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One Minute Memo™

USCIS Liberalizes Rules Governing How Long H-1 and L-1 Workers Can Work in U.S.

In December 2006 the U.S. Citizenship and Immigration Services (USCIS) clarified the rules used to determine the maximum time that foreign nationals can spend in the United States in H-1B or L-1 work status.

Background

Foreign nationals in H-1B status are allowed to remain in the U.S. for a total of six years; foreign nationals in L-1A status are allowed to remain in the U.S. for a total of seven years; and foreign nationals in L-1B status are allowed to remain in the U.S. for a total of five years. [In certain circumstances, extensions beyond the maximum allowable periods of stay may be granted.] Dependent spouses and children of H-1B visa holders are granted H-4 status, and dependent spouses and children of L-1 visa holders are granted L-2 status. Dependent family members of H-1B/L-1 foreign nationals are not limited to a specific amount of time in the U.S.; rather, they are allowed to remain in the U.S. to accompany the primary H-1B/L-1 visa holder as long as the primary H-1B/L-1 visa holder is authorized to remain in the U.S. It has generally been understood that time spent in H-4 or L-2 status as a family dependent would count against the time available to the family member if the family member were to switch to the H-1 or L-1 work permit status.

New Rules

The new guidance from USCIS regarding periods of stay in the U.S. provides greater flexibility for foreign nationals and their families, as well as for employers. Family members who have spent several years in the U.S. in dependent status will no longer be limited to a period of stay less than six years should they wish to obtain H-1B or L-1 sponsorship. In addition, employers will have more latitude when hiring foreign nationals currently abroad who have held H-1B status in the past and who did not exhaust the six-year maximum, without worrying about the shortage of cap-subject H-1B visas.

Time Spent as Family Dependent Does Not Count Against Maximum Time Available in H-1B or L-1 status.

Under USCIS' new policy, any time spent in H-4 or L-2 status does not count against the maximum allowable period of stay to foreign nationals who apply for H-1B or L-1 status. Note, however, that an H-4/L-2 dependent who seeks to change his/her status to H-1B would be subject to the H-1B cap (unless the dependent were otherwise exempt from the cap).

H-1B Workers Can Get "Seventh Year Extension" Even If Not Currently In U.S. or Not Currently in H-1B Status.

In general, an H-1B worker can obtain an annual extension of H-1B work permit status even beyond the six-year limit that would otherwise apply if green card paperwork had been filed for at least one year prior to exhausting the six-year limit in H-1 status. Prior to the USCIS clarification, it was unclear whether a foreign national physically outside the U.S. (or in the U.S. but in a different nonimmigrant visa category) would be eligible to apply for an additional period of H-1B status if he/she had already reached the six-year limit of stay, even if he/she was otherwise clearly eligible to apply for H-1B status beyond the six-year limit. Under the new rule, a foreign national eligible for an H-1B extension beyond the six-year limit may be granted the extension regardless of whether he/she is currently in the U.S. or abroad, and regardless of his/her nonimmigrant status, if in the U.S.

Option for H-1B Workers Outside of the U.S. for At Least One Year: Re-enter U.S. for Balance of Six-Year Remainder OR Re-enter With Full Six Years But Subject to H Cap

After an absence from the U.S. of one year or more, a foreign national who previously held H-1B status in the U.S. within the prior six years and who did not exhaust the six-year maximum period of H-1B time may elect to re-enter the U.S. either (1) for the "remainder" of the initial six-year period without being subject to the H-1B cap (assuming that the prior H-1B work permit had itself been subject to the cap), or (2) as a "new" H-1B foreign national with a full six-year eligibility, but subject to the H-1B cap in that case. Under prior CIS policy, there was no option to invoke the balance of the previously unused H-1B six-year life.