203:Shortcuts Through the Immigration & Expatriate Maze for Employees

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Faculty Biographies

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Mark Aoki-Fordham is director, corporate counsel for Starbucks Coffee Company in Seattle, where he provides advice in the areas of immigration and international, commercial, joint venture, acquisition, and licensing transactions.

Prior to joining Starbucks Coffee Company, Mr. Aoki-Fordham worked in Seattle law firms, where his practice emphasized immigration, international, intellectual property, commercial, and financing transactions.

He serves on the board of trustees of the King County Bar Association, on the executive committee of the Washington State China Relations Council, and on the board and legal committee of the American Civil Liberties Union of Washington. He does pro bono work in the areas of immigration, landlord/tenant, and civil rights.

He received a BA from the University of Washington and is a graduate of the Columbia University School of Law.

Catherine E. Bocskor

Catherine E. Bocskor is general counsel for WorldWide Parking Inc., a multinational corporation based in Maryland. Her duties include managing legal issues arising from company operations in the U.S., Poland, Brazil, Mexico, Dominican Republic, and Korea.

Prior to this position, she managed two investment funds for Americans in Budapest, Hungary, and specialized in foreign compensation claims through her law office branches in Budapest, and Washington, DC. She has previously practiced international law and international trade law in Washington, DC. Additionally, in the past she has worked as special assistant attorney general for the State of Maryland as well as assistant counsel for international affairs for the U.S. Department of Labor.

Ms. Bocskor holds a JD from the University of Toledo College of Law, an LLM in securities and finance from Georgetown Law School, and an LLM in international law from George Washington University.

Darryl A. Weiss

Darryl A. Weiss is currently the vice president of human resources and legal affairs for ORINCON Corporation International a provider of signal processing, digital imaging, and information assurance solutions for defense and commercial applications. His responsibilities include providing legal counsel to the organization and board of directors, managing the corporate compliance activities, international law, executive compensation, benefits, and oversight of the general human resources function.

Prior to joining ORINCON, Mr. Weiss worked in the aerospace, computer, telecommunications, and biotechnology industries in a variety of legal and human resources roles. Mr. Weiss has worked on site in Canada, England, France, Germany, Hong Kong, Ireland, Japan, Malaysia, Netherlands, Singapore, Sweden, and Switzerland.

Mr. Weiss is currently on the board of directors for the ACCA's San Diego Chapter as well as ACCA's International Law and Employment and Labor Law Committees.

You Bring Employees In
You Send Employees Out

The Immigration and Expatriate Hokey Pokey

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5 W's And 1 H

- Think Locally And Act Globally
  - Why
  - What
  - Where
  - Who
  - When
  - How

Why Use Them?

- Development
  - Rounding Out an Employee
- Start Up
  - Opening a Facility
- Financial Control
  - Changing the System
- Senior Management
- Project
- Request

Selection Process

- Profiles Of The Candidate And Family
  - Have They Ever Been Out of the Country?
  - Is Spousal Employment an Issue?
  - Have a Professional Profile Done on the Family
  - Interview Everyone Who Is Moving
  - Is Religion an Issue?
- Cultural Assimilation
  - Alone in a Crowd of Faces

Pay Systems

- Local Pay
  - Advantages
    - Pay Parity With Local Co-workers
    - Simple to Administer
    - Less Costly
  - Disadvantages
    - Complex When the Employee Moves From Country to Country on New Assignments
    - Negotiated Allowances to Offset Shortfalls Can Add to the Cost and Complexity

Pay Systems

- Balance Sheet
  - Allows the Expatriate to Maintain the Same Purchasing Power in the Host Country As They Have in Their Home Country
- Comprised Of
  - Income Taxes
  - Housing
  - Goods and Services
  - Reserve

Pay Systems

- Single Currency
  - Pay in Local Currency
  - Add Premiums to Maintain Purchasing Power
  - Foreign Exchange Requires Recalculations
  - Higher Taxes Means More Cost to the Company
  - Lower Taxes Means Windfall to the Employee

Pay Systems

- Split Pay
  - Reduce Home Country Pay
  - Company Pays for the Offset in Local Currency
  - Exchange Rates Do Not Affect It
  - Provides the Same Purchasing Power As a Peer in the Home Country

Pay Systems

- Lump Sum
  - Provide a Lump Sum of Money in Addition to Salary
  - Least Tax Effective Means of Pay
  - Often the Most Expensive Method of Pay Delivery

Security

- Security Plan
  - When to Close Office
  - What Measures to Be Taken
  - What to Take
  - What to Destroy
  - Where to Go
  - Who to Notify
  - Emergency Contact Information
  - Evacuation Routes
  - Who Is Allowed to Stay and Who Goes

Security

- Other Considerations
  - Emergency Kits
    - First Aid, Gas Masks, Water, Etc.
  - Bomb Threat Guidelines
  - Kidnapping Guidelines
  - Kidnap and Ransom Insurance
  - Med-evac
  - Legal Assistance

Security

- Sources of Information
  - Insurance Carriers
    - AIG, CRG, CIGNA International, Winterthur, Generali
  - State Department Updates
  - Canada's Department of Foreign Affairs and International Trade

Key Issues

- Tax Issues
  - Equalization
  - Preparation
  - Taxable items
    - ***401(K) match is income in Japan***
- Cost
- Repatriation
- Selection
- Security

Employing Foreign Workers

The Most Common Business Visa Categories

Nonimmigrant Visas are for Stays of Limited Duration and Temporary Employment of Foreign Workers

- B-1 Visitor For Business
- F-1 Student
- H-1C Professional Nurses
- H-1B Worker In Specialty Occupations
- H-2 Unskilled
- H-3 Trainee
- J-1 Exchange Visitor
- L-1 Intracompany Transfer
- O-1 Individuals Of Extraordinary Achievement
- P-1 Performing Entertainers And Athletes
- TN-1 Trade NAFTA

B-1 Business Visitor

- Temporary Visit to Conduct Business to Benefit **Foreign** Employer
- Employment in U.S. Not Permitted
- Must Demonstrate Intent to Depart U.S.
- Canadians Apply at Port of Entry; Others Must Obtain Visa at U.S. Embassy or Consulate in Home Country
- May Not Be Compensated by U.S. Company
- Admitted for 30 Days to 6 Months

Visa Waiver Permanent Program

- Permits a Waiver of B-1/B-2 Visa Requirements for Nationals of 27 Countries
- For Stays of 90 Days or Less – Not Extendable
- Subject to Summary Proceedings to Deny Admission, Without Judicial Review

Acceptable B-1/VWP Activities

- Meeting With U.S. Business Associates
- Attending Conferences, Conventions, Seminars, Trade Shows, or Job Fairs
- Training and Orientation
- Negotiating Contracts
- Providing After-sales Service and Support Pursuant to a Warranty or Service Contract
- Look to 9 FAM §41.31(b)(1)
- May Not Engage in "Local Employment or Labor for Hire"

F-1 Student

- After Attending School for One Year, Student Is Eligible for One Year of Optional Practical Training (OPT) With a U.S. Employer (Can Be Taken in Shorter Terms, but Cannot Exceed One Year)
- Designated School Official Must Certify Qualification for OPT on Form I-20 and Obtain EAD Card for Student to Verify Employability

Labor Condition Application

- Before Filing H-1B Petition, Employer Must Certify to Department of Labor:
  - Employer Will Pay Higher of the **Actual Wage** Paid to Other Employees or **Prevailing Wage** for Area
  - Working Conditions Will Not Adversely Affect Conditions of Other Workers
  - No Strike or Lockout
  - Notices Have Been Posted at Worksite
  - No Benching

H-1B Specialty Occupation

- Job Must Require a Bachelor's Degree, and Employee Must Have Bachelor's Degree or Equivalent in Education And/or Work Experience
- Employer Must Submit Attestations Regarding Wages and Working Conditions to U.S. Department of Labor
- Granted in Three-year Increments, Subject to Six-year Maximum Stay (With Additional Extensions in Very Limited Circumstances)
- Subject to Numerical Limitations Established by Congress
- May Have "Dual Intent" (I.E., May Apply for Permanent Residence Without Jeopardizing Nonimmigrant Status)
- Employer Must Pay Cost of Return Home at End of Employment

L-1 Intracompany Transferee

- U.S. Company Must Have Foreign Affiliate, Parent, Branch or Subsidiary and Both Must Continue to Operate.
- Employee Must Have Worked for at Least One Year Out of Last Three Years for Foreign Employer in Managerial, Executive, or Specialized Knowledge Capacity and Be Coming to U.S. To Perform Duties in One of Those Capacities.
- Granted for Three-year Period, Then in Two-year Increments for Extension, Subject to Five-year Maximum Stay for Specialized Knowledge, and Seven Years for Managerial or Executive.
- May Have Dual Intent.

TN Professional

- Applicant Must Be Canadian or Mexican Citizen
- Job Offered Must Be Listed on Appendix to NAFTA
- Applicant Must Have Appropriate Educational Credentials
- May Not Be Self-employed

The Immigrant Process (A.K.A., "Green Card")

- Step 1. Labor Certification
- Step 2. Immigrant Petition
- Step 3. Adjustment of Status

Step 1. Labor Certification

- Company must prove that there is a shortage of U.S. workers for the position
- Employment of foreign national employee will not have adverse effect on wages and working conditions of U.S. workers

Filing Procedures

- Filed With State Employment Security Department
- If ESD Finds Case Meets Requirements, Forwards to U.S. Department of Labor for Final Review
- If DOL Satisfied That Regulations Have Been Met, Labor Certification Is Certified and Approved

Step 2. Immigrant Petition

- Filed With INS
- Company Must Prove That Foreign National Employee Possessed All Requirements for Job at the Time He or She Began Working in His or Her Current Position
- Even If Labor Certification Approved, INS Can Deny Immigrant Petition

Step 3.
Adjustment of Status

- Immigrant Petition Approved
- Immigrant Visa Number Available; If Number Available, May Be Filed Concurrently With Immigrant Petition
- Employee May File Application to Adjust Status to That of Lawful Permanent Resident

Family Members

- (A) Spouse and (B) Children Under Age of 21 Are Eligible to File Applications for Adjustment of Status at Same Time As Employee
  - Child's Adjustment of Status Application Must Be Approved Before 21st Birthday
  - Due to the Lengthy Processing Times for Each Step, Child Who Is 18 Years Old or Older When You Begin Immigrant Process May Not Be Able to Adjust As a Dependent

Grounds of Excludability

- Similar to Nonimmigrant Grounds, Including (but Not Limited To):
  - Past Immigration Violations
  - Criminal Record
  - Public Health Concerns
- Waivers Available for Most (but Not All) Conditions

Employment Authorization

- Employee and Immediate Family Members Eligible to Receive Employment Authorization Document (EAD) While Adjustment Application Is Pending
  - Processing Time for the Adjustment of Status Is More Than One Year
  - Processing Time for EAD Is 90 Days

Travel Document

- Individuals in H or L Status May Travel Using Receipt for Filed Adjustment of Status Application
- Individuals Working Under EAD Card Need Advance Parole Before Leaving United States

Immigrant Intent

- TN Classification Is for Temporary Employment Only
- H and L Status Allows Employee to Have "Dual" Intent (Nonimmigrant and Immigrant)

Legislative History and Update

Immigration Reform and Control Act of 1986 (IRCA)

- Made Knowing Employment of Aliens Without Work Authorization Illegal
- Creation of I-9 Form for All Employees
- Must Be Completed Within 72 Hours of Beginning Employment
- I-9 Audits Are a Cash Cow for the DOL

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRARIA)

- I-9 Paperwork Violations
  - If in Good Faith Compliance Despite Technical or Procedural Failure to Comply With the Act
  - Employer May Voluntarily Correct Errors Within 10 Days of Notice
- Bars to Admissibility
  - Those Previously Barred for More Than 180 Days but Less Than One Year Are Now Barred for Three Years
  - Anyone in the US Unlawfully for Over One Year Is Now Barred for Ten Years

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRARIA)

- Expedited Removal Process
  - Inspectors Can Summarily Remove a Person From the US If They Attempt to Enter With Fraudulent or No Documents

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRARIA)

- Aggravated Felonies
  - Convicted of Crimes of Moral Turpitude Within Five Years of Their Last Entry
  - Drug Offense
  - Firearms Offense
  - Terrorist Activities

American Competitiveness in the 21st Century Act (AC 21)

- Increased H-1B Numbers
- H-1B Portability
  - Allows an Employee of Company A to Immediately Move to Company B When Company B Files a New Petition
- Six-year Limitation Extended
  - Allows the Six Year Maximum Stay to Be Extended in One Year Increments If a Labor Certification or Permanent Residency Is Pending and the Delay Is Due to the Fault of the Government Organization

American Competitiveness in the 21st Century Act (AC 21)

- Per-country Limits Liberalized
  - Unused Numbers Are Freed up for Over Subscribed Countries
- Job Changes While I-485 Pending
  - If an I-485 Has Been Pending for More Than 180 Days, the Alien Can Change Jobs or Employers As Long As the New Job Is in the Same or Similar Classification

American Competitiveness in the 21st Century Act (AC 21)

- Corporate Restructuring
  - Allows an Alien to Continue to Work for a Successor Employer Without Filing Amended Paperwork
- Job Creation Investors
  - "A Meellion Dollars"
- Premium Processing Fees
  - $1,000 More for Expedited Treatment

Homeland Security Act

- Department of Homeland Security
- Bureau of Citizenship and Immigration Services (BCIS)
- Bureau of Immigration and Customs Enforcement (BICE)
- Bureau of Customs and Border Protection (BCBP)

Homeland Security Act

- Visit and Immigrant Status Indicator Technology (VISIT)
  - Automated Entry/exit System
- In Country Reporting
  - All Aliens Over Age 14 Must File Address Changes
  - 25 Countries Have Special Rules

Homeland Security Act

- Visa Processing Overseas
  - Toughened Procedures
  - In Person Interviews Versus Mail in
- On Line Filing
  - Certain Immigration Forms May Now Be Filed on Line

Resources

- American Immigration Lawyers Association:
  - www.aila.org
- Bureau of Citizenship and Immigration Services:
  - www.immigration.gov
- Expat Forum
  - *www.expatforum.com*
- Department of Labor
  - *www.dol.gov*
- World at Work *(Formerly American Compensation Association)*
  - *www.worldatwork.org*
- International Foundation of Employee Benefits
  - *www.ifebp.org*

EXECUTIVE SUMMARY OF NEW US LABOR DEPARTMENT REGULATIONS

The US Department of Labor (DOL) published regulations affecting how Labor Condition Applications (LCAs) are to be filed and maintained. These regulations became effective January 19, 2001.

- **H-1B "DEPENDENT" EMPLOYERS FACE GREATER REQUIREMENTS WHEN FILING LCAS**
  H-1B "dependent" employers must increase recruitment efforts to find US workers, and must document those efforts. H-1B dependent employers may still exempt themselves from the increased requirements if they hire H-1B workers who either earn at least $60,000 per year, or hold a Master's degree related to the field of employment.

- **NEW "NON-DISPLACEMENT" PROVISIONS FOR H-1B DEPENDENT EMPLOYERS**
  H-1B dependent employers must attest to the Labor Department that its H-1B employees will not displace any similarly situated US workers at the sponsoring company. Furthermore, H-1B dependent employers must attest that they will not send H-1B employees to other companies under contract, where doing so would displace similarly situated US workers at those companies.

- **RULES REGARDING "BENCHED" ("NONPRODUCTIVE") EMPLOYEES**
  H-1B employers must continue to pay H-1B employees the full salary (and benefits) owing to the employee under the LCA attestation, even where the employee is forced into a "nonproductive" status due to a lack of work assignments or other employer-related reasons.

〈 **RULES REGARDING BENEFIT PLANS FOR H-1B EMPLOYEES**
  H-1B employees must be offered benefits and eligibility for benefits on the same basis as US workers. Employers must now include in their LCA public access files a summary of their benefit plans, listing those benefits offered to both H-1B and US workers.

- **NEW POSTING NOTICE REQUIREMENTS FOR MOBILE H-1B EMPLOYEES**
  In most circumstances, H-1B employers will now have to post notices at any and all worksites where H-1B employees work, including client companies receiving agreed-upon services from H-1B employees.

DETAILED SUMMARY OF NEW US LABOR DEPARTMENT REGULATIONS

The DOL regulations radically affect how employers must proceed with the H-1B process, and in particular affecting how Labor Condition Applications ("LCAs") are to be filed and maintained.

- **ARE YOU AN "H-1B" DEPENDENT EMPLOYER?**

  - The DOL regulations create a "snap shot" test to determine if an employee is H-1B dependent. Please note that employers hiring 7 H-1B employees or fewer cannot be deemed H-1B dependent. Under this "snap shot" test, employers are defined as H-1B dependent if:

    - they have 25 or fewer full-time equivalent ("FTE") employees, of whom 8 or more are (part-time or full time) H-1B employees

    - they have between 26 and 50 full-time employees, of whom 13 or more are (part-time or full time) H-1B employees, or

    - they have 51 or more full-time employees, of whom 15% or more are (part-time or full time) H-1B employees.

- If the above formula does not lead to a clear result, or if employers feel the "snap shot" test improperly leads to the employer being defined as H-1B dependent, the employer may instead adopt a DOL-devised formula. Under this formula, "full-time equivalent" ("FTE") employees, are defined as:
  - actual individuals who work at least 35 hours per week, or
  - virtual full-time employees, created through
    - combining two part-time employees as one, or, alternatively,
    - adopting a formula whereby the employer totals the hours worked by all part-time employees within the pay period, divide that total by the employer's standard number of hours full-time employment period (typically, 40 hours per week), based upon either the last payroll or a standard work schedule.
- Bona fide independent contractors and consultants are not to be counted as FTEs.
- In making the H-1B dependency calculation, a group of corporations will be treated as a "single employer" where the group is comprised of:
  - a parent-subsidiary controlled group, brother-sister controlled group, or a combined group,
  - trades or businesses under common control
  - affiliated service groups (such as law firms or accounting firms), where the principals of these organizations possess sufficient ownership in the H-1B petitioning company
- The H-1B dependency calculation must be made each time a new or existing LCA is used to support a new H-1B petition, whether for new H-1B employment or extension of previously-approved H-1B employment.
- No documentation of the H-1B dependency determination need be kept by the employer *unless* the "snap shot" test reveals the employer to be dependent, and only the alternate test demonstrates the employer is not H-1B dependent.
- If the employer is deemed to be H-1B dependent, it must so indicate on all LCA filings unless the only H-1Bs to be sponsored on the LCA are "exempt".
- Any H-1B employer who is found to have either failed to comply with its own LCA attestations, or alternatively, made a material misrepresentation on an LCA, will be treated as H-1B dependent, and subject to random DOL audits, for a five-year period following the date of final determination of LCA violation/misrepresentation.

- **"H-1B DEPENDENT" EMPLOYERS FACE NEW ATTESTATION REQUIREMENTS ON RECRUITMENT**
  - Effective January 19, 2001, US employers that are defined as "dependent" upon H-1B employees (that is, whose workforce contains a certain ratio of H-1B employees to other employees, as discussed above) must engage in "good faith recruitment" using "industry wide standards."
    - Such recruitment must take place both internally and externally, using both active methods (*e.g.*, college placement, headhunters, job fair attendance) and passive methods (*e.g.*, print or internet advertisements).

- Such recruitment efforts must be done in good faith, meaning that nonimmigrant job candidates may not be given preferential treatment during the recruitment process.

- DOL has indicated in the preamble to its regulations that it will scrutinize H-1B dependent employers who are unable to demonstrate success in finding US workers.

- In the course of such recruitment, the H-1B dependent employer must offer its open positions to any US workers who apply for the job with equal or better qualifications.

➢ Employers defined as H-1B dependent must create and maintain documentation of their recruitment efforts.

- Recruitment documentation may consist of actual copies of the recruitment materials used, or a summary memorandum of those efforts.

- Recruitment documentation must include documentation received or created during the candidate selection process, including resumes, interview sheets, ratings forms, records of interviews, etc. A summary memorandum documenting the recruitment methods used must be maintained in the employer's "public access" LCA file.

• **NON-DISPLACEMENT ATTESTATIONS FOR H-1B DEPENDENT EMPLOYERS**

➢ H-1B dependent employers must attest on each LCA that the H-1B employee being sponsored will not displace any similarly-situated US worker from equivalent jobs in the same geographic area of employment.

➢ Similarly, H-1B dependent employers must attest that their H-1B employees will not displace US workers at other worksites. For example, an H-1B dependent software consulting company may not use H-1B workers to work under contract with another company, where such a placement would, in turn, displace US workers at the contracting company. This is referred to as "secondary displacement".

➢ The prohibition against "secondary displacement" does not apply unless there are "indicia of employment" which indicate that the H-1B employee is engaging in a "quasi-employment" relationship with the "secondary employer". Such indicia include, but are not limited to, the following:

- the contracting/secondary employer controls how, when and where the H-1B employee performs the contracted services,

- the contracting/secondary employer provides the relevant materials or equipment for the H-1B employee,

- the work is performed on the contracting/secondary employer's premises,

- a continuing relationship develops between the H-1B employee and the contracting/secondary employer, and/or

- the H-1B employee is providing services that comprise the regular business for the company (*e.g.*, a software engineer developing software for a software company).

➢ While contracting/secondary employers may be allowed some leeway to terminate its US workforce (*e.g.*, termination for cause), layoffs may be closely scrutinized.

- H-1B dependent employers (and not the contracting, secondary employers) are expected to exercise due diligence in determining from the contracting entity whether and how the placement of H-1B workers might impact US workers at the contracting company's worksite.

- **EXEMPTIONS FROM NEW LCA OBLIGATIONS FOR H-1B DEPENDENT EMPLOYERS**

  - Even where an employer is deemed as H-1B dependent through application of either formula described above, the new attestation requirements do not apply where the H-1B employee to be sponsored is deemed "exempt".

  - An H-1B worker will be exempt from the heightened LCA attestation requirements for "dependent" employers where:

    - The H-1B worker holds a master's degree or higher in the field of specialty related to the proposed H-1B employment, or

    - The H-1B worker will earn annual wages (including bonuses and related compensation) of at least $60,000.

  - By "master's degree", the DOL means an actual master's degree, without regard to so-called "experience equivalencies".

  - When using an LCA for a "exempt" H-1B employees, the employer must maintain documentation regarding all "exempt" H-1B employees in its public access LCA files. Further, the employer must keep such evidence available for DOL's review upon request. For this reason, H-1B dependent employers may wish to consider filing separate LCAs for exempt H-1B employees.

- **NEW LCA FORMS AND LCA FILING PROCEDURES**

  - A revised version of the Labor Condition Application (ETA Form 9035) has been made available.

  - This new form contains new attestations on a cover page to the LCA form (ETA Form 9035CP).

  - The new attestations, where required, must be included with all posting notices. We recommend that the cover page (ETA 750CP) be retained in the public access file for each LCA. The attestations on the cover page must be provided to the H-1B employee if he or she requests a copy. A copy of the LCA must be provided to the H-1B employee.

  - From January 19, 2001 through at least February 5, 2001, all LCAs must be sent via US Mail. There will be no "faxback system", which will likely drastically slow down LCA processing times.

  - After February 5, 2001, the new faxback system should be running, and able to accommodate the new LCA form.

- **NO NEED TO FILE NEW LCAS AFTER CORPORATE REORGANIZATIONS**

  - No new LCA need be filed with the DOL due to a corporate reorganization, even where the corporate reorganization results in a new corporate identity, or even a new IRS Employment Identification Number ("EIN").

- Instead, the newly-created corporate entity is required to assume the obligations of the prior LCA by amending its public access files.

- **NEW RULES FOR WHEN AND HOW LCAS MUST BE FILED FOR MOBILE EMPLOYEES**

  - "Place of employment" has been re-defined to allow H-1B employees to move from location to location – even outside the geographic area of the LCA-designated worksite – as long as the H-1B employee's duties require frequent trips to many different locales.

  - However, such trips must be extremely short in duration (*e.g.*, no more than 5 consecutive business days for employees who frequently travel, and no more than 10 consecutive business days for employees who only occasionally travel.)

  - For H-1B employees who move to a different worksite within the **same** geographic area of the LCA-designated worksite, new LCA posting notices must be displayed on or before the date the H-1B employee reports to that worksite.

  - For H-1B employees who move to a different worksite within a geographic area **outside** the LCA-designated worksite, the H-1B employer must either file a new LCA or follow new "short-term placement" rules.

    - Under "short-term placement" rules, qualifying employers may temporarily place an H-1B employee at a worksite outside the LCA's designated geographic area for a total of 30 workdays in any given year.

    - Under these same rules, qualifying employers may temporarily place an H-1B employee at a worksite outside the LCA's designated geographic area for a total of 60 workdays in any given year, as long as the employee maintains a permanent presence at the LCA-designated worksite, and as long as the employee actually continues to live within the geographic area of the LCA-designated worksite.

    - The "short-term placement" rules prohibit employers from making the H-1B employee's *initial* assignment outside the LCA-designated worksite.

    - The "short-term placement" rules may not be used when H-1B employees are being sent to a geographic area where that employer has already filed a separate LCA for the relevant occupational classification.

    - Employers taking advantage of the "short-term placement" rules must continue to pay the required wage designated on the H-1B employee's LCA, and must also pay the employee's actual cost of travel, lodging, meals, and incidental expenses for all days (not just workdays) at the short-term worksite.

- **RULES REGARDING "BENCHED" ("NONPRODUCTIVE") EMPLOYEES**

  - The new DOL rules implement statutory requirements that H-1B employers continue to pay H-1B employees the full salary (and benefits) due the employee under the LCA attestation, even where the employee is forced into a "nonproductive" status due to a lack of work assignments or other reasons the employer decides.

  - These obligations are incurred once the H-1B enters into employment with the petitioning company, or within 30 days of the H-1B employee's entry to the United States on the H-1B visa, or -- if the H-1B employee is already in country the time of H-1B petition approval – within 60 days of the H-1B employee's eligibility to assume work with the H-1B employer.

- If an employee becomes nonproductive voluntarily (such as taking a period of time off for personal reasons, or medical leave) the LCA wage need not be paid. However, employers are reminded that payments of wages pursuant to other laws may be required. In addition, as discussed below, employers must extend to H-1B employees all benefits otherwise due to similarly employed US workers.

- A bona fide termination relieves the H-1B employer of these provisions, but the DOL regulations imply that a bona fide termination may require the H-1B employer to send notice to the BCIS that the employment relationship has been terminated, request a cancellation of the terminated employee's H-1B petition, and fulfill the obligation to provide return airfare to worker. In any event, we recommend that employers document termination of employees in writing using termination letters or similar written memos.

〈 **NEW RULES REGARDING BENEFIT PLANS FOR H-1B EMPLOYEES**

- H-1B employees must be offered benefits and eligibility for benefits on the same basis as US workers.

- Employers must now include in their LCA public access files a summary of their benefit plans, listing those benefits offered to both H-1B and US workers.

- Multinational employers are not required to initiate US benefits for workers that remain on the foreign office benefits and payroll for US trips of 90 days or less. However, employers may not avail themselves of this rule unless they maintain special documentation of the foreign benefits in their public access LCA files and individual employee files.

• **LIMITATIONS ON H-1B FEES & COSTS CHARGEABLE TO THE H-1B EMPLOYEE**

- Employers may not charge their H-1B employees for the attorneys fees and other costs incurred in obtaining H-1B authorization for that employee, if such fees – when deducted from the employee's wage – would bring the employee's wage below the required prevailing wage.

- Employers may not charge penalties to H-1B employees for terminating their employment with the petitioning employer prior to the agreed-upon date. Employers may charge previously agreed-upon liquidated damages (including attorneys' fees) to the employee, but may not do so by deducting money from the H-1B employee's outstanding paychecks. In no event may an H-1B employer recoup the $1000 training fee paid to the BCIS with the H-1B petition.

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Immigration Reform and Control Act of 1986

The Immigration Reform and Control Act of 1986 (IRCA) made knowing employment of aliens without work authorization illegal. Under the law, employers have to verify the identity and eligibility for employment for all new hires. Employers must fill out an I-9 form for each new employee.

Under the law employers can commit a legal offense if they fail to properly complete an I-9 form; knowingly hire an unauthorized alien; provide or knowingly accept a false social security card; or engage in a pattern or practice of I-9 compliance failure. Fines for improper compliance with the law can total $10,000 or more.

Employers who commit an unfair immigration related employment practice are subject to civil penalties. These include discrimination against a protected individual in hiring or termination because of national origin or citizenship status. Protected individuals include permanent residents, temporary residents, special agricultural workers, refugees and asylees.

Amnesty Provision. The IRCA also provided amnesty for foreign nationals who had been in the U.S. for a number of years. Aliens who had been unlawfully residing in the United States since before January 1, 1982 were legalized. Aliens employed in seasonal agricultural work for a minimum of 90 days in the year prior to May 1, 1986 were also legalized. Ultimately nearly 2.7 million people were approved for permanent residence under these amnesty provisions.

IIRARIA
Illegal Immigration Reform and Immigrant Responsibility Act of 1996

I-9 Paperwork Violations: An employer who is in "good faith compliance" with Form I-9 paperwork requirements is considered to have complied with the requirements despite a technical or procedural failure to meet one of the requirements. The employer must voluntarily correct the failure within ten days after the failure has been pointed out to the employer. The IIRARIA reduced the list of acceptable documents that may be presented by new employees to establish employment eligibility.

Bars to Admissibility: Anyone who has previously been in the U.S. unlawfully for more than 180 days but less than one year will be barred from entering the U.S. for a period of three years. Anyone in the U.S. unlawfully for a period of over one year will be barred from re-entering the U.S. for a period of ten years.

Expedited Removal Process. The law created an expedited removal process at all U.S. ports of entry. An inspector can summarily remove a person from the U.S. if he is found to attempt to enter the U.S. with fraudulent documents or with no documents. The law takes away from the courts any authority to review the removal decision.

Aggravated Felonies: The law expanded the definition of "aggravated felony" the commission of which triggers a deportation. Noncitizens are considered deportable if they have been

convicted of a crime of oral turpitude committed within five years of the last entry if a sentence of one year was imposed or conviction of two crimes of moral turpitude at any time after entry. In addition, a noncitizen is deportable for conviction of an aggravated felony, a drug offense, a firearms offense, involvement in terrorist activities or other crimes involving espionage, treason and sabotage.

Immigrants convicted of an aggravated felony are not eligible for relief from deportation (suspension of deportation/cancellation of removal).

The IIRAIRA also took away the right of a court to review almost all discretionary decisions affording relief to eligible individuals.

American Competitiveness in the 21st Century Act (AC21)

Signed into law on October 17, 2000, the law lifted the restraints imposed by the cap on the number of H-1B visas that are available for foreign-national professional workers.

The law increased the H-1B numbers to 195,000 for each of the fiscal years 2001, 2002 and 2003. Fiscal year 2003 ended on September 30, 2003.

Exemptions: The following employers are exempt from the H-1B cap:

- higher educational institutions and their related or affiliated non-profit entities
- non-profit research organizations
- government research organizations
- H-1B physicians who have received a J-1Conrad 20 waiver of the two-year home residency requirement based on a work in a geographic area where health professionals are in short supply

Filing fees for H-1B visas were increased to $1,110.

H-1B "Portability" Rule: Previously, holders of H-1B visas could not change jobs before the second temporary job visa petition was approved. Under the new law, the H-1B visa holders can change jobs at the time they file a second temporary visa petition to work for a different employer and can take up the new job without waiting for the petition to be approved. If the new petition is denied, however, there is no further employment authorization.

Six-Year Time Limitation Extended. The old law established six years as the maximum time that an H-1B visa-holder could work in the United States. The new law allows this time to be extended in one-year increments if a permanent resident visa or labor certification application is pending.

Per-Country Limits Liberalized. Under the old law, the immigrant visa applicants had to adhere to strict per-country limits on the number of visas that would be available to residents of each country. These numbers were particularly backed up for residents of China and India.

Under the new law, unused numbers from countries or categories that are under-utilized were freed-up to be used by immigrant visa applicants from over-subscribed countries. A person who is currently in the U.S. under an H-1B temporary worker status can extend that status until his or her employment-based immigrant visa petition is adjudicated.

Job Change While I-485 Application Pending. A worker who has filed for adjustment of status in the U.S. to change from a temporary visa to a permanent visa whose I-485 applications have been pending for 180 days or more, can change jobs or employers provided that the new job is in "the same or a similar occupational classification."

Visa Waiver Permanent Program Act

The Visa Waiver program was enacted into law on a permanent basis on October 30, 2000. This program allows residents of certain countries where the incidence of visa fraud is low to enter the United States for up to 90 days without being formally processed for a visa at a U.S. Consulate.

Corporate Restructuring Provision. This provision allows most H-1B workers to continue to work for a successor employer without filing an amended H-1B petition in the event of a corporate restructuring provided that the terms of conditions of employment remain the same. A corporate restructuring includes but is not limited to a merger, acquisition, or consolidation where the new corporate entity succeeds to the interests and obligations of the original employer.

Job Creation Investors. If a foreign national invests at least $1 million in the U.S. (or in some cases $500,000) and creates a U.S. business and jobs, this visa category was extended through September 30, 2003.

Premium Processing Fees. A provision appended to the omnibus-spending bill of December 21, 2000 allowed business visa petitioners to pay an additional $1000 for expedited visa processing service.

Homeland Security Act

In the Spring of 2003, the Homeland Security Act created the Department of Homeland Security (DHS). This new cabinet agency includes 170,000 employees from 22 agencies. Among other agencies, the Act transferred the Immigration and Naturalization Service (INS) from the Justice Department to the Department of Homeland Security.

The service functions of the former INS including applications for citizenship, permanent residence and asylum will be carried out by the Bureau of Citizenship and Immigration Services (BCIS).

Part of the DHS encompasses several enforcement components from the former INS, the U.S. Customs Service and the Federal Protective Service. These components were brought together

to form DHS's Bureau of Immigration and Customs Enforcement (BICE). BICE is the investigative and enforcement arm of the DHS.

The Bureau of Customs and Border Protection (BCBP) is responsible for border inspections and includes the former Border Patrol, the former Customs Services and agricultural quarantine.

These Bureaus report to the Deputy Secretary for Homeland Security.

The Executive Office for Immigration Review will stay within the Justice Department. This Office includes the Board of Immigration Appeals and the Immigration Judges.

US VISIT system. One of the first new programs to be implemented by the new DHS will be the "United States Visitor and Immigrant Status Indicator Technology" (US VISIT) program, which is an automated entry/exit system to be implemented in phases. Under this program nonimmigrant visa holders travel documents will be scanned, a photo and fingerprint will be taken and their identities checked against certain databases. On departure from the country their identity will be verified and a record created of their departure. This program is supposed to be implemented at airports and seaports by January 1, 2004.

In-country reporting. All aliens over the age of 14 are required to file a change of address card with the Department of Homeland Security within ten days of a change of address. Citizens of 25 countries, primarily Middle Eastern countries, who are in the U.S. on temporary visas, must complete special registration formalities on entering and upon departing the U.S. They must also update their registrations each year.

Visa Processing Overseas. The Department of State will continue to issue U.S. visas from the U.S. Consulates overseas. Visa issuing procedures have been toughened since 9/11 and since the Iraqi War. As of August 1, 2003 in-person visa interviews will be required for a higher percentage of non-immigrant visa applicants. In addition, FBI and CIA clearance is now mandatory before a visa will be issued.

On-Line Filing. The BCIS has made it possible to now file certain applications on-line. At present only those people applying for work authorization (form I-765) or for replacement of green cards (form I-90) can file on line. The BCIS plans to make more on-line filing available in the future. These forms can be accessed by going to www.bcis.gov. The applicants cannot pay on-line yet. This is planned for later by the BCIS. At present, applicants must set up an online transfer from their bank accounts to pay the application fees. Applicants still need to arrange for fingerprinting and ID photographs through their local immigration offices.

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

HQBCIS 70/6.2.8 - P

425 I Street NW
Washington, DC 20536

August 4, 2003

MEMORANDUM FOR SERVICE CENTER DIRECTORS, BCIS
REGIONAL DIRECTORS, BCIS

FROM: William R. Yates /s/ Janis Sposato
Acting Associate Director for Operations
Bureau of Citizenship and Immigration Services
Department of Homeland Security

SUBJECT: Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (AD03-16)

The purpose of this memorandum is to provide field offices with guidance on processing Form I-485, Application to Register Permanent Residence or Adjust Status, when the beneficiary of an approved Form I-140, Petition for Immigrant Worker, is eligible to change employers under §106(c) of AC21.

On January 29, 2001, the legacy Immigration and Naturalization Service's (Service) Office of Field Operations issued a memorandum entitled "*Interim Guidance for Processing H-1B Applications for Admission as Affected by the American Competitiveness in the Twenty-First Century Act of 2002, Public Law 106-313.*" On June 19, 2001, the Office of Programs issued a follow-up memorandum entitled "*Initial Guidance for Processing H-1B Petitions as Affected by the American Competitiveness in the Twenty-First Century Act (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396).*" On February 28, 2003, Immigration Services Division issued a memorandum entitled "*Procedures for concurrently filed family-based or employment-based Form I-485 when the underlying visa petition is denied.*" These memoranda remain in effect. On July 31, 2002, the Service published an interim rule allowing, in certain circumstances, the concurrent filing of Form I-140 and Form I-485. Previous Service regulations required an alien worker to first obtain approval of the underlying Form I-140 before applying for permanent resident status on the Form I-485. Institution of the concurrent filing process, and other issues relating to revocation of approval of Form I-140 petitions, have resulted in questions on how to process adjustment applications when the alien beneficiary claims eligibility benefits under §106(c) of AC21 due to a change in his or her employment.

A. Approved Form I-140 Visa Petitions and Form I-485 Applications

The AC21 §106(c) states:

> A petition under subsection (a)(1)(D) [since re-designated section 204(a)(1)(F) of the Act] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Accordingly, guidance in the June 19, 2001, memorandum provides that the labor certification or approval of a Form I-140 employment-based (EB) immigrant petition shall remain valid when an alien changes jobs, if:

(a) A Form I-485, Application to Adjust Status, on the basis of the EB immigrant petition has been filed and remained unadjudicated for 180 days or more; and

(b) The new job is in the same or similar occupational classification as the job for which the certification or approval was initially made.

This policy is still in effect and has not changed as a result of implementation of the concurrent filing process.

If the Form I-140 ("immigrant petition") has been approved and the Form I-485 ("adjustment application") has been filed and remained unadjudicated for 180 days or more (as measured from the Form I-485 receipt date), the approved Form I-140 will remain valid even if the alien changes jobs or employers as long as the new offer of employment is in the same or similar occupation.[1] If the Form I-485 has been pending for less than 180 days, then the approved Form I-140 shall not remain valid with respect to a new offer of employment.

B. Provisions in Cases of Revocation of the Approved Form I-140

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[1] AC21 also provides that any underlying labor certification also remains valid if the conditions of §106(c) are satisfied.

As discussed above, if an alien is the beneficiary of an approved Form I-140 and is also the beneficiary of a Form I-485 that has been pending 180 days or longer, then the approved Form I-140 remains valid with respect to a new offer of employment under the flexibility provisions of §106(c) of AC21.

Accordingly, if the employer withdraws the approved Form I-140 on or after the date that the Form I-485 has been pending 180 days, the approved Form I-140 shall remain valid under the provisions of §106(c) of AC21. It is expected that the alien will have submitted evidence to the office having jurisdiction over the pending Form I-485 that the new offer of employment is in the same or similar occupational classification as the offer of employment for which the petition was filed. Accordingly, if the underlying approved Form I-140 is withdrawn, and the alien has not submitted evidence of a new qualifying offer of employment, the adjudicating officer must issue a Notice of Intent to Deny the pending Form I-485. *See* 8 CFR 103.2(b)(16)(i). If the evidence of a new qualifying offer of employment submitted in response to the Notice of Intent to Deny is timely filed and it appears that the alien has a new offer of employment in the same or similar occupation, the BCIS may consider the approved Form I-140 to remain valid with respect to the new offer of employment and may continue regular processing of the Form I-485. If the applicant responds to the Notice of Intent to Deny, but has not established that the new offer of employment is in the same or similar occupation, the adjudicating officer may immediately deny the Form I-485. If the alien does not respond or fails to timely respond to the Notice of Intent to Deny, the adjudicating officer may immediately deny the Form I-485.

If approval of the Form I-140 is revoked or the Form I-140 is withdrawn before the alien's Form I-485 has been pending 180 days, the approved Form I-140 is no longer valid with respect to a new offer of employment and the Form I-485 may be denied. If at any time the BCIS revokes approval of the Form I-140 based on fraud, the alien will not be eligible for the job flexibility provisions of §106(c) of AC21 and the adjudicating officer may, in his or her discretion, deny the attached Form I-485 immediately. In all cases an offer of employment must have been bona fide, and the employer must have had the intent, at the time the Form I-140 was approved, to employ the beneficiary upon adjustment. It should be noted that there is no requirement in statute or regulations that a beneficiary of a Form I-140 actually be in the underlying employment until permanent residence is authorized. Therefore, it is possible for an alien to qualify for the provisions of §106(c) of AC21 even if he or she has never been employed by the prior petitioning employer or the subsequent employer under section 204(j) of the Act.

Questions regarding this memorandum may be directed via e-mail through appropriate channels to Joe Holliday at Service Center Operations or to Mari Johnson in Program and Regulation Development.

Accordingly, the *Adjudicator's Field Manual* (*AFM*) is revised as follows:

A 1. Chapter 20.2 of the AFM is revised by adding a new paragraph (c) to read as follows:

20.2 Petition Validity.

(c) Validity after Revocation or Withdrawal. Pursuant to the provisions of section 106(c) of the American Competitiveness in the Twenty-First Century Act (AC21), Public Law 106-313, the approval of a Form I-140 employment-based (EB) immigrant petition shall remain valid when an alien changes jobs, if:

- A Form I-485, Application to Adjust Status, on the basis of the EB immigrant petition has been filed and remained unadjudicated for 180 days or more; and
- The new job is in the same or similar occupational classification as the job for which the certification or approval was initially made.

If the Form I-140 has been approved and the Form I-485 has been filed and remained unadjudicated for 180 days or more (as measured from the form I-485 receipt date), the approved Form I-140 will remain valid even if the alien changes jobs or employers as long as the new offer of employment is in the same or similar occupation. If the Form I-485 has been pending for less than 180 days, then the approved Form I-140 shall not remain valid with respect to a new offer of employment.

Accordingly, if the employer withdraws the approved Form I-140 on or after the date that the Form I-485 has been pending 180 days, the approved Form I-140 shall remain valid under the provisions of §106(c) of AC21. It is expected that the alien will have submitted evidence to the office having jurisdiction over the pending Form I-485 that the new offer of employment is in the same or similar occupational classification as the offer of employment for which the petition was filed. Accordingly, if the underlying approved Form I-140 is withdrawn, and the alien has not submitted evidence of a new qualifying offer of employment, the adjudicating officer must issue a Notice of Intent to Deny the pending Form I-485. *See* 8 CFR 103.2(b)(16)(i). If the evidence of a new qualifying offer of employment submitted in response to the Notice of Intent to Deny is timely filed and it appears that the alien has a new offer of employment in the same or similar occupation, the BCIS may consider the approved Form I-140 to remain valid with respect to the new offer of employment and may continue regular processing of the Form I-485. If the applicant responds to the Notice of Intent to Deny, but has not established that the new offer of employment is in the same or similar occupation, the adjudicating officer may immediately deny the Form I-485. If the alien does not respond or fails to timely respond to the Notice of Intent to Deny, the adjudicating officer may immediately deny the Form I-485.

If approval of the Form I-140 is revoked or the Form I-140 is withdrawn before the alien's Form I-485 has been pending 180 days, the approved Form I-140 is no longer valid with respect to a new offer of employment and the Form I-485 may be

denied. If at any time the BCIS revokes approval of the Form I-140 based on fraud, the alien will not be eligible for the job flexibility provisions of §106(c) of AC21 and the adjudicating officer may, in his or her discretion, deny the attached Form I-485 immediately. In all cases an offer of employment must have been bona fide, and the employer must have had the intent, at the time the Form I-140 was approved, to employ the beneficiary upon adjustment. It should be noted that there is no requirement in statute or regulations that a beneficiary of a Form I-140 actually be in the underlying employment until permanent residence is authorized. Therefore, it is possible for an alien to qualify for the provisions of §106(c) of AC21 even if he or she has never been employed by the prior petitioning employer or the subsequent employer under section 204(j) of the Act.

Λ 2. The *AFM* **Transmittal Memoranda** button is revised by adding the following entry:

AD 03-16 [INSERT SIGNATURE DATE OF MEMO]	Chapter 20.2(c)	Provides guidance on the validity of immigrant petitions under section 106(c) of AC21 (Public Law 106-313

