

9 FAM 41.53 N9.2-1 Validity of H1-B visas When Change of Employer Pending

(TL:VISA-615; 04-28-2004)

- a. Public Law 106-313 provides for "portability" for H1-B aliens, permitting them to change jobs while the application filed by their new employer is still pending approval by Department of Homeland Security (DHS). In order to change employers which penalty, H1-B aliens must meet the following conditions:
 - (1) The alien had been lawfully employed;
 - (2) The new employer filed a petition for the alien prior to the expiration of his or her authorized stay; and
 - (3) The alien had not worked without authorization prior to the filing of that new petition.
- b. If the alien's prior visa and petition have expired, the alien is not eligible to receive a new visa until the pending petition has been approved.

9 FAM 41.53 N9.2-2 H1-B Aliens May Travel Abroad While Change of Employer Pending

(CT:VISA-842; 10-10-2006)

(Effective Date: 10-04-2006)

H1-B aliens traveling abroad during the period when their new employment petition is pending may use their old petition and visa for return to the United States provided the applicant:

- (1) Is otherwise admissible;
- (2) Has a valid passport and visa (whether new or the original visa with the prior employer's name);
- (3) Has the prior Form I-94, Arrival and Departure Record, a Form I-797, Notice of Action, or a copy thereof, showing the original petition's validity dates; and
- (4) Has a dated filing receipt or other evidence that a new petition was filed in a timely fashion.

9 FAM 41.53 N9.2-3 Validity of H-1B When There is a Change of Employer

(CT:VISA-842; 10-10-2006)

(Effective Date: 10-04-2006)

- a. After changing H-1B employers in accordance with DHS procedures for making such a change, an H-1B visa holder may continue to use his or

her original H-1B visa for entry into the United States. Upon applying for entry, the visa holder must present the new Form I-797, Notice of Action, evidencing the approval of the change of employer in addition to the visa.

- b. An H-1B applicant can change employers without penalty while in the United States provided the following criteria were met:
- (1) The alien was lawfully admitted to the United States;
 - (2) The new employer filed the petition for the alien prior to the expiration of his or her authorized stay;
 - (3) The alien had not worked without authorization prior to the filing of the new petition; and
 - (4) Has not been employed in the United States without authorization subsequent to lawful admission but before filing such petition.

After the filing of the new petition the H-1B is authorized to accept employment until the petition is adjudicated. If the new petition is denied, employment must cease. If the alien's prior visa and petition have expired, the alien is not eligible to receive a new visa until the pending petition has been approved.

9 FAM 41.53 N9.2-4 Limiting Validity of H Visas

(CT:VISA-842; 10-10-2006)

(Effective Date: 10-04-2006)

- a. Consular officers may restrict visa validity in some cases to less than the period of validity of the approved petition or authorized period of stay (for example, on the basis of reciprocity or the terms of a waiver of a ground of ineligibility). In any such case, in addition to the other notations required on the H visa, posts shall insert the following:
- "PETITION VALID/STAY AUTHORIZED (whichever is applicable) TO (date)"
- b. Posts should use appropriate operating instructions for annotating visas.

9 FAM 41.53 N9.2-5 Job Flexibility for Long-delayed Applicants for Adjustment of Status to LPR

(TL:VISA-371; 03-15-2001)

INA 204(j) provides that if an H-1(B) alien, whose employer has filed for permanent residence status for him or her as an employment-based immigrant under INA 204(a)(1)(D), changes employers or jobs, the petition and the labor certification approved for the original employer will remain valid if:

- (1) The petition of the new employer has remained unadjudicated for