

Immigration Newswire
Volume 5, Issue 10
October 25, 2006

**DOL Provides Additional Guidance on Processing RIR
Conversion Requests**

As previously reported in [Immigration Newswire](#), the Department of Labor has extended the deadline by which traditional labor certifications can be converted to Reduction in Recruitment (RIR). Now all pre-PERM labor certifications can be converted to RIR.

The Department of Labor issued additional guidance on how RIR conversion requests should be processed. Following are highlights from the DOL guidance:

1.) Backlog Elimination Centers (BECs) will not delay recruitment on applications to await RIR conversion requests.

When an employer decides to convert a pending, traditional labor certification to RIR, that employer must conduct good faith recruitment for the position before submitting the conversion request. If, during the time the employer is engaging in recruitment efforts in preparation to file a conversion request, the BEC begins to process the application by beginning supervised recruitment, then any advertising conducted by the employer in preparation for RIR will be lost. *However*, DOL has stated that if an RIR conversion request is submitted to the DOL with a postmark or express courier shipping date that is before the date that DOL places a job order, DOL will accept and process the RIR request and cancel the job order.

In the past, when local DOL offices were processing labor certifications, before creation of the BECs, some local DOL offices would comply with an employer's request to delay supervised recruitment so that the employer could submit an RIR conversion request. BECs will not follow this procedure, in an effort to eliminate the backlog of applications as quickly as possible. Therefore, employers who prepare for RIR conversion by conducting good faith recruitment risk having to duplicate those recruitment efforts under the supervision of the DOL.

However, DOL has promised that beginning in November, the BECs will be publishing processing dates for traditional applications showing by month and year what filing dates they are working on. This will help employers to know when they can expect to receive recruitment instructions on their pending traditional cases and inform the decision as to whether or not to pursue an RIR conversion request. Currently they are working on applications from April 2001 and do not expect to advance the date for some time due to the volume of applications filed then.

2.) Supporting documentation required for RIR conversion request:

a.) Written request for conversion

b.) Documentation demonstrating pattern of good faith recruitment within 6 months preceding date conversion request is received by the BEC, and that U.S. workers were rejected only for lawful, job-related reasons. Must include description of recruitment process used & results of recruitment process.

c.) Contact information regarding the application, including e-mail address where reply to the RIR conversion request can be sent.

3.) RIR conversion requests should be sent to the Backlog Elimination Center where the labor certification is pending.

The employer should have been notified of the BEC to which the application was sent via a 45-day letter which includes the BEC address.

4.) RIR conversion request will not change priority date.

Unlike a request for conversion of a pre-PERM case to PERM processing, the request to convert a traditional labor certification to RIR processing cannot result in any change to the priority date, whether the RIR conversion request is approved or denied.

5.) Employer must use 100% of the current prevailing wage for the RIR.

When traditional labor certifications were filed, the Department of Labor allowed employers to pay the beneficiary only 95% of the prevailing wage. However, under current DOL rules, employers are obligated to pay 100% of the prevailing wage. When an employer requests conversion to RIR, the recruitment must be done at 100% of the *current* prevailing wage, not 95% of the prevailing wage and not the prevailing wage that was in effect when the labor certification was originally filed.

How Long Do My Consular Processing Documents Remain Valid?

As you are undoubtedly aware, priority dates retrogressed last year in the employment-based immigrant visa categories. Retrogression caught different people in different stages of applying for permanent residency. For many of our clients who were in the process of applying for immigrant visas using [Consular Processing](#), their applications had already been submitted to the U.S. consulate abroad or to the National Visa Center when visa numbers retrogressed. Depending on the country in which these individuals were applying for

immigrant visas, their applications may have included original documents such as birth certificates, police clearance certificates, etc.

For all individuals who had already submitted their consular processing applications when retrogression occurred, the question arises as to how long their supporting documents will remain valid for. The Department of State *Foreign Affairs Manual* provides conclusive guidance on this matter. It states at 9 FAM 42.65 N3,

Supporting documents that are subject to change are valid for one year. This time limitation applies to Form OF-230, Parts I and II (Application for Immigrant Visa and Alien Registration), medical examinations and police certificates from any country visited or inhabited subsequent to the previous clearances. *It does not apply to a birth certificate or a third country clearance or police certificates from an area to which the alien has not returned since its issuance.* The affidavit of support must be submitted within six months of its signature by the supporting relative, however, it remains valid indefinitely. However, because the affidavit of support is based on the Federal Poverty Guidelines in effect at the time of the visa issuance, it may need to be updated.

Does AC21 Limit Availability Of Post-6th Year H-1B Status To Those Currently Maintaining H-1B Status?

Congress passed the American Competitiveness in the Twenty First Century Act (hereinafter, "AC21") in October 2000, after the high tech boom of the 1990s and before September 11, 2001. AC21 reflects the openness to immigration during those years, and we are now left with its benefits. Unfortunately, no regulations have ever been implemented to interpret AC21's provisions. All we have as guidance are administrative memoranda leaked from USCIS, which are not binding authority. One of many unresolved questions about AC21 is whether sections 104(c) or 106(a) permit an alien to obtain a 7th or subsequent year of H-1B status when he is currently either outside the United States or in a status other than H-1B.

Section 104(c) of AC21 states that it permits a post-6th year H-1B "extension" in three year increments where certain conditions are met. It states:

Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), 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]. USCIS has interpreted this to mean that H-1B status can be extended past the 6th year in three year increments, where (1) an I-140 petition has been approved on the beneficiary's behalf; and (2) the beneficiary is unable to obtain permanent residence because a visa number is unavailable.

USCIS has never addressed in any memoranda whether AC21 § 104(c) applies only to those currently in the United States maintaining H-1B status; or whether there are cases where people who are outside the U.S. or in the U.S. in a status other than H-1B can obtain a post-6th year H-1B. AC21 § 104(c) is ambiguous in this regard because the term “extension” has multiple meanings in immigration law. On the one hand, an “extension” can refer to an “extension of stay.” Immigration regulations found at 8 C.F.R. § 214.1(c)(4) govern extensions of stay, and make it clear that, with certain exceptions, an “extension” is only available where the applicant is in the U.S. maintaining his status, and files the request for extension of stay prior to expiration of his previously authorized status. If the word “extension” in AC21 104(c) refers to an “extension of stay,” then it is possible to infer that 104(c) only applies to those who are currently in the U.S. and who are maintaining H-1B status.

On the other hand, the word “extension” in AC21 § 104(c) could also refer to an “extension of visa petition validity.” 8 C.F.R. § 214.2(h)(14) states that Form I-129, which is filed to request an extension of H-1B status, can be used simultaneously to request extension of visa petition validity. 8 C.F.R. § 214.2(h)(15)(i) goes on to clarify, “Even though the requests to extend the petition and the alien’s stay are combined on the petition, the director shall make a separate determination on each.” Thus, an alien who wishes to apply for both an extension of stay and an extension of visa petition validity at the same time must be physically present in the U.S. and maintaining H-1B status in order to receive both. However, an H-1B petition extension could be filed for an alien who (1) was previously granted H-1B status; (2) that previous H-1B petition has not yet expired; but (3) the alien is not physically present in the United States.

For example, say Company A filed an H-1B petition for Mr. Smith on October 1, 2003, and it was approved with validity dates of 10/1/03-10/1/06. Also assume that 10/1/06 will mark the end of Mr. Smith’s 6th year in H-1B status. However, Company A has filed an I-140 petition on Mr. Smith’s behalf which has been approved, and Company A has no intention of revoking that approved petition. Before Company A files the H-1B petition requesting extension of Mr. Smith’s status, Mr. Smith is called away to a family emergency abroad. Thus Company A files the H-1B petition requesting a three-year extension of Mr. Smith’s status based on AC21 104(c), and also requesting that notification of the petition approval be sent to the U.S. Consulate in Mr. Smith’s home country. The petition is filed prior to expiration of Mr. Smith’s previous H-1B and requests “extension of visa petition validity;” however, it does not request an “extension of stay” for

Mr. Smith because Mr. Smith is not currently in the United States. If the word “extension” in AC21 § 104(c) refers to “extension of stay,” it means that § 104(c) allows 3-year H-1B extensions only for those physically present in the U.S. and maintaining H-1B status. But if “extension” refers to “extension of visa petition validity,” then 104(c) can be used by aliens in Mr. Smith’s situation. The term used in § 104(c) is “extension of such nonimmigrant status,” which uses neither of the terms of art used in USCIS regulations and could feasibly mean either one.

While AC21 104(c) arguably applies to aliens who are outside the U.S., it does not appear to apply to aliens who are in the U.S. in a status other than H-1B. An alien in another status does not have an H-1B petition to extend; nor would he be requesting an “extension of stay” under 8 C.F.R. § 214.1. Instead, he would be requesting a “change of status” under 8 C.F.R. § 248.

If AC21 § 104(c) is ambiguous, § 106(a) and (b) are far worse. AC21 § 106(a) and (b), as amended by the 21st Century Department of Justice Appropriations Authorization Act, state:

(a) The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of such Act (8 U.S.C.1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since the filing of any of the following:

- (1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. 1153(b)).
- (2) A petition described in section 204(b) of such Act (3 U. S.C. 1154(b)) to accord the alien a status under section 203(b) of such Act.”

(b) EXTENSION OF H-1B WORKER STATUS.—The Attorney General shall **extend the stay** of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—

- (1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;
- (2) to deny the petition described in subsection (a)(2); or
- (3) to grant or deny the alien’s application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

[Emphasis added.] In short, § 106(a) and (b) permit an indefinite number of one-year extensions of H-1B status past the traditional six-year maximum, where either a labor certification or I-140 were filed on the beneficiary’s behalf at least 365 days ago. What is unclear is whether 7th- and subsequent year H-1Bs are available for aliens currently either outside the U.S., in the U.S. in another nonimmigrant status, or in the U.S. but out of status.

Section 106(a), taken by itself, seems to make 7th- and subsequent year H-1Bs available regardless of whether filed as an extension of stay, change of status, or request for new or continued employment for someone abroad. It simply waives application of INA § 214(g)(4) to anyone who had a labor certification or I-140 filed on his behalf at least 365 days ago. INA § 214(g)(4) is the section of the Act limiting H-1B status to a maximum of six years. It states:

In the case of a nonimmigrant described in section 101(a)(15)(H)(i)(b), the period of authorized admission as such a nonimmigrant may not exceed 6 years.

If INA § 214(g) doesn't apply, then aliens are permitted indefinite H-1B status. However, AC21 § 106(b) appears to limit this waiver. It states that such extensions of H-1B status shall only be granted in one-year increments (rather than the three-year extensions normally permitted for H-1Bs). But § 106(b) does more than this: it says an "extension of stay" shall be granted to those who qualify under § 106(a)'s requirements. Unlike AC21 § 104(c), § 106(b) actually uses the term of art "extension of stay," from which the inference can be drawn that the alien is required to be in the United States and in H-1B status in order to reap the benefits of AC21 § 106(a). However, it is not at all clear how §§ 106(a) and (b) are to be read together. The meanings of the two subsections conflict with each other. Subsection (a) states it applies to, "any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b)." This is a broad group of individuals including those currently in the U.S. in another nonimmigrant status; those out of status; and those abroad. But subsection (b) says § 106(a) applies only to those requesting an "extension of stay." This is a narrow group of people including only those currently in the U.S. in H-1B status requesting extension of stay. In effect, subsection (b) says that subsection (a) says something that it doesn't; hence, the ambiguity.

Our office's experience in filing H-1B petitions indicates that USCIS decisions on this issue are anything but consistent. In a recent case, one of our clients applied for an 8th year extension under § 106(a) while the beneficiary was outside the U.S. USCIS issued a Request for Additional Evidence (RFE) on the case. The RFE stated that in order to take advantage of § 106, the beneficiary is required to be in the U.S. and maintaining H-1B status. However, in another recent case, adjudicated by the same service center, the H-1B beneficiary had already been in H-1B status for 8 years based on AC21 § 106(a) extensions, but had changed status to H-4 as his wife's dependent because he was temporarily out of work. However, the same company re-hired him a few months later and filed a new H-1B petition invoking AC21 § 106(a) and requesting a 9th year in H-1B status. The petition was immediately approved without RFE. It is unclear whether USCIS, or even individual service centers have taken a firm stance on whether they will grant AC21 § 106(a) extensions for beneficiaries who are outside the U.S. or in the U.S. in another status, or even in the U.S. and out of status. However, in cases where options are limited, it is worth the argument that AC21 §§ 104(c) and

106(a) permit post-6th year H-1B status even for those who are not currently in the U.S. or are not currently maintaining H-1B status.

There is one option that can assist many individuals in avoiding this murky area of AC21. In October 2005, USCIS issued a memorandum clarifying its policy on granting recapture of time spent outside the United States while in H-1B (or L-1) nonimmigrant status. The memo confirms that it is now USCIS policy to allow H-1B and L-1 status holders to recapture any time spent outside the United States while in status. In order to recapture time, one must provide documentary evidence of each day spent outside the United States while in H-1B status. Examples of such documentation include, but are not limited to, flight ticket stubs, passport arrival/ departure stamps, receipts for purchases made abroad or credit card statements showing purchases made abroad. If recapture is granted, an alien will be permitted to extend his stay or reenter the U.S. in H-1B status for exactly the number of days he spent outside of the U.S. during his period of authorized admission.

An H-1B beneficiary who is outside the U.S. or who is in the U.S. in another nonimmigrant status; who has otherwise reached the end of his 6th year in H-1B status; and who spent even a small amount of time outside the U.S. during the validity period of his H-1B can file an H-1B petition seeking to recapture that time. If the recapture is granted, the beneficiary will be placed back in H-1B status, which grants him time to then file another H-1B petition, this time requesting an “extension of stay” and invoking AC21 § 104(c) or 106(a), as appropriate.

USCIS seems to be allowing aliens to recapture time spent outside the U.S. even when they are well past the 6th year of H-1B status. In the case mentioned above, where our client applied for an 8th year extension, and USCIS refused to apply AC21 106(a) to his case because he was outside the U.S., USCIS ultimately did approve the petition based on our alternative argument that he should be able to recapture time spent abroad. USCIS allowed him to accumulate time spent outside the U.S. during the entire seven years he had previously spent in H-1B status. While this is only one case, our experience suggests that it is possible to recapture any time spent outside the U.S. while in H-1B status, even when one is well past the sixth year in H-1B status.

It should also be possible to combine a recapture request with a request for an AC21 § 104(c) or 106(a) request. The May 2005 Yates memo on AC21 contains the following question and answer:

Question 1: When an alien would otherwise be eligible for an H-1B extension, is it necessary to first file a Form I-129 requesting an extension of time to allow the beneficiary to complete or nearly complete the initial 6 years, and then file an additional form I-129 requesting an extension of time beyond the 6 years?

Answer: No. Section 106(a) of AC21 allows an alien to obtain an extension of status beyond the 6-year period, when:

- A. 365 days or more have passed since the filing of any application for labor certification, Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant, or
- B. 365 days have passed since the filing of an EB immigrant petition.

Once these requirements have been met, the alien may be granted an extension beyond the 6-year maximum on or prior to the date the alien reaches the 6-year maximum. Such extensions may only be granted in one-year increments, but may be requested on a single (combined) extension request for any remaining time left in the initial 6-year period. ...

Based on the Yates memo, it would appear that a request for an H-1B extension under AC21 can be combined with another request. It therefore makes sense to combine a request for recapture with a request for extension of stay under AC21. In the event that USCIS refuses to combine the recapture request with an AC21 extension because an alien is not currently in the United States or is not currently maintaining H-1B status, they should at the very least grant the recapture request, allowing another extension of stay to be filed immediately thereafter, invoking AC21.

DOL Administrative Review Board Addresses When H-1B Employers Are Liable for Back Wages

In a September 29, 2006 decision by the Administrative Review Board (which is the highest Administrative court within the Department of Labor to hear LCA issues), DOL addressed the issue of when an employer is liable for back wages. In that case, an H-1B employer had terminated an H-1B employee by notifying her of her termination. However, because the employer never notified USCIS that the employee had been terminated (as is required by 8 CFR 214.2(h)(11)(i)(A)), and because the employer failed to pay the cost of the H-1B employee's return transportation abroad (as is required by 8 CFR 214.2(h)(4)(iii)), the employer had not made a *bona fide* termination for immigration purposes, and was therefore required to pay the employee back wages, at the prevailing wage rate, until the expiration date on the H-1B petition. In order to avoid such liability, H-1B employers should notify USCIS in writing whenever an H-1B employee is terminated, and should pay the cost of the employee's return transportation to his or her last place of foreign residence.

~ Disclaimer ~

*The information contained in this newsletter is for informational purposes only.
It does not constitute legal advice.*