U.S. Department of Justice
Immigration and Naturalization Service
Washington, DC 20536

# QUESTIONS AND ANSWERS

November 21, 2000

## Changes to the H-1B Program

On October 17 and 30, 2000, President Clinton signed into law several bills which significantly change the H-1B program as well as the employment based immigration program. Prominent among these bills is the American Competitiveness in the Twenty-First Century Act (AC21).

**Q1: How does AC21 affect the H-1B cap?**

A1: Section 214(g) of the Immigration and Nationality Act (Act) sets an annual limit on the number of aliens that can receive H-1B status in a fiscal year. For FY2000 the limit was set at 115,000. AC21 increases the annual limit to 195,000 for 2001, 2002 and 2003. After that date the cap reverts back to 65,000.

**Q2: Are there new exemptions to the H-1B cap?**

A2: Yes. In addition to increasing the cap, AC21 exempts H-1B workers who are employed by or have an offer of employment from:

- Institutions of higher education;
- Related or affiliated nonprofit entity, or
- Nonprofit or government research organization.

AC21 also specifies that an H-1B worker be counted against the cap if the worker transfers from an "exempt" employer to an employer that does not have an exemption.

In addition, the FY 2001 cap does not include H-1B petitions filed after INS reached the FY 2000 cap on March 22, 2000 but before September 1, 2000. INS estimates that approximately 30,000 petitions were filed during that time frame.

**Q3: How does INS plan to adjust its current counting method so that any petitions filed prior to September 1, 2000 will not count against the FY 2001 cap?**

A3: The Service already electronically captures the date a petition was received by INS. Therefore, our ability to electronically separate cases file before 09/01/00 is already in place.

**Q4: What steps has INS taken to improve its counting to ensure that multiple beneficiaries are only counted once as required by the new law?**

A4: The Service has conducted sweeps of the H-1B data to identify multiple beneficiaries to ensure that they are counted toward the cap only once in past fiscal years. We will continue with that process insuring that we conduct the sweep on using H-1B data for the past six years.

**Q5: The bill requires that INS may not count someone toward the cap if they have had H-1B status in the prior 6 years, unless the individual would be authorized for a new 6-year period of stay. How is INS going to implement this? How does this differ from INS' current counting methodology?**

A5: INS is revising its regulations to explain when an H-1B worker is eligible for a new 6-year period of stay.

System changes will be made in order to allow the Adjudicator to indicate whether an individual who was previously H-1B is now eligible for a new 6-year period of stay. This indicator will enable the Service to properly count an individual toward the cap in these circumstances.

Upon approval of the petition, the program will compute the number of H1B visas issued according to the factors as defined by statute.

**Q6: The legislation states that the limit for FY 99 is increased by "a number equal to the number of aliens issued such a visa or provided such as status" from the time the limit was reached and September 30, 1999. Is INS interpreting this clause to deal solely with the discovered overage or does INS intend to recapture any visas it issued before September 30, 1999 but had given FY 2000 start dates?**

A6: The Service interprets this language as forgiveness for the number of H-1B petitions approved in excess of the FY99 cap due to counting errors. It is not our intent to recapture numbers for cases approved in FY00 toward the FY00 cap.

**Q7: When does the law take effect?**

A7: Almost all of the provisions of AC21 and the related legislation are effective immediately upon enactment. The law was officially enacted on October 18, 2000. The sole exception is the increase in H-1B petitioner fee from $500 to $1000, which takes effect on December 17, 60 days after enactment.

**Q8: Are there new exemptions from the ACWIA (now $1,000) fee?**

A8: Yes. Employers now exempt from paying the fee include:

- Institutions of higher education and related or affiliated non-profit organizations;
- Non-profit or governmental research organizations;
- Any employer who is filing for a second extension of stay for an H-1B nonimmigrant;
- Primary or secondary education institutions; or
- Nonprofit entity engaged in "established curriculum-related clinical training of students".

Although the fee increase does not take effect for 60 days, the new exemptions from the fee are effective immediately. Thus the new exempt organizations are exempt as of October 18, 2000. INS is working to change its forms and systems to accommodate this change but this will take time. In the meantime, petitioners claiming to be exempt should submit a copy of the relevant provision of AC21 with their petition along with evidence that they qualify as an exempt organization. Petitioners should also note on Form I-129W the basis for the exemption, notwithstanding the fact that the form will not initially contain the necessary boxes to check for these new exemptions.

**Q9: Are there any new filing exemptions?**

A9: Yes. An amended H-1B petition is no longer required when the petitioning employer undergoes a corporate restructuring, including but not limited to a merger, acquisition or consolidation, where the new corporate entity succeeds to the interest and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner.

**Q10: Who is eligible to use the H1B "portability" provisions?**

A10: The portability provisions allow a nonimmigrant alien previously issued an H-1B visa or otherwise accorded H-1B status to begin working for a new H-1B employer as soon as the new employer files an
H-1B petition for the alien. Previously, aliens in this situation had to await INS approval before commencing the new H-1B employment. These provisions apply to H-1B petitions filed "before, on, or after" the date of enactment, so all aliens who meet this definition can begin using the portability provisions.

**Q11: Are there any other limitations on the portability provisions?**

A11: An alien must have been lawfully admitted into the United States. The new employer must have filed a "non-frivolous" petition while the alien was in a period of stay authorized by the Attorney General. A non-frivolous petition is one that has some basis in law or fact. INS plans to further define this in its implementing regulations.

Subsequent to such lawful admission, the alien must not have been employed without authorization.

**Q12: How will employers who hire H-1B aliens using the portability provisions comply with their I-9 requirements?**

A12: Current regulations at 8 C.F.R. 274A.12(b)(20) authorize employment with the existing employer after a request for extension of H-1B status is filed. The alien in this case is employment authorized but the I-9 form contains no provision for this authorization. Employers should follow the documentation procedures they currently use for an extension of this sort. Typically, this could involve attaching a copy of the receipt notice for the filed petition along with a copy of the alien's I-94 to the I-9 kept on file.

**Q13: When will the Implementing regulation be published?**

A13: INS is currently drafting the regulation. Because of the new $1,000 fee increase, it is possible that in addition to the normal DOJ and OMB review, this regulation will have to undergo the additional review required by the Small Business Regulatory Enforcement Fairness Act of 1996. If this is the case it is unlikely that the regulation will be published before March 2001. INS is exploring ways to expedite publication of the regulation.

**Q14: What benefits are available under AC21 to aliens with Immigrant petitions/adjustment applications?**

A14: First, § 104 of AC21 lifts the per-country limits on employment-based immigrant visa numbers if the total number of visas available during a calendar quarter exceeds the number used. The Department of State is charged with issuance of these visas and maintenance of priority dates and availability. This issue will not be addressed in INS regulations.

Where the country caps delay an alien's immigration notwithstanding this provision, AC21 also provides for an extension of H-1B status until the alien's adjustment of status application can be processed and a decision made.

Finally, AC21 gives extensions of H-1B status in one-year increments to H-1B aliens who have an employment-based immigrant visa petition or application for adjustment of status pending if It has been more than 365 days since the visa petition or the labor certification application has been filed. Note that the adjustment application, labor certification, or visa petition need not necessarily have been pending for a year to obtain this benefit. The only requirement is that 365 days have passed since filing of the labor certification or immigrant visa petition.

**Q15: Will H-4 dependents of H-1B nonimmigrants be able to receive these extensions?**

A15: The AC21 does not address this issue but speaks only of aliens issued a visa or otherwise provided nonimmigrant status under the H-1B provisions of the Act. INS is studying this issue, which will be addressed in the implementing regulations currently under development.

**Q16: How will employers demonstrate I-9 compliance for H-1B aliens granted extensions beyond the six-year period in INA 214(g)(4)?**

A16: Current regulations at 8 C.F.R. 274A.12(b)(20) authorize employment with the existing employer after a request for extension of H-1B status is filed. The alien in this case is employment authorized but the I-9 form contains no provision for this authorization. Employers should follow the documentation procedures they currently use for an extension of this sort. Typically, this involves attaching a copy of the receipt notice for the extension along with a copy of the alien's I-94 to the I-9 kept on file.

**Q17: The law requires that any visas revoked due to fraud are recaptured and restored to the total available for the current fiscal year. How does INS intend to do this?**

A17: INS already has the ability to electronically identify those cases that are revoked due to fraud as opposed to those that are revoked for other reasons. Therefore, this should not be an issue.

**Q18: The law mandates INS processing times of 180 days. Given the current budget situation does INS feel that it can realistically meet this goal?**

A18: The new law does not mandate any processing times. It does, however, indicate that it is the sense of Congress that adjustment applications should be completed in no more than 180 days and nonimmigrant petitions should be processed in no more than 30 days. This sense of Congress is followed by recognition that INS is in need of appropriations for infrastructure and other improvements. INS will in the process of collecting data in an attempt to comply with the reporting requirements necessary to be eligible for consideration of appropriations that may be granted to aide in the reduction of processing times. There is no guarantee that Congress will appropriate funds for the improvements necessary to reduce backlogs and improve processing time within the Service even if INS complies with all of the reporting requirements set forth in the statute.

**Q19: Given the large increase in the volume of applications, does INS feel that it can maintain its current processing goals of 60 days for H-1B petitions and 90 days for I-140 petitions given that Congress has only earmarked 4 percent of the new H-1B fee for INS processing?**

A19: The Service will do its best to maintain current processing times. Much of our ability to maintain the processing times will be a result of the budget that is passed and our ability to direct overtime funds to the offices that will be impacted by the increased filings. Although we have been authorized to hire individuals into term positions to deal

with the increased filings, the hiring and training process are lengthy and the true benefits of the hiring will not be realized for several months.

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