



October 17, 2011

Executive Summary

USCIS Stakeholder Engagement: American Competitiveness in the Twenty-First Century Act of 2000 (AC21)

Overview

On July 13, 2011, the Office of Public Engagement hosted a stakeholder engagement to discuss issues related to the American Competitiveness in the Twenty-First Century Act (AC21). More specifically, USCIS was seeking feedback regarding H-1B extensions beyond the six-year statutory limitation; calculation of the H-1B admission period; H-1B portability under INA 214(n); job flexibility and I-140 petition portability under INA 204(j); H-1B whistleblower provisions; and employer debarment issues. Below, USCIS has summarized the relevant ideas and concerns that were raised by stakeholders for each theme discussed. USCIS is considering these ideas for the formulation of additional guidance related to AC21.

Principal Themes

H-1B Extensions Beyond the Statutory Six Year Limitation

Stakeholders requested specifics on how the six year H-1B period is calculated. Stakeholders provided feedback indicating that the 10 day period of admission time should not be counted as part of the 6 years physical presence time. Several stakeholders suggested that USCIS provide a reasonable grace period for H-1B workers who have been laid off so that they have time to find new H-1B employment or take other steps as may be required in order to remain in compliance with applicable immigration laws. Some stakeholders suggested that 6 months was a reasonable grace period while others suggested that 3 months was sufficient.

In addition, stakeholders requested that when an H-1B worker leaves the United States for 24 hours or more, USCIS should count either the departure or arrival date, but not both dates, against the six year limitation. There was also a question as to whether a petitioner could combine an AC21 H-1B extension beyond the six year limitation with a petition seeking six-year H-1B remainder time. One stakeholder indicated that the rule should clearly state that the petitioner may choose to request H-1B remainder time or a new six-year period of admission.

Several stakeholders also suggested that the spouse of an H-1B worker who is also in valid H-1B status should be able to extend his or her H-1B status beyond the six year limitation based on his or her spouse's eligibility to extend their status beyond the six year limitation. Several stakeholders requested that individuals who are in H-4 status should be granted employment authorization as well.

Stakeholders sought guidance on what type of documents would be sufficient or acceptable for AC21 104(c) and 106(a) H-1B extensions and whether an attorney email would satisfy this documentary requirement. Stakeholders suggested that an email message from an attorney to their client confirming that their I-140 application has been approved should be accepted by USCIS. Stakeholders suggested that USCIS should have their employees check a beneficiary's status via their internal systems rather than requiring any evidence from the beneficiary. Additionally stakeholders suggested that a totality of the circumstance test be used when determining a beneficiary's eligibility for an extension rather than requiring any particular documentation from the applicant.

Portability of H-1B

Stakeholders suggested that anyone who has held an H-1B visa in the past should be able to qualify for H-1B portability under INA 214(n). Stakeholders wanted USCIS to clarify that the individual can currently be in any status and be granted an extension if they meet the three prong test. Stakeholders had questions regarding the status of individuals who may be in higher education and have a lapse in their employment during the summer months. Stakeholders also provided feedback indicating that it would be helpful to have some clarification via rulemaking as to how much time a beneficiary would have to go from one employer to another without losing their status.

It was suggested by some stakeholders that there should be a cap grace period for beneficiaries who change from a cap-exempt to a cap subject position and that a particular time period should be permitted during the change-over from the original H-1B petitioner to the new H-1B petitioner while the new H-1B petition is pending adjudication by USCIS.

Stakeholders also indicated that if an applicant has their I-140 approved, yet cannot file an I-485 because there is no visa available, they should still be eligible to apply for and obtain an EAD card. Some stakeholders suggested that USCIS should implement an application process for adjudication of I-140 portability requests. This system should allow for tracking of applications and issuance of Requests for Evidence (RFE) by USCIS to resolve any discrepancies. Stakeholders indicated that this new application process should be part of the I-140 process and therefore should not have additional filing fees. Other stakeholders suggested that an application for I-140 portability should not be required.

H-1B Whistleblower Provision and Employer Disbarments:

Stakeholders indicated that whistleblower provisions were drawn too narrowly and that these provisions should include protections (including a grace period) for employees of employers who are violating the regulations given that these individuals may be considered out of status if their employer is not paying the correct wage. Stakeholders suggested an open-market employment authorization for those H-1B workers who have been fired or lose their jobs due to whistle blowing activities by another employee against their employer. Other stakeholders indicated that if an H-1B worker is mistreated and they want to move to a different employer, it is sometimes hard for that employee to get necessary documentation from the prior employer. Stakeholders suggested that in such cases, USCIS should accept an attestation from the employee regarding the employer's refusal to provide the necessary documentation about the prior employment.

Next Steps

USCIS will review issues raised during the teleconference and consider the feedback during rulemaking.