U.S. Department of Justice
Immigration and Naturalization Service

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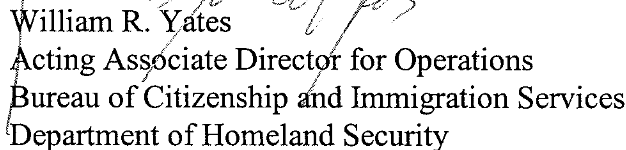
MEMORANDUM FOR SERVICE CENTER DIRECTORS, BCIS
REGIONAL DIRECTORS, BCIS
OFFICE OF INTERNATIONAL AFFAIRS
BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT
BUREAU OF CUSTOMS AND BORDER PROTECTION



FROM: William R. Yates
Acting Associate Director for Operations
Bureau of Citizenship and Immigration Services
Department of Homeland Security

SUBJECT: Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273): Adjudicator's Field Manual Update AD 03-09

On November 2, 2002, President Bush signed into law the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act). One section of the new law amends §106(a) of the American Competitiveness in the Twenty-First Century Act (AC21) and removes the six-year limitation on H-1B status for certain aliens on whose behalf an alien labor certification or employment-based (EB) immigrant petition has been pending for 365 days or more. The new amendment broadens the class of H-1B nonimmigrants who may avail themselves of this provision. The purpose of this memorandum is to provide field offices with guidance on processing H-1B extension requests in light of this legislation.

On January 29, 2001, the former Immigration and Naturalization Service's 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 106-396). Both of these memoranda remain in effect.

A. Provisions in Cases of Lengthy Adjudication

Section 106(a) of AC21 allows an alien to obtain an extension of H-1B status beyond the 6-year maximum period under certain conditions. Previously, the extension could only be granted if the H-1B nonimmigrant was the beneficiary of an EB immigrant petition or an application for adjustment of status, and if 365 days or more had passed since the filing of a labor certification application or since the filing of the EB immigrant petition. The 21st Century DOJ Appropriations Act amends §106(a) of AC21 to permit H-1B nonimmigrants to obtain an extension of H-1B status beyond the 6-year maximum period, when:

(1) 365 days or more have passed since the filing of any application for labor certification, Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant, or

(2) 365 days or more have passed since the filing of an EB immigrant petition.

This provision minimizes the risk that an alien who has been present in the United States for six years, and who is pursuing permanent resident status, will be forced to depart the United States on account of processing delays at either the Department of Labor (DOL) or the BCIS. Any alien who meets the above criteria on or after November 2, 2002, may be eligible for an extension of H-1B status beyond the sixth year. Further, a petitioner must establish that the above criteria were met at the time the application or petition was filed. 8 CFR 103.2(b)(12). Accordingly, if the filing date of the labor certification application or the EB immigrant petition is 365 days or more prior to the filing date of the extension application, and the application is adjudicated on or after November 2, 2002, the alien is eligible for an extension of H-1B status beyond the sixth year. If an alien did not meet the criteria on or after the effective date of the legislation and at the time of filing, and the alien is not otherwise eligible for an extension of H-1B status, then the BCIS will not approve a request for extension of H-1B status. The request for an extension of status must establish that the alien beneficiary is in valid H-1B status at the time the petition (Form I-129) is filed with the BCIS. An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status, or where such status expired before the application or petition was filed, with certain exceptions. 8 CFR 214.1(c)(4).

B. Length of Time to be Allowed for Extension of Stay

The BCIS is required to grant the extension of stay of such H-1B nonimmigrants in one-year increments, until a final decision is made:

(1) to 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;
(2) to deny the EB immigrant petition, or
(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status.

A decision to certify or deny an application for labor certification is made by one of DOL's certifying officers. If the application is denied, the employer is advised that there is a period of 35 days within which the decision may be appealed to the Board of Alien Labor Certification Appeals (BALCA). If the employer does not file an appeal within that period, the denial becomes the final decision of the Secretary of Labor. The BCIS will not consider a decision that is under appeal to be final until such time as a decision is issued by BALCA.

Derivative family members are eligible for H-4 status for the same period of authorized stay granted to the principal beneficiary. A family member who has been in the United States in H-1B status for the maximum period of admission may be eligible to change to H-4 status and remain in the United States beyond the sixth year based on the principal alien's status. Unless the alien is independently eligible for an extension of H-1B status, the alien is limited to the H-4 classification.

C. Evidence that an Application for Labor Certification has been Pending 365 Days or More

The BCIS will accept the following documents as evidence that an application for labor certification filed on behalf of the H-1B beneficiary has been pending 365 days or more:

(1) a document from a State Workforce Agency (SWA) notifying the employer, the employer's representative, the DOL, or the BCIS that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more; **or**

(2) a document from one of DOL's Employment and Training Administration (ETA) regional offices notifying the employer, the employer's representative, or the BCIS that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more.

The above documents must include 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. The DOL has agreed that if neither of the above documents were issued at the time of filing, the ETA regional office with jurisdiction over the application for labor certification will issue the second document listed above to the employer named on the Form ETA-750, upon request. If the H-1B nonimmigrant is requesting an extension based upon a labor certification that has been pending 365 days or more but was certified in the name of another alien, the H-1B nonimmigrant 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. This means that the alien will be the beneficiary of a pending or approved Form I-140 based on that labor certification.

D. Procedures

In order for an H-1B nonimmigrant to receive an extension of stay beyond the 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 one of the events outlined in section B of this memo occurs. In accordance with the requirements of the June 19, 2001 memorandum cited above, a petitioner is required to file a new Form I-129 and pay the $130 filing fee for a request for a 1-year extension of status under AC21 §106. Existing guidelines in the instructions on the Form I-129W that relate to payment of the $1,000 H-1B Nonimmigrant Petitioner Account Fee shall be followed.

Questions regarding this memorandum may be directed via e-mail through appropriate channels to Joe Holliday at Service Center Operations or to Mari Johnson in Adjudications.

Accordingly, the *Adjudicator's Field Manual* (*AFM*) is revised as follows:

☞ 1. A new paragraph is added at the end of Chapter 31.1(b) of the *AFM* to read:

On November 2, 2002, President Bush signed into law the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act). One section of the new law amends § 106(a) of the American Competitiveness in the Twenty-first Century Act (AC21) by making the following change:

- Public Law 107-273:
  - Removes the six-year limitation on H-1B status for certain aliens on whose behalf an alien labor certification or employment-based (EB) immigrant petition has been pending for 365 days or more.

☞ 2. Chapter 31.2(d) of the *AFM* is revised to read:

(d) Limits on a Temporary Stay. Specific limits on what is regarded as a temporary period of stay in all H classifications are included in the regulations to reflect the temporary nature of these classifications and to achieve consistency in the handling of requests for extensions of stay. The maximum time limit in an H classification and the requirement to reside abroad upon expiration of this period cannot be avoided by leaving the United States before the expiration of the maximum time limit and reentering within a short period of time under a new petition. In such cases, the approval period of the new petition shall be consistent with and count towards the maximum time limit on an alien's temporary stay. A new period of authorized stay may begin only when the alien has resided outside the United States for a period required by the classification, or when the alien qualifies for an exemption from limits on the maximum period of stay as discussed below. The H nonimmigrant's spouse and children are subject to the same time limits as the principal. A family member who has been in the United States in H-1B status for the maximum period of stay may be eligible to change to H-4 status and remain in the United States beyond the sixth year based on the principal alien's status, provided the principal alien qualifies for an exemption from limits on the maximum period of stay. Unless the alien is independently eligible for an extension of H-1B status, the alien is limited to the H-4 classification.

The limitation on the total period of stay does not apply to H-1B, H-1C, H-2B, or H-3 aliens who do not reside continually in the United States and whose employment in the United States is seasonal or intermittent or for an aggregate of six months or less per year. Further, the limitations do not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the

alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

Finally, the limitation on the total period of stay does not apply to H-1B aliens when:

- 365 days or more have passed since the filing of any application for labor certification, Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant; or
- 365 days or more have passed since the filing of an EB immigrant petition.

☞ 3. Chapter 31.3 of the *AFM* is revised by adding a new section (g)(8) to read:

(8) Extension of H-1B Status Based on a Pending Labor Certification Application or Employment-Based (EB) Immigrant Petition. As discussed in section 31.2(d) of the *AFM*, if the filing date of the labor certification application or the EB immigrant petition is 365 days or more prior to the filing date of the extension application, and the application is adjudicated on or after November 2, 2002 (the effective date of the legislation), the alien is eligible for an extension of H-1B status beyond the sixth year. The Secretary of Homeland Security is required to grant the extension of stay of such H-1B nonimmigrants in one-year increments, until a final decision is made:

- to 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;
- to deny the EB immigrant petition, or
- to grant or deny the alien's application for an immigrant visa or for adjustment of status.

A decision to certify or deny an application for labor certification is made by one of Department of Labor's certifying officers. If the application is denied, the employer is advised that there is a period of 35 days within which the decision may be appealed to the Board of Alien Labor Certification Appeals (BALCA). If the employer does not file an appeal within that period, the denial becomes the final decision of the Secretary of Labor. The BCIS will not consider a decision that is under appeal to be final until such time as a decision is issued by BALCA.

The BCIS will accept the following documents as evidence that an application for labor certification filed on behalf of the H-1B beneficiary has been pending 365 days or more:

- a document from a State Workforce Agency (SWA) notifying the employer, the employer's representative, the Department of Labor, or the BCIS that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more; or

- a document from one of Department of Labor's Employment and Training Administration (ETA) regional offices notifying the employer, the employer's representative, or the BCIS that a Form ETA-750 filed on behalf of the H-1B beneficiary has been pending 365 days or more.

The above documents must include 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. The Department of Labor has agreed that if neither of the above documents were issued at the time of filing, the ETA regional office with jurisdiction over the application for labor certification will issue the second document listed above to the employer named on the Form ETA-750, upon request. If the H-1B nonimmigrant is requesting an extension based upon a labor certification that has been pending 365 days or more but was certified in the name of another alien, the H-1B nonimmigrant 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. This means that the alien will be the beneficiary of a pending or approved Form I-140 based on that labor certification.

☞ 4. The *AFM* **Transmittal Memoranda** button is revised by adding the following entry:

AD 03-09 [INSERT SIGNATURE DATE OF MEMO]	Chapter 31.1(b); Chapter 31.2(d); and Chapter 31.3(g)	Provides guidance on granting extensions of H-1B stay beyond the 6th year in accordance with Pub. 107-273.