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# Preparing For Potential Cuts To Certain H-1B Extensions

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Media reports indicate that the U.S. Department of Homeland Security is considering new measures that would potentially reduce or eliminate certain H-1B extensions granted under the American Competitiveness in the 21st Century Act of 2000. The AC21 extensions at issue are provided to H-1B workers in the permanent resident (green card) process who have completed their sixth year in H-1B status, the presumptive ceiling on H-1B tenure, but who are not yet able to obtain permanent resident status because of a per-country immigrant visa quota.[1] (See AC21, P.L. 106-313, § 104(c); 8 C.F.R. § 214.2(h)(13)(E).)

The per-country limitations primarily affect nationals of countries with high rates of immigration to the United States, including nationals of India, China and the Philippines. For example, Indian nationals qualified in the employment-based second-preference (applicable to holders of advanced degrees and persons of exceptional ability) and third-preference (applicable to professionals and skilled workers) categories must wait approximately 9 and 11 years, respectively, for an immigrant visa to become available after submission of an application for PERM (program electronic review management) labor certification. (See www.travel.state.gov here.)

Since AC21 was enacted in October 2000, U.S. Citizenship and Immigration Services and its predecessor agency, the Immigration and Naturalization Service, have routinely approved extensions of H-1B status for beneficiaries affected by the per-country limitation. The Trump administration is reportedly now reviewing whether AC21 legislative language indicating that DHS “may grant” per-country extensions to H-1B workers provides the administration with sufficiently broad discretion to refuse to grant per-country extensions in some or all cases. The statutory language contrasts with a separate section of AC21 by which H-1B extensions are required to be approved in one-year increments beyond the six-year limitation where the employer has submitted an application for PERM labor certification or an employment-based immigrant petition (Form I-140) on behalf of the H-1B worker and more than 365 days have elapsed since submission. (See AC21, P.L. 106-313, §§ 106(a), (b); 8 C.F.R. § 214.2(h)(13)(D).)

The Trump administration has not provided any statement in response to the media reports. There is accordingly no confirmation that DHS is planning to take action to restrict or eliminate the per-country

exemption at this time. To assist employers in advising their work corps about the potential impact if DHS does take action, however, we provide the following guidelines.

**Are all candidates for H-1B extensions past the sixth year at risk of losing their H-1B status?**

No. DHS is only reviewing H-1B extensions sought under the per-country exception of AC21, which the agency currently grants in three-year increments. Individuals with H-1B extensions granted in one-year increments following the sixth year under the "lengthy adjudication delay" exception are not at risk.

**Are candidates who already have three-year extensions under the per-country exemption at risk of losing their current three-year status?**

Likely no. DHS would be hard pressed to justify a rule under which extensions of stay issued under the agency's longstanding (17-year) interpretation could be revoked.

**Are candidates who already have three-year extensions under the per-country exemption at risk of being refused new validity periods?**

Possibly, but unlikely. The statute authorizes the grant of the "one-time protection" under the per-country provisions "until the alien's application for adjustment of status has been processed and a decision made thereon." (See AC21 §104(c)(2).) USCIS regulations provide for the one-time protection to be issued in three-year validity periods "for as long as the alien remains eligible for this exemption." (See 8 C.F.R. §214.2(h)(13)(iii)(E).) Eligibility is premised exclusively on (1) having current H-1B status; (2) being the beneficiary of an approved immigrant petition under the first, second or third employment-based preferences; and (3) being eligible for adjustment of status but for the application of the per-country limitation on the date the H-1B petition request is filed. (Id.) The regulations, however, mimic the permissive "may" of the statute when denoting that USCIS "may grant validity periods of up to three years." Accordingly, the administration could take a bold position to argue that even previously approved beneficiaries of the per-country exemption are not eligible for new three-year validity periods.

**Is the administration likely to act without formally amending its regulations?**

Possibly, but unlikely. Absent a notice and comment rulemaking, the administration will be vulnerable to challenge under the Administrative Procedures Act (APA). In a recent decision, the U.S. District Court for the District of Columbia upheld an APA-based challenge to DHS's decision to delay implementation of a rule that provides for parole of entrepreneurs into the United States for purposes of establishing startup companies because "the agency did so without providing notice or soliciting comment from the public, as the APA generally requires." (See National Venture Capital Association, et al. v. Secretary, U.S. Department of Homeland Security, et al, Case 1:17-cv-01912-JEB, Memorandum Opinion (Dec. 1, 2017).) Moreover, without the benefit of rulemaking, employers would have no guidance on the factors that USCIS may consider in deciding which requests to approve and which ones to deny, which would further expose the agency to legal challenges.

**What are the consequences to a green card applicant if their H-1B extension is refused?**

Green card candidates subject to the per-country exemption are not able to file for adjustment of status to permanent residency because an immigrant visa is not immediately available to them. They accordingly depend on the H-1B visa for work and residency authorization pending the immigrant availability. As noted, the queue for immigrant visas for such individuals can span multiple years. If their

application for H-1B extension is denied, they will lose their right to remain in the United States lawfully and work pending conclusion of their permanent residency case. Leaving the United States at that point becomes important to avoid accumulation of days of unlawful presence, which can lead to a bar from reentry to the United States in the future if the candidate overstays by 180 days or more.[2] Provided the candidates depart the United States promptly, they will remain able to obtain their residency when an immigrant visa becomes available. At that time, they will need to engage in immigrant visa processing through the U.S. Consulate in their home country, rather than adjustment of status in the United States, as the latter is dependent on the individuals having a nonimmigrant status — i.e., H-1B — from which to adjust to immigrant (green card) status.

**If the administration takes action to deny H-1B extensions premised on the per-country exemption, is the administration likely to deport the individuals who are refused the extension?**

No. While an H-1B visa holder who remains in the United States beyond his or her authorized period of stay would be deportable, there is no indication that the administration would target such individuals for removal. Moreover, an employee whose extension of stay is denied is well advised to depart the United States promptly following the denial.

**What should employers do now?**

- Identify their affected population, both in the work corps and among candidates for recruitment;
- Provide communications from the leadership of their HR, mobility, and legal teams advising the work corps that the employer is closely monitoring the situation and will advise employees and recruiters of any changes to the current rules and practice;
- Consider inclusion of FAQs addressing the impact of any action by the administration, once it occurs; and
- Establish a process for making decisions about whom to sponsor for a green card early so that PERM sponsorship may begin no later than the fourth year of H-1B status.

**Conclusion**

The Senate report to the AC21 legislation expressly addressed that without the per-country exemption in Section 104(c), "these immigrants would otherwise be forced to return home at the conclusion of their allotted time in H-1B status, disrupting projects and American workers." The exemption, as distilled in the Senate report, "enables these foreign nationals to remain in H-1B status until they are able to receive an immigrant visa and adjust their status in the United States, thus limiting the disruption to American businesses." The approach DHS appears to be pursuing is thus directly at odds with the congressional intent for Section 104(c) as expressed in the legislative history of AC21, in addition to contravening more than 16 years of practice by USCIS and its predecessor agency.

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[1] No more than 7 percent of the immigrant visas allocated annually under the Immigration and Nationality Act may be made available to nationals of any single foreign state.

[2] Aliens who depart the United States following a period of unlawful presence of 180 days to one year are ineligible to return for three years. Those who depart after having been unlawfully present for one year or more may not return for 10 years. (See Immigration and Nationality Act §212(a)(9)(B).)

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