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**U.S. Citizenship
and Immigration
Services**

HQPRD 70/6.2.8-P

Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS

From: William R. Yates /S/
Associate Director for Operations
United States Citizenship and Immigration Services
Department of Homeland Security

Date: May 12, 2005

Re: 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) (Public Law 106-313)

Purpose

The purpose of this memorandum is to provide field offices with interim guidance on:

- (1) Processing Form I-140 petitions and Form I-485 applications in connection with the I-140 portability provision of §106(c) of AC21;
- (2) Adjudication of H-1B petitions in connection with the 7th year extension provisions of § 106(a) of AC21;
- (3) Adjudication of H-1B petitions in connection with the 7th year extension provisions of 104(c) for aliens subject to per country visa limitations; and
- (4) Adjudication of H-1B petitions in connection with the H-1B portability provisions of § 105 of AC21;

This interim guidance will only be in effect until regulations that are currently in progress are published as a final rule. The proposed rule may take a more restrictive position than this memorandum. Please note that the *Adjudicator's Field Manual (AFM)* will not be updated at this time.

Prior AC21 Guidance

On January 29, 2001, the Office of Field Operations issued a memorandum entitled "*Interim Guidance for Processing H-1B Applications for Admission as Affected by the American Competitiveness in the Twenty-First Century Act of 2002, Public Law 106-313.*" On June 19, 2001, the Office of Programs issued a follow-up memorandum entitled "*Initial Guidance for Processing H-1B Petitions as Affected by the American Competitiveness in the Twenty-First Century Act (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396).*" On February 28, 2003, the Immigration Service Division issued a memorandum entitled "*Procedures for concurrently filed family-based or employment-based Form I-485 when the underlying visa petition is denied.*" On April 24, 2003, the Office of Operations issued a memorandum entitled "*Guidance for Processing H-1B Petitions as Affected by the Twenty-First Century Department of Justice Appropriations Authorization Act (Public Law 107-273).*" On August 4, 2003, the Office of Operations issued a memorandum entitled "*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).*"

All of these memoranda remain in effect and this memorandum supplements the existing guidance.

New AC21 Guidance

New issues and questions in connection with I-140 portability cases and H-1B cases have arisen since the previous guidance memoranda were issued. Implementation of the provisions of AC21 have been further complicated by the interim rule published on July 31, 2002, allowing, in certain circumstances, the concurrent filing of Form I-140 and Form I-485. Previous Service regulations required an alien worker to first obtain approval of the underlying Form I-140 before applying for permanent resident status on the Form I-485.

This guidance is intended to address those questions and issues. This memorandum is divided into four separate sections, establishing guidelines and interim procedures for use by USCIS personnel:

- **Section I**
Processing of Form I-140 petitions and Form I-485 applications when there is a question of eligibility for I-140 portability benefits under §106(c) of AC21.
- **Section II**
Processing of H-1B petitions where there is a question of eligibility for an H-1B extension past the 6-year limit under §106(a) of AC21.

Memorandum for Service Center Directors, et al.

Subject: 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) (Public Law 106-313)

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- Section III
Processing of H-1B petitions where there is a question of eligibility for an H-1B extension past the 6-year limit under §104(c) of AC21 (aliens subject to per country limitations).
- Section IV
Processing of H-1B petitions where there is a question of the affect of H-1B portability under §105 of AC21.

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IV. Q & A ON PROCESSING OF H-1B PETITIONS UNDER THE H-1B PORTABILITY PROVISIONS

Question 1. Can an H-1B temporary worker “port” under §105 of AC21 (INA § 214(n)) from one employer to another even after the alien’s I-94 or last approved petition has expired as long as he or she is still in a “period of stay authorized by the Attorney General”?

Answer: Yes. Under certain circumstances, an H-1B alien may still be able to port to another H-1B employer even after the alien’s I-94 or last approved petition has expired. In order to port, however, such alien must meet all the requirements of INA § 214(n), including the requirement that the new petition be filed while the alien is in a “period of stay authorized by the Attorney General.” USCIS has previously determined and issued guidance explaining what constitutes a “period of stay authorized by the Attorney General.” One example would be:

Alien is in H-1B status. Employer A timely files a non-frivolous extension of the alien’s H-1B status. Alien’s original petition, approved for Employer A, expires during the pendency of the extension. Alien is then in a “period of stay as authorized by the Attorney General” while Employer A’s extension is pending. Employer B then files new petition and alien wants to port to Employer B. Under INA § 214(n), the alien should be permitted to port because he or she is in a “period of stay as authorized by the Attorney General.”

In other words, porting under INA §214 does not require that the alien currently be in H-1B status as long as he or she is in a “period of stay authorized by the Attorney General.”

Question 2. Can there be successive H-1B portability petitions filed for an alien while the previous H-1B petitions remain pending (i.e. creating a “bridge” of H-1B petitions)?

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Answer: Yes. However, to be approved every H-1B portability petition must separately meet the requirements for H-1B classification and for an extension of stay.

Question 3. **If successive H-1B portability petitions can be filed, what happens if an alien's nonimmigrant status expires while the H-1B portability petitions are pending and a petition in the "bridge" is denied?**

Answer: As stated above, to be approved every H-1B portability petition must separately meet the requirements for H-1B classification and for an extension of stay. 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 which will result in the denial of the successive requests to extend or change status.

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Questions regarding this memorandum may be directed through appropriate channels to Service Center Operations.