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Efren Hernandez, Esq.
Chief, Business & Trade Branch
U.S. Department of Justice
Immigration & Naturalization Service
425 "I" Street, NW, Room 6100
Washington, D.C. 20534

Dear Mr. Hernandez:

We are writing for clarification of § 106(a) of the American Competitiveness in the 21st Century Act ("AC21"), the section that permits a foreign national to seek one-year increments of H-1B status beyond the statutory six-year cap.

Among other provisions, § 106(a) permits extensions of stay beyond six years for those H-1B nonimmigrants on whose behalf "*a* petition" has been filed under INA § 204(b) to accord the alien immigrant status under § 203(b), if at least 365 days have elapsed since the filing of "*a* labor certification application" on the alien's behalf or the filing of "*a* petition" under § 204(b), or the filing of *an* application for adjustment of status.[1] We emphasize Congress' use of

[1] The statutory provision is: (a) Exemption from Limitation-The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of that Act on whose behalf *a* petition under section 204(b) of that Act to accord the alien immigrant status under section 203(b) of that Act, or an application for adjustment of status under section 245 of that Act to accord the alien status under such section 203(b), has been filed, if 365 days or more have elapsed since–

(continued...)

the indefinite article "a," rather than its use of the definite article "the" to point out what we see as the meaning of the statute: The benefit of the seventh year in H-1B status flows to those for whom *a* petition or *a* labor certification application was filed more than a year ago, and not necessarily a petition or labor certification filed by the same employer submitting the seventh-year H-1B petition.

For example, we are currently representing a corporation that filed a labor certification application for an H-1B employee on May 4, 2001. That employee's sixth year in H-1B status will run out on June 1, 2002. Because of the backlogs in the New York State Alien Certification Unit, it is doubtful whether the application will be certified in time to file an I-140 petition by May 4 or even by June 1, thus allowing the employer to file a seventh-year H-1B petition. But that same H-1B employee is also the beneficiary of an approved I-140 petition in the same occupational classification filed on his behalf by a *former* H-1B employer. That petition was based on a labor certification application with a priority date of November 18, 1999. The approved petition has never been withdrawn.

Under our reading of § 106 of AC21, our client may benefit from the provision and seek a seventh year of H-1B status for its employee based on the filings of the prior employer. According to the statutory requirements: *a* petition to accord the alien status under INA § 203(b) was filed more than a year ago; and a labor certification application, upon which the I-140 petition was based, was also filed more than a year ago.

Apart from the statutory language, we also rely on prior Service interpretations of a somewhat analogous provision, INA § 245(i). In 1999, Robert Bach, then-Executive Associate Commissioner, Office of Policy and Programs, issued guidance on the benefits available under the 1998 version of INA § 245(i), and explained that the Service had adopted an "alien-based" reading of that statutory provision.[2] Specifically, the Service policy held that an alien who had had a visa petition or labor certification application filed on his behalf prior to January 14, 1998, would be "grandfathered" for 245(i) purposes. "In other words," Mr. Bach wrote, "the pre-January 15th filing allows the alien to use 245(i) as the vehicle for adjustment, *but the basis for the adjustment may be obtained through a different filing. . . .*" (Emphasis added.)

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[1] (...continued)

(1) the filing of *a* labor certification application on the alien's behalf (if such certification is required for the alien to obtain status under such section 203(b)); or

(2) the filing of the petition under such section 204(b).

(Emphasis added.)

[2] April 14, 1999 memorandum of Robert Bach, then-Executive Associate Commissioner, Office of Policy and Programs, HQ 70/23.1-P, HQ 70/8-P.

Thus, if a labor certification application had been filed for an alien prior to January 14, 1998 by employer A, the alien would be grandfathered and able to apply for adjustment of status based on a labor certification application or petition filed for him by Employer B.

We believe that § 106(a) of AC21 should draw forth the same policy consideration from the Service, since that provision, like § 245(i), was enacted to be ameliorative. In addition, with the stated requirements fulfilled, *i.e.*, more than a year having elapsed since the filing of a petition based on a labor certification application, an H-1B petition seeking a seventh year in these circumstances would certainly seem to come within Congressional intent in passing this piece of legislation.

Finally, the benefits of § 106(a) also flow to an alien who filed an adjustment of status application, provided that an immigrant petition, or a labor certification application followed by an immigrant petition, was filed at least a year earlier. Given that § 106(c) of AC21 permits an alien whose adjustment of status application has been pending for 180 days or longer to change employers, it would make no sense if eligibility for a seventh year in H-1B status were tied to the same employer who filed a labor certification application or immigrant petition. Rather, since a change of employer is permitted, eligibility for the seventh year must be "alien-based."

We thank you for giving consideration to our questions, and look forward to your reply.

Very truly yours,

Naomi Schorr

NS/rt
cc: Crystal Williams
Director of Regulatory Affairs and Oversight

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