

H-1B EXTENSIONS BEYOND THE 6TH YEAR | FREQUENTLY ASKED QUESTIONS

THREE-YEAR EXTENSIONS OF H-1B STATUS AFTER SIX YEARS

Ordinarily, H-1B workers are allowed six years of H-1B status within the United States. Once those six years have expired, the H-1B worker is expected to have either obtained a green card, switched to another nonimmigrant visa status, or departed the United States. However, immigrant visa limits . AC21 permits extensions of H-1B non-immigrant status to those who are:

1. the beneficiary of an I-140 Employment Based (EB) immigrant visa petition filed under the EB-1, EB-2 or EB-3 preference categories, and
2. eligible to immigrate but for per-country quota limitations.

The State Department publishes a Visa Bulletin every month, updating the progression or retrogression of priority dates for all intending immigrants, informing whether immigrant visas will be available for their priority date in the coming month. Immigrant visa availability or unavailability is typically determined by checking the intending immigrant's "priority date" against the Visa Bulletin's listed dates. The "priority date" itself is the date set by the filing of either a PERM labor certification application or I-140 immigrant visa petition on behalf of the intending immigrant.

H-1B non-immigrant status extensions are now allowed for those unable to file Form I-485 (also known as "adjustment of status") or for those whose Form I-485 application remain pending due to immigrant visa unavailability per the State Department Visa Bulletin. If an I-140 immigration visa petition has been approved for you, but the Visa Bulletin indicates your priority date is not yet "current" at the time your 6th year of H-1B status will have expired, your employer can still file an H-1B extension petition on your behalf in three-year increments until the Visa Bulletin declares you eligible to file Form I-485, or until your pending I-485 application has been approved.

AC21 also preserves the validity of an I-140 immigrant visa petitions despite employer withdrawal or termination of the employer's business, once 180 days have elapsed since the approval of the I-140 immigrant visa petition. This allows long-approved I-140 immigrant visa petitions to anchor H-1B extensions past the sixth year, even though the I-140 immigrant visa petition itself can no longer be used to directly immigrate with that employer.

ONE-YEAR EXTENSIONS OF H-1B STATUS AFTER SIX YEARS

AC21 also permits one-year extensions of H-1B status beyond the sixth year, even without an approved I-140 immigrant visa petition. These one-year H-1B status extensions are possible if 365 days or more have elapsed since the filing of either (a) the H-1B worker's PERM labor certification application, or (b) the H-1B worker's I-140 immigrant visa petition. These one-year H-1B extensions past the sixth year can continue indefinitely until a final decision is reached on the pending PERM application or I-140 immigrant visa petition. Once the PERM application is approved, the employer must file the subsequent I-140 immigrant visa petition within six months, in order to preserve future eligibility of H-1B status extensions beyond the sixth year. Once the I-140 immigrant visa petition is approved, the H-1B worker can then extend status for three years until they immigrate, as long as the Visa Bulletin continues to show that an immigrant visa number remains unavailable to them.

FREQUENTLY ASKED QUESTIONS: THREE-YEAR H-1B EXTENSIONS

A1. Does this section apply only to H-1B extensions?

Yes. No other visa categories benefit from AC21.

A2. What if I had H-1B status before but am now in another nonimmigrant visa status?

Foreign nationals can seek a post-sixth year AC21 "extension" of H-1B visa status even if the foreign national now holds a different visa status (e.g., H-4, TN) or is outside the U.S., provided they otherwise qualify for H-1B status per AC21 and the INA.

A3. If a person has selected Consular Processing (CP), and does not intend to file for adjustment of status, can such an extension be filed?

Yes.

A4. If a person has an approved I-140 with Company A, but has switched employment to Company B, can a sixth-year H-1B extension still be filed?

Yes, but it is possible USCIS may inquire as to the H-1B beneficiary's plans to immigrate on the original I-140 immigrant petition. Therefore, it would be safest to have the current H-1B employer resume the immigrant visa sponsorship process as soon as possible.

A5. Is there a limit to the number or duration of H-1B extensions permitted past the sixth year?

No. Despite the reference to a "one-time protection", you may be granted more than one extension under this provision. Each extension under AC-21 may be granted for a period up to three years, as long as the priority date is not yet current for immigration.

A6. Are family members eligible for extensions past the sixth year under AC21?

H-4 dependents of the principal H-1B worker may ask for H-4 status extensions concurrent with the principal's AC21 H-1B extension. Note that an H-4 dependent's status is reliant on the principal H-1B worker's status remaining valid. However, dependent family members in H-1B status (as opposed to H-4 status) cannot "piggyback" their H-1B extensions through a principal H-1B worker's AC21 eligibility. They must qualify for further H-1B extensions past the sixth year based on their own sponsorship.

A7. When is an AC-21 H-1B extension beyond the 6-year limit unavailable?

H-1B extensions are no longer available under AC21 if the priority date has been current for a full year without the H-1B beneficiary having filed a Form I-485 application or consular immigrant visa application. For this reason, it is important that H-1B workers counting on AC21 extensions resume the immigrant visa sponsorship process immediately after changing employers.

FREQUENTLY ASKED QUESTIONS: ONE-YEAR H-1B EXTENSIONS

B1. Does this provision apply only to H-1B extensions?

Yes, the plain language of the statute limits its application to H-1B status holders only.

B2. Must a PERM labor certification application or I-140 immigrant visa petition be filed or approved to take advantage of H-1B extension past the sixth year?

Only filing of the PERM labor certification application or I-140 immigrant visa petition is required. Upon 365 days from filing, you may be granted an H-1B extension past the sixth year. While rare, there are certain types of immigrant visa categories where PERM labor certification is not required before the I-140 immigrant visa petition is filed. This includes immigrant visa categories under the "extraordinary ability", "outstanding researcher", "national interest waiver", "Schedule A Group II", and "multinational manager/executive" immigrant visa categories.

B3. If a person has a pending Form I-140 immigrant visa petition based on a job offer with Company A, but has changed employment to Company B, can an extension of H-1B status past the sixth year be filed under AC21?

Yes, as long as the original I-140 petition was never withdrawn by the employer, or, if withdrawn, the I-140 immigrant visa petition was withdrawn more than 180 days after approval.

B4. What if the I-140 visa petition has been approved and the H-1B employee is waiting for an immigrant visa interview at a U.S. Consulate? Can the employer submit an H-1B extension beyond the 6th year?

Yes. Choosing CP or adjustment of status does not affect 106(a) eligibility so long as the other requirements are met under AC21.

B5. If the H-1B employee still has time left before the end of the 6th year but still requires H-1B extension due to an expiring I-94 card, can the employer preemptively file an AC21 extension of stay with a PERM application pending for one year?

Yes. AC21 allows H-1B extensions in one-year increments past the sixth year, and also allows extensions for any remaining time left of the initial six-year period, plus the one-year extension past the sixth year. Thus, if one must file an H-1B extension with 7 months left before the end of the sixth year, and a PERM application pending as of one year, then the H-1B extension can be granted for a total of 1 year and 7 months.

B6. How early can an H-1B extension under this section be filed?

The AC-21 H-1B extension can be filed up to six months prior to the expiration of the existing I-94 card, but no sooner.

B7. Where the anchoring PERM labor certification has been approved, must the I-140 immigrant visa petition be filed in order to qualify for a one-year H-1B extension?

No. However, please note that labor certifications are valid for only 180 days after approval. H-1B workers cannot rely on an approved but expired labor certification as the basis for an H-1B AC21 extension, unless an I-140 immigrant visa petition was timely filed after PERM approval. In most cases, the best way to proceed upon approval of the PERM application is to immediately file an I-140 immigrant visa petition using premium processing. That way, the H-1B worker can most likely qualify for a three-year H-1B extension based on the approved I-140 petition, rather than a mere one-year H-1B extension based on the previously filed PERM application.

B8. Are H-4 dependents also eligible for a one-year extension of H-4 status beyond the 6-year limit?

Yes.

B9. When is a one-year AC-21 extension beyond the six-year limit unavailable?

Extension is not available under this section unless a PERM or I-140 petition was filed 365 days prior to reaching the 6-year limit.

Please note that this memorandum does not attempt to provide specific legal advice on any given case. Jackson & Hertogs cautions you to seek advice from qualified legal counsel concerning the impact AC21 may have on your particular set of circumstances.