

By: Neelofer Syed, ESQ

IMMIGRATION

This article is for common questions from readers. The questions have been selected keeping in view this particular time of the year which is very relevant for the Cap Gap and H-1B related questions.

The following questions were sent by readers. The names of the readers will not be published in order to protect their privacy.

Question:

“Hi Legal Corner,
I am a regular reader of CityMasala and I am especially in tuned with the Legal Corner. I have some concerns about my H-1B status extension. I am currently in my 6th year of H-1B. In fact it has just started a couple of months ago. My employer started my green card process just a few months ago and last week my PERM was filed. Would I be able to get my H-1B extension beyond 7th year? Also, if I get married this year, will I be able to add my wife on my green card. Will she get her green card together with me, please advise.”

Answer:

The answer to your question will be useful to a number of readers who are in similar situation as you are.

Regarding the first part of your question which is pertaining to the extension of your H-1B beyond the 6th year, the answer depends on a number of factors where most important is the timing.

Legally, the H-1B extension beyond 6th year is granted in following situation:

- a) Where the PERM has been filed 365 days prior to the expiration of the 6th year of the H-1b; and
- b) If the I-140 is already approved prior to the expiration of the 6th year of the H-1B.

In your case, based on the information you provided, it seems that your PERM was not filed 365 days prior to the expiration of the 6th year of your H-1B so you will not be able to extend your H-1B based on the condition “a”.

Nevertheless, there is a possibility that you may get your certification of PERM in time to file the I-140 petition and hope that it gets approved prior to the expiration of the 6th year of your H-1B. You must also consider opting for premium processing in connection with your I-140 filing to make sure that the petition gets approved in time to allow you to request the H-1B extension beyond 6th year.

In addition, if you have spent any time outside the United States while you were on H-1B status, you can also extend your current H-1B by requesting to recapture time spent outside the United States. This strategy will also extend your current H-1B (hence extending the date of the expiration of the 6th year). Now, based on the extended H-1B, you can also recalculate if the PERM was filed 365 days from the date of extended H-1B expiration.

Regarding the second part of your question, you should be able to add your wife to the green card process. You can do that at any stage during the process. The priority date for your wife will be the same as yours. It is also important to understand that your wife does not get automatically included in the process upon marriage. You will have to file a separate application of adjustment of status for her.

Question:

“I am a student. I have my OPT which is expiring in June 2011. If any company files for my H-1B will I be able to work from June to October or will I need to stop working after my OPT expires. Your response will be much appreciated”

Answer:

If your potential employer files the H-1B petition on your behalf while your OPT is still valid, your OPT will be extended through September 30th 2011. In other words, as long as the H-1B petition is properly filed and a receipt notice is issued, the beneficiary (you) becomes eligible for the OPT cap gap extension.

It is important that you let your DSO know about the H-1B filing. The DSO in turn will be able to issue an extended I-20 extending your OPT.

On the other hand if the H-1B is filed after the OPT has expired, then the beneficiary (you) is eligible only for the cap gap extension NOT the OPT extension. In that case you will not be able to work during the period between the expiration of OPT and the start date of your H-1B employment.

Question:

“Hi, I will be eligible for the 17 months STEM extension. My question is - will I be able to stay with my current OPT employer or do I have to have a different employer once I am granted the STEM extension?”

Answer:

Before answering your question, let me explain to the readers what a STEM extension is. Under the new rules, students who receive degrees in science, technology, engineering and mathematics (STEM) are eligible to extend their OPT for an additional 17 months. The total period of OPT for STEM degree holders, now, has become 29 months as opposed to the 12 month period under the old rules that did not have any distinction for STEM degrees from any other subjects.

In order to be eligible for a 17 month extension, the student must currently be in an approved post completion OPT period based on a STEM degree. In other words, if a student has an undergraduate degree in a designated STEM field, but is currently in OPT status based on a NON STEM graduate degree, s/he will not be eligible for the 17 month extension.

Returning to your question, in order for you to request the 17 month extension you must have a job offer from an E-verify employer. The STEM extension is granted ONLY for the job offer from the employers registered on the E-verify. If you want to continue working with your current employer, make sure that the employer is registered with E-verify. The employer can register by going to the USCIS website and following the E-verify link and the instructions.

If your employer is not an E-verify employer, your extension request will be denied.

I hope that the answers to the above questions will address the concerns of a number of readers.

Ms. Syed is a practicing attorney with Perez and Associates, specializing in immigration law. Please send your questions concerning immigration issues to legal@citymasala.com



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