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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

RASHAD AHMAD REFAAT EL BADRAWI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	3:07-cv-01074 (JCH)
	)	
DEPARTMENT OF HOMELAND	)	November 5, 2010
SECURITY, ET AL.,	)	
	)	
Defendants.	)	
	)	

BRIEF *AMICI CURIAE* OF THE AMERICAN IMMIGRATION COUNCIL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN OPPOSITION TO THE MOTION OF DEFENDANT UNITED STATES FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF INTEREST 3

ARGUMENT 4

I. CONGRESS DESIGNED THE H-1B VISA PROGRAM TO ENABLE U.S. EMPLOYERS TO HIRE EDUCATED, HIGHLY SKILLED IMMIGRANTS TO FILL CRITICAL GAPS IN U.S. LABOR MARKETS. 4

II. EXISTING LAW DICTATES THAT THE BENEFICIARY OF A PENDING TIMELY FILED H-1B EXTENSION REQUEST IS ENTITLED TO REMAIN IN THE UNITED STATES UNTIL THE REQUEST HAS BEEN ADJUDICATED. 8

A. Viewed in the Context of the Legal and Regulatory Framework Governing the H-1B Program, DHS's Restrictive Interpretation of 8 C.F.R. § 274a.12(b)(20) is Clearly Flawed. 8

B. DHS Misconstrues the Case Law Cited To Support Its Position. 13

III. A CONTRARY INTERPRETATION OF EXISTING LAW WOULD DISRUPT KEY SECTORS OF THE U.S. ECONOMY AND THEREBY UNDERMINE THE GOALS OF THE H-1B PROGRAM. 16

CONCLUSION 19

EXHIBIT A: Declaration of Edward L. Skornia 21

EXHIBIT B: Declaration of Bradley S. Paskievich 25

EXHIBIT C: Declaration of Deborah A. Marlowe 29

EXHIBIT D: Memorandum from Michael A. Pearson, Period of stay authorized by the Attorney General after 120 day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (March 3, 2000) 34

EXHIBIT E: Memorandum from Thomas E. Cook, Guidance on Interpretation of "Period of Stay Authorized by the Attorney General" in determining "unlawful presence" under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (April 2, 2003) 41

TABLE OF AUTHORITIES

Cases

Bokhari v. Holder, No. 09-60538, 2010 WL 3768016 (5th Cir. 2010) 15

El Badrawi v. DHS, 579 F. Supp. 2d 249 (D. Conn. 2008) 9, 16

Matter of Essex Cryogenics, 14 I. & N. Dec. 196 (Dep. Assoc. Comm'r 1972) 4

Matter of Rotimi, 24 I. & N. Dec. 567 (BIA 2008) 13

Matter of Shaw, 11 I. & N. Dec. 277 (Dist. Director 1965) 4

Matter of Teberen, 15 I. & N. Dec. 689 (BIA 1976) 15

Rotimi v. Holder, 577 F.3d 133 (2d Cir. 2009) 14

Statutes

American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. 106-313, 114 Stat 1251 10

Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 8

Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 .... 4, 5, 6

Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163 .... 4, 5

INA § 212(a)(9)(B)(iv), 8 U.S.C. § 1182(a)(9)(B)(iv) 12

INA § 212(h), 8 U.S.C. § 1182(h) 13

INA § 214(a), 8 U.S.C. § 1184(a) 8

INA § 214(b), 8 U.S.C. § 1184(b) 5

INA § 214(c)(7), 8 U.S.C. § 1184(c)(7) 19

INA § 214(c)(9)(A), 8 U.S.C. § 1184(c)(9)(A) 18

INA § 214(c)(9)(B), 8 U.S.C. § 1184(c)(9)(B) 18

INA § 214(g)(1)(A)(vii), 8 U.S.C. § 1184(g)(1)(A)(vii) 1

INA § 214(g)(4), 8 U.S.C. § 1184(g)(4) 6

INA § 214(g)(5)(C), 8 U.S.C. § 1184(g)(5)(C) 1

INA § 214(i)(1), 8 U.S.C. § 1184(i)(1) 1, 5

INA § 214(n), 8 U.S.C. § 1184(n) 10

INA § 245(k), 8 U.S.C § 1255(k) 15

Regulations

8 C.F.R. § 103.7(e) ... 9

8 C.F.R. § 214.2(h)(4)(ii) ... 5

8 C.F.R. § 214.2(h)(4)(iii)(D)(5) ... 5

8 C.F.R. § 214.2(h)(4)(v)(A) ... 5

8 C.F.R. § 214.2(h)(9)(i)(B) ... 9

8 C.F.R. § 214.2(h)(9)(iii)(A)(1) ... 7, 11

8 C.F.R. § 214.2(h)(14) ... 8

8 C.F.R. § 214.2(h)(15) ... 11

8 C.F.R. § 214.2(h)(16)(i) ... 6

8 C.F.R. § 274a.12(b)(20) ... *passim*

Federal Register

Control of Employment of Aliens, 52 Fed. Reg. 16216 (May 1, 1987) ... 2, 9, 16

Control of Employment of Aliens, 56 Fed. Reg. 41767 (Aug. 23, 1991) ... 2, 9, 16

Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 29851 (May 30, 2007) ... 18

Legislative History

136 Cong. Rec. H8637 (daily ed. Oct. 2, 1990) ... 6

U.S. Citizenship and Immigration Services Documents

Memorandum from Michael A. Pearson, Period of stay authorized by the Attorney General after 120 day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (March 3, 2000) (Exhibit D) ... 12

Memorandum from Thomas E. Cook, Guidance on Interpretation of "Period of Stay Authorized by the Attorney General" in determining "unlawful presence" under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (April 2, 2003) (Exhibit E) ... 12

Memorandum from Donald Neufeld, Lori Scialabba, Pearl Chang, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act (May 6, 2009) ... 12

Press Release, U.S. Citizenship and Immigration Services, *USCIS Reaches FY 2008 H-1B Cap* (Apr. 3, 2007) ... 2

U.S. Citizenship and Immigration Services, *Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2009 Annual Report*, April 15, 2010 ... 5

U.S. Citizenship and Immigration Services, Online USCIS Processing Time Information ... 10

Declarations

Declaration of Edward L. Skornia, Senior Vice President and General Manager of O'Grady Peyton International .... *passim*

Declaration of Bradley S. Paskievich, Senior Legal Counsel, Compliance and Employment, DHL Global Business Services .... *passim*

Declaration of Deborah Marlowe, Director of Global Personnel Alliance .... *passim*

Miscellaneous

Dr. Jeanne Batalova, *The Growing Connection Between Temporary and Permanent Immigration Systems*, Migration Policy Institute (January 2006) 6

Dr. Jeanne Batalova, *The H-1B Temporary Skilled Worker Program*, Migration Policy Institute (October 2010) 2

Bill Gates, Op-Ed, *How to Keep America Competitive*, Wash. Post, Feb. 25, 2007 7

Dr. Alan Greenspan, Testimony before the Senate Subcommittee on Immigration, Refugees, and Border Security, April 30, 2009 7

State Department cable no. 91-State-171115 (May 24, 1991), *reprinted at* 68 No. 21 Interpreter Releases 681 (June 3, 1991) 6

Interview with Eric Schmidt, *The Economic Times*, Sept. 19, 2010 7

Nancy Zuckerbrod, *Bill Gates: Remove Limits on H1-B* [sic] *Visas*, Associated Press, March 8, 2007 7

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BRIEF *AMICI CURIAE* OF THE AMERICAN IMMIGRATION COUNCIL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN OPPOSITION TO THE MOTION OF DEFENDANT UNITED STATES FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The H-1B visa program has enabled thousands of U.S. employers to retain the temporary services of professional foreign workers in occupations requiring both highly specialized knowledge and the attainment of a bachelor's degree, license, or equivalent training and experience as a prerequisite for entry into the field. *See* INA § 214(i)(1), 8 U.S.C. § 1184(i)(1). From the nation's leading technology companies to its most prominent research universities, employers rely on H-1B visas to attract talented professionals from abroad and to allow those educated on our shores to continue working in the United States. The program has proven so popular that the annual cap on H-1B visas—currently set at 65,000 per fiscal year[1]—has been reached in as little as one day.[2]

[1] INA § 214(g)(1)(A)(vii), 8 U.S.C. § 1184(g)(1)(A)(vii). The first 20,000 H-1B beneficiaries who have earned a master's or higher degree from a U.S. educational institution are not counted toward the 65,000 numerical limit, resulting in a functional numerical limit of 85,000. INA § 214(g)(5)(C), 8 U.S.C. § 1184(g)(5)(C).

Since 2003, the majority of approved H-1B petitions have been filed by employers seeking to continue employing their own H-1B personnel or to hire individuals who previously worked for another H-1B employer.[3] To compensate for adjudication delays and to avoid disruptions in the employment of nonimmigrant workers, the former Immigration and Naturalization Service ("legacy INS") promulgated a regulation—now codified at 8 C.F.R. § 274a.12(b)(20)—to automatically extend the period of employment authorization for certain categories of nonimmigrant workers, including H-1B workers whose employers have filed extension requests *prior to* the expiration of their initial period of authorized stay.[4] *Amici* argue that the right to continued employment necessarily implies the right to remain in the United States without risk of arrest, detention, or initiation of removal proceedings while the extension request remains pending.[5] Any contrary interpretation of existing law would undermine the goals of the H-1B program and disrupt significant sectors of the U.S. economy that depend on H-1B employees.

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[2] Press Release, U.S. Citizenship and Immigration Services, *USCIS Reaches FY 2008 H-1B Cap* (Apr. 3, 2007), *available at* http://www.uscis.gov/files/pressrelease/H1BFY08Cap040307.pdf.
[3] *See* Dr. Jeanne Batalova, *The H-1B Temporary Skilled Worker Program*, Migration Policy Institute (October 2010) (citing U.S. Citizenship and Immigration Services, *Characteristics of H-1B Specialty Occupation Workers*).
[4] Control of Employment of Aliens, 52 Fed. Reg. 16216, 16220 (May 1, 1987) (establishing automatic extension of employment authorization for 120 days given "the possibility of delays in the processing of applications for extensions of stay"); Control of Employment of Aliens, 56 Fed. Reg. 41767, 41780-81 (Aug. 23, 1991) ("[T]his final rule extends the 120-day period to 240 days to ensure that work authorization documents are issued to these aliens without causing a gap in their employment authorization.").
[5] This brief only addresses the risk of arrest, detention, and removal proceedings for alleged violations of H-1B status.

STATEMENT OF INTEREST

The American Immigration Council ("Council") (formerly the American Immigration Law Foundation) was established in 1987 as a not-for-profit educational and charitable organization. The Council, through its Legal Action Center, strives to increase the accountability of government agencies that administer the immigration laws and to ensure these laws are interpreted and implemented in a way that protects fundamental constitutional and human rights. The Council engages in impact litigation and appears as *amicus curiae* before administrative tribunals and federal courts in significant immigration cases on targeted legal issues. The Council also provides resources to lawyers litigating immigration cases and serves as a point of contact for lawyers conducting or contemplating immigration litigation.

The American Immigration Lawyers Association ("AILA") is a national association with more than 11,000 members throughout the United States and overseas. AILA's members regularly practice before the immigration courts and federal courts. AILA's members have a strong interest in ensuring that their clients' rights are protected by the Board of Immigration Appeals and the federal courts.

The issue presented in this case—whether the beneficiary of a timely filed H-1B extension request is entitled to remain in the country after his initial period of admission has expired—impacts employers who rely on the H-1B visa program, the continuity of their business operations, and the rights of H-1B employees themselves. The Council and AILA have monitored the H-1B visa program for many years and work closely with employers who rely heavily on H-1B employees. In light of their extensive experience in immigration law and practice, they are well-placed to assist the Court in understanding the complex legal and regulatory framework governing the H-1B program.

ARGUMENT

I. CONGRESS DESIGNED THE H-1B VISA PROGRAM TO ENABLE U.S. EMPLOYERS TO HIRE EDUCATED, HIGHLY SKILLED IMMIGRANTS TO FILL CRITICAL GAPS IN U.S. LABOR MARKETS.

Though officially established in the Immigration Act of 1990, the H-1B visa is the modern offshoot of the "H-1" visa created in the Immigration and Nationality Act (INA) of 1952. The original INA authorized the issuance of H-1 visas to foreign nationals with "distinguished merit and ability . . . to perform temporary services of an exceptional nature requiring such merit and ability." Pub. L. 82-414, § 101(a)(15)(H)(i), 66 Stat. 163, 168. Pursuant to subsequent agency determinations, noncitizens could qualify for an H-1 visa in one of two ways: by attaining a level of "preeminence" in their field of endeavor, *Matter of Shaw*, 11 I. & N. Dec. 277, 280 (Dist. Director 1965) (requiring H-1 beneficiaries to possess a "degree of skill and recognition substantially above that ordinarily encountered"), or by virtue of their membership in a profession requiring specialized training and education. *Matter of Essex Cryogenics*, 14 I. & N. Dec. 196, 197 (Dep. Assoc. Comm'r 1972) (holding that "a person who is qualified as a member of the professions qualifies as a person 'of distinguished merit and ability.'").

Following minor statutory revisions in subsequent decades, Congress revamped the H-1 visa category in the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978. Jettisoning the phrase "distinguished merit and ability," lawmakers instead applied the new "H-1B" designation to noncitizens working in a "specialty occupation," which they defined as a position requiring both the "theoretical and practical application of a body of highly specialized knowledge" and the "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 104 Stat. 5020 (enacting INA

§ 214(i)(1)(A)-(B), 8 U.S.C. § 1184(i)(1)(A)-(B)). As a result of this change, H-1B status is now available to noncitizens with bachelor's or higher degrees[6] or equivalent experience that relate specifically to the job they intend to perform. 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). (In addition, H-1B workers must obtain state licensure if required for practice in the state. 8 C.F.R. § 214.2(h)(4)(v)(A).) Though the list is not exhaustive, federal regulations mention "architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts" as fields in which H-1B nonimmigrants may work. 8 C.F.R. § 214.2(h)(4)(ii).

A second change made by the Immigration Act of 1990 was to eliminate longstanding statutory requirements that had prevented many otherwise eligible foreign nationals from obtaining H-1 status. Under the earlier INA, potential H-1 beneficiaries—like all nonimmigrants—could not obtain a visa unless they established to consular officials' satisfaction that they intended to eventually return to their countries of origin. INA § 214(b), 8 U.S.C. § 1184(b). To ensure their stays were in fact temporary, Congress mandated that applicants seeking H-1 visas possess a foreign residence that they had no intent of abandoning. Pub. L. 82-414, § 101(a)(15)(H)(i), 66 Stat. 163, 168.

The Immigration Act of 1990 repealed both requirements,[7] making H-1B beneficiaries one of only two categories of nonimmigrants statutorily presumed to possess "dual intent"—

[6] While Congress only requires H-1B beneficiaries to possess a bachelor's degree, government statistics show that the majority of H-1B beneficiaries possess a master's or other advanced degree. Of the workers whose petitions were approved in fiscal year 2009, roughly 40 percent held a master's degree, 13 percent held a doctorate, and 6 percent held a professional (*e.g.* medical, legal) degree. U.S. Citizenship and Immigration Services, *Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2009 Annual Report* at 10, April 15, 2010 (see Table 7, H-IB Petitions Approved by Level of Education of Beneficiary).

[7] Pub. L. 101-649, §§ 205(b), (e), 104 Stat. 4978, 5020, 5022 (amending INA § 214(b), 8 U.S.C. § 1184(b)).

namely, the ability to enter the United States on a temporary visa while simultaneously pursuing lawful permanent residence.[8] INA § 214(b), 8 U.S.C. § 1184(b); 8 C.F.R. § 214.2(h)(16)(i). This change was intentional. As Representative Bruce Morrison (D-Conn.), the chief sponsor of the legislation in the House of Representatives, explained, the elimination of these requirements was meant to "move[] in the direction of bringing in permanent workers rather than temporary workers." 136 Cong. Rec. H8637 (daily ed. Oct. 2, 1990). Similarly, in a cable sent to all diplomatic and consular personnel, the State Department said the amendments reflected an "overwhelmingly strong congressional statement" to "eliminate[] nonimmigrant intent as a factor of consideration" in adjudicating H-1B visa petitions. State Department cable no. 91-State-171115, paras. 2, 8 (May 24, 1991), *reprinted at* 68 No. 21 Interpreter Releases 681 (June 3, 1991). Thus, while retaining the requirement that H-1B beneficiaries remain in the United States "temporarily," Congress simultaneously enabled them to seek lawful permanent residence in the United States without returning to their countries of origin.[9]

A final statutory change enacted in the Immigration Act of 1990 was the imposition of a six-year limit on the time during which a foreign national could remain in the United States in H-1B status. Pub. L. 101-649, § 205(a), 104 Stat. 4978, 1519 (enacting INA § 214(g)(4), 8 U.S.C. § 1184(g)(4)). Under subsequently issued federal regulations that remain in effect, however, legacy INS mandated that no H-1B petition be approved for a period longer than three years.

[8] At present, the other nonimmigrant categories exempt from the immigrant presumption are intra-company transferees holding "L" visas, and spouses and minor children of lawful permanent residents holding "V" visas. *Id.*

[9] Though the government does not keep precise statistics, some studies indicate that at least half of H-1B beneficiaries ultimately adjust to permanent residence. *See, e.g.,* Dr. Jeanne Batalova, *The Growing Connection Between Temporary and Permanent Immigration Systems*, Migration Policy Institute (January 2006).

8 C.F.R. § 214.2(h)(9)(iii)(A)(1). As a result, employers wishing to employ H-1B workers for six years must file at least one extension request.

Given the advanced skill set that H-1B nonimmigrants necessarily possess and the ever-increasing need for such highly skilled workers, prominent members of the business community and high-tech industry repeatedly have called for the program's expansion. Among the program's most prominent supporters is Bill Gates, the founder and Chairman Emeritus of Microsoft Corporation, which sponsored the second-highest number of H-1B applicants in fiscal year 2009.[10] In testimony before Congress, Gates asked lawmakers to eliminate altogether the annual cap on H-1B visas.[11] In 2009, former Federal Reserve Chairman Alan Greenspan similarly told Congress that the current cap on H-1B visas is "far too small" to meet the country's continuing need for skilled workers, particularly with the impending retirement wave of skilled "baby boomers."[12] And in September of this year, Google Chief Executive Officer Eric Schmidt characterized the United States' failure to automatically provide H-1B visas to foreign graduates of American universities as "the stupidest thing we've ever done."[13]

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[10] U.S. Citizenship and Immigration Services, *Number of H-1B Petitions Approved By USCIS in FY 2009 for Initial Beneficiaries*, *available at* http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/H-1B/h-1b-fy09%20counts-employers.csv (listing Microsoft Corporation as the sponsor of 1,318 beneficiaries in fiscal 2009). Other institutions that filed large numbers of H-1B petitions included Intel Corp. (723), Cisco Systems (308), Oracle (272), Google (211), Yahoo (183), Johns Hopkins University Medical Institute (179), Apple (168), Yale University (159), Stanford University (150), and Harvard University (145). *Id.*

[11] Nancy Zuckerbrod, *Bill Gates: Remove Limits on H1-B* [sic] *Visas*, Associated Press, March 8, 2007 (quoting Gates as saying Congress should not impose "any limit" on H-1B visas); *see also* Bill Gates, Op-Ed, *How to Keep America Competitive*, Wash. Post, Feb. 25, 2007 (calling the 65,000 cap "not nearly enough to fill open technical positions").

[12] Dr. Alan Greenspan, Testimony before the Senate Subcommittee on Immigration, Refugees, and Border Security, April 30, 2009, *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=3793&wit_id=7848.

[13] Interview with Eric Schmidt, *The Economic Times*, Sept. 19, 2010, available at http://economictimes.indiatimes.com/videoshow/6600792.cms.

II. EXISTING LAW DICTATES THAT THE BENEFICIARY OF A PENDING TIMELY FILED H-1B EXTENSION REQUEST IS ENTITLED TO REMAIN IN THE UNITED STATES UNTIL THE REQUEST HAS BEEN ADJUDICATED.

The INA permits the Department of Homeland Security (DHS)[14] to prescribe the duration and conditions of the admission of nonimmigrants to the United States, but the agency must do so by regulation. INA § 214(a), 8 U.S.C. § 1184(a). Detailed regulations govern the filing of requests for H-1B extensions. To be considered timely, such a request must be filed before the end of an H-1B employee's initial period of authorized stay in the United States, which is generally indicated on Form I-94 (Arrival/Departure Record). 8 C.F.R. § 214.2(h)(14). To continue employment without having a timely extension request filed on his behalf, an H-1B beneficiary ordinarily must leave the country, await the approval of his visa abroad, and re-enter the United States after receiving approval.

A. Viewed in the Context of the Legal and Regulatory Framework Governing the H-1B Program, DHS's Restrictive Interpretation of 8 C.F.R. § 274a.12(b)(20) is Clearly Flawed.

The critical question in this case is whether an H-1B nonimmigrant has a right to remain in the United States if his initial period of authorized stay expires during the pendency of his employer's timely filed extension request on his behalf. While the immigration regulations do not address this point directly, 8 C.F.R. § 274a.12(b)(20) permits the beneficiary of a timely filed H-1B extension request to continue employment with the same employer for up to 240 days beyond the expiration of his previously authorized period of stay.[15] Notwithstanding this

[14] The Homeland Security Act of 2002 abolished the Immigration and Naturalization Service, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205, and re-assigned responsibility for the enforcement of the Immigration and Nationality Act from the Attorney General to the Secretary of Homeland Security. Pub. L. No. 108-7, Div. (L) § 105, 117 Stat. 11, 531.

[15] This regulation specifies that employment authorization is "subject to any conditions and limitations noted on the initial authorization" and "shall automatically terminate upon notification of the denial decision." 8 C.F.R. § 274a.12(b)(20).

provision, DHS argues that Mr. El Badrawi had no right to remain in the United States after his initial period of admission had expired. Def. U.S. Mot. Summ. J. 15-22. Discounting DHS's argument as "bewildering" and "seemingly untenable," this Court correctly concluded that continued employment with the same employer "necessarily includes the right to physically remain in the country." *El Badrawi v. DHS*, 579 F. Supp. 2d 249, 277 (D. Conn. 2008).

Acknowledging the likelihood of adjudication delays, DHS promulgated 8 C.F.R. § 274a.12(b)(20) to ensure continuity of employment while H-1B extension requests are pending. *See* 52 Fed. Reg. 16216, 16220 (May 1, 1987) (acknowledging "the possibility of delays in the processing of applications for extensions of stay"); 56 Fed. Reg. 41767, 41780-81 (Aug. 23, 1991) (noting that the final rule was intended to prevent a gap in the applicant's work authorization during the pendency of an extension request). The immigration regulations have been construed to preclude an employer from filing an H-1B petition or an H-1B extension request more than six months before the date of anticipated employment. 8 C.F.R. § 214.2(h)(9)(i)(B); Declaration of Edward L. Skornia ("Skornia Dec."), Senior Vice President and General Manager of O'Grady Peyton International, attached hereto as Exhibit A, ¶ 4; Declaration of Bradley S. Paskievich ("Paskievich Dec."), Senior Legal Counsel, Compliance and Employment, DHL Global Business Services, attached hereto as Exhibit B, ¶ 7. However, DHS will not guarantee that it will adjudicate such requests before an employee's initial period of authorized stay expires.[16] The most recent processing time reports from U.S. Citizenship and Immigration Services ("USCIS"), the DHS component that adjudicates benefit applications,

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[16] Although employers can try to expedite the adjudication of H-1B extension petitions by paying an additional $1,000 for premium processing, 8 C.F.R. § 103.7(e), most businesses try to avoid this additional expense. *See* Skornia Dec. (Ex. A), ¶ 6; Paskievich Dec. (Ex. B), ¶ 7. The payment of the additional fee does not guarantee that expedited processing will occur, but the fee is refunded if it does not. Skornia Dec. (Ex. A), ¶ 6.

indicate that, as of August 31, 2010, H-1B extension requests took nearly twelve weeks to process at the California Service Center and more than fourteen weeks to process at the Vermont Service Center. U.S. Citizenship and Immigration Services, Online USCIS Processing Time Information, *available at* https://egov.uscis.gov/cris/processTimesDisplayInit.do;jsessionid=bacjk8Lk5Bfs_dBsINtRs (scroll to bottom of page and follow "Instructions on Using the Table").[17] USCIS itself acknowledges that these reports are based on information that is at least 45 days old, which suggests that the actual processing times may be outdated. *See id.* The experience of many AILA members confirms that actual processing times often exceed posted processing times. Given that backlogs may extend beyond six months,[18] 8 C.F.R. § 274a.12(b)(20) ensures that employers will not lose critical staff pending the adjudication of their H-1B extension requests.[19]

The Court should thus construe 8 C.F.R. § 274a.12(b)(20) as a necessary and proper implementation of INA § 214, which provides that an H-1B beneficiary may be admitted to the United States for up to six years pursuant to terms defined by regulations. *See* INA §§ 214(a),

[17] At the time Mr. El Badrawi's employer filed his H-1B extension request, the USCIS Vermont Service Center was still processing applications filed more than 170 days (i.e. almost six months) earlier. See USCIS Vermont Service Center Processing Dates as of April 8, 2004, *available at* http://www.aila.org/content/default.aspx?bc=1016|8767|6722|12631|10460.

[18] *See, e.g.,* Skornia Dec. (Ex. A), ¶ 6 ("The time for approval has varied widely over the years and has often exceeded six months—the maximum lead time for advance filing."); Declaration of Bradley S. Paskievich ("Paskievich Dec."), attached hereto as Exhibit B, ¶ 7 ("The time required for an extension of stay to be adjudicated has varied widely over the past few years and currently ranges between four and six months."); Declaration of Deborah Marlowe ("Marlowe Dec."), attached hereto as Exhibit C, ¶ 4 (noting that a delay of two or three months in the regular processing of extension petitions is "not uncommon").

[19] Under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. 106-313, 114 Stat 1251, the beneficiary of a timely filed H-1B extension request is also free to accept new employment upon the filing by the prospective employer of a new H-1B petition during an authorized period of stay. INA § 214(n), 8 U.S.C. § 1184(n). The authorization to work for the new employer "continue[s] for such alien until the new petition is adjudicated." *Id.* But, "[i]f the new petition is denied, such authorization shall cease." *Id.*

(g)(4), 8 U.S.C. § 1184(a), (g)(4). Because the applicable regulations specify that an H-1B nonimmigrant's initial period of authorized stay cannot exceed three years, 8 C.F.R. § 214.2(h)(9)(iii)(A)(1), the prospect of an extension is clearly anticipated. *See also* 8 C.F.R. § 214.2(h)(15) ("Extension of stay"). 8 C.F.R. § 274a.12(b)(20) facilitates the extension process for the beneficiary of a pending timely filed petition, who is permitted to work for up to 240 days after his initial period of authorized stay expires.

Without the ability to remain and work lawfully in the United States while an extension petition is pending, all nonimmigrants in Mr. Badrawi's situation—and the employers who depend on them—would fall victim to the vagaries of USCIS processing delays. If the government's argument were correct, DHS could render a broad spectrum of nonimmigrants[20] removable simply by delaying adjudication of their employers' pending extension requests until after their previously authorized stays had expired. Under this scenario, the 240-day extension of employment authorization would serve no conceivable purpose. In fact, DHS would have an incentive to increase adjudication backlogs in order to expand its arrest authority.

In other contexts, DHS has strived to ensure that nonimmigrants do not suffer adverse consequences as a result of the agency's processing delays. For example, policy guidance issued

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[20] 8 C.F.R. § 274a.12(b)(20) grants an extension of employment authorization to many categories of nonimmigrants with pending timely filed extension requests. These include R-1 (religious workers); L-1A (intracompany transferees serving as executives, managers, or specialists for multinational corporations); A-3 (employees of foreign diplomats); E-1 (persons in the United States pursuant to multilateral treaties of commerce and friendship who are engaged in international trade) or E-2 (investors of substantial sums of capital in this country); I (foreign news correspondents and other media personnel); J-1 (exchange visitors in a program designated by the Department of State); O-1 (persons of extraordinary ability in the sciences, arts, education, business or athletics); P-1 (other athletes, artists and entertainers); and TN (business professionals under the North American Free Trade Agreement). Adopting the government's position in this case would place these talented individuals, who make valuable contributions to our country, at great risk and could discourage others like them from coming to the United States in the future.

by legacy INS prior to Mr. Badrawi's arrest establishes that "[b]ecause of the current backlogs, which in some cases tend beyond six months," nonimmigrants with timely filed extension requests that "have been pending beyond the 120 day tolling period [in INA § 212(a)(9)(B)(iv), 8 U.S.C. § 1182(a)(9)(B)(iv)] should be considered to be in a period of stay authorized by the Attorney General . . . ." *See* Memorandum from Michael A. Pearson, Period of stay authorized by the Attorney General after 120 day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act at 1 (March 3, 2000), attached hereto as Exhibit D.[21] During this period, the nonimmigrant does not accrue unlawful presence, which could render him ineligible for certain immigration benefits and/or bar him from readmission to the United States for certain periods. *Id.*

DHS suggests that an H-1B employee can remain in the United States only if his employer's extension request is approved before the end of his initial period of authorized admission. If this were true, the relevant provisions of the INA and immigration regulations would be written differently. To be considered timely filed, an employer's extension request would have to be submitted early enough for DHS to adjudicate it before the end of the H-1B nonimmigrant's initial period of authorized admission.[22] In addition, DHS would have a

[21] *See also* Memorandum from Thomas E. Cook, Guidance on Interpretation of "Period of Stay Authorized by the Attorney General" in determining "unlawful presence" under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act, at 4 (April 2, 2003), attached hereto as Exhibit E. Both the Pearson and Cook memos were subsequently consolidated and reaffirmed in a USCIS memo dated May 6, 2009, which rescinded the prior memos. *See* Memorandum from Donald Neufeld, Lori Scialabba, Pearl Chang, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, at 32-33, 35 (May 6, 2009), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.

[22] As previously discussed, current law is generally interpreted to preclude an H-1B employer from filing an extension request more than six months ahead of the start of anticipated employment.

corresponding obligation to timely adjudicate the request. In the absence of those requirements, existing law must be construed to preserve the status quo during the pendency of an H-1B extension request.

B. DHS Misconstrues the Case Law Cited To Support Its Position.

DHS relies heavily on *Matter of Rotimi*, 24 I. & N. Dec. 567 (BIA 2008), for the categorical proposition that "an alien's work authorization provides no safe harbor from arrest for being illegally present in the country." Def. U.S. Mot. Summ. J. 12. As Plaintiff's counsel has noted, *Rotimi* involved a distinct provision of immigration law (INA § 212(h), 8 U.S.C. 1182(h)) unrelated to the issue in this case, and the Board explicitly limited its decision to the facts before it. *Matter of Rotimi*, 24 I. & N. Dec. at 571 (declining to issue a "comprehensive ruling that would address and resolve the many cases not now before us"). Moreover, the respondent's incidental receipt of employment authorization had no bearing on the Board's ultimate decision in *Rotimi*. Finally, as discussed below, the Second Circuit panel that reviewed the decision not only criticized the Board's reasoning but specifically found that its ruling would *not* apply to the very circumstances now presented in Mr. El Badrawi's case.

The central question in *Rotimi* was whether the respondent—a convicted criminal denied admission to the country following a trip abroad—was eligible for a waiver of inadmissibility under INA § 212(h).[23] *Id.* at 570. To qualify for a waiver, Rotimi had to establish that he had "lawfully" resided in the United States for the seven years prior to his placement in removal proceedings. *Id.* at 571. Because Rotimi had been a lawful permanent resident for less than six

[23] INA § 212(h), 8 U.S.C. § 1182(h), vests DHS with discretion to waive grounds of inadmissibility related to the commission of various criminal offenses. Lawful permanent residents may take advantage of the provision in instances where a criminal conviction in the United States renders them inadmissible upon returning from a trip abroad. INA § 212(h)(2), 8 U.S.C. § 1182(h)(2).

years, he argued that he had "lawfully" resided in the country during the prior 13-month period after his tourist visa expired but while his applications for adjustment of status and asylum remained pending. *Id.* Although the Board rejected Rotimi's argument that his work authorization constituted evidence of "lawful" residence, *id.* at 578, this determination was irrelevant to the disposition of his case. The Board only addressed the matter in the final paragraph of its opinion, *id.*, and mention of it is wholly absent from the Second Circuit's subsequent decision.

On appeal, the Second Circuit, exercising *Chevron* deference, adopted the Board's conclusion that Rotimi's period of "lawful residence" ended when his nonimmigrant visa expired. *Rotimi v. Holder*, 577 F.3d 133, 137 (2d Cir. 2009).[24] However, the panel expressly found the Board's decision inapplicable to a noncitizen who "applied for a lawful status early in a substantial period of some other lawful status . . . and [the government] inexcusably postponed decision on the application until after the expiration of the initial lawful status." *Id.* at 139, n.5. Thus, the decision has no bearing on a noncitizen like Mr. El Badrawi whose timely filed extension request was still pending when his initial period of authorized admission ended. Indeed, two panel members deemed it "absurd and unjust" for the lawfulness of a nonimmigrant's continued presence in the United States to "turn on how quickly the immigration authorities adjudicate" his pending extension request. *Id.* at 142 (Katzmann, J., concurring). Given that this Court is not constrained by a prior agency determination of the question presented, it should adhere to its prior interpretation of 8 C.F.R. § 274a.12(b)(20) to avoid reaching an "absurd and unjust" result.

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[24] Two of the judges on the panel noted that they would have resolved the question differently had it arisen in a judicial proceeding. *Rotimi*, 577 F.3d at 142 (Katzmann, J., concurring, joined by Feinberg, J.) ("I would interpret the statute differently were I called on to do so in the first instance.").

The Fifth Circuit's recent decision in *Bokhari v. Holder*, No. 09-60538, 2010 WL 3768016 (5th Cir. 2010), is similarly inapposite. *Bokhari* concerned the right of an L-1A (intracompany transferee) nonimmigrant to acquire permanent resident status under INA § 245(k), 8 U.S.C § 1255(k). *Id.* at *2. As in Mr. El Badrawi's case, Bokhari's employer filed a timely extension request on his behalf. *Id.* at *1. In Bokhari's case, however, the extension request was adjudicated—and *denied*. *Id.* Following the denial, Bokhari filed a separate application for adjustment of status from a nonimmigrant to a lawful permanent resident. *Id.* The Immigration Judge found Bokhari ineligible for adjustment of status under INA § 245(k) because he had failed to maintain "a lawful status" in the United States for more than 180 days. *Id.* This decision was affirmed by both the Board of Immigration Appeals and the Fifth Circuit. *Id.* at *1, *4.

Like Mr. El Badrawi, Bokhari was entitled to work and to reside in the United States during the pendency of his employer's extension request. The central question in *Bokhari* was whether DHS's *denial* of the L-1A extension request retroactively negated Bokhari's right to remain in this country while it was pending. Whatever the answer to this question, Mr. El Badrawi's situation is distinguishable because DHS never adjudicated the extension request filed on his behalf. Pending a final decision, he had a right to remain in the United States.

In both *Bokhari* and the case at bar, DHS places great weight on the Board's cursory decision more than three decades ago in *Matter of Teberen*, 15 I. & N. Dec. 689 (BIA 1976). *Teberen* involved an international student placed in deportation proceedings following the expiration of his F-1 (student) status, despite the timely submission of an extension request that the government apparently lost. *Id.* at 690. The Board affirmed the deportation order in a terse, two-page opinion, holding that to establish a noncitizen's removability as an "overstay," the government "need only show that the alien was admitted as a nonimmigrant for a temporary period, that the period has elapsed, and that the nonimmigrant has not departed." *Id.* (internal quotations, citations omitted). Yet, as this Court previously held, *Teberen* is not relevant to this case because it was decided more than a decade before legacy INS adopted the regulation upon which El Badrawi relies.[25] *El Badrawi v. DHS*, 579 F. Supp. 2d 249, 277 (D. Conn. 2008). Indeed, *Teberen* is instructive only insofar as it highlights the lack of regulatory provisions comparable to 8 C.F.R. § 274a.12(b)(20). Had Teberen been arrested in the face of a regulation authorizing international students to continue studying for an additional 240 days pending adjudication of an F-1 extension request, the Board may well have undertaken a more nuanced analysis and reached a different conclusion.

III. A CONTRARY INTERPRETATION OF EXISTING LAW WOULD DISRUPT KEY SECTORS OF THE U.S. ECONOMY AND THEREBY UNDERMINE THE GOALS OF THE H-1B PROGRAM.

The H-1B program has enabled thousands of U.S. employers to compete effectively in today's global market. As Deborah Marlowe, a founding member and director of the Global Personnel Alliance,[26] explains:

> American companies must have knowledge of foreign operating conditions, consumer preferences, competing products, the regulatory environment and other expertise relating to those markets. Without access to a select number of persons from those markets with knowledge, American business and industry is at a severe disadvantage vis-à-vis its foreign competitors. Business opportunities are

[25] Control of Employment of Aliens, 52 Fed. Reg. 16216, 16220 (May 1, 1987) (establishing automatic extension of employment authorization for 120 days for H visa applicants); 56 Fed. Reg. 41767, 41780-81 (Aug. 23, 1991) (extending 120-day period to 240 days).

[26] The Global Personnel Alliance (GPA) is a forum for internationally active companies interested in global personnel mobility, including immigration. Marlowe Dec. (Ex. C), ¶ 1. GPA provides companies with the opportunity to discuss best practices and common issues and to seek resolution of shared problems. *Id.* Companies involved in GPA include many major multinationals and smaller, emerging companies, which represent numerous industries, including technology, financial services, manufacturing and healthcare. *Id.*

> found and lost with stunning rapidity, and the flexibility to respond promptly to problems and opportunities is of paramount importance.

Declaration of Deborah A. Marlowe ("Marlowe Dec."), attached hereto as Exhibit C, ¶ 3. To preserve their competitive edge, U.S. companies depend on their ability to employ foreign professionals for varying periods and, where necessary, to extend H-1B nonimmigrants' initial periods of authorized stay without a break in their employment. *See* Skornia Dec. (Ex. A),[27] ¶ 5 (noting that physical therapists are "admitted for only one year initially, as opposed to the maximum three years permitted under the regulations," which requires their employer to petition for H-1B extensions during their first year of work); Paskievich Dec. (Ex. B),[28] ¶ 5 ("In order to retain the foreign employees on nonimmigrant visas for the period of time required for them to complete their duties in the U.S., the company frequently must file petitions for extensions of stay or extensions of status.").

Employers rely on the elaborate legal and regulatory framework discussed in Section II, *supra*—and on 8 C.F.R. § 274a.12(b)(20) in particular—to ensure the continuity of their business operations during adjudication of their extension applications, which can be a lengthy and unpredictable process. *See* Skornia Dec. (Ex. A), ¶ 6; Paskievich Dec. (Ex. B), ¶ 6. According

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[27] Edward L. Skornia is the Senior Vice President and General Manager of O'Grady Peyton International (OGP), a wholly owned subsidiary of AMN Healthcare, Inc. Skornia Dec. (Ex. A), ¶ 1. OGP specializes in the recruitment and employment of foreign-trained healthcare personnel. *Id.*, ¶ 3. AMN provides high quality physicians, nurses and allied healthcare professionals to thousands of hospitals, clinics, medical centers and other healthcare facility clients across the United States, including many of the nation's top hospitals. *Id.*, ¶ 2.

[28] Bradley S. Paskievich is Senior Legal Counsel, Compliance and Employment, DHL Global Business Services. Paskievich Dec. (Ex. B), ¶ 1. Global Business Services is a division of DPWN Holdings [USA] Inc., a subsidiary of Deutsche Post DHL. *Id.*, ¶ 2. Deutsche Post DHL is the world's leading logistics group, with over 300,000 employees in more than 220 countries and territories around the world, and 2009 revenues of over 46 billion euros. *Id.* Deutsche Post DHL provides comprehensive services in international express, air and ocean freight, road and rail transportation, and contract logistics. *Id.* The company has substantial U.S. operations. *Id.*

to Marlowe, "[i]t would create havoc, and severely disrupt the conduct of projects and business if the integrity of these rules were not honored and preserved." *See* Marlowe Dec. (Ex. C), ¶ 4.

The process of obtaining H-1B status can be both cumbersome and expensive. Employers must submit documentation to two separate agencies—the Departments of Labor and Homeland Security—and often wait up to six months for final approval. If the potential employee is outside the United States, he must apply for a visa at a U.S. consular post, which can add months to the process. The steps required to extend H-1B status are virtually identical. Such petitions generally entail fees ranging from $1,070 to $1,820 depending on the size of the company.[29] Employers must comply meticulously with all requirements to enjoy the benefits of the H-1B program. In return, DHS necessarily has a reciprocal obligation to adjudicate their requests. *See* Skornia Dec. (Ex. A), ¶ 7 (noting that the prospect of arrest during the extension processing period would "make a mockery of the over $1[,]800 in fees that we pay for each such first extension petition").

A policy that allowed DHS to arrest, detain, and initiate removal proceedings against an H-1B beneficiary during the processing period for a timely filed, pending extension request would have devastating consequences for companies that depend on these employees. According to Bradley S. Paskievich of DHL Business Services:

> If the government took such a position, it would send a sense of fear and insecurity through our highly valued foreign workforce, and create a great deal of instability to our business operations. Many of our foreign employees would

[29] The filing fee for an initial H-1B petition or any subsequent extension is $320. Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 29851, 29854, (May 30, 2007). Under federal law, employers must also pay separate fees of $750 or $1,500 (depending on the size of the employer) for an initial H-1B petition and the first extension. INA § 214(c)(9)(B), 8 U.S.C. § 1184(c)(9)(B). Employers are exempt from the latter fee if they are a primary or secondary education institution; an institution of higher education or affiliated nonprofit entity; or a nonprofit or government research organization. INA § 214(c)(9)(A), 8 U.S.C. § 1184(c)(9)(A).

> likely decide to wait abroad, with their family members, for processing of extensions, which would prove highly disruptive and damaging to our normal U.S. business operations.

Paskievich Dec. (Ex. B), ¶ 8. Similarly, Edward Skornia of O'Grady Peyton International affirms that such a policy would destroy his company's credibility, shake public confidence in its stock, and cause irreparable damage to its business. *See* Skornia Dec. (Ex. A), ¶¶ 7-8.

If, for whatever reason, DHS decided that Mr. Badrawi should leave the United States, the proper course of action would have been to adjudicate and, if appropriate, deny his employer's pending request to extend the H-1B petition or his period of authorized stay.[30] At that point, Mr. El Badrawi would have been on notice that he could no longer remain in this country.[31] If he failed to depart, DHS could justifiably have initiated removal proceedings.

CONCLUSION

For the foregoing reasons, *Amici Curiae* American Immigration Council and the American Immigration Lawyers Association respectfully request that that this Court deny the Motion of Defendant United States for Summary Judgment and Grant Plaintiff's Cross-Motion for Summary Judgment.

[30] *See* Marlowe Dec. (Ex. C), ¶ 5 ("It must be emphasized that continuing to maintain the integrity of employment until the petition is adjudicated in no way limits government from pursuing necessary actions, including even prosecution or removal, where those are justified. In such a case, the government must simply first adjudicate the petition for extension.").

[31] *See* INA § 214(c)(7), 8 U.S.C. § 1184(c)(7) (requiring notification to the employer of a negative determination, the reasons for the denial, and the process for appeal).

Respectfully submitted,

/s/ Melissa Crow

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Attorneys for *Amici Curiae*

**Ben Winograd, a Law Fellow with the American Immigration Council, assisted in the preparation of this brief.*

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

RASHAD AHMAD REFAAT EL BADRAWI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	3:07-cv-01074 (JCH)
	)	
DEPARTMENT OF HOMELAND SECURITY, ET AL.,	)	November 4, 2010
	)	
Defendants.	)	

DECLARATION OF EDWARD L. SKORNIA

I, Edward L. Skornia, declare as follows:

1. I am Senior Vice President and General Manager of O'Grady Peyton International, Inc. (OGP). OGP is a wholly owned subsidiary of AMN Healthcare, Inc. (AMN).

2. AMN is a publicly traded company which employs the largest number of healthcare employees in the United States who are deployed as "staffing company" employees. Under this model, the individuals are recruited and employed by the staffing company, but they are assigned to work for healthcare providers at their own worksites. AMN provides high quality physicians, nurses and allied healthcare professionals to thousands of hospitals, clinics, medical centers and other healthcare facility clients across the United States, including many of the nation's top hospitals.

3. OGP is an AMN subsidiary that specializes in the recruitment and employment of foreign-trained healthcare personnel. Our employees are primarily registered nurses (RNs) and physical therapists (PTs). Our RNs come to the United States as immigrants and become lawful

permanent residents. However, most of our PTs come initially as nonimmigrants under the H-1B program.

4. There is a severe shortage of qualified PTs in the U.S. The majority of our PTs are placed in more rural locations where there is a lack of qualified PTs for our clients to hire. In order to serve their patients, our clients need us to provide qualified licensed PTs who will remain with them for up to two years to ensure continuity of care for their patients. We get excellent reports back from our clients who are delighted with our PTs' excellent patient care.

5. Each year we petition for dozens of H-1B physical therapists. Because of state licensure laws, most PTs cannot receive a license without being physically present in the United States. Consequently, under USCIS regulations, they are admitted for only one year initially, as opposed to the maximum three years permitted under the regulations. We are regularly required to petition for the extension of H-1B status during our PTs' first year of work for us. USCIS regulations limit the window in which we can file an extension petition to the final six months of an employee's current H-1B visa.

6. OGP has been in the international nurse and PT business for over 30 years. We have succeeded by knowing and following USCIS regulations. We file to extend the H-1B status of currently employed PTs as expeditiously as possible, but we have always relied on the USCIS regulation providing an automatic extension of 240 days of employment authorization beyond the current I-94 expiration date while the Form I-129 petition is under consideration. The time for approval has varied widely over the years and has often exceeded six months—the maximum lead time for advance filing. Although the government has made "premium processing" available in more recent years, we try to avoid that expense, which must be passed on to the

healthcare facilities. There is no guarantee that the expedited processing will occur, only assurance of a refund of the fee if it does not.

7. It never occurred to us that DHS could arrest one of our PTs during the processing time for a timely filed extension petition. Such a rule makes no sense in light of the 240-day automatic extension of work authorization. Such a rule would also make a mockery of the over $1,800 in fees that we pay for each such first-extension petition. We could not assure our clients of the continued presence of our PT employees if they were subject to arrest simply because USCIS failed to act on our extension petitions. Our business is based on providing dependable, quality employees to care for the patients of our clients. It would only take one such incident to destroy the credibility that we have built over our past 30 years in business. Were our parent company to present such a risk to its public investors, their confidence in our stock would surely be shaken.

8. Our employees and our clients rely on us to understand and follow the immigration laws so that they can depend on the international healthcare workers that we assign to them. We would have difficulty explaining to them that the law permits DHS to arrest one of our employees while the agency was still deciding whether the employee's stay could be extended. While the one subject to arrest is the employee, we, the petitioner and employer, are a U.S. business. The mere threat of such a government option would do irreparable damage to our business.

Edward L. Skornia
Senior Vice President and General Manager
O'Grady Peyton International, Inc.
A subsidiary of AMN Healthcare, Inc.

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

RASHAD AHMAD REFAAT EL BADRAWI,	)	
Plaintiff,	)	
v.	)	3:07-cv-01074 (JCH)
DEPARTMENT OF HOMELAND SECURITY, ET AL.,	)	NOVEMBER 1, 2010
Defendants.	)	

DECLARATION OF BRADLEY S. PASKIEVICH

I, Bradley S. Paskievich, declare as follows:

1. I am Senior Legal Counsel, Compliance and Employment, for DHL Global Business Services. DHL Global Business Services is a division of DPWN Holdings [USA] Inc., a subsidiary of Deutsche Post DHL, a publicly-traded German company.

2. Deutsche Post DHL is the world's leading logistics group, with over 300,000 employees in more than 220 countries and territories around the world, and 2009 revenues of over 46 billion euros. Deutsche Post DHL, through its integrated DHL and Deutsche Post brands, provides comprehensive services in international express, air and ocean freight, road and rail transportation and contract logistics. Deutsche Post DHL's Global Forwarding business is the world's largest provider of air and ocean freight services. The company has substantial operations throughout the U.S.

3. Neither Deutsche Post DHL nor any of its related entities are plaintiffs in the above-captioned matter. On behalf of the Deutsche Post DHL, I hereby state that I do not express any opinion as to the facts of the above-captioned matter. However, as a major

multinational company that employs foreign workers in the United States, Deutsche Post DHL has an interest in the specific legal issue of the lawful status of foreign nationals in the U.S. during the pendency of their extensions of stay.

4. While employees holding nonimmigrant visas represent only a very small percentage of our U.S. work force, Deutsche Post DHL and its subsidiaries in the U.S. rely on various categories of temporary visas to the U.S., primarily the H-1B and L visa categories, to facilitate the hiring of key talent and/or the international transfer of in-house experts, managers and executives to help ensure the consistency and high quality of our operations in the U.S.

5. In order to retain the foreign employees on nonimmigrant visas for the period of time required for them to complete their duties in the U.S., the company frequently must file petitions for extensions of stay or extensions of status.

6. While the company's petitions for extensions of stay are always filed on a timely basis, it often takes U.S. Citizenship and Immigration Services ("USCIS") several months to adjudicate these extensions. When an extension petition remains pending with USCIS beyond the expiration date of the employee's I-94 document, the company relies upon the USCIS regulation at 8 C.F.R Section 274a.12(b)(20) providing for an automatic extension of employment authorization of 240 days for certain classes of nonimmigrants whose extensions are not adjudicated prior to the expiration of their stay.

7. The time required for an extension of stay to be adjudicated has varied widely over the past few years and currently ranges between four and six months. For H-1B visa holders, the earliest time one can file an extension is six months prior to expiration of stay. For an L-1 visa holder, the earliest time one can file an extension is four months prior to the expiration of stay. We attempt to file extensions at the earliest point in time possible. However, a foreign national

must be physically present in the U.S. in order for an extension to be filed on his or her behalf. Because our business requires a highly mobile workforce, sometimes an extension must be filed on a date that is closer to an employee's expiration of stay, due to the employee's international travel plans. Although "premium processing" is available for most of these extension petitions, sound financial management dictates that we avoid the additional charges for this service wherever possible.

8. The notion that the 240 days of automatic work authorization would not be considered to be a period of lawful status, and that any of our employees in such a period would be subject to arrest and detention by officials of the Department of Homeland Security, undermines the reliance our multinational business places upon a rational immigration system. If the government took such a position, it would send a sense of fear and insecurity through our highly valued foreign workforce, and create a great deal of instability to our business operations. Many of our foreign employees would likely decide to wait abroad, with their family members, for processing of extensions, which would prove highly disruptive and damaging to our normal U.S. business operations.

Bradley S. Paskievich
Senior Legal Counsel,
Compliance and Employment
DHL Global Business Services.

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

RASHAD AHMAD REFAAT EL BADRAWI, *Plaintiff*, v. DEPARTMENT OF HOMELAND SECURITY, ET AL., *Defendants*.	)))))))))))	 3:07-cv-01074 (JCH) October 29, 2010

DECLARATION OF DEBORAH A. MARLOWE

I, Deborah A. Marlowe, declare as follows:

1. I am one of the founding members and Directors of the Global Personnel Alliance (GPA). GPA is a forum for internationally active companies interested in global personnel mobility, including immigration. Immigration issues and policies directly affect the ability of companies to create employment in the United States. GPA provides companies with the opportunity to discuss best practices and common issues and to seek resolution of shared problems. GPA holds conferences and briefings, and has testified before Congress on immigration issues affecting the employment of foreign nationals in the United States. Companies involved in GPA include many major multinationals, as well as smaller, emerging companies, and these companies represent numerous industries, from technology to financial services, from manufacturing to healthcare.

2. I understand that the American Immigration Council (AIC) is submitting an amicus brief in the above-captioned matter. The purpose of this Declaration is not to express any opinion with respect to the particular facts or circumstances of the above-captioned matter.

Rather, the purpose of this Declaration is to focus on a specific issue that is important to the stability of business, and the orderly progress of projects, conducted by United States companies that employ any foreign nationals as a part of their United States workforce.

3. The H-1B visa program is critical to the international competitiveness of American businesses. As GPA has explained in Senate testimony, "American companies must have knowledge of foreign operating conditions, consumer preferences, competing products, the regulatory environment and other expertise relating to those markets. Without access to a select number of persons from those markets with knowledge, American business and industry is at a severe disadvantage vis-à-vis its foreign competitors. Business opportunities are found and lost with stunning rapidity, and the flexibility to respond promptly to problems and opportunities is of paramount importance. The business community is already encumbered by logistical difficulties in securing the expeditious transfer of personnel needed to facilitate employment or exports. The regular petition process at … CIS Service Centers is slow and difficult. The application procedure at Consulates abroad has become more complex and time-consuming….. Requests for further information are frequent and not always logical. The leadership of ... CIS Homeland Security is well motivated and dedicated to efficiency, but is hampered badly by a lack of resources… Further unnecessary restrictions will literally handcuff American business on international markets."

4. These general concerns are applicable in the context of petitions for extension of H-1B classification. In numerous instances, there are significant delays in the regular processing of extension petitions. A delay of two or three months is not uncommon. For this reason, the immigration service (legacy INS and now CIS) has long held, and enshrined in regulation, that status is preserved by a timely filed petition for extension (filed prior to the expiration of status).

Similarly, it has long been held, and enshrined in regulation, that employment authorization will continue for 240 days after expiration as long as a petition for extension was timely filed prior to expiration, and such application remains unadjudicated. It would create havoc, and severely disrupt the conduct of projects and business if the integrity of these rules were not honored and preserved. Projects would frequently and suddenly be halted, where government backlogs prevent prompt adjudication of petitions, with severe consequences for other employees and the timeliness and competitiveness of deliverables. Moreover, the abrupt cessation of appropriate status for H-1B employees in this circumstance would have far reaching consequences that could complicate the process of obtaining future extensions and/or the process of obtaining permanent residence (a "green card") for key employees. These problems would be magnified even further by the fact that CIS, in a significant number of cases and with respect to certain industries, is moving toward a policy of often providing extensions of H-1B status for much shorter periods of time.

5. In short, where a petition for extension of H-1B status is timely filed prior to the expiration of status, where that petition remains unadjudicated , and where the employee has employment authorization as provided by regulation, the government should not be permitted to consider an H-1B employee as having violated, or being without, status. To hold otherwise would create a highly unstable and disruptive immigration policy, and create significant logistical and economic problems for employers. It must be emphasized that continuing to maintain the integrity of employment until the petition is adjudicated in no way limits government from pursuing necessary actions, including even prosecution or removal, where those are justified. In such a case, government must simply first adjudicate the petition for extension. Creating an exception to this basic rule would result in needless unintended

consequences that would be extremely harmful to the integrity of employment and the orderly conduct of business. Government must be required to abide by established regulations and procedures that are there for good reasons and have stood the test of time.

GLOBAL PERSONNEL ALLIANCE

By: Deborah A Marlowe

Deborah A. Marlowe

EXHIBIT D

U.S. Department of Justice
Immigration and Naturalization Service

HQADN70/21.1.24-P
AD 00-07

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

MAR 3 2000

MEMORANDUM FOR REGIONAL DIRECTORS

DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER, IMMIGRATION SERVICES DIVISION

ACTING DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS

FROM: Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (the Act). (AD 00-07)

This memorandum addresses issues relating to the 3- and 10-year bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act and the decision to designate as a period of stay authorized by the Attorney General the entire period during which a timely filed, non-frivolous application for extension of stay (E/S) or change of status (C/S) is pending with the Service, provided the alien has not engaged in any unauthorized employment. This period of stay authorized by the Attorney General covers the 120-day tolling period described in section 212(a)(9)(B)(iv) of the Act, and continues until the date the Service issues a decision.

By way of background, section 212(a)(9)(B)(ii) of the Act states that an alien who is present in the United States without admission or parole, or who remains in the United States beyond the period of stay authorized by the Attorney General, accrues unlawful presence towards the 3- and 10-year bars under section 212(a)(9)(B)(i)(I) and (II) of the Act. Section 212(a)(9)(B)(iv) of the Act is a tolling provision that covers certain nonimmigrants. If an alien has timely filed a nonfrivolous application for E/S or C/S, the first 120 days of unlawful presence are not counted towards the 3-year bar under section 212(a)(9)(B)(i) of the Act. Section 212(a)(9)(B)(iv) of the Act further states that the alien must have been lawfully admitted or paroled into the United States, and must not have been employed without authorization before the E/S or C/S application was filed or while it was pending.

Although legislative history is silent regarding the intent of the 120-day tolling period, an inference may be drawn that Congress expected the Service to adjudicate the petitions within such a timeframe. However, due to unprecedented workload, in many instances the Service has been unable to adjudicate a timely filed application for E/S or C/S within the 120-day period envisioned by Congress.

Under current Service policy, if a decision is not rendered within the tolling period, aliens admitted to the United States until a specific date begin accruing unlawful presence on the 121st day after the expiration of their Form I-94. Because of the current backlogs, which in some cases extend beyond six months, aliens who remain in the United States while the C/S or E/S is pending may incur a 3-year or even a 10-year bar to admission if the application is ultimately denied.

Therefore, in order to alleviate problems aliens may encounter concerning unlawful presence through no fault of their own, the Service has determined that nonimmigrants who were admitted until a specific date and who apply for C/S or E/S and whose applications have been pending beyond the 120-day tolling period should be considered to be in a period of stay authorized by the Attorney General, if certain requirements are met. Because these requirements are the same as those for tolling under section 212(a)(9)(B)(iv) of the Act, the Service has further determined that the period of stay authorized by the Attorney General covers the E/S or C/S application for the entire period that it is pending.

As a practical matter, we note that this policy applies only to those nonimmigrants who were admitted until a specific date and whose I-94 has expired while the E/S or C/S application is pending. This is because nonimmigrants admitted for duration of status (D/S) do not begin accruing unlawful presence until a status violation is found. Refer to the Service's memorandum dated September 19, 1997, 96 Act #058, for a discussion of the Service's policy on unlawful presence as it relates to nonimmigrants admitted D/S.

This memorandum is being issued simultaneously with a separate memorandum, HQADN 70/12-P, amending the Service's 1/14/99 guidance on section 222(g), which is found in Chapter 15 of the Inspector's Field Manual (IFM). These policies and procedures are effective immediately and will be included in the AFM and in the IFM, respectively, in the next release of INSERTS.

A new Chapter 30.1(d) is added in the AFM to read as follows:

(d) Unlawful Presence under Section 212(a)(9)(B) of the Act. (1) The 3- and 10-year bars to admission under section 212(a)(9)B)(i)(I) and (II) of the Act do not apply to:

- Applicants for adjustment of status under section 202(b) of NACARA

- Applicants for adjustment of status under — of HRIFA; and
- Registry applicants under section 249 of the Act.

(2) Counting of Unlawful Presence for Nonimmigrants. An alien who remains in the United States beyond the period of stay authorized by the Attorney General is unlawfully present and becomes subject to the 3- or 10-year bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. Under current Service policy, unlawful presence is counted in the following manner for nonimmigrants.

(A) Nonimmigrants Admitted until a Specific Date. Nonimmigrants admitted until a specific date begin accruing unlawful presence on the date the period of admission authorized by the Service expires, as noted on the arrival document issued at the port-of-entry.

(B) Nonimmigrants Admitted Duration of Status (D/S). Nonimmigrants admitted to the United States for D/S begin accruing unlawful presence on the date the Service finds a status violation while adjudicating a request for another immigration benefit, or on the date an immigration judge finds a status violation in the course of proceedings. If, however, the immigration judge concurrently issues voluntary departure and the alien complies with the order by making a timely departure, no unlawful presence accrues. See sections (d)(2) and (d)(5) of this chapter regarding voluntary departure as a period of stay authorized by the Attorney General.

(3) Period of Stay Authorized by the Attorney General. The Service has also designated the following as periods of stay authorized by the Attorney General:

- Voluntary departure;
- Refugee status;
- Asylee status;
- Grants of withholding or deferral of removal under the United Nations Convention Against Torture;
- Legalization and special agricultural worker applications for lawful temporary residence which are pending through an administrative appeal;
- Grants of withholding or suspension of deportation, or cancellation of

removal;

- Applications for temporary and permanent residence by Cuban-Haitian entrants under section 202(b) of Pub. L. 99-603 through administrative appeal;

- Grants of Temporary Protected Status and Deferred Enforced Departure;

- Properly filed, affirmative applications for adjustment of status under section 245 of the Act (including section 245(i)), and properly filed, affirmative registry applications under section 249 of the Act. The period of stay authorized by the Attorney General continues if the application is denied and renewed in proceedings, through review by the Board of Immigration Appeals (BIA). The alien must, however, be eligible to renew the denied application in proceedings and have a legal basis for renewing that application; and

- Certain pending applications for extension of stay or change of status. <u>See</u> sections (d)(4) and (d)(5) of this chapter.

(4) <u>Requirements for Period of Stay Authorized by the Attorney General with Respect to Pending Change of Status and Extension Applications</u>.

(A) The application for change of status or for extension of stay was filed timely. To be considered timely, the application must have been filed before the previously authorized stay expired, as provided under 8 CFR 214.1(c)(4) and 8 CFR 248.1(b).

(B) The alien did not work without authorization before the application for change of status or extension of stay was filed or while it was pending; and

(C) The change of status or extension application has been pending with the Service for more than 120 days after the date the I-94 expired.

(5) <u>Effect of Decision on Unlawful Presence and Tolling</u>.

(A) <u>Approved Applications</u>. If the Service approves an E/S or C/S application, the alien will be granted a new period of stay authorized by the Attorney General, retroactive to the date the previously authorized stay expired, as applicable to the nonimmigrant classification under which the alien was admitted pursuant to 8 CFR 214.2. No unlawful presence accrues. This applies to aliens admitted until a specific date and aliens admitted D/S.

(B) Denied applications. (i) Denial of Timely Filed Applications and Frivolous Applications; Unauthorized Employment. If the timely filed C/S or E/S application is denied because it was frivolous or because the alien engaged in unauthorized employment, any and all time after the Form I-94 expiration date will be considered unlawful presence, if the alien was admitted until a specific date. If, however, the alien was admitted D/S, unlawful presence begins accruing on the date of the Service's decision.

(ii) Denial of Untimely Applications. If the application was untimely and was denied, unlawful presence begins accruing on the date the I-94 expired, regardless of the reason for denial. For aliens admitted D/S, unlawful presence begins accruing on the date of denial.

(6) Voluntary Departure as a Period of Stay Authorized by the Attorney General. The Service has designated voluntary departure as a period of stay authorized by the Attorney General. However, any unlawful presence that accrued before the date the voluntary departure was actually granted is not eliminated. And, if the alien does not make a timely departure, the counting of unlawful presence resumes. Moreover, the alien becomes subject to civil penalties and is ineligible for any further voluntary departure or other forms of relief, such as adjustment of status, registry, and cancellation of removal.

(7) Effect of Departure.

(A) Applicants for Nonimmigrant Visas. Date certain nonimmigrants who file an application for change of status or extension of stay who depart the United States while the application is pending and subsequently apply for another nonimmigrant visa must establish, to the satisfaction of the consular officer, that the application was timely filed and that it was not frivolous. The requirement that the application was timely may be established through the submission of evidence of the date the previously authorized stay expired, together with a copy of a dated filing receipt, a canceled check payable to the Service for the E/S or C/S application, or other credible evidence of a timely filing. To be considered non-frivolous, the application must have an arguable basis in law and fact and must not have been filed for an improper purpose. If the consular officer finds that the alien qualifies for a visa in the same category as the visa classification that was sought in the abandoned E/S or C/S application, the consular officer may presume that the E/S or C/S application was not frivolous. The question then turns to whether the alien engaged in unauthorized employment before the E/S or C/S application was filed or while it was pending. Consular officers will determine this through the routine course of questioning. Consular officers may also review and consider evidence of an alternate means of support during the time in which the alien was not authorized to work. If the consular officer determines that the application was timely filed, non-frivolous, and that the alien did not engage in unauthorized employment, the alien is not subject to the 3- or 10-year bars to admission under section 212(a)(9)(B)(i) of the Act. See Chapter 15 of the IFM for a discussion of the effect of the alien's departure on section 222(g). D/S nonimmigrants who depart the United States while an application for change of status or extension of stay is pending generally do not trigger the 3- and 10-year bars under section 212(a)(9)(B)(i) of the Act, unless a formal finding of a status violation has been made, and the alien has not been granted any other period of stay authorized by the Attorney General, such as voluntary departure.

(B) Applicants for Admission at a Port of Entry (POE). When a date certain nonimmigrant files an application for change of status or extension of stay and departs the United States while the application is pending, Service officers at POEs should use the same procedures followed by consular officers to determine whether the application was timely and non-frivolous, and whether the alien engaged in unauthorized employment. If the extension application was timely and non-frivolous and the alien did not engage in unauthorized employment, the alien is not subject to the 3- or 10-year bar to admission. [See *Inspector's Field Manual*, Chapter 15 for the applicability to section 222(g).]

If Service Officers have any questions regarding this policy decision, contact Sophia Cox in HQADN at 202-514-4754.

EXHIBIT E

U.S. Department of Justice
Immigration and Naturalization Service

HQBCIS 70/21.1.24-P

425 I Street NW
Washington, DC 20536

April 2, 2003

MEMORANDUM FOR SERVICE CENTER DIRECTORS, BCIS
REGIONAL DIRECTORS, BCIS
OFFICE OF INTERNATIONAL AFFAIRS
DIRECTOR, ADMINISTRATIVE APPEALS OFFICE

FROM: Thomas E. Cook /s/
Acting Assistant Commissioner
Office of Adjudications

SUBJECT: Guidance on Interpretation of "Period of Stay Authorized by the Attorney General" in Determining "Unlawful Presence" under section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (Act)

Attached is a legal memorandum from the Bureau of Citizenship and Immigration Services (BCIS) Office of General Counsel. It provides guidance to address questions on the accrual of unlawful presence. Specifically, the questions related to an alien who filed an application for extension of stay after the alien's authorized period of admission expired, but while in a period of authorized stay. The attached memorandum provided by the BCIS Office of General Counsel is BCIS policy.

Legal Memorandum

The attached legal memorandum, responding to questions from the Texas Service Center, advises that where the alien files a timely application for extension of stay (EOS) or change of status (COS), and where the application is denied, the alien can begin to accrue unlawful presence beyond the date of the denial regardless of whether the alien filed additional, but untimely, applications for EOS or COS. The BCIS Office of the General Counsel further advises that an application for EOS or COS filed after the alien's authorized period of admission has expired does not have the effect of prolonging the alien's status. The legal memorandum references two previously issued field memoranda, which are also attached:

- *Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act*, March 3, 2000 ("3/3/00 Pearson memo"), and

- *Unlawful Presence*, June 12, 2002 ("6/12/02 Williams memo").

U.S. Department of Justice
Immigration and Naturalization Service

HQCOU 90/15

Office of the General Counsel

425 I Street NW
Washington, DC 20536

March 27, 2003

MEMORANDUM FOR THOMAS E. COOK
ACTING ASSISTANT COMMISSIONER, OFFICE OF ADJUDICATIONS

FROM: Janice Podolny /s/
Chief, Inspections Law Division, Office of General Counsel

SUBJECT: Interpretation of "Period of Stay Authorized by the Attorney General" in determining "unlawful presence" under INA section 212(a)(9)(B)(ii).

Issues:

1. Where an alien files additional (untimely) applications for extension of stay (EOS) or change of status (COS) during the period in which a timely filed application for EOS or COS is pending before the Immigration and Naturalization Service (the "Service"), does that alien avoid becoming unlawfully present even if the Service ultimately denies the initial timely filed EOS or COS application?

2. Where an alien is awaiting Service adjudication of a timely filed EOS or COS application, does an EOS or COS application filed after the alien's authorized period of admission has expired have the effect of prolonging the alien's status beyond the period of his or her authorized admission?

Practical concern:

The Service is experiencing an increase in multiple filings for the same alien where the alien seeks to extend his or her stay and the petitioner seeks to change the alien's status. The multiple filings arise in the context of an alien wishing to remain in the United States beyond the period of lawful admission without accruing unlawful presence while he or she awaits adjudication of the application/petition.

It has become apparent to the Service that some immigration practitioners consider the "period of stay authorized by the Attorney General" to be equivalent to "status." They argue that, because an alien is in "status" during the time the Service takes to adjudicate the alien's application for EOS or COS, an alien can continuously file EOS or COS requests which, in effect, protect the alien from accruing unlawful presence even if a decision to deny is made on one or more of the filings.

Summary answer:

1. Where an alien files a timely EOS or COS application and that application is ultimately denied, the alien can begin to accrue unlawful presence beyond the date of the denial regardless of whether the alien filed additional, but untimely, requests for EOS or COS that are awaiting adjudication.[1]

2. An EOS or COS application must be filed within the period during which the alien is in an "authorized status", i.e., within an authorized period of admission as contemplated by parts 214.1 and 248.1.[2] The period during which a timely filed EOS or COS application is pending continues the alien's period of authorized stay in the United States (allowing the alien to avoid accruing unlawful presence), but does not extend the alien's period of "authorized status."[3]

Case scenario for B-2 alien:

3/16/01 employer timely files I-129 for COS and H-1B

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1 There appears to be no question that an alien who files, initially, an untimely EOS or COS request which is ultimately denied can be determined to be unlawfully present retroactively to the date his or her initial period of admission expired regardless of whether the alien filed additional (untimely) requests for EOS or COS that are awaiting adjudication. See AFM 30.1(d)(4). Therefore, we do not address this scenario any further.

2 In limited cases, failure to file before the period of previously authorized status expired may be excused at the discretion of the Service. See 8 C.F.R. 214.1(c)(4); 8 C.F.R. 248.1(b)

3 For the reasons explained herein, "authorized status" or authorized period of admission and "period of stay authorized by the Attorney General" are not interchangeable terms and do not carry the same legal implications. An alien's authorized period of admission is determined with reference to his or her Form I-94 (arrival/departure record) or, where the alien is the beneficiary of an approved EOS or COS application, with reference to the validity dates on the Form I-797 ("Notice of Action") approval notice.

	Thereafter, I-94 arrival/departure record for B-2 alien expires
9/10/01	B-2 alien files untimely I-539 for EOS (after difficult RFE is issued on I-129 case)
12/7/01	initial timely filed COS and H-1B denied
1/11/02	same employer files a second I-129 for COS and H-1B
2/8/02	untimely I-539 EOS is denied for late filing.
2/11/02	second H-1B is approved but COS is denied for alien being out of status at time of filing.

Arguments and Analysis:

Some practitioners have argued that the above scenario creates, in effect, a "bridge" of continuing status stemming from the initially timely filed COS application such that an alien can eternally avoid becoming unlawfully present as long as they have a pending EOS or COS application with the Service. The essence of their argument relies on their misinterpretation of "period of stay authorized by the Attorney General" as equivalent to status. They argue that if the alien is in "status" because they have been granted "a period of stay authorized by the Attorney General," then that alien should be able to extend his or her stay or change status. A review of the relevant statutes and regulations indicates that the "bridge" of continuing status analysis is an incorrect and improper interpretation of the relevant statutes, regulations and INS memos on unlawful presence (see Memorandum for Regional Directors from Johnny N. Williams, Executive Associate Commissioner (Office of Field Operations) ("6/12/02 Williams memo"); Memorandum for Regional Directors from Michael A. Pearson, Executive Assistant Commissioner (Office of Field Operations) ("3/3/00 Pearson memo")).

The relevant regulations distinguish between the period of time in which an alien is considered to be in "status" and the period of time during which he or she is deemed to be in a "period of stay authorized by the Attorney General".

8 C.F.R. 214.2(c)(4) provides that an extension of stay may be approved for an applicant who maintained his or her status before the application was filed. Similarly, 8 C.F.R. 248.1(b) provides that a change of nonimmigrant classification may be approved for an alien who maintained his or her status before the application was filed. In order to determine if an alien has maintained his or her status, the Service looks to see if the authorized period of admission has

been overstayed. The relevant inquiry as to "status" requires the Service to determine if the alien was still within a period of authorized admission at the time of filing the application.

For purposes of section 212(a)(9)(B)(ii) of the Immigration and Nationality Act an alien is "unlawfully present" in the United States after the expiration of the period of stay authorized by the Attorney General. The period of stay authorized by the Attorney General normally expires upon the expiration of the alien's Form I-94 (arrival/departure record).[4]

For the reasons stated in previous INS guidance and restated here, the Service will deem the alien to be within a period of stay authorized by the Attorney General (and not unlawfully present), if the alien has a filed a non-frivolous EOS or COS application with the Service Center and that application is still pending, provided that such application was timely filed, i.e., prior to the expiration of the Form I-94. See 3/3/00 Pearson memo.

In these circumstances, the alien benefits from a continuation of the period of stay authorized by the Attorney General, but not from a continuation of "status." I.e., the alien was in a period of authorized stay when he or she was within the initial period of his or her admission and the period of authorized stay continues after the filing of a timely EOS or COS application. There is simply no analogous rule or guidance providing for a continuation of the alien's "status." Therefore, the alien will be in status only as long as he or she remains within the initial period of his or her admission. Of course, if the alien's EOS or COS application is granted, the alien will again be in "status."

In the above case scenario, the alien's initial period of admission (as per her I-94 "Arrival/Departure Record") expired prior to 9/10/01. She was no longer in status once her I-94 expired, but was considered to be in a period of stay authorized by the Attorney General because of her pending, timely filed COS application. The second application for an extension of stay of the alien's B-2 nonimmigrant status was filed after the original B-2 status expired. Accordingly, it did not meet the requirements of 8 C.F.R. 214.1(c) as it was not timely filed. The alien became unlawfully present upon the denial of her original, timely filed COS application (12/07/01). The fact that the alien was also the beneficiary of an untimely filed EOS application (09/10/01) that was pending with the Service Center at the time it issued its denial of the COS application did not confer continuing "status" on the alien. As the alien was not within her initial period of admission when the B-2 EOS application was filed, she cannot invoke the policy outlined in the Pearson memo for purposes of avoiding unlawful presence.

4 Where the alien's application for EOS or COS has been approved, the alien is again in an "authorized status." The expiration of his or her status and authorized period of stay in these circumstances expires on the last day of validity of the EOS or COS approval notice.

Relevant Authorities:

The regulations governing the Service's ability to extend the stay of certain aliens are found at 8 C.F.R. 214.1. Under 214.1(c)(4), certain aliens are ineligible for grants of extension of stay. The regulations provide, in relevant part, that "an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before their application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service ..." (emphasis added)

The Service's authority to change the nonimmigrant classification of certain aliens to another nonimmigrant classification is found at INA section 248 "Change of Nonimmigrant Classification." The applicant must be "continuing to maintain" his or her nonimmigrant status.[5]

INS regulations at C.F.R. 248.1 state that "a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed, except that failure to file before the previously authorized status expired may be excused in the discretion of the Service ..."(emphasis added)[6]

INA section 212(a)(9)(B)(ii) provides that "an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General ... ."

The Service has previously provided guidance on the issue at hand. The 3/3/00 Pearson memo addressed the Service's change in policy allowing certain aliens with pending applications to remain in the United States beyond the 120 days provided by the tolling provision without accruing unlawful presence "because of the current backlogs, which in some cases extend beyond six months." As a result, a "period of stay authorized by the Attorney General" was defined to include the entire period during which a timely filed, non-frivolous application for extension of stay or change of status is pending with the Service ... " Specifically, the "period of stay authorized by the Attorney General covers the 120 day tolling period described in section 212(a)(9)(B)(iv) of the Act, and continues until the date the Service issues a decision." The

5 This memo does not address collateral issues that may otherwise affect an alien's ability to extend his or her stay or change status (e.g., lawful admission, inadmissibility, unauthorized employment, etc.)

6 The regulations at CFR 248.1 do not provide a definition of "maintaining status." However, in determining whether the applicant has maintained status, the Service will consider whether the authorized period of admission has been overstayed and any other conduct relating to the maintenance of current status, including unauthorized employment.

policy change, consistent with the ensuing new Chapter of the Adjudicators Field Manual, stressed that only aliens with timely filed applications would benefit. "This policy applies only to those nonimmigrants who were admitted until a specific date and whose I-94 has expired while the EOS or COS application is pending." Presumably, the practitioners of the multiple filing (or "bridge") theory described above would read the above requirement as: "nonimmigrants who were admitted until a specific date and whose I-94 has expired **either before or while** the EOS or COS application is pending" in order to avoid an unlawful presence determination for their clients. This reading is contrary to the express language of the Pearson memo.

The Pearson memo added Chapter 30.1(d) to the Adjudicators Field Manual (AFM):

30.1(d) Unlawful Presence under Section 212(a)(9)(B) of the Act provides an exclusive designation of "periods of stay authorized by the Attorney General." This list includes "certain pending applications for extension of stay or change of status. See sections (d)(3) and (d)(4) of this chapter." Therefore, it is improper to consider whether a pending EOS or COS application is a "period of stay authorized by the Attorney General" without reference to (d)(3) and (d)(4). Sections (d)(3) and (d)(4) make it clear that for an alien with a pending EOS or COS request to be considered within "a period of stay authorized by the attorney general" the alien application "must have been filed before the previously authorized stay expired." See AFM 30.1(d)(3). If the application was untimely and was denied, unlawful presence begins accruing on the date the I-94 expired, regardless of the reason for denial. See AFM 30.1(d)(4).

The policy outlined in the Pearson memo is further reiterated, without modification, in the 6/12/02 Williams memo.

The Williams memo provides that, for purposes of section 212(a)(9)(B)(ii) of the Act, the INS has designated the following periods of stay authorized by the Attorney General "Certain pending applications for extension of stay or change of status." There is no express of implied indication in the Williams memo that the Service intends to alter existing Service practice and policy. Therefore, this section cannot be read separate an apart from sections (d)(4) and (d)(5) of Chapter 30.1(d) as introduced by the Pearson memo. See discussion supra.

For the reasons outlined above, where the alien filed a timely EOS or COS application and that application is ultimately denied, the alien can begin to accrue unlawful presence beyond the date of the denial regardless of whether the alien filed additional, but untimely, requests for EOS or COS that are awaiting adjudication.

Moreover, for the reasons outlined above, an EOS or COS application filed after the alien's authorized period of admission has expired does not have the effect of prolonging the alien's status.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CERTIFICATE OF SERVICE

RASHAD AHMAD REFAAT EL BADRAWI,	)	
Plaintiff,	)	
v.	)	3:07-cv-01074 (JCH)
DEPARTMENT OF HOMELAND SECURITY, ET AL.,	)	November 5, 2010
Defendants.	)	

I hereby certify that on November 5, 2010, a copy of the foregoing Brief *Amici Curiae* of the American Immigration Council and the American Immigration Lawyers Association in Opposition to the Motion of Defendant United States for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

/s/ Melissa Crow

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