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US IMMIGRATION & NATIONALITY LAW

INTERPLAY BETWEEN I-140 PREMIUM PROCESSING, AC21 AND RETROGRESSION

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by
Cyrus D. Mehta*

For those who have been waiting endlessly for permanent residence as applicants for adjustment of status, three important announcements were made this week that could provide relief, but could also delay the coveted goal of obtaining a green card.

First, the US Citizenship and Immigration Services (USCIS) announced in a June 11, 2008 *Update* that it will restore Premium Processing for certain I-140 Petitions filed for alien workers in H-1B status who are reaching the end of their six years. It will become effective on June 16, 2008. Along with this announcement also came the bad news that the Employment-based Third Preference category became unavailable for July 2008, and will likely be unavailable for the rest of the 2008 fiscal year. Finally, the DHS also announced that it would issue 2-year Employment Authorization Documents for adjustment of status applicants.

Premium Processing

Starting July 16, 2008, USCIS will begin accepting Form I-907, Request for Premium Processing Service, for Forms I-140 filed for alien beneficiaries who, as of the date of filing Form I-907:

- Are currently in H-1B nonimmigrant status;
- Will reach the 6th year of their H-1B nonimmigrant stay in 60 days;
- Are only eligible for a further H-1B extension under AC21 § 104(c) upon approval of their Form I-140 petition; and

- Are ineligible to extend their H-1B status under AC21 §106(a).

What does this all mean to the layperson? The American Competitiveness in the 21st Century Act of 2000 (AC21) allows those in H-1B status who will be reaching their maximum time of 6 years to extend the status if the beneficiary is on the pathway to permanent residency.

§106(a) permits a one-year extension provided the labor certification or I-140 petition was filed 365 days or more prior to the sixth year. If the beneficiary has spent time outside the US during his or her H-1B stay, the H-1B time can be extended by the number of days that have been spent outside the US, thus extending the six years. Although the labor certification or the I-140 need not be approved to obtain the one year increment in H-1B status beyond six years, §106(a) will not apply if the labor certification or I-140 has received a final denial. In other words, if either the labor certification or I-140 petition are being appealed, the decision is not considered final and the beneficiary of the H-1B petition may still receive a one year increment in H-1B status beyond the maximum limit of 6 years.

The new USCIS guidance states that premium processing will not be available to an H-1B beneficiary who is still eligible under §106(a). On the other hand, premium processing will be available to an H-1B beneficiary who is eligible under §104(c) of AC21. §104(c) permits 3-year H-1B extensions of stay for an H-1B beneficiary, provided he or she is also the beneficiary, as the USCIS indicates, of an approved I-140 petition and otherwise eligible for lawful permanent resident status except that the employment-based preference is unavailable. Thus, with respect to §104(c) eligibility, it does not matter that the labor certification or the I-140 was not filed more than 365 days prior to the sixth year of the H-1B status.

Let's suppose the labor certification was filed in the sixth year, and approved prior to the end of the sixth year, the beneficiary is eligible for an I-140 petition to be filed subsequent to the approval on his or her behalf by the employer. According to the USCIS interpretation, an I-140 has to be approved in order for the H-1B beneficiary to avail of §104(c). Without the premium processing service, it is not likely that the I-140 would be approved before the H-1B beneficiary's sixth year. Moreover, given the retrogression in the EB-3 preference, this individual would not be eligible to file an adjustment of status (Form I-485) application and remain in status. Thus, the USCIS announcement

of restoring premium processing for an I-140 petition in this limited sense will provide relief to H-1B beneficiaries who would not have otherwise been able to seek an extension under §106(a).

However, the USCIS could have done it differently. Last week's article, NEW INTERPRETATIONS ON AC21 (June 07, 2008), argued that it was not necessary for an I-140 to be approved for an H-1B beneficiary to avail of the benefit of §104(a). It just needed to be filed, based on the plain meaning of the statute. The limited availability of premium processing to ensure that the I-140 is timely approved will permit the USCIS to perpetuate its erroneous reading of §104(c). Rather than limit premium processing to facilitate eligibility under § 104(c), it would have been better if the USICS could have restored premium processing for all I-140s prior to its scrapping last July 2007.

Finally, the American Immigration Lawyers Association (AILA) has announced, based on its liaison efforts with the USCIS, that the premium processing option is not available for those beneficiaries who have already run out of H-1B time, and who have departed the country or who are in another nonimmigrant status. AILA, however, is in ongoing discussions with USCIS on these issues and has asked the agency to consider enlarging the policy to include these cases too.

The USCIS has also indicated that the restoration of its premium processing policy for I-140 does not preclude one from also utilizing the USCIS *Expedited Criteria*

Employment-based 3rd Preference (EB-3) Category Unavailability

In its latest *Visa Bulletin* for July 2008, the Department of State (DOS) has announced that the entire EB-3 category will become unavailable beginning July 1 and will remain so for the remainder of the fiscal year 2008, which ends on September 30. The DOS further advises that "Such action will only be temporary. However, the EB-3 availability will return to the cut-off dates established for June in October, the first month of the new fiscal year."

AILA has confirmed with USCIS that adjustment of status applications will continue to be accepted and receipted through the end of June. Therefore, those who are unable to avail of either §104(a) or §106(c) of AC21, but have a labor certification approved, and their priority date is current under the June 2008 visa bulletin, should file an I-485 application on or before June 30, 2008.

Indeed, even those eligible for H-1B AC21 extensions should file their I-485s by June 30. By filing an I-485 application, an applicant can continue to remain lawfully in the US and also enjoy the incidental benefits such as employment authorization and travel permission, which is known as advance parole.

Two-Year Employment Authorization Documents

In an address on the "State of Immigration," June 9, 2008, the Secretary of the Department of Homeland Security, Michael Chertoff, announced that USCIS will begin issuing two-year employment authorization document (EAD) to individuals with a pending adjustment of status application.

On June 12, 2008, USCIS issued a *FAQ* limiting the 2-year EAD to pending adjustment applicants who have filed for an EAD and who are currently unable to adjust status because an immigrant visa number is not currently available. USCIS will continue to grant EADs that are valid for one-year for adjustment applicants who have an immigrant visa number available. Initially, EADs will only be valid for one year since they are submitted with an I-485 that can only be filed when there is an immigrant visa number immediately available. Applicants are eligible for a 2-year EAD if their immigrant visa availability date retrogresses after the I-485 has been filed. USCIS will decide whether to renew an EAD for either a one- or two-year validity period based on the most recent DOS visa bulletin. Note that the 2-year EAD will never be available to immediate relatives who have filed an I-485 application, such as spouses and parents of US citizens, as there is always visa availability for such persons. They will continue to receive the 1-year EAD.

The application for the renewal must be filed more than 90 days in advance so as to ensure that the new EAD is issued before the expiration of the old EAD. Any gap between the two EADs will result in the applicant not being authorized to work or continue working during that interval causing hardship to both the employer and the foreign national worker on the path to permanent residency.

USCIS has indicated in its latest FAQ that if an applicant has not received a decision within 90 days of the USCIS receipt date and he or she has properly filed the EAD application, the applicant may apply to obtain an interim EAD by appearing in person at the local USCIS district office by bringing proof of identity and any notices that he or she has received from USCIS in connection with the application for EAD.

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* **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.**