

YLD Notes

## **How Current H-1B Holders Can Maximize Travel and Extensions of Stay**

*by Giselle Carson*

The H-1B nonimmigrant visa category is the most used category for professionals/specialists seeking to work in the United States. Its unmatched demand was established when the fiscal year 2008 quota was met on April 3, 2007. Thus, below are strategic and practical answers to some of the H-1B visa questions for new immigration practitioners.

### ***Can an H-1B worker who ported to a new employer travel abroad while the new H-1B petition is pending?***

Yes, the worker is admissible so long as the foreign national: (1) is otherwise admissible; (2) has an unexpired passport and unexpired visa (endorsed with the name of the prior employer); (3) has evidence of approval of prior H-1B status (copy of I-94 and/or Form I-797); and (4) has a Form I-797 showing that U.S. Citizenship and Immigration Services (USCIS) received a timely filed new petition. The worker is admissible to the expiration date of the previous H-1B petition, plus 10 days. However, the U.S. Customs and Border Protection inspector rarely includes the 10 days on the I-94 at admission, and the 10 days are not effective unless included on the I-94. During this time, the foreign national is authorized to be present in the United States but is not authorized to work. Furthermore, the new employer's name should be noted on the new I-94. If the validity date of the prior H-1B has expired, and the applicant has no evidence that the new petition has been approved, the applicant is not admissible. See INS memorandum on processing H-1B applicants as affected by AC21, AILA InfoNet Doc. No. 01020802.

### ***Is a worker who travels abroad required to obtain a new visa stamp to be readmitted?***

Not necessarily. If the visa stamp is unexpired and in the same nonimmigrant classification (H-1B), no new visa stamp is required. The visa remains valid during its validity period regardless of a change in employer. The Department of State discourages new visa applications unless the old visa stamp is within 60 days of expiration. USCIS Associate Director for Domestic Operations Michael Aytes clarified in a memo that when nonimmigrants in L, O, or P classifications who change employers remain in the same nonimmigrant classification and have an unexpired visa stamp, they also can travel abroad using the prior visa stamp. (See AILA InfoNet Doc. No. 97071690).

### ***What happens if the visa stamp has expired and the worker needs to travel abroad?***

The foreign national should wait for the approval of the new I-129 petition and apply for a new H-1B visa stamp at a U.S. consulate abroad before re-entering. If travel is imminent, consider using premium processing to expedite the adjudication of the I-129. To obtain a new visa stamp, the foreign national needs to submit the original I-797 petition approval notice with Form DS-156, Form DS-157 (if needed), a current passport, the required fees, and other documents as required by the particular consulate. Check the specific consulate's website for additional information.

### ***What happens if the foreign national is in another valid status—such as F-1—and travels abroad while the change of status to an H-1B is pending?***

According to a U.S. Department of Justice memo, the H-1B petition should be adjudicated and, if approved, the foreign national would have to apply for a visa at a U.S. consulate abroad because the change of status will be deemed abandoned. (See AILA InfoNet Doc. No. 01081635).

***How can an H-1B worker extend H-1B status beyond the basic six years of maximum period of stay?***

Section 106(a) of the American Competitiveness in the 21st Century Act of 2000 (AC21) (Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000)) allows an H-1B worker to seek extensions in one-year increments beyond the six-year period when a labor certification application or an EB immigrant petition (I-140 immigrant petition for an extraordinary ability, multinational manager, outstanding researcher, or national interest case) has been filed at least 365 days before the expiration of six years in H-1B status. This benefit also is available if the worker ported to a new employer. Another Aytes memo states that USCIS does not require the labor certification or petition to be from the same employer requesting the extension. (See AILA InfoNet Doc. No. 06092763).

If the labor certification or petition was filed less than 365 days at the time of filing for the extension, consider filing an extension to recapture time abroad and/or have the worker leave the United States for the required time, if possible, since the six-year period only includes the time the foreign national is physically present in the United States in H-1B status. An Aytes memo set the procedures for calculating the maximum period of stay for H-1B and L-1 nonimmigrants. The time limit is to be computed from the entry date (as noted on the foreign national's passport and I-94), not the date of the petition approval. (See AILA InfoNet Doc. No. 05110363).

The foreign national is not required to be in H-1B status or physically present in the United States to be granted the one-year extension under AC21 §106 or the three-year extension under AC21 §104(c). (See AILA InfoNet Doc. No. 06122063). However, the H-1B extension application must be filed while the person is physically present in the United States, since USCIS will otherwise likely deny the extension.

***Can an H-1B worker obtain an extension of stay in three years increments beyond the initial six years?***

Yes, in some circumstances. AC21 §104(c) provides that an H-1B worker who has used up the initial six years of stay may be eligible for a three-year extension if the person would be eligible to file for adjustment of status but for the visa quota backlogs. USCIS Associate Director for Operations William Yates clarified in a memo that USCIS has taken the position that the I-140 must be approved for §104(c) to apply. (See AILA InfoNet Doc. No. 05051810). These extensions can be obtained until the alien's application for adjustment of status has been processed and a decision is made thereon. The petition for extension must request three years and include a labor condition application covering this period.

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*Correction:* In the May/June 2007 *AILA Dispatch* issue, Sarah Buffett was listed as the Young Lawyers Division chair for 2006–2007; however, Aimee Clark Todd is the 2006–2007 chair and Sarah is the incoming 2007–2008 chair.