



OPT expanded to 29 months for some

In one of two major moves involving nonimmigrant status this past month, the CIS has now authorized certain students to receive an additional 17 months of Optional Practical Training. STEM (science, technology, engineering, math) graduates may now apply for and receive an additional 17 months of practical training—for a total authorization of 29 months of OPT.

There are several limitations on this grant. First, the student must be a STEM graduate. Second, the employer must enroll in the E-Verify program. Finally, if the student has already started OPT, the student must apply for the extension before the current grant of OPT expires.

The CIS defines STEM

degrees as including:

Computer Science Applications; Biological and Biomedical Sciences; Actuarial Science; Mathematics and Statistics; Engineering; Military Technologies; Engineering Technologies; Physical Sciences; Science Technologist; and Medical Scientist.

The new OPT regulations give STEM graduates a total of 29 months of OPT.

Qualifying employers must enroll in the E-Verify program. Proof of enrollment will be required for any student seeking to extend his or her OPT to take advantage of the 17 months of additional time.

In addition to the OPT extension made available to STEM

graduates, the CIS also provided permanent “cap-gap” relief. This means that any student for whom an employer files a successful H-1B petition prior to the start of the new fiscal year will receive an automatic extension of stay and OPT until October 1st.

Finally, we want to remind everyone that students working on OPT authorization are not required to pay FICA taxes. Neither the student nor the employer should pay FICA. This amounts to 15% of the student’s salary (7.5% paid by each side). If employers need verification of this, they should go to the IRS web site (<http://www.irs.gov/publications/p519/ch08.html#d0e9898>). There, they will find official authorization to refrain from paying FICA taxes on students working under OPT authorization.

H-1B Filings all over the map

In the wake of the annual April new H-1B filing rush, we are finding that H-1 processing results are all over the map. The CIS has said that they will not finish mailing out receipt notices until June 2nd. They will return all unsuccessful H petitions by June 5th.

We had not received any new H filing receipts in the last two and a half weeks until we received one from the NSC today.. This represents our first non-master’s cap NSC receipt notice thus far.

We suspect that the CIS is attempting to adjudicate as many petitions as possible,

as quickly as possible, in order to determine how many petitions can be accommodated. We are already seeing reports of denials for relatively minor issues—issues that would normally draw an RFE. We suspect that this is so that they can get a final count on availability under the H quota

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Special points of interest:

- Cutoff date movement stalls in June
- CIS will soon prohibit concurrent filings of I-140 petitions and I-485 applications.
- Sudden flurry of new legislative proposals brings hope for legal immigration relief this year.

CIS publishes rule to increase TN stays from one year to three

The CIS has fulfilled its promise of almost one year ago and published regulations extending the stay of TN nonimmigrants from one to three years.

Ironically, the CIS which almost never follows applicable law and engages in public “notice and comment” rulemaking, has decided to do just that in this case. Customarily, the CIS ignores the Federal Register Act and simply publishes rules on an “interim/final” basis, claiming that the agency did not have sufficient time to go through the legally mandated process. Often, important and highly controversial issues and dealt with in this fashion and public scrutiny and comment are avoided.

In this case, however, where there is little controversy and even less to be gained through public comment, the CIS has managed to draw out the process of this fairly simply policy change.

After ignoring notice and comment rulemaking for years, the CIS has decided to employ it with regard to a matter that is wholly noncontroversial.

There is absolutely no controversy surrounding this proposal, nor does it impact substantive rights. It appears that the CIS, after getting criticized for dragging its feet for so long, has decided to justify the delay by engaging in proper

rulemaking.

The CIS has refused to publish rules in connection national interest waiver processing, even though that statutory provision has been on the books for eighteen years. Similarly, they have refused to publish rules in connection with the AC21 legislation signed into law by President Clinton. For whatever reason, however, they decided that they need to go through formal notice and comment rulemaking for TN extensions.

Comments are due in 60 days and the final rule could be published with 60 days of that date.

Cutoff date movement

We waited until the June Visa Bulletin came out to publish this month’s newsletter. In that cutoff dates have been moving forward rapidly in the last few months, we felt that there would likely be big news to report. There isn’t.

For employment based applicants, there is no change from the May Visa Bulletin. We had expected to see further advances in the worldwide employment based third preference category.

Federal law prohibits the issuance of more than 27% of the annual visa quota in any of the first three fiscal quarters (October through June). The remaining 19% of the quota, plus all visas that were unused or returned during the first three quarters are then issued in the last quarter (July—September).

We know that the maximum limit was not met during the first half of the fiscal year because we saw visa cutoff dates advancing rapidly between January and April. Had all visas available been used, not only would there have been no ad-

vances, there would have been a retrogression.

Historically, approximately 40% of all immigrant visas (and adjustment approvals) are issued during the fourth quarter of each fiscal year. Since the CIS has not been able to achieve productivity sufficient to exhaust the entire annual quota at any time over the past twelve years, the State Department has customarily advanced cutoff dates in the third and fourth quarters in order to generate demand for visas through consular processing overseas.

The July Visa Bulletin contains the following inexplicable claim:

“E. EMPLOYMENT THIRD PREFERENCE VISA AVAILABILITY

Demand for numbers, primarily by Citizenship and Immigration Services Offices for adjustment of status cases, is expected to bring the Employment Third preference category very close to the annual numerical limit in June. As a result, this category is likely to experience retrogressions or

visa unavailability beginning in July. Such action would only be temporary, however, and a complete recovery of the cut-off dates would occur for October, the first month of the new fiscal year. “

It is difficult to understand how this could be so, since the law explicitly prohibits the issuance of more 81% of the visas in the annual quota during the first three quarters. This is not a suggestion, it is an absolute command.

Unless the Visa Office and the CIS broke the law and used more than the legally permitted number of visas, there must be visas left in the quota for the July through September quarter. More to the point, all of the unused and returned visas from the first three quarters are required by law to be reserved for issuance in the fourth quarter.

Clearly, something unusual is going on. We will provide you with more information as we learn it.

CIS proposes to eliminate concurrent I-140/I-485 filings

For each of the past three years, the CIS has included in its semi-annual regulatory agenda a regulation that would eliminate the concurrent filing of I-140 petitions with I-485 applications for adjustment of status (AOS). Rumors are now rampant that the CIS will publish this rule within the next sixty to ninety days.

If they do, it will no longer be possible for applicants to file AOS applications without first obtaining I-140 petition approvals. This, in turn, will eliminate almost all advantages in filing for AOS.

Presently, with concurrent filing, if an applicant's priority date is current when his or her labor certification is approved, the applicant may file a combined I-140/I-485 package and request both employment authorization and travel permission. These ancillary benefits are usually granted within 90 days of filing.

The down side of AOS, of course, is that it can take between three and five years (on average) to complete. During that time, applicants have to deal with the CIS—not the most responsive or helpful agency.

The CIS appears to be processing AOS cases on a random selection basis. The

CIS Ombudsman has criticized that agency for taking cases out of orders, preferring easier and more recently filed cases to complex and older cases.

With concurrent filing, however, many applicants elected the immediate benefit of receiving travel and work authorization as an acceptable trade-off for

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longer and more uncertain processing.

Applicants for consular immigrant visa processing (CP) must wait until their I-140 petitions have been approved in order to begin that process. Generally speaking, it takes about 180 days from the date of I-140 approval until the final consular interview. While work and travel permission are not available to CP applicants, as a practical matter, they receive their green cards about 90 days after people who apply for adjustment of status get their travel and work authorization—and years before AOS applicants receive their green cards.

If an applicant's priority date is not cur-

rent, then consular processing starts looking even better. While an AOS applicant cannot even file an application until the first day of the first month that the applicant's priority date is current, CP applicants may begin the processing of their cases immediately upon approval of their I-140 petitions.

The NVC will process their cases to the point where the only remaining step is to order a visa number and then they will pause further processing until the applicant's priority date becomes current. When the priority date does become current, the NVC will order a visa number and generally schedule the applicant for a final interview overseas in the months following the first month that the priority date is current. When this happens, CP applicants actually get their green cards about a month to a month and a half before AOS applicants with identical priority dates even receive their work or travel authorization.

Overseas consular processing typically requires the applicant to remain abroad for about a week. The applicant must, however, enter the US within six months of the visa being issued.

Sudden rush of new immigration bills proposed

The last few weeks have seen the introduction of approximately a dozen new legal immigration reform bills. For the past one year, progress on legal immigration reform has been blocked by the Congressional Hispanic Caucus. They have asked the Democratic party leadership to prevent any legal immigration reform proposals from advancing to the floor for votes. They insist that nothing be voted upon unless it includes an amnesty provision for illegals present in the United States. Thus far, the leadership has acquiesced to their wishes.

Over the past few months, the CHC has taken a public relations beating over this issue. It has gotten to the point where

other members of Congress are openly vilifying them for their position. We have also seen a movement to “end run” the CHC and try to pass temporary legal immigration reform fixes—something the CHC has strenuously opposed.

Two weeks ago, apparently feeling the heat from this criticism, the CHC issued a press release in which they characterized Democratic party leadership as “spineless” for not giving them the unqualified support they have demanded. This may signal a break in the dam—or at least a major crack.

Most of the bills that have been proposed

will provide only temporary relief for the next few years. These bills propose to increase the H-1B and H-2 quotas, increase the employment based quota, and possibly even increase the family based quota.

In order to placate the CHC, almost all of them are designed to be temporary stop-gap measures to stave off the worst problems temporarily until “comprehensive” (*i.e.*, something that includes an amnesty) immigration legislation can be considered in a year or two.

Stay tuned.

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Should I begin green card processing?

Anyone who plans to become a lawful permanent resident of the United States is looking at standing in a line. The sooner you get in line, the sooner you get a green card.

Taking all things into account, now is a very good time to begin. Not only will you get in line ahead of those who begin their processing in a few months, but you may be able to take advantage of circumstances that are likely to change in the near future.

If nothing happens to change the present circumstances, you will at least have established your place in line. Circumstances, however, are likely to change soon. We have no way of knowing with certainty that Congress will act, but all of the signs point to that happening—possibly this year.

That is one prospective change. The other is the immanent return of premium processing for labor certification based I-140 petitions.

If these two changes occur, then it will become possible for someone to process for a green card—start to finish—in about a year. Those who start the process now will be on the leading edge of the wave. Those who start later will still be able to process, but will find themselves in line behind those who acted quickly.

If Congress expands the employment based visa quota, as expected, tens of thousands of new labor certification appli-

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cations will get filed as a result. Do you want to have your application in process when this happens or do you want to get in line behind all of the others who have filed.

Right now, the processing estimate for PERM (labor certification) applications, including the DOL backlog, is about six months. If Congress acts, increasing the

quota, we will see an enormous number of new filings. The processing backlog could quickly grow to a year or longer.

Similarly, the CIS is about to re-introduce I-140 premium processing for labor certification based petitions. If they are suddenly overwhelmed with new filings, they will likely discontinue premium processing again, as they did last year. Once more, would you rather be at the head of that line so that you have a good shot at premium processing, or in the middle of the pack and risk having to wait a year for I-140 processing.

If you are planning to get a green card, you are going to have to stand in line—no matter what. You might as well get in line now and hope for the best. Who knows, you may get lucky and have everything line up for you. At worst, you will be no worse off than where you would be if you waited.

Think about it.