

DON'T HATE ME BECAUSE I CAN'T COMMIT!:
AC21 ADVANCED ISSUES FOR THE H-1B HOLDER

HYPOTHETICAL SCENARIOS

HYPOTHETICAL SCENARIO #1

Athena, a citizen of Greece is hired in June 1, 2007 by XXX Systems, Inc. ("XXX Systems") as a Strategic Operations Director under an H-1B visa. She holds an MBA from Stanford University.

Athena's job at XXX Systems required that she travel outside the U.S. for 30 days each year. From June 1, 2007 to January 1, 2013 she has been outside of the U.S. for 150 days. Although, the company made promises to file a Second Preference Employment-Based Permanent Resident case for Athena, XXX Systems failed to take any action in filing a PERM Labor Certification Application for Athena.

In January 1, 2013, Athena receives a job offer from Wise Systems, Inc. ("Wise Systems"), who would like her to take over as their Business Operations Director and would also like to sponsor her for permanent resident status.

However, Wise Systems has some concerns about keeping her employed at their company, and has asked legal counsel to answer the following questions:

- 1) If Wise Systems files the H-1B Petition on January 15, 2012, when is the earliest Athena can start work?
- 2) Suppose we file an H-1B petition to transfer Athena to our company. How long does she have to work for us under the H-1B visa?
- 3) How do we keep Athena working for us in the U.S. continuously until we obtain a green card for her? What are our options?
- 4) Is there is there a difference if we file for her in the Employment-Based Second Preference (EB-2) category vs. the Employment-Based Third Preference category (EB-3)?

HYPOTHETICAL SCENARIO #2

Jack Chase, a British national, was employed as a Graphic Designer with Media, Inc. from October 2003 until September 2009, under H-1B status. Very close to the time Jack's H-1B status was set to expire, his employer was able to file and get approved an O-1 petition so Jack could continue on as an art director with the company.

During his time in H-1B status, the company was able to have a PERM application under the EB-3 category approved by the DOL. His priority date is January 18, 2006. During the great visa debacle of July 2007, and while Jack was still in H-1B status, Jack filed an I-140/I-485 package and was patiently waiting for his priority date to become current. His I-140 petition was approved in 2008.

During the pendency of his I-485 application, Jack always used advance parole to return to the U.S. after trips abroad. Unfortunately though, during his last trip outside of the U.S., Jack didn't realize his AP had expired (as he was looking at the admission stamp and not the date of expiration on the AP), and he was required to go through secondary and then deferred CBP inspection. After much pleading and explanation, CBP paroled Jack back into the U.S. to resume the pendency of his I-485 application.

Miraculously, Jack's priority date recently become current, but he received a Notice of Intent to Deny (NOID) his I-485 for leaving the U.S. with an expired AP, and USCIS is claiming he abandoned his I-485 application. USCIS has recently denied the I-485 after the NOID response.

Jack and the petitioner have come to you now to make sure Jack can get back on the payroll without too much of a gap in time. Jack has been in the U.S. for over 20 years in F-1, H-1B, and O-1 statuses, respectively, how best to get him back to work?

- 1) What is the best course of strategy here to get Jack back in either a work authorized NIV status or get his I-485 reopened and approved or re-filed?
- 2) Is an O-1 the best option here?
- 3) Is an H-1B the best option? If so, how can Jack be put back in H-1B status if he "used it all up" before changing to O-1 in 2009?
- 4) Is Jack eligible to use AC21 106(a) or AC21 104(c) benefits, or both?
- 5) Is there recapture time here?
- 6) What evidence do we need to use in his H-1B petition to show he is eligible for AC21 benefits and recapture time (if applicable)?

HYPOTHETICAL SCENARIO #3

- Ms. Porta Bility was working in H-1B status at Innocent Software, Inc. pursuant to an H-1B petition that was valid from June 14, 2011 through June 30, 2012.
 - Out Sorcerers, Inc. filed an H-1B petition on Porta's behalf on July 18, 2011.
 - Porta began working for Out Sorcerers, Inc. on August 11, 2011.
 - Out Sorcerers, Inc.'s H-1B petition was denied on February 10, 2012.
 - Out Sorcerers, Inc. filed a timely appeal of the denial on February 23, 2012.
 - USCIS issued an I-290B Receipt Notice on February 28, 2012.
 - Out Sorcerers, Inc. filed a new H-1B petition for Porta on March 8, 2012, requesting an extension of status.
- 1) Has Porta maintained eligibility for H-1B portability?
 - 2) Is Porta eligible for an extension of H-1B status?
 - 3) Does the concept of "Period of Stay Authorized by the Attorney General" (known as POSABAG) change the answer?
 - 4) How does the concept of successive H-1B portability petitions filed for a beneficiary while the previous H-1B petitions remain pending (i.e. creating a "bridge" of H-1B petitions) apply to this case?