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Efren Hernandez, Esq.
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111 Massachusetts Avenue, NW, 3rd Floor
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Dear Mr. Hernandez:

Several months ago we talked about an issue that has been "kicking around" for several years, but has remained unresolved. The issue concerns the scope of the so-called H-1B portability provision of the Act.[1] Briefly, under that provision, an H-1B nonimmigrant, if otherwise eligible, may commence employment with a new employer upon the filing by that new employer of an H-1B petition on the worker's behalf.

I'm writing to ask whether an H-1B worker who's employed by a cap-exempt employer can switch from cap-exempt employment to cap-subject employment *upon the filing*[2] of an H-1B petition by that cap-subject employer in a period in which no H-1B numbers are available?

Here's a typical example: A biochemist is employed by a cap-exempt university in H-1B status under a petition valid through June 2008. A pharmaceutical company files a cap-subject H-1B petition for him on April 2, 2007, asking for a petition start date of October 1, 2007. The

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[1] INA § 214(n), 8 USC § 1184(n) provides:

Increased portability of H-1B status.—

(1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(H)(i)(b) of this title is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a) of this section. Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

(2) A nonimmigrant alien described in this paragraph is a nonimmigrant alien--

(A) who has been lawfully admitted into the United States;

(B) on whose behalf an employer has filed a nonfrivolous petition for new employment before the date of expiration of the period of stay authorized by the Attorney General; and

(C) who, subsequent to such lawful admission, has not been employed without authorization in the United States before the filing of such petition.

[2] By "filing," I mean that the case has been receipted in by the USCIS.

underlying labor condition application is valid from April 2, 2007 through April 2, 2010. The biochemist would like to begin the new job as soon as the filing receipt is issued, let's say on April 13, 2007.

Can you confirm that the worker can "port" to the pharmaceutical company on April 13, and remain in an employment authorized status until October 1, 2007, when the new petition takes effect? Please note that there are no "cap gap" issues involved since the first petition is valid through June 2008, and that the petition would also be requesting an extension of H-1B status.

In our earlier discussions on this question, we pointed out that there is ample authority in the law to conclude that employment authorization in this case—even when H-1B numbers will not be available until October 1, 2007—can begin on the date the new H-1B petitioner files the cap-subject petition.

For one thing, INA § 214(n) permits the commencement of H-1B *employment*, and not necessarily H-1B *status*. The statutory language at INA § 214(n)(1) is quite clear and provides that a nonimmigrant alien previously issued an H-1B visa or provided H-1B status, "is authorized to **accept** new employment upon the **filing**" of a new petition. (Emphasis added.)

Analogous support for the proposition that employment authorization begins when the foreign national switches employers in a case like this may be found in USCIS pronouncements about the scope of INA § 214(g)(6). Under that provision, if a worker "ceases" to be employed by a cap-exempt entity, he will be counted against the cap when he takes on cap-subject employment. But, if he's employed by a cap-exempt entity and takes on *concurrent* H-1B employment, even with a cap-subject employer, the petition filed by the cap-subject employer will not be counted against the cap because the worker hasn't "ceased" the cap-exempt employment. In other words, the USCIS has agreed that concurrent employment is authorized, even though an H-1B number may not be available for the cap-subject employment.

Similarly, the USCIS has confirmed that the benefits of AC21 can accrue to a beneficiary when no immigrant visa numbers are available. In a May 12, 2005 memorandum, the agency included this question and answer:

> **Question 12**. Can the 180 days that an I-485 application must be pending for I-140 portability eligibility accrue during a period when visa numbers are unavailable?

> **Answer:** Yes. The fact that a visa number becomes unavailable after the filing of the I-485 application does not stop the number of days required for I-140 portability eligibility from accruing.[3]

In other words, the fact that no immigrant visa numbers are available does not "trump" the benefits made available under the plain meaning of the statute.

Let's change the facts. Suppose a filing were to take place at a time when H-1B numbers *were* available, and the worker was going from cap-exempt to cap-subject employment. That person may port to the new job, begin working immediately upon the petition's filing, and be deemed to have been in an employment-authorized status even if four months later the petition is *denied*. Put another way, employment authorization under the portability provision does not depend upon the petition's ultimate approval, and it does not depend on whether an H-1B number is ultimately used.

Now, I do understand that there have been some other concerns raised about the H-1B portability provision because the statute also provides:

> Employment authorization shall continue for such alien *until the new petition is adjudicated*. If the new petition is denied, such authorization shall cease.

(Emphasis added.)

There are those who read this to mean that once the petition is approved, employment authorization ceases. That would mean, for example, that if a petition was filed using premium processing and was approved in 15 days, employment authorization would end after 15 days, but if a petition was filed under normal processing, employment authorization would last for as long as it took for the case to be adjudicated, maybe four months, or considerably longer. As you have pointed out, that interpretation makes no sense, because those whose petitions are pending—even those whose petitions may ultimately be denied—are in a better position than those whose petitions have been approved. Furthermore, there's another way to read the statutory provision, and that is, if the new petition is denied, such authorization shall cease but ***if the petition is approved, such authorization shall continue.***

For all these reasons, we believe that if an H-1B worker, in the circumstances we described, changes from cap-exempt to cap-subject employment in a period when no H-1B numbers are

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[3] Memorandum from William R. Yates, Associate Director for Operations, USCIS, *Interim Guidance for Processing Form I-140 Employment-Based Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*, HQPRD 70/6.2.8-P (May 12, 2005) at 7.

available, that person may start the new job upon the filing of the cap-subject petition, and may continue to be lawfully employed by the cap-subject entity under the H-1B portability provisions until new H-1B numbers become available on October 1.

Thank you for your consideration of these matters.

Very truly yours,

Naomi Schorr

NS:rt

U.S. Citizenship and Immigration Services

May 23, 2007

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Dear Ms. Schorr:

This is in response to your April 27 letter regarding the H-1B portability provisions of AC21. You ask whether the fact that an H-1B nonimmigrant is moving from cap exempt to cap subject employment during a period when there are no H-1B numbers available prevents him or her from using the portability provisions of section 214(n).

The portability provision of INA section 214(n) does not confer H-1B *status* on the beneficiary of the H-1B petition. Rather, section 214(n) provides the narrower benefit of continued employment authorization and is silent as to the actual status of the worker. As such, an H-1B worker such as the one you describe, whose entire period of employment authorization under 214(n) will be covered by a valid LCA and for whom there is no "cap gap," who meets the requirements of INA 214(n), may commence employment under that section with a new or concurrent employer notwithstanding the fact that the prior H-1B employment on which portability is based is cap exempt employment and the new or concurrent employment is cap subject employment.

As is the case in all situations in which H-1B portability is used, it is possible that the H-1B petition filed by the new employer may be denied, at which point employment authorization ceases under INA 214(n). This fact is especially important to an H-1B nonimmigrant moving from cap exempt to cap subject employment. If such an alien were to port to the new employer upon filing of the cap-subject H-1B petition, as he or she is allowed to do, and were for some reason not to receive a cap number, as was the case this year when the cap was reached on the first day of filing and not all first day filers received a cap number, the alien's work authorization under 214(n) would cease. An alien using the portability provision under these circumstances should be aware of this risk.

As you note, section 214(n) provides employment authorization until the H-1B petition is either denied or adjudicated. Congress appears to have not contemplated a situation in which H-1B status would not be immediately conferred upon the portability worker upon approval of the H-1B petition. By addressing the result of a denial but not an approval Congress seems to have assumed that the alien would immediately be covered by the approval and would no longer require the employment authorization conferred by 214(n), and

thus drafted 214(n) so that the employment authorization it provides ends upon "adjudication." I agree that a result in which an alien with a pending petition is in a better situation than one with an approved petition makes no sense. A reading of 214(n) such as the one you suggest that continues employment authorization until H-1B *status* is available is a logical one, and USCIS will explore this position in future rulemaking.

Efrén Hernandez III
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