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DEPARTMENT OF HOMELAND SECURITY

Bureau of Citizenship and Immigration Services

7/23

[CIS No. 2316-04]

Supplemental Information Regarding the H-1B Numerical Limitation
for Fiscal Year 2004 Affecting F and J Nonimmigrants

AGENCY: Bureau of Citizenship and Immigration Services, DHS.

ACTION: Notice.

SUMMARY: On February 25, 2004, the Department of Homeland Security (DHS), Bureau of Citizenship and Immigration Services (CIS) published a notice in the **Federal Register** at 69 FR 8675, informing the public of the procedures DHS would follow as the fiscal year 2004 (FY 2004) numerical cap for the H-1B nonimmigrant category would be reached. This notice supplements that information and informs the public that as part of those H-1B cap procedures the Secretary of Homeland Security will exercise his authority under 8 CFR 214.2(f)(5)(vi) and 8 CFR part 214.2(j)(1)(vi) to extend the status of certain F and J nonimmigrant students if DHS has received from their prospective employer a timely filed request for change of nonimmigrant status to that of an H-1B nonimmigrant no later than July 30, 2004 and the employment start date on the petition is no later than October 1, 2004.

DATES: This notice is effective [Insert date of publication in the FEDERAL REGISTER].

RECEIVED
DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES
FOR PUBLIC INFORMATION
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IN THE OFFICE OF THE
THE FEDERAL REGISTER

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FOR FURTHER INFORMATION CONTACT: Kevin J. Cummings, Business and Trade Services Branch/Program and Regulation Development, Bureau of Citizenship and Immigration Services, Department of Homeland Security, 425 I Street, NW., ULLB 3rd Floor, Washington, DC 20536, telephone (202) 305-3175.

SUPPLEMENTARY INFORMATION:

Section 214(g) of the Immigration and Nationality Act (Act) provides that the total number of aliens who may be issued H-1B visas or otherwise granted H-1B status during FY 2004 may not exceed 65,000. On February 25, 2004, CIS published a notice in the **Federal Register** at 69 FR 8675 informing the public that the H-1B numerical limitation would be reached and that CIS would not process any additional petitions with an employment start date on or before September 30, 2004. The notice contained the procedures that CIS would follow as the cap was reached. This notice supplements the information in the February 25, 2004 notice and informs the public that the Secretary of Homeland Security is exercising his authority under 8 CFR 214.2(f)(5)(vi) and 8 CFR part 214.2(j)(1)(vi) for this fiscal year to extend the duration of status for certain F and J students if their prospective employer has timely filed a request for change of nonimmigrant status to that of an H-1B nonimmigrant alien that is received by DHS on or before July 30, 2004 and contains an employment start date of no later than October 1, 2004. This

measure will prevent a lapse of status for aliens who have maintained their status and would otherwise be eligible for a change to H-1B status if the annual H-1B numerical limitation had not been reached.

Background

The former U.S. Immigration and Naturalization Service (Legacy INS) published an interim rule in the **Federal Register** on June 15, 1999, at 64 FR 32146, that amended its regulations to expand the definition of duration of status for an F and J nonimmigrant alien whose prospective employer timely files an application for change of status to H-1B nonimmigrant classification.

The rule, codified at 8 CFR part 214.2(f)(5)(vi) and 8 CFR part 214.2(j)(1)(vi), provides that the Secretary of Homeland Security may extend the duration of status, by notice in the **Federal Register**, of an F or J nonimmigrant on whose behalf a prospective employer has timely filed a petition for change of nonimmigrant status to that of an H-1B nonimmigrant pursuant to 8 CFR part 248, provided the alien has not violated the terms of his or her admission to the United States. This extension can be accomplished at any time the Secretary of Homeland Security determines that the H-1B cap will be reached prior to the end of the fiscal year. The regulation provides that the extension shall continue for such time as is necessary to complete

adjudication of an application for change of nonimmigrant status to H-1B. An alien whose duration of status has been extended by the Secretary of Homeland Security and who continues to adhere to the other terms of the alien's status is considered to be maintaining lawful nonimmigrant status for all purposes under the Act.

Will the Secretary of Homeland Security exercise his authority to extend the status of F-1 and J-1 students on whose behalf employers have timely filed applications to change status to H-1B, but who are unable to obtain that status because the Fiscal Year 2004 H-1B numerical limitation has been reached?

Yes, if the H-1B petition meets certain requirements. This notice informs the public that the Secretary of Homeland Security will exercise his discretionary authority under 8 CFR part 214.2(f)(5)(vi) and 8 CFR part 214.2(j)(1)(vi) for petitions affected by the reaching of the FY 2004 cap. Accordingly, any F-1 or J-1 student (as defined at 22 CFR part 62.4(a)) nonimmigrant continuing to maintain status whose prospective employer timely files an H-1B petition on his or her behalf prior to July 30, 2004, that contains an employment start date of no later than October 1, 2004, will continue to be in valid F-1 or J-1 status until October 1, 2004. Additionally, in the case of a J-1 student, the alien must not be subject to the two-year home residence requirement under section 212(e) of the

Act. The duration of status for dependents of affected F-1 or J-1 nonimmigrant aliens is also extended under this notice until October 1, 2004. This notice applies only to J-1 exchange visitor students (defined at 22 CFR part 62.4(a)), and does not apply to other categories of exchange visitors.

Pursuant to 8 CFR 248.1(b) and 214.1(c)(4), the term "timely filed" refers to an application for a change of nonimmigrant status filed prior to the expiration of the alien's period of authorized stay in the United States. As stated above, the application must also be filed by July 30, 2004, and contain an employment start date of no later than October 1, 2004. "Filing" means receipt by CIS as indicated by the receipt date on Form I-797.

Will the Student and Exchange Visitor Information System (SEVIS) maintain records of F-1 and J-1 nonimmigrants whose stays are extended?

Yes. SEVIS will continue to maintain the record of an F-1 or J-1 nonimmigrant whose stay is extended.

How does this notice affect F-1 and J-1 students who are entitled to an extension of their status?

This extension is in fact an extension of the ordinary 60-day or 30-day "grace period" already accorded an F-1 or J-1 nonimmigrant at the completion of his or her program and approved training. As a result, an alien benefiting from this

extension of the "grace period" may not work for the petitioning employer or otherwise engage in activities inconsistent with those that would be allowed during the ordinary 60-day or 30-day grace period. Dependents of an F-1 or J-1 nonimmigrant benefiting from an extended grace period must follow the same rules as those that apply to the F-1 or J-1 principal alien during the grace period.

Nonimmigrants affected by this notice, and all aliens in the United States, are reminded that they have an obligation under 8 CFR part 265.1 to report each change of address and new address to DHS during their stay in the United States. An alien who fails to comply with the change of address requirements may be removable under section 237(a)(3)(A) of the Act and subject to criminal or monetary penalties under section 266(b) of the Act.

What is the status of an F-1 or J-1 nonimmigrant if their H-1B petition filed is approved prior to October 1, 2004?

In accordance with 8 CFR 214.2(f)(5)(vi) and 8 CFR part 214.2(j)(1)(vi), the Secretary of Homeland Security may extend the duration of the status of certain F-1 and J-1 nonimmigrant aliens for such time as is deemed necessary to complete the adjudication of the change of status. DHS believes that the extension until October 1, 2004 provides it with sufficient time to adjudicate H-1B petitions filed on or before July 30, 2004.

If the alien's H-1B petition is approved before October 1, 2004, the alien will continue in the extended grace period as an F-1 or J-1 student until October 1, 2004 (i.e., the date an H-1B visa will become available and the employment start date). On October 1, 2004, the alien's change of status from F-1 or J-1 to H-1B nonimmigrant status will become effective.

What is the status of an F-1 or J-1 nonimmigrant if the H-1B petition remains pending beyond October 1, 2004?

In the unlikely event that the application to change nonimmigrant status to H-1B remains pending beyond October 1, 2004, an individual whose application remains pending will not be in valid nonimmigrant status as of October 1, 2004. However, because an extension of stay application was timely filed, the individual (and dependent(s) included on the application) will be considered as being in a period of stay authorized by the Secretary of Homeland Security until the date CIS adjudicates the H-1B petition and effectuates the change to H-1B status. As a result, such individuals will not be accruing unlawful presence as described in section 212(a)(9)(B) of the Act.

If an H-1B petition filed on behalf of an F-1 or J-1 nonimmigrant is denied, what is the status of the alien and his or her dependents?

Under 8 CFR part 214.2(f)(5), an F-1 student who has completed a course of study and any authorized practical

training following completion of studies is allowed an additional 60-day period to prepare for departure or to transfer schools. Similarly, under 8 CFR part 214.2(j)(1)(ii), a J-1 student may be entitled to an additional 30-day period to prepare for travel. This notice simply extends that grace period. If the application to change status to H-1B is denied within 60 days (for an F-1) or 30 days (for a J-1) of the alien's completion of studies, program or optional practical training, the alien and any dependents may finish his or her respective 60-day or 30-day grace period. If the H-1B petition is denied after the 60-day or 30-day grace period, the alien's F-1 or J-1 status is terminated as of the date of the decision and he or she, as well as any dependents, must immediately depart the U.S.

Can an F-1 or J-1 nonimmigrant with a pending H-1B petition travel during the extended grace period under this notice?

No. DHS has issued this notice to allow certain qualifying F-1 and J-1 students and their dependents to remain in the United States in lawful status while their H-1B petitions are pending, so that these aliens are not required to depart the

United States and consular process. However, if a nonimmigrant alien is planning to or does depart the United States, that alien will be in a position to consular process, and therefore will not benefit from the extended grace period.

Dated: *July 20, 2004*

Tom Ridge

Tom Ridge,

Secretary of Homeland Security.

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