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USCIS Advises on Period of Admission for H-4 and L-2 Nonimmigrants

In a [USCIS memo](#) dated December 5, 2006, USCIS stated that it will not consider time spent in H-4 or L-2 nonimmigrant status to count against the authorized period of admission for L-1 or H-1B status. For example, if a husband and wife enter the U.S. together with the husband in H-1B status and the wife in H-4 status, and spend six years here, then at the end of the six years, the wife could change to H-1B status and the husband could obtain H-4 status as her dependent. The same goes for an L-1 and an L-2 spouse.

USCIS had not previously issued guidance on the question of whether H-4 and L-2 time counts against the maximum period of stay for H-1B (six years) or L-1 (five or seven years) status. Conservative immigration practitioners therefore advised clients to consider H-4 and L-2 time as counting against the H-1B and L-1 maximum.

While the memo is a positive policy decision on the part of USCIS, it raises important questions:

- 1.) Does time spent in L-2 status count against the six-year maximum for H-1B status and does time spent in H-4 status count against the five-year maximum for L-1B status or the seven-year maximum for L-1A status?
- 2.) Does the memo apply only to H-1B/H-4 and L-1/L-2 nonimmigrants or does its rationale extend to other employment-based nonimmigrant statuses, such as R-1/R-2 as well?

These questions have yet to be answered.

BALCA Decision Raises Questions About the Definition of "Employer" for Labor Certification Purposes

In order to qualify for a labor certification filed on his behalf, an alien must possess the minimum level of education and experience required by the employer at the time the labor certification is filed, and none of the qualifying experience may have been gained with the employer that files the labor certification. In order

to determine whether experience was gained with the same employer, it is essential to define the term "employer."

In a recent decision, [*Matter of Harvest Office Services, Inc.*](#), 2005-INA-111 (12/7/06), the Board of Alien Labor Certification Appeals (BALCA) ruled that despite the fact that the employer that files the labor certification is a distinct legal entity from the employer with which the alien gained qualifying experience, the experience may be considered to have been gained with the same employer-- and therefore disqualify the alien from using the labor certification-- if there is a close relationship (e.g. in terms of corporate officers, personnel, and physical location) between the two entities.

Matter of Harvest Office Services, Inc. dealt with a pre-PERM labor certification. A question thus arises as to the extent, if any, to which the decision applies to PERM applications. Prior to PERM, labor certification regulations at 20 C.F.R. § 656.3 defined an "employer" as follows:

a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. ...

The PERM regulations, at 20 C.F.R. § 656.3, retain this definition of "employer" but add the sentence, "An employer must possess a valid Federal Employer Identification Number (FEIN)." In addition, PERM regulations at 20 C.F.R. § 656.17(i)(5)(i) state that an employer is "an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3. The comments published in the Federal Register when the PERM regulations were implemented, at [69 Fed. Reg. 77354 \(Dec. 27, 2004\)](#) indicate that despite public comments advocating that DOL "pierce the corporate veil" in determining what constitutes an "employer" for labor certification purposes, the DOL chose to simplify the definition to mean an entity with a distinct FEIN.

It would seem that the Department of Labor has modified the definition of "employer" for labor certification purposes, such that *Matter of Harvest Services, Inc.* would only apply to cases filed under the pre-PERM regulations which more broadly defined an "employer." However, it remains to be seen whether the DOL will attempt to extend the rationale of *Harvest Services* to PERM applications.

Retention of I-140 Priority Dates Where Previous I-140 Withdrawn

An alien on whose behalf an I-140 petition has been approved may use the priority date established by that petition in subsequent employment-based immigrant petition. This provision is set forth in immigration regulations found at 8 C.F.R. § 204.5(e), which state:

A petition approved on behalf of an alien under sections 203(b)(1), (2), or (3) of the Act accords the alien the priority date of the approved petition for any subsequently filed petition for any classification under sections 203(b)(1), (2), or (3) of the Act for which the alien may qualify. In the event that the alien is the beneficiary of multiple petitions under sections 203(b)(1), (2), or (3) of the Act, the alien shall be entitled to the earliest priority date. ***A petition revoked under sections 204(e) or 205 of the Act will not confer a priority date***, nor will any priority date be established as a result of a denied petition. A priority date is not transferable to another alien.

(Emphasis added).

This regulation seems to indicate that a priority date from a previously approved I-140 petition can only be retained if the I-140 has not been revoked under sections 204(e) or 205 of the Immigration and Nationality Act. Section 205 of the Act states:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition.

Thus under the law and regulations, an I-140 revoked for *any reason* will not support retention of a priority date on a later filed I-140 petition. Often USCIS revokes I-140 petitions because the I-140 petitioner requests withdrawal. 8 C.F.R. § 205.1(a)(iii)(C) states that an I-140 petition is automatically revoked upon a written request by the employer that the case be withdrawn.

Despite the law and regulations in this area, the Adjudicators Field Manual (AFM), which is the adjudications handbook for immigration officers, has recently been updated to state, "once the alien's Form I-140 petition has been approved, the alien beneficiary retains his or her priority date as established by the filing of the labor certification for any future Form I-140 petitions, unless the previously approved Form I-140 petition has been revoked *because of fraud or willful misrepresentation*."

Thus the AFM indicates that the priority date of a previously revoked I-140 petition can be retained so long as it was not revoked for fraud or willful misrepresentation. While this is contrary to the law and regulations, it appears to

be the guidance that USCIS officers will follow in adjudicating I-140 petitions request retention of a priority date.

USCIS Sends Boilerplate Requests for Evidence on All I-360 Religious Worker Immigrant Visa Petitions

As previously reported in [Immigration Newswire](#), USCIS is conducting a massive fraud investigation into religious worker visa fraud. In an apparent effort to combat fraud through administrative inefficiency, CIS has transferred all R-1 and I-360 petitions to the California Service Center and has sent out boilerplate Requests for Evidence (RFE) on all I-360 religious worker immigrant petitions. Immigration attorneys around the country are reporting receipt of exactly the same RFE. The RFE asks for basically every piece of information required by the I-360 regulations. In most cases all of the evidence was already submitted with the initial filing, though perhaps in a slightly different format than requested by the RFE, such that it is necessary to gather new information for submission in response to the RFE. In addition to the standard information required, the RFEs are requiring copies of the beneficiary's federal income tax returns, presumably to determine whether the beneficiary has ever worked without authorization for additional employers while in the U.S.

As our office prepares R-1 and I-360 petitions in the future, we will follow the format suggested by the boilerplate RFE in the hope of avoiding receipt of the same RFE on every case, although it appears that USCIS is not performing any initial review of the petitions to determine whether or not the evidence they are requesting has already been submitted.

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