U.S. Department of Justice
Immigration and Naturalization Service

HQOPS 70/20

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

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MEMORANDUM FOR ALL REGIONAL DIRECTORS
DEPUTY ASSOCIATE COMMISSIONER,
IMMIGRATION SERVICES
DIRECTOR, OFFICER DEVELOPMENT TRAINING FACILITY,
GLYNCO
DIRECTOR, OFFICER DEVELOPMENT TRAINING FACILITY,
ARTESIA

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Interim Guidance for Processing H-1B Applicants for Admission as Affected by the *American Competitiveness in the Twenty-first Century Act of 2000, Public Law 106-313*

On October 17, 2000, President Clinton signed into law the "American Competitiveness in the Twenty-first Century Act of 2000 (AC21)." The new law not only increases the H-1B Petitioner Fee and the numerical limitation on H-1B visas, but also modifies the manner in which they will be processed. All provisions in AC21, with the exception of a fee increase, were effective upon enactment. This memorandum is being issued to provide interim guidance to Ports-of-Entry (POEs) when processing H-1B applicants for admission. While these guidelines were developed to clarify provisions in the new law that affect the Inspections Program, it is anticipated that further guidance will be disseminated once the Immigration and Naturalization Service (INS) regulations have been drafted.

Visa portability

Visa portability provisions in AC21 allow a nonimmigrant alien previously issued an H-1B visa or otherwise accorded H-1B status to begin working for a new H-1B employer as soon as the new employer files a "nonfrivolous" H-1B petition for the alien. A "nonfrivolous" petition is one that is not without basis in law or fact. Forthcoming regulations will further clarify this standard. Since portability provisions apply to H-1B petitions filed "before, on, or after" the date of enactment, all aliens who meet the requirements may benefit from the provisions effective immediately.

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The portability provisions described in AC21 relieve the alien from the need to await approval notification from the INS before commencing new H-1B employment. In order to be eligible for the visa portability provisions: (1) the alien must have been lawfully admitted into the United States; (2) an employer must have filed a nonfrivolous petition for new employment before the date of expiration of the period of stay authorized; and (3) the alien must not have accepted unauthorized employment subsequent to his/her admission and before the filing of the new petition.

An H-1B applicant for admission who is no longer working for the original petitioner is admissible at a POE, pursuant to portability provisions in AC21, as long as certain conditions listed below 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.

1) The applicant is otherwise admissible.
2) 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).
3) 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, Arrival/Departure Record, 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.
4) 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. It must be emphasized that the burden of proof remains with the alien to prove that he or she is admissible as an H-1B and eligible for visa portability provisions described in AC21.

No evidence of an I-129, Petition for Nonimmigrant Worker, filed by the current employer

If the H-1B applicant has changed employers, but is not in possession of Form I-797 and query of CLAIMS shows no evidence that a new petition has been filed, the applicant is not admissible in H-1B status and should be processed accordingly. Generally, an alien who lacks

evidence of a pending petition should not be processed as an expedited removal, unless there is evidence of fraud or misrepresentation.

The original petition has expired

If the original petition has expired, the applicant is not admissible in H-1B status, unless the applicant presents evidence that a new petition has been approved. Generally, an alien whose petition has expired should not be processed as an expedited removal, unless there is evidence of fraud or misrepresentation.

Extensions of stay

The AC21 provides for the extension of H-1B status in cases where an alien's immigrant visa petition or adjustment of status application is pending due to the per country limitation on visas or to a lengthy adjudication process[1]. Therefore, it is possible that an H-1B alien may exhaust the 6-year limit of stay[2] defined in Section 214(g)(4) of the Immigration and Nationality Act, yet remain in status due to the extension of stay provisions described in AC21. As long as an alien in these circumstances remains in status with extension(s), the alien would not accrue unlawful presence.

NOTE: In accordance with previously issued policy relating to dual intent, if the H-1B applicant has an immigrant visa petition pending, and has otherwise remained in status, he or she may be readmitted into the United States in H-1B status, provided he or she is reentering within the authorized period of stay. An H-1B alien who has an adjustment of status application pending is not required to present an I-512, Advance Parole Authorization, after travel outside of the United States. For further clarification regarding dual intent, refer to the March 14, 2000, policy memorandum, subject *AFM Update: Dual Intent Follow-up Guidance: H-1 and L-1; Pending Applications for Adjustment of Status, validity of nonimmigrant status, and the elimination of the advance parole requirement.*

Questions regarding this memorandum may be directed to either Assistant Chief Inspector Maureen Dugan at 202-305-9242 or Beverly Matthews at 202-305-9245.

[1] The AC21 defines lengthy as more than 365 days since the filing of a labor certification or petition on the alien's behalf.
[2] Petitions for Department of Defense projects may be extended to 10 years.