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

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Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS

cc: OFFICE OF INTERNATIONAL OPERATIONS
OFFICE OF COMMUNICATIONS
DISTRICT DIRECTORS

From: Michael Aytes /s/
Associate Director, Domestic Operations

Date: December 5, 2006

Re: Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year.

Revisions to *Adjudicator's Field Manual* (*AFM*) Chapters 31.2(d), 31.3(g) and 32.6 (AFM Update 06-29)

I. Purpose

This memorandum provides guidance in three areas regarding how adjudicators should determine periods of admissions for an alien. Specifically, this memorandum:

- Clarifies that time spent as an H-4 and L-2 dependent does not count against the maximum allowable periods of stay available to principals in H-1B and L-1 status.

- Clarifies that H-1B aliens, who qualify under American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Pub.L.106-313) section 106(a) and (c), need not be in H-1B status when requesting an additional period of stay beyond the six year maximum.

- Clarifies how to determine the maximum period of admission in H-1B status for a beneficiary who was in the United States in valid H-1B status for **less** than the six-year

maximum period of admission, but who has since been outside the United States for more than one year.

An alien seeking H-1B or L-1 status (or corresponding derivative status) in light of these clarifications still must meet all of the substantive requirements for those classifications and is subject to the normal rules concerning maintenance of status.

Questions regarding this memorandum should be directed through appropriate channels.

II. Field Guidance

An alien may be admitted to the United States in H-1B status for a maximum period of six years and in L-1 status for a maximum period of five (specialized knowledge workers) or seven years (managers and executives). *See* INA 214(g)(4) and 214(c)(2)(D) of the Immigration and Nationality Act ("INA" or "Act"). At the end of the maximum period, the alien must either change to a different status (other than from H to L or from L to H) or depart the United States. USCIS regulations provide that an alien who has been outside the United States for at least one year may be eligible for a new six-year period of admission in H-1B status or a new five-year or seven-year period in L-1 status. *See* 8 CFR 214.2(h) (13)(iii)(A) and 214.2(l)(12).

A. Decoupling H-4 and L-2 Time from H-1B and L-1 Time

USCIS reviewed the current INA provisions governing the H classifications as well as its governing regulations and policy guidance. Neither the statute nor regulations addresses whether time spent in H-4 status counts against the six-year maximum period of admission available to an alien seeking H-1B status. Further, USCIS has not issued any recent policy guidance that clarifies the issue.[1]

USCIS, therefore, is now clarifying that any time spent in H-4 status will not count against the six-year maximum period of admission applicable to H-1B aliens. Thus, an alien who was previously an H-4 dependent and subsequently becomes an H-1B principal will be entitled to the maximum period of stay applicable to the classification.

USCIS finds this approach most consistent with the statutory framework, which allows eligible aliens to obtain a full six-year admission period as an H-1B alien. Further, from a policy perspective, this interpretation promotes family unity by affording each qualified spouse the opportunity to spend six-years in H-1B status while allowing the other spouse to remain as an H-4 dependent and without undermining the Congressional intent to limit a principal alien's ability

[1] See, e.g., INA §§ 101(a)(15)(h(i)(b), 214(g)(2) and (4); 8 CFR §§ 214.2(h)(8)(i)(A), (h)(9)(iv), and (h)(13). Also note the David Martin General Counsel Opinion of July 2, 1997, on "*Eligibility of an alien to change nonimmigrant classification to H-4*," only addresses determining time limits aliens who remain in H-4 status and are requesting additional time *in H-4 status*. It does not address scenarios where an alien, who has spent time in H-4 status, is now requesting status as an H-1B or changing status from H-4 to H-1B.

to work in a specialty occupation for six-year maximum period. For example, a husband and wife who come to the United States as a principal H-1B and dependent H-4 spouse may maintain status for six years, and then change status to H-4 and H-1B respectively. Note that, upon the switch, the new "principal alien" would be subject to the H-1B cap if not independently exempt. USCIS will consider, in the context of any applications for change of status from H-4 to H-1B, whether the H-4 alien complied with the requirements of accompanying or joining the H-1B alien, and whether the alien otherwise maintained valid nonimmigrant status.[2]

Also, in light of the similar statutory provision set forth in INA 214(d) applicable to L-1 and L-2 aliens, this memorandum provides that time an alien has spent time in L-2 dependent status will not count against the time available to the alien in L-1A or L-1B status.

USCIS may limit, deny or revoke on notice any stay for an H-4 or L-2 dependent that is not primarily intended for the purpose of being with the principal worker in the United States. A spouse or child may be required to show that his or her requested stay is not intended to evade the normal requirements for nonimmigrant classification that otherwise would apply when the principal alien is absent from the United States. This policy is meant to prevent an H-1B or L-1 alien from using only occasional work visits to the United States to "park" dependent family members in the United States for extended periods of time while the principal is normally absent. Note, an H-1B or L-1 worker who appropriately brings his or her family to the United States may from time to time be stationed temporarily outside the United States while leaving the family in the United States for purposes of continuity in schooling or similar arrangements.

B. Periods of Stay in H-1B Status Beyond the Six Year Maximum

In sections 106 and 104(c) of AC21, Congress provided exemptions to the six-year maximum period of stay rules for certain H-1B aliens who were being sponsored by employers for permanent residence and were subject to lengthy processing delays. Though both provisions of AC21 use the term "extension of stay," eligibility for the exemptions is not restricted solely to requests for extensions of stay while in the United States. Aliens who are eligible for the 7th year extension may be granted an extension of stay regardless of whether they are currently in the United States or abroad and regardless of whether they currently hold H-1B status. Further, in examining eligibility for the 7th year extension, USCIS will focus on whether the alien is eligible for an additional period of admission in H-1B status, rather than whether the alien is currently in H-1B status that is about to expire and seeking an extension of that status in the United States pursuant to 8 CFR 214.1(c).

Note: The burden of proof rests with the petitioner and alien to establish his or her eligibility for any additional periods of stay in H-1B status beyond the six year maximum, including evidence of job requirements, alien credentials, labor condition application approval, previous H-1B

[2] Maintenance of H-4 status continues to be tied to the principal's maintenance of H-1B status. Thus, H-4 dependents may only maintain such status as long as the principal holds H-1B status.

status, and, as applicable, pending labor certification or immigrant petition or approved petition and unavailability of immigrant visa number, and admissibility or maintenance of nonimmigrant status.

C. H-1B "Remainder" Option

Section 214(g)(4) of INA provides that "the period of authorized admission as [an H-1B] nonimmigrant may not exceed 6 years." INA section 214(g)(7) provides, in pertinent part, as follows:

> Any alien who has already been counted within the 6 years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.

In AAO Adopted Decision 06-0001, USCIS has confirmed that the six-year period of maximum authorized admission accrues only during periods when the alien is lawfully admitted and physically present in the United States.

8 CFR 214.2(h)(13)(i) provides that when an alien has reached the maximum period of admission, a new petition may be approved only if the alien has remained outside the United States for one year. The statute, regulations, and current policy guidance, however, do not clearly address situations where an alien did not exhaust his or her maximum six-year period of admission.

There have been instances where an alien who was previously admitted to the United States in H-1B status, but did not exhaust his or her entire period of admission, seeks readmission to the United States in H-1B status for the "remainder" of his or her initial six-year period of maximum admission, rather than seeking a new six-year period of admission. Pending the AC21 regulations, USCIS for now will allow an alien in the situation described above to elect either (1) to be re-admitted for the "remainder" of the initial six-year admission period without being subject to the H-1B cap if previously counted or (2) seek to be admitted as a "new" H-1B alien subject to the H-1B cap.[3]

Specifically, the "remainder" period of the initial six-year admission period refers to the full six-year period of admission minus the period of time that the alien previously spent in the United States in valid H-1B status. For example, an alien who spent five years in the United States in H-1B status (from January 1, 1999 - December 31, 2004), and then remained outside the United

[3] This new "remainder" policy does not affect an H-1B alien who was previously admitted to the United States, but who has **not** been absent from the United States for more than one year. Such an alien would not be eligible for a new six-year period of admission and therefore may only seek readmission based on time remaining against his or her initial six-year period of admission.

States for all of 2005, could seek to be admitted in January 2006 for the "remainder" of the initial six-year period, i.e. a total of one year. If the alien was previously counted toward the H-1B numerical limitations in relation to the time that has accrued against the six-year maximum period of admission, the alien would not be subject to the H-1B cap. If the alien was not previously counted against the H-1B numerical limitations (i.e. because cap-exempt), the alien will be counted against the H-1B cap unless he or she is eligible for another exemption.

In the alternative, admission as a "new" H-1B alien refers to a petition filed on behalf of an H-1B alien who seeks to qualify for a new six-year admission period (without regard to the alien's eligibility for any "remaining" admission period) after having been outside the United States for more than one year. For example, the alien who spent five years in the United States in H-1B status (from January 1, 1999 - December 31, 2004), and then remained outside the United States for all of 2005, is eligible to apply for a "new" period of H-1B status based on his or her absence of at least one year from the United States. Most petitioners electing this option will seek a three-year H-1B petition approval, allowing for the possibility of later seeking a three-year H-1B extension. "New" H-1B aliens are subject to the H-1B numerical limitations unless they qualify for an exemption. *See* INA §§ 214(g)(1) and (g)(5).

Note: The burden of proof rests with the alien to show that he or she has been outside the United States for one year or more and is eligible for a new six-year period, or that he or she held H-1B status in the past and is eligible to apply for admission for the H-1B "remainder" time. Petitions should be submitted with documentary evidence of previous H-1B status such as Form I-94 arrival-departure records, I-797 Approval notices and/or H-1B visa stamps.

III. AFM Amendments

The revised AFM Chapters will be included in the next "I-Link" release. Accordingly, the *AFM* is revised as follows:

☞ 1. Section 31.2 in Chapter 31 of the Adjudicator's Field Manual is revised at paragraph(d) to read as follows:

31.2 General Requirements for H Petitions

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(d) Limits on a Temporary Stay.

(1) Principal Alien.

Specific limits on what is regarded as a temporary period of stay in all H classifications are included in the regulations to reflect the temporary nature of these classifications and to achieve consistency in the handling of requests for extensions of stay. The maximum time limit in an H classification and the requirement to reside abroad upon expiration of this period cannot be avoided by

leaving the United States before the expiration of the maximum time limit and reentering within a short period of time under a new petition. In such cases, the approval period of the new petition shall be consistent with and count towards the maximum time limit on an alien's temporary stay. A new period of authorized stay may begin only when the alien has resided outside the United States for a period required by the classification, or when the alien qualifies for an exemption from limits on the maximum period of stay as discussed below.

(2) Spouse and Dependents.

Limitations on the duration of time spent in H-1B nonimmigrant status refer only to the principal alien worker in H-1B status and do not apply independently to the principal worker's spouse and children. Normal rules for maintenance of derivative status still apply such that the spouse or dependent may remain in the United States only for the purpose of unity with the principal worker.

Time spent as an H-4 dependent does not count against the maximum allowable period of stay available to principals in H-1B status. Thus, an alien who was previously an H-4 and subsequently becomes an H-1B principal will be entitled to a maximum period of stay. Conversely, an H-1B principal who subsequently converts H-4 status may remain in the derivative status for as long as the principal alien spouse maintains that principal status.

USCIS may limit, deny or revoke on notice any stay for an H-4 dependent that is not primarily intended for the purpose of being with the principal worker in the United States, and a spouse or child may be required to show that his requested stay is not intended to evade the normal requirements of the nonimmigrant classification that otherwise would apply when the principal alien is absent from the United States. USCIS (as well as port inspectors and consular officers) may adjudicate applications for dependent stays in order to prevent an H-1B alien from using only occasional work visits to the United States in order to "park" the family members in the United States for extended periods while the principal alien is normally absent.

(3) Seasonal, Intermittent or Aggregate Periods of Employment of Six Months or Less.

The limitation on the total period of stay does not apply to H-1B, H-1C, H-2B, or H-3 aliens who do not reside continually in the United States and whose employment in the United States is seasonal or intermittent or for an aggregate of six months or less per year. Further, the limitations do not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception.

Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

(4) Exemptions to Limitations of Stay.

The limitation on the total period of stay does not apply to H-1B aliens when:

(A) 365 days or more have passed since the filing of any application for labor certification, Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant; or

(B) 365 days or more have passed since the filing of an EB immigrant petition; or

(C) The alien is the beneficiary of an approved EB immigration petition and is not able to file to adjust status to U.S. permanent legal residence based on the unavailability of an immigrant visa number.

(5) Applying for Exemptions to Limitations of Stay.

In sections 106 and 104(c) of AC21, Congress provided exemptions from maximum stay rules for certain H-1B aliens who were being sponsored by employers for permanent residence and were subject to long delays either for government processing or for visa numbers. The relevant subsections emphasize exemption from the maximum admission under INA section 214(g)(4). Congress did not restrict eligibility for additional periods of admission beyond the maximum six years to only requests for extension of stay.

A qualified alien need not be in H-1B status in order to benefit from sections 106 and 104(c) of AC21. The alien may obtain such additional periods of H-1B admission through a petition to change status from another nonimmigrant classification, or through H-1B visa issuance at a U.S. consulate (unless visa exempt) and admission from abroad.

Note: The burden of proof rests with the petitioner and alien to establish his or her eligibility for any additional periods of stay in H-1B status beyond the six year maximum, including evidence of job requirements, alien credentials, labor condition application approval, previous H-1B status, pending labor certification or immigrant petition, and unavailability of immigrant visa number, and admissibility or maintenance of nonimmigrant status.

☞ 2. Section 31.3(g) in Chapter 31 of the Adjudicator's Field Manual is amended to include the following new paragraphs at subsection (g)(14) to read as follows:

31.3 H-1B Classification and Documentary Requirements

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(g) Adjudicative Issues

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(14) H-1B "Remainder" Time: USCIS officers shall comply with the following guidance regarding requests for time in H-1B status on the behalf of an alien who has not exhausted his or her H-1B maximum period of admission and who has been absent from the United States for longer than a year.

Section 214(g)(4) of INA provides that "the period of authorized admission as [an H-1B] nonimmigrant may not exceed 6 years." INA section 214(g)(7) provides, in pertinent part, as follows:

> Any alien who has already been counted within the 6 years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.

In AAO Adopted Decision 06-0001, USCIS has confirmed that the six-year period of maximum authorized admission accrues only during periods when the alien is lawfully admitted and physically present in the United States.

8 CFR 214.2(h)(13)(i) provides that when an alien has reached the maximum period of admission, a new petition may be approved only if the alien has remained outside the United States for one year. The statute, regulations, and current policy guidance, however, do not clearly address situations where an alien did not exhaust his or her maximum six-year period of admission.

There have been instances where an alien who was previously admitted to the United States in H-1B status, but did not exhaust his or her entire period of admission, seeks readmission to the United States in H-1B status for the "remainder" of his or her initial six-year period of maximum admission, rather than seeking a new six-year period of admission. Pending the AC21 regulations, USCIS for now will allow an alien in the situation described above to elect either (1) to be re-admitted for the "remainder" of the initial six-year admission period without being subject to the H-1B cap if previously counted or (2) seek to be admitted as a "new" H-1B alien subject to the H-1B cap.[4]

[4] This new "remainder" policy does not affect an H-1B alien who was previously admitted to the United States, but who has **not** been absent from the United States for more than one year. Such an alien would not be eligible for a

Specifically, the "remainder" period of the initial six-year admission period refers to the full six-year period of admission minus the period of time that the alien previously spent in the United States in valid H-1B status. For example, an alien who spent five years in the United States in H-1B status (from January 1, 1999 - December 31, 2004), and then remained outside the United States for all of 2005, could seek to be admitted in January 2006 for the "remainder" of the initial six-year period, i.e. a total of one year. If the alien was previously counted toward the H-1B numerical limitations in relation to the time that has accrued against the six-year maximum period of admission, the alien would not be subject to the H-1B cap. If the alien was not previously counted against the H-1B numerical limitations (i.e. because cap-exempt), the alien will be counted against the H-1B cap unless he or she is eligible for another exemption.

In the alternative, admission as a "new" H-1B alien refers to a petition filed on behalf of an H-1B alien who seeks to qualify for a new six-year admission period (without regard to the alien's eligibility for any "remaining" admission period) after having been outside the United States for more than one year. For example, the alien who spent five years in the United States in H-1B status (from January 1, 1999 - December 31, 2004), and then remained outside the United States for all of 2005, is eligible to apply for a "new" period of H-1B status based on his or her absence of at least one year from the United States. Most petitioners electing this option will seek a three-year H-1B petition approval, allowing for the possibility of later seeking a three-year H-1B extension. "New" H-1B aliens are subject to the H-1B numerical limitations unless they qualify for an exemption. *See* INA §§ 214(g)(1) and (g)(5).

Note: The burden of proof rests with the alien to show that he or she has been outside the United States for one year or more and is eligible for a new six-year period, or that he or she held H-1B status in the past and is eligible to apply for admission for the H-1B "remainder" time. Petitions should be submitted with documentary evidence of previous H-1B status such as Form I-94 arrival-departure records, I-797 Approval notices and/or H-1B visa stamps.

☞ 3. Section 32.6 in Chapter 32 of the *Adjudicator's Field Manual* is amended to include a new paragraph (h) at AFM 32.6 to read as follows:

32.6 Technical Issues

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new six-year period of admission and therefore may only seek readmission based on time remaining against his or her initial six-year period of admission.

(h) Decoupling Time Spent in L-2 Status from L-1 Maximum Period of Stay.

(1) Time spent in L-2 status does not count against the five or seven-year maximum period of admission applicable to L-1A and L-1B aliens respectively. An alien who holds L-2 status (or who previously held L-2 status) and subsequently seeks to obtain L-1A or L-1B status is eligible for a maximum period of stay of five or seven years in L-1A or L-1B status respectively.

(2) In the context of any applications for change of status from L-2 to L-1A or L-1B, adjudicators should consider whether the L-2 alien complied with the requirements of accompanying or joining the L-1A or L-1B alien, and whether the alien otherwise maintained valid nonimmigrant status.

(3) USCIS may limit, deny or revoke on notice any stay for an L-2 dependent that is not primarily intended for the purpose of being with the principal worker in the United States, and a spouse or child may be required to show that his requested stay is not intended to evade the normal requirements of the nonimmigrant classification that otherwise would apply when the principal alien is absent from the United States. USCIS (as well as port inspectors and consular officers) may adjudicate applications for dependent stays in order to prevent an L-1 alien from using only occasional work visits to the United States in order to "park" the family members in the United States for extended periods while the principal alien is normally absent.

☞ 4. The *AFM* Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read:

AD06-29 [INSERT SIGNATURE DATE OF THIS MEMO]	Chapter 31.2(d), 31.3(g)(14) and Chapter 32.6(h)	This memorandum revises Chapter 31.2(d) of the Adjudicator's Field Manual (AFM) to include new provisions regarding admission periods for aliens previously in H-4 status and provisions for aliens applying for additional periods of admission beyond the H-1B six year maximum. It also revises Chapter 31.3(g) to include section(g)(14) regarding appropriate of length of admission for H-1B aliens who have not exhausted their six-year maximum but have been absent from the U.S. for more than one year. The memorandum also revises Chapter 32.6 of the *Adjudicator's Field Manual* (*AFM*) to include section (h) regarding decoupling time spent in L-2 status from L-1 maximum period of stay.

cc: USCIS Headquarters Directors
Bureau of Immigration and Customs Enforcement
Bureau of Customs and Border Protection