

Vermont Service Center

I-129 H-1B Local Adjudicator's Guide

Prepared by:
Center Training Unit

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General

Purpose This guide will address conditions requiring review in determining eligibility of I-129 H-1B petitions within the Vermont Service Center (VSC).

IMPORTANT: This document is to be used in conjunction with the I-129H-1B National SOP. The information contained in this document is a combination of handouts and local policy for I-129H-1Bs. It is to be used as a resource/instruction guide during adjudication of these form types.

Conflict Resolution Any provision of the Immigration and Nationality Act (INA) or Title 8, Code of Federal Regulations (8 CFR) that conflicts with this SOP will take precedence over the SOP. If you identify a conflict, report the matter immediately to your supervisor or to any SISO.

If any conflict is noted between this SOP and policy or guidance documents issued by HQSCOPS, report the matter through the supervisory chain for resolution.

This SOP supersedes all prior Vermont Service Center guidance documents, policy memoranda, training packets, or other materials pertaining to the I-539 application; these documents should be discarded.

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General, Continued

Revisions

Electronic and Printed Copies

All personnel who maintain a printed copy of the document will post the revisions upon receipt. Electronic copies of the document will be modified to reflect changes as they are issued. A listing of posted revisions will be included in the electronic document to serve as a summary of all revisions.

Proposed Changes

Submit proposed changes with appropriate supporting documents through first-line supervisors to Assistant Center Directors (ACDs) in Adjudications.

Revisions

Current revisions will be posted in the beginning of the document and all new changes will be highlighted in yellow. A complete listing of all prior revisions can be found at the end of this document in the Previous Revisions section.

NOTE: The KM# column indicates the Knowledge Management change request number associated with the change

Current Revisions

Refer to the table below for the list of current revisions to this Local Guide:

Revision #	Date	Subject	Pages	KM#
78	1/3/14	Revised Step 6 of AC21 Adjudication table	p. 98	1139

Chapter 1: Overview

Introduction

Definitions

Section 101(a)(15)(H)(i) of the INA defines an alien:

(b)... who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)... or as a fashion model, who meets the requirements of the occupation specified in section 214(i)(2) or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under 212(n)(1);...

OR

(b1)...who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed in section 214(g)(8)(A), who is engaged in a specialty occupation described in section 214(i)(3), and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 212(t)(1)...

Continued on next page

Introduction, Continued

H-1B Classifications in CLAIMS

The H-1B classification is reserved for an alien who is coming temporarily to the United States to:

Perform services...	Identified in this guide as...	Updated in CLAIMS as...
In a specialty occupation,	H-1B1	1B1
Of an exceptional nature relating to a cooperative research and development project administered by the Department of Defense (DOD),	H-1B2	1B2
As a fashion model of distinguished merit and ability, or	H-1B3	1B3
Under the Free Trade Agreements (FTAs) with Chile and Singapore.	HSC	HSC

NOTE: Employees outside the United States, who wish to be admitted as an HSC under the FTA with Chile or Singapore, must apply directly to the Department of State (DOS) for a nonimmigrant visa. Requests for a change in nonimmigrant status to HSC or an extension of stay (EOS) of HSC are filed with the VSC, effective April 1, 2006, and adjudicated by a selected group of officers.

"Specialty Occupation"

Section 214(i)(1) of the INA defines "specialty occupation" as:

an occupation that requires--

- (A) Theoretical and practical application of a body of highly specialized knowledge, and
- (B) Attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Expired Dates

Processing Guidance for petitions with expired dates can be found on the Business Division ECN page at Reference Material/General/Expired Petitions Guidance 07022013. The guidance relates to cases that have never had a final decision, consular returns, and appeals that have been affirmed by the AAO.

General Filing Requirements

Where to File The filing location is identified in the Form I-129 filing instructions at [\[http://www.uscis.gov/files/form/i-129instr.pdf\]](http://www.uscis.gov/files/form/i-129instr.pdf).

Jurisdiction of VSC Effective April 2, 2007, the VSC will serve as the filing location for all H-1B petitions where the beneficiary is or will be employed in the following locations:

Alabama, Arkansas, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, U.S. Virgin Islands, or West Virginia.

Jurisdiction of CSC California Service Center (CSC) will serve as the filing location for all other locations not listed above and for petitioners claiming H-1B cap exemption by checking one or more of the following boxes in item 3 of Part C, Numerical Limitation Information, on pages 18 and 19 of the Form I-129:

- a. Petitioner is an institution of higher education as defined in section 101(a) of the Higher Education Act, of 1965, 20 U.S.C. 1001(a);
- b. Petitioner is a nonprofit entity related to or affiliated with an institution of higher education as defined in section 101(a) of the Higher Education Act, of 1965, 20 U.S.C. 1001(a);
- c. Petitioner is a nonprofit research organization or a governmental research organization as defined in 8 CFR 214.2(h)(19)(iii)(C); or
- d. Petitioner will employ the beneficiary to perform job duties at a qualifying institution (see a – c above) that directly and predominately furthers the normal, primary, or essential purpose, mission, objectives, or function of the qualifying institution, namely higher education or nonprofit or government research.

NOTE: Cap exempt cases should not be adjudicated at the VSC. Forward these cases to an ISO3 for relocation.

HSC Filing Jurisdiction Requests for change of status to HSC (also known as H-1B1, according to the INA) or extension of stay for HSC are filed with VSC regardless of the place of employment.

Continued on next page

General Filing Requirements, Continued

Employment in More Than One Location When employment will be in more than one state, the state where the petitioner is located will determine the Service Center where the I-129 petition should be filed.

EXAMPLE: The beneficiary will work in Arizona and Texas and the petitioner is located in New York. Form I-129 is filed with VSC.

When to File The petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services.
[8 CFR 214.2(h)(9)(i)(B)]

In the event that a petition is accepted more than six months prior to the date of actual need, (i.e. requested employment start date), route the case, and any accompanying I-539, to an ISO3 H-1B POC. The case will be sent to the Case Resolution Unit where an appropriate letter will be prepared and the fee refunded.

Continued on next page

General Filing Requirements, Continued

Evidentiary Requirements

The I-129 Petition for a Nonimmigrant Worker must be accompanied by the following items:

1. Form I-129 filed with proper fees and signatures. See Chapter 2 for information on fees and who is qualified to sign.
2. The H-1B Data Collection and Filing Fee Exemption Supplement to Form I-129.
 - a) If the petitioner is claiming exemption(s) from the H-1B cap or any fees on the supplement, there should be evidence to support the claimed exemption(s).
 - b) Information contained on the Data Collection Supplement must be reviewed for accuracy and must match the information contained in the CLAIMS I-129W screen.
3. Form ETA 9035 Labor Condition Application (LCA) certified by the Department of Labor (DOL) for the "specialty occupation".

NOTE: An LCA is not required for classification as H-1B2 working for the Department of Defense.

4. Evidence that petitioner qualifies as a U.S. Employer or Agent.
5. Evidence that the offered position qualifies as a "specialty occupation."
6. Evidence that the beneficiary qualifies for the "specialty occupation," to include:
 - a) A degree in the specific specialty;
 - b) Licensure, if applicable (e.g. Elementary and Secondary Public School Teachers);
 - c) USMLE, or equivalent, and ECFMG, for foreign physicians; and
 - d) Certification, if applicable, of Healthcare Workers.
7. If requesting a change of status or extension of stay, evidence the beneficiary was maintaining a valid, nonimmigrant status at the time the petition was filed and thus is eligible for the requested change of status or extension of stay. [8 CFR 248.1 or 8 CFR 214.1(c)(4)]

Continued on next page

General Filing Requirements, Continued

Signature Requirements for a Corporation or other Legal Entity

A qualified agent must sign the petition on behalf of a corporation or other legal entity. A qualified agent must:

- be an officer or employee of the petitioning entity;
- have executive or managerial authority to sign documents on behalf of the entity; and
- have knowledge of the factual claims made in the application or petition to attest to the truth of the factual claims.

An attorney that is employed by the petitioner as in-house counsel generally qualifies as a signer as described above. If the attorney is working for an outside agency, he or she does not meet the qualified agent requirements above or requirements of 8 CFR 103.2(a)(2) concerning a properly signed petition. (See G-28 SOP for additional information on petitions signed by counsel.)

Petition may be denied pursuant to 8 CFR 103.2(b)(8)(ii) for failing to establish eligibility for the benefit sought if the petition was accepted as signed, but it was not signed by a qualified signer.

Release of Controlled Technology

Part 6 of Form I-129 is an attestation regarding the release of controlled technology or technical data to foreign persons in the United States.

Petitioners must complete Part 6 of petitions postmarked on or after Feb. 20, 2011, which seek H-1B or H-1B1 status.

The petitioner is required to:

- affirm that he or she has reviewed the export control regulations.
 - indicate whether a license is required from either the Department of Commerce (DOC) or the Department of State (DOS) to release technology or technical data to the beneficiary of the petition.
 - certify that the beneficiary will not access such technology or data until the license has been obtained if a license is required.
-

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General Filing Requirements, Continued

Part 6 of Form I-129 is Not Completed

If Part 6 is not completed, you must provide the petitioner with the opportunity to submit the required response by issuing a Request for Evidence (RFE). Use standard 1817 which requests the petitioner to complete and submit Page 5, Part 6, of Form I-129 with a revision date of November 23, 2010 or later. You should not return the original signed petition to the petitioner.

NOTE: At this time, USCIS does not require a copy of the export control license as part of the nonimmigrant visa petition process. However, if the petitioner declines to respond to Part 6 in response to an RFE, deny the petition pursuant to 8 CFR 103.2(b)(1) for failure to properly complete and file the petition with any initial evidence required by applicable regulation and/or the form's instructions.

The standard denial to address this scenario is the I129CTECH letter.

Chapter 2: Proper Filing Fees

Fees Required for H-1B Petitions

**Base Fee,
ACWIA Fee,
and Fraud
Prevention and
Detection Fee**

The H-1B Visa Reform Act of 2004 imposed two additional fees that must be paid in addition to the I-129 base fee of \$325. These two additional fees consist of the following:

- First, section 214(c)(9) of the INA was amended to reinstitute and modify the additional fees previously imposed by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). The ACWIA fee expired on October 1, 2003. The H-1B Visa Reform Act of 2004 reinstated the ACWIA fee and raised the ACWIA fee to \$1,500 or \$750, depending on the size of the employer.
- Second, section 214(c) of the INA was amended by adding a new subsection (12), which imposes a \$500 fraud prevention and detection fee on certain employers filing H-1B (and L) petitions.

**Amount of
ACWIA Fee**

The re-instituted ACWIA fee is required for cases filed after December 8, 2004 and is determined according to the following table.

If the petitioner has...	Then the ACWIA fee is...
More than 25 full-time equivalent employees in the United States,	\$1500
25 or less full-time equivalent employees in the United States,	\$750

**Petitioners that
are Subject to
the ACWIA
Fee**

A U.S. employer, other than an exempt employer (see exemptions that follow), who files a Form I-129 between December 1, 1998 and September 30, 2003, or after December 4, 2004 must pay the ACWIA fee if the petition is for the following purposes:

- An initial grant of H-1B status,
- An initial extension of stay, or
- Authorization for a change in employers.

USCIS will accept remittances of the ACWIA fee **only** from the U.S. employer or its representative of record. [8 CFR 214.2(h)(19)(ii)]

Any party may pay the standard base fee.

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Fees Required for H-1B Petitions, Continued

**Petitioners that
are Exempt
from Paying
the ACWIA fee**

The following organizations are not required to pay the ACWIA fee:

- An institution of higher education as defined in section 101(a) of the Higher Education Act of 1965,
- An affiliated or related nonprofit entity that is connected or associated with an institution of higher education,
- A nonprofit research organization or governmental research organization,
- A primary or secondary educational institution, or
- A non-profit entity, which engaged in an established curriculum-related clinical training program for students.

Further, the ACWIA fee is not required in the following circumstances:

- A petitioner is filing its **second** request for an extension of stay for an alien,
- A filing is an amended petition that does not contain any requests for an extension of stay, or
- A petition is filed to correct a USCIS error.

8 CFR 214.2(h)(19)(iii)(A), (B), and (C) and

8 CFR 214.2(h)(19)(v)(A), (B), and (C).

**Fraud
Prevention and
Detection Fee**

In addition to the ACWIA fee, the employer filing the petition must pay a Fraud Prevention and Detection Fee of \$500 to:

- Initially grant an alien H-1B (or L) nonimmigrant classification, or
- To obtain authorization for an alien having such status to change employers. [Section 214(c)(12) of the INA]

EXCEPTIONS:

- Amended petitions
- Successor in interest

This \$500 fee applies to petitions filed on or after March 8, 2005 and may be paid by any party. This fee is required when the petitioner requests a change of status from L-1 to an "initial grant" of H1B for the same beneficiary to perform essentially the same job.

NOTE: The \$500 Fraud Prevention and Detection Fee is never required for petitions for HSC (also known as H-1B1, according to the INA) Free Trade nonimmigrants from Chile or Singapore. [See 70 FR 23776]

Continued on next page

Fees Required for H-1B Petitions, Continued

New Fees for Border Security On August 13, 2010, President Obama signed Public Law 111-230, the Emergency Supplemental Appropriation for Border Security Act. The new fee is in addition to the Base Fee, ACWIA Fee, Fraud Prevention and Detection Fee, as well as any Premium Processing Fee, if applicable.

Amount of Border Security Fee Public Law 111-230 requires the submission of an additional fee of:

- \$2,000 for certain H-1B petition and
- \$2,250 for certain L-1A and L-1B petitions.

Petitions that are Subject to the Border Security Fee An I-129 petition for H1B or L status postmarked on or after August 14, 2010 through September 30, 2014 must pay the fee if the following criteria are met.

- 1) The petition is requesting:
- An initial grant of H1B status **OR**
 - Authorization to change employers

AND

- 2) The petitioner meets both of the following conditions:
- Employs 50 or more U.S. employees **AND**
 - More than 50% of those employees are in H1B or L1 status.

NOTE: The fee is required when the petitioner requests a change of status from L-1 to an "initial grant" of H1B for the same beneficiary to perform essentially the same job.

Continued on next page

Fees Required for H-1B Petitions, Continued

Determining Number of U.S. Employees

All of the petitioner's U.S. employees should be counted when determining whether it is subject to the Border Security Fee. If a petitioner claims exemption from the Border Security Fee based on a combination of employees within a controlled group of corporations, an RFE using autotext 2036 should be issued to request clarification about the number of the petitioner's U.S. employees.

When determining the total number of employees in the United States for the purposes of the Border Security Fee, petitioners should **not** include:

- Employees from partnerships, proprietorships etc., which are under common control;
- Employees from affiliated service groups; and
- Leased employees.

Who Can Pay the Fees?

Refer to the table below to determine which party can pay the different fees associated with the filing of an I-129.

Type of Fee	Must be paid by...
Base Filing Fee	The petitioner, attorney, or beneficiary
ACWIA Fee	The petitioner or attorney **cannot be paid by the beneficiary
Premium Processing Fee/I-907	The petitioner, attorney or beneficiary. **If paid by the beneficiary, the I-907 still needs to be signed by the petitioner or attorney. An I-907 may be signed by the attorney, if there is a properly executed G-28 for the attorney signed by both the attorney and petitioner.
Fraud Fee	The petitioner, attorney, or beneficiary
Border Security Fee	The petitioner or attorney **cannot be paid by the beneficiary

Continued on next page

Fees Required for H-1B Petitions, Continued

Requests for ACWIA, Fraud and/or Border Security Fees

- When the ACWIA Fee and/or Fraud Fee is not submitted and it is the only deficiency in the case, issue an intent to deny (ITD).
- When the Border Security Fee is not submitted or the case has additional issues that need to be addressed issue a request for evidence (RFE).

Refer to the chart below to determine which notice should be issued to request ACWIA, Fraud and/or Border Security Fees.

When the file does not contain acceptable evidence of exemption and is missing the...	Then use...
ACWIA Fee	B3EXEMPT
Fraud Fee	B3EXEMPT FRAUD
ACWIA Fee and Fraud Fee	B3EXEMPTA&F
Border Security Fee	Auto Text 2034 in an RFE

Chapter 3: The H-1B Cap

General Guidelines on H-1B Cap Limitations

Introduction Congress has set a limit on the number of H-1 visas issued annually. Due to the changing nature of this subject every year, refer to the latest guidance on:

- When the cap is reached, and
 - What cases may be worked at the time of your adjudication
-

What are the Numerical Limitations Congress has determined that the total number of aliens who may be issued H-1B visas based on the regular H-1B cap may not exceed 65,000 in a Fiscal Year (FY). [Section 214(g)(1)(A) of the INA]

There is also a separate cap, which provides for exemption of aliens with a United States-earned master's degree. The U.S. master's degree cap may not exceed 20,000 per FY. [Section 214(g)(5)(C) of the INA]

Refer to the table below for the breakdown of the annual numerical limitations:

Classification	Limitation
HSC – from Chile	1,400
HSC – from Singapore	5,400
H-1B – from all other countries	58,200
H-1B – alien with a United States-earned master's or higher degree	20,000
Total	85,000

NOTE: Unused HSC (also known as H-1B1, according to the INA) visas for aliens from Chile and Singapore are made available to the H-1B classification for aliens from all other countries at the start of the following fiscal year.

Continued on next page

General Guidelines on H-1B Cap Limitations, Continued

Duplicate Filings Rule

The duplicate filing rule ensures the fair and orderly administration of the cap. USCIS will deny, or revoke, all H-1B petitions filed within the same fiscal year by an employer or agent that files more than one petition for the same alien, if the alien is subject to the cap or has filed under the Master's cap exemption.

The regulation may be found at the following link:

[8 CFR 214.2\(h\)\(2\)\(i\)\(G\)](#)

Cap on DOD Cases

The above described limitations do not apply to H-1B2 petitions to work for the DOD. The H-1B2 classification has its own numerical limitation. A **maximum of 100** aliens can be employed at any time in the DOD H-1B2 classification. [8 CFR 214.2(h)(8)(i)(B)]

Bring all H-1B2s to a Business Division Senior for adjudication.

H-4 Dependents

The numerical limitations only apply to principal aliens and not to the spouses or children of such aliens. [Section 214(g)(2) and Section 214(g)(8)(B)(iii) of the INA]

Continued on next page

General Guidelines on H-1B Cap Limitations, Continued

Who is Subject to the Cap?

The cap limitation applies to petitions filed for new employment of an H-1B worker where:

- The petitioner is requesting employment for an alien who has not previously been granted status as an H-1B nonimmigrant;
- The petitioner is requesting employment for an alien previously granted H-1B nonimmigrant status but the alien has resided outside the United States for one year or more since obtaining such status and the alien will begin a new period of employment in H-1B status;
- The beneficiary previously worked as an H-1B nonimmigrant for, or at, a cap exempt organization, such as an institution of higher education, an entity related to or affiliated with an institution of higher education, or a nonprofit research organization or governmental research institution, and was not previously counted towards the cap and now seeks to work for a non-cap exempt organization; or
- The beneficiary is seeking initial HSC classification; or
- The beneficiary has completed 5 years in HSC status and is seeking a sixth or subsequent extension of stay in HSC status. [INA Section 214(g)(8)(D)]

NOTE: An alien previously counted toward the HSC cap is not precluded from changing status to H-1B; however, the alien must then be counted toward the H-1B cap, unless a cap exemption, as outlined below, applies. Likewise, a change of status from H-1B to HSC will be counted toward the HSC cap, unless a cap exemption applies.

Cap Exemptions

Who is Exempt From the Cap? The following situations are exempt from the numerical limitations of the cap due to the petitioner's status as, or due to the beneficiary's employment at:

- An institution of higher education as defined in section 101(a) of the Higher Education Act of 1965, [20 USC Section 1001(a)];
 - A nonprofit organization or entity related to or affiliated with an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965, [20 USC Section 1001(a)];
 - A nonprofit organization or entity related to or affiliated with an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965, [20 USC Section 1001(a)];
-

Cap Guidance Memo Refer to Michael Aytes Memo of June 6, 2006, *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on § 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)* (Public Law 106-313) for additional guidance regarding eligibility for exemption from the cap where petitioner is NOT a qualifying institution, yet petitioner claims exemption because the alien beneficiary will perform all or a portion of the job duties at:

- an institution of higher education,
- a related or affiliated nonprofit entity,
- a nonprofit research organization, or
- a governmental research organization.

Continued on next page

Cap Exemptions, Continued

**Beneficiary has
Earned a
Master's
Degree**

The beneficiary may qualify for cap exemption if he/she has earned a master's degree or higher from a U.S. institution of higher education as defined in section 101(a) of the Higher Education Act of 1965, [20 USC Section 1001(a)] until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000; [Section 214(g)(5)(C) of the INA]

Evidence to show the beneficiary qualifies for this exemption include any of the following:

- A copy of the master's degree;
- A copy of a transcript showing that all degree requirements have been met;
- A letter from the school's office of the registrar addressing:
 - 1) the completion of all degree requirements towards the master's degree and
 - 2) the reason the degree has not been conferred.

NOTE: An excellent source for verifying whether a U.S. school is an accredited institution of higher education can be found at:

<http://www.ope.ed.gov/accreditation/Search.aspx>

**Master's
Degree from
Unaccredited
Institution**

If the regular cap has not been met, any case filed under the master's cap, in which the master's degree is not from an accredited U.S. institution of higher education, may be converted to a regular cap case by:

- Removing MAS in CLAIMS and replacing it with REG, and
- Annotating the I-129 H-1B Data Collection Supplement in red as "not accredited."

If the regular cap has been met, deny the unqualified master's cap case with the I129H1CAP denial.

Continued on next page

Cap Exemptions, Continued

**Beneficiary was
Admitted as J-1
Nonimmigrant
(Conrad
Waiver)**

The beneficiary is an alien who was admitted to the United States as a J-1 nonimmigrant in order to receive graduate medical training and the alien has received a waiver of the two-year foreign residence requirement to practice primary care or specialty care medicine in a medically underserved area of for an interested federal or state agency [See Section 214(l)(2)(A) of the INA]. This is often referred to as a “Conrad 20” or “Conrad 30” waiver;

IMPORTANT: Not just *any* J-1 nonimmigrant qualifies for this exemption. The alien beneficiary must be a J-1 who received graduate medical education or training and who was granted a waiver of 212(e) to be employed for 3 years as a physician for the healthcare facility named in the approved waiver. Furthermore, once the alien beneficiary, who receives the Conrad waiver, fulfills his or her 3-year obligation, he or she is forever H-1B cap exempt.

Continued on next page

Cap Exemptions, Continued

Additional Cap Exemptions

- The petitioner is requesting an extension of the amount of time a current H-1B worker may remain in the United States;
- The petitioner is requesting a change in the terms of employment for a current H-1B worker with the same employer;
- The petition is a request to change employers of a current H-1B worker who was previously counted towards the cap;
- The beneficiary has already been counted toward the numerical limitations within the 6 years prior to approval of the petition but did not exhaust his or her entire period of admission and seeks to be re-admitted for the "remainder" of the initial six-year period. [Section 214(g)(7) of the INA and Aytes Memo of December 5, 2006]
- The petition is a request to allow a current H-1B exempt worker to work concurrently in a second H-1B petition that may or may not be subject to the cap. [Section 214(g)(6) of the INA] **OR**
- H-1B workers admitted to perform labor and services in the Commonwealth of the Northern Mariana Islands (CNMI) and Guam are exempt from the H-1B cap from November 28, 2009 to December 31, 2014.

NOTE: All filings for employment or services in the CNMI and Guam are filed at CSC.

Continued on next page

Cap Exemptions, Continued

Cap Exempt Concurrent Employment

USCIS does not require that an alien who is cap-exempt be counted towards the cap if they accept concurrent employment with a non-exempt employer. [Section 214(g)(6) of the INA]

As soon as the alien is no longer employed by the cap-exempt employer, that alien will then be subject to the cap.

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.

The validity dates on the concurrent employment petition may be granted for the time requested and do not need to be limited to the dates of the cap-exempt employment.

[See Neufeld Memo of May 30, 2008, 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]

Remainder Option for Prior H-1B Aliens

Introduction

An alien who was previously admitted to the United States in H-1B status and has remained outside the United States for 1 year or more, but did not exhaust his or her entire 6-year period of admission, may elect to:

1. Seek admission as a "new" H-1B alien, be subject to the H-1B cap unless he or she qualifies for an exemption, and begin a new 6-year admission period, OR
2. Be readmitted for the "remainder" of the initial 6-year period without being subject to the H-1B cap if previously counted

NOTE: If the beneficiary of an H-1B petition has already been counted against the cap within the last 6 years and has not reached the six-year limitation, then the beneficiary is cap exempt and not counted against the H-1B cap again, even if the beneficiary did not use the approved petition to apply for a visa or enter the United States.

Continued on next page

**Admission as a
“new” H1B
alien or
readmission for
remainder of 6-
year period.**

If the alien is seeking...	And the petitioner...	Then the alien is eligible for...
<p>Admission as a “new” H1B alien,</p> <p>NOTE: The alien is subject to the H-1B CAP unless he or she otherwise qualifies for a cap exemption.</p>	<ul style="list-style-type: none"> • <u>DID NOT</u> complete parts C-1-d and C-3-g of the I-129 H-1B Data Collection Supplement and • Provided documentation to establish that the alien has been, or will be, outside the United States for more than one year as of the requested start date... <p>(OCC guidance 03/21/13)</p>	<p>The full six year validity period.</p>
<p>Readmission for the remainder of the initial 6-year period,</p> <p>NOTE: The alien is not subject to the H-1B CAP unless his or her previous entry was H-1B Cap exempt.</p>	<ul style="list-style-type: none"> • Checked parts C-1-d and C-3-g of the I-129 H-1B Data Collection Supplement, • Indicated in a cover letter that the beneficiary is electing the “remainder” option, and • Submitted evidence to show the alien previously held H-1B status... 	<p>The time he or she has not used in the previously granted H-1B status.</p>

See Aytes Memo of December 5, 2006, Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year, available on the Div IV ECN page.

Chapter 4: Labor Condition Application

Labor Condition Application Requirements

Introduction	This section provides information regarding the requirements of a Labor Condition Application (Form ETA 9035) with an H-1B petition.
General	<p>Each petition filed for H-1B classification must be accompanied by a Form ETA 9035 Labor Condition Application (LCA) with evidence that such has been filed with, and certified by, the Secretary of Labor prior to filing Form I-129 for the occupational specialty in which the alien(s) will be employed.</p> <p>Form ETA 9035 and Form ETA 9035E are both LCAs.</p> <p>NOTE: The requirements relating to an LCA from the Department of Labor (DOL) shall <u>not</u> apply to petitions involving DOD cooperative research and development projects or co-production projects. [8 CFR 214.2(h)(4)(vi)(A)(2)]</p>
What Does the LCA Contain	<p>The LCA contains the following information:</p> <ul style="list-style-type: none">• Number of alien workers sought• The occupational classification• The wage rate• Working conditions• Period of intended employment
Section F-1 of LCA	Section F-1 of the LCA (section I on the new LCA) pertains to certain employers who are H-1B dependent or have been found to have committed a willful violation or misrepresentation of a material fact to the DOL. These employers must agree to certain DOL conditions. The information in section F of the LCA is for DOL purposes only. USCIS does not treat the adjudication of H-1B dependent employers or willful violators any differently than other filings.

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Labor Condition Application Requirements, Continued

Banned Employers

When DOL informs USCIS that certain organizations have violated the INA, DOL will provide USCIS with a list of these employers that are banned for a set period from having an immigrant and/or nonimmigrant petition approved. The ban does not affect petitions that were previously approved; however, new petitions may not be approved during the banned period for the listed employers.

NOTE: The Data Reporting Group (DRG) runs a scrape for banned employers. If you receive a petition filed by a banned employer, bring the petition to the appropriate form type ISO3.

List of Banned Employers

The list of organizations ineligible for approval of immigrant and nonimmigrant petitions is located on the Division IV ECN page under I-129 Memos/ I129 General Memos.

Continued on next page

Labor Condition Application Requirements, Continued

Certification by the DOL

Certification by the DOL of an LCA in an occupational classification **does not** constitute a determination by that agency that the occupation is a specialty occupation.

Certification by the DOL is evidence that the employer filing the LCA has agreed to:

- Offer the actual wage level for the occupational classification at the place of employment, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, determined at the time of filing the LCA.
- Provide working conditions for such aliens that will not adversely affect the working conditions of U.S. workers similarly employed.
- Attest on the day the application was signed and submitted to DOL that there was not a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification at the place of employment, and if such a strike, lockout, or work stoppage occurs after submitting the application, the employer will notify the Employment and Training Administration (ETA) within three days of such occurrence and the application will not be used in support of a petition filed with USCIS for H-1B nonimmigrants to work in the same occupation at the place of employment until the ETA determines the strike, lockout, or work stoppage has ceased.
- Provide notice of filing to the bargaining representative (if any) or have a posted notice of filing in conspicuous locations at the place of employment.

See *Section 212(n) of the INA* and *20 CFR 655* for additional information on employer requirements pertaining to DOL

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Labor Condition Application Requirements, Continued

LCA Certification Prior to Filing

The LCA must be certified by the DOL **prior** to the filing of the I-129 petition * pursuant to:

- 8 CFR 214.2(h)(4)(i)(B),
- 8 CFR 214.2(h)(4)(iii)(B), and
- 8 CFR 103.2(b).

If a certified LCA is not received with the I-129 petition, the petition will be rejected. Officers should bring I-129 petitions without certified LCAs to a Division IV ISO3 to be rejected.

* USCIS temporarily accepted H1B petitions with uncertified LCAs from November 5, 2009 until March 9, 2010.

Prevailing Wage on LCA vs. Wage offered in I-129

The wage being offered to the beneficiary in the I-129 petition shall be considered as meeting the prevailing wage standard on the LCA if the wage being offered in the petition is:

- The actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment, or
- The prevailing wage listed by the DOL, whichever is greater.

[212(n)(1)(A)(i) of the INA]

Petitioner is Offering less than Prevailing Wage on LCA

If the petitioner has indicated on the I-129 petition that the wage offered is less than the prevailing wage listed on the LCA, issue an intent to deny for failure to comply with the terms and conditions of the LCA provided to DOL and for misrepresenting the intended wage to DOL.

USCIS is not bound to approve petitions based on information misrepresented on the LCA filed with DOL. Section 212(n)(1)(G)(ii) of the INA indicates the Secretary of Labor shall review an application (LCA) filed under this subsection only for completeness and obvious inaccuracies. Unless the Secretary of Labor finds that an attestation is incomplete or obviously inaccurate, the Secretary of Labor shall provide the certification described in section 101(a)(15)(H)(i)(b) within 7 days of the date of the filing of the attestation.

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Labor Condition Application Requirements, Continued

Validity Period and the LCA

The validity period of the petition may be approved as follows:
[8 CFR 214.2(h)(9)(iii) and Section 214(g)(8)(C) of the INA]

Classification	Validity Limitation
H-1B1	<ul style="list-style-type: none">• Up to 3 years, but• May not exceed validity period endorsed by DOL on LCA.
H-1B2	<ul style="list-style-type: none">• Up to 5 years.• NO LCA required.
H-1B3	<ul style="list-style-type: none">• Up to 3 years.• May not exceed validity period endorsed by DOL on LCA.
HSC	<ul style="list-style-type: none">• Up to 1 year, but• May not exceed validity period endorsed by DOL on LCA.

NOTE: It is the policy of VSC to give a 3-year validity period as 3 years “minus 1 day,” e.g., 10/1/09 to 9/30/12, even if the LCA is certified from 10/1/09 to 10/01/12. According to *timeanddate.com*, if we gave from 10/1/09 to 10/1/12 for validity dates, this would calculate to 3 years plus 1 day, which is more than the allowable 3 years. The same “minus 1 day” practice should be applied to 1-year and 5-year validity periods.

Chapter 5: Petitioner Requirements

Introduction

Who May File The following entities may file for an H-1B nonimmigrant.
[8 CFR 214.2(h)(2)(i)]

ENTITY	DEFINED AS:
An Agent	A U.S. individual or company in business as an agent may file for types of workers who are traditionally self-employed or use an agent to arrange short-term employment with numerous employers. A U.S. agent may be: <ul style="list-style-type: none">• The actual employer of the beneficiary,• The representative of both the employer and the beneficiary, or• A person or entity authorized by the employer to act for, or in place of, the employer as its agent. [8 CFR 214.2(h)(2)(i)(F)]
A U.S. Employer	A person, firm, corporation, contractor, or other association or organization in the United States which: <ul style="list-style-type: none">• Engages a person to work in the United States,• Has an employer-employee relationship demonstrated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee, and• Has an Internal Revenue Service tax identification number. [8 CFR 214.2(h)(4)(ii)]

Agents

A petition filed by an agent must include a complete itinerary of services or engagements, including dates, names and addresses of the actual employers, and the locations where the services will be performed. The agent must guarantee the wage offered and the other terms and conditions of employment by contract with the alien(s).

- 8 CFR 214.2(h)(2)(F)(1) and (2);
- Memo dated December 29, 1995 *Interpretation of the Terms "Itinerary" found in 8 CFR 214.2(h)(2)(i)(B) as it relates to the H-1B Nonimmigrant Classification*

Continued on next page

Introduction, Continued

Itinerary Requirements

A petition that requires services to be performed in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions.

Multiple Employers

An alien may be employed by more than one employer (petitioner) at any given time. However, a separate petition must be approved for each employer. This is referred to as a “concurrent” filing.

Concurrent employment may only be granted to an alien seeking employment in the same nonimmigrant classification.

EXAMPLE: An H1B alien may not seek concurrent employment as an H1B1 (HSC), H1B2, H1B3, or vice-versa.

Right to Control

Employer- Employee Relationship

Employer-employee relationship in the second prong of the U.S. employer definition at 8 CFR 214.2(h)(2)(i) is defined to include the following:

- Hiring,
 - paying,
 - supervising or
 - otherwise controlling the work of any such employee
-

Neufeld Memo & Factors to Consider

Right to control vs. actual control is discussed in depth in the 01/08/2010 memo from Don Neufeld, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements*. Evaluating a petitioner's right to control will help determine if the employer meets the employer-employee relationship prong of the definition of U.S. employer. The petitioner must be able to establish that it has the right to control when, where, and how the beneficiary performs the job. USCIS will consider the following to make such a determination, with no one factor being decisive:

- 1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
 - 2) If the supervision is off-site, how does the petitioner maintain such supervision, i.e. weekly calls, reporting back to main office routinely, or site visits by the petitioner?
 - 3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?
 - 4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
 - 5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
 - 6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
 - 7) Does the petitioner claim the beneficiary for tax purposes?
 - 8) Does the petitioner provide the beneficiary any type of employee benefits?
 - 9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
 - 10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
 - 11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?
-

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Right to Control, Continued

Evaluating the Employer/ Employee Relationship

The totality of evidence must satisfy the employer-employee relationship in all filings where the beneficiary will be employed at an offsite location. In assessing the requisite degree of control, be mindful of the nature of the petitioner's business and the type of work done by the beneficiary.

In addition to the 11 factors for consideration outlined in the Don Neufeld employer/employee memo dated 1/8/2010, the following criteria are also factors to consider when reviewing the file for sufficient employer-employee relationship evidence:

- Is the employer identified in a Statement of Findings (SOF) as one who has benched employees or who does not have sufficient work available, and there is more than one possible work location?
- Is the petitioner a staffing company?

NOTE: The main product of a staffing company is providing people solutions. A company that uses its own proprietary technology, methodologies, tools and instrumentalities to provide IT work solutions is not a staffing company.

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Right to Control, Continued

Self-Petitioners A self-petitioner refers to a petitioning company that is owned in whole or in major part by the beneficiary. In order to establish that a beneficiary-owned company has a qualifying employer-employee relationship and thus qualifies as a U.S. employer, it must be established that the organization or company, and not the beneficiary, has the ability to hire, fire, pay or otherwise supervise and control the work of the beneficiary. Self-petitioners require careful consideration of the following factors:

- whether the organization can hire or fire the beneficiary or set rules and regulations on the beneficiary's work;
- to what extent the organization supervises and assigns the beneficiary's work;
- whether the beneficiary reports to someone higher in the organization;
- whether, and if so, to what extent the beneficiary is able to influence the organization;
- whether the parties intended that the beneficiary be an employee, as expressed in written agreements or contracts; and/or
- whether the beneficiary shares in the profits, losses and liabilities of the organization.

If evidence suggests that the beneficiary may be self-petitioning, forward the file for adjudication by an ISO on the Entrepreneurs-In-Residence (EIR) team:

- Essex – NFTS to AC2258 and place crate labeled “EIR Files” in office, Cube EA017
- Tabor – NFTS to AC0016 and place crate labeled “EIR Files” in office, EX198

(b)(6)

Continued on next page

Right to Control, Continued

Determining the Validity Period

The validity period may be limited to the amount of time for which right to control is established, or one year, whichever is greater. Refer to the table below for guidance when certain conditions are present.

If right to control...	Then ...
Has only been established for a portion of the requested validity period, and additional evidence is required to establish other eligibility criteria,	<ul style="list-style-type: none">• RFE for other eligibility criteria, and• Address right to control full requested validity period.
Has only been established for a portion of the requested validity period, and all other eligibility criteria has been established,	<ul style="list-style-type: none">• Approve with a limited validity period.
Is established with an open ended contract and/or end-user,	<ul style="list-style-type: none">• Approve for full requested validity period.

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Right to Control, Continued

Amended Petitions

When an amended petition is filed, check CLAIMS and the CCD, under the NIV Applicant Petitioner option, for status of the prior petition.

Refer to the table below to determine if right to control should be re-adjudicated on amended petitions.

If an amended petition is filed...	Then ...
Only to fix a service error,	Right to control will not be re-adjudicated.
Only to notify USCIS of immaterial changes such as a petitioner's name change or acquisition by another company,	
To change the work location,	Right to control must be re-adjudicated.
To obtain a COS from a prior consular approval and CLAIMS or CCD indicates that the prior petition is in the process of being returned for review and possible revocation,	<p>Determine the location of the prior file.</p> <p>If the file is at the VSC:</p> <ul style="list-style-type: none"> • request and work the consular return. • Prepare an RFE for the subsequent filing which addresses right to control and any other material issues from the consular return. <p>If the file is not at the VSC:</p> <ul style="list-style-type: none"> • Print a copy of the consular return memo in CCD under PIMS Petitioner Report/Revocation Request and Supporting Documents. • Prepare an RFE for the subsequent filing which addresses right to control and any other material issue described in the consular return memo.
To obtain a COS from a prior consular approval and CLAIMS or CCD indicates that the prior petition has been revoked,	Prepare an RFE for right to control and address any other material issue described in the CCD Revocation Request.

Troubled Asset Relief Program (TARP)

TARP Requirements

The Troubled Asset Relief Program (TARP) requirements apply to H-1B petitioners if:

- The petitioner received TARP funds,
- The petition was filed on or after February 17, 2009,
- The beneficiary does not currently work for the petitioner, and
- The requested employment start date is prior to February 17, 2011.

NOTE: The TARP requirements found in the Employ American Workers Act (EAWA), Pub. L. 111-5, Div. A, Title XVI, § 1611 sunset on February 16, 2011.

H-1B petitioners who received funds under TARP and section 13 of the Federal Reserve Act, and sought to hire new H-1B workers, had to comply with the “H-1B dependent employer” provisions regarding recruitment of U.S. workers. These employers were required to make additional attestations to DOL when filing the LCA. This means that these organizations were required to indicate they are H-1B dependent on the LCA.

- On the old version of the LCA, this is indicated by checking off option B in Section F-1.
- On the newer version of the LCA, this would be indicated by answering “yes” to question a.1 in section I.

Form I-129 was revised on March 11, 2009 to inquire whether the petitioner received TARP funding. If the petitioner indicates it has received TARP funding, ensure that the petitioner has indicated it is H-1B dependent on the LCA. If the petitioner has not submitted Form I-129, with a revision date of March 11, 2009 or later, and/or otherwise indicated whether or not it received TARP funds, ask the petitioner to complete Part A, Question 1 d of the H-1B Data Collection and Filing Fee Supplement, using TARP RFE 2033. This applies to all H-1B petitions filed on or after February 17, 2009, and seeking an employment start date before February 17, 2011.

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Troubled Asset Relief Program (TARP), Continued

Determining When to Use TARP RFE

Follow the steps below to determine when to use TARP RFE #2033.

Step	Action						
1	Is the requested employment start date February 17, 2011, or later? <table> <tr> <th>If...</th><th>Then...</th></tr> <tr> <td>Yes,</td><td>TARP does not apply. Adjudicate on merit.</td></tr> <tr> <td>No,</td><td>Go to Step 2.</td></tr> </table>	If...	Then...	Yes,	TARP does not apply. Adjudicate on merit.	No,	Go to Step 2.
If...	Then...						
Yes,	TARP does not apply. Adjudicate on merit.						
No,	Go to Step 2.						
2	Is the beneficiary currently working for the petitioner in a work authorized category (i.e., H-1B, OPT, L-1, etc.)? <table> <tr> <th>If...</th><th>Then...</th></tr> <tr> <td>Yes,</td><td>TARP does not apply. Adjudicate on merit.</td></tr> <tr> <td>No,</td><td>Go to Step 3.</td></tr> </table>	If...	Then...	Yes,	TARP does not apply. Adjudicate on merit.	No,	Go to Step 3.
If...	Then...						
Yes,	TARP does not apply. Adjudicate on merit.						
No,	Go to Step 3.						
3	Review the Labor Condition Application (LCA) to see if the petitioner has indicated they are H-1B dependent. <table> <tr> <th>If the petitioner has indicated it is...</th><th>Then...</th></tr> <tr> <td>Not H-1B dependent, or H-1B dependent and/or a willful violator,</td><td>Go to Step 4.</td></tr> <tr> <td>H-1B dependent,</td><td>Go to Step 6.</td></tr> </table>	If the petitioner has indicated it is...	Then...	Not H-1B dependent, or H-1B dependent and/or a willful violator,	Go to Step 4.	H-1B dependent,	Go to Step 6.
If the petitioner has indicated it is...	Then...						
Not H-1B dependent, or H-1B dependent and/or a willful violator,	Go to Step 4.						
H-1B dependent,	Go to Step 6.						
4	Refer to the table below. <table> <tr> <th>If the petitioner submitted...</th><th>Then...</th></tr> <tr> <td>Any version of Form I-129 prior to the 3/11/09 version, and: Did NOT include the H-1B Data Collection and Filing Fee Exemption Supplement with a revision date of 3/11/09 or later, and Did NOT provide information regarding whether the business received TARP funds,</td><td>Issue TARP RFE 2033.</td></tr> <tr> <td>Any version of Form I-129 and included the H-1B Data Collection and Filing Fee Exemption Supplement with a revision date of 3/11/09 or later,</td><td>Go to step 5.</td></tr> </table>	If the petitioner submitted...	Then...	Any version of Form I-129 prior to the 3/11/09 version, and: Did NOT include the H-1B Data Collection and Filing Fee Exemption Supplement with a revision date of 3/11/09 or later, and Did NOT provide information regarding whether the business received TARP funds,	Issue TARP RFE 2033.	Any version of Form I-129 and included the H-1B Data Collection and Filing Fee Exemption Supplement with a revision date of 3/11/09 or later,	Go to step 5.
If the petitioner submitted...	Then...						
Any version of Form I-129 prior to the 3/11/09 version, and: Did NOT include the H-1B Data Collection and Filing Fee Exemption Supplement with a revision date of 3/11/09 or later, and Did NOT provide information regarding whether the business received TARP funds,	Issue TARP RFE 2033.						
Any version of Form I-129 and included the H-1B Data Collection and Filing Fee Exemption Supplement with a revision date of 3/11/09 or later,	Go to step 5.						

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Troubled Asset Relief Program (TARP), Continued

Determining When to Use TARP RFE (continued)

Step	Action								
5	<p>Refer to the table below.</p> <table> <tr> <td>If the petitioner submitted any version of Form I-129 and included the H-1B Data Collection and Filing Fee Exemption Supplement with a revision date of 3/11/09 or later and...</td><td>Then...</td></tr> <tr> <td>Responded "No" to Question 1 d in Part A, indicating the business did not receive TARP funds, OR Voluntarily included information that the business did not receive TARP funds,</td><td>Adjudicate on merits.</td></tr> <tr> <td>Left the question regarding TARP funds blank, OR Did not provide information regarding whether the business received TARP funds,</td><td>Issue TARP RFE 2033.</td></tr> <tr> <td>Responded "Yes" to Question 1 d in Part A, indicating the business did receive TARP funds, OR Voluntarily included information that the business did receive TARP funds,</td><td>Deny for lack of a valid LCA at the time of filing.</td></tr> </table>	If the petitioner submitted any version of Form I-129 and included the H-1B Data Collection and Filing Fee Exemption Supplement with a revision date of 3/11/09 or later and...	Then...	Responded "No" to Question 1 d in Part A, indicating the business did not receive TARP funds, OR Voluntarily included information that the business did not receive TARP funds,	Adjudicate on merits.	Left the question regarding TARP funds blank, OR Did not provide information regarding whether the business received TARP funds,	Issue TARP RFE 2033.	Responded "Yes" to Question 1 d in Part A, indicating the business did receive TARP funds, OR Voluntarily included information that the business did receive TARP funds,	Deny for lack of a valid LCA at the time of filing.
If the petitioner submitted any version of Form I-129 and included the H-1B Data Collection and Filing Fee Exemption Supplement with a revision date of 3/11/09 or later and...	Then...								
Responded "No" to Question 1 d in Part A, indicating the business did not receive TARP funds, OR Voluntarily included information that the business did not receive TARP funds,	Adjudicate on merits.								
Left the question regarding TARP funds blank, OR Did not provide information regarding whether the business received TARP funds,	Issue TARP RFE 2033.								
Responded "Yes" to Question 1 d in Part A, indicating the business did receive TARP funds, OR Voluntarily included information that the business did receive TARP funds,	Deny for lack of a valid LCA at the time of filing.								
6	<p>Has the petitioner included the H-1B Data Collection and Filing Fee Exemption Supplement with a revision date of 3/11/09 or later, and provided an answer to Question 1 d in Part A or voluntarily included information regarding whether the business received TARP funds?</p> <table> <tr> <td>If...</td><td>Then...</td></tr> <tr> <td>Yes,</td><td>Adjudicate on merits.</td></tr> <tr> <td>No,</td><td>Issue TARP RFE 2033.</td></tr> </table>	If...	Then...	Yes,	Adjudicate on merits.	No,	Issue TARP RFE 2033.		
If...	Then...								
Yes,	Adjudicate on merits.								
No,	Issue TARP RFE 2033.								

Chapter 6: Position Requirements

Specialty Occupation (H-1B1 in CLAIMS)

Introduction This section provides information regarding the qualifications of the position of an H-1B petition.

“Specialty Occupation” Criteria

8 CFR 214.2(h)(4)(iii)(A) requires for H-1B petitions involving a “specialty occupation” that the position meet one of the following criteria:

- A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that only an individual with a degree can perform it;
- The employer normally requires a degree or its equivalent for the position; OR
- The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

NOTE: It is not sufficient that the position merely requires attainment of a bachelor’s degree. The degree must be in a “specific specialty” and must be required so that the employee may apply a “body of highly specialized knowledge” to the occupation. The key factor is whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor’s degree in the specific specialty as the minimum for entry into the occupation as required by the INA. [Section 214(i)(1) of the INA]

Continued on next page

Specialty Occupation (H-1B1 in CLAIMS), Continued

Industry-wide Standards

In addition to the above-listed criteria, USCIS will look to industry-wide standards to determine whether a position is a specialty occupation, and whether a bachelor's degree in a specific specialty is normally the minimum prerequisite for the position.

In certain professions, it will be very clear that this is the case. For example, a bachelor's degree in Accounting is normally a minimum prerequisite for a Certified Public Accountant position with an accounting firm. In a case where a bachelor's degree is less directly related to the occupation in question, it would be beneficial for the petitioner to list:

- Relevant course work of the beneficiary in order to further establish the direct relevance of the degree to the position, and
 - Show that the position is indeed professional in nature.
-

Job Duties

While both the job and the beneficiary must meet the above stated requirements, the mere fact that the beneficiary meets the requirements of the position does not necessarily mean that the duties to be performed require an individual of that caliber.

The petitioner must provide a detailed description of the job duties to be performed.

Occupational Outlook Handbook

If the detailed description does not persuade you that the job offered meets the requirements of a "specialty occupation", useful guidance may be found in the Reference Library or on-line. A good reference is the Department of Labor's Occupational Outlook Handbook (OOH). The OOH outlines the duties normally performed and basic educational and experience requirements.

- The OOH may be accessed through the Internet at the following location:
<http://www.bls.gov/oco/home.htm>
- The OOH may also be accessed from the VSC Adjudications ECN page under the Reference Link.

When using the OOH, make sure the job title researched accurately reflects the job duties to be performed. Look at each case individually; do not get in the habit of classifying "job titles."

Department of Defense Specialty Occupation (H-1B2 in CLAIMS)

Definition

8 CFR 214.2(h)(4)(i)(4) states in part:
...petition for alien to perform services in a specialty occupation, services relating to a DOD cooperative research and development project or co-production project...

IMPORTANT

Forward all of these cases to a Business Division Senior for adjudication.

General Requirements

Services of an exceptional nature relating to DOD cooperative research and development projects or co-production projects shall be those services that require a baccalaureate or higher degree, or its equivalent, to perform the duties.

The existence of this special program does not preclude the DOD from utilizing the regular H-1B provisions provided the required guidelines are met.

LCA

The petitioner is **NOT** required to obtain a Form ETA-9035 (Labor Condition Application) [8 CFR 214.2(h)(4)(vi)(A)(2)].

Position Requirements for H-1B2

- The petition must be accompanied by a verification letter that the alien will be working on a cooperative project under a reciprocal government to government agreement administered by DOD. Details about the specific project are not required.
- The petitioner shall provide a general description of the alien's duties and indicate the actual dates of the alien's employment on the project.
- The petitioner shall submit a statement indicating the names of aliens currently employed on the project in the United States and their dates of employment. The petitioner shall also indicate the names of aliens whose employment on the project ended within the past year.

[8 CFR 214.2(h)(4)(vi)(B)]

Fashion Models of Distinguished Merit & Ability (H-1B3 in CLAIMS)

Definition	Section 101(a)(15)(H)(i)(b) of the INA relates to an alien: ...who is coming temporarily to the United States to perform services...as a fashion model...of distinguished merit and ability...
General Requirements	H-1B classification may be granted to an alien who is of distinguished merit and ability in the field of fashion modeling. An alien of distinguished merit and ability in the field of fashion modeling is one who is prominent in the field of fashion modeling. The alien must also be coming to the United States to perform services that require a fashion model of prominence. [8 CFR 214.2(h)(4)(vii)]
LCA	The petitioner shall obtain a certification from DOL that it has filed an LCA in the occupational specialty for each Standard Metropolitan Statistical Area (SMSA) where the alien will be employed.
Position Requirements for H-1B3	The evidence must establish that: <ul style="list-style-type: none">• The services to be performed involve an event, production or activity which has a distinguished reputation, or• The services are to be performed for an organization or establishment that has a distinguished reputation for, or record of, employing prominent persons.

Free Trade Agreements with Chile and Singapore (HSC in CLAIMS)

Definition

Section 101(a)(15)(H)(i)(b1) was added to the INA as a result of Public Law 108-77 and Public Law 108-78 when the President signed the Free Trade Agreements (FTAs) with Chile and Singapore. For purposes of section 101(a)(15)(H)(i)(b1) of the INA, the term "specialty occupation" means an occupation that requires:

- The theoretical and practical application of a body of specialized knowledge; and
- Attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

[Section 214(i)(3) of the INA]

General Requirements

Refer to the table below for filing requirements for Chilean or Singaporean individuals seeking free trade nonimmigrant status (HSC).

If a Chilean or Singaporean individual...	Then ...
<ul style="list-style-type: none">• Desires HSC status, and• is not presently in the U.S,	The beneficiary applies directly to the Department of State for an H-1B1 nonimmigrant visa.
<ul style="list-style-type: none">• Is requesting a change in nonimmigrant status to HSC, or• an extension of HSC status,	Effective April 1, 2006, the beneficiary files the Form I-129 with the VSC, regardless of place of employment. NOTE: HSC cases are only adjudicated by a designated team of officers. If you receive a request for HSC status, bring the case to your SISO for redistribution.

Continued on next page

Free Trade Agreements with Chile and Singapore (HSC in CLAIMS), Continued

**Labor
Condition
Attestation**

Employers must submit a labor condition attestation for foreign workers from Chile or Singapore under the FTA H-1B1 program. The law requires the DOL to certify to the Department of State (DOS) that the appropriate LCA, ETA Form 9035 or ETA Form 9035E, has been filed with DOL.

If certified and the beneficiary will be consular processing, the employer transmits a copy of the signed, certified LCA to the beneficiary together with a written offer of employment. At the time of visa application at the consulate, the beneficiary will present a certified copy of the LCA, clearly annotated by the employer as "H1B1 Chile" or "H1B1 Singapore," as proof of filing.

Chapter 7: Beneficiary Requirements

General

Introduction This section provides information regarding the qualifications of the beneficiary for H-1B classification.

Individual Qualifications In order for an individual to qualify to perform services in a specialty occupation, the beneficiary must meet one of the following criteria:

- Hold a U.S. baccalaureate or higher degree required by the specialty occupation from an accredited college or university,
- Hold a foreign degree determined to be equivalent to a U.S. baccalaureate or higher degree required by the specialty occupation from an accredited college or university,
- Hold an unrestricted state license, registration, or certification, which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment,

OR,

- Has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation, and has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

[8 CFR 214.2(h)(4)(iii)(C)]

Licensed Occupations If the occupation requires a state or local license for an individual to fully perform that occupation, an alien seeking H classification in that occupation must have the license prior to approval of the petition. [Section 214(i)(2)(A) of the INA and 8 CFR 214.2(h)(4)(v)(A)] Although, 8 CFR 103.2(b)(1) states the applicant or petitioner must establish eligibility for the requested benefit at the time of filing the application or petition, the H-1B specific statute at Section 214(i)(2)(A) of the INA and 8 CFR 214.2(h)(4)(v)(A) take precedence over the general language of 8 CFR 103.2(b)(1). Therefore, it is acceptable for a beneficiary to receive the license after the date of filing, but prior to approval.

Continued on next page

General, Continued

Sources for Determination of Licensure Requirements

One source for determining if a state requires a license for a particular occupation may be found at the following link:

[BRB Publication's Public Record Resource Center](#)

Some states do not issue licenses until the worker is present. We will accept a statement from the state licensing authority affirming the beneficiary has met all requirements and that a license will be issued to the beneficiary immediately upon arrival in the United States. In such cases, the approval will be limited to one year.

The following memos also pertain to licensure requirements:

- Thomas E. Cook Memo of November 20, 2001, *Social Security Cards and the Adjudication of H-1B Petitions*.
- Donald Neufeld Memo of March 21, 2008, *Adjudicator's Field Manual Update: Chapter 31: Accepting and Adjudicating H-1B Petitions When a Required License is not Available Due to State Licensing Requirements Mandating Possession of a Valid Immigration Document as Evidence of Employment Authorization*.

The memos can be accessed on the Division IV ECN site under I-129 memos/ Social Security Cards and the Adjudication of H-1B Petitions 11/20/01 and AFM Update Chap 31 3/21/08.

Expiring Licenses

Full licenses, to include wallet size or web verified, may include an expiration date. The license must be valid at the time of filing.

In many occupations an alien's license, though not a limited license, will not be valid for the entire length of time requested by the petitioner. Licensed professionals must renew their full license every few years. The validity dates of an approved petition should not be limited simply because the alien's license will expire prior to the requested ending employment date.

[See Brown Memo *Validity Period of I-129 Petition* 7/10/95]

Continued on next page

General, Continued

**No License
Required if
Working Under
Supervision of
Licensed
Professional**

If the alien can perform the duties of the proffered position without licensure because he or she will work under the supervision of a licensed professional as permitted by State law, then the validity period of the petition will not be limited despite the lack of a permanent license.

Example 1.

A Medical Resident working under the supervision of a licensed physician in New York State is not required to have a license and thus, the validity of the petition should not be limited. [8 CFR 214.2(h)(4)(v)(C)]

Example 2.

Medical Residents in Connecticut do not need a license when working under the supervision of a licensed physician in a Connecticut hospital. The hospital must send a list of those who will be obtaining their residency with the hospital to the Connecticut licensing authority. Although the licensing authority issues a permit for all of the residents on the list, an individual permit is not issued to the resident. While the permit list is valid for one year, it is automatically renewed when the hospital requires an extension for the residents to obtain subsequent year(s) of training. Thus, the permit that is required for residents to work in Connecticut hospitals is not a license and the validity of the petition should not be limited. [8 CFR 214.2(h)(4)(v)(C)]

Example 3.

A Civil Engineer hired to design the construction of a public building (not to be confused with a Software Engineer) generally requires a license; however, if the petitioner submits evidence to demonstrate the beneficiary will work under the supervision of a licensed engineer, then no license is required.

Continued on next page

General, Continued

Physicians Working for the Veteran's Administration (VA)

Physicians coming to the United States to work at a Veteran's Administration (VA) hospital are required to have a state license to practice medicine; however, the license does not have to be from the state where the VA hospital is located. [See Redman Memo *License Requirements for H-1B Physicians* dated December 19, 1997]

Iranian Sanctions

On May 6, 1995, the President of the United States promulgated Executive Order 12,959, entitled "*Prohibiting Certain Transactions With Respect to Iran*" [EO 12,959, 60 Fed. Reg. 24, 797 (1995)]. The Executive Order imposed economic sanctions against Iran that prohibit, among other things, the importation of Iranian services where the alien is performing such service as an agent, employee, or contractor of the Iranian government or a business or other organization in Iran. The Office of Foreign Assets Control (OFAC) published regulations in 1999, which clarified the sanctions, whereby an I-129 petition for an Iranian citizen may be approved as long as the Iranian is:

- Not normally a resident in Iran, **AND**
- Not working in a way that is connected to:
 - The Iranian government (excluding diplomatic and consular services),
 - An Iranian business,
 - An Iranian organization, or
 - Any person located in Iran.

[31 CFR 560.306(d)]

Effects of a Strike

A petition may not be approved if the Secretary of Labor has certified to the Commissioner that a strike, or other labor dispute, is in progress, which involves a work stoppage. This is not something the petitioner will always disclose to USCIS. HQSCOPS will inform VSC of current strike information.

[Section 214(j) of the INA]

Continued on next page

General, Continued

Dual Intent

The approval of a permanent labor certification or the filing of a preference petition for an alien shall NOT be a basis for denying an H-1B1, H-1B2, or H-1B3 petition or a request to extend such a petition, or the alien's admission, change of status, or extension of stay. An alien may legitimately come to the United States for a temporary period as an H-1B1, H-1B2, or H-1B3 nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States. [Section 214(h) of the INA and 8 CFR 214.2(h)(16)(i)]

An HSC nonimmigrant (H-1B1 under the FTAs of Chile or Singapore) may NOT have dual intent. [See Yates Memo dated January 8, 2004, *Lifting of Numerical Cap on Mexican NAFTA Nonimmigrant Professionals ("TN") and Free Trade Agreements with Chile and Singapore*]

Continued on next page

General, Continued

H-1B Process for LPRs

Refer to the table below to determine the action to take on an H-1B petition when the beneficiary adjusts to lawful permanent resident (LPR) status.

If the beneficiary...	Then...						
Adjusts to LPR status after the requested start date on the H-1B petition,	Grant H-1B validity up to date of adjustment.						
<ul style="list-style-type: none"> Adjusted prior to the requested start date, and Seeks consular notification, 	Adjudicate on merit. Notate the KCC copy to indicate the alien is an LPR.						
<ul style="list-style-type: none"> Adjusted prior to requested start date, and Seeks EOS/COS, 	Send an RFE questioning the alien's intent to be a nonimmigrant or immigrant. <table border="1"> <tr> <th>If the response indicates...</th><th>Then...</th></tr> <tr> <td>Intent to abandon LPR status,</td><td> <ul style="list-style-type: none"> Change the petition to consular notification, and Indicate on the KCC copy that the alien will abandon LPR status at the consulate. </td></tr> <tr> <td>No intention to abandon LPR status,</td><td>Deny the EOS portion of the petition.</td></tr> </table>	If the response indicates...	Then...	Intent to abandon LPR status,	<ul style="list-style-type: none"> Change the petition to consular notification, and Indicate on the KCC copy that the alien will abandon LPR status at the consulate. 	No intention to abandon LPR status,	Deny the EOS portion of the petition.
If the response indicates...	Then...						
Intent to abandon LPR status,	<ul style="list-style-type: none"> Change the petition to consular notification, and Indicate on the KCC copy that the alien will abandon LPR status at the consulate. 						
No intention to abandon LPR status,	Deny the EOS portion of the petition.						

Department of Defense (DOD) H-1B2

The petition shall be accompanied by evidence that the beneficiary has a baccalaureate or higher degree, or its equivalent, in the occupational field in which he or she will be performing the services.

[8 CFR 214.2(h)(4)(vi)(C)]

Physicians

Graduates of Foreign Medical Schools

Graduates of foreign medical schools must meet additional special requirements as outlined in the below table.

If the beneficiary will...	Then...
<ul style="list-style-type: none"> • Be teaching or conducting research, or both, AND • No patient care will be performed except that which is incidental to the alien's research or teaching, 	No additional requirements must be met.
<ul style="list-style-type: none"> • Be performing services as a member of the medical profession (i.e., providing patient care), 	<p>The beneficiary must have:</p> <ul style="list-style-type: none"> • Passed the United States Medical Licensing Examination (USMLE) [formerly the Federal Licensing Examination (FLEX) or National Board of Medical Examiners Exam (NBME)] AND • Have competency in oral and written English as evidenced by: <ul style="list-style-type: none"> – Educational Commission for Foreign Medical Graduates (ECFMG) Certification.

[212(a)(5)(B) of the INA and 8 CFR 214.2(h)(4)(viii)(A) and (B)]

IMPORTANT: For alien graduates of foreign medical schools, passage of the USMLE, or an equivalent examination, is required in addition to possessing a certificate from ECFMG and a license or other authorization to practice medicine in the state where the alien physician will work.

Graduates of U.S. Medical Schools

Graduates of accredited U.S. medical schools do not need ECFMG certification or evidence of passing the USMLE. However, graduates of U.S. medical schools must still possess a license in order to practice medicine. [8 CFR 214.2(h)(4)(viii)(B)(2)]

ECFMG

The ECFMG is the only recognized source in the United States for verification of medical transcripts and diplomas. Part of the ECFMG's certification process involves verification of a foreign medical graduate's overseas education.

Continued on next page

Physicians, Continued

Evidence of English Language Proficiency

Despite the reference to passage of the ECFMG in the regulations at 8 CFR 214.2(h)(4)(viii)(B)(2)(i), there is no longer a separate English language proficiency examination administered by ECFMG.

As of July 14, 2004, proficiency in the English language is established through the passage of:

- Step 1 and
- Step 2 Clinical Skills portion of the USMLE.

However, a certificate issued by the ECFMG is still considered evidence that an alien is proficient in the English language.

Canadian Medical School Graduates

Canadian medical school graduates are considered competent in oral and written English; therefore, they are not required to take the ECFMG. Canadian medical school graduates must still pass the USMLE or an equivalent examination, unless coming to the United States to teach or conduct research with no patient care except that which is incidental to the research or teaching.

[Memo, from the Commissioner, INS, March 29, 1977]

USMLE (formerly FLEX or NBME)

If the physician is required to pass the USMLE (or FLEX or NBME, tests that were issued in the 1990s), he or she must have done one of the following:

- Passed Step 1, Step 2 Clinical Knowledge and Step 2 Clinical Skills, and Step 3 of the USMLE, or
- Passed components 1 and 2 of the FLEX, or
- Passed Parts I, II and III of the NBME.

At present, it is not sufficient for an H-1B physician to have passed only parts of the various examinations, and to claim that passing a combination of various parts meets the H-1B requirements.

Continued on next page

Physicians, Continued

Physician Meets Criteria

If the alien meets the criteria discussed above, adjudicate the petition as any other H-1B.

- An LCA is required, just like any other H-1B alien.
- Verify that the beneficiary is properly licensed.
- Generally, if any direct patient care is involved, a license will be required, unless the petitioner proves otherwise.

NOTE: Some residents, who are physicians in training, may not require a license in certain states, e.g., New York, when working under the supervision of a licensed professional. Make sure you have evidence to support any claimed exemption from a medical license.

An excellent source for state licensing requirements of physicians can be found at: www.ama-assn.org/ama/pub/category/2645.html - [Similar Sites and Reviews](#) | [Xmarks](#)

Continued on next page

Physicians, Continued

Physicians of National or International Renown

Pursuant to 8 CFR 214.2(h)(4)(viii)(C), foreign medical school graduates who are of national or international renown are exempt from the requirements of passing the USMLE (or an equivalent examination) and the ECFMG for direct patient care. However, it is a common misconception that these physicians are exempt from licensure. Physicians of national or international renown **still require licensure** and an LCA.

Possible evidence that the beneficiary qualifies as a physician of national or international renown may include:

- reference letters from other medical professionals of national or international renown, stating that the foreign national has national or international renown for his or her abilities as a doctor or other contributions to the medical profession,
- awards, particularly if they are national or international in scope, such as the World Health Organization (WHO),
- articles or presentations published by the foreign national in medical journals or presented at medical conferences,
- media publicity or journal articles describing or making reference to the foreign national or his/her work,
- evidence of the foreign national's working in prominent positions for renowned academic or medical institutions,
- evidence of the foreign national's serving as a speaker or panelist at medical conferences, and/or
- evidence of the foreign national's acting as a peer reviewer of the work of others presented at conferences published in journals.

NOTE: An H-1B physician of national or international renown does not necessarily have to meet the requirements of an O-1A or E11 alien. The evidence must just establish that he or she is renowned. *Merriam-Webster's Collegiate Dictionary*, tenth edition, defines "renown" as "a state of being widely acclaimed and highly honored."

Nurses

Nurses

September 1, 1995 marked the sunset of the H-1A program that provided for employment of foreign nurses. As a result, petitioners have attempted to file for registered nurses (RNs) under the H-1B specialty occupation classification. USCIS does not typically regard registered nurse positions as specialty occupations, because RNs are generally not required to have a bachelor's degree in nursing. The minimum requirement for entry into the field of nursing as an RN is a two-year associate degree in nursing. Since an RN is generally not required to have a bachelor's degree, ISOs must look closely at the job duties and be satisfied that the worker will be utilized as a professional registered nurse.

An H-1B petition for a qualified nurse should be denied unless:

- The degree is a state licensing requirement*;
 - The hospital or other petitioning facility uniformly requires a degree**; or
- The nurse will be used in a nursing specialty that is particularly complex and ordinarily associated with a degree, such as advanced practice registered nurses (APRN).

*The state of North Dakota is the only state that requires that an individual possess a BSN in order to be licensed as an RN in that state. [See Johnny N. Williams memo dated November 27, 2002, *Guidance on Adjudication of H-1B Petitions filed on Behalf of Nurses*]

**A petitioner's self-imposed standards will not mask the fact that a position is not a specialty occupation. The critical element is whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.

[See Defensor v. Meissner, 201 F. 3d 384 (5th Cir. 2000)]

Continued on next page

Nurses, Continued

SISO Sign-Off of Nurses

SISO sign-off is required for all H-1B approvals when the position requires a degree in nursing.

Educational Requirements for Advanced Level Nursing

The OOH describes the educational requirements for advanced level nursing as:

There are three major educational paths to registered nursing:

- A bachelor's of science degree in nursing (BSN)
- An associate degree in nursing (ADN)
- A diploma

Program	Information
BSN	<ul style="list-style-type: none">• Offered by colleges and universities• Take about 4 years to complete.• In 2006, 709 nursing programs offered degrees at the bachelor's level.
ADN	<ul style="list-style-type: none">• Offered by community and junior colleges.• Take about 2 to 3 years to complete.• About 850 RN programs granted associate degrees.
Diploma	<ul style="list-style-type: none">• Administered in hospitals.• Take about 3 years.• Only about 70 programs offered diplomas.

Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions:

Nurse Requirements

Most nurse petitions are denied; however, if it appears that an H-1B nurse petition is approvable, you must obtain concurrence from a SISO.

In addition to evidence that the position requires the minimum of a baccalaureate degree in a specific field of study, the petition must be accompanied by an ETA 9035, endorsed by the DOL, as well as evidence that the beneficiary has obtained:

- State licensure, AND
 - Certification from the Commission on Graduates of Foreign Nursing Schools (CGFNS). The CGFNS certification cannot be substituted for a license (unlike the Schedule A, Group 1, nurses on an I-140 petition.)
-

Continued on next page

Nurses, Continued

Nurse Managers/ Advance Practice Nurses

Certain advanced practice occupations will generally be H-1B equivalent if the position requires, and the alien has obtained, advanced practice certification. If the petitioner claims the beneficiary will be employed as an advanced practice nurse, then the record should contain evidence that the beneficiary has received advanced practice certification in order to be employed in an advanced practice occupation.

Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration. These nurses may qualify as an H-1B. An example of a qualifying upper-level nurse manager or nurse administrator would be someone who is in charge of the direction of an entire nursing program within a facility.

AAO Decision Regarding a Nurse Supervisor

There is an Administrative Appeals Office (AAO) decision for a Nurse Supervisor, which can be found by choosing "I-129 Memos & Decisions" on the Division IV ECN page, then choosing "Nurse Supv for Health Care Org" from the "Select an H1B AAO Decision" drop down menu.

In this decision, the AAO discusses the duties of the proffered position to include "observe techniques and services performed by nursing staff, sort problem areas in [the] nursing department, interpret and implement quality assurance standards in health care facilities to ensure quality care for patients, analyze nursing techniques and recommend modifications, working with [the] Nursing Director, implement quality of care programs."

The AAO notes that while the nursing position is beyond that of an entry-level registered nurse, it is not analogous to an administrative nursing position. ISOs should be mindful that performing duties, such as supervising nurses, does not, in and of itself, equate to working as an "upper-level 'nurse manager' in a hospital administrative position" as discussed in the Johnny Williams memo.

[See Johnny N. Williams Memo of November 27, 2002, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*]

Other Healthcare Workers

Certification of Foreign Health Care Workers

The following health care occupations are inadmissible to the United States unless they present a certification from one of the approved credentialing organizations listed in the below section. Certification is needed in addition to any licensure requirements. [Section 212(a)(5)(C) of the INA and 8 CFR 212.15]

Medical Technologist
Medical Technician
Nurse
Occupational Therapist
Physical Therapist
Physician's Assistant
Speech Language Pathologist

There is no provision in regulations for exceptions to foreign health care workers who are educated in the United States, who are currently licensed to practice in the United States, or to whom certificates were issued prior to the publication of the interim regulation.

Approved Credentialing Organizations for Health Care Workers

The following independent credentialing organizations have received USCIS approval to issue certificates in the listed health care occupations:

1. **Commission on Graduates of Foreign Nursing Schools (CGFNS)** can issue certificates for nurses, physical therapists, occupational therapists, speech-language pathologists and audiologists, medical technologists (also known as clinical laboratory scientists), medical technicians (also known as clinical laboratory technicians), and physician assistants.
2. **National Board for Certification in Occupational Therapy (NBCOT)** can issue certificates for occupational therapists.
3. **Foreign Credentialing Commission on Physical Therapy (FCCPT)** can issue certificates for physical therapists.

NOTE: If the beneficiary has been issued a certificate from one of these approved credentialing organizations, there is no need to require an evaluation of the beneficiary's foreign education. Part of the certification process of these organizations is to evaluate the beneficiary's foreign education. If the beneficiary's foreign education is not equivalent to the required U.S. education, the organization will not issue the certification.

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Other Healthcare Workers, Continued

Lack of Certification

If no evidence is received to demonstrate that a health care worker has the required certification, the classification may be approved, if all other requirements are met, but any request for an extension of stay or change of status should be denied using **autotext 4928**, as the alien is considered inadmissible. [Section 212(a)(5)(C) of the INA, 8 CFR 212.15, and 8 CFR 214.1(j)]

Consular notification requests with no evidence of certification- indicate on the petition and on the copy going to either the KCC or the POE/PFI that the alien appears inadmissible under 212(a)(5)(C) of the INA.

Speech Language Pathologist Clinical Fellows

There are many companies that claim the healthcare worker certification under 212(a)(5)(C) is not needed because the clinical fellow works under the supervision of another licensed speech language pathologist (SLP). The clinical fellows are working in a position that involves direct patient care. Referring to the position as only “clinical fellow” and not speech language pathologist clinical fellow does not change the fact that the duties are those of a speech language pathologist, albeit supervised. Further, the CGFNS will issue speech language pathologist certification whether the position is for a clinical fellow or not.

For all healthcare worker cases, the petitioner or attorney’s statement alone is not acceptable proof that the occupation does not require certification. There must be documentary evidence from the CGFNS stating that the certification is not required. Licensure or permit requirements by state for a clinical fellow SLP can be found in the SLP license chart located on the Division IV intranet site. When researching for state licensure information, look under the specific healthcare position’s title on the state websites, not under “clinical fellow.”

Physical Therapist Interns

There are also times when petitioners filing for physical therapist interns will claim the healthcare worker certification under 212(a)(5)(C) is not needed because the physical therapist intern will be working under the direction of a licensed physical therapist. Follow the same guidance as stated above with the SLP clinical fellows. The healthcare worker certification is still needed and licensure requirements will be determined by the state.

Fashion Models of Distinguished Merit & Ability (H1B3 in CLAIMS)

Beneficiary Requirements for H1B3s

To qualify as a fashion model of distinguished merit and ability, the beneficiary must be:

- Prominent in the field of fashion modeling, and
 - Coming to the United States to perform services, which require a fashion model of prominence.
-

Definition of Prominence

Prominence means a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of fashion modeling.

[8 CFR 214.2(h)(4)(ii)]

Criteria for Beneficiary of H-1B3

To establish that the beneficiary qualifies as an alien of distinguished merit and ability in the field modeling you must have evidence of **two** of the following:

1. Has achieved national or international recognition for outstanding achievements evidenced by critical reviews or other published material by or about the alien in major newspapers, trade journals, or magazines.
2. Has performed and will perform services as a fashion model for employers that have a distinguished reputation.
3. Has received recognition for significant achievements from organizations, critics, or other recognized experts in the field of fashion modeling. Such testimonials must be in a form that clearly indicates the author's authority, expertise, and knowledge of the alien's achievements.
4. Commands a high salary or other substantial remuneration for services (in relation to others in the field) as evidenced by contracts or other reliable evidence.

[8 CFR 214.2(h)(4)(vii)(C)]

Free Trade Agreements with Chile and Singapore (HSC in CLAIMS)

Beneficiary Requirements for HSC

The beneficiary of an HSC petition must have attained a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. [Section 214(i)(3) of the INA]

The beneficiary must submit:

- A job offer letter,
- Relevant credentials, and
- A labor condition attestation

Alternative Credentials

The FTAs with Chile and Singapore allow for alternative credentials for certain professions. The United States has agreed to accept alternative credentials for Chilean and/or Singaporean nations in certain occupations as shown in the following table.

If the beneficiary is from...	And the beneficiary will be employed in the position of...	Then the beneficiary may qualify with...
Chile,	<ul style="list-style-type: none"> • Agricultural Manager, or • Physical Therapist, 	<ul style="list-style-type: none"> • A combination of a post-secondary certificate in the specialty, <u>and</u> • 3 years experience in lieu of the standard degree requirements.
Chile or Singapore,	<ul style="list-style-type: none"> • Disaster Relief Claims Adjuster, or • Management Consultant, 	

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Free Trade Agreements with Chile and Singapore (HSC in CLAIMS), Continued

Licensing Requirements

While the requirements for other H-1B classifications include licensure, requirements for classification under the FTAs with Chile and Singapore do not include licensure. Licensure to practice a given profession in the United States under the FTAs with Chile and Singapore is a post-entry requirement subject to enforcement by the appropriate state or other sub-federal authority.

Proof of licensure to practice in a given profession in the United States may be offered along with a job offer letter, or other documentation in support of an application for an H-1B1 visa under the FTA with Chile or Singapore. However, admission/classification should not be denied based solely on the fact that the applicant does not already hold a license to practice in the United States.

NOTE: Aliens seeking classification as H-1B1 under the FTAs of Chile and Singapore **ARE** subject to INA Section 212(a)(5)(C) Uncertified Foreign Health Care Workers. Refer to "Certification of Foreign Health Care Workers" under General Requirements for H-1B Healthcare Workers section of this SOP.

Temporary Admission of HSC

Both the agreement with Chile and the agreement with Singapore provides for the temporary entry of professionals into the United States. Temporary entry is defined in both agreements as "an entry into the United States without the intent to establish permanent residence."

- The alien must satisfy the consular officer that the proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence.
 - The circumstances surrounding an application should reasonably and convincingly indicate that the alien's temporary work assignment in the United States will end predictably and that the alien will depart upon the completion of the assignment.
 - An intent to immigrate in the future, which is in no way connected to the proposed immediate trip, need not in itself result in a finding that the immediate trip is not temporary.
 - An extended stay, even in terms of years may be temporary, as long as there is no immediate intent to immigrate.
-

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Free Trade Agreements with Chile and Singapore (HSC in CLAIMS), Continued

**Period of
Admission for
HSC**

H-1B1 nonimmigrant professionals from Chile and Singapore are admitted for a one-year period, renewable indefinitely, provided the alien is able to demonstrate that he or she does not intend to remain or work permanently in the United States.

[Section 214(g)(8)(C) of the INA]

**Dual Intent
NOT available
to HSC**

Unlike the other H-1B classifications, which specifically allow for “dual intent,” there is no similar provision with respect to an H-1B1 under the FTAs of Chile or Singapore.

COS to HSC

A national of either Chile or Singapore, currently admitted to the United States as a nonimmigrant in a category eligible to change nonimmigrant status, may apply to the VSC in order to change status to HSC or extend the stay of an HSC nonimmigrant using Form I-129. The petition must be accompanied by:

- A letter from the U.S. employer stating the activity to be engaged in, the anticipated length of stay, and the arrangements for remunerations;
 - Evidence the alien meets the educational requirement for the profession or occupation, which normally is a bachelor's degree or higher [Refer to exceptions under “Alternative Credentials” above];
 - Certified Labor Attestation from DOL.
-

Education and Experience Evaluations

Foreign Degree Equivalency

Because many beneficiaries are educated outside the United States, you must ascertain whether the beneficiary's foreign education is equivalent to a U.S. degree. Just because the degree says it is a bachelor's degree does not necessarily mean that it is equivalent to a U.S. bachelor's degree. Therefore, professional education evaluations are often used to determine the level of education attained by the beneficiary.

Education Only Evaluations

An advisory evaluation of the beneficiary's credentials may be necessary to determine the level and major field of educational attainment, in terms of equivalent education in the United States.

USCIS will only accept evaluations from credentialing companies when they are evaluating education only. Normally, evaluators from these companies do not have the authority to grant college-level credit in the specialty at an accredited college or university, which has a program for granting such credit based on an individual's training and/or work experience pursuant to 8 CFR § 214.2(h)(4)(iii)(D)(1). The scope of an evaluation from a credentialing company is limited to evaluating education only, not training or work experience.

NOTE: USCIS does not endorse or recommend evaluators. Many private individuals, organizations and educational institutions provide this service.

Education Evaluation Requirements

An acceptable evaluation of formal education should:

- Consider formal education only, not practical experience,
 - State if the collegiate training was post-secondary education, i.e., whether the applicant completed the U.S. equivalent of high school before entering college,
 - Provide a detailed explanation of the material evaluated rather than a simple conclusive statement, and
 - Briefly state the qualifications and experience of the evaluator providing the opinion.
-

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Education and Experience Evaluations, Continued

Formula

Refer to the table below for the general formula to apply in determining education equivalence:

To be equivalent to the following education:	The beneficiary must have the following experience:
Any college education credit	Specialized training or work experience must be in a professional position
one year college credit	3 years
a bachelor's degree	12 years
master's degree	bachelor's + 5 years
PhD	no substitute

IMPORTANT: Ordinary experience alone cannot be equated with a college degree. Experience, which is substituted for education, must include the theoretical and practical application of specialized knowledge required at the professional level of the occupation. It cannot be concluded that any on-the-job experience related to a professional activity may be substituted for academic education. [See *Matter of Sea, Inc.*, 19 I&N Dec. 817]

Evaluator Requirements for Combination Evaluation of Education and Experience

USCIS will only accept evaluations of a combination of education, training and/or work experience if the evaluator meets the requirements of 8 CFR 214.2(h)(4)(iii)(D)(1) in that he or she has the authority to grant college level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

If the evaluator of a credentialing company also meets the requirements of 8 CFR 214.2(h)(4)(iii)(D)(1), then USCIS would find the evaluation acceptable for consideration.

NOTE: Evaluations are advisory in nature. USCIS may still disagree with the finding.

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Education and Experience Evaluations Continued

Criteria for Professional Evaluation of Education and Experience

A professional evaluation of education and experience must meet certain criteria to be useful to USCIS. An evaluation should consider that:

1. The beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty.
2. The claimed experience was gained while working with peers, supervisors, and/or subordinates who have a degree or equivalent in the specialty.
3. The beneficiary has recognition of expertise in the specialty evidenced by at least one type of documentation such as:
 - Recognition of expertise in the specialty occupation by at least two recognized authorities in **the same specialty occupation**,
 - Membership in a recognized foreign or United States association or society in the specialty occupation,
 - Published material by or about the alien in professional publications, trade journals, or major newspapers,
 - Licensure or registration to practice the specialty occupation in a foreign country, or
 - Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

[8 CFR 214.2(h)(4)(iii)(D)(5)]

Officer's Determination

Ultimately, the officer makes the final determination that the equivalent of the degree required by the specialty occupation has been acquired:

- Through a combination of education, specialized training, and/or work experience in areas related to the specialty, and
 - The alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.
-

Chapter 8: Employment Dates

Employment Date Requirements

Introduction This section provides information regarding the validity periods for the H-1B classification.

Validity Period Generally, the validity period of the petition shall be limited to the validity period certified on the LCA for:

- Professionals in a Specialty Occupation,
- Fashion Models of Distinguished Merit and Ability, and
- Chilean or Singaporean individuals in HSC status.

However, an LCA is **NOT** required for aliens employed under the DOD cooperative research and development project.

**H-1B1
Professionals
and H-1B3
Models**

H-1B (Professionals and Models) are initially approved for up to 3 years with extensions granted in increments of up to 3 years.

The total period of stay of an H-1B1 or H-1B3 may not exceed 6 years in H or L status, **UNLESS**:

- The alien has resided and has been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year (see "Exceptions to Time Limits," "Recapture of Time," and "AC21," which follow).

[8 CFR 214.2 (h)(13)(iii)(A)]

H-1B2 DOD

H-1B2 (DOD) are initially approved for up to 5 years.

The total period of stay of an H-1B2 may not exceed 10 years in H or L status, **UNLESS**:

- The alien has resided and has been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year (see "Exceptions to Time Limits," "Recapture of Time," and "AC21," which follow).

[8 CFR 214.2(h)(13)(iii)(B)]

Continued on next page

Employment Date Requirements, Continued

HSC Chilean and Singapore Nationals

H-1B1 nonimmigrant professionals from Chile and Singapore are admitted for a 1 year period, renewable indefinitely in 1-year increments, provided the alien is able to demonstrate that he or she does not intend to remain or work permanently in the United States.

Limitations of Stay

An H-1B alien who has spent six years in the United States under section 101(a)(H) and/or (L) of the INA may not seek an extension, change of status, or be readmitted to the United States under section 101(a)(H) and/or (L) of the INA unless the alien has resided and been physically present outside of the United States for the immediate prior year (See "Exceptions to Time Limits," "Recapture of Time" and "AC21", which follow).

- No new petitions may be approved where the alien has spent the maximum time period allowed in either H or L classification.
- Brief trips to the United States for business or pleasure are not considered to interrupt the required one-year outside the United States.

[See 8 CFR 214.2(h)(13)(iii)(A)]

H-4 Dependents

Dependents are eligible for H-4 status extensions through the proper filing of a Form I-539 with fee, and whenever possible, filed concurrently with the principal's Form I-129.

Any time spent in H-4 (or L-2) status does not count against the maximum allowable periods of stay available to principals in H-1B (or L-1) status.

[See Aytes Memo of December 5, 2006, Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year]

Continued on next page

Employment Date Requirements, Continued

Exceptions to Time Limits

The six year time limitation does not include time spent as an HSC or a parolee.

Time limitations do not apply to aliens who:

- Did not reside continually in the United States, and
- Whose employment in the United States was seasonal or intermittent or was for an aggregate of six months or less per year.

The time limitation shall 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 alien must provide clear and convincing proof such as:

- Arrival and departure records,
- Copies of tax returns, and
- Records of employment abroad.

Continued on next page

Employment Date Requirements, Continued

Recapture/ Remainder of Time

The only time that counts towards an alien's time in H-1B or L status is the time the alien was actually present in the United States and in H-1B or L status. When determining the amount of time an H-1B or L alien has remaining, officers should subtract the amount of time the alien has spent in the United States in H-1B or L status from the maximum time allowed by the specific classification being requested. Time spent in the United States in any other nonimmigrant status is not counted. The time left over is the remaining time the alien is entitled to. There is no difference between recaptured time and remainder time.

An alien is not required to be in a valid H-1B or L status and requesting an extension of stay to be eligible to "recapture" time not spent in H-1B or L status. An alien may be requesting a change of status or consular notification and still be eligible for any unused portion of their H-1B or L status.

NOTE: Only time spent outside the United States in the initial six years of the beneficiary's H-1B status may be recaptured. Time spent outside the United States during a period of extension pursuant to AC21 is not eligible for recapture.

[See Robert C. Divine memo of October 18, 2005, designating *Matter of IT Ascent*, as a USCIS Adopted Decision, and Michael Aytes memo of October 21, 2005, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants (AFM Update AD 05-21)*]

Additionally, time spent in the United States as a parolee or in a status other than H-1B or L does not count toward the six-year limitation. [AFM 31.3(g)(9)(A)]

Calculation for Recapture/ Remainder of Time

The simple calculation looks like this:

Max. time allowed - Time spent in the United States in H-1B/L status =
Remaining time alien is allowed

Date Duration Calculator

A resource for calculating the duration of time between dates can be found at the following link:

[Date Duration Calculator: Days between two dates](#)

Chapter 9: AC21

Overview

Introduction This section provides information regarding AC21.

Defined Public Law 106-313, the American Competitiveness In The Twenty-First Century Act (AC21), was signed into law by the President on October 17, 2000. On November 2, 2002, certain portions of AC21 were amended by PL 107-273, the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act).

For the purposes of adjudicating Form I-129, the relevant portions of AC21 are Sections 104(c), 105, and 106. Refer to the table below for a link to the corresponding law.

Law	Link
AC21 Public Law 106-313	PL 106-313
21st Century Department of Justice Appropriations Authorization Act Public Law 107-273	PL 107-273

Sections 104(c) and 106 Overview AC21 Sections 104(c) and 106 provide for an exception to the H-1B six-year limitation found in section 214(g)(4) of the INA and 8 CFR 214.2(h)(13)(iii)(A).

Section 105 Overview Section 105, commonly known as portability, allows an H-1B nonimmigrant to begin working for a new H-1B employer as soon as the new employer files a non-frivolous H-1B petition on the nonimmigrant's behalf.

Prior to AC21, aliens seeking to change H-1B employers were not permitted to commence new H-1B employment until the new H-1B petition was approved.

Effective Dates All provisions are effective:

- Upon the date of enactment, October 17, 2000, or
- Date of amendment, November 2, 2002, or
- Upon dates of subsequent guidance.

Continued on next page

Overview, Continued

Filing For Additional Periods of Stay Under AC21

Although each section of AC21 will be addressed separately in this guide, the following pertains to all requests made under AC21:

- 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.
- The petitioner is required to file a new Form I-129 and pay the base-filing fee and comply with the existing guidelines in the instructions to the H-1B Data Collection and Filing Fee Exemption Supplement for the anti-fraud fee and the ACWIA fee.
- The Labor Condition Application must be certified prior to the filing of the I-129.
- The validity period may still only be granted within the time allotted by an endorsed LCA.
- All licensing and certification restrictions must still be met.
- The beneficiary need **NOT** be in H-1B status when requesting an additional period of stay beyond the 6-year maximum.

IMPORTANT: Though both section 104(c) and section 106 of AC21 use the term "extension of stay," eligibility for the exemptions is not restricted solely to requests for extensions of stay while in the United States. Aliens who are eligible for the 7th year extension may be granted an extension of stay regardless of whether they are currently in the United States or abroad and regardless of whether they currently hold H-1B status.

[See Aytes Memo of December 5, 2006, Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year]

Each H-1B Spouse Must Independently Meet the Requirements of AC21

An alien who has reached his or her 6 years in H-1B status, and who has an H-1B spouse who has a pending or approved labor certification and/or pending or approved I-140, is not eligible for extensions under AC21 based upon the spouse's labor certification or I-140.

An H-1B alien must meet all the requirements independently of his or her spouse's eligibility for an extension under AC21.

Continued on next page

Overview, Continued

**Accrual of
Unlawful
Presence**

An alien may stay beyond the 6-year maximum period of stay as defined in Section 214(g)(4) of the INA, and remain in status under AC21 provisions as long as the alien remains in a period of stay authorized through extensions and does not accrue unlawful presence.

**Validity
Periods**

Requested extensions made on validity periods previously granted beyond the 6-year period will be honored so long as they meet the requirements under AC21.

Since any time spent outside the United States while an alien holds H-1B status can be recaptured, an alien's H-1B period is not confined within a continuous six-year timeframe.

Section 104(c) Limitation on Per Country Ceiling with Respect to Employment-Based Immigrants

Introduction

Assuming that an alien is otherwise eligible for an additional period of admission in H-1B status, USCIS will grant up to a three-year extension beyond the 6th year, if the H-1B nonimmigrant is the beneficiary of an approved I-140 petition and such alien is unable to apply for adjustment due to per country limitations, meaning a visa number is unavailable.

Section 104(c)

SEC. 104. LIMITATION ON PER COUNTRY CEILING WITH RESPECT TO EMPLOYMENT-BASED IMMIGRANTS.

(c) ONE-TIME PROTECTION UNDER PER COUNTRY CEILING.-

Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8USC 1184(g)(4)), an alien who-

- (1) is the beneficiary of a petition filed under section 204(a) of that Act for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act; and
 - (2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs, may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.
-

Subsequent Extensions

Despite reference to a "one-time protection", an alien is not limited to receiving only one extension under 104(c). Subsequent extensions can be requested, up to three years each.

[See Section III, Question 3 of Aytes Memo, December 27, 2005, *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)*]

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Section 104(c) Limitation on Per Country Ceiling with Respect to Employment-Based Immigrants, Continued

Use of the DOS Visa Bulletin

The Department of State (DOS) Visa Bulletin is published monthly and can be obtained from the Adjudications page of the VSC ECN. It is also emailed to adjudicators each month.

To determine the availability of immigrant visa numbers, refer to the DOS Visa Bulletin. Check the country of birth [See Step 6, page 1-6 of I-485 SOP] and classification of the immigrant visa when looking at the Visa Bulletin as of the date the I-129 petition was filed.

Denied I-485

If it comes to the attention of an adjudicator that an I-485 has been denied subsequent to an I-129 extension under Section 104(c), the I-129 should be retrieved to pursue an intent to revoke the I-129 petition, since the benefit under Section 104(c) could be up to three years.

NOTE: The I-485 will still be considered pending if a motion is pending before USCIS.

Section 106 Special Provisions in Cases of Lengthy Adjudications

Introduction Section 106(a)

Assuming that an alien is otherwise eligible for an additional period of admission in H-1B status, USCIS will grant an extension beyond the 6th year if the filing date of a pending or approved labor certification application or a pending or approved employment-based (EB) immigrant petition is 365 days or more **as of the date the beneficiary will have exhausted 6 years of H-1B status in the United States pursuant to 214(g)(4).**

[See Neufeld Memo of May 30, 2008, 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]

Introduction Section 106(b)

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 was approved, to revoke the approved labor certification; or
 - Deny the employment based immigrant petition; or
 - Grant or deny the alien's application for an immigrant visa or for adjustment of status.
-

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Section 106 Special Provisions in Cases of Lengthy Adjudications, Continued

Section 106(a) SEC. 106. SPECIAL PROVISIONS IN CASES OF LENGTHY ADJUDICATIONS

- (a) EXEMPTION FROM LIMITATION. – The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)) 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 if 365 days or more have elapsed since-
- (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 section 203(b)); or
 - (2) the filing of the petition under such section 204(b).

NOTE: If a labor certification was filed over 365 days ago and has been approved, eligibility for section 106(a) does not automatically cease. The priority date (i.e., filing date) of the labor certification is what is used in determining whether 365 days or more have elapsed; however, refer to Expiration of Labor Certifications in the section that follows.

Continued on next page

Section 106 Special Provisions in Cases of Lengthy Adjudications, Continued

Expiration of Labor Certifications

Effective July 16, 2007, an approved labor certification will have an expiration date of 180 calendar days if it is not filed in support of an I-140 petition. An expired labor certification may not be used to apply for an extension under section 106 of AC21.

Use the table below to determine whether a labor certification has expired.
[See 72 FR 27946]

If an approved permanent labor certification was granted...	Then the labor certification expires...
<ul style="list-style-type: none">• On or after July 16, 2007, and• Is not filed in support of an I-140 petition,	180 calendar days from the date the DOL granted the certification.
<ul style="list-style-type: none">• Before July 16, 2007, and• Is not filed in support of an I-140 petition,	Within 180 calendar days of July 16, 2007; i.e., on January 12, 2008.

IMPORTANT: Once the labor certification is filed within 180 calendar days in support of an I-140 petition, the labor certification remains valid, even if the I-140 petition is denied.

- Section 106(b)** (b) **EXTENSION OF H-1B WORKER STATUS.**- The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made
- (1) to deny the application described in subsection (a)(1), or in a case in which such application is granted, to deny a petition described in subsection (1)(2) filed on behalf of the alien pursuant to such grant;
 - (2) to deny the petition described in subsection (a)(2); or
- to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

Continued on next page

Section 106 Special Provisions in Cases of Lengthy Adjudications, Continued

Section 106(c) (c) **INCREASED JOB FLEXIBILITY FOR LONG DELAYED APPLICANTS FOR ADJUSTMENT OF STATUS.**- (1) Section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) is amended by adding at the end the following new subsection:
“(j) **Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence.**- A petition under subsection (a)(1)(D) for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.”

Relevance of Section 106(c) This section of AC21 provides for I-140 portability, which is different from I-129 portability. Section 106(c) is relevant in determining extensions of H-1B status beyond the 6th year in the event that an approved I-140 has been withdrawn. If an I-485 had been pending at least 180 days as of the date of the withdrawal of the approved I-140, and the I-485 continues to remain pending, an alien is eligible to receive an extension under Section 104(c) and Section 106.

Despite the withdrawn I-140, the H-1B nonimmigrant may be able to establish I-140 portability if there is a new offer of employment in the same occupation or in a similar occupation and thus be entitled to an I-129 AC21 extension. Unlike I-129 nonimmigrant petitions, the filing of a new I-140 immigrant petition is **NOT** required for I-140 portability purposes.

No Limit on the Number of Section 106 Extensions Extensions under Section 106(b) have commonly been referred to as “7th year extensions”. Despite this, extensions under 106(b) are not limited to just the 7th year.

There is no limit on the number of one-year extensions under Section 106(b), if the filing date of a pending or approved labor certification application or a pending or approved EB immigrant petition is 365 days or more as of the date the beneficiary will have exhausted 6 years of H-1B status in the United States.

Continued on next page

Section 106 Special Provisions in Cases of Lengthy Adjudications, Continued

Consular Notification

AC21 extension requests should not be denied if the labor certification ~~or~~ I-140 was filed more than 365 days ago, but the I-140 indicates the alien intends to consular process. The alien is **NOT** required to be in the United States at the time the I-129 is filed to be eligible for the AC21 extension.

[See Aytes Memo of December 5, 2006, Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year]

Applying the 365 Days to EB Petitions that Do Not Require a Labor Cert

When determining the applicability of Section 106(a) for employment-based (EB) categories that do not require a labor certification, the 365 days will pertain only to the filing of the EB petition.

Labor Certification Not Required

Form I-140 is used to file for 2nd and 3rd preference EB petitions. Pursuant to INA 203(b), a determination by the Secretary of Labor (a labor certification) is required for most second and third preference EB classifications. In relatively few cases, a determination by the Secretary of Labor is not required.

These exceptions are:

- Aliens eligible for Schedule A blanket labor certification, such as physical therapists.
- Classification under section 203(b)(2) for aliens who qualify for a “national interest waiver”.

Forms I-360 and I-526 are also immigrant petitions that do not require the filing of an underlying labor certification.

Therefore, if any I-526, I-360, or any 2nd or 3rd preference I-140 petition, whether or not the I-140 requires a labor certification, has been pending more than 365 days, the alien may be granted a one-year extension request.

Continued on next page

Section 106 Special Provisions in Cases of Lengthy Adjudications, Continued

**Denied/
Revoked I-140
or Denied I-485**

If it comes to your attention that an I-140 has been denied or revoked, ~~or an I-~~ 485 has been denied subsequent to granting a one-year extension under Section 106, USCIS will **NOT** pursue revocation of the I-129, since the benefit under Section 106 is only valid for a maximum period of one year.

AC21 Adjudication

**Time that
Counts Toward
6-year Period
in H Status**

For both 104(c) and 106:

Time spent by an alien in another H or L nonimmigrant status, such as H-2B, H-3, or L-1B status, counts toward the six-year period in H status. However, time spent in H-4 or L-2 dependent status does NOT count against the six-year maximum period of admission available to an alien seeking H-1B status.

[See Aytes Memo of December 5, 2006, Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year]

Continued on next page

AC21 Adjudication, Continued

Section 104(c) Adjudicate an I-129 filed with a request for consideration under AC21 104(c) the same as all others. In addition, you must consider the alien's eligibility for an additional period of stay up to three years beyond the sixth year in H-~~IB~~ status.

Follow the steps below to determine eligibility for AC21 104(c).

Step	Action								
1	<p>Verify that the beneficiary has been or will be in H status for six years.</p> <p>Extensions of 104(c) can be combined with any remaining time left in the six-year period, so long as the validity of the petition does not exceed three years. If an H nonimmigrant has recaptured time, the period of time since commencing H or L status will extend beyond a six-year continuous period of time.</p>								
2	<p>Verify that the alien is the beneficiary of an approved I-140 employment-based petition filed under section 204(a) of the INA for preference status under Section 203(b)(1), (2), or (3) of the INA.</p> <table border="1"> <tr> <th>If...</th><th>Then...</th></tr> <tr> <td>The I-140 has been approved,</td><td>Proceed to step 3.</td></tr> <tr> <td>The approved I-140 has been withdrawn,</td><td> <p>Check to see if an I-485 had been pending at least 180 days as of the date of the withdrawn/revoked I-140 and that the I-485 remains pending.</p> <ul style="list-style-type: none"> • If yes, proceed to Step 4. • If no, deny the request for extension under 104(c). </td></tr> <tr> <td>The I-140 has not yet been approved or has been denied,</td><td> <p>The alien does not qualify for an additional 3-year period of stay under section 104(c); however, the alien may be entitled to an additional 1-year period of stay pursuant to sections 106(a) and (b).</p> <p>Refer to step 2 of the Section 106 table on the next page to determine eligibility under Section 106.</p> </td></tr> </table>	If...	Then...	The I-140 has been approved,	Proceed to step 3.	The approved I-140 has been withdrawn,	<p>Check to see if an I-485 had been pending at least 180 days as of the date of the withdrawn/revoked I-140 and that the I-485 remains pending.</p> <ul style="list-style-type: none"> • If yes, proceed to Step 4. • If no, deny the request for extension under 104(c). 	The I-140 has not yet been approved or has been denied,	<p>The alien does not qualify for an additional 3-year period of stay under section 104(c); however, the alien may be entitled to an additional 1-year period of stay pursuant to sections 106(a) and (b).</p> <p>Refer to step 2 of the Section 106 table on the next page to determine eligibility under Section 106.</p>
If...	Then...								
The I-140 has been approved,	Proceed to step 3.								
The approved I-140 has been withdrawn,	<p>Check to see if an I-485 had been pending at least 180 days as of the date of the withdrawn/revoked I-140 and that the I-485 remains pending.</p> <ul style="list-style-type: none"> • If yes, proceed to Step 4. • If no, deny the request for extension under 104(c). 								
The I-140 has not yet been approved or has been denied,	<p>The alien does not qualify for an additional 3-year period of stay under section 104(c); however, the alien may be entitled to an additional 1-year period of stay pursuant to sections 106(a) and (b).</p> <p>Refer to step 2 of the Section 106 table on the next page to determine eligibility under Section 106.</p>								

Continued on next page

AC21 Adjudication, Continued

Section 104(c) (continued)

3	<p>Check to see if an I-485 has been filed on behalf of the alien.</p> <table border="1"> <thead> <tr> <th data-bbox="565 407 1003 443">If the I-485...</th><th data-bbox="1008 407 1320 443">Then...</th></tr> </thead> <tbody> <tr> <td data-bbox="565 449 1003 520">has not been filed, is pending or has been denied.</td><td data-bbox="1008 449 1320 520">Proceed to step 4.</td></tr> <tr> <td data-bbox="565 527 1003 627">was approved after the requested employment start date,</td><td data-bbox="1008 527 1320 627">Grant the I-129 extension up to the date the I-485 was approved.</td></tr> <tr> <td data-bbox="565 634 1003 705">was approved prior to the requested employment start dates,</td><td data-bbox="1008 634 1320 705">Deny the I129 using the I129AC21A denial.</td></tr> </tbody> </table> <p>NOTE: Even though an approved I-140 is required by section 104(c) of AC21, there is no requirement for the filing of an I-485.</p>	If the I-485...	Then...	has not been filed, is pending or has been denied.	Proceed to step 4.	was approved after the requested employment start date,	Grant the I-129 extension up to the date the I-485 was approved.	was approved prior to the requested employment start dates,	Deny the I129 using the I129AC21A denial.
If the I-485...	Then...								
has not been filed, is pending or has been denied.	Proceed to step 4.								
was approved after the requested employment start date,	Grant the I-129 extension up to the date the I-485 was approved.								
was approved prior to the requested employment start dates,	Deny the I129 using the I129AC21A denial.								
4	<p>Check the DOS Visa Bulletin for visa availability.</p> <p>To determine visa availability, compare the alien's country of birth to the employment-based preference level.</p> <table border="1"> <thead> <tr> <th data-bbox="565 1045 818 1081">If a visa is...</th><th data-bbox="823 1045 1320 1081">Then...</th></tr> </thead> <tbody> <tr> <td data-bbox="565 1087 818 1234">Not available, as of the day of filing,</td><td data-bbox="823 1087 1320 1234"> <ul style="list-style-type: none"> • Grant the 104(c) extension as requested by the petitioner, not to exceed three years. • Proceed with regular H-1B processing. </td></tr> <tr> <td data-bbox="565 1241 818 1633">Available, as of the day of filing,</td><td data-bbox="823 1241 1320 1633"> <p>The alien does not qualify for an additional 3-year period of stay under section 104(c) because a visa is available; however, the alien will most likely be entitled to an additional 1-year period of stay pursuant to sections 106(a) and (b).</p> <p>Refer to step 2 of the Section 106 table on the next page to determine eligibility under Section 106.</p> </td></tr> </tbody> </table>	If a visa is...	Then...	Not available, as of the day of filing,	<ul style="list-style-type: none"> • Grant the 104(c) extension as requested by the petitioner, not to exceed three years. • Proceed with regular H-1B processing. 	Available, as of the day of filing,	<p>The alien does not qualify for an additional 3-year period of stay under section 104(c) because a visa is available; however, the alien will most likely be entitled to an additional 1-year period of stay pursuant to sections 106(a) and (b).</p> <p>Refer to step 2 of the Section 106 table on the next page to determine eligibility under Section 106.</p>		
If a visa is...	Then...								
Not available, as of the day of filing,	<ul style="list-style-type: none"> • Grant the 104(c) extension as requested by the petitioner, not to exceed three years. • Proceed with regular H-1B processing. 								
Available, as of the day of filing,	<p>The alien does not qualify for an additional 3-year period of stay under section 104(c) because a visa is available; however, the alien will most likely be entitled to an additional 1-year period of stay pursuant to sections 106(a) and (b).</p> <p>Refer to step 2 of the Section 106 table on the next page to determine eligibility under Section 106.</p>								

Continued on next page

AC21 Adjudication, Continued

Section 106. The adjudication of an I-129 filed with a request for consideration under AC21 Section 106 is the same as all others. The only additional consideration is the alien's eligibility for a one-year extension beyond the sixth year of H-1B status.

One-year extensions under Section 106 can be combined with any remaining time left in the six-year period, as long as the validity of the petition does not exceed three years. If an H nonimmigrant has recaptured time, the period of time since commencing H or L status will extend beyond a six-year continuous period of time.

Follow the steps below to determine eligibility for AC21 106.

Step	Action								
1	<p>Determine if the petitioner is requesting:</p> <ul style="list-style-type: none"> • an extension based solely on eligibility under AC21 Section 106, or • a combination of both the time remaining towards the beneficiary's 6-year maximum period of time and additional time pursuant to AC21 Section 106. <table border="1"> <tr> <th>If the extension request ...</th><th>Then...</th></tr> <tr> <td>Is just for 1 year pursuant to AC21 Section 106 eligibility,</td><td>Go to Step 2.</td></tr> <tr> <td>Combines both time remaining toward 6-year max and additional time pursuant to AC21 Section 106,</td><td>Go to Step 3.</td></tr> </table>	If the extension request ...	Then...	Is just for 1 year pursuant to AC21 Section 106 eligibility,	Go to Step 2.	Combines both time remaining toward 6-year max and additional time pursuant to AC21 Section 106,	Go to Step 3.		
If the extension request ...	Then...								
Is just for 1 year pursuant to AC21 Section 106 eligibility,	Go to Step 2.								
Combines both time remaining toward 6-year max and additional time pursuant to AC21 Section 106,	Go to Step 3.								
2	<p>Verify the qualifying labor certification application or I-140 has or will have been pending for at least 365 days prior to the alien's requested start date on the petition seeking the extension.</p> <p>See section on Labor Certifications for acceptable documentation of a pending or approved labor certification, as well as information on the substitution of an alien worker on a labor certification.</p> <table border="1"> <tr> <th>If it has...</th><th>Then...</th></tr> <tr> <td>Not been 365 days since: <ul style="list-style-type: none"> • filing a labor certification, or • filing an I-140 </td><td>Deny the I-129.</td></tr> <tr> <td>Been 365 days since the filing of a labor certification and the labor certification has been approved,</td><td>Go to step 4.</td></tr> <tr> <td>Been 365 days since the filing of a labor certification and the labor certification is pending,</td><td>Approve the case.</td></tr> </table>	If it has...	Then...	Not been 365 days since: <ul style="list-style-type: none"> • filing a labor certification, or • filing an I-140 	Deny the I-129.	Been 365 days since the filing of a labor certification and the labor certification has been approved,	Go to step 4.	Been 365 days since the filing of a labor certification and the labor certification is pending,	Approve the case.
If it has...	Then...								
Not been 365 days since: <ul style="list-style-type: none"> • filing a labor certification, or • filing an I-140 	Deny the I-129.								
Been 365 days since the filing of a labor certification and the labor certification has been approved,	Go to step 4.								
Been 365 days since the filing of a labor certification and the labor certification is pending,	Approve the case.								

Continued on next page

AC21 Adjudication, Continued

Section 106 (continued)

Step	Action												
3	<p>Determine if the labor certification or I140 petition was filed at least 365 days by the conclusion of the 6 year limitation of stay.</p> <table> <tr> <th>If 365 days ...</th><th>Then...</th></tr> <tr> <td>will not have passed since the filing of a labor certification or I-140 prior to the date the alien beneficiary will have exhausted 6 years of H-1B status,</td><td>Approve only for the allowable time remaining for the beneficiary's initial 6 year period.</td></tr> <tr> <td>will have passed as of the date the beneficiary will have exhausted 6 years of H-1B status and the labor certification has been approved,</td><td>Proceed to step 4.</td></tr> <tr> <td>will have passed as of the date the beneficiary will have exhausted 6 years of H-1B status and the labor certification is pending,</td><td>Approve the case.</td></tr> </table>	If 365 days ...	Then...	will not have passed since the filing of a labor certification or I-140 prior to the date the alien beneficiary will have exhausted 6 years of H-1B status,	Approve only for the allowable time remaining for the beneficiary's initial 6 year period.	will have passed as of the date the beneficiary will have exhausted 6 years of H-1B status and the labor certification has been approved,	Proceed to step 4.	will have passed as of the date the beneficiary will have exhausted 6 years of H-1B status and the labor certification is pending,	Approve the case.				
If 365 days ...	Then...												
will not have passed since the filing of a labor certification or I-140 prior to the date the alien beneficiary will have exhausted 6 years of H-1B status,	Approve only for the allowable time remaining for the beneficiary's initial 6 year period.												
will have passed as of the date the beneficiary will have exhausted 6 years of H-1B status and the labor certification has been approved,	Proceed to step 4.												
will have passed as of the date the beneficiary will have exhausted 6 years of H-1B status and the labor certification is pending,	Approve the case.												
4	<p>Determine if an I-140 was filed.</p> <table> <tr> <th>If an I-140 was ...</th><th>Then...</th></tr> <tr> <td>Not filed,</td><td> <p>Ensure that the labor certification has not expired. (Refer to <i>Expiration of Labor Certifications</i> section).</p> <table> <tr> <th>If the labor certification...</th><th>Then...</th></tr> <tr> <td>Has expired,</td><td>Deny the AC21 extension.</td></tr> <tr> <td>Is still valid,</td><td>Approve the case.</td></tr> </table> </td></tr> <tr> <td>Filed,</td><td>Proceed to step 5.</td></tr> </table>	If an I-140 was ...	Then...	Not filed,	<p>Ensure that the labor certification has not expired. (Refer to <i>Expiration of Labor Certifications</i> section).</p> <table> <tr> <th>If the labor certification...</th><th>Then...</th></tr> <tr> <td>Has expired,</td><td>Deny the AC21 extension.</td></tr> <tr> <td>Is still valid,</td><td>Approve the case.</td></tr> </table>	If the labor certification...	Then...	Has expired,	Deny the AC21 extension.	Is still valid,	Approve the case.	Filed,	Proceed to step 5.
If an I-140 was ...	Then...												
Not filed,	<p>Ensure that the labor certification has not expired. (Refer to <i>Expiration of Labor Certifications</i> section).</p> <table> <tr> <th>If the labor certification...</th><th>Then...</th></tr> <tr> <td>Has expired,</td><td>Deny the AC21 extension.</td></tr> <tr> <td>Is still valid,</td><td>Approve the case.</td></tr> </table>	If the labor certification...	Then...	Has expired,	Deny the AC21 extension.	Is still valid,	Approve the case.						
If the labor certification...	Then...												
Has expired,	Deny the AC21 extension.												
Is still valid,	Approve the case.												
Filed,	Proceed to step 5.												
5	<p>Check the status of the I-140.</p> <table> <tr> <th>If the I-140 status is...</th><th>Then...</th></tr> <tr> <td>Approved,</td><td>Proceed to Step 7.</td></tr> <tr> <td>Pending,</td><td>Approve the case.</td></tr> <tr> <td>Denied or Revoked,</td><td>Proceed to Step 6.</td></tr> </table>	If the I-140 status is...	Then...	Approved,	Proceed to Step 7.	Pending,	Approve the case.	Denied or Revoked,	Proceed to Step 6.				
If the I-140 status is...	Then...												
Approved,	Proceed to Step 7.												
Pending,	Approve the case.												
Denied or Revoked,	Proceed to Step 6.												

Continued on next page

AC21 Adjudication, Continued

Section 106 (continued)

Step	Action										
6	<p>Refer to the table below if the I-140 was denied or revoked.</p> <table> <tr> <th>If the I-140 was ...</th><th>Then...</th></tr> <tr> <td> Denied or Revoked (for reasons other than withdrawal after approval) more than 33 days ago and <ul style="list-style-type: none"> • no motion or appeal has been filed, or • the motion or appeal has been dismissed, </td><td>Deny the <u>case</u>.</td></tr> <tr> <td> Denied or revoked <ul style="list-style-type: none"> • less than 33 days ago, or • a motion or appeal to AAO is pending, </td><td>Approve the case.</td></tr> <tr> <td> Revoked based on withdrawal request after approval and: <ul style="list-style-type: none"> • the I-485 had been pending at least 180 days when the I-140 was withdrawn/revoked and • the I-485 remains pending, </td><td>Approve the case.</td></tr> <tr> <td> Revoked more than 33 days ago based on withdrawal request after approval and: <ul style="list-style-type: none"> • the I-485 had been pending less than 180 days, when the I-140 was withdrawn/revoked or • no I-485 is pending, </td><td>Deny the <u>case</u>.</td></tr> </table>	If the I-140 was ...	Then...	Denied or Revoked (for reasons other than withdrawal after approval) more than 33 days ago and <ul style="list-style-type: none"> • no motion or appeal has been filed, or • the motion or appeal has been dismissed, 	Deny the <u>case</u> .	Denied or revoked <ul style="list-style-type: none"> • less than 33 days ago, or • a motion or appeal to AAO is pending, 	Approve the case.	Revoked based on withdrawal request after approval and: <ul style="list-style-type: none"> • the I-485 had been pending at least 180 days when the I-140 was withdrawn/revoked and • the I-485 remains pending, 	Approve the case.	Revoked more than 33 days ago based on withdrawal request after approval and: <ul style="list-style-type: none"> • the I-485 had been pending less than 180 days, when the I-140 was withdrawn/revoked or • no I-485 is pending, 	Deny the <u>case</u> .
If the I-140 was ...	Then...										
Denied or Revoked (for reasons other than withdrawal after approval) more than 33 days ago and <ul style="list-style-type: none"> • no motion or appeal has been filed, or • the motion or appeal has been dismissed, 	Deny the <u>case</u> .										
Denied or revoked <ul style="list-style-type: none"> • less than 33 days ago, or • a motion or appeal to AAO is pending, 	Approve the case.										
Revoked based on withdrawal request after approval and: <ul style="list-style-type: none"> • the I-485 had been pending at least 180 days when the I-140 was withdrawn/revoked and • the I-485 remains pending, 	Approve the case.										
Revoked more than 33 days ago based on withdrawal request after approval and: <ul style="list-style-type: none"> • the I-485 had been pending less than 180 days, when the I-140 was withdrawn/revoked or • no I-485 is pending, 	Deny the <u>case</u> .										
7	<p>Check to see if an I-485 has been filed on behalf of the alien.</p> <p>NOTE: There is no time limit for filing an I-485 if the I-140 has been approved.</p> <table> <tr> <th>If the I-485...</th><th>Then...</th></tr> <tr> <td>has not been filed, is pending or has been denied,</td><td>Approve the case.</td></tr> <tr> <td>is approved,</td><td> The I-129 extension may be granted up to the date the I-485 was approved. NOTE: If the I-485 was approved prior to the requested employment start dates, deny the I-129 using the I129AC21A denial found in the I129 Standards and Letters folder. </td></tr> </table>	If the I-485...	Then...	has not been filed, is pending or has been denied,	Approve the case.	is approved,	The I-129 extension may be granted up to the date the I-485 was approved. NOTE: If the I-485 was approved prior to the requested employment start dates, deny the I-129 using the I129AC21A denial found in the I129 Standards and Letters folder.				
If the I-485...	Then...										
has not been filed, is pending or has been denied,	Approve the case.										
is approved,	The I-129 extension may be granted up to the date the I-485 was approved. NOTE: If the I-485 was approved prior to the requested employment start dates, deny the I-129 using the I129AC21A denial found in the I129 Standards and Letters folder.										

Continued on next page

AC21 Adjudication, Continued

Validity Dates Refer to the table below to determine how long to grant the approval for.

If the case is a...	Then grant approval for...
First request for Section 106 of AC21 (i.e., a 7 th year extension),	<ul style="list-style-type: none"> • 1 year, plus • Any amount of time remaining in the initial 6-year period, not to exceed a maximum validity period of 3 years.
Second or subsequent request for Section 106 of AC21 (e.g., an 8 th year extension),	A maximum of 1 year.

Petition Notations Refer to the table below for notations to be made on the petition relative to AC21.

If the ...	Then ...
beneficiary is eligible for EOS pursuant to AC21,	<ul style="list-style-type: none"> • Approve the EOS, and • Notate on the petition in the <i>Partial Approval</i> block "AC21 Sec.104(c)" or "AC21 Sec. 106." as appropriate.
<ul style="list-style-type: none"> • petitioner is requesting an EOS for the beneficiary to include remainder of time, in addition to an AC 21 extension, and • beneficiary is ineligible for the AC21 EOS at the time of approval, 	<ul style="list-style-type: none"> • Limit the approval of the EOS to only the remainder of time for which the beneficiary is eligible, and • Indicate in the <i>Partial Approval</i> block the reason why the AC21 EOS was not granted (i.e. Ineligible for AC21 EOS because Labor Certification not pending 365 days or more as of the date the beneficiary will have exhausted 6 years of H-1B status).
<ul style="list-style-type: none"> • petitioner is requesting an EOS for the beneficiary based on AC21 only, and • beneficiary is ineligible for an AC21 EOS, 	<ul style="list-style-type: none"> • Deny the petition using the I129AC21 denial letter. <p>NOTE: No notation is required, as the denial letter explains the reason for denial.</p>

Labor Certification

**Documentation
of Pending
Labor
Certification
(LCA)**

Refer to the table below for the forms of documentation that will be accepted 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...	Then...
is a Form ETA-750 that is still pending with DOL,	<p>a screen-print from the Backlog Elimination Center (BEC) Public Disclosure System (PDS), which also can be verified by the officer at http://pds.pbis.doleta.gov/, that shows the status of the labor certification application as <i>In Process</i> or <i>On Appeal</i> and includes:</p> <ul style="list-style-type: none"> • the name of the petitioning employer, • the date the Form ETA-750 was filed, • the name of the alien beneficiary, and • the case number assigned to the pending Form ETA-750. <p>If a screen print from the PDS is not available, a letter or e-mail from DOL issued within the previous 60 days prior to the filing of the extension petition will be acceptable. The DOL letter/e-mail must verify that an application for a labor certification is still pending</p>
is a Form ETA-9089 that is still pending with DOL,	a copy of the ETA-9089 from the employer's PERM account that shows the filing date and ETA Case Number. If a copy of the ETA 9089 from the employer's PERM account is not available, a letter or e-mail from DOL issued within the previous 60 days prior to the filing of the extension petition will be acceptable. The DOL letter/e-mail must verify that an application for a labor certification is still pending
is a Form ETA-9089 that was denied but is on appeal,	documentation from DOL or Board of Alien Labor Certification Appeals (BALCA) that shows the labor certification is on appeal (See section titled "Appeal of Denied Labor Certification")

Continued on next page

Labor Certification, Continued

**Documentation
of Pending
Labor
Certification
(LCA)
Application
(LCA)
(continued)**

If the LCA was certified by DOL...	Then...
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 I140 petition receipt notice for the petition filed on behalf of the H-1B beneficiary
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.

**Verification
through the
PDS**

The DOL Backlog Elimination Center (BEC) has made the Backlog Public Disclosure System (PDS) available to the public. Access this system to verify the status of a labor certification application in one of the DOL's backlog centers. Follow the steps below to verify the status of a labor certification application through the PDS.

Step	Action
1	Access the PDS website at: http://www.pbis.doleta.gov/pbis_pds.cfm
2	Enter the 10-digit case number which begins with a: <ul style="list-style-type: none"> • "D" for cases located in the Dallas BEC or • "P" for cases located in the Philadelphia BEC. <p>NOTE: Some cases may have had a case number starting with "T" prior to completing data entry at a BEC; however, all such cases have since been converted and now begin with either "D" or "P."</p>
3	After entering the case number, the search results will indicate the current case status. Case status definitions are provided at the bottom of the PDS website page.

IMPORTANT: The absence of a case in the PDS will not be sufficient to establish that an alien is ineligible for an extension under AC21 Section 106.

Continued on next page

Labor Certification, Continued

**DOL
Documentation
Unavailable**

Pursuant to the September 23, 2005 memo on the implementation of the DOL PERM rule, in the event that DOL documentation is unavailable to the petitioner or attorney during the DOL's transition to its new permanent labor certification process known as PERM, USCIS will accept the following:

Evidence of the mailing of the ETA-750 labor certification to DOL such as a USPS and private package handler's certified mail receipts and a signed attestation of an authorized official of the petitioning employer.

The signed attestation must include:

- The date the Form ETA-750 was filed,
- The name of the beneficiary,
- The case number assigned to the ETA-750, and
- A clear assertion that the labor certification was indeed filed as indicated.

Continued on next page

Labor Certification, Continued

Appeal of Denied Labor Certification

For the purposes of determining if an H-1B nonimmigrant is eligible for an additional period of stay under Section 106(a) of AC21, a denied labor certification will be considered pending:

- During the period in which an appeal may be filed, or
- While the appeal is actually pending with the Board of Alien Labor Certification Appeals (BALCA). Evidence of pending appeal at BALCA could include:
 - A screen shot from DOL showing case is pending, or
 - E-mail communication with one of DOL's Employment & Training Administration offices.

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 of a decision is issued by BALCA.

[See Yates Memo of September 23, 2005, *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 6th Year*, pages 7-8]

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

Denial of Labor Certification After Granting AC21 Extension

USCIS will **not** pursue revoking an AC21 one-year extension under Section 106 if the labor certification is subsequently denied, since the benefit under Section 106 is only valid for a maximum period of one year.

Continued on next page

Labor Certification, Continued

**I-140 Labor
Substitutions
On or Before
July 16, 2007**

If an AC21 extension request is filed based upon a labor certification that has been pending 365 days or more, but was certified in the name of another alien (this is referred to as a "labor substitute"), 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 employment-based immigrant.

- There must be a pending or approved I-140 for the beneficiary of the AC21 extension request.
 - Verify that the labor certification has not been used by the previous alien toward an approved I-140. This may be done by searching the electronic databases with the name of the previous alien.
 - The substituted beneficiary retains the original priority date of the labor certification.
-

**I-140 Labor
Substitutions
After July 16,
2007**

Effective July 16, 2007, substitution of alien beneficiaries will be prohibited on all pending and approved permanent labor certification applications [See 72 FR 27906]. These regulatory changes do not affect labor substitutions approved by DOL or USCIS on or before July 16, 2007.

**I-140 Employer
is a Successor-
in-interest**

Successor-in-interest rules apply. Petitioner is eligible to use earlier "filing date/priority date" from a labor certification approved on behalf of an assumed entity.

**Same Employer
Not Required**

There is no requirement that the labor certification or I-140 must be from the same employer as the H-1B petitioner.

Section 105 Portability and H-1B Petitions

Introduction

- Section 105 of AC21 is commonly referred to as “portability”.
 - AC21 includes portability provisions for both I-129 and I-140 petitions.
 - Section 105 of AC21 refers to I-129 portability only.
 - Section 105 portability provisions relieve an H-1B alien from the need to await approval notification from USCIS before commencing new H-1B employment.
-

Section 214(n) of the INA

The provisions of AC21 Section 105 have been incorporated into Section 214(n) of the INA.

Section 214(n) of the INA: Requirements for Portability

Portability provides that an H-1B 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 “non-frivolous” H-1B petition on the nonimmigrant’s behalf, if:

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

Effective Dates of Portability

Portability provisions apply to H-1B petitions filed before, on, or after the date of enactment of AC21 on October 17, 2000.

Employment Authorization

Under portability and 214(n) of the INA, employment authorization continues until the new petition is adjudicated.

214(n) of the INA provides that if the new petition is denied, employment authorization ceases. Upon denial of the petition the alien will no longer be in an authorized period of stay and he or she will begin to accrue unlawful presence. Although the alien’s status ends as of the date of the expiration of the I-94 or I-129 petition, unlawful presence only begins to accrue as of the denial of the current petition.

Continued on next page

Section 105 Portability and H-1B Petitions, Continued

H-4 Dependents The status of a dependent of an H-1B 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.

Upon approval of the new H-1B petition, the H-4 dependent is not required to file a new I-539 until their current H-4 status expires.

**Admission of
Porting Alien
and Dependents
at a Port of
Entry**

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 portability provisions in AC21, as long as certain conditions are met.

If these conditions are met, the H-1B applicant is admissible to the validity date of the previous H-1B petition, plus ten days. H-4 applicants for admission, who are dependants of H-1B aliens employed pursuant to visa portability provisions, must meet these same requirements.

**Conditions for
Admissibility at
POE**

The conditions to be met for admissibility at a POE are as follows:

- The applicant is otherwise admissible.
 - The applicant, unless exempt under 8 CFR 212.1, is in possession of a valid unexpired passport and visa (including a valid, unexpired visa endorsed with the name of the original petitioner).
 - The applicant establishes to the satisfaction of the inspecting officer that he or she 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, 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.
 - The applicant presents evidence that a new petition was filed timely with the Service Center, in the form of a dated filing receipt, Form I-797, or other credible evidence of timely filing that is validated through a CLAIMS query. In order to be a timely filing, the petition must have been filed prior to the expiration of the H-1B's previous period of admission.
-

Porting from One Employer to Another

Introduction

An alien may port from one employer to another even after the alien's I-94 or last petition has expired. In order to do this the alien must meet the requirements of Section 214(n) of the INA, including the requirement that the petition be filed while the alien is in a period of stay authorized by the Attorney General.

Bridge of Petitions

An alien can have successive H-1B portability petitions filed while the previous H-1B petitions remain pending. However to be approved, every H-1B portability petition must separately meet the requirements for the H-1B classification and for an extension of stay.

Denial of Petition Undercuts the Bridge

In the event 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" that "carried" any petition filed after the expiration of any approved status.

This results in the denial of the successive requests to extend or change status.

EXAMPLE:

Alien is in valid H-1B status with *Artel Incorporated*. *Basil Company* timely files an I-129 petition for the alien and thereafter the alien ports to *Basil Company*. While the petition for *Basil Company* is pending the alien's I-94 expires. At this point the alien is still in an authorized period of stay. *Codder Inc.* files an I-129 petition for the beneficiary. The alien leaves *Basil Company* to be employed with *Codder Inc.* Again the alien has remained in an authorized period of stay. Then the petition for *Basil Company* is denied. The denial of *Basil Company's* petition undercuts the bridge that kept the alien in an authorized period of stay. The extension of stay for *Codder Inc.* will have to be denied if the classification portion of the petition is approved.

Upon the date of the denial of *Basil Company's* petition, the alien begins accruing unlawful presence. Even though the alien's status ended upon the expiration of the I-94, unlawful presence does not begin accruing until the date *Basil Company's* petition is denied.

Continued on next page

Porting from One Employer to Another, Continued

Withdrawal of Petition Does Not Undercut the Bridge

A withdrawal would not undercut the bridge of pending petitions that kept the alien in an authorized period of stay. The adjudicator merely needs to be satisfied that the petition that was withdrawn was either already approved or would have been approved.

EXAMPLE: In the example given above, if *Basil Company* decided to withdraw their petition because the alien left the company, the withdrawal of such petition does not carry the same effect as a denial. Similarly, if *Basil Company's* petition had been approved and was then revoked because the alien was no longer employed with *Basil Company*, the withdrawal would have no negative impact on *Codder Inc's* pending petition.

Terms Pertaining to Portability

**Authorized
Period of Stay**

Certain periods of time when an alien is not in a valid nonimmigrant status qualify as an "authorized period of stay." The entire list of "authorized periods of stay" can be viewed in Chapter 30.1(d) of the Adjudicators Field Manual.

Applicable to I-129 adjudication, it is the time during which a non-frivolous I-129 H-1B petition for an extension of stay or change of status is pending.

**Unlawful
Presence**

An alien who remains in the United States beyond the authorized period of stay is unlawfully present and becomes subject to the 3- or 10-year bar to admission under section 212(a)(9)(B)(i)(I) and (II) of the INA.

Portability provides a period of authorized stay in which an alien does not accrue unlawful presence, provided all the provisions of 214(n) of the INA are met.

**Non-frivolous
Petition**

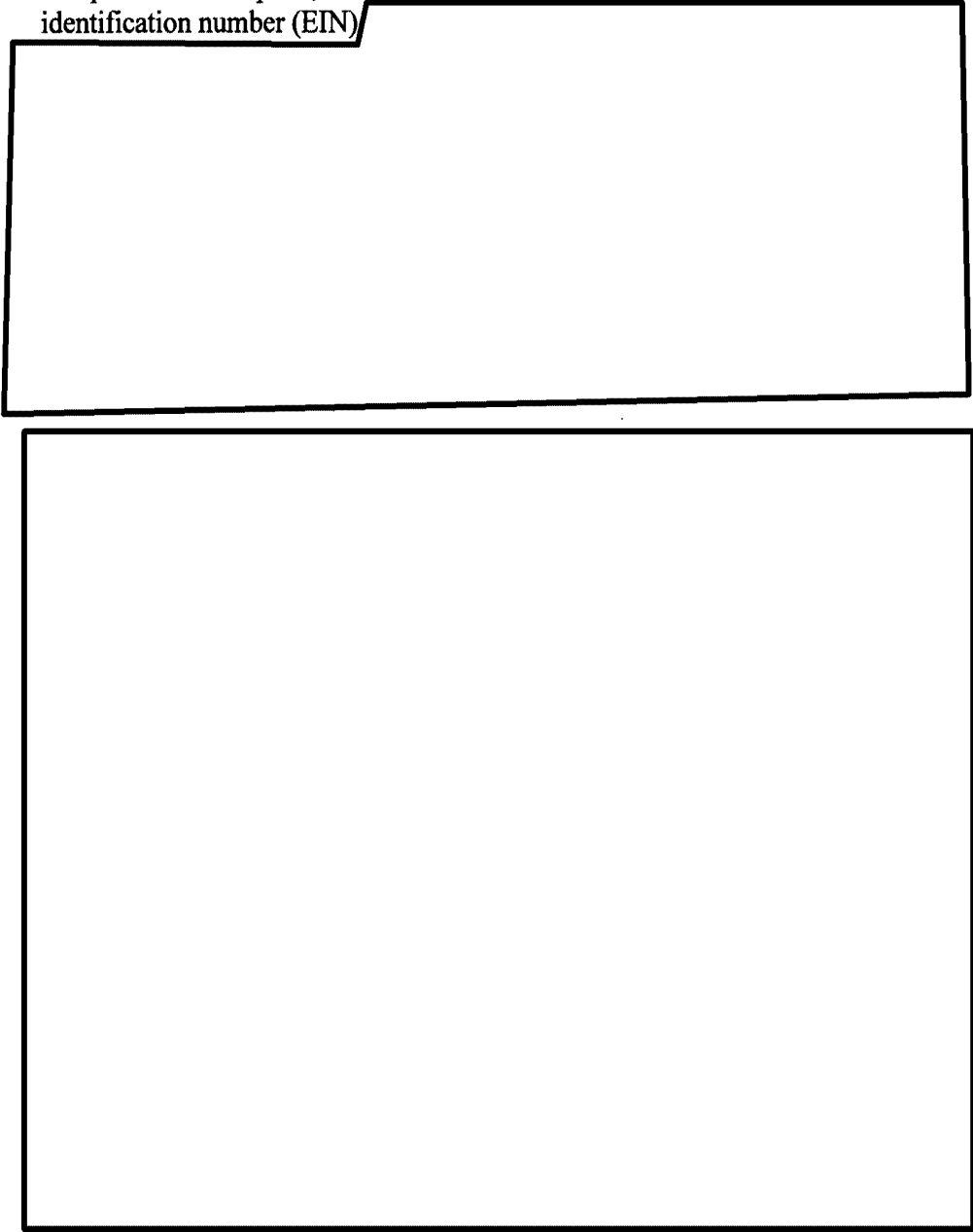
A non-frivolous petition is one that is not without basis in law or fact. The application must have an arguable basis in law and fact and must not have been filed for an improper purpose.

Continued on next page

Terms Pertaining to Portability, Continued

**Example of a
Frivolous Filing**

An alien, who holds the equivalent of a U.S. baccalaureate in art, was previously accorded H-1B status to work as a graphic artist for *Adler Technologies*. A new H-1B petition is filed by *Bardo Graphic Arts* showing that the alien is listed as both the petitioner and the beneficiary. The alien states in a letter of support that she wishes to petition for herself as an art director and is in the process of incorporating her graphic arts business. Once that process is complete, her corporation will apply for a federal tax identification number (EIN)



(b)(5)

Chapter 10: H-1B Processing Instructions

Validity Dates

Starting and Ending Dates Use the below table to determine the starting and ending validity dates of the H-1B petition. Note: if the requested validity dates have expired, then refer to the section on Expired Dates on page 13.

If...	Then starting validity date should be...	And ending validity date should be...
<ul style="list-style-type: none"> • New employment, or • Initial H-1B1, H-1B2, or H-1B3 request (Consular notification), 	Date of approval, date requested, or LCA "from" date, whichever is later.	Date requested on petition or expiration date on LCA, whichever is earlier. ¹
Change of Status,	Date of approval, Start Date Requested, or the beginning ETA 9035 or ETA 750 period, whichever is later.	Date requested on petition or expiration date on LCA, whichever is earlier.
Change of Employer,	Date of approval, date requested, or LCA "from" date, whichever is later.	Date requested on petition or expiration date on LCA, whichever is earlier. ²
Extension of same employer,	Day after expiration of previously approved H-1B for that company, or date requested, whichever is earlier, provided LCA supports the date. ⁴	Date requested on petition or expiration on LCA, whichever is earlier. ²
Amended petitions where there was a USCIS error with the original notice,	Same start date as initially approved petition. ³	Same expiration date as initially approved petition. ³
Amended petitions where there has been a change in the employment conditions,	Date of approval, date requested, or LCA "from" date, whichever is later.	Same expiration date as initially approved petition.

Continued on next page

Validity Dates, Continued

If...	Then starting validity date should be...	And ending validity date should be...
New concurrent employment,	Date of approval or date requested, which ever is later, provided LCA supports the date.	Date requested on petition or expiration date on LCA, whichever is earlier. ²
<ul style="list-style-type: none"> • Same employer, • Change in employment conditions, 	Date of approval, date requested, or LCA "from" date, whichever is later.	Date requested on petition or expiration date on LCA, whichever is earlier. ²

¹ Ensure that beneficiary has not been granted H-1B status within previous 12 months. If so, do not exceed a total of 6 years of H-1B status unless eligible for exemption.

² Ensure that beneficiary is not granted more than a total of 6 years in H or L status unless HSC or eligible for exemption.

³ Does not apply if amendment is due to incorrect validity dates.

⁴ If the beneficiary's status has expired or will expire prior to the date that you selected as the "from" date, AND the petition was filed by the same employer, then backdate the validity date to the day after the beneficiary's status expires to eliminate gaps.

Expired ETA-9035 or ETA-750 Dates

If, at the time of adjudicating a change of status (COS), the ETA 9035 dates have passed, then issue an intent to deny [B10]. This shell explains that the requested period has passed. It gives the petitioner an opportunity to provide an ETA 9035 for the time subsequent to the original ETA dates. The B10 intent to deny shell will also provide the petitioner the opportunity to withdraw the petition.

NOTE: The requested ETA 9035 must have been granted by DOL prior to the filing date of the I-129. If the response does not request a withdrawal and does not include a new ETA 9035 certified prior to the I-129 filing date, the I-129 classification portion should be approved and the COS portion should be denied. The COS denial is based on the fact that the period of requested employment has passed and there is no sufficient nonimmigrant status in which to place the alien beneficiary.

Continued on next page

Validity Dates, Continued

**Expired ETA
9035 and the I-
129 is Ordered
Approved on
Appeal**

If the AAO sustains an appeal and orders the I-129 approved, grant the classification for the dates requested and deny the COS using auto text call-up 4890. 4890 explains that the authorized period of employment has passed and that there is no sufficient status in which to place the alien.

NOTE: If this scenario presents itself on an EOS request, seek advice from your SISO.

Extensions of Stay, Continued

Applicant failed to maintain status

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, except that failure to file before the period of previously authorized status expired may be excused in the discretion of USCIS and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

- The delay was due to extraordinary circumstance beyond the control of the applicant or petitioner, and USCIS finds the delay commensurate with circumstances;
- The alien has not otherwise violated his or her nonimmigrant status;
- The alien remains a bona fide nonimmigrant; and
- The alien is not the subject of deportation proceedings under section 242 of the INA (prior to April 1, 1997) or removal proceedings under section 240 of the INA.

[8 CFR 214.1(c)(4)]

Timely Filing

The adjudicator has discretion to grant an extension based on an untimely filing pursuant to 8 CFR 214.1(c)(4). In deciding such a case, determine:

- The reasons for late filing,
- Whether the reasons were beyond the alien's control,
- The degree of lateness,
- Whether there is any indication that the applicant may have violated status in some other way,
- Whether the applicant is otherwise a bona fide nonimmigrant, and
- Whether the applicant has been apprehended and placed in proceedings.

[AFM, Chapter 30, Section 30.2(d)(3)(C)]

Inadmissible Aliens

An alien who is inadmissible to the United States under Section 212(a) of the INA may not be granted a change of status or an extension of stay unless and until he or she has applied for and been granted a waiver of his or her inadmissibility which covers the classification requested and the entire period of his or her proposed stay in the United States.

[Adjudicator's Field Manual (AFM), Chapter 30, Section 30.2(c)(3)(Note 2)]

Continued on next page

Extensions of Stay, Continued

Failure to Fulfill 3-Year Requirement of Conrad Waiver

A foreign medical graduate who changed classification from J-1 to H-1B after receiving a Conrad waiver but who failed to fulfill the terms of the Conrad waiver will once again become inadmissible under section 212(e) of the INA and may NOT be granted an extension of stay or change in nonimmigrant status.

USCIS, in the exercise of discretion, may excuse early termination of the 3-year period of employment with the health care facility named in the waiver due to extenuating circumstances. Although a new waiver is not required, the following evidence must be submitted with a new H-1B petition:

- An employment contract between the beneficiary and the new petitioner establishing that the beneficiary will practice medicine with the petitioner for the balance of the required 3-year period,
- Evidence that the new petitioner is also a health care facility located in a Health and Human Services (HHS)-designated medically underserved area, and
- Evidence of the extenuating circumstances:
 - If extenuating circumstances are based on hardship to the beneficiary, evidence must show that such hardship was caused by unforeseen circumstances beyond the beneficiary's control, and
 - If extenuating circumstances are based on closure of the health care facility named in the waiver application, documentation must be submitted showing the facility has closed or is about to be closed.

The burden of establishing eligibility for a favorable exercise of discretion rests with the foreign medical graduate.

[See 8 CFR 212.7(c)(9)(iv), (v), and (vi)]

Continued on next page

Extensions of Stay, Continued

Excusing Early Termination of the 3-year Period of Employment

Concurrence must be obtained from the I-612 waiver SISO before a final decision is reached to excuse the 3-year period of employment with the health care facility named in the waiver. Follow the steps below to obtain concurrence from the waiver POC.

Step	Action
1	Prepare an email that includes the following information: <ul style="list-style-type: none">• Receipt number,• Current Petitioner/new facility,• Former Petitioner/facility,• Synopsis of the extenuating circumstances, and• Proposed action – favorable or nonfavorable.
2	Email the synopsis to the I-612 waiver SISO (presently [redacted] (b)(6) [redacted])
3	NFIS file to AA0197.
4	Bring the file to [redacted] office.

Denial of EOS

If the beneficiary is not eligible for the requested extension of stay, but all other requirements for the classification have been met, the officer may:

- Approve the petition for H-1B classification, and
- Deny the request for an extension of stay.

If the officer determines that the classification is approvable but the requested extension of stay should be denied, the case must be updated as an approval and released to Clerical. The adjudicator will prepare a separate notice explaining the reasons the EOS is being denied, which will be mailed with the notice approving the classification. Refer to the *Approval Phrases* section of this SOP for appropriate approval phrase to use in CLAIMS when granting the classification but denying the EOS.

Continued on next page

Extensions of Stay, Continued

TECS Nonimmigrant Information Systems Check & Denial of EOS

- All denials of EOS must include a Non Immigrant Information System (NIIS) check by performing an ADIS Query in the Treasury Enforcement Communication System (TECS) up to 15 days prior to the final decision.
- A copy of the ADIS printout should be placed on the non-record side of the file and stamped with the "Unclassified-For Official Use Only" stamp.
- If no TECS record is available for the beneficiary, the petition should be notated as such with the date the check was performed.

[See William R. Yates memo dated April 5, 2005, *Revised Enhanced Processing Instructions* and Johnny N. Williams memo dated March 18, 2002, *Enhanced Processing Instructions*]

Gap or Bridge Filings

If the "valid to" date of the beneficiary's I-94 has expired or will expire prior to the requested employment start date, there will be a "gap" in his or her status. An extension of stay may not be granted unless the beneficiary is continuing to maintain a valid nonimmigrant status. Thus, it is incumbent on officers to first work any "gap" applications or "bridge" petitions when the alien's status has expired.

EOS GAP EXAMPLE:

- Company A receives an approval to change Mary Doe's status from F-1 student to H-1B worker with validity dates from October 1, 2006 until September 30, 2009.
- On April 1, 2009, before Mary's H-1B status expires, Company B files an H-1B petition for her. Mary can port to Company B and work there while Company B's petition is pending pursuant to the portability provisions of INA § 105(n).
- Company C then files a petition on Mary's behalf on December 1, 2009, while Company B's petition is still pending.

While portability allows Mary to work as soon as each new employer files a petition on her behalf, Mary is only in an "authorized period of stay" while the petitions are pending and she is not accruing any unlawful status. Mary's H-1B status expired on September 30, 2009. In this example, the officer should attempt to get Company B's petition adjudicated to "bridge" the gap in Mary's status. If Company B's petition is denied or cannot be worked for fraud reasons, then the portion of Company C's petition seeking an EOS should be denied using call-up 4896.

Continued on next page

Extensions of Stay, Continued

Process to Work Gap or Bridge Case

Follow the table below to have a “gap” application or “bridge” petition adjudicated before working a succeeding case.

If the gap or bridge case is...	And your file is...	Then...
With the VSC contractor,	Not a premium processing case,	<ul style="list-style-type: none"> • Order the gap file through NFTS to be delivered in your next work order. • If not certified to work the gap case, see a SISO to have the case worked by another officer.
With the VSC contractor, or At another Service Center,	A premium processing case,	E-mail the <u>DIV4DIV5 FileAssist</u> account to request the gap case be pulled and worked. Include the following in the e-mail: <ul style="list-style-type: none"> • What day the premium file is on, • The Receipt # of the requested file, and • The current NFTS location of the requested file.
At another Service Center,	Not a premium processing case,	E-mail the <u>DIV4DIV5 FileAssist</u> account to request the gap case be pulled and worked. Include the following in the e-mail: <ul style="list-style-type: none"> • The Receipt # of the requested file, and • The current NFTS location of the requested file.
With another officer at VSC,	Either premium or non-premium,	E-mail the officer directly to request that the gap case be worked.

Paroled AOS Applicants

AOS Applicants

If an H-1B nonimmigrant has filed for adjustment of status (AOS) and is subsequently paroled pursuant to a grant of advance parole, (s)he may apply for an extension of his or her H-1B status, provided there is a valid and approved H-1B petition.

If USCIS approves the beneficiary's extension of H-1B nonimmigrant status, the decision granting such extension will have the effect of terminating the grant of parole and admitting the beneficiary in H-1B classification.

[See memorandum from Michael D. Cronin, Acting Associate Commissioner, Office of Programs dated May 25, 2000, with the subject: *AFM Update: Revision of March 14, 2000 Dual Intent Memorandum*]

Eligible AOS Applicants

The beneficiary is eligible for an extension of his or her H-1 nonimmigrant status if he or she was an H-1 nonimmigrant who is paroled pursuant to a grant of advance parole and who has a valid and approved H-1 petition as of the requested starting validity date on Form I-129, and the beneficiary has **NOT** used his or her EAD to leave the employer listed on the approved I-129 petition and engage in employment for a separate employer.

Ineligible AOS Applicants

The beneficiary is **NOT** eligible for an extension of his or her nonimmigrant status if he or she was an H-1 nonimmigrant who is paroled pursuant to a grant of advance parole and who:

- Has a valid and approved H-1 petition as of the requested starting validity date on Form I-129, and the beneficiary has **USED** his or her EAD to leave the employer listed on the approved I-129 petition and engaged in employment for a separate employer, or
 - Does **NOT** have a valid and approved H-1 petition as of the requested starting validity date on Form I-129.
-

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Paroled AOS Applicants, Continued

Paroled H-4 Dependents

Based on recent USCIS policy [See a memorandum from Michael Aytes, Associate Director, Domestic Operations, dated December 5, 2006, with the subject: *Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum but Who Have Been Absent from the United States for Over One Year*], which looks at dependents with a focus on family unity, paroled H-4 dependents will be processed the same as the H-1 principal, provided:

- The H-1 principal is in status, and
- The H-4 dependent was maintaining H-4 status as of the filing date of the I-539.

NOTE: Late filings may be excused as a matter of discretion under extraordinary circumstances. [8 CFR 214.1(c)(4)]

Change of Status

General

Evidence must show the beneficiary is eligible for a change of nonimmigrant status and that he or she was maintaining the nonimmigrant status previously accorded to him or her at the time the petition was filed, unless failure to file a timely request for a change of status before the period of previously authorized status expired was due to extraordinary circumstances beyond the control of the applicant or petitioner and USCIS finds the delay in filing commensurate with the circumstances. [8 CFR 248.1(b)]

Casebook

Fraud Databases (Casebook) Definition

(b)(7)(e)

Continued on next page

Change of Status, Continued

How to Access Casebook

Access the CFDO Casebook database through Center Applications:

- Select Local Databases
- Select the Casebook (butterfly) Icon

After you successfully open the file, you should see the new butterfly icon on your Quick Launch toolbar. You can use this shortcut to access the database by simply clicking on the butterfly icon.

NOTE: If you attempt to log into Casebook using a different computer, you will need to initially access through Center Applications/Local Databases at each computer used

How to Run a Query in Casebook

Casebook must be cross referenced with the information found on the I-129. If a record exists, the officer is responsible for reviewing the information in the "Information" field. If there is a Summary of Findings (SOF), it will be linked to the Casebook record. The officer must print the SOF and place it on the non-record side of the file. The information provided in the "Information" field and in the SOF must be considered when adjudicating the I-129.

NOTE: "Adjudicate On Merits" on the SOF does not mean the application is readily approvable. The application must still meet all necessary filing requirements and all information on the SOF must be taken into consideration before a final action can be taken.

Alien Departed Prior to Filing

If it is determined that the alien departed the United States prior to the date of filing the I-129 petition, check ADIS for a subsequent entry made prior to the filing of the petition. If there is no entry prior to the filing date of the petition, then the alien was not maintaining nonimmigrant status and the COS may not be granted. Use Autotext 4910 for denial of the COS.

Continued on next page

Gap in Status

- Since only an alien who is continuing to maintain his or her nonimmigrant status may apply to have his or her status changed, the beneficiary of an H-1B petition may not remain in the United States without a valid status while he or she is waiting for a visa number to become available.
- Requests to change a beneficiary's status must be denied when there will be a gap between the date the beneficiary's current nonimmigrant status expires and the requested starting employment date on the petition.
- Before denying a COS for a gap in status, the adjudicator should check systems to determine whether the beneficiary has another application or petition pending. If no record of a pending application or petition is found, an RFE may be appropriate.

EXCEPTION: The status of an F-1 student, who is the beneficiary of an H-1B petition seeking a change of status, shall be automatically extended until October 1st of the fiscal year for which such H-1B visa is being requested when:

- The petition has been timely filed, and
- The employment start date for the F-1 student is October 1st of the following fiscal year.

[See 8 CFR 214.2(f)(5)(vi)]

Continued on next page

Change of Status, Continued

Process to Work Gap or Bridge Case

Follow the table below to have a "gap" application or "bridge" petition adjudicated before working a succeeding case.

If the gap or bridge case is...	And your file is...	Then...
With the VSC contractor,	Not a premium processing case,	<ul style="list-style-type: none"> • Order the gap file through NFTS to be delivered in your next work order. • If not certified to work the gap case, see a SISO to have the case worked by another officer.
<ul style="list-style-type: none"> • With the VSC contractor, or • At another Service Center, 	A premium processing case,	E-mail the <u>DIV4DIV5 FileAssist</u> account to request the gap case be pulled and worked. Include the following in the e-mail: <ul style="list-style-type: none"> • What day the premium file is on, • The Receipt # of the requested file, and • The current NFTS location of the requested file.
At another Service Center,	Not a premium processing case,	E-mail the <u>DIV4DIV5 FileAssist</u> account to request the gap case be pulled and worked. Include the following in the e-mail: <ul style="list-style-type: none"> • The Receipt # of the requested file, and • The current NFTS location of the requested file.
With another officer at VSC,	Either premium or non-premium,	E-mail the officer directly to request that the gap case be worked.

Continued on next page

Change of Status, Continued

**Ineligible for
COS**

The following aliens are not eligible for a change in their nonimmigrant status [8 CFR 248.2]:

- WT/WB
- C-1, C-2, C-3
- TWOVs
- D-1, D-2
- K-1, K-2
- J-1, J-2 who are subject to the 2-year foreign residence requirement, unless a waiver of the 2-year foreign residence requirement has been granted.

In addition, USCIS shall deny a request for change of nonimmigrant classification from that of an M-1 student to that of an alien temporary worker under section 101(a)(15)(H) of the INA if the education or training which the alien received while an M-1 student enables him or her to meet the qualifications for temporary worker classification under section 101(a)(15)(H) of the INA. [8 CFR 248.1(d)(1)]

Continued on next page

Change of Status, Continued

Denial of COS Follow the chart below when approving the H-1B classification but denying the requested change of status.

If...	Then ...
The beneficiary is not eligible for the requested change of status, but all other requirements for the classification have been met,	<ul style="list-style-type: none">• Approve the petition for H-1B classification, and• Deny the request for a change of status.
The classification is approvable but the requested change of status should be denied,	<ul style="list-style-type: none">• Update the case as an approval and “Y” for release to Clerical.• Prepare a separate denial notice for the COS in CG. Refer to <i>Preparing COS or EOS Denials</i> in the Denial section of this Guide for processing instructions on how to prepare a separate denial notice. <p>RESULTS: Clerical will first release the approval notice for the classification and then type the separate denial of the COS and mail the released approval notice together with the COS denial to the petitioner.</p> <p>NOTE: ISOs should no longer batch print the approval notice for a COS denial using CLAIMS approval phrases #8 or #9, since autotext #0054 must be added to all COS denials that leave the beneficiary without lawful immigration status.</p> <p>IMPORTANT: Refer to the “Approval Phrases” section of this Guide for appropriate approval phrases to use for CLAIMS updating when granting the classification but denying the COS.</p>

Continued on next page

Change of Status, Continued

TECS Nonimmigrant Information Systems Check

- All requests for a change of status must include a Non Immigrant Information System (NIIS) check by performing an ADIS Query in the Treasury Enforcement Communication System (TECS) up to 15 days prior to a final decision.
- A copy of the ADIS printout should be placed on the non-record side of the file and stamped with the "Unclassified-For Official Use Only" stamp.
- If no TECS record is available for the beneficiary, the petition should be notated as such with the date the check was performed.

[See William R. Yates memo dated April 5, 2005, *Revised Enhanced Processing Instructions* and Johnny N. Williams memo dated March 18, 2002, *Enhanced Processing Instructions*]

If at any time it comes to the attention of USCIS that an alien on whose behalf a request for a change of nonimmigrant status has been filed has traveled outside the United States during the pendency of the request for a change of status, the requested change of status should be denied pursuant to 8 CFR 248.3(g), even if the alien returns prior to the final decision.

[See Cook memo dated June 18, 2001, *Travel After Filing a Request for a Change of Nonimmigrant Status*]

Use Autotext 4916 for denial of a COS when an alien travels during the pendency of the petition.

Continued on next page

Change of Status, Continued

I-94 Not Issued There will be times when the beneficiary of an I-129 petition seeking a change of status to H-1B was not issued an Arrival-Departure Record (Form I-94) upon his or her admission to the United States; e.g., a Canadian citizen admitted as a B-2 visitor. When granting a change of status to a beneficiary who was not issued an I-94 upon his or her admission, you must issue a new I-94 to the beneficiary before an approval notice can be generated.

Follow the steps in the table below when you are unable to locate any information in ADIS, but there is evidence that the beneficiary made a lawful entry, such as:

- an admission stamp in the beneficiary's passport,
- an airline ticket,
- a boarding pass, or
- a check of the crossings field in SQ11 in TECS.

Step	Action
1	Obtain a new I-94 card from Supply.
2	Discard the top and bottom sections of the new I-94 card.
3	Complete as much information in the middle section of the new I-94 card as possible. At the very minimum, indicate the beneficiary's full name, date of birth, and country of citizenship.
4	Stamp the new I-94 with a replacement I-94 stamp, using security ink, and filling in the following fields on the stamp: <ul style="list-style-type: none">• "Admitted at:" Write the place of admission,• "On:" Write the date of admission,• "Until:" Write the date admitted to,• "Class:" Write the class of admission,• "This document prepared on" and "At:" Write the date you prepared the replacement I-94/VSC and your RAFACS #.• "Last C/S Granted to Class" and "On:" Write new classification granted and date COS was granted.
5	Notate the new I-94 number on the I-129 petition in Part 3, Item 2.
6	Forward the completed and stamped I-94 for entering into the TECS/NIIS System by: <ul style="list-style-type: none">• Attaching the I-94 to an Adjudications Worksheet,• Checking the "Other" block on the Worksheet,• Writing "To NIIS" on the line next to "Other", and• Placing on the "Mailroom-No Envelopes" shelf in FCU.
7	Ensure the new I-94 number is entered into the beneficiary screen in CLAIMS.

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Change of Status, Continued

Requesting a COS from A or G

In addition to the evidence required for the classification, the petitioner must submit:

- The beneficiary's I-94 card, and
- Form I-566, certified by the DOS, indicating the beneficiary's continuing accredited diplomatic status.

Follow the steps in the I-566 quick reference guide located on the local area network (LAN) in MSWord/ADJ SOPs/I-566 for processing Form I-566 for a change of status from A or G classification.

Requesting a COS from former "CNMI status"

Aliens who were present in the Commonwealth of the Northern Mariana Islands (CNMI) on or before November 28, 2009, are present without admission or parole. These aliens should have been admitted to the CNMI under the former CNMI immigration laws and will accordingly have a CNMI immigration status, as opposed to a nonimmigrant status under the INA. The former "CNMI status" is not a valid status under the INA from which a COS can be granted and thus, is not eligible for a change of status. Consular processing is currently the only appropriate action for those present under the former "CNMI status."

Requesting a COS from F-1 or F-2

In addition to the evidence required for the classification, the petitioner must submit evidence to establish that the beneficiary had been maintaining his or her F-1 or F-2 status at the time the petition was filed.

Documentary evidence that an F-1 or F-2 nonimmigrant is maintaining a valid, nonimmigrant status should consist of a SEVIS issued Certificate of Eligibility for Nonimmigrant (F-1) Student Status (Form I-20A-B), and may include an Employment Authorization Document (Form I-766).

1. Verify the beneficiary's F-1 or F-2 status in the SEVIS system.
NOTE: F-1 and F-2 nonimmigrants are granted a 60 day grace period beyond the F-1's program end date per 8 CFR 214.2(f)(5)(iv). If the petition has been filed within the 60-day grace period, USCIS will consider the beneficiary to be maintaining status.
 2. Verify that the beneficiary's SEVIS number has been entered correctly in the "SEVIS FROM" field in CLAIMS.
 3. Notate at the bottom of the first page of the petition, "SEVIS checked," with the date checked and NFTS number. Alternatively, a printout of SEVIS may be placed on the non-record side of the file.
-

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Change of Status, Continued

COS to/from TN

The TN classification was created under the North American Free Trade Agreement (NAFTA) for certain Canadian and Mexican citizens.

An alien may change status **from** TN to H-1B.

The VSC processes filings for change of status **to** TN or extensions of stay for TN nonimmigrants. Refer to the I-129TN SOP for the adjudication of change of status to TN classification or extension of stay for TN classification petitions.

COS from TPS

Generally, an alien granted Temporary Protected Status (TPS) is not eligible for a change of status. Section 248 of the INA permits a change from one nonimmigrant status to another nonimmigrant status in the case of any alien:

1. Lawfully admitted to the United States as a nonimmigrant,
2. Who is continuing to maintain that status, and
3. Who is not inadmissible under certain provisions of Section 212.

A grant of TPS is not an admission, and as such, an alien granted TPS would generally fail to meet criterion number 1 above. However, a change of status from TPS may be granted if an alien can establish that he or she was:

- Admitted as a nonimmigrant and overstayed,
 - Granted TPS, and
 - There was no gap between the expiration of his or her nonimmigrant visa and the granting of TPS.
-

COS From J-1 or J-2

**Requesting a
COS from J-1
or J-2**

In addition to the evidence required for the H-1B classification, the petitioner must submit evidence to establish that the beneficiary had been maintaining his or her J-1 or J-2 status at the time the petition was filed.

Documentary evidence that a J-1 or J-2 nonimmigrant is maintaining a valid, nonimmigrant status should consist of a SEVIS issued Certificate of Eligibility for Exchange Visitor (Form DS-2019).

1. Verify the beneficiary's J-1 or J-2 status in the SEVIS system.

NOTE: J-1 and J-2 nonimmigrants are granted a 30 day grace period beyond the J-1's program end date pursuant to 8 CFR 214.2(j)(1)(ii). If the petition has been filed within the 30-day grace period, USCIS will consider the beneficiary to be maintaining status.

2. Verify that the beneficiary's SEVIS number has been entered correctly in the SEVIS FROM field in CLAIMS.
3. Notate at the bottom of the first page of the petition, "SEVIS checked," with the date checked and NFTS number. Alternatively, a printout of SEVIS may be placed on the non-record side of the file.

If the beneficiary is subject to section 212(e) of the INA (the 2-year foreign residence requirement), a change of status may not be granted unless the beneficiary has been issued a waiver. See I-539 SOP, your mentor or SISO if you have questions about the waiver requirement.

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COS From J-1 or J-2, Continued

Waiver Required

When a waiver is required for a J-1 or J-2 requesting COS to H-1B, check Nationals and local CLAIMS for status of any pending waiver.

HINT: A search might be more successful if searched fields are limited. For example, run the last name and DOB if unsure how a double first name or a first name and middle name were entered.

Refer to the table below for adjudication of a J-1 COS petition dependent on a waiver.

If Nationals or local CLAIMS shows that...	Then...
<ul style="list-style-type: none"> • No waiver is pending, and • No copy of the DOS recommendation letter is in the file, 	Prepare an RFE using autotext 2215.
<ul style="list-style-type: none"> • No waiver is pending, and • A copy of the DOS recommendation letter is in the file, 	<ul style="list-style-type: none"> • Query Nationals and local CLAIMS again, using the name exactly as it appears on the DOS letter. • If no receipt number can be found, e-mail the Division IV Waiver POC for evidence that the applicant is in the Consolidated Consular Database (CCD). <p>NOTE: Include the case number located on the waiver letter in your e-mail message.</p>
Waiver has been approved,	Adjudicate the I-129.
Waiver has been denied,	Notify the petitioner of beneficiary's ineligibility for a change of status.
Waiver is pending,	<p>Do not make a final decision on the I-129 until the I-612 is completed.</p> <p>Determine the location of the pending waiver and refer to the appropriate block below: "Pending Waiver at VSC" or "Pending Waiver at Another Service Center."</p>

Continued on next page

COS From J-1 or J-2, Continued

Pending Waiver at VSC

If there is a waiver pending at the VSC, check NFTS to determine the location of the file.

If the file...	Then...
Is with an ISO,	Email the officer with the file and ask him or her to work the waiver as soon as possible.
Is NOT with an ISO (i.e. on a shelf, or with the Contractor), Or Cannot be found in NFTS,	E-mail the Division IV Waiver POC with the receipt number of the waiver and its location, if available. RESULT: The waiver POC will have the waiver worked and you will be informed when it is complete.

Pending Waiver at Another Service Center

If there is a waiver pending at another Service Center, send an e-mail with the receipt number to "DIV4DIV5 FileAssist" to request that the other Service Center adjudicate the waiver.

The e-mail should include:

- Receipt number of the waiver,
- Receipt number of the relating I-129, and
- Whether the I-129 is a premium or non-premium case.

If the waiver is not completed by the other Service Center within a reasonable amount of time, such as five business days, issue an RFE using autotext 2215.

Lack of Waiver of 212(e)

If the evidence fails to demonstrate that a J alien has fulfilled the 2-year foreign residence requirement or has obtained a waiver of the 2-year foreign residence requirement, the classification may be approved if all other requirements are met. But any request for an extension of stay or change of status should be denied using autotext 4889, 4918, or 4919, as the alien is considered inadmissible. [Section 212(e) of the INA, 8 CFR 214.1(a)(3)(i), and 8 CFR 248.2(c) and (d)]

Consular notification requests with no evidence of waiver – the ISO should indicate on the petition and on the copy going to either the KCC or the POE/PFI that the alien appears to be inadmissible under 212(e) of the INA.

Admission of H Nonimmigrants

10-Day Period

Occasionally, a beneficiary's Arrival-Departure Record (Form I-94) will show an ending date of 10-days beyond the period for which the petition was approved. An H nonimmigrant may be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may only work during the validity period of the petition.

Processing Approvals

Duplicate Petition Copies

All duplicate copies of the I-129 petition and RFE responses, provided by the petitioner, must be sent to the Kentucky Consular Center (KCC) for entry into PIMS.

NOTE: You are not required to make a second copy for the KCC if the petitioner has not provided one.

Follow the steps below when forwarding duplicate petitions to the KCC.

Step	Action
1	Attach duplicate RFE response to duplicate petition. If a duplicate RFE response is not provided, attach a copy of the sent RFE to the duplicate petition.
2	Ensure that the EAC # is also on the face of the duplicate being sent to the KCC. Preferably, the EAC barcode should be placed in the lower, right-hand corner. If not, write the number on the duplicate copy.
3	Ensure that any required annotations are included on the duplicate copy, as directed in the <i>Petition Annotations Block</i> above.
4	Stamp and sign the duplicate copy.
5	Place the duplicate petition on the " I-129 Approved KCC " shelf in FCU.

Expedite Requests

To forward duplicate petitions to the KCC for expedite requests, place the duplicate approved petition on the "**I-129 Priority Overnight**" shelf in FCU. The petition will be sent to the KCC via overnight delivery.

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Processing Approvals, Continued

Petition Annotations

Refer to the table below for proper annotations to be made on the Form I-129 petition and on any duplicate copy provided.

Item	Action
Passport and/or visa name vs. name on petition	The beneficiary's name on the petition should be exactly the same as the name appears on the beneficiary's passport or visa, whichever document was issued latest. If it is not, the ISO must change the name on the petition and in GUI to reflect the beneficiary's name as it appears on the passport or visa. All names should be run in TECS.
TECS and NSEERS	Perform all necessary TECS, NSEERS, and ADIS checks.
Annotate Classification	<ul style="list-style-type: none"> • "1B1" for professionals. • "1B2" for DOD. • "1B3" for models. • "HSC" for Chilean or Singaporean nationals under the FTAs with Chile and Singapore.
Number employees	Always "1" for H-1B petitions
Validity Dates	Period limited by the LCA, unless H-1B2 for DOD.* If the validity dates must be limited for any reason, annotate the reason in the "Remarks" block on the face of the petition.
Class Approved	Check "Classification Approved" box for all approvals.
Consulate/POE/PFI Notified	If notifying a consulate/POE/PFI: <ul style="list-style-type: none"> • Check "Consulate/POE/PFI Notified" box, • Circle or underline which is being notified, i.e., either the consulate, the POE, or the PFI, and • Write the name of the consulate/POE/PFI on the blank line.
Extension Granted	Check box if granting an extension of stay.
COS/Extension Granted	Check box if granting a change in classification and an extension of the beneficiary's stay.
Partial Approval	Annotate the partial approval block when: <ul style="list-style-type: none"> • Denying COS or EOS,** • Excusing a late filing, or • Granting AC21 Section 104(c) or Section 106.

Continued on next page

Processing Approvals, Continued

(continued)

Item	Action
Rate of Pay Per Year	If Item 6 in Part A of the I-129 H-1B Data Collection Supplement does not indicate an Annual Rate of Pay, calculate the Annual Rate of Pay by multiplying the hourly rate by the number of hours per week the beneficiary will work (40 if full-time position) and multiply the result by 52 weeks.
Action Block	Stamp and sign.

* See section on validity dates assignment.

** See section on "Preparing COS or EOS Denials."

NOTE: While it is recommended that the job code or approval phrase be annotated on the face of the petition to aid officers in updating, it is not required that the job code or approval phrase be written on the petition. Only GUI must reflect the correct job code and approval phrase. However, it is helpful to have such information on the petition for customer inquiries.

Continued on next page

Processing Approvals, Continued

CLAIMS Updating

Follow the steps below to update CLAIMS.

Step	Action
1	Review the initial CLAIMS screen for accuracy regarding all pertinent information (i.e., petitioner's name, address, etc.).
2	Verify information in the I-129W screen is complete and accurate.
3	Verify information in the beneficiary screen is complete and accurate. The following information must be entered: <ul style="list-style-type: none"> • Annual Rate of Pay (See "Petition Annotations" section for calculating Annual Rate of Pay). • I-94 number for all EOS or COS requests. • Country of Citizenship (COC) must be entered in Country of Birth (COB) field if petition is requesting EOS or COS.
4	Press [F10] to Save any Changes.
5	<ul style="list-style-type: none"> • Select "APPROVE THE CASE" • Select "APPROVE - ORDER NOTICE"
6	Enter: <ul style="list-style-type: none"> • Proper approval phrase (send to consulate, change status, etc. Refer to the <i>Approval Phrases</i> Block) • Type of classification (1B1, 1B2, 1B3, or HSC) • Validity Dates • Consulate, POE, or PFI, if applicable • 3-Digit Occupational Code. (Additional information provided in the <i>Obtaining the 3-Digit Occupational Code</i> block below.)
7	<p>Select "N" for a PRINT or "Y" for a RELEASE.</p> <p>By selecting "N" for a PRINT, the approval notice will be batch printed by IT and go out for mailing.</p> <p>By selecting "Y" for a RELEASE, this instructs the computer to "hold" the approval notice in the batch queue and thus, no notice will be generated until the Clerk releases the notice.</p> <p>For a RELEASE, instruct the Clerk to release the notice by annotating the Adjudications Worksheet. State on the worksheet exactly why the case has to be "RELEASED" (i.e., DHL envelope, Amended Notice, etc.).</p>

Continued on next page

Processing Approvals, Continued

Obtaining the 3-Digit Occupational Code

The Occupational Code was previously entered on the LCA as a 3-digit code from the Dictionary of Occupational Titles called a DOT code. The current LCA utilizes an 8-digit code from the Standard Occupational Classification of the Occupational Network (O*NET). The new 8-digit code, called the SOC (ONET/OES) code, is located on Page 1 of 5, Part B number 2 of the current LCA.

When updating an approval in CLAIMS the officer must use the 3-digit job code. This code may be found using one of the following options:

- On Page 2 of 4 of the older version of the LCA, Part D number 3.
 - In Part A of the H-1B Data Collection Supplement number 7, or
 - Utilize this link to cross reference the 8-digit code found on the LCA to the 3-digit code.
http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9035_CP_Appendix_1_021309.pdf
-

Returning Original Documents

When original documents must be returned to the petitioner, the case will be updated as an "N" for a Print. Flag the original documents to be returned on the non-record side of the file.

You may either:

- Batch all the cases together that have original documents to be returned and label the top case (with a worksheet, note, or post-it, etc.) "RETURN ORIGINALS", or
 - Label each case "RETURN ORIGINALS".
-

Continued on next page

Processing Approvals, Continued

Approval Phrases

Use the chart below to determine the appropriate phrase to use when approving an H-1B petition.

CLAIMS #	Approval Phrase	Purpose
1	Send to selected consulate	Petitioner has requested consulate be notified of the approval.
2	Send to selected consulate w/cable	No longer used for H-1B petitions since we no longer fax or cable H-1B expedites to the KCC.
3	Workers Visa Exempt – to POE	<ul style="list-style-type: none"> • Beneficiary is not required to have a visa [per 8 CFR Section 212.1], and • Petitioner has requested POE or PFI be notified of the approval.
4	Send to different consulate	The consulate requested by the petitioner is not available.
5	Send to different consulate w/cable	No longer used for H-1B petitions since we no longer fax or cable H-1B expedites to the KCC.
7	Class and COS approved – Other	<ul style="list-style-type: none"> • Petitioner has requested a change of status for the beneficiary and • Both the classification and change of status are approved.
10	Class approved; COS denied; consulate/sep notice	<ul style="list-style-type: none"> • Classification is approved, • Notifying consulate abroad, and • A separate notice is prepared outlining the reasons for denial of the change of status <p>NOTE: Update as “Y” for Release to Clerical so approval notice may be sent together with the notice denying the change of status.</p>
11	Class approved; COS denied; POE notified; sep notice	<ul style="list-style-type: none"> • Classification is approved, • Notifying POE or PFI, and • A separate notice is prepared outlining the reasons for denial of the change of status <p>NOTE: Update as “Y” for Release to Clerical so approval notice may be sent together with the notice denying the change of status.</p>

Continued on next page

Processing Approvals,

Approval Phrases (continued)

CLAIMS #	Approval Phrase	Purpose
12	Class and EOS approved – Other	<ul style="list-style-type: none"> • Petitioner has requested an extension of stay for the beneficiary (same/same and change of employer requests), and • Both the classification and EOS are approved.
13	Class approved – extension denied; send to consul	<ul style="list-style-type: none"> • Classification is approved, • Notifying consulate abroad, and • A separate notice is prepared outlining the reasons for denial of the extension of stay. <p>NOTE: Update as “Y” for Release to Clerical so approval notice may be sent together with the notice denying the extension of stay.</p>
14	Class approved; EOS denied; send to POE	<ul style="list-style-type: none"> • Classification is approved, • Notifying POE or PFI, and • A separate notice is prepared outlining the reasons for denial of the extension of stay. <p>NOTE: Update as “Y” for Release to Clerical so approval notice may be sent together with the notice denying the extension of stay.</p>
15	Concurrent employment approved (in United States)	<ul style="list-style-type: none"> • Beneficiary is in the United States in valid H-1B status, and • Petition is granting approval to work concurrently for another employer.
16	Change in employment conditions approved (in United States)	<ul style="list-style-type: none"> • Beneficiary is physically present in the United States in valid nonimmigrant status, <u>and</u> • Petition is granting approval for work that has changed with the same employer since prior authorization; or <p>Also for: Amended petitions when:</p> <ul style="list-style-type: none"> • there is no request for additional time, but • there are changes in the employment, such as location, title, etc. <p>NOTE: Do not use this approval phrase when beneficiary will consular process or when petitioner is filing to correct a service error.</p>

Continued on next page

Processing Approvals, Continued

Approval Phrases (continued)

CLAIMS #	Approval Phrase	Purpose
26	Concurrent employment approved (abroad)	<ul style="list-style-type: none">• Beneficiary is outside the United States, and• Petition is granting approval to work concurrently for another employer.
28	Workers Visa Exempt – POE notified by Fax/Phone	<ul style="list-style-type: none">• Beneficiary is not required to have a visa [per 8 CFR Section 212.1] <p>NOTE: We no longer fax to the POE. Duplicates are forwarded to the KCC priority overnight.</p>

Amended Cases

Amended Notices

For H-1B purposes, there are two types of AMENDED cases.

The first type of an AMENDED case is a petition that:

- Is given to an ISO by a SISO for corrective action, or
- An ISO discovers incorrect information and the notice has already been printed in the batch queue.

In these scenarios, adjudicators must:

1. Amend/correct the petition.
2. Update the case correctly.
3. Make the case a RELEASE.
4. Complete an Adjudications Worksheet, checking the boxes next to "Release" and "Amended Notice."

As stated above, the case must be updated as a "Y" for a RELEASE so that the clerk can release the notice as an "AMENDED NOTICE". When a clerk releases the notice, the words "AMENDED NOTICE" actually appear on the approval notice.

Amended Petitions

The second type of an AMENDED case is a petition that is filed and the petitioner has indicated that the petition is an "AMENDED" petition.

- The reason(s) that the petitioner is submitting an AMENDED petition should be clearly outlined on the petition itself and/or in the supporting documentation (i.e. new work-site location, different job duties, etc.).
 - Process the petition as usual taking into consideration the reasons for the amendment.
 - The petition should be updated in the CLAIMS system in the same manner as updating the case normally.
 - This case would be updated as an "N" for a PRINT as the approval notice is not actually being amended, but rather only the petition is amended and therefore, there is no need to amend the approval notice.
-

Continued on next page

Amended Cases, Continued

**Fees for
Amended
Petitions**

Sometimes, a petitioner will indicate that the petition is amended, when it is actually a request to change employers. In cases where the petitioner indicates a petition is amended, but it is actually a request to change employers, verify that the ACWIA fee, the Border Security fee and the Fraud fee have been paid, if required.

Requests for Evidence (RFEs)

Introduction

The Request for Evidence (RFE) standards are contained within the 1800-2999 series of autotext. They are available in MSWord and CG. Officers must type the RFE in CG.

- Refer to the Correspondence Generator User Guide for specific instructions on preparing the RFE.
 - Complete the Adjudications Worksheet as directed in the Adjudications Worksheet SOP.
-

CLAIMS Updating for RFEs

Follow the steps below to update an RFE in CLAIMS.

Step	Action
1	Access "GUI Adjudication".
2	Wand or enter the receipt number of the case.
3	Press [F10].
4	<ul style="list-style-type: none">• Select "CASE REVIEW".• Select "PLACE IN SUSPENSE".
5	Select either: <ul style="list-style-type: none">• "ORDER INITIAL EVIDENCE REQUESTED NOTICE", or• "ORDER ADDITIONAL EVIDENCE REQUESTED NOTICE", or• "ORDER INITIAL AND ADDITIONAL EVIDENCE REQUESTED NOTICE"
6	Follow <i>Distribution of Work After Updating</i> section.

Denials

Introduction

H1B denials must be constructed using the standard denial letters from the "I-129/H1B" folder in CG. The H1B folder contains additional folders which further describe the denials contained in each.

The I-129 Denial Index lists all I-129 denial letters and can be found in MSWord by choosing:

- "Add'l Resources" from the Adjudications' Standard Toolbar,
- Select "Indexes," and
- Select "I-129 Denial Index."

The Autotext Index lists all the numbered Autotext and can be found in MSWord on the Adjudicator's Toolbar under Add'l Resources/Indexes/Autotext Index.

EOS/COS denials must also be prepared in CG using the standards from Autotext numbered 4889 to 4929.

Preparing the Classification Denial

Follow the steps below to prepare a denial.

Step	Action
1	Refer to the Correspondence Generator User Guide for specific instructions on preparing the denial.
2	Complete and attach the Adjudications Worksheet as directed in the Adjudications Worksheet SOP, if the denial needs to go to clerical.
3	Stamp and sign the action block.
4	Perform all necessary TECS, NSEERS and ADIS checks.

Continued on next page

Denials, Continued

CLAIMS Updating for Denials

Follow the steps below to update denial of the classification in CLAIMS.

Step	Action
1	Access "GUI Adjudication".
2	Wand or enter the receipt number of the case.
3	Press [F10].
4	<ul style="list-style-type: none"> • Select "DENY THE CASE". • Select the most appropriate denial phrase (i.e., "ORDER DENIAL NOTICE").
5	Release the "SUPERVISORY HOLD" on all denial orders: <ul style="list-style-type: none"> • Press [ALT] and [F8] simultaneously. • Type in your user ID number along with your four-digit password. • Press [F4].
6	Refer to <i>Distribution of Work After Updating</i> section.

Preparing COS/EOS Denials

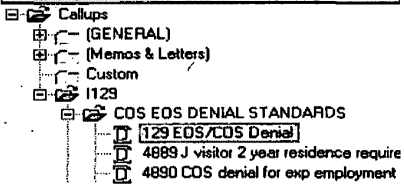
All COS or EOS denials must be prepared in CG. Follow the steps below for preparing a COS/EOS denial.

Step	Action
1	Select [I129 Denial EOS/COS] from correspondence menu. <div data-bbox="565 1157 776 1266" data-label="Image"> </div> <p>NOTE: If you select [I129 Denial EOS/COS] for any other denial that is not a split decision, your icons may be disabled when you attempt to send the document to the queue for printing.</p>

Continued on next page

Denials, Continued

Preparing COS/EOS Denials (continued)

Step	Action
2	<p>Select [129 EOS/COS Denial] and move to the writing window.</p>  <p>IMPORTANT: The “general” I-129 EOS/COS denial shell guarantees the proper denial and motion or appeal verbiage is included in the correspondence. Select [129 EOS/COS Denial] and move to the writing field. Denial statements may then be inserted into the general EOS/COS denial shell.</p>
3	<p>Insert the appropriate standard(s) into the denial shell using the standards from Autotext numbered 4889 to 4929.</p> <p>NOTE: Autotext #0054 must be added to all COS denials that leave the beneficiary without lawful immigration status.</p>
4	Save the document in CG.
5	<p>Review Recipient Information screen. Form I-290B should be an automatic attachment.</p> <p>NOTE: If the Form I-290B attachment is not included, refer to <i>Enclosures/Attachments</i> instructions under <i>Review Recipient Information</i> in the CG User guide.</p>
6	Perform Spell Check.
7	Perform Print Preview and print file copy from the Print Preview screen.
8	Place on Manual Hold.
9	Attached a completed Adjudications Worksheet to the file and route to clerical.

Continued on next page

Denials, Continued

CLAIMS Updating for COS/EOS Denials

After accessing "GUI Adjudications", review the CLAIMS screen for accuracy regarding all pertinent information (i.e., petitioner's name, address, etc.). Follow the steps below to update approval of the classification, and denial of the COS or EOS in CLAIMS.

Step	Action
1	Perform all necessary TECS, NSEERS, and ADIS checks.
2	Verify information in the I-129W screen is complete and accurate.
3	Verify information in the beneficiary screen is complete and accurate.
4	Press [F10]
5	<ul style="list-style-type: none"> • Select "APPROVE THE CASE" • Select "APPROVE - ORDER NOTICE"
6	Select proper approval phrase, #10, #11, #13, or #14 (Refer to "Approval Phrases" section of this SOP).
7	Enter: <ul style="list-style-type: none"> • Type of classification (1B1, 1B2, 1B3, or HSC) • Validity Dates • Consulate, POE, or PFI • Occupational Code from LCA.
8	Select "N" for a PRINT or "Y" for a RELEASE. By selecting "N" for a PRINT, the approval notice will be batch printed by IT and go out for mailing. By selecting "Y" for a RELEASE, this instructs the computer to "hold" the approval notice in the batch queue and thus, no notice will be generated until the Clerk releases the notice.
9	Follow guidance in the <i>Distribution of Work After Updating</i> section.

Continued on next page

Denials Continued

Appeal Rights There **ARE** appeal rights to the AAO for denial of the H-1B classification.

NOTE: There is **NO** provision for an appeal from a decision to deny the **extension of stay or change of status** portion of the petition; however, the petitioner may file a Motion to Reopen or a Motion to Reconsider a decision denying an extension of stay or change of status.

In addition, there are **NO** appeal rights for denials where evidence does not support claimed exemption from the **ACWIA fee**. The AAO considers the petition not properly filed if the ACWIA fee is not paid.

Abandonment Denials

Introduction

An abandonment denial is sent when the petitioner fails to respond to an RFE notice within the allowable time. The file copy of the RFE shall be stamped with "NO RESPONSE".

Before preparing an "Abandonment Denial", look in CLAIMS to verify whether a response has been received and/or if the address has changed.

Refer to the table below for processing abandonment denials after CLAIMS verification.

If CLAIMS shows...	Then...
That a response has been received,	See FCU to obtain the response.
The address has changed,	Instruct clerical to re-send the notice.
No response has been received and the address has not changed,	<ul style="list-style-type: none"> • Update the case as abandonment denied, • Prepare the "H1" or "H2" (for multiple RFEs) in CG.

CLAIMS Updating for Abandonment Denials

Follow the steps below to update Abandonment Denials in CLAIMS.

Step	Action
1	Perform all necessary TECS, NSEERS, and ADIS checks.
2	Access "GUI Adjudications".
3	Wand or enter the receipt number of the case.
4	Press [F10].
5	<ul style="list-style-type: none"> • Select "DENY THE CASE". • Select "ORDER ABANDONMENT DENIAL NOTICE".
6	Release the "SUPERVISORY HOLD" on all denial orders: <ul style="list-style-type: none"> • Press [ALT] and [F8] simultaneously. • Type in your user ID number along with your four-digit password. • Press [F4].
7	Follow guidance in the <i>Distribution of Work After Updating</i> section.

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Abandonment Denials, Continued

No Appeal Rights for Abandonment Denials

There is no provision for an appeal of a petition denied for abandonment. A motion to reopen/reconsider may be filed. The motion can only be granted if the petitioner meets one of the three categories of eligibility.

[Refer to the Motions and Appeals SOP for further information regarding motions filed on abandonment denials.]

Distribution of Work after Updating

Brown Files Requiring Clerical Action

All brown work that requires a clerical action should be NFTSd to AI0002 and dropped off in the designated work sort area. The work should be bundled and/or labeled accordingly (i.e., releases, originals to be returned, RFEs, denials, etc.).

If the file requires clerical to perform this action...	Then place file on this clerical pending shelf...
RFE,	I-129 T/O.
Denial,	I-129 ORDERS.
Abandonment,	ABANDONMENTS.
Withdrawal,	G-1.

Other Brown (Non-clerical) Work

All other brown work, which does not require clerical action, should be NFTSd to SC3000 and dropped off in the designated work sort area. The work should be bundled and/or labeled accordingly to show exactly where it should be routed (i.e., records, VSC CFU, RFE shelf, etc.).

If you have taken this action...	Then place file on this shelf in FCU...
RFE,	T/O Business Shelf.
Approved or denied,	RECORDS.

Premium Processing Files

See Premium Processing SOP for guidance on processing these cases.

Chapter 11: Appendices

References

General Sources

- Immigration and Nationality Act (INA) Sections 101 (a)(15)(H)(i)(b) and 214
- 8 CFR 214.1 and 214.2(h) - USCIS Regulations
- 22 CFR 41.53 – Department of State Regulations
- 20 CFR, Parts 655 and 656 - DOL Regulations
- Operation Instructions (OI) Section 214.2(h)
- Adjudicator's Field Manual, Chapters 30 and 31 (ECN/Adjudications Site)
- I-129H1B National SOP
- Occupational Outlook Handbook (Reference Library and ECN)
- State Licensure Requirements - (Reference Library and ECN)
- *Immigration Law and Procedure*, Gordon and Mailman, Vol 1 Chp 20 (Reference Library)
- AC21 (Memo under I129 Memos on the Adjudications/ ECN site)
- Autotext Series 1800-2999 and 4900-4929
- I-129 Denial Letters

Continued on next page

References, Continued

Precedent Decisions

Refer to the table below for precedent decisions most commonly applied to the adjudication of the Form I-129.

Decision	Source	Summary
<i>Matter of IT Ascent, Inc.</i>	USCIS Adopted Decision, October 18, 2005	When outside the United States, the beneficiary was not in any status for U.S. immigration purposes. Thus, the beneficiary interrupted his period of H-1B status when he departed the country, and renewed his period of H-1B status each time he was readmitted in the United States.
<i>Matter of Essex Cryogenics Industries, Inc.</i>	14 I&N Dec. 196 (Comm. 1972)	Status accorded even though there is no labor shortage in area of employment and wage may adversely affect United States citizens and LPRs similarly employed.
<i>Matter of Bienkowski</i>	12 I&N Dec. 17 (RC 1966)	Professional experience, combined with some education may equate to a bachelor's degree.
<i>Matter of Pizarro</i>	12 I&N Dec. 537 (RC 1967)	Beneficiary not considered professional despite attainment of a degree. Profession requires a higher degree to practice as a professional.
<i>Matter of Ling</i>	13 I&N Dec. 35 (RC 1968)	The attainment of a bachelor's degree in Business Administration does not necessarily establish that the beneficiary is a member of the professions.
<i>Matter of Brantigan</i>	11 I&N Dec. 493 (BIA 1966)	The burden of proof to establish eligibility for the benefit sought rests with the petitioner.
<i>Matter of Caron International, Inc.</i>	19 I&N Dec. 791 (Comm. 1988)	Defines a "professional position".

Continued on next page

References, Continued

Chronology of H-1B Guidance and Policy Memoranda

Refer to the table below for guidance and policy memoranda relative to the adjudication of I-129 H-1B petitions, available on the DIV IV ECN page under I-129 Memos.

Date of Memo	Title of Memorandum	Author
1/08/10	Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements	Donald Neufeld
5/30/08	Supplement Guidance Relating to Processing of H-1B petitions in connection with extension provisions under AC21 sections 106(a) and 104(c) and Guidance relating to processing of H-1B petitions requesting concurrent employment on behalf of H-1B cap exemption.	Donald Neufeld
3/21/08	Guidance on accepting and adjudicating H-1B petitions when a required license is not available due to state licensing requirements mandating possession of a valid immigration document as evidence of employment authorization.	Donald Neufeld
12/05/06	Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year	Michael Aytes
06/06/06	Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on § 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)	Michael Aytes
12/27/05	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) (This memo reissues the prior guidance of May 12, 2005, without change except to clarify the answer to question 1 in Section I.)	Michael Aytes

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References, Continued

Chronology of H-1B Guidance and Policy Memoranda (continued)

Date of Memo	Title of Memorandum	Author
10/21/05	Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants (a/k/a Recapture Memo)	Michael Aytes
9/23/05	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 th Year (a/k/a Perm Memo)	William R. Yates
5/12/05	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)	William R. Yates
04/05/05	Revised Enhanced Processing Instructions	William R. Yates
4/23/04	The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity.	William R. Yates
1/8/04	Lifting of Numerical Cap on Mexican NAFTA Nonimmigrant Professionals ("TN") and Free Trade Agreements with Chile and Singapore	William R. Yates
8/4/03	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)	William R. Yates
4/24/03	Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act	William R. Yates
11/27/02	Guidance on Adjudication of H-1B Petitions filed on Behalf of Nurses	Johnny N. Williams
3/18/02	Enhanced Processing Instructions	Johnny N. Williams

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References, Continued

Chronology of H-1B Guidance and Policy Memoranda (continued)

Date of Memo	Title of Memorandum	Author
11/20/01	Social Security Cards and the Adjudication of H-1B Petitions	Thomas E. Cook
6/19/01	Initial Guidance for Processing H-1B Petitions Affected by the "American Competitiveness in the Twenty-First Century Act"	Michael D. Cronin
6/18/01	Travel After Filing a Request for a Change of Nonimmigrant Status	Thomas E. Cook
1/29/01	Interim Guidance for Processing H-1B Applicants for Admission as Affect by the American Competitiveness in the Twenty -first Century Act of 2000	Michael A. Pearson
05/25/00	AFM Update: Revision of March 14, 2000 Dual Intent Memorandum	Michael D. Cronin
12/19/97	License Requirements for H-1B Physicians	Kathy A. Redman
1/19/96	Amended H-1B Petitions	Yvonne M. LaFleur
12/29/95	Interpretation Of The Term "Itinerary" Found in 8 CFR 214.2(h)(2)(i)(B) As It Relates To The H-1B Nonimmigrant Classification	Michael Aytes
11/13/95	Supporting Documentation for H-1B Petitions	
7/10/95	Validity Period of I-129 Petitions	John W. Brown
06/8/95	Ability to Pay the Prevailing Wage in H-1B Cases	John W. Brown
05/19/93	Determining Educational Equivalencies in Petitions Involving Specialty Occupations	James A. Puelo
06/18/91	Strikes and Work Stoppages and their Effect on H Petitions and Applications	Eastern Service Center

H-1B Local Adj Guide Revisions

Historical Revisions to SOP

The revisions below represent changes that were made to the H-1B Local Adjudicator's Guide prior to the current revision date.

Revision #	Date	Subject	Pages
59	5/09/11	Updated the Link to the latest memo for the list of organizations ineligible for approval of immigrant and nonimmigrant petitions, effective 4/26/2011.	29
60	5/25/11	Updated the Link to the latest memo for the list of organizations ineligible for approval of immigrant and nonimmigrant petitions, effective 5/16/2011.	29
60		Added time spent as an HSC to the exceptions to the time limits.	71
60		Changed the reference source for inadmissible aliens from Note 1 to Note 2 in the Adjudicator's Field Manual, Chapter 30, Section 30.2(c)(3).	109
61	07/01/2011	Updated the Link to the latest memo for the list of organizations ineligible for approval of immigrant and nonimmigrant petitions, effective 06/24/2011.	36
62	7/28/11	Added cap exempt cases to those cases under CSC jurisdiction.	14
62		Provided direction for determining if the beneficiary is requesting admission as a "new" H-1B alien or readmission for the remainder of the 6-year period, on the most recent Form I-129.	31
62		Updated the Link to the latest memo for the list of organizations ineligible for approval of immigrant and nonimmigrant petitions, effective 07/22/2011.	33
62		Added direction for deciding AC21 106 eligibility if the I-140 was denied or revoked less than 33 days prior.	96
62		Added direction for excusing Early Termination of the 3-year Period of Employment for a J-1 foreign medical graduate.	120
62		Changed the contact information for email to be sent to Division IV Waiver POC to request evidence that the J-1 waiver applicant is in the Consolidated Consular Database (CCD).	137
63	9/22/11	Added guidance pertaining to Part 6 of Form I-129, relative to the release of controlled technology.	18 & 19

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H-1B Local Adj Guide Revisions, Continued

Historical Revisions to SOP (continued)

Revision #	Date	Subject	Pages
68	4/25/12	Changed <i>Revisions</i> section to indicate that prior revisions are now listed in a separate document.	11
		Added direction that the original signed petition should not be returned to the petitioner when an RFE is sent for completion of page 5, part 6, of Form I-129.	20
		Added direction to change the degree information in CLAIMS if converting a case filed under the master's cap to a regular cap case by removing MAS in CLAIMS and replacing it with REG, and to notate in red on the I-129 H-1B Data Collection Supplement.	29
		Revised to delete the link, but provide access instructions, for the memo which provides the list of organizations ineligible for approval of immigrant and nonimmigrant petitions.	35
		Corrected sections of law discussing the LCA filing process.	37
		Corrected section of law that defines Agent.	39
		<ul style="list-style-type: none"> • Reformatted the table for determining the validity period when right to control issues are present. • Added direction to check CCD for any amended petition which requests a COS from a prior consular approval. 	44
		Removed the link to the Benefit Fraud and Compliance Assessment and added direction for accessing the document.	45
		Corrected the section of law that discusses models.	54
		Revised formatting and added direction to bring HSC cases to SISO.	55
		Removed direction to consult with SISO before taking action on DOD specialty occupation petitions. These cases must go to an ISO3 for adjudication.	69
		Reformatted entire <i>AC21 Adjudication</i> section.	96-103

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H-1B Local Adj Guide Revisions, Continued

Historical Revisions to SOP (continued)

Revision #	Date	Subject	Pages
68	4/25/12	<ul style="list-style-type: none"> Revised direction for processing AC21 request based on I-485. Changed country of nationality to country of birth in determining visa availability. 	98
		Corrected letter to be used when I-485 was approved prior to requested start date.	101
		Revised the direction for petition notations to be made when adjudicating AC21 requests.	103
		Revised direction to change name on petition to that indicated on either the passport or visa, whichever document was issued later.	143
		Removed the links to H-1B Guidance and Policy Memoranda. These documents may all be accessed on the Division IV ECN page.	163-165
		Removed all prior revisions from the back of this document.	
69	1/14/13	Revised to indicate that prior revisions are now found at the end of this document.	10
		Adding guidance for processing I-539 riding with I-129 filed more than six months prior to date of need.	15
		Added guidance for determining if right to control should be re-adjudicated when an amended petition is filed.	43
		<ul style="list-style-type: none"> Revised to provide clarity in determining passport validity requirements. Added table with guidance for determining RFE requirements when record lacks evidence of a valid passport. 	116
		Added <i>Name Discrepancies</i> block to provide instruction for petition annotations and updating when name discrepancies are present on the passport and/or visa.	117
		Revised block which addresses COS or EOS requests by inadmissible aliens and added relative section of law.	119

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H-1B Local Adj Guide Revisions, Continued

Historical Revisions to SOP (continued)

69	1/14/13	Added guidance for processing requests to excuse early termination of 3-year employment period by foreign medical graduates granted a Conrad Waiver.	121
		<ul style="list-style-type: none"> • Added guidance to the <i>Approval Processing</i> section for forwarding duplicate petitions and RFE responses to the KCC. • Added guidance to the <i>Approval Processing</i> section for forwarding duplicate petitions to the KCC for expedited requests. 	138
		<ul style="list-style-type: none"> • Revised to indicate that beneficiary must be in valid H1B status if cased is updated with approval phrase 15, <i>Concurrent Employment</i>. • Revised the purpose of approval phrase 16, <i>Change in Employment Conditions</i>. 	144
		Added notation indicating that cases updated as <i>Workers Visa Exempt – POE Notified by Fax/Phone</i> are no longer faxed to the POE.	145
		Added instruction to verify payment of ACWIA fee, border security fee, and fraud fee if petitioner has incorrectly indicated that the petition is an amended petition.	147
		Added historical revisions to this document.	162-179
70	2/6/13	Revised instructions in <i>Duplicate Petitions</i> block to indicate that a copy of the sent RFE should be attached to the duplicate petition going to the KCC, if a duplicate RFE response is not provided.	137
		<ul style="list-style-type: none"> • Added clarification to the purpose of approval phrase 16. • Added notation that approval phrase should not be used if beneficiary is consular processing. 	142

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H-1B Local Adj Guide Revisions, Continued

Historical Revisions to SOP (continued)

Revision #	Date	Subject	Pages
71	3/28/2013	Removed all internal links within this document.	throughout
		Revised description of the <u>duplicate filings rule</u> and added a link to the relative section of 8 CFR.	26
		Revised the list of those <u>subject to the CAP</u> to include the beneficiary that previously worked as an H-1B nonimmigrant at a cap exempt organization, was not previously counted towards the cap, and now seeks to work for a non-cap exempt organization	27
		Revised the list of situations defined as being <u>cap exempt</u> to indicate that exemption is due to the petitioner's status as, or to the beneficiary's employment at, a cap exempt organization.	28
72	4/11/13	Added <i>Master's Degree from Unaccredited Institution</i> block to provide guidance if case is filed under master's cap and master's degree is not from an accredited U.S. institution of higher education.	28
73	8/11/13	Revised jurisdiction guidance for California Service Center (CSC).	15
		Revised "When to File" guidance for I-129 petitions filed more than six (6) months prior to requested employment date.	16
		Deleted "How to Admin. Close the Case Instructions."	17
		Revised guidance and table to determine if an alien is seeking admission as a "new" H1B alien or readmission for remainder of the 6-year period.	34

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H-1B Local Adj Guide Revisions, Continued

Historical Revisions to SOP (continued)

73	8/11/13	Deleted H-1B Dependent employer with more than one location and 10/25/10 from the employer employee relationship criteria. Changed "Summary" of Findings to "Statement" of Findings.	43
		Added processing instructions for potential self-petitioning EIR cases.	44
		Deleted H1B Benefit Fraud and Compliance Assessment 10/25/10 Criteria.	46-47
		Defined status used to calculate Recapture/Remainder of Time.	82
74	9/6/13	Added footnote number "4" (page 114) and footnote text that provides guidance when beneficiary's status has expired/will expire prior to "from" date.	112, 113
		Added guidance to annotate "Remarks" block when limiting dates.	137
		Added Guidance for processing cases with expired dates.	13

Revision #	Date	Subject	Pages	#KM
75	10/7/13	Deleted erroneous text.	113	789
		Corrected Map Titles to eliminate the second "continued" in "Right to Control, continued"	41-46	
		Changed Map Titles from "Petitioner Fraud" to "Troubled Asset Relief Program (TARP)"	46-48	776
		Rearranged blocks in the Beneficiary Requirements section to provide a more logical sequence.	55-77	
76	11/17/13	Added expired validity date reference note.	111	973
77	11/23/13	Added new section outlining requirements and instructions to check Casebook database.	pp. 124-5	1008