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Can USCIS Discontinue H-1B Extensions Beyond 6 Years?

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Submitted by admin on Jan 2nd 2018

Can USCIS Discontinue H-1B Extensions Beyond 6 Years? In my opinion, the answer is: no. Can they try? Yes, but they will need to change the law through the Congress. Drastic changes through executive action are legally unavailable.

This discussion has become necessary because there are reports circulating that the Trump administration is trying to devise ways and methods to take away the benefit of extension beyond six years for H-1B holders. In my view, this is easier said than done.

The law that permits, in fact mandates, the availability of extensions beyond six years is clearly binding upon the Trump administration. The idea that is being floated that there are occasional uses of the word ?may,? which permits the government to implement or not to implement the extension provisions. That idea is incorrect. The law, American Competitiveness in the 21st Century Act (AC21), permits no discretion in availability of extension beyond six years.

Use of the word ?may?
The word ?may? has been used in the section 104 of AC 21 (three years H-1B extensions), but I do not believe it would be easy for the government to argue that discretion to extend has been left entirely to the president. This result is inevitable under the ?plain meaning? rule of statutory interpretation and I believe especially so where a statute enacted to benefit of a class of people is being interpreted.
The word ?may? has also been used in the regulations (in the context of one year H-1B extensions), but that word is trumped by the use of the word ?shall? in Section 106 of AC21 in the same context.

Taking away H-1B extensions by executive action is going to be extremely difficult if not impossible.

Note further that the current regulations (effective from 17 January 2017) affecting H-1B extensions beyond six years are clear and detailed. To withdraw these regulations, the government will have to promulgate new regulations. That process has its own difficulties and is open to judicial challenges if proper procedures are not followed or proper considerations

are not taken into account. Please see below, an infographic I have prepared (and posted earlier) about the procedure for rescinding regulations:

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https://scontent-iad3-1.xx.fbcdn.net/v/t31.0-8/p720x720/26220661_778209689033534_8324558244776273962_o.png?oh=7716bb0e6f9cfc60bed834af2dd

[2]

The takeaway from this discussion is that I see no reason for us to worry that Trump administration can rescind the rights granted by AC21.
If you are interested in further information, review the provisions of the law and the regulations provided below.

The Law

There are two pertinent sections, 104 and 106 of AC21 providing for extension:

SEC. 104. LIMITATION ON PER COUNTRY CEILING WITH RESPECT TO EMPLOYMENT-BASED IMMIGRANTS.
(c) ONE-TIME PROTECTION UNDER PER COUNTRY CEILING- Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who--
(1) is the beneficiary of a petition filed under section 204(a) of that Act for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act; and

(2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs, may apply for, and the Attorney General ***may*** grant, an extension of such nonimmigrant status until the alien?s application for adjustment of status has been processed and a decision made thereon.

SEC. 106. SPECIAL PROVISIONS IN CASES OF LENGTHY ADJUDICATIONS.

(a) EXEMPTION FROM LIMITATION- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)) with respect to the duration of authorized stay ***shall*** not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of that Act on whose behalf a petition under section 204(b) of that Act to accord the alien immigrant status under section 203(b) of that Act, or an application for adjustment of stat us under section 245 of that Act to accord the alien status under such section 203(b), has been filed, if 365 days or more have elapsed since--
(1) the filing of a labor certification application on the alien?s behalf (if such certification is required for the alien to obtain status under such section 203(b)); or

(2) the filing of the petition under such section 204(b).

(b) EXTENSION OF H-1B WORKER STATUS- The Attorney General ***shall extend the stay*** of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made on the alien?s lawful permanent residence.

See: https://www.uscis.gov/ilink/docView... [3]

The Regulations

8 CFR 214.2
(D) Lengthy adjudication delay exemption from 214(g)(4) of the Act.
(1) An alien who is in H-1B status or has previously held H-1B status is eligible for H-1B status beyond the 6-year limitation under section 214(g)(4) of the Act, if at least 365 days have elapsed since:
(i) The filing of a labor certification with the Department of Labor on the alien's behalf, if such certification is required for the alien to obtain status under section 203(b) of the Act; or
(ii) The filing of an immigrant visa petition with USCIS on the alien's behalf to accord classification under section 203(b) of the Act.

(2) H-1B approvals under paragraph (h)(13)(iii)(D) of this section ***may*** be granted in up to 1-year increments until either the approved permanent labor certification expires or a final decision has been made to:
(i) Deny the application for permanent labor certification, or, if approved, to revoke or invalidate such approval;
(ii) Deny the immigrant visa petition, or, if approved, revoke such approval;
(iii) Deny or approve the alien's application for an immigrant visa or application to adjust status to lawful permanent residence; or
(iv) Administratively or otherwise close the application for permanent labor certification, immigrant visa petition, or application to adjust status.

(3) No final decision while appeal available or pending. A decision to deny or revoke an application for labor certification, or to deny or revoke the approval of an immigrant visa petition, will not be considered final under paragraph (h)(13)(iii)(D)(2)(i) or (ii) of this section during the period authorized for filing an appeal of the decision, or while an appeal is pending.

(4) Substitution of beneficiaries. An alien who has been replaced by another alien, on or before July 16, 2007, as the beneficiary of an approved permanent labor certification may not rely on that permanent labor certification to establish eligibility for H-1B status based on this lengthy adjudication delay exemption. Except for a substitution of a beneficiary that occurred on or before July 16, 2007, an alien establishing eligibility for this lengthy adjudication delay exemption based on a pending or approved labor certification must be the named beneficiary listed on the permanent labor certification.

(5) Advance filing. A petitioner may file an H-1B petition seeking a lengthy adjudication delay exemption under paragraph (h)(13)(iii)(D) of this section within 6 months of the requested H-1B start date. The petition may be filed before 365 days have elapsed since the labor certification application or immigrant visa petition was filed with the Department of Labor or USCIS, respectively, provided that the application for labor certification or immigrant visa petition must have been filed at least 365 days prior to the date the period of admission authorized under this exemption will take effect. The petitioner may request any time remaining to the beneficiary under the maximum period of admission described at section 214(g)(4) of the Act along with the exemption request, but in no case may the approved H-1B period of validity exceed the limits specified by paragraph (h)(9)(iii) of this section. Time remaining to the beneficiary under the maximum period of admission described at section

214(g)(4) of the Act may include any request to recapture unused H-1B, L-1A, or L-1B time spent outside of the United States.

(6) Petitioners seeking exemption. The H-1B petitioner need not be the employer that filed the application for labor certification or immigrant visa petition that is used to qualify for this exemption.

(7) Subsequent exemption approvals after the 7th year. The qualifying labor certification or immigrant visa petition need not be the same as that used to qualify for the initial exemption under paragraph (h)(13)(iii)(D) of this section.

(8) Aggregation of time not permitted. A petitioner may not aggregate the number of days that have elapsed since the filing of one labor certification or immigrant visa petition with the number of days that have elapsed since the filing of another such application or petition to meet the 365-day requirement.

(9) Exemption eligibility. Only a principal beneficiary of a nonfrivolous labor certification application or immigrant visa petition filed on his or her behalf may be eligible under paragraph (h)(13)(iii)(D) of this section for an exemption to the maximum period of admission under section 214(g)(4) of the Act.

(10) Limits on future exemptions from the lengthy adjudication delay. An alien is ineligible for the lengthy adjudication delay exemption under paragraph (h)(13)(iii)(D) of this section if the alien is the beneficiary of an approved petition under section 203(b) of the Act and fails to file an adjustment of status application or apply for an immigrant visa within 1 year of an immigrant visa being authorized for issuance based on his or her preference category and country of chargeability. If the accrual of such 1-year period is interrupted by the unavailability of an immigrant visa, a new 1-year period shall be afforded when an immigrant visa again becomes immediately available. USCIS may excuse a failure to file in its discretion if the alien establishes that the failure to apply was due to circumstances beyond his or her control. The limitations described in this paragraph apply to any approved immigrant visa petition under section 203(b) of the Act, including petitions withdrawn by the petitioner or those filed by a petitioner whose business terminates 180 days or more after approval.

(E) Per-country limitation exemption from section 214(g)(4) of the Act. An alien who currently maintains or previously held H-1B status, who is the beneficiary of an approved immigrant visa petition for classification under section 203(b)(1), (2), or (3) of the Act, and who is eligible to be granted that immigrant status but for application of the per country limitation, is eligible for H-1B status beyond the 6-year limitation under section 214(g)(4) of the Act. The petitioner must demonstrate such visa unavailability as of the date the H-1B petition is filed with USCIS.

(1) Validity periods. USCIS may grant validity periods for petitions approved under this paragraph in increments of up to 3 years for as long as the alien remains eligible for this exemption.

(2) H-1B approvals under paragraph (h)(13)(iii)(E) of this section may be granted until a final decision has been made to:
(i) Revoke the approval of the immigrant visa petition; or

(ii) Approve or deny the alien's application for an immigrant visa or application to adjust status to lawful permanent residence.

(3) Current H-1B status not required. An alien who is not in H-1B status at the time the H-1B petition on his or her behalf is filed, including an alien who is not in the United States, may seek an exemption of the 6-year limitation under 214(g)(4) of the Act under this clause, if otherwise eligible.

(4) Subsequent petitioners may seek exemptions. The H-1B petitioner need not be the employer that filed the immigrant visa petition that is used to qualify for this exemption. An H-1B petition may be approved under paragraph (h)(13)(iii)(E) of this section with respect to any approved immigrant visa petition, and a subsequent H-1B petition may be approved with respect to a different approved immigrant visa petition on behalf of the same alien.

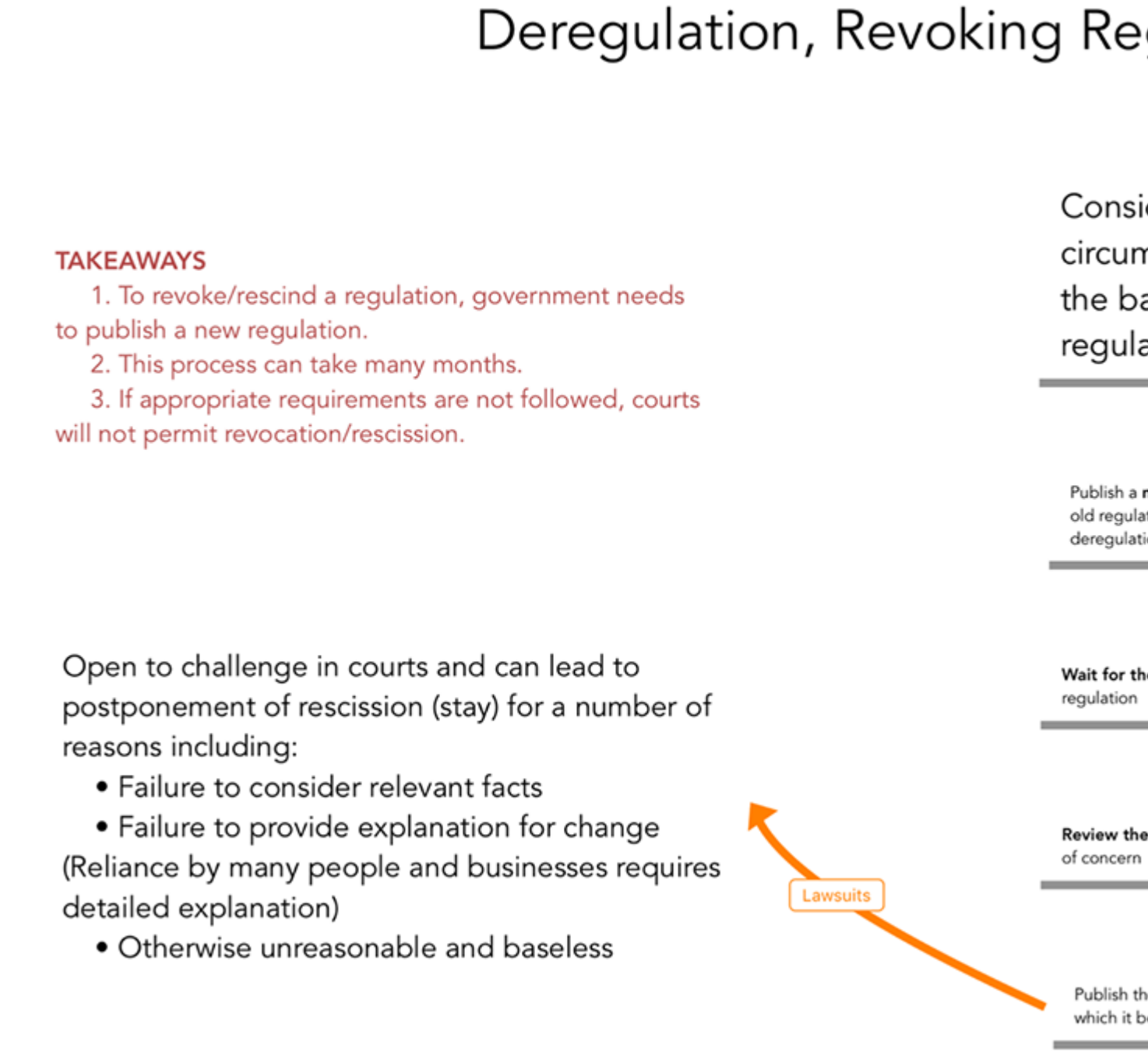
(5) Advance filing. A petitioner may file an H-1B petition seeking a per-country limitation exemption under paragraph (h)(13)(iii)(E) of this section within 6 months of the requested H-1B start date. The petitioner may request any time remaining to the beneficiary under the maximum period of admission described in section 214(g)(4) of the Act along with the exemption request, but in no case may the H-1B approval period exceed the limits specified by paragraph (h)(9)(iii) of this section.

(6) Exemption eligibility. Only the principal beneficiary of an approved immigrant visa petition for classification under section 203(b)(1), (2), or (3) of the Act may be eligible under paragraph (h)(13)(iii)(E) of this section for an exemption to the maximum period of admission under section 214(g)(4) of the Act.

(iv) H-2B and H-3 limitation on admission. An H-2B alien who has spent 3 years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under sections 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediately preceding 3 months. An H-3 alien participant in a special education program who has spent 18 months in the United States under sections 101(a)(15)(H) and/or (L) of the Act; and an H-3 alien trainee who has spent 24 months in the United States under sections 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under sections 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediate prior 6 months.

(v) Exceptions. The limitations in paragraphs (h)(13)(iii) through (h)(13)(iv) of this section shall not apply to H-1B, H-2B, and H-3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitations shall not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. An absence from the United States can interrupt the accrual of time spent as an H-2B nonimmigrant against the 3-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least two months. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

8 C.F.R. § 214.2(i)(F)(13)(E)(6)(v)
Nonimmigrant Visas:
H Visa [4]
H-1 Visa [5]
Image:



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[4] https://immigration.com/visa/nonimmigrant-visas/h-visa
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