

## **BIRT Byte: What Is the AC21 Requirement to File Form I-485 Within One Year of a Visa Number Becoming Available?**

*By AILA's Business Immigration Response Team<sup>1</sup>*

Section 106(a) of the American Competitiveness in the Twenty-First Century Act (“AC21”) permits H-1B holders to extend their stay past the sixth year in one-year increments if a labor certification or I-140 petition was filed on the alien’s behalf at least 365 days ago and a final decision has not yet been made to deny the alien’s permanent residency application. The statutory text reads as follows:

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 on whose behalf a petition under section 204(b) of that Act to accord the alien immigrant status under section 203(b) of that Act, or an application for adjustment of status under section 245 of that Act to accord the alien status under such section 203(b), has been filed, if 365 days or more have elapsed since—

- (1) the filing of a labor certification application on the alien’s behalf (if such certification is required for the alien to obtain status under such section 203(b)); or
- (2) the filing of the petition under such section 204(b).

However, USCIS regulations limit these 1-year extensions as follows:

*(10) Limits on future exemptions from the lengthy adjudication delay.* An alien is ineligible for the lengthy adjudication delay exemption under paragraph (h)(13)(iii)(D) of this section [specifically referring to 1-year H-1B extensions] if the alien is the beneficiary of an approved petition under section 203(b) of the Act and ***fails to file an adjustment of status application or apply for an immigrant visa within 1 year of an immigrant visa being authorized for issuance based on his or her preference category and country of chargeability. If the accrual of such 1-year period is interrupted by the unavailability of an immigrant visa, a new 1-year period shall be afforded when an immigrant visa again becomes immediately available.*** USCIS may excuse a failure to file in its discretion if the alien establishes that the failure to apply was due to circumstances beyond his or her control. The limitations described in this paragraph apply to any approved immigrant visa petition under section 203(b) of the Act, including petitions withdrawn by the petitioner or those filed by a petitioner whose business terminates 180 days or more after approval.<sup>2</sup>

---

<sup>1</sup> Special thanks to BIRT Committee members Danielle Rizzo and Alex Dgebuadze for their contributions to this practice resource.

<sup>2</sup> See 8 C.F.R. § 214.2(h)(13)(iii)(D)(10) (emphasis added).

In other words, if a foreign national with only one year of H-1B status remaining whose priority date is current (based on one or more I-140 approvals from prior employment) fails to file an I-485 within 1 year of an immigrant visa number becoming available, he or she is ineligible to request further 1-year H-1B extensions. This provision begs the question of whether DHS considers a visa number to be “available” when a person’s priority date is current under the “Final Action Dates” or the “Dates for Filing” in the Visa Bulletin.

### **Spoiler Alert: It’s the Final Action Dates**

DHS has clarified in the High Skilled Workers Final Rule<sup>3</sup> that for purposes of determining when an individual becomes ineligible for the lengthy adjudication delay exemption, DHS will look to see if he or she failed to apply for adjustment of status or an immigrant visa within 1 year of the date an immigrant visa is authorized for issuance based on the applicable Final Action Date in the Visa Bulletin as opposed to the Dates for Filing date.

The regulatory language at 8 C.F.R. § 214.2(h)(13)(iii)(D)(10) does not spell this out explicitly, but does refer to the “immigrant visa being authorized for issuance,” which is consistent with the “Final Action Date” as opposed to the “Dates for Filing.” This interpretation is made more explicit in the preamble to the Final Rule on page 82450, stating:

*Comment.* A few commenters objected to the provision that makes an individual ineligible for the lengthy adjudication delay exemption if he or she fails to file an application for adjustment of status within 1 year of the date an immigrant visa becomes available. Commenters thought that the 1-year requirement is unnecessary, is beyond DHS's legal authority, is contrary to the statute, and would force inappropriate concurrent or premature filings. ...

*Response.* In section 106(a) of AC21, Congress provided exemptions to the general 6-year limitation on H-1B admission for certain individuals who experience lengthy adjudication delays in the processing of their applications for adjustment of status. However, in section 106(b), Congress placed a 1-year temporal limitation on the extension period afforded to these individuals. The intent of this exemption was to help facilitate the adjustment of status of those individuals whose process was stymied due to adjudication delays. Allowing foreign workers to benefit from the exemption when they do not file applications for adjustment of status after an immigrant visa becomes immediately available, may allow such workers to remain in H-1B status indefinitely, which would run counter to the purpose of the statute. See S. Rep. No. 260, at 23. To avoid this result, DHS is confirming that beneficiaries of section 106(a) must file an application for adjustment of status within 1 year of immigrant visa availability.

[...]

The final rule also retains current policy that alleviates concerns raised by commenters about the 1-year filing requirement. Specifically, the rule resets the 1-

---

<sup>3</sup> 81 Fed. Reg. 82398, 82450 (November 18, 2016).

year clock following any period in which an application for adjustment of status or immigrant visa could not be filed due to the unavailability of an immigrant visa. It also authorizes USCIS to excuse the failure to timely file such an application, as a matter of discretion, if an individual establishes that the failure to apply was due to circumstances beyond his or her control. ***The final rule further clarifies that for purposes of determining when an individual becomes ineligible for the lengthy adjudication delay exemption, DHS will look to see if he or she failed to apply for adjustment of status or an immigrant visa within 1 year of the date an immigrant visa is authorized for issuance based on the applicable Final Action Date in the Visa Bulletin. See final 8 CFR 214.2(h)(13)(iii)(D)(10).***<sup>4</sup>

Thus, in order to retain eligibility for a post-6<sup>th</sup> year H-1B extension under AC21 section 106, an individual must file his or her I-485 application within one year of his or her priority date becoming current under the “Final Action Dates” listed in the Visa Bulletin, unless retrogression occurs within that one year period, in which case the clock will start ticking on a new one year period once the individual’s priority date once again becomes current under the “Final Action Dates.” In addition, USCIS may excuse a failure to file during this window if the failure to do so was due to circumstances beyond his or her control.

---

<sup>4</sup> *Id.* (emphasis added).