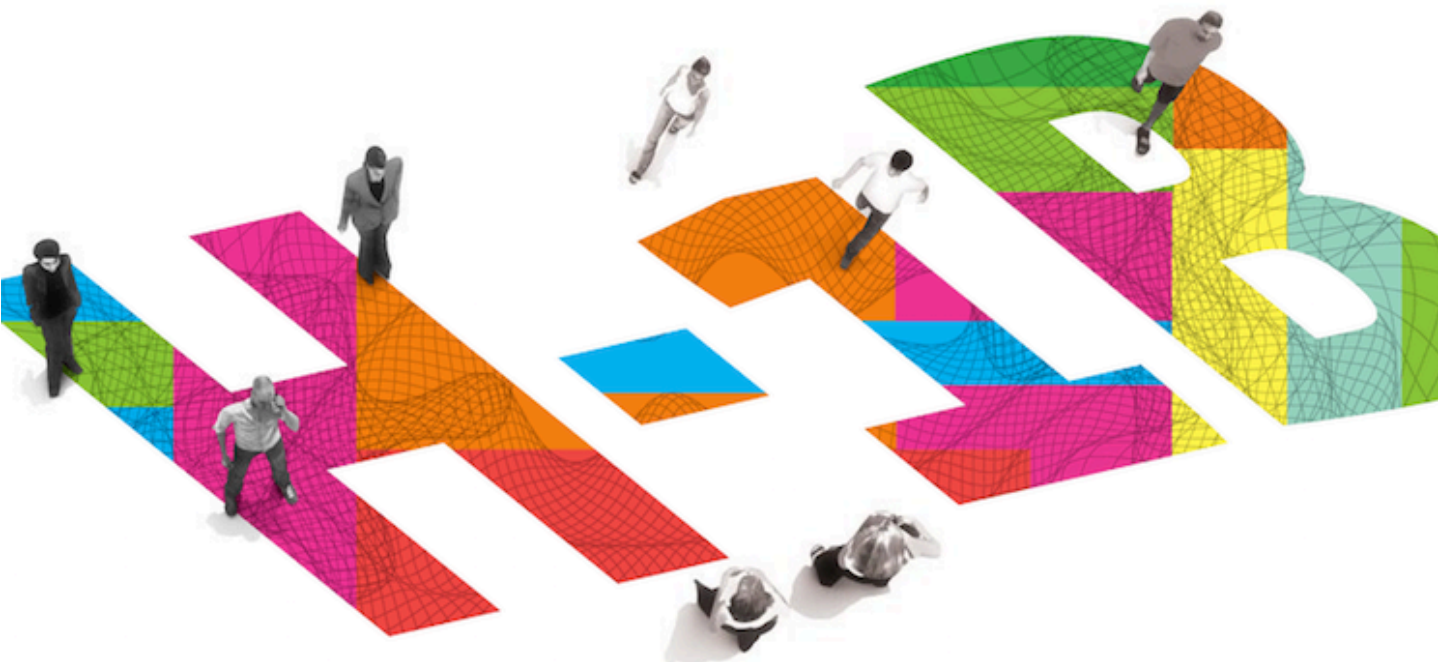
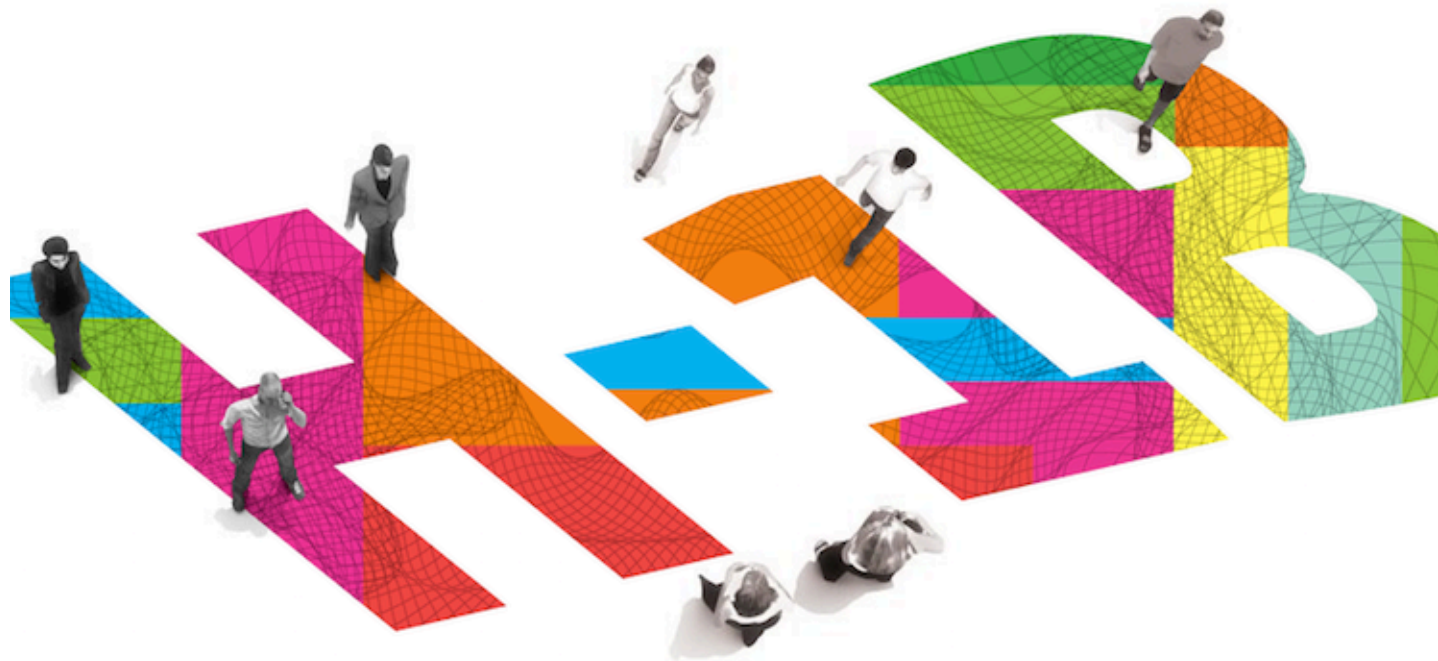




The Latest Updates on H-1B Visa Sponsorship

Employment and Labor



CHEAT SHEET

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- **AC-21 rule.** The AC-21 rule took effect in 2017 and clarified how to recruit H-1B professionals, renew H-1B work authorization, and determine which employers are exempt from the annual H-1B quota.
 - **BAHA.** The Buy American Hire American Executive Order (BAHA), released in April 2017, has a stated goal to protect the economic interests of US workers and seeks to reform H-1B visas.
 - **Grace periods.** Grace periods under the AC-21 rule make it easier for employers to recruit foreign professionals and for foreign workers to search for new sponsors after a termination.
 - **H-1B portability provisions.** The so-called H-1B “portability” provisions provide a roadmap for employers seeking to hire H-1B status professionals already working for another employer.

In the final days of the Obama administration, US Citizenship and Immigration Services (USCIS) published a final rule implementing the American Competitiveness in the Twenty-first Century Act (AC-21), which Congress enacted in 1999.

After 18 years of regulatory silence, US employers received much-needed clarity on how to recruit H-1B and other professional workers who are employed by competitors or have been laid off by a prior sponsor; how and when to renew the H-1B work authorization for employees who have otherwise exhausted their maximum stay; and how to determine which employers are exempt from the annual H-1B quota.

The new regulation took effect on January 17, 2017, just three days before the new presidential administration took office. Well received by the business community, the rule reflected and addressed the commercial realities of a modern workforce, the immense pressure placed on US businesses seeking to fill professional jobs given low unemployment rates, and vulnerabilities faced by foreign professionals whose career paths were limited by inflexible rules that stifled mobility. Coupled with longstanding USCIS policy, the new rule reflected the agency's recognition that the infusion of qualified foreign professionals into the US workforce ultimately benefits the American economy.

On April 18, 2017, nearly three months to the day after the AC-21 rule took effect, the Buy American Hire American Executive Order (BAHA) directed federal agencies to administer US immigration programs in a way that protects US workers and emphasized H-1B visa reform.

While the current presidential administration has not sought to rescind the AC-21 rule in the year since BAHA was issued, it has instituted subregulatory measures directly affecting US employers seeking to attract and retain foreign professional talent. The cornerstone of these measures has been three policy memoranda directing USCIS adjudicators to scrutinize H-1B petitions more closely and challenge eligibility for H-1B benefits more often.

This article will examine key provisions of the AC-21 rule and will then review the principal policy memoranda that have altered the playing field for US employers seeking to supplement their domestic workforces with key foreign talent.

The AC-21 rule: Grace periods, portability, indefinite extensions, and quota exemptions

Grace periods make it easier to recruit foreign professionals who may now remain in the United States and search for new sponsors after a termination.

The AC-21 rule introduced grace periods for foreign workers after the termination of sponsored employment. Before the AC-21 rule, H-1B and other foreign professionals working temporarily in the United States, along with their dependents, had to depart the United States immediately upon termination. No grace period applied.

Once their employment ended, these professionals had no time to finalize their affairs, were unable to remain in the country lawfully in order to seek other employment or change to another visa status, and immediately became removable from the United States.

USCIS does have discretion, upon request by a new employer, to excuse a gap in lawful status when a sponsored individual has already left his or her prior job; however, the agency considers these requests for good cause on a case-by-case basis and historically has been reluctant to forgive status gaps of more than 30 days. Prospective employers were thus uncertain whether they could seamlessly recruit and hire foreign professionals who were recently terminated by their previous employers.

With the implementation of the AC-21 rule, when a foreign professional loses his or her job, USCIS will, in most cases, recognize a 60-day grace period, during which he or she can remain legally in the United States and seek sponsorship by a new employer. This benefit also extends to US employers seeking to fill open positions with foreign professionals still in the United States whose employment was terminated in the preceding two months.

“Prior to the enactment of the AC-21 statute in 1999, it was exceedingly difficult for H-1B workers to change employers and consequently difficult for employers to recruit these workers away from effectively captive jobs.

Under the prior regulatory scheme, when a foreign professional was a recruiter's top candidate and he or she had already left a previous job, employers were burdened with the risk of delays in the onboarding process while a new work permit was adjudicated. They also had to contend with the costs and delays of international travel to allow the employee to apply for a new visa or cure the gap in status through departure and re-entry.

The applicability of the 60-day grace period is not always straightforward. It's unclear if a foreign professional can receive more than one grace period. For example, when a foreign worker is terminated and then hired by a new employer, the rule leaves murky when the H-1B worker would benefit from another 60-day grace period if later terminated by the new employer. This is especially true when employment with the new employer is not based on an approved petition.

In the absence of interpretive guidance from the agency, treating each petition approval or period of admission as a new validity period for purposes of the 60-day grace period is not unreasonable. However, employers should bear in mind that the rule provides USCIS with authority to limit a grace period, post-hoc, to fewer than 60 days. This means that a laid-off worker and his or her new employer may only learn that the agency will not recognize a presumed grace period after the fact, when the new employer petitions USCIS to extend the employee's stay in the United States.

H-1B portability provisions provide a roadmap for employers seeking to attract skilled professionals already working in H-1B status for another US employer.

Prior to the enactment of the AC-21 statute in 1999, it was exceedingly difficult for H-1B workers to change employers and consequently difficult for employers to recruit these workers away from effectively captive jobs. This was because new sponsors often needed to wait months for USCIS to approve their H-1B petitions before they could onboard a coveted foreign professional. Given the speed with which many employers need to fill open requisitions, the status quo was commercially unfeasible.

AC-21 alleviated this burden by permitting H-1B workers and their new sponsors to begin working together as soon as the new sponsor files its petition with USCIS. These so-called H-1B "portability" provisions breathed new life into an immigration program that was failing to keep pace with the demands of a modern economy. Implementing regulations were still greatly needed, however, because AC-21 left open questions including how the law would apply when multiple employers seek to "port" the worker's employment at the same time.

The AC-21 rule provides crucial flexibility for businesses operating in the United States. The rule confirms that an H-1B worker, whose initial H-1B approval expired but who is employed lawfully by a subsequent sponsor based on a pending portability petition, remains available for recruitment by new sponsors who may also take advantage of the portability provisions, (i.e., hire the candidate as soon as the H-1B petition is filed with USCIS).

Indefinite extensions of H-1B work authorization are available to employers for employees sponsored for US residency.

The Immigration and Nationality Act (INA) generally permits foreign professionals to work in the United States with an H-1B visa for up to six years. If an employer wants to retain the services of an H-1B worker for more than six years, the employer is typically required to conduct a labor market test, obtain a certification from the Department of Labor (DOL) that no qualified US workers are available for the role, and then file an immigrant petition with USCIS to classify the sponsored worker as eligible for permanent residency status (green card).

The green card program is subject to a quota system that is based on the nature of the sponsored role, the foreign worker's place of birth, and the date the green card process commenced. The green card process can take a few to several years to complete — and even longer for natives of India and China — due to quota backlogs. Before the US Congress passed the AC-21 statute in 1999, if sponsored H-1B workers did not receive their green cards by the end of the statutory six-year period, employers were often required to jettison these employees or find work for them abroad.

The AC-21 statute provides US employers and their sponsored professional employees with two mechanisms by which USCIS may approve H-1B work authorization beyond the normal six-year limit. If employers start the green card process before the employee has spent five full years in the United States in H-1B status, USCIS will permit the employee to request an indefinite number of one-year H-1B status extensions until the green card application is processed. The statute also provides for H-1B extensions beyond the normal six-year limit — in three-year increments — for employees whose immigrant petition was approved but cannot proceed to green card status due to quota backlogs.

Exemption from the annual H-1B quota is available to more employers.

The H-1B visa program is inaccessible to many employers because the demand for visas far exceeds the annual quota of approximately 85,000. AC-21 exempts most US universities and certain other nonprofits from the annual quota in order to ensure these employers have reliable access to international specialists when filling professional positions.

The two types of US nonprofit organizations that are exempt are research nonprofits and nonprofits related to or affiliated with a US university. Many US nonprofits faced restrictive and unpredictable results when requesting an exemption from the annual H-1B quota.

In promulgating the AC-21 regulation, USCIS explicitly recognized this challenge and the need to expand the kinds of university affiliations nonprofits could show to obtain an exemption from the H-1B quota. In discussing the changes made by the new regulation, USCIS provided, "This proposed path to eligibility for the [H-1B] cap ..., which is not available under current policy, was intended to expand eligibility to nonprofit entities that maintain common, bona fide affiliations with institutions of higher education."

"With a strong desire to offer promised protection for American workers, the Buy American Hire American Executive Order (BAHA) was released on April 18, 2017, three months after the new administration came into office and three months after the AC-21 rule took effect.

The new regulation clarifies that a nonprofit will be deemed to have the requisite relationship or affiliation with a university, and will be exempt from the annual H-1B visa quota, if there is a formal, written understanding between the nonprofit and the university showing the nonprofit will directly further the educational or research mission of the university. A quota-exempt nonprofit would also need to show that supporting the university's mission is among the nonprofit's fundamental activities.

The new regulation, and the more expansive definition of "related to or affiliated with," is most likely to have an impact on nonprofits that partner with universities to provide educational opportunities to students. Under the new regulation, these educationally supportive nonprofits may qualify for an exemption from the H-1B quota if they are able to demonstrate that university relationships are an ongoing and important activity of the nonprofit.

The Buy American Hire American Executive Order: Specialty occupations, deference, and third-party worksites

During the 2016 presidential campaign, much of the debate around immigration focused on border security, leaving the business community to speculate about how the policies of the next presidential administration would impact the growing need of American employers to secure the services of foreign professional talent.

With a strong desire to offer promised protection for American workers, the BAHA was released on April 18, 2017, three months after the new administration came into office and three months after the AC-21 rule took effect. BAHA's stated goal is to protect the economic interests of US workers, such as creating higher wages and employment rates. It also directs US immigration agencies to propose changes to the H-1B program in order to ensure that the "most skilled and highest paid" get visas, and calls for changes to the way USCIS allocates H-1B visas under the quota system.

USCIS has released several policy memoranda directing their adjudicators to take a more restrictive

approach in processing petitions filed by US employers seeking H-1B work permits for foreign professionals, including three immediately felt by employers and continuing into the present.

USCIS questions whether jobs require a related university degree or equivalent.

The first and most wide-reaching of these memos was issued on March 31, 2017, the eve of the annual H-1B filing season, when US employers filed nearly 200,000 H-1B petitions in an effort to claim the 85,000 new H-1B visas the government makes available each year.

The so-called "computer programmer memo" rescinded prior guidance and instructed USCIS adjudicators to apply extra scrutiny to H-1B petitions filed for computer programmers. The agency no longer deems these jobs as "specialty occupations" or jobs that necessarily require a bachelor's degree or equivalent in a particular course of study, which is a fundamental requirement of the H-1B program.

The regulations do not prescribe how USCIS should determine, or how employers may demonstrate, whether educational requirements are "normal" for an occupation, but USCIS generally relies on the Occupational Outlook Handbook (OOH), a lexicon of US jobs and their requirements that is published and periodically updated by the DOL.

There is frequent disagreement over whether USCIS correctly interprets the OOH, especially as it pertains to IT occupations, since the publication recognizes that most programming jobs in the United States are filled by degreed professionals, yet USCIS maintains this means a degree is not normally required.¹⁶ At least one federal court has overturned the denial of an H-1B petition over this issue, holding that USCIS misinterpreted the OOH's discussion of an IT occupation's minimum educational requirements.

The agency nevertheless continues to rely on the OOH to challenge H-1B petitions for programming and other IT occupations where the OOH reflects any ambiguity as to an occupation's degree requirements. Where USCIS finds the OOH unconvincing, it asks employers to provide alternative evidence of the degree requirement.

“Employers, with the assistance of competent immigration counsel, should argue that it is the nature of the job within the context of the employer’s business, projects, and operational environment that dictates the required level of educational attainment.

In many cases, however, when employers provide this additional evidence, USCIS still does not find it convincing enough. For example, the computer programmer memo advises adjudicators to presume that computer programmers at the beginning of their careers are not filling jobs that require a related bachelor's degree.

As a result, when US employers file H-1B petitions for entry level programmers (or any entry-level job where the OOH does not provide that all positions require a degree), they will face a higher burden in demonstrating eligibility, including showing that the duties are sufficiently complex to warrant a degree.

Employers should consider challenging this reasoning when responding to USCIS requests for additional evidence. The H-1B rules do not provide that sponsored jobs require employment experience, only that they require the incumbent to possess a degree or equivalent in a specialized

course of study.

USCIS appears to be reading a work experience requirement into the regulation by ostensibly asserting that if all jobs in a given occupation (e.g., all computer programming jobs) don't require at least a bachelor's degree, then it must necessarily be the entry-level jobs for which inferior credentials are acceptable.

This notion should be rebutted. Employers, with the assistance of competent immigration counsel, should argue that it is the nature of the job within the context of the employer's business, projects, and operational environment that dictates the required level of educational attainment. In this regard, any entry-level job (not just programming jobs) may call upon the incumbent to apply highly technical skills, analysis, and intellectual creativity gained from rigorous bachelor's degree coursework and related academic experience.

Petitioning to extend a foreign professional's employment authorization now carries greater risks.

USCIS issued a second memo in October 23, 2017 — known as the "end of deference memo" — rescinding prior guidance and counseling adjudicators against extending deference to a prior USCIS approval when reviewing a petition to extend H-1B (or other) work authorization.

This is true even where the prior approval was based on a petition filed by the same sponsor, for the same foreign national, and for the same job. The memo encourages adjudicators to review the extension petition anew and feel unconstrained from challenging and asking employers for additional evidence to demonstrate eligibility for the work permit sought.

Under prior guidance, USCIS adjudicators were instructed to defer to prior adjudications on the same facts unless the prior approval involved a material error, there was a substantial change in circumstances, or there was new material information that adversely impacted the employer's or H-1B worker's eligibility. This approach to agency decision-making created predictability in the process and allowed employers to engage in medium and long-term workforce planning.

Like the computer programmer memo, the end of deference memo has led to a large increase in challenges to petitions that were previously approved on the same facts, leaving many businesses in the United States and their employees uncertain about their ability to staff projects with international talent. It has also resulted in a much longer adjudications process. USCIS regulations only provide H-1B workers with 240 days of extended employment authorization while the government processes an extension.

Generally slow government processing times coupled with delays associated with a USCIS request for additional evidence (i.e., the time it takes the employer to collect additional evidence and for immigration counsel to prepare and submit a response, plus the time it takes the government to review the response and ultimately approve the request) often causes extension processing to bump up against or exceed the 240-day limit.

This may result in either a temporary gap in employment authorization and productivity from the employee, or the expensive government filing fee required to have USCIS expedite processing of the extension under the Premium Processing program.

Here again the answer is thoughtful and assertive filings. If the case was approved the first time, it

likely had the foundational elements for an approval. Employers are now on notice that prior approvals may not, and we should assume will not, be given deference. Extension petitions should be filed with all of the evidence normally submitted with initial filings and should anticipate scrutiny on the issue of the degree requirement, as discussed above, and any third-party worksite considerations, discussed below, as applicable.

Petitions for H-1B employees who will work at client or customer sites will require more evidence.

The third and most recent of the policy memos — the "third party worksite memo" — was issued by USCIS on February 22, 2018, also quite close in time to the H-1B quota filing period which opened on April 1, 2018.

This memo takes aim at employers whose H-1B workers are required to work at client or customer sites, citing the agency's concern that when employees are placed at third-party worksites it is more difficult for the agency to determine whether an employment relationship will exist between the H-1B worker and sponsoring employer, and whether the employee will be engaged in H-1B employment that meets the regulatory requirements (e.g., a job that requires a related degree or equivalent).

As a result of these concerns by the agency, the memo encourages USCIS adjudicators to request various forms of evidence from petitioners, including often proprietary contracts and statements of work demonstrating the relationship between the H-1B petitioner and its customer and, of particular concern, letters from the customer confirming the job description, and minimum educational requirements for the job.

Employers such as IT and other consulting companies that assign employees to work at client sites in order to fulfill contractual obligations have been receiving requests for additional evidence from USCIS on this issue for some time.

“Employers are now on notice that prior approvals may not, and we should assume will not, be given deference.

Historically, employers and their immigration counsel familiar with these business models have been very successful in thoughtfully and skillfully educating adjudicators on the types of evidence that can reasonably be produced and have been able to provide sufficient alternative evidence to assuage any concerns by USCIS regarding, for example, whether the petitioner will at all times have the right to control the H-1B worker and whether full-time, professional employment is available to the worker even though the work will be performed at a client site.

The imminent concern with the new third-party worksite memo, put into place just as USCIS began adjudicating this year's H-1B cap filings, is that it appears to treat the absence of certain kinds of evidence — such as detailed, proprietary documentation belonging to a customer, or letters from end clients attesting to the duties and requirements of the H-1B worker's job — as grounds to deny a petition without the support of regulatory language requiring the same. Thus, the employer is left to guess what evidence is sufficient enough to merit approval by USCIS.

A federal lawsuit has been filed seeking to enjoin implementation of this memo because, among other things, it appears to condition approval of an H-1B petition on evidence from a third-party who neither hired, trained, nor has control over the H-1B worker, to attest to job information (i.e., duties

and requirements) that only the H-1B sponsor — the worker's actual employer — would possess.

Conclusion

As of the publishing of this article, USCIS issued two new memoranda that will further change the landscape of employment-based nonimmigrant processing for employers.

Effective September 11, 2018, USCIS adjudicators will have "full discretion to deny applications, petitions, and requests without first issuing an [Request for Evidence] or [Notice of Intent to Deny], when appropriate." Such discretion includes petitions where the adjudicator perceives that the petition as submitted lacks sufficient initial evidence.

The second memorandum involves the expanded ability of USCIS to issue Notices to Appear (which commences removal proceedings against the foreign national) upon the denial of an application or petition. This latest memo is likely to have a substantial impact on the way US employers pursue extensions of stay for their foreign professional employees.

The past two years have seen more immigration developments than the previous twenty. Yet, those developments have been directly affected by the recent series of policy changes issued by USCIS in 2018.

While the AC-21 rule almost immediately created more opportunities for US employers to recruit and sponsor foreign professionals for H-1B employment authorization, USCIS memoranda issued subsequent to BAHA have made it more challenging for employers to demonstrate that offered jobs qualify under the H-1B program. Employers can no longer rely on past approvals and face increased uncertainty as to what evidence will satisfy USCIS' scrutiny for workers engaged at third-party sites.

Not only should corporate counsel continue to remain vigilant as to how the recent USCIS policy directives play out over time, but counsel should also be aware of new policies and directives as they emerge so that they can work with immigration counsel to develop innovative strategies to overcome USCIS' evolving approach in assessing H-1B eligibility.

Further Reading

"The Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," 81 FR 82398 (Nov. 18, 2016).

Public Law 106-313, 114 Stat. 1251 (Oct. 17, 2000).

Executive Order 13788 of April 18, 2017.

8 CFR 214.1(c)(4).

8 CFR 214.1(l)(2).

8 USC 1184(n).

8 CFR 214.2(h)(ii)(H)(3). Not without limits, the AC-21 rule cautions that a "request to amend the

petition or for an extension of stay in any successive H-1B portability petition cannot be approved if a request to amend the petition or for an extension of stay in any preceding H-1B portability petition in the succession is denied, unless the beneficiary's previously approved period of H-1B status remains valid." *Id.*

8 USC 1184(g)(4).

8 CFR 214.2(h)(13)(iii)(D).

8 CFR 212.2(h)(13)(iii)(E).

214.2(h)(8)(ii)(F).

Interoffice Memorandum HQPRD 70/23.12 entitled "Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), June 6, 2006, Michael Aytes, Associate Director for Domestic Operations. See former 8 CFR 214.2(h)(19)(iii)(B).

See note iii, *supra*.

"Rescission of the December 22, 2000 "Guidance memo on computer-related positions." PM-602-0142, Mar. 31, 2017.

"Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, on the Internet at www.bls.gov.

Id., Computer Programmers, www.bls.gov (visited June 17, 2018).

Next Generation Technology v. Johnson, 2017 WL 4685275 (S.D.N.Y., September 29, 2017)

"Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status." PM-602-0151, Oct. 23, 2017.

"The Significance of Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Validity Period." HQOPRD 72/11.3, Apr. 23, 2004.

"Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites." PM-602-0157, Feb. 22, 2018.

Small and Medium Size Enterprise Consortium, Inc., Namo Info, Inc., and Derex Technologies, Inc., v. Nielsen, Case 2:18-cv-08672, U.S. District Court, District of New Jersey (filed May 1, 2018).



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