CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

NEW INTERPRETATIONS ON AC21

Posted on June 7, 2008 by Cyrus Mehta

by
Cyrus D. Mehta*

The US Citizenship and Immigration Services (USCIS) issued an important

Memorandum by Donald Neufeld (Neufeld Memo),[1] dated May 30, 2008, providing guidance on various provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). AC21 allows beneficiaries of H-1B petitions to extend their H-1B status beyond the maximum limit of six years while the permanent residency process has not yet been completed. AC21 also provides job flexibility for certain aliens who have a pending adjustment of status application for more than 180 days.

The Neufeld Memo is particularly important as it applies AC21 to changes that were made by the Department of Labor (DOL) concerning the validity of labor certifications.

This article highlights some of the important interpretive guidance in the Neufeld Memo, but also advises practitioners to advocate positions on behalf of their clients that have not been addressed in the Neufeld Memo.

What impact do the changes in DOL's regulation provisions have on the ability to extend the H-1B status beyond 6-years through AC21?

The DOL rule at 20 CFR §656.32, which took effect on March 28, 2005, provides for the revocation of labor certifications by the DOL even after approval. A more recent rule, which took effect on July 16, 2007, 20 CFR §656.30(b), provides for a 180-day validity period for labor certifications that are approved on or after July 16, 2007. According to 20 CRR §656.30(b), if a labor certification is not filed with the USCIS with an accompanying I-140 petition within the 180 day period of the validity of the labor certification, it is no longer valid.

Until the Neufeld Memo, it was possible to argue that an expired labor certification could still be used to extend an alien's H-1B status beyond six years under §106 (a) of AC21. Under that provision, so long as a labor certification was filed 365 days prior the expiration of the H-1B sixth year, the H-1B status could be extended in one-year increments. After all, §106(a) has always been expansively interpreted by the USICS to the extent that an alien could utilize the labor certification filed by another employer to extend H-1B status beyond six years with a different employer.[2]

According to the Neufeld Memo, these extensions, under §106(a) of AC21, will continue unless a final decision is made to:

(i) Deny the application for labor certification;
(ii) If the labor certification is approved, to revoke the approved labor certification;
(iii) Deny the EB immigrant petition; or
(iv) Grant or deny the alien's application for an immigrant visa or for adjustment of status.

The Neufeld Memo now accounts for the DOL's ability to revoke a labor certification, and such a labor certification cannot be used to seek an H-1B extension beyond six years under §106(a). This policy is less controversial. More problematic is the policy set forth in the Neufeld Memo, which states that the USCIS will not grant an H-1B extension under AC21 §106(a) if at the time the extension request is filed, the labor certification has expired by virtue of not having been timely filed in support of an EB immigrant petition during the 180-day validity period.

Practitioners who wish to challenge this interpretation in federal court can rely on an AILA Practice Pointer.[3] This Practice Pointer, in addition to demonstrating the expansive reach of §106(a), also notes that the 180 day validity period is a DOL rule, which should not impact the hitherto expansive interpretation of §106(a). The DOL recently promulgated its rule to ensure that the labor market conditions that existed when the application was filed have not significantly changed since the filing of the I-140 petition, and the policy behind the DOL's rule should not impact the Congressional intent behind AC21, which was to relieve H-1B beneficiaries of the six-year limitation when a labor certification was timely filed.

AC21 §104(c) H-1B Extensions for Aliens Subject to Per Country Visa Limitations

The Neufeld Memo clarifies that a 3-year extension under §104(c) of AC21 can only be granted if the alien is the beneficiary of an approved I-140 petition and is eligible to be granted legal permanent residence but for the per country limitation in the preference category or if the entire preference category is unavailable.

The Neufeld Memo instructs adjudicators to review the Department of State Immigrant Visa Bulletin that was in effect at the time of filing of the Form I-129 petition. If, on the date of filing of the H-1B petition, the visa bulletin shows that the alien was subject to a per country limitation in accordance with the alien's immigrant visa priority date, or if the entire preference category was unavailable, then the H-1B extension request under the provisions of §104 (c) of AC21 may be granted for a period of 3 years. This provision can be relied upon even if the labor certification was filed within the 365 days of the sixth year in H-1B status.

Unfortunately, the Neufeld Memo indicates that the I-140 petition must be approved, although this is contrary to the statute.

According to §104(c) of AC21:

> any alien who –
>
> > (1) is the beneficiary of a petition *filed* under section 204(a) of that Act for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act; and
> > (2) *is eligible to be granted that status* but for application of the per country limitations applicable to immigrants under those paragraphs,

may apply for, and the Attorney General may grant, *an extension of such nonimmigrant status* until the alien's application for adjustment of status has been processed and a decision made thereon. (emphasis added).

The clear and unambiguous language of the statute indicates that so long as an I-140 petition is *filed* and the alien is incapable of adjusting status but for the visa unavailability for the applicant in the relevant preference category, he/she is eligible for an extension of his/her non-immigrant status for three year

increments. Further, USCIS procedures, which were promulgated after AC21, permit the concurrent filing of an I-140 petition and I-485 adjustment application, thus making an alien "eligible" for the benefits of adjustment before the I-140 is approved.[4] An approved I-140 petition, in other words, is not needed then to file an adjustment application and receive the ancillary benefits of that application (i.e. an employment document valid for open-market employment and travel privileges). While there is a statutory basis to argue that an I-140 need not be approved in order to get the benefit of §104(c) of AC21, the Neufeld Memo has explicitly stated that there needs to be an approved I-140. Practitioners should continue to remind the USCIS that the Neufeld Memo's interpretation is contrary to that of the plain language of §104(c). In any event, the need to make such an argument will be obviated if the USCIS re-institutes premium processing for I-140 petitions, thereby allowing for swifter approvals.

Portability Guidance under AC21 §106(c), INA §204(j)

Can an alien exercise portability after the adjustment of status application has been pending for more than 180 days but the I-140 petition either remains unadjudicated or has been denied?

The Neufeld Memo incorporates the Appeals Administrative Office (AAO) decision in *Matter of Al Wazzan*, A95 253 422 (Jan. 12, 2005), which held that an alien cannot seek the benefit of §204(j) portability based on a denied I-140 petition or if it is "deniable." The Neufeld Memo goes on to state, "An unadjudicated Form I-140 is not made 'valid' merely through the act of filing the petition with USCIS or through the passage of 180 days." It is hoped that *Matter of Al Wazzan* does not conflict with the earlier 2005 Yates Memo.[5] Indeed, in *Matter of Al Wazzan*, the I-140 had actually been denied. The Yates Memo, addressed whether an alien could port off an unadjudicated I-140 petition, and the relevant Q&A from the revised December 27, 2005 Memo is reproduced:

> Q&A ON PROCESSING OF I-140 PETITIONS AND I-485 APPLICATIONS UNDER THE I-140 PORTABILITY PROVISIONS OF §106(C) OF AC21.
>
> Question 1. How should service centers or district offices process unapproved I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I- 140 portability provisions under §106(c) of AC21?

> Answer: If it is discovered that a beneficiary has ported off of an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied:
> A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it been adjudicated within 180 days. If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of the petition, approve the petition on its merits. Then adjudicate the adjustment of status application to determine if the new position is the same or similar occupational classification for I-140 portability purposes.
> B. If a request for additional evidence (RFE) is necessary to resolve a material issue, other than post-filing issues such as ability to pay, an RFE can be issued to try to resolve the issue. When a response is received, and if the petition is approvable, following the procedures in part A above.

The Neufeld Memo does not appear to contradict the interpretation in the Yates Memo. In fact, it states that *Al Wazzan* is consistent with the earlier guidance. Although the Yates Memo suggested that an alien can port off an unadjudicated I-140, it impliedly concluded that porting could occur only if the I-140 was approved but provided a mechanism for that approval even though the alien was no longer with the employer who had filed the I-140 petition.

It remains to be seen whether the Nebraska and Texas Service Centers, which have sole jurisdiction over I-140 petitions, will be amenable to follow the Yates Memo policy and allow beneficiaries who have ported to be able to respond to a request for evidence on an I-140 petition so as to facilitate its approval.

Concurrent Employment for H-1B Cap Exempt H-1B Aliens

The Neufeld Memo positively interprets INA §214(g)(6)[6] and authorizes concurrent employment when the alien is the beneficiary of an H-1B petition approved through a cap-exempt employer, such as an institution of higher education or a non-profit organization affiliated with such an institution of higher education, who is concurrently also working for a non-exempt employer. *See* INA §214(g)(5)(a) and (b). In other words, while an alien is the beneficiary on an H-1B petition approved through a cap-exempt employer, he or she can also be the beneficiary of an H-1B petition filed concurrently through a non-exempt

employer.

The Neufeld Memo emphasizes that the beneficiary must not have ceased to be employed by a cap-exempt employer in order to be eligible for a concurrent H-1B petition that is filed by cap-subject employer. If the H-1B alien beneficiary ceases to be in the employment of a cap-exempt employer, then he or she will be subject to the H-1B numerical limitation, and the concurrent employment petition may not be approved unless a cap number is available to the alien beneficiary. If the USCIS determines that an H-1B alien beneficiary has ceased to be employed in a cap-exempt position after a new cap-subject H-1B petition has been approved on his or her behalf, USCIS will deny any subsequent cap-subject H-1B petition filed on behalf of the H-1B alien beneficiary if no cap numbers are available.

Guidance Relating to Changes in Employment by H-1B Aliens who report LCA Violations

The Neufeld Memo also breathes life into INA §212(n)(2)(C)(v), which creates protection for H-1B beneficiaries who have been retaliated against by employers. §212(n)(2)(C)(iv) prohibits an employer from retaliating against an employee who has disclosed information with respect to an employer violation under the H-1B program.

The Neufeld Memo states that if credible documentary evidence is provided in support of an H-1B petition that the alien beneficiary faced retaliatory action from former employer, then USCIS adjudicators may consider any related loss of H-1B status by the alien as an "extraordinary circumstance" as defined by 8 CFR §214.1(c)(4). The Neufeld Memo allows for additional time to acquire new H-1B employment and remain eligible to apply for change of status or extension of stay notwithstanding the termination of employment or other retaliatory action by the employer.

Can a spouse seek an H-1B extension beyond 6 years when the other spouse is the beneficiary of a timely filed labor certification?

A good argument can be made that such a spouse can seek an extension based on a reading of §106(a). Unfortunately, the Neufeld Memo does not address this issue.

On November 2, 2002, the Department of Justice Appropriations Authorization Act (DOJ Appropriations Act) took effect and liberalized the provisions of the

American Competitiveness in the 21st Century Act (AC21) that enabled nonimmigrants present in the United States in H-1B status to obtain one-year extensions beyond the normal 6th-year limitation. The new amendments enacted by the 21st Century DOJ Appropriations Act liberalized §106(a) of AC21 and now permits an H-1B visa holder to extend her status beyond the 6th-year if:

1. 365 days or more have passed since the filing of any application for labor certification that is required or used by the alien to obtain status under §203(b) of the Immigration and Nationality Act, or
2. 365 days or more have passed since the filing of an Employment-based immigrant petition under §203(b) of the Act.

Previously, §106(a) of AC21 only permitted one-year extensions beyond the 6th-year limitation if the H-1B nonimmigrant was the beneficiary of an EB petition or an application for adjustment of status and 365 days or more had passed since the filing of a labor certification application or the Employment-based (EB) immigrant petition. Even under this more restrictive version of §106(a) of AC21, as noted above, the USCIS applied a more liberal interpretation, permitting H-1B aliens to obtain one-year extensions beyond the normal 6th-year limitation where there was no nexus between the previously filed and pending labor certification application or EB immigrant petition and the H-1B nonimmigrant's current employment.

Accordingly, the H-1B spouse beneficiary should be permitted to benefit from a labor certification application that was filed and/or approved on behalf of the other spouse, because under the liberalized provisions of AC21 as amended by the 21st Century DOJ Appropriations Act, "365 days or more have passed since the filing of any application for labor certification," which the H-1B spouse will use to obtain status pursuant to §203(b).

It should be noted, however, that the 2005 Yates Memo made reference to the fact that "an H-1B spouse must meet all the requirements independently of the H-1B spouse's eligibility for a 7th year extension." *Id*. at 10. On the other hand, it can be counter-argued that the H-1B spouse is independently meeting the requirement of AC21 §106(a) by relying on her spouse's labor certification, which is "any application for labor certification that is required or used by the alien to obtain status under §203(b)."

Although a spouse will qualify as a derivative under §203(d), this provision states that the spouse is "entitled to the same status, and the same order of consideration provided in the respective subsection (§§203(a), (b) or (c)), if accompanying or following to join, the spouse or parent." It could thus be further argued that a derivative under §203(d) is in the same shoes of the principal under §203(b).

---

* **Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, is the Managing Member of Cyrus D. Mehta & Associates, PLLC in New York City. He is also an Adjunct Associate Professor of Law at BrooklynLaw School where he will teach a course on Immigration and Work. Mr. Mehta has received an AV rating from Martindale-Hubbell and is listed in Chambers USA, International Who's Who of Corporate Immigration Lawyers, Best Lawyers and New York Super Lawyers. Mr. Mehta is a former Chairman of the Board of Trustees of the American Immigration Law Foundation (2004-2006). He was also the Secretary and member of the Executive Committee (2003-2007) and the Chair of the Committee on Immigration and Nationality Law (2000-2003) of the New York City Bar. He is a frequent speaker and writer on various immigration related topics.**

[1] Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, *Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277,* HQ 70/6.2, AD 08-06 (May 30, 2008).

[2] Letter of Efren Hernandez III, INS Director, Business and Trade Services to Attorney Naomi Schorr (April 24, 2002), posted on AILA Infonet at Doc. No. 02050231; Memo, Yates, Associate Director of Domestic Operations*, Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by AC21*, HQPRD 70/6.2.8-P (May 12, 2005), posted on AILA Infonet at Document No. 05051810 (Yates Memo).

[3] Alexis Axelrad, Shawn Orme, Naomi Schorr and Crystal Williams, *Labor*

Certification Expiration and Section 106 of the American Competitiveness in the Twenty-First Century Act (AC21), posted on AILA Infonet at Document No. 08041830.

[4] 67 Fed. Reg. 49,561-64 (July 31, 2002)(amending 8 CFR §245.2).

[5] On December 27, 2005, the Office of Field Operations issued a memorandum entitled *Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)* (Public Law 106-313), posted on AILA Infonet at Document No. 06092763. This memorandum re-issued prior guidance provided in the Yates Memo without change except to clarify the answer to questions 1 in Section 1.

[6] INA §214(g)(6) reads as follows: "Any alien who ceases to be employed by an employer described in paragraph (5)(A) shall, if employed as a nonimmigrant alien described in section 101(a)(15)(H)(i)(b) of this title, who has not previously been counted toward the numerical limitations contained in paragraph (1)(A), be counted toward those limitations the first time the alien is employed by an employer other than the one described in paragraph (5)."