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Questions and Answers: Temporary Acceptance of H-1B Petition Filed without DOL's Certified Labor Condition Applications (LCAs)

Introduction

U.S. Citizenship and Immigration Services extends the filing period of H-1B petitions without Labor Condition Applications (LCAs) that have been certified by the U.S. Department of Labor (DOL). The effective dates are Nov. 5, 2009 through Mar. 9, 2010, which provides the public with the benefit of the full 120 day accommodation measure since the posting of the USCIS Update dated Nov. 10, 2009. At this time, USCIS is only providing this temporary measure to address problems related to the Department of Labor's (DOL) iCERT System. USCIS will continue to monitor the situation.

Questions & Answers

Q: What is the effective period for the temporary acceptance of H-1B petitions filed without a certified LCA?

A: The effective period is Nov. 5, 2009 through Mar. 9, 2010.

Q: Will USCIS also accept H-1B petitions in cases where DOL has denied an LCA based on Federal Employer Identification Number (FEIN) "no match" grounds, or other erroneous grounds, and the employer has filed a subsequent LCA with DOL that has been pending for less than seven days if the original LCA was filed more than seven calendar days ago?

A: USCIS cannot accept H-1B petitions that are submitted based on a denied LCA, even if the denial by DOL may have been erroneous. However, USCIS will review the totality of the circumstances to determine whether it can exercise discretion and excuse the late filing if the petitioner submits evidence to establish that the reason for the failure to timely file an extension of stay or change of status H-1B petition was due to the erroneous denial of an LCA.

Q: In the case of an H-1B petition filed for an extension of stay, will USCIS accept a certified LCA in response to a Request for Evidence (RFE) where the date of certification may be subsequent to the date the H-1B petition was filed with USCIS? If there is a gap between the starting date requested on the H-1B petition and the starting date authorized on the certified LCA, will USCIS issue an I-94 showing continuous authorized stay and extension of stay?

Example:

An H-1B petition requesting an extension of stay is filed with evidence of a pending LCA. The requested starting validity date listed on both the H-1B petition and pending LCA corresponds to the date the beneficiary's current H-1B status expires. However, because of the various delays in the iCERT system and the fact that the DOL cannot backdate the starting validity of an LCA, the LCA originally filed with petition is certified with a starting date that is subsequent to the date the beneficiary's current H-1B status has expired. Although the H-1B petition was timely filed with USCIS before the beneficiary's status expired, there is a gap between the starting date requested on the H-1B petition and the starting date authorized on the certified LCA originally filed with the petition (aka "LCA-gap").

A: USCIS will not deny an H-1B petition filed during this temporary extension on the basis that the LCA originally filed with petition was certified after the petition was filed, as long as the case is found to be otherwise eligible. In the example above, USCIS will exercise discretion based on the totality of circumstances to determine whether to issue a Form I-94 showing continuous authorized stay and extension of stay.

Q: If a petitioner takes advantage of the temporary acceptance procedures, but the LCA originally filed with the petition is subsequently denied by DOL, can the petitioner submit a new, certified LCA in response to the USCIS RFE?

A: No, the certified LCA submitted in response to the RFE must be the same LCA that was pending at the time of filing of an H-1B petition receipted under the temporary acceptance procedures. Each LCA has a unique identification number. Submission of a new certified LCA possessing a different identification number than the LCA referenced upon initial filing will be denied. The only exception is if the new LCA was certified prior to the filing of the petition.

Q: Which petitions are eligible under this temporary acceptance procedure?

A: This guidance applies to all H-1B petitions that were pending receipt with USCIS as of Nov. 5, 2009.

Q: How will petitions that were previously denied based on the failure to have a certified LCA be affected by this announcement? Will USCIS review H-1B extension of stay and change of status petitions previously denied, which may be the subject of pending Motions to Reopen/Reconsider (MTRs), based on this new policy?

A: USCIS will apply the temporary acceptance procedures to all MTRs pending during the validity of this temporary acceptance period. However, USCIS will not automatically initiate a service motion to reopen any previously adjudicated extension of stay or change of status petitions.

Q: In general, how far in advance can a petition be filed for the H-1B classification, including an extension of stay?

A: An H-1B petition may be filed up to six months prior to the requested starting date of employment. USCIS strongly encourages petitioners to take DOL iCERT processing times into account when preparing to file an H-1B petition.

For more information on USCIS and its programs, visit www.uscis.gov or call 1-800-375-5283

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