonimmigrant on whom the applicant is dependant, before expiration of the validity dates of the principal nonimmigrant's previously authorized period of stay. This evidence shall be in the form of a copy of a dated Form I-797 receipt notice reflecting that a new H-1B petition has been filed, or other credible evidence of timely filing that is validated through a CLAIMS query.

a. The applicant does not present evidence that an H-1B petition has been timely filed on behalf of the principal nonimmigrant

If the applicant is not in possession of a copy of the Form I-797, or a query of CLAIMS shows no evidence that an H-1B petition has been timely filed, the applicant is not admissible and should be processed accordingly. Generally, an applicant who lacks evidence of a pending H-1B petition should not be processed as an expedited removal unless there is evidence of fraud or misrepresentation.

b. The validity dates of the applicant's previously approved nonimmigrant petition have expired

If the validity dates of the applicant's previously approved nonimmigrant petition have expired, and the applicant does not present evidence that the new H-1B petition has been approved, he is not admissible under these provisions and should be processed accordingly. Generally, an alien whose petition has expired should not be processed as an expedited removal unless there is evidence of fraud or misrepresentation.

E. AC21 §106 -- Special Provisions in Cases of Lengthy Adjudication

AC21 §106 permits H-1B nonimmigrants to obtain an extension of H-1B status beyond the 6-year maximum period, when:

(a) the H-1B nonimmigrant is the beneficiary of an employment based (EB) immigrant petition or an application for adjustment of status; and
(b) 365 days or more have passed since the filing of a labor certification application, Form ETA 750, that is required for the alien to obtain status as an EB immigrant, or 365 days or more have passed since the filing of the EB immigrant petition.

The Attorney General is required to grant the extension of stay of such H-1B nonimmigrants in 1-year increments, until a final decision is made on the H-1B nonimmigrant's lawful permanent residence.

1. Procedures for Obtaining Extension of Status in Cases of Lengthy Adjudication

In order for an H-1B nonimmigrant to receive an extension of stay under AC21 §106 beyond the maximum 6-year limit, a petitioner must file a Form I-129 on behalf of the nonimmigrant beneficiary. The petitioner may be either the beneficiary's current employer or a new employer. If the H-1B petition is approved, the petition will be valid for a period of 1 year. One-year extensions of the beneficiary's H-1B status may continue until a final decision is made on the alien's lawful permanent resident status. A petitioner is required to file a new Form I-129 and pay the $110 filing fee for the request for a 1-year extension of status under AC21 §106. Existing guidelines in the instructions to the Form I-129W for payment of the $1,000 H-1B Nonimmigrant Petitioner Account Fee shall be followed. For example, if the petitioner is a nonprofit research organization or the petition is a second or subsequent request for extension of stay filed by that petitioner on behalf of that beneficiary, the petitioner is exempt from payment of the $1,000 H-1B Nonimmigrant Petitioner Account Fee.

The status of a dependent of an H-1B nonimmigrant is derivative of and linked to the status of the principal H-1B nonimmigrant. Therefore, dependents are eligible for H-4 status upon the filing of an H-1B petition on behalf of the principal alien, and the filing of a Form I-539 with filing fee and all necessary supporting documentation for the dependent. Dependents should be advised to file the Form I-539 concurrently, whenever possible, with the H-1B petition filed on behalf of the principal H-1B nonimmigrant.

F. AC21 §106(c) – Change of Employment Permitted in Cases of Lengthy Adjustment Adjudication

The AC21 §106(c) provides that the certification or Form I-140 approval of an EB immigrant petition shall remain valid when an alien changes jobs, if:

(a) a Form I-485, Application to Adjust Status, on the basis of the EB immigrant petition has been filed and remained unadjudicated for 180 days or more; and
(b) the new job is in the same or similar occupational classification as the job for which the certification or approval was initially made.

1. Procedures for Processing Benefits under AC21 §106(c)

If an alien has complied with the above statutory requirements, adjudicators shall not deny applications for adjustment of status on the basis that the alien has changed jobs. Under present practices it is expected that an I-485 applicant notify the Service when they no longer intend to enter into employment with the employer who sponsored them on the I-140 petition. The Service should continue to expect the applicant to submit a letter notifying INS of this change in intent. If the Adjudicator has reason to believe that the applicant's intent has changed a Request for Evidence (RFE) may be issued to clarify the applicant's intent in regards to employment.

In instances where the applicant no longer intends to be employed by the employer who sponsored him/her on the I-140, the Service should request a letter of employment from the new employer. The letter from the new employer verifying that the job offer exists should contain the new job title, job description and salary. This information is necessary to determine whether the new job is in the same or similar occupation and to determine whether the alien is admissible under the public charge ground of inadmissibility at INA §212(a)(4). To determine whether a new job is in the same or similar occupational classification as the original job for which the certification or approval was initially made, the adjudicating officer may consult the Department of Labor's Dictionary of Occupational Titles or its online O*NET classification system or similar publications.

The Service is currently formulating proposed regulations to establish a policy framework in which to adjudicate AC21 §106(c) benefits. Until the Service promulgates final regulations establishing such a policy framework, adjudicators shall consult, on a case by case basis, with Headquarters before denying cases on the basis that the new job is not in the same or similar classification.

G. AC21 §108 -- Recovery of Visas Obtained Fraudulently

The AC21 §108 provides that when approval of an H-1B petition is revoked on the basis of fraud or the willful misrepresentation of a material fact, one number shall be restored to the H-1B cap in the FY in which the petition is revoked, regardless of the FY in which the petition was actually approved.

Any revocation based on fraud or misrepresentation must be updated correctly in CLAIMS, and the proper correspondence shall be sent to the petitioner.

H. Extensions of Stay beyond the 6-Year Maximum Period of Stay and Unlawful Presence

As described above, AC21 provides for the extension of H-1B status in cases where an alien's immigrant visa petition or adjustment of status application is pending due to the per-country limitation on visas, or due to a lengthy adjudication process. Therefore, it is possible that an H-1B nonimmigrant may stay beyond the 6-year maximum period of stay[2] defined at INA §214(g)(4), yet remain in status under the AC21provisions. As long as aliens in these circumstances remain in a period of stay authorized through extensions of nonimmigrant stay, they do not accrue unlawful presence.

III. OTHER LEGISLATION AFFECTING THE H-1B NONIMMIGRANT CLASSICATION

A. Public Law 106-311- Increase of the H-1B Nonimmigrant Petitioner Fee from $500 to $1,000

This law raises the H-1B Nonimmigrant Petitioner Fee from $500 to $1,000 effective 60 days after enactment. The law was enacted on October 17, 2000. Therefore, unless exempt by statute from the H-1B Nonimmigrant Petitioner Fee, all Form I-129 H-1B petitions received by the Service on or after December 17, 2000, must be accompanied by the increased H-1B Nonimmigrant Petitioner Fee of $1,000. There are no provisions in the law for waiving the $1,000 H-1B Nonimmigrant Petitioner Fee. The employer continues to be precluded from requiring an alien beneficiary to reimburse or otherwise compensate the employer for all or part of the H-1B Nonimmigrant Petitioner Fee. The petitioner may submit separate checks or one single remittance to cover the usual filing fee for the Form I-129 and the H-1B Nonimmigrant Petitioner Fee.

Under Public Law 106-311, the following employers are exempt from the H-1B Nonimmigrant Petitioner Fee, effective October 17, 2000:

(a) a primary or secondary educational institution;
(b) an institution of higher education, as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. Sec. 1001(a);
(c) a nonprofit entity related to or affiliated with an institution of higher education;
(d) a nonprofit entity which engages in established curriculum-related clinical training of students at an institution of higher education;
(e) a nonprofit research organization; or
(f) a governmental research organization.

Guidance on these provisions will be forthcoming in regulation.

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[2] Petitions for Department of Defense projects may be extended to 10 years.

B. Public Law 106-396 – Exemption of Certain Employers from Requirement to File Amended Petitions

Under the provisions of this law, amended H-1B petitions are not required when the petitioning employer is involved in a corporate restructuring where:

(a) the new corporate entity succeeds to the interests and obligations of the original petitioning employer; and
(b) the terms and conditions of employment remain the same, except for the identity of the petitioner.

The eligible forms of corporate restructuring may include, but are not limited to, mergers, acquisitions or consolidations. Forthcoming regulations will define the eligible forms of corporate restructuring, and the type of evidence required, including the manner in which that evidence should be submitted for extension of stay requests by the new corporate entity.

The statute requires no affirmative action on the part of the employer in these corporate restructuring scenarios. In these instances, the previous approval and previously issued approval notice remain valid. Therefore, the Service will not issue amended approval notices bearing the new company name. Although not necessary, if an employer wishes to obtain an approval notice bearing the new company name, the appropriate procedure for obtaining a new approval notice will continue to be through the filing of an amended Form I-129 with fee.

1. Admission Procedures for H-1B Nonimmigrants Working for Employers Claiming Exemption from the Requirement to file Amended H-1B Petitions

An H-1B applicant for admission who no longer works for the original H-1B petitioner and now works for a new corporate entity claiming exemption from the requirement to file an amended H-1B petition may be admitted at a POE if:

(a) he is otherwise admissible;
(b) unless exempt, he is in possession of a valid, unexpired passport and nonimmigrant visa; and
(c) he presents a letter from the new corporate entity stating that:

    (i) the new corporate entity has succeeded to the interests and obligations of the original H-1B petitioning employer; and
    (ii) the terms and conditions of employment of the H-1B nonimmigrant remain the same.

Questions regarding this memorandum may be directed to Tracy Renaud, Immigration Services Division at (202) 305-8010.