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H-1B visa approvals should be for six years: US expert

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US Citizenship and Immigration Services (USCIS) should amend its regulations to grant H-1B status for up to six years, an expert on immigration issues at a Washington think tank has suggested.

In recent years, Indian tech professionals have been getting about 70% of 85,000 H-1B visas issued annually to foreign workers who are "coming temporarily to the United States to perform services . . . in a specialty occupation."

While the workers may be "coming temporarily," Congress has recognized that an employer's need for an H-1B worker may last several years, David J. Bier, a research fellow at the Cato Institute noted in a recent blog post.

Even though the law envisions employment of at least six years, the Department of Labor (DOL) and USCIS regulations limit labor condition applications (LCAs) and petition approvals to no more than 3 years.

"USCIS and the DOL should restart granting petition approvals and LCAs for up to six years," Bier wrote in response to USCIS's federal register request for comments on improvements to the legal immigration system.

The Immigration Act of 1990 has authorized H-1B workers to receive status up to six years, and the American Competitiveness in the 21st Century Act has permitted extensions beyond that period if the worker is following the process to obtain permanent status, he wrote.

Filing for an extension after three years is an unnecessary and expensive burden, Bier wrote noting in 2020, H-1B workers and employers had to file more than 320,000 extension requests.

Employers and workers suffer unjust costs and potential delays, and USCIS and DOL are burdened with additional reviews of materials that they have already reviewed and approved, he noted.

The 3-year limit can impose other logistical problems, Bier wrote. "Doctors who change status from J-1 to H-1B status must receive a waiver of the requirement to return to their home country and must commit to work for a full three years in a medically underserved area."

"If the LCA, petition, and actual employment periods do not perfectly align down to the day, the doctor must seek an H-1B extension to finish the 3-year J-1 waiver requirement," he noted.

“Because the doctors commonly want to leave their current employer as soon as the waiver requirement is complete, some employers simply refuse to file an H-1B extension on their behalf.”

“Others extract further commitments to work for longer periods than the law requires in exchange for sponsorship,” Bier wrote calling it “unfair to workers who are trying to fulfill the legal requirements.”

DOL and DHS have never affirmatively justified the three-year limit on LCAs and petitions, and DOL previously permitted longer approvals, he noted.

In 1991, DOL issued regulations implementing the Immigration Act of 1990 that authorized a labor condition application for the period of employment up to 6 years.

But in 1994, DOL reduced the validity period to no longer than 3 years, Bier wrote, Its “only justification was that INS regulations granted petitions for no more 3 years.”

In doing so it “just carried over the same language from the pre-1990 H-1 category regulations.” Bier wrote noting, “Those regulations had established the 3-year limit because INS felt that it needed to define the meaning of the phrase ‘coming temporarily’ in the definition of an H-1 worker in the absence of any congressional guidance on the issue.”

From 1952 to 1984, the INS had imposed 1-year limit, but it expanded authorizations to two years in 1983 and three years in 1987 because “extension requests filed by the vast majority of aliens of distinguished merit and ability are routinely granted.”

H-1B extension requests are still ‘routinely granted’ for ‘the vast majority’ of applicants (94 percent in 2020), Bier noted.

Extension approval rates will increase even more after USCIS’s April 2021 policy manual update that instructs officers to give deference to prior determinations when adjudicating extension requests involving the same parties and facts, he wrote.

“In other words, the same facts as those in 1983 would justify increasing petition validity to six years, except today six years would have an underlying statutory basis,” Bier wrote.

“Indeed, there is no longer any basis for defining ‘coming temporarily’ to mean less than six years now that Congress has explicitly stated otherwise,” he wrote.

Thus, Congress has overturned the original basis of USCIS’s 3-year petition limit, and DOL has already stated that the 3-year limit for LCAs was only necessary because of INS’s regulation, while acknowledging it could impose burdens on applicants and the agency, Bier noted.

“For these reasons, USCIS should replace the 3-year limit on initial H-1B petition approvals with a 6-year limit, and DOL should revert to its earlier regulation allowing a 6-year approval of LCAs,” he wrote.